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

Date of decision: 06.11.2023

+ **CM(M) 1800/2023 & CM APPL. 57164/2023**

SUDHIR POWER PROJECTS LTD.

..... Petitioner

Through: Mr. Manish Kumar, Mr. Piyush
Kaushik and Ms. Aprajita Jha,
Advocates

versus

PRIME MEIDEN PVT. LTD.

..... Respondent

Through: Mr. Rajesh Rai, Advocate

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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. 57165/2023 (For Exemption)

Allowed, subject to all just exceptions.

Accordingly, the present application stands disposed of.

CM(M) 1800/2023 & CM APPL. 57164/2023

1. This petition filed under Article 227 of the Constitution of India impugns the order dated 19.10.2023 passed by the District Judge, South-East, Saket Courts, Delhi in CS (Comm) No. 318/2020, titled as **M/s Prime Meiden Limited vs M/s Sudhir Power Projects Limited** ('Trial Court') whereby the application filed by the Petitioner under Section 151 of the Civil Procedure Code, 1908 ('CPC') seeking to reject the evidence filed by



way of affidavit on behalf of PW-3 has been dismissed by the Trial Court.

1.1. The Petitioner is the original defendant and the Respondent is the original plaintiff before the Trial Court. The Respondent has filed a commercial suit for recovery of a sum of Rs. 48,90,000/-.

1.2. The parties are being referred to as per their rank and status before the Trial Court.

2. Learned counsel for the defendant states that a list of witnesses was filed by the plaintiff on 06.04.2023. He states that however, the plaintiff herein initially filed evidence affidavit of only one witness i.e., PW-1.

2.1. He states that due to a change in its authorised representative, the plaintiff company filed an application under section 151 of the CPC for substitution of its authorized representative. He states that since the application for substitution was allowed by the Trial Court *vide* order dated 31.07.2023, therefore, the plaintiff filed evidence affidavit of PW-2 i.e., Ms Sakshi Raizada as well as an amended list of witnesses on 14.08.2023.

2.2. He states that the defendant proposes to lead evidence of a single witness and the evidence affidavit of the said proposed witness stands filed as on 05.07.2023.

2.3. He states that plaintiff was obliged to file the evidence affidavits of all the witnesses mentioned in the list of witness dated 14.08.2023 simultaneously and cannot selectively filed the evidence affidavit of PW-2 alone.

2.4. He states that PW-2 was cross-examined and discharged on 31.08.2023. He states, it is at this belated stage on 03.10.2023, plaintiff filed the evidence affidavit of proposed PW-3.

2.5. He states that defendant objected to the filing of the evidence affidavit



of PW-3 by way of this application dated 11.10.2023 by relying upon the provision of Order XVIII Rule 4 of CPC as amended by Commercial Courts Act, 2015 ('Act of 2015'). He states that he more specifically relies upon Rule 4 (1A) of Order XVIII in terms whereof, the party is obliged to file the affidavits of all its witnesses simultaneously at the time directed in the first case management hearing.

2.6. He states that the defendant has been prejudiced since a perusal of the evidence affidavit of proposed PW-3 shows that the plaintiff has sought to improve various factual aspects upon which PW-2 was cross-examined.

2.7. He states that during the cross-examination, PW-2 was unable to answer the questions, which were put to her in the cross-examination, therefore, the plaintiff has now by way of evidence of proposed PW-3 sought to lead evidence on the issue of territorial jurisdiction raised by the defendant. He states that no such facts were deposed by PW-2 and nor do such facts find mention in the pleadings.

3. In reply, learned counsel for the Respondent i.e., plaintiff states that a perusal of the application dated 11.10.2023 would show that in the said application, the defendant has not identified or specified the portions of the evidence affidavit of proposed PW-3, which are beyond pleadings or amount to an improvisation on the evidence of PW-2. He states that the arguments made before this Court on this issue are therefore beyond the pleas raised in the application.

3.1. He states that in the facts of this case, the Trial Court after framing the issues on 27.03.2023 had directed the parties to file a list of witnesses.

3.2. He states that thereafter *vide* order dated 06.04.2023, the Trial Court appointed the Local Commissioner to record evidence and issued a direction



for filing evidence by way of affidavit.

3.3. He states that there were no specific directions issued by the Trial Court either to the plaintiff or the defendant to file the affidavits of all the witnesses simultaneously and therefore, the plaintiff herein initially filed evidence of only one witness i.e., PW-1, which was subsequently permitted to be withdrawn by the Trial Court *vide* order dated 31.07.2023 due to the reason of change in authorised representative of the plaintiff company.

3.4. He states that no additional documents have been filed with the evidence affidavit of PW-3. He states that the matter is next listed before the Local Commissioner for cross-examination of PW-3 and the facts of this case do not warrant intervention of this Court under its supervisory jurisdiction under Article 227 of the Constitution.

4. In response, learned counsel for the defendant states that it is a matter of record that there was no specific direction issued by the Trial Court on 27.03.2023 or 06.04.2023 to the plaintiff to file the evidence affidavit of all its witnesses simultaneously. He states that however, since it is the mandate of Order XVIII Rule 4(1A) that the affidavit of evidence of all the witnesses whose evidence is proposed to be led by a party shall be filed simultaneously, therefore, the plaintiff cannot be heard to contend otherwise.

4.1. He states that the mandatory nature of the provision Order XVIII Rule 4(1-A) has been noted by a learned Single Judge of this Court in the case of ***Ambience Pvt. Ltd. vs. Hotel Ambience and Ors.*** decided in CS (COMM) **548/2018** dated 19.09.2018 and the judgement of High Court of Karnataka in the case of ***Krishna Bhagya Jala Nigam Ltd. and Ors. vs. A. Prabhakara Reddy and Ors.*** decided in Writ Petition No. 201900/2023 (GM-CPC) on 11.09.2023 to contend that the said provision is mandatory in nature.



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

6. In order to appreciate the contention of the parties, this Court has perused the orders dated 27.03.2023 and 06.04.2023 passed by the Trial Court as well as the proceedings recorded before the Local Commissioner.

7. The Trial Court *vide* order dated 27.03.2023 framed issues and directed the parties to file their list of witnesses on 06.04.2023. Thereafter, *vide* order dated 06.04.2023, the Trial Court appointed a Local Commissioner for recording the evidence of the plaintiff as well as of the defendant's witnesses. The Trial Court issued a direction for serving of advance copy of evidence by way of affidavit to the opposite party. The relevant portion of the directions given *vide* order dated 06.04.2023 by the Trial Court reads as under: -

"Parties are directed to appear before Ld. Local Commissioner for PE on 08.05.2023 for recording of evidence. The Ld. LC may fix other date of recording of evidence in consultation with the parties, and to conclude the evidence 15 days prior to final arguments.

Now, to come up for awaiting report of Ld. Local Commissioner and for Final arguments on 11.07.2023.

Advance copies of the evidence by way of affidavit be supplied to opposite parties at least three days prior to next date of hearing before Ld. LC.

It is made clear that in case parties failed to lead evidence or cross examine the witnesses before the Ld. LC on the dates fixed before him, their right to do so shall be deemed to closed.

A copy of the order be supplied to parties as well as to Ld. Local Commissioner."

(Emphasis Supplied)

8. It appears that after the passing of the aforesaid order, the plaintiff filed the evidence affidavit of its proposed witness PW-1 on 08.05.2023 and



the said PW-1 was partly cross-examined before the Local Commissioner.

9. In the meantime, the defendant filed the evidence affidavit of its sole witness on 05.07.2023.

10. However, subsequently, on 08.07.2023, the plaintiff filed two applications; one for change of name of the plaintiff company and second for substitution of the authorised representative of the plaintiff company. The said applications were allowed by the Trial Court *vide* order dated 31.07.2023 and as the application for substitution of the authorised representative was allowed, consequently, the plaintiff was permitted to file an amended list of witness. PW-2 and PW-3 were duly enlisted in the amended list of witness filed on 14.08.2023.

11. The PW-2's evidence affidavit was filed on 14.08.2023 along with the amended list of witness. The relevant order dated 14.08.2023 reads as under:-

"14.08.2023

Present- Sh. Sahil Solanki and Sh. Rohan Rai, Ld. Counsels for the plaintiff.

Sh. Piyush Kaushik, Ld. Counsel for the defendant.

Ld. Counsel for the plaintiff filed reply to the application under Order VIII Rule 1A (3) CPC along with amended list of witnesses, affidavit of evidence on behalf of the PW-2. Copy supplied.

Arguments on applications under Order VIII Rule 1A (3) CPC heard.

Put up for order on this application at 4:00 p.m today.

At 4:00 p.m

Present- None for the plaintiff.

Sh. Manish Kumr, Ld. Counsel for the defendant (through VC).

Vide separate order, announce in open court, the application under Order VIII Rule 1A (3) CPC filed by the defendant, stands dismissed and disposed of accordingly.

Both the parties are directed to appear before the Ld. Local commissioner for recording of evidence on 1.08.2023. The Ld. LC is directed to conduct the recording of evidence preferably on day to day basis and parties are directed to cooperate with the Ld. LC in recording of evidence in day to day basis.



To come up for awaiting report of Ld. Local Commissioner and for Final arguments on 18.09.2023.”

(Emphasis Supplied)

12. In terms of the order dated 14.08.2023, thereafter, PW-2 was cross examined on 21.08.2023 and 31.08.2023 and accordingly discharged. Pertinently, on none of these dates, any objection with regards to non-filing of the affidavit of evidence of PW-3 was raised by the Defendant.

13. On 31.08.2023, the Local Commissioner fixed the matter for examination of PW-3 for 06.09.2023. The relevant order reads as under:-

“PW2 has been cross examined by the Ld. Counsel for the defendant and accordingly discharged.

Put up for examination of PW3 on 06.09.2023 at 2:45 pm.

Cost for today proceeding has been paid by the plaintiff.”

(Emphasis Supplied)

14. No objection was raised by the defendant before the Local Commissioner on 31.08.2023 for the time granted to the plaintiff for examination of PW-3. Accordingly, the Plaintiff filed evidence affidavit of proposed witness PW-3 on 03.10.2023.

15. It was at this stage on 03.10.2023 that an objection was raised by the defendant and thereafter the counsel for the defendant refuse to cross-examine PW-3 on the plea that “it was too late”. No other objection was taken by the counsel for the defendant. No reference was made to the provision of Order XVIII Rule 4 (1A) CPC and the objection was not explained. The matter was adjourned by the Local Commissioner on 09.10.2023 for examination of DW-3.

Accordingly, it was on 09.10.2023 before the learned Local Commissioner that an objection was raised for the first time by the defendant followed by an application dated 11.10.2023 filed before the Trial



Court for seeking rejection of the evidence filed by way of affidavit on behalf of PW-3 relying upon Order XVIII Rule 4 (1A) of CPC. The said application of the defendant has been dismissed by the impugned order dated 19.10.2023.

16. In the facts of this case, it is the matter of record that list of witnesses was initially filed on 06.04.2023 and the amended list of witnesses was filed on 14.08.2023. Though, the plaintiff initially filed the evidence affidavit of Mr. Rajnish Kumar (PW-1) only and subsequently on 14.08.2023 of Ms. Sakshi Raizada (PW-2) only, however, as is evident from the said order, at this stage, no objection was raised by the defendant that the evidence affidavit of Mr. Suryakant Mohapatra, the enlisted witness No. 3 of plaintiff company has not been filed in terms of Order XVIII Rule 4 (1-A) of CPC.

17. Even though, the matter was listed before the Local Commissioner on 21.08.2023 and 31.08.2023, in the facts of this case, a perusal of the order sheets of the Trial Court and the proceedings before the Local Commissioner shows that the Defendant at no stage prior to 09.10.2023 raised an objection with respect to plaintiff being in default of not filing the affidavits of all its witnesses together in terms of Order XVIII Rule 4 (1A) CPC.

18. In the opinion of this Court, this objection on behalf of the defendant ought to have been taken by defendant on 14.08.2023 or 21.08.2023 before commencing cross-examination of PW-2; so as to enable the plaintiff to take measures. This is also for the reason that as is also evident from the record that there was no specific direction to the parties by the Trial Court either on 27.03.2023 or on 06.04.2023 while undertaking case management hearing in terms of the Order XV(A) Rule 2(c) and Order XVIII Rule 4 (1A) of CPC as



amended by the Act of 2015.

19. Further even though the Plaintiff had filed the evidence affidavit of proposed PW-3 on 03.10.2023, however, the proposed PW-3 was duly enlisted in the list of witnesses dated 14.08.2023, therefore the Trial Court has correctly held that the proposed witness PW-3 by plaintiff company has not been introduced suddenly after the cross-examination of PW-2.

20. This Court also finds merits in the submissions of the counsel for the plaintiff that the objections raised during the course of oral arguments before this Court that the averments made by proposed PW-3 in his evidence affidavit at paragraph 3, 7, 8 and 10 are beyond pleadings and/or improvement in the testimony of PW-2 has not been raised in the application filed by the defendant dated 11.10.2023.

21. The learned counsel for the defendant contends that the Trial Court fell in error in permitting the plaintiff's witness i.e., PW-3 to lead evidence since it is in contravention of the mandate of Order XVIII Rule 4 (1A) of CPC as amended by the Act of 2015. However, this Court is of the view that in the facts of this case, no such error is made out as no specific directions for filing the affidavits in terms of Order XVA Rule 2(c) was issued to the plaintiff and no objections was raised by the defendant in August, 2023 before the Local Commissioner.

22. This Court, even otherwise, is of the opinion that the order passed by the Trial Court is well within its jurisdiction and even if, the Trial Court erred in permitting evidence to be led on behalf of PW-3 such an error falls within its jurisdiction. No case is made out for invoking the supervisory jurisdiction of this Court under Article 227 of Constitution. In the opinion of this Court, if such a petition is entertained, it would be contrary to the intent



of Section 8 of the Commercial Courts Act, 2015.

23. In this regard, it would be instructive to refer to the observations of the judgement of the Division Bench in ***Black Diamond Track Parts Pvt. Ltd. vs. Black Diamond Motors Pvt. Ltd., 2021 SCC OnLine Del 3946*** wherein, at paragraph 30 had observed as under:

“30. We are of the view that once the Commercial Courts Act has expressly barred the remedy of a revision application under Section 115 of the CPC, with respect to the suits within its ambit, the purpose thereof cannot be permitted to be defeated by opening up the gates of Article 227 of the Constitution of India. The scope and ambit of a petition under Article 227 is much wider than the scope and ambit of a revision application under Section 115 of the CPC; whatever can be done in exercise of powers under Section 115 of the CPC, can also be done in exercise of powers under Article 227 of the Constitution. Allowing petitions under Article 227 to be preferred even against orders against which a revision application under Section 115 CPC would have been maintainable but for the bar of Section 8 of the Commercial Courts Act, would nullify the legislative mandate of the Commercial Courts Act. Recently, in Deep Industries Limited Vs. Oil and Natural Gas Corporation Limited (2020) 15 SCC 706, in the context of petitions under Article 227 of the Constitution of India with respect to orders in an appeal against an order of the Arbitral Tribunal under Section 17 of the Arbitration & Conciliation Act, 1996, it was held that if petitions under Article 226 / 227 of the Constitution against orders passed in appeals under the Arbitration Act were entertained, the entire arbitral process would be derailed and would not come to fruition for many years. It was observed that though Article 227 is a constitutional provision which remains untouched by an non-obstante Clause 5 of the Arbitration Act but what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing First Appeals under the Arbitration Act, yet the High Court would be extremely circumspect in interfering with the same taking into account the statutory policy, so that interference is restricted to orders which are patently lacking in inherent jurisdiction. Thus, though we are of the view that gates of Article 227 ought not to be opened with respect to orders in commercial suits at the level of the District Judge against which a revision application under CPC was maintainable but which remedy has been taken away by the Commercial Courts Act, but abiding by the judgments aforesaid, hold that it cannot be said to be the law that jurisdiction under Article 227 is completely barred. However the said jurisdiction is to be exercised very sparingly and more sparingly with respect to orders in such suits which under the CPC were revisable and which remedy has been taken away by a subsequent



legislation i.e. the Commercial Courts Act, and ensuring that such exercise of jurisdiction by the High Court does not negate the legislative intent and purpose behind the Commercial Courts Act and does not come in the way of expeditious disposal of commercial suits.”

(Emphasis Supplied)

24. It would also be instructed to refer to judgement of the Single Judge of this Court in ***Black Diamond Track Parts Pvt. Ltd. vs. Black Diamond Motors Pvt. Ltd., 2022 SCC Online Del 545*** highlighting peripheries of the jurisdiction vested under Article 227 of the Constitution of India held as under:

“5. Before proceeding further, it may be noted that the power under Article 227 of the Constitution of India being one of judicial superintendence cannot be exercised to upset conclusions, howsoever erroneous they may be, unless there was something grossly wrong or unjust in the impugned order shocking the court’s conscience or the conclusions were so perverse that it becomes absolutely necessary in the interest of justice for the court to interfere. The powers under Article 227 will be used sparingly. The Supreme Court has observed in M/s India Pipe Fitting Co. Vs. Fakhruddin M.A. Baker And Anr (1997) 4 SCC 587 and in Mohd. Yunus Vs. Mohd. Mustaqim & Others (1983) 4 SCC 566 that the supervisory jurisdiction conferred to the High Courts under Article 227 of the Constitution of India is limited to overseeing that an inferior court or tribunal functions within the limits of its authority and is not meant to correct an error, even if apparent on the face of the record. A mere wrong decision without anything more is not enough to attract this jurisdiction. Even in the judgment relied upon by the learned senior counsel for the respondent/plaintiff, mentioned above, the Division Bench of this court has again cautioned that Article 227 of the Constitution of India be used sparingly in such suits which under the CPC are revisable and which remedy has been taken away by the Commercial Courts Act, 2015, in order to preserve the legislative intent and give effect to the purpose behind the Commercial Courts Act, of expeditious disposal of commercial suits.”

(‘Emphasis Supplied’)

25. This Court is of the opinion that the defendant is well within its right to raise the objections with respect to paragraphs 3, 7, 8 and 10 of the evidence affidavit filed on behalf of PW-3, during the recording of the evidence and before the Local Commissioner; and the effect of the such an



objection if raised, can be duly considered by the Trial Court while hearing the matter finally for disposal.

26. The judgement of this Court in *Ambience Pvt. Ltd.* (Supra) was passed by the learned Single Judge, who was hearing the matter in exercise of its original jurisdiction decline to take on record an additional affidavit with reference to Order XVIII Rule 4(1B) CPC and amended by Act, 2015 and at that stage, the said Court passed the order within its jurisdiction.

27. However, in the present case, this Court is dealing with its supervisory jurisdiction and as observed above, no case has been made out for exercising this Courts supervisory jurisdiction.

28. In view of the above, as no error of jurisdiction or other error warranting supervisory correction, in exercise of Article 227 jurisdiction of this Court, can be said to exist, hence, the present petition is accordingly dismissed along with pending applications.

MANMEET PRITAM SINGH ARORA, J

NOVEMBER 6, 2023/rhc/ms

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