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

Date of decision: 31.07.2023

+ **CM(M) 1036/2023**

SUNIL KUMAR TANDON

..... Petitioner

Through: Mr. Vivek Bhadauria and Mr. Vishal
Srivastva, Advocates

versus

NARENDER KUMAR

..... Respondent

Through: Mr. Kartikay Bhargava and Mr.
Siddharth Singh, Advocates

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

CM APPL. 33660/2023 (for exemption)

Exemption is allowed, subject to all just exceptions.

Accordingly, the present application stands disposed of.

CM(M) 1036/2023 & CM APPL. 33661/2023

1. This petition filed under Article 227 of the Constitution of India impugns the order dated 17.04.2023 passed by the ADJ-02, North East District, Karkardooma Courts, Delhi ('Trial Court') in civil suit no. 476364/2015, titled as '**Narender Kumar vs. Sunil Kumar Tandon & Ors.**', whereby the Trial Court has dismissed the Petitioner's application filed under Order 18 Rule 17 of Code of Civil Procedure, 1908 ('CPC') for recalling of DW-1, i.e., Petitioner himself, for further cross examination.

1.1 The Petitioner is the original defendant and the Respondent is the



original plaintiff in the civil suit.

2. Brief facts leading to filing of present petition are as under: -

2.1 The civil suit has been filed by the plaintiff seeking specific performance of Agreement to Sell ('ATS') dated 13.10.2007, recovery of damages and injunction.

2.2 The Petitioner herein stepped into the witness box as DW-1 and tendered his affidavit by way of evidence on 19.09.2019. He was cross-examined on the same date (i.e., 19.09.2019) by the counsel for the Respondent and subsequently discharged.

2.3 During the course of cross-examination, the Petitioner herein deposed with respect to the ATS (Exhibit PW-1/3) and answered the questions of the counsel for the Respondent. However, on 19.09.2019 while signing his statement, the counsel for the Petitioner raised an objection to the effect that a statement 'volunteered' by DW-1 during his cross-examination has not been recorded by the Trial Court.

2.4 The said submission of the Petitioner was recorded by the Trial Court in its order dated 19.09.2019, however, the Trial Court did not find any merit in the same and therefore did not permit any addition to the statement recorded during the cross-examination.

2.5 The Petitioner thereafter filed an application on or around 07.09.2021 under Order 18 Rule 17 CPC for recalling DW-1 to the witness stand to offer himself for further and proper cross examination by Respondent herein. The said application was opposed by the Respondent, who stated that he does not wish to further cross examine DW-1.

2.6 The said application has been dismissed by the Trial Court *vide* impugned order dated 17.04.2023, wherein the Trial Court held as under:

"5. In the present application filed by DW 1, there is not even an iota of



suggestion regarding what important aspects were needed to be inculcated by DW1 during his testimony, which were allegedly omitted for reasons detailed in the application. It also needs to be stressed that it is also not understandable/explained that admittedly, plaintiff has no objection regarding the cross examination of DW1 but DW1 has himself objected his cross examination and needs the flow of objections/suggestions/voluntary statement to be made according to him in the course of his cross examination. Time and again, it is stressed that the cross examination of witness is the prerogative of the party who conducts his/her cross examination. Therefore, in view of the above discussion, there is no merit in the present application of DW1 and the same is dismissed accordingly. Though, at the same time, defendant number 1 has submitted that he wants to lead further defendants' evidence. In the interest of justice, one opportunity is being granted to defendant number 1 for leading defendants' evidence. If witness needs to be summoned he must be summoned before the next date of hearing or in case evidence by way of affidavit is to be filed let advance copy of same be supplied to the other party so that the testimony be recorded positively on next date of hearing. Application is disposed of accordingly."

(Emphasis Supplied)

3. The learned counsel for the Petitioner has placed reliance upon the averments made in the written statement and the affidavit of examination-in-chief conducted on 19.01.2019 to contend that the Petitioner herein has specifically disputed the hand written entry of Rs. 6 lakhs dated 13.08.2018 as it appears on the back side of the ATS i.e., Exhibit PW-1/3.

3.1 He states that the Petitioner herein is aggrieved by the non-recording of the volunteered statement after the following portion in his cross-examination (appearing at page no. 1), which is reproduced as under for ease of reference:

"it is correct that the back side of the first page of the agreement Ex PW-1/3 bears my handwriting and signatures at the portion encircled at point X-2."

3.2 He states that the Petitioner herein wanted the aspect of the denial of receipt of Rs. 6 lakhs to be specifically recorded in the volunteered statement after the aforesaid portion; and that the limited purpose of moving this application is to have the volunteered statement recorded.

4. In reply, learned counsel for the Respondent states that the Respondent is opposing the prayer of the Petitioner. He states that the Respondent does



not wish to further cross examine DW-1 and the reliefs sought in this application are not maintainable.

5. This Court has considered the submissions of the parties and perused the paper book.

5.1 In the opinion of this Court the impugned order suffers from no infirmity and is correct in facts and law.

5.2 The evidence of DW-1 was recorded; and he was cross examined on 19.09.2019 and discharged. As is evident from the statement recorded on 19.09.2019, no objection was raised before the Trial Court during the recording of cross examination to the effect that the volunteered statement has not been recorded.

5.3 The objection of non-recording of volunteered statement was first raised by the counsel for the Petitioner, while signing the statement on 19.09.2019. The statement ran into four (4) pages and the first three (3) pages were duly signed. The referenced portion, where the volunteered statement is stated to have been omitted was also duly signed by the witness. It therefore, appears that the objection of non-recording of volunteered statement was raised by the counsel for the Petitioner belatedly, at the time of the signing of the statement.

5.4 The objection of non-recording raised by the Petitioner has been considered and rejected on 19.09.2019 by the Trial Court, which recorded the evidence and found no merit in the same. There is no challenge to the order dated 19.09.2019 and the said order has become final.

5.5 The application filed under Order XVIII Rule 17 CPC for seeking permission to step into the witness box to make further statements is misconceived in law. The Supreme Court in the case of **Ram Rati v. Mange**



Ram (dead) Through LRs & Ors., (2016) 11 SCC 296, has held that under Order 18 Rule 17 of CPC, the Court can recall the witness for seeking clarification, however, the same cannot be used to fill up the omission in the evidence already let by a witness. The relevant extract of ***Ram Rati*** (Supra) reads as under:

*“11. The respondent filed the application under Rule 17 read with Section 151 CPC invoking the inherent powers of the court to make orders for the ends of justice or to prevent abuse of the process of the court. The basic purpose of Rule 17 is to enable the court to clarify any position or doubt, and the court may, either suo motu or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt, once the court recalls the witness for the purpose of any such clarification, the court may permit the parties to assist the court by examining the witness for the purpose of clarification required or permitted by the court. **The power under Rule 17 cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for the purpose of filling up a lacuna in the evidence. “No prejudice is caused to either party” is also not a permissible ground to invoke Rule 17.** No doubt, it is a discretionary power of the court but to be used only sparingly, and in case, the court decides to invoke the provision, it should also see that the trial is not unnecessarily protracted on that ground.”*

(Emphasis Supplied)

5.6 Further, there is no provision in law whereby the Petitioner herein can step into the witness box and compel the plaintiff to cross examine.

6. The stand of the Petitioner that he has disputed the hand written entry of Rs. 6 lakhs dated 13.08.2005 has been raised by him in the written statement and examination in chief. It is presumed that a suggestion to this effect would have also been put to the plaintiff witness by the counsel for the defendant while cross examining him on the ATS (Ex. PW-1/3).

6.1 The effect of the said defense will be duly considered by the Trial Court at the stage of the final arguments.

6.2 The discretion of the Trial Court in recording the evidence (cross-examination) cannot be interfered with in this manner and that too after



passage of 4 years from 19.09.2019 i.e., when the Petitioner was cross examined and stood discharged. Though in the facts of this case, it appears that the objection to non-recording of the volunteered statement was not raised during the recording of evidence on 19.09.2019, as it finds no mention in the witness statement. The objection was raised at the time of the signing of the statement and therefore there is no error in the order of the Trial Court refusing to record the statement at that stage. Even otherwise the Petitioner herein cannot compel the Trial Court to record a volunteered statement, which the Court considers to be irrelevant. The Trial Court, which is recording the evidence has discretion to permit or disallow recording of volunteered statements made by the witness.

7. The counsel for the Petitioner raised another contention that since the witness has not signed page no. 3 of his cross-examination statement, the same cannot be read in evidence.

7.1 A perusal of the statement recorded on 19.09.2019 shows that the cross examination was recorded over three (3) pages wherein page nos. 1 and page 2 have been duly signed by the witness. It is only page no. 3, which has not been signed; however, the objection to statement which has been referred to by the counsel for the Petitioner appears at page no. 1 and the same has been duly signed by the witness. No objection has been raised by the Petitioner to the testimony recorded at page no. 3. This objection is therefore, pedantic and without any merit.

7.2 Further, in view of the judgment of the Supreme Court in *Owners and Parties Interested in M.V. "Vali Pero" v. Fernando Lopez & Ors, 1989 4 SCC 671*, this Court is of the opinion that non-signing of the page no. 3 by the DW-1 is also of no effect, considering that he does not dispute the



correctness of the record of page no. 3. The testimony of the Petitioner recorded on 19.09.2019 is therefore, valid and can be relied upon.

8. This Court therefore, finds no merit in the present petition and the same is accordingly, dismissed. Pending applications, if any, are also disposed of.

MANMEET PRITAM SINGH ARORA
(JUDGE)

AUGUST 1, 2023/rk/aa

[Click here to check corrigendum, if any](#)

