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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) 1515/2018

SWARAN SINGH

..... Petitioner

Through : Mr.Kirti Uppal, Sr Advocate with
Mr.Manav Gupta, Mr.Aditya
Awasthi, Mr.Sahil Garg and Ms.Esha
Dutta, Advocates.

versus

SURINDER KUMAR & ORS

.... Respondents

Through : Mr.Sachin Datta, Sr Advocate with
Ms.Jyoti Mendiratta and Mr.Ravinder
Pal Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

ORDER

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11.12.2018

CAV 1151/2018

Counsel as above appears for the respondent/caveator.

The caveat is discharged.

CM Appl.No. 51896/2018

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

CM(M) 1515/2018, CM Appl.No. 51895/2018

1. This petition is for setting aside the impugned order dated 14.11.2018 passed by the learned Trial Court in CS No.7179/2016

whereby the evidence affidavit in rebuttal filed by the plaintiff was directed to be taken off the record and their right to lead rebuttal evidence was closed, subject to cost of Rs.50,000/- for causing delay.

2. Admittedly, the case of the petitioner/plaintiff is they had entered into an agreement to sell/purchase of the subject property for a sum of Rs.29.25 lac, which the plaintiff duly paid and even a No Objection Certificate was obtained from the concerned authorities but since the defendant failed to execute the sale deed in their favour, the suit for specific performance was thus filed.

3. On the other hand, the case of the respondent is the actual agreement to sell was for a consideration of Rs.1.89 Crore approx. and out of which they had received only a sum of Rs.48.00 Lac approximately and since the plaintiff had failed to make the payment of the balance consideration, the agreement failed.

4. The learned senior counsel for the petitioner/plaintiff lay stress upon three issues, re-framed by the Court as follows: -

1(a). Whether the agreements between the parties was as set out in the plaint, i.e. dated 16.06.1993, 11.12.1993 and 11.01.1995 for a total sale consideration of Rs.29,25,000/-? OPP.

1(b). Whether the agreements between the parties was as set out in the written statement, i.e. dated 15.03.1993 and 15.04.1993, for a total sale consideration of Rs.1,89,94,791/- and the defendants had only received a sum of Rs.31.25 Lakhs? OPD.

6. Whether the agreement consisting of the receipt cum agreement dated 15.03.1993 and the agreement dated 15.04.1993 stood novated in the year 1995, plaintiff having

paid an amount of Rs. 17 lakhs at that stage? OPD.

5. Thus, it is argued by the learned senior counsel for the petitioner that to prove the petitioner has paid the entire consideration qua the agreements to sell dated 15.03.1993 and 15.04.1993, they need to file an affidavit in rebuttal evidence showing cash receipts of payment of entire consideration of Rs.1,89,94,791/- and hence by ordering such affidavit to be taken off the record, the learned Trial Court has committed an illegality.

6. Admittedly, after filing of the written statement, the plaintiff has filed an application for amendment to incorporate the aforesaid facts qua payment of entire consideration of Rs.1.89 Crore which application was dismissed vide order dated 21.01.2008 passed by the Division Bench of this Court and it noted: -

“12. On a consideration of the plaint, the written statement, the application seeking amendment to the plaint and the reply thereto, it is clear to this Court that the nature of the amendment sought to be carried out by the plaintiff would materially alter the suit itself. In the first place, the plaintiff approached the Court stating that an agreement had been entered into between the parties on 16th June, 1993 as evidenced by the receipt-cum-agreement of that date. The further reference was made in the plaint to the receipts-cum-agreement of 11th December, 1993 and 11th January, 1995. There is absolutely no whisper of any agreement of 15th March, 1993. After noticing what was stated in the written statement filed by the defendants, the plaintiff seeks to fundamentally alter the very basis of the suit as is evident from para 21 of the application where it is prayed that “the plaintiff may be allowed to add/substitute the words “agreement dated 15.3.1993” before the words “dated 16.6.1993”. There is also a material alteration as regards the amount agreed to be paid. In the plaint the total consideration was stated to be Rs.25.95 lacs. Now it is

sought to be substituted in para 23 “that in para No. 6 instead of words “Rs.28 lacs”, it may be allowed to be amended as Rs.1,89,94,791/-” .

13. By no stretch of imagination in a suit for specific performance, can it be said that these amendments are of a minor nature. In fact, to this Court it appears plainly that the plaintiff did not come to the Court with clean hands and was suppressing the complete facts. The explanation now furnished in the application is indeed preposterous. The plaintiff now states in the application under Order 6 Rule 17 CPC that “this fact is not denied that the total deal was agreed at Rs.1,89,94,791/- but as desired by the defendants it was not to be disclosed.” Then in para 10, it is asserted that “the defendants have received the whole consideration amount but the plaintiff has got at his disposal receipts for only Rs.1,22,75,000/- (Rupees one crore twenty two lacs and seventy five thousand only). Rest of the receipts were destroyed as per the asking of the defendants.” Then in para 11 it is asserted that “Everything was done at the instance of the defendants to save permission under Section 34 A of the Income Tax Act”.

14. The above statements in the application leave no manner of doubt that the plaintiff suppressed material facts before this Court. When the defendants pointed out in the written statement that the factual position was something else, the plaintiff turned turtle to justify his suppression of facts on the ground that he did it at the instance of the defendants. This is nothing but a plain abuse of the process of law. It was recently pointed out by the Hon’ble Supreme Court in Usha Balasaheb Swami v. Kiran Appaso Swami (2007) 5 SCC 602 that “the general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

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16. However, as far as the present case is concerned, the Court is satisfied that the plaintiff has suppressed the material particulars, in the suit filed by him. It is evident that the application for amendment was filed three years after the suit was filed. The Court is satisfied that the application for amendment is an abuse of the process of law and, therefore, ought not to have been permitted by the trial court."

7. Though this order was challenged by the petitioner before the Supreme Court by filing SLP (C) No.20093/2008, but it was dismissed.

8. The petitioner then moved an application under Section 151 CPC for exhibiting the documents (cash receipts of Rs.1.89 Crore approximately) which was rather de-exhibited in the examination in chief of PW1 by the plaintiff themselves, the said application was also dismissed vide an order dated 24.04.2014 passed by this Court with the following observations:-

"From the above, it is clear that original plaint remains as it is, wherein plaintiff has alleged that deal was struck for Rs.29,25,000/- and the entire amount stood paid and possession was handed over. Plaintiff has to prove the facts pleaded in the plaint necessary corroborating of this is that documents sought to be exhibited are not relevant for the said purpose, thus, PW-1 had given up the para 5 and 8 of the affidavit resulting in de-exhibition of the documents as well.

Plaintiff has to prove his case as set up in the plaint. Plaintiff has not to lead evidence on the defence of the defendant. It is for the defendants to prove or not to prove the fact pleaded in the written statement. As regards plaintiff is concerned, documents, as contained in paragraphs 5 and 8 of the affidavit, which PW1 has himself withdrawn being beyond the pleadings and the documents Ex. PW1/2 to Ex. PW1/13 and Ex. PW1/17 to Ex. PW1/22 relating to the said paras, not being relevant to the

original plaint, cannot be permitted to be exhibited more so, when PW1 had himself de-exhibited the said documents in his examination-in- chief.”

9. The petitioner filed an appeal against the order dated 24.4.2014 before the Supreme Court, but it was dismissed vide order dated 12.09.2014.

10. Then an order dated 07.12.2017 was passed in this suit wherein the Court held:-

“.....In the present Suit, it is not the case of the plaintiff that he had paid a sum of Rs.1,89,94,791/- to the defendants. His case is that he paid Rs.28,00,000/- while case of the defendants is that Rs.46,00,000/- was paid. No doubt the plaintiff is entitled to demolish the defence of the defendants, however in the garb of demolishing the defence of the defendants, the plaintiff cannot introduce a case that is beyond his pleadings. Issue no,1 has placed onus on the plaintiff to prove that the agreement of which specific performance has been sought was for a consideration of Rs.29,25,000/-, while defendants have to prove that the agreement was for a sum of Rs,1,89,94,791/-. Payment of Rs.28,00,000/- is not in dispute, rather defendants are admitting to have received higher amount. Facts which have been admitted need not be proved. Thus, it cannot be said that issue no.1, as framed vide Order dated 19.11.2008 burdens the plaintiff to prove that Rs.28,00,000/- was actually paid to the defendants. What the plaintiff has sought to confront and accordingly prove is that he paid Rs.1,89,94,791/- to the defendants which is not even his case, Hence, plaintiff cannot be allowed to introduce such documents which are beyond the pleadings, even for the purpose of confronting the witness of the defendants as per Order VIII Rule 1 A(4) CPC.”

11. The order dated 7.12.2017 was upheld under order dated 17.01.2018 in CRP No.278/2017 and it notes:-

“1. After some hearing the counsel for the petitioner

submits that he may be allowed to withdraw the present petition and the applications filed therewith and instead approach the trial Court with an appropriate application for reframing/recasting of issue no.1, which was framed on 19.11.2008, in as much as, per his submissions, the issue as framed lacks clarity, it not indicating the agreements set up by both sides. He submits that he may be given liberty to move a fresh application for permission to confront the first defendant in his testimony (as DW1) with the documents in question after a decision is taken on the application for reframing of the said issue, reserving all his contentions as urged in this petition."

12. Thereafter, vide order dated 07.02.2018, the issues were reframed and were made more specific.

13. Thereafter, an application under Order 18 Rule 17 CPC was filed by the petitioner for recall of DW1 so as to confront him with the cash receipts of Rs.1.89 Crore and for further cross examination of DW1, but it was also disallowed by the learned Trial Court vide order dated 20.07.2018 while noting as follows:-

"14. It is the settled law that what cannot be done directly, cannot be done indirectly. Ld. Counsel for the plaintiff contended that though the cash receipts are beyond pleadings, he can cross-examine defendant's witness on the basis of those cash receipts in view of Order VII Rule 14 (4) CPC and Order VIII Rule 1A (4) CPC. The relevant provisions read as below:-

"....14(4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

1A(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents

(a) produced for the cross -examination of the plaintiff's witness, or

(b) handed over to a witness merely to refresh his memory."

15. to 17. xxx xxx

18. Plaintiff has specifically stated that he wants to lead evidence with respect to adequate and reasonable compensation for which it needs to be ascertained what was the complete amount paid by the plaintiff. As per his own case, plaintiff paid Rs.28 Lacs and due opportunity has already been granted to the plaintiff to prove the said fact. Vide order dated 20.02.2018 Hon'ble High Court did not frame any new issue and had only recasted the issues already framed vide order dated 19.11.2018 just to bring clarity.

19. In such circumstances, I find no justification why plaintiff should be allowed to recall DW1 for further cross examination. The plaintiff cannot be allowed to prove that he had paid Rs.1.89 Crores under the garb of discrediting the veracity of DW1."

14. This order yet again was challenged before this Court by filing CM(M) No.1009/2018 which was dismissed vide order dated 29.08.2018 noting *interalia*: -

"12. Taking into account the factum that the production of the said documents, exhibition thereof and the pleadings in relation thereto have repeatedly been declined vide orders dated 21.05.2018 in FAO(OS) No.103/2008 of this Court, so upheld vide order dated 21.05.20008 of the Hon'ble Supreme Court in Special Leave Appeal (Civil) No.20093/2008 and having been permitted to be brought on record ultimately through order dated 12.09.2014 in Special Leave to Appeal (C) No.22714/2014 arising out of order dated 07.05.2014 in FAO(OS) No.227/104 of this Court which arose out of the order dated 24.04.2014 of this Court in the suit, it is apparent that the petitioner cannot

now be permitted to produce such documents which he seeks to rely upon for the purposes of the cross-examination also of the defendant's witnesses as per Annexure 14 (Colly), as annexed to the present petition."

15. The SLP (C) No.25269/2018 filed against above order was also dismissed by the Supreme Court vide order dated 24.09.2018.

16. Now, on the eve of final arguments, an application for rebuttal evidence was filed which was though allowed by the learned Trial Court vide order dated 15.10.2018, but subject to the following conditions:-

"In view of thereof application is allowed subject to the following conditions:-

1. For causing delay, plaintiff shall deposit cost of Rs.20,000/- at Kerala Floods Relief Fund before the next date of hearing.

2. The plaintiff shall file evidence affidavits of all his witnesses to be produced in rebuttal within a week from today i.e. by 22.10.2018, with copy to the defendant.

3. The plaintiff shall produce all his witnesses on the next date i.e. 29.10.2018 at 2:00PM, failing which no further opportunity shall be granted.

4. Needless to state, the rebuttal evidence shall not go beyond the pleadings of the plaintiff,, and any attempt to circumvent this term shall invite further heavy cost."

17. The above order was never challenged and the petitioner filed the rebuttal evidence, but once again sought to prove cash receipts which the petitioner had himself de-exhibited and even was not

allowed to confront with to the defendant No.1, hence the learned Trial Court directed to take off the record such rebuttal evidence affidavit subject to costs and it was rightly so considering the same issue being agitated time and again umpteen times. The petitioner by such rebuttal affidavit again wished to prove receipts for Rs.1.89 crores approx., which request of his was declined on numerous occasions and the Division Bench of this Court even went to the extent of saying it was an abuse of process of Court. Hence, there is no merit in the instant petition and it is dismissed. The pending application also stands disposed of.

18. The Registry to communicate the copy of this order to the learned Trial Court.

YOGESH KHANNA, J.

DECEMBER 11, 2018

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