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

+ **CM(M) 1163/2023 & CM APPL. 37556/2023**

Date of decision: 09.10.2023

**M/S AKUMS DRUGS AND PHARMACEUTICALS
LIMITED**

..... Petitioner

Through: Mr. Abhishek Sandillya, Advocate
alongwith Mr. Shantanu, AR

versus

M/S DM SYSTEMS (P) LIMITED & ANR. Respondent

Through: Mr. M.C. Kochhar, Advocate for R-1

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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):

1. This Petition filed under Article 227 of the Constitution of India impugns the order dated 19.04.2023 passed by ADJ-05, South District, Saket Courts, New Delhi ('Trial Court') in CS (DJ) No. 5896/2016 ('civil suit') titled as **M/s D.M. Systems (P) Ltd v. M/s Akums Drugs Pharmaceuticals Ltd**, whereby the Trial Court dismissed an application filed by Petitioner herein i.e., defendant no.1 under Order XVI Rule 1(3) of the Code of Civil Procedure, 1908 ('CPC') seeking the permission of the Trial Court to examine Sh. Praveen Soni as additional witness in civil suit.

1.1. The Petitioner herein is the original defendant no.1 and the Respondent No.1 is the original plaintiff.



1.2. The civil suit has been filed for recovery of a sum of Rs. 3,33,326/- along with the interest for payment towards sale of software developed by defendant no. 2. The suit was filed in March, 2013 and is presently at the stage of recording of evidence.

1.3. The defendant no.1 filed its written statement on 06.06.2013. The written statement was accompanied with a counter claim praying for a refund of Rs. 2,36,184 and damages for the loss allegedly suffered by the defendant no.1.

1.4. The plaintiff evidence stands concluded and substantial evidence of the defendant no. 1 has also been led. The defendant no. 1 filed its list of witnesses on 24.09.2014 and as per the said list the defendant no. 1 has been permitted to lead evidence of its Authorised Representative Mr. Vikas (CCW-1), Mr. Rohit Tiwari, IT Department (CCW-2) and Ms. Kusum Sharma, HR Department.

1.5. The defendant no. 1, in addition, wants to lead evidence of one Mr. Praveen Soni, from Business Development department. His name was not mentioned in the list of witnesses and his role is not evident from the pleadings. The Trial Court by the impugned order has dismissed the application.

2. The learned counsel for the Petitioner states that the Petitioner proposes to lead evidence of Mr. Praveen Soni. He states that Mr. Soni is a material witness and if he is precluded from leading his evidence it will have an adverse effect on the weight of evidence led in support of the defence. He states that an appropriate application for leading his evidence was filed on 23.01.2019 under Order XVI Rule 1(3) read with Section 151 of the CPC.

2.1. He states that the Petitioner herein has already filed evidence affidavit



of a competent witness Mr. Rohit Tiwari (CCW2) and during the cross examination of the said witness it became apparent that the Respondent No.1 herein considered Mr. Praveen Soni to be a material witness and non-production of Mr. Praveen Soni would be argued against the Petitioner during final arguments. He states that in these circumstances, the Petitioner herein filed an application for producing Mr. Praveen Soni as an additional witness.

2.2. He states that the relevance of Mr. Praveen Soni is demonstrated from the cross examination of CCW-2. He states that the affidavit evidence of Mr. Praveen Soni has been filed before the Trial Court.

3. In reply, learned counsel for the Respondent No.1 states at the outset that Mr. Rohit Tiwari (CCW2) who has filed his evidence affidavit and has been cross examined at length, has already lead evidence on each of the facts on which Mr. Praveen Soni is proposed as an additional witness. He states that therefore, leading evidence of Mr. Praveen Soni on the very same facts is not justified and would in fact enable the **Respondent** to overcome the loopholes in defence of the Petitioner, which were brought out in the cross examination of Mr. Rohit Tiwari.

4.1 He states that he is, however, fairly willing to concede that the suggestions given by Respondent No.1 to Mr. Rohit Tiwari (CCW2) to the effect that the Petitioner is withholding Mr. Praveen Soni may be struck off from the record.

4.2 He states that a comparison of the evidence affidavit tendered by Mr. Rohit Tiwari, CCW2 and evidence affidavit of Mr. Praveen Soni would show that they are identical. He states that Mr. Soni relies upon the documents, which have already been exhibited by CCW2. He states



therefore Mr. Praveen Soni has no different aspect to depose on. He relies upon the tabular comparison of the contents of the affidavit filed in his reply to this petition.

4. This Court has considered the submissions of the parties and perused the record.

5. There is no dispute that the contents of the evidence affidavit of Mr. Praveen Soni are identical and near similar to the evidence affidavit already tendered by Mr. Rohit Tiwari (CCW2). There is also no dispute that Mr. Rohit Tiwari (CCW2) is competent to depose with respect to the transactions which are the subject matter of the claim. Further, in view of the submission made by the counsel for the Respondent No.1 that the suggestions given to Mr. Rohit Tiwari (CCW2) that the Petitioner herein has withheld Mr. Praveen Soni be taken off the record, this Court finds no reasons to permit leading of evidence by Mr. Praveen Soni.

6. This Court has also perused the impugned order passed by the Trial Court on 19.04.2023. The material portion whereof reads as under:

*“6. Evidentiary affidavit of proposed witness Sh. Praveen Soni is also on record. The said affidavit has also been perused. In the said affidavit, in para no.2, it is submitted by non- applicant/ plaintiff that, it was proposed witness, who was approached and discussed about software in question. That he (Praveen Soni) carried out the entire email / correspondence placing order and dealt with non-applicant/ plaintiff. None of all these facts pleaded in the counter-claim/ written statement of applicant. **Name of Praveen Soni is not mentioned anywhere in the counter-claim nor it is claimed that it was him, who dealt with the non-applicant/ plaintiff. So much so no details have been mentioned in pleadings as to which department in particular carried out the deal.** Further, it is contended by counter-claimant that Praveen Soni is best witness to depose on the business dealings of parties. In the present matter, issue between the parties revolves around the fact that software so supplied by non- applicant/ plaintiff was not functioning properly and claim of non-applicant/plaintiff is that applicant/ defendant not paid for purchase, they have not been paid. Therefore, in backdrop of this, it is clear that fulcrum of the controversy is that software so supplied by applicant/ plaintiff was*



defective or not.

7 As per affidavit of proposed witness Sh. Praveen Soni, works in business Development Department and not in the IT Department. Further, no reason except slip of mind and inadvertence is cited for not mentioning name of witness in list of witnesses. As noted above, name of Praveen Soni is not only missed in list of witnesses but pleadings were also silent on the aspect which proposed witness seeks to lead. It is claimed that Praveen Soni is best witness to prove the case. To miss details of such person who supposedly is the best witness being placed on record due to slip of mind does not appeal to logic and common sense, rather any such person would be informed about and included at very first opportunity. Evidence of Plaintiff is complete and substantial evidence of applicant/ defendant also been led. Therefore, application of posing Sh. Praveen Soni as a better witness who appear seems to be an afterthought. Hence, in view of above discussion, application is dismissed."

(Emphasis supplied)

7. In the opinion of this Court, there is no infirmity in the said impugned order especially considering the fact that Mr. Rohit Tiwari (CCW2) who was a competent witness on behalf of the Petitioner has already stepped into the witness box and deposed.

8. This Court has also perused the cross examination of Mr. Rohit Tiwari (CCW2) placed on record as Annexure P-2 to the rejoinder. A perusal of the said cross examination shows that Mr. Rohit Tiwari (CCW2) has asserted that he is as competent as Mr. Praveen Soni to depose on the facts of the matter and he is well-versed with the transactions between the parties.

9. This Court also finds merit in the submissions of the counsel for the Respondent No.1 that in view of the contents of the evidence affidavit of Mr. Praveen Soni, there are no new facts or no new documents which are sought to be proved by Mr. Praveen Soni.

10. The statement of the learned counsel for the Respondent No.1 that all suggestions given to Mr. Rohit Tiwari (CCW2) in the cross examination to



the effect that Petitioner has withheld Mr. Praveen Soni or that Mr. Praveen Soni was a better witness to appear, stand struck off from the record and will not be read in evidence at the time of the final arguments. This is even otherwise merited in view of the fact that though the Petitioner is willing to lead the evidence of Mr. Praveen Soni, it is the Respondent No.1 who has opposed leading of any further evidence so as to ensure expeditious trial. It is accordingly ordered, that Respondent No. 1 will be precluded from contending at the final arguments stage that Petitioner has withheld Mr. Praveen Soni and all suggestions/questions to the CCW2 to this effect stand struck off.

11. Accordingly, the present petition is dismissed. Pending application is disposed of.

MANMEET PRITAM SINGH ARORA, J
OCTOBER 09, 2023/msh/sk

Click here to check corrigendum, if any