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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 250/2019 & CM APPL. 6881/2019
ANTHEM YASH KIRTI INFRACITY PVT LTD Petitioner
Through: Mr. Vijay Kinger, Adv.
versus

M/S UNIQUE INFOCOM PVT LTD & ORS Respondent
Through: Mr. Vinay Gupta, Adv.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER

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14.02.2019

The respondent nos.2 & 3 arrayed on record are proforma parties. In terms of order dated 13.02.2019 on behalf of the petitioner has been produced the copy of the email stated to have been sent by the witness Mr. Vivek Upadhyay to the learned counsel for the petitioner on 12.09.2018, copy of which is stated to have already been supplied to the learned counsel for the respondent no.1 along with email are indicated to be attached 13 attachments.

Vide the present petition, the petitioner assails the impugned order dated 07.01.2019 of the learned trial Court of the ADJ-03, South-East in CS 11257/2016 vide which an application under Order 18 Rule 17 of the CPC filed by the petitioners herein arrayed as defendant to the said suit seeking reopening of the defence evidence and recalling of the order dated 12.12.2018,- was declined observing to the effect that the report of the Local Commissioner recording the evidence showed the casual approach of the defendant to seek adjournments one after another on various dates and in view of the conduct of the defendant, the learned trial Court was not inclined

to recall the order whereby the right of the defendant to lead evidence was closed and the said application was declined.

Vide proceedings dated 12.12.2018 before the learned trial Court it is indicated that the learned counsel for the defendant nos.1 to 4 i.e. for the present petitioner was present before the learned trial Court and the Local Commissioner was also present and the Local Commissioner informed that despite giving ample opportunities, the defendant were not cooperating or participating in recording of evidence and the counsel for defendants also stated that he wanted to withdraw his vakalatnama since the defendants were not coming forward for recording of evidence despite sending instructions and stated that he also sent intimation to the witness Mr. Vivek Upadhaya, AR of the defendant about withdrawal of his vakalatnama and the statement of counsel for the defendant was also recorded in this regard by the learned trial Court and the counsel was allowed to withdraw his vakalatnama and was thus discharged.

It has been submitted on behalf of the petitioner herein that the testimony of DW-1 Mr. Vivek Upadhyay had been recorded partially on 06.09.2018 when the said witness put forth as DW-1 by the defendant no.1 i.e. the petitioner herein had tendered his affidavit in evidence and was cross examined partially on the said date when the further cross examination of the witness was deferred due to paucity of time by the Local Commission. The proceedings recorded by the Local Commission of the date 06.09.2018 further indicate that the testimony of this witness had been deferred apart from paucity of time also for want of requisite documents and the defendant had submitted that he would supply the requisite document on or before

15.09.2018 to the plaintiff and the defendant also stated that he would not produce any other witness except the witness Mr. Vivek Upadhyay who was being cross examined and if necessitated, he would summon any other independent witness by moving an appropriate application before the Court. On 15.09.2018, the Local Commissioner's proceedings reflect that the counsel for the defendant sought an adjournment on the ground that as per the telephonic conversation the witness was suffering from Dengue and therefore he could not supply the requisite documents to the plaintiff and that thus he would supply the documents in relation to the medical ailment on the next date with the matter having been renotified for 26.09.2018 and on 26.09.2018, it is indicated vide the Local Commissioner's Report that as per telephonic conversation, counsel for the defendant again sought adjournment on the ground that the witness was not completely cured from dengue and the defendant had not supplied the requisite documents to the plaintiff nor had he supplied medical documents pertaining to his illness and the proceedings thereafter were deferred for 20.10.2018, on which date, it is indicated that as per the telephonic conversation, the counsel for the defendant sought adjournment on the ground that he is not well and that the advance copy of the required documents had not been supplied by the defendant till that date and thus a last and final opportunity was given with directions that the advance copy of documents be supplied within a period of 7 days with the matter having been renotified for 31.10.2018 and on 31.10.2018, the matter was fixed for defendant's evidence but the defendant had not supplied the advance copy of documents and the defendant witness was not present and the matter was adjourned on the request of the counsel

for defendant subject to cost of Rs.5,000/- for the date 01.12.2018 and on 01.12.2018, counsel for defendant sought to withdraw his vakalatnama submitting to the effect that the witness was not present and had not informed about his presence and had not supplied the advance copy of documents as stated by him.

It has been submitted on behalf of the respondent no.1 by learned counsel for the respondent no.1 that the documents in relation to the purported ailment of the witness Mr. Vivek Upadhyay reflect only that the said witness was suffering from loose motions and had been advised only bed rest for two days and there is nothing to indicate that he was suffering from ailment as the kind of dengue as per the card issued by the Lok Nayak Hospital on 14.09.2018.

Undoubtedly, the medical document in relation to Mr. Vivek Upadhyay does not reflect that he was suffering from dengue. It is however, essential to observe that vide proceedings dated 06.09.2018 of the Local Commissioner when the testimony of Mr. Vivek Upadhyay, DW-1 was deferred it was deferred for paucity of time and for want of requisite documents which the witness had submitted would be supplied on or before 15.09.2018 to the plaintiff. The repeated proceedings dated 15.09.2018, 26.09.2018, 20.10.2018, 31.10.2018 and 01.12.2018 before the Local Commissioner qua submissions made by the counsel for the defendant no.1 i.e. the petitioner herein are to the effect that documents which were to be supplied by the defendant no.1 to the counsel had not been supplied by the defendant no.1 on or before 15.09.2018 and could not be even supplied in advance to the plaintiff. It is in this context that the submission was made on

13.02.2019 on behalf of the petitioner herein that such documents had been sent by the witness Mr. Vivek Upadhyay to his counsel much before the date 15.09.2018. The copy of the email has thus been submitted today on behalf of the petitioner to indicate that the said documents with the attachments and the mail had been sent to the learned counsel for the petitioner herein whose presence is also indicated in all the proceedings before the Local Commissioner and the learned trial Court. Taking the same into account and the factum that the witness Mr. Vivek Upadhyay had been cross examined partially to an extent that there is his testimony of six and a half pages that was recorded on that date and this is the only witness that is to be examined by the defendant no.1, in the interest of justice, it is considered appropriate to grant one opportunity to the petitioner herein to produce this witness DW-1 before the learned trial Court for cross examination by the plaintiff of the suit subject to costs of Rs.25,000/- to be paid by the petitioner to the respondent no.1 on the date to be fixed by the learned trial Court for recording of evidence, to be so recorded by the Local Commissioner.

It has been submitted on behalf of the respondent no.1 that the costs as imposed vide proceedings dated 13.01.2018 by the Local Commissioner have not been paid yet, the same be paid by the petitioner to the respondent no.1 on the date when the cross examination of DW-1 is to be recorded.

The petition is disposed of accordingly.

Copy of the order be given Dasti to both parties, as prayed.

ANU MALHOTRA, J

FEBRUARY 14, 2019/vm

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