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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) 4/2019 & CM. Nos. 1084/2019 and 1085/2019**
THE ASSOCIATED CHAMBERS OF COMMERCE & INDUSTRY
OF INDIA Appellant

Through: Mr. J.K. Mittal, Adv.

versus

ZEAL INFOTECH PVT LTD

..... Respondent

Through:

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

% **11.01.2019**

CM. No. 1085/2019 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

FAO(OS) 4/2019

This appeal has been filed by the appellant challenging the order dated 5th December, 2018 passed by the learned Single Judge dismissed the appeal filed by the appellant. Vide the impugned order the learned Single Judge has in Para 3 & 4 and 6 to 10 stated as under:

“3. Learned counsel for the defendants submits that the plaintiff is bound to produce PW-1 for cross-examination and it cannot be permitted to examine another witness in place of PW-1.

4. After some hearing, learned counsel for the defendants submit that if PW-1 cannot be produced for cross-examination, his affidavit by way of evidence should not be read in evidence. Learned counsel for the plaintiff has no objection to this.

6. The documents permitted by the learned Joint Registrar are the copies of the bills/invoices alleged to have been sent by the plaintiff to the defendants on the basis of which the plaintiff is claiming the Service Tax.

7. Learned counsel for the defendants submit that the documents are not relevant for determining the real controversy between the parties. It is further submitted that the documents are forged and were never delivered to the defendant.

8. This Court is satisfied that the documents are relevant for determining the real controversy between the parties. The defendants contention that the documents were never delivered to the defendant, can be decided after evidence.

9. There is no infirmity in the order dated 25th September, 2018. There is no merit in the appeal and, therefore, the appeal is dismissed with cost of Rs.25,000/- to be deposited by the defendants with the Delhi State Legal Services Authority within two weeks.

The grievance of the appellant as urged by Mr. Mittal is that once PW1/ Sanjay Jha is not appearing for cross-examination, he could not have been replaced by Ms. Veena Saini as a witness. In this regard, we may state that in Para 4 of the impugned order, the counsel for the appellant had himself submitted that if PW1/Sanjay Jha cannot be produced for cross-examination, the affidavit by way of evidence should not be read in evidence. The said submission was accepted by the counsel for the respondent herein. So the plea of Mr. Mittal is unmerited.

In so far as the plea on documents is concerned, we find that it is the case of the respondent that as the said documents were not traceable they could not be filed at the time of filing of the suit. We also find that it is the case of the appellant, that it had not received the said documents.

Be that as it may, the Joint Registrar has accepted the said prayer which had been confirmed by the learned Single Judge finding that those are relevant for determining the real controversy between the parties. We do not find any reason to interfere with the said finding.

The appeal is dismissed.

CM. No. 1084/2019 (for stay)

Dismissed as infructuous.

CHIEF JUSTICE

V. KAMESWAR RAO, J

JANUARY 11, 2019/jg