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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 19th September, 2019

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CM (M) 1002/2018 & CM APPL. 34738/2018

M/S PRAKASH OIL CORPORATION & ANR. Petitioners

Through: Mr. Jasbir Singh, Advocate (M-9810093469)

versus

BRIJ KISHAN Respondent

Through: Mr. Anunaya Mehta, Mr. Anurag Sahay & Mr. Siddhant Singh, Advocates (M-9899834055)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition has been filed challenging the impugned order dated 14th August, 2018 by which the application filed by the Petitioner under Section 65 of the Indian Evidence Act, 1872 has been disposed of by the Id. Trial Court in the following terms:

“Matter is listed for rerecording of testimony of the petitioner. An application u/s 65 of the Evidence Act r/w Section 151 CPC dated 13.08.2018 is filed by the Ld. Counsel for the respondents. Copy of the application is supplied.

The application is taken up. It is stated in the application that the petitioner has wrongly exhibited many documents in his affidavit. It is stated that these documents cannot be proved by the petitioner and ought to be de-exhibited.

The application is opposed by the Ld. Counsel for the petitioner. It is submitted by the Ld. Counsel for the petitioner that application has been filed only to delay the disposal of the case.

Record is perused.

In case a document is not proved in accordance with

law, either because it is inadmissible or the mode of proof is not as per law, it shall, not be read in evidence while finally deciding the case. The specific objections taken by the respondent qua various documents need not be discussed and determined by the court at this stage. With these observations, the application is disposed off.

The petitioner has tendered his affidavit. Ld. Proxy counsel for the respondents submits that the matter be passed over to 2:00 pm for cross-examination of the petitioner. It is submitted by the Ld. Proxy counsel that the Ld. Main counsel for the respondents who is to cross-examine the petitioner is busy before another court and will be available to appear in this case at 2:00 pm.

The undersigned has to attend a meeting convened by the Ld. Senior Civil judge today at 3:00 pm.

Ld proxy counsel for the respondents assures the court that the Ld. Main counsel for the respondents shall start and conclude cross-examination of the petitioner from 2:00 pm to 3:00 pm.

In view of the assurance given by the Ld. Proxy counsel appearing on behalf of the respondents, matter is passed over till 2:00 pm for cross-examination of PW-1.

Matter is again called out at 2:00 pm.

Present: Ld. Counsel for the petitioner along with PW-1.

Ld. Proxy counsel for the respondents.

Ld. Proxy counsel for the respondents submits that Ld. Main counsel for the respondents cannot appear today. He prays for an adjournment.

Request for adjournment is vehemently is opposed.

Record is perused. Matter has been adjourned at the request of the respondents several times. Cost have also been imposed upon them.

It was at their request that the matter was passed over to 2:00 pm today and the petitioner and his counsel

were made to wait from 10:00 am till 2:00 pm. However, a lenient view is taken and request for adjournment is allowed, though subject to cost of Rs. 10000/- to be paid by the respondents to the petitioner. Ld. Proxy counsel for the respondents undertakes that the cost shall be paid on the next date of hearing. Subject to payment of cost, matter is adjourned and cross examination of PW-1 is deferred to 31.08.2018. It is submitted by the Ld. Proxy counsel for the respondents that it is convenient for the Ld. Main counsel to appear before the court on 31.08.2018.”

2. The issue raised by the ld. counsel for the Petitioners is that the objections as to inadmissibility or mode of proof of a document exhibited by a witness ought to be determined by the Court prior to the commencement of the cross-examination itself. The exhibit marking ought not to be given mechanically by the Court, as that would seriously prejudice the case of the party conducting the cross-examination, inasmuch as the cross-examination would also extend to those documents in respect of which objections have been raised. Ld. counsel submits that forcing cross-examination in this manner, in respect of documents which have not been proved and are not even admissible in accordance with law, tends to protract the trial and also leads to the taking on record of various documents which are exhibited in a completely mechanical manner. He relies on a Full Bench judgment of the Bombay High Court in ***Hemendra Rasiklal Ghia v. Subodh Mody [W.P. 623/2005, decided on 16th October, 2008]*** which considers the amendment to Order XVIII of the Civil Procedure Code, 1908 (*hereinafter, “CPC”*), as also various judgments of the Supreme Court in this regard.
3. On the other hand, ld. counsel for the Respondent submits that the question as to whether a document is to be taken on record or not, would

have to be postponed to the final stage. The rationale behind this is that if a decision on every document, as to inadmissibility or mode of proof, is taken during the course of trial, this would result in vested rights being created in favour of either party and would make the order appealable, potentially resulting in a substantial delay in the trial. He relies upon two judgments of this Court in *Exide Industries Ltd. v. Exide Corporation USA, 2014 (58) PTC 200 (Del)* as also *Xerox Corporation and Ors. v. P.K. Khansaheb and Ors. [CS (COMM) 1196/2016, decided on 3rd December, 2018]*.

4. As is evident from the extract above, the Id. Trial Court has observed that if the document which is exhibited is not proved in accordance with law, either because it is inadmissible or because the mode of proof is not as per law, the Court would take a decision on the same at the time of final arguments. In such a situation, it is understood that the cross-examination relating to the said document would not be relevant until the document is to be considered at the final stage.

5. This Court has to therefore determine whether the admissibility and mode of proof of the exhibited document is to be decided at the final stage or during the trial itself - at the time when the exhibit mark is being put on the document.

6. Order XIV Rule 4 CPC deals with examination-in-chief and cross-examination. The scheme of Order XIV Rule 4 CPC, after the amendment in 2002, is that the examination-in-chief of the witness would be done by affidavit and in respect of documents which are filed with the affidavit, the proof and admissibility of such documents shall be subject to the orders of the Court. At the same time, Order XIV Rule 4 CPC also records that the Commissioner, who may be appointed for recording the evidence, should

record the demeanour of the witness and any objections raised during the course of the examination-in-chief or cross-examination and the same would be determinable by the Court at the stage of arguments. A combined reading of Order XIV Rule 1 and Rule 4 of the CPC shows that the intention is that the trial of the suit not be delayed in any manner and be proceeded with diligently before the Commissioner or before the Court.

7. The apprehension raised by the Petitioners is, however, not without any basis inasmuch as the Commissioner would be recording the objection in respect of the non-admissibility/lack of proof of the documents and the party who is cross-examining the witness has to, without prejudice, conduct the cross-examination. This apprehension has been dealt with by the Bombay High Court in the judgment cited by the Petitioners.

8. The question of how to conduct proceedings in a trial when documents are objected to on the ground of admissibility and mode of proof is a vexed question inasmuch as dealing with objections at that stage could considerably delay the trial and on the other hand if the objections are not dealt with, it could lead to a lengthier cross-examination. The judgment of the Supreme Court in ***Bipin Shantilal Panchal v. State of Gujarat & Anr., (2001) 3 SCC 1***, observes as under:

“ ...

When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the

final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. There is no illegality in adopting such a course.

However, if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceedings further. For all other objections the procedure suggested above can be followed.”

Thus, the Supreme Court has observed that the procedure which could be adopted would be to record objections in respect of any document during the examination-in-chief, permit the cross-examination to continue and thereafter, decide any objections in respect of the said documents at the stage of final arguments.

9. In fact, it is this very procedure which has been suggested as being the best procedure to be followed, by a Id. Division Bench of this Court in ***Exide Industries Ltd. v. Exide Corporation USA (supra)***. In this case, the Id. Division Bench permitted documents annexed to the affidavit in evidence to be taken on record and directed the objections to be recorded and cross-examination to be conducted without prejudice to the objections. The observation of the Id. Division Bench in ***Exide Industries Ltd. v. Exide Corporation USA (supra)*** is as under:

“6. In our opinion, the appeal is premature inasmuch as the question whether the documents should at all be received or accepted as evidence is a matter that can be decided by the learned Single Judge at the time of final hearing of the case. Presently, no serious prejudice is caused to any of the parties if cross-examination of the witness is conducted by the Appellant on the basis of the documents attached to the affidavit by way of evidence. Needless to say that the Local Commissioner

would be obliged to record the objections that the Appellant has to the reception of these documents.

7. The issue whether the documents should at all be received and their admissibility will, of course, be decided by the learned Single Judge at the time of final hearing of the case. We need not express any opinion on this, one way or the other.”

The above two judgments have also been followed by this Court in ***Xerox Corporation and Ors. v. P.K. Khansaheb and Ors. (supra)***.

10. The judgment of the Bombay High Court in ***Hemendra Rasiklal Ghia v. Subodh Mody (supra)*** has extensively dealt with the procedure to be adopted in the case of exhibition of documents. The Court has categorised documents into three types –

- (i) documents where the objection of stamp duty is raised;
- (ii) documents where the objection is in respect of mode of proof;
- (iii) documents where the objection is in respect of inadmissibility in evidence.

Insofar as the category (i) documents are concerned, the High Court has held that the said documents cannot be exhibited until the objection as to stamp duty is judicially determined. This is a consistent position, as held by the Supreme Court in ***Bipin Shantilal Panchal (supra)***. Insofar as the second category of documents are concerned, the Bombay High Court has held that such objections have to be raised at the time when the document is sought to be tendered in evidence. The same ought to be decided at that stage and only then cross-examination should proceed further. This, according to the High Court, would give adequate opportunity to the party tendering the document to address the objection(s) raised. In respect of the third category of documents, the High Court holds that the said objections can be raised at

any stage. However, the Court finally concludes as under:

“95. However, by way of exception, the objection relating to the admissibility of the document requiring resolution of complex issues, having effect of arresting progress of the matter, or if the admissibility of the evidence is dependent on receipt of further evidence, then, in such cases the trial Court can, in the interest of justice, defer the issue of deciding admissibility of the document. In Ram Ratan v. Bajarang Lal (supra), the Supreme Court has also observed that in a given circumstance a document can be exhibited with the endorsement made by the learned trial Judge “objected, allowed subject to objection”, clearly indicating that the objection has not been judicially determined and the document was tentatively marked. This procedure is to be followed only in exceptional circumstances. Ordinarily, the objection to the admissibility of the document should be decided as and when raised without reserving the question as to admissibility of the document until final judgment in the case. We may make it clear that omission to object to a document, which in itself is inadmissible in evidence, would not constitute such document in evidence. It is also duty of the Court to exclude all irrelevant evidence even if no objection is taken to its admissibility by the parties. The question of relevancy of the document being a question of law can be raised and decided at any stage of the proceeding.”

96. The cases; wherein Court Commissioner is appointed to record cross-examination, the Court may decide the question of admissibility of document or proof of such document before the matter is sent for recording of evidence to the Commissioner in the form of cross-examination or re-examination or, in a given case, the Court may decide that question at a subsequent stage. The Court, obviously, has a discretion of recording cross-examination and re-

examination itself. During the cross-examination, if the document is produced and the question leading to its admissibility is raised, then, the Commissioner cannot rule the point as to admissibility of the evidence. In such case, the Court Commissioner is expected to record objection and can give tentative exhibit to the document subject to the decision of the Court. The Court would then be obliged to decide the question before the judgment is delivered so that the party producing evidence could not be deprived of its right to tender evidence or an opportunity of producing fresh evidence or opportunity of making up defects which in many cases could be remedied, if he is told that the objection is allowed.

97. The different cases will have different facts. Each case must be dealt with on its own facts. No straitjacket formula can be evolved. The Civil Procedure Code has been amended from time to time in order to meet the changing situations. The Courts trying the suit or proceedings involving peculiar facts do have a discretion to work out its own procedure and determine the stage of deciding the admissibility of the documents for the reasons to be recorded, if it advances the cause of justice without causing prejudice to the rights of either of the parties. The discretion should not be used fancifully. It is quite possible that sometimes when party fails to substantiate the allegations, he may resort to dilatory tactics to harass the opponent by filing irrelevant and frivolous documents to prolong the continuance of the case. This should be checked by exercising power available with the Court. As already said, procedure is always evolved to serve the ends of justice and to avoid miscarriage of justice.”

11. A perusal of the above shows that the view of the Bombay High court relied upon by the Ld. Counsel for the Petitioner, is not an absolute view. The Court has carved out several exceptions when the decision on the

objections can be postponed to a later stage. However, insofar as Delhi High court is concerned, the view consistently has been that the objections can be recorded at the time of recordal of evidence and can be decided at the final stage, especially if a court commissioner is recording evidence.

12. This however does not mean that if the court is recording evidence, the Court cannot take a view on mode of proof and/or admissibility at the stage when it is raised. If the court is able to take a view at that stage, there would be clarity. It would depend on the factual circumstances in each case and the perception of the Court if the trial is likely to be delayed. The endeavour always ought to be to conclude the trial as expeditiously as possible. This court is of the view that court has to strike the right balance – allowing objections regarding exhibited documents to be captured in the statement of the witness and permitting cross examination to be conducted without prejudice to the objections raised, would strike the right balance between ensuring that the trial is not protracted and that the rights of the party are also not jeopardised, especially if the court is of the opinion that the objections raised require detailed hearing and adjudication and witnesses ought not to be inconvenienced and summoned repeatedly to the court.

13. In ***Sudir Engineering Company v. Nitco Roadways Ltd., (1995) 34 DRJ 86***, this Hon'ble High Court has clarified that the mere marking of a document as an exhibit does not amount to it being proved. The relevant portion of the judgment is extracted below:

“15. The marking of a document as an exhibit, be it in any manner whatsoever either by use of alphabets or by use of numbers, is only for the purpose of identification. While reading the record the parties and the Court should be able to know which was the document before

the witness when it was deposing. Absence of putting an endorsement for the purpose of identification no sooner a document is placed before a witness would cause serious confusion as one would be left simply guessing or wondering while was the document to which the witness was referring to which deposing. Endorsement of an exhibit number on a document has no relation with its proof. Neither the marking of an exhibit number can be postponed till the document has been held proved; nor the document can be held to have been proved merely because it has been marked as an exhibit.”

Thus, even if a document is given an exhibit number it does not mean that the same has to be read in evidence. The exhibit marking is subject to objections which have to be adjudicated.

14. The only question that remains is that once the objections are recorded, how is the Trial Court to proceed with the final arguments. Once the trial concludes and the cross-examination has been conducted by the parties, without prejudice to the objections as to the documents, at the stage of final arguments, the Trial Court would hear the objections on the documents first. The court would then take a view on which documents are being considered for the purpose of adjudication of the issues and proceed to hear final arguments. The Court would then give its reasons in the initial part of the final judgment, making clear as to which of the documents are being considered for the purposes of finally adjudicating the issues. Once the adjudication takes place, in a comprehensive manner in the final judgment, both in respect of the documents and the issues framed in the suit, the same could be the subject matter of an appeal which may be preferred by any of the parties. If this procedure is not adopted, trials in the suits would get substantially prolonged and delayed, which is not the purpose of the

amendments to the CPC in 2002 and the Commercial Courts Act, 2015.

15. Ld. counsel for the Respondent has brought to the notice of this Court, the recent Delhi High Court (Original Side) Rules, 2018 (*hereinafter*, “*Original Side Rules*”) which deal with objections to the exhibition of documents. Chapter XI, Rule 11 of the Original Side Rules reads as under:

“11. Objections to exhibition of documents. - (i)
Objection(s) to exhibiting any document or its production, shall be recorded to be decided at the time of decision of the suit/ other original proceeding or at such time as the Court considers appropriate.

(ii) In case, the Registrar/ Commissioner considers that the objection(s) needs to be decided forthwith, he shall place the matter before Court, without delay after recording of reasons for the same.”

16. A perusal of the Original Side Rules of this Court also shows that the purpose of the Rules is to ensure that the trial is not prolonged and is concluded in an efficient manner.

17. Thus, in the overall facts and circumstances, there is no infirmity in the order passed by the Id. Trial Court. As already observed, the trial court would take a view in respect of the documents at the final stage. Needless to add, the cross-examination of the witness which may be conducted by the Petitioner, would be subject to the objections in respect of the documents, which shall be adjudicated at the final stage, in accordance with law.

18. Accordingly, the petition and all pending applications are disposed of.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 19, 2019/Rahul

Corrected & released on 1st October, 2019