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

\+ CS(OS) 463/2017

RAJESH KUMAR GUPTA & ANR ..... Plaintiffs

Represented by: Ms.Smita Maan, Mr.Vishal Maan and Mr.Paritosh Tomar, Advocates.

versus

SH. PRATAP DUBE ..... Defendant

Represented by: Mr.Jayant Mehta, Ms.Tejaswi Shetty, Ms.Anushree Malaviya, Ms.Harshita Reddy and Ms.Drishti Harpalana, Advocates.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

O R D E R

% 27.09.2019

I.A. No.13579/2019 (under Order XVI Rule 1A CPC-by defendant)

1. Issue notice.

2. Learned counsel for the plaintiffs/non-applicant accepts notice.

3. By this application, defendant seeks to examine an expert witness who would be able to demonstrate the value of the suit property.

4. Learned counsel for the defendant submits that since this witness can be produced by the defendant and no assistance of the Court is required to summon the said witness and the present application being one under Order XVI Rule 1 of CPC, the defendant would be entitled to produce the witness and the learned Local Commissioner cannot deny examination of the said witness.

5. Learned counsel for the plaintiff opposing the application states that for examination of this very expert witness, the defendant/applicant had

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earlier filed two applications being I.A.No.5067/2019 under Order XXXIV Rule 7 CPC to allow investigation of the suit property by an expert valuer and I.A. No.5068/2019 under Order XVI Rule 1(3) CPC to amend the list of witnesses which were declined by order dated 8th August, 2019.

6. Order dated 8th August, 2019 passed by this Court reads as under:

> *"**IA No.5067/2019 & 5068/2019***
>
> *1. The application IA No.5067/2019 is filed under Order 34 Rule 7 CPC to allow investigation of the suit property by an expert valuer. The application IA No.5068/2019 is filed under 16 Rule 1(3) CPC to amend the list of witnesses.*
>
> *2. The present suit is filed seeking a decree of specific performance of the agreement to sell dated 25.03.2017 regarding property being 12 Bighas 4 Biswas claiming part of Farm No.E-19, Pushpanjali Farms, Village Bijwasan, New Delhi.*
>
> *3. Issues were framed on 12.04.2018 are as follows:*
>
> > *"i) Whether the parties had entered into an oral Agreement to Sell on 25.3.2017 to sell the suit property to the plaintiffs? OPP. (In the aforesaid issue the defence of the defendant will be included that no agreement to sell was entered into.)*
> >
> > *ii) Whether the plaintiffs have always been and continue to be ready and willing to perform their part of the contract/agreement to sell? OPP*
> >
> > *iii) If plaintiffs succeed in proving the issue No.l, then whether the defendant is guilty of breach of contract? If so, its effect? OPP*
> >
> > *iv) Whether the plaintiffs are entitled to the discretionary relief of specific performance? OPP*

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v) Relief."

4. The plaintiffs have completed their evidence. The defendant has also filed his affidavit by way of evidence and the cross-examination of DW1 is also said to be virtually over.

5. On 26.09.2018, this court while deciding IA No.12120/2018 filed under Order 26 Rule 9 CPC seeking appointment of a commissioner to conduct a local investigation to ascertain the true market value of the property, allowed the defendant to withdraw the said application with liberty to move a fresh application for amending the list of witnesses. Hence, the present application has been filed.

6. Learned counsel for the applicant/defendant has pleaded that the claim of the plaintiffs that the parties agreed vide an oral agreement to sell to sell the property for a sum of Rs.6 crores (approximately) is clearly incorrect and can be rebutted by the defendant by saying that the valuation of the property is Rs.30-40 crores. Hence, need of the present application. The valuer will testify regarding the value of the properties.

7. Learned senior counsel appearing for the plaintiffs, however, refutes the contentions of the defendant stating that at this belated stage the defendant cannot be permitted to amend the list of witnesses. Reliance is also placed on the written statement of the defendant to state that the case of the defendant is that there is no agreement to sell and hence the question of trying to conduct/prove the valuation of the property does not arise. It is strenuously urged that when existence of the agreement to sell is denied, there is no reason to conduct/prove the valuation of the property by the defendant. He also states that there is no issue framed which required valuation of the property.

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8. A perusal of the written statement filed by the defendant would show that he states that the plaintiffs agreed to advance a sum of Rs.6 crores to the defendant against the total sale consideration of Rs.36 crores. However, subsequently, in the written statement, the defendant states that a total consideration of the Farm House was not fixed and agreed between the parties and the offer made by the plaintiffs to purchase the Farm House was never accepted by the defendant. It is manifest that the written statement seems to state that no agreement to sell was entered into between the parties.

9. In the light of the above facts, there is no purpose, at this stage, to allow the defendant to introduce a new witness to try and raise the issue regarding the valuation of the property. This plea is not raised in the written statement.

10. Even otherwise, in my opinion, the application is highly belated. The evidence of the plaintiffs is over. The evidence of DW1 is almost over. There is no explanation as to why the defendant has woken up at this late stage to amend his list of witnesses and to add a valuer to the list. At this stage, it would not be appropriate to permit the defendant to add a valuation expert to the list of witnesses. This would only delay the proceedings. The plea does not appear to be bona fide.

11. There is no merit in the application. The same is dismissed."

7. It is apparent from the reading of the order dated 8th August, 2019 that this Court did not allow the applications and held that the defendant cannot be permitted to amend his list of witnesses and add a valuer to the list at this stage when the plaintiff's evidence is over and evidence of DW-1 is almost complete.

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8. Learned counsel for the defendant has heavily relied upon the decision of the Supreme Court reported as 1983 (4) SCC 36 *Mange Ram vs. Brij Mohan & Ors.* whereby dealing with the issue of examination of a witness under Order XVI Rule 1 CPC it was held:

> *7. The neat question of law is: where a party to a proceeding does not wish to have the assistance of the court for the purpose of procuring the attendance of a witness or witnesses, could he be denied the privilege of examining witnesses kept present by him on the date fixed for recording his evidence, on the sole ground that the names of the witnesses and the gist of evidence have not been set out in the list which may or ought to have been filed in compliance with Order 16, Rule 1 of the Code of Civil Procedure?*
>
> *8. Sub-rule (1) of Rule 1 of Order 16 casts an obligation on every party to a proceeding to present a list of witnesses whom it proposes to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in court. Sub-rule (2) requires that the parties seeking the assistance of the court for procuring the attendance of a witness must make an application stating therein the purpose for which the witness is proposed to be summoned. Sub-rule (3) confers a discretion on the court to permit a party to summon through court or otherwise any witness other than those whose names appear in the list submitted in sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list. Rule 1-A in its amended form in force since 1977 enables a party to bring any witness to give evidence or to produce documents but this enabling provision is subject to the provision contained in sub-rule (3) of Rule 1 of Order XVI. If a reference to Rule 22 of the High Court Rules is recalled at this stage, it merely re-enacts sub-rule (1) and sub-rule (2) of Rule 1 of Order XVI.*

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9. He further relies on the decision of this Court reported as 2006 (90) DRJ 696 *Roshan Lal Mittal & Ors. vs. Hari Singh (Decd.) Thru LRs* wherein it was held:

> *14. In my considered view, there can be no legal dispute insofar as the question of law is concerned in view of the judgment of the Supreme Court in Mange Rani's case (supra). Thus, if the name of a witness does not appear in the list of witnesses filed under sub-rule (1) of Rule 1 of Order XVI of the Code, the same does not preclude the party from producing the witnesses at its own responsibility. This is so since the object of filing the list of witnesses is that where the assistance of court is required, the court has an opportunity to examine on the application of the party whether such an assistance is required to be given to the party and whether the witness is liable to be summoned. The point, however, remains that if the party seeks to lead the evidence of further witnesses, those witnesses should be present and the court should not find that they are irrelevant or the production of those witnesses is only for dilatory purposes.*

10. Indubitably, where the assistance of the Court for the purpose of procuring the attendance of the witness is not required the defendant would be entitled to produce the witness as held by the Supreme Court however, considering the fact that this prayer of the defendant has already been rejected by this Court vide order dated 8th August, 2019 passed on the two applications already filed, merely by change of nomenclature of the application, the same relief which has been denied earlier cannot be granted.

11. Application is dismissed.

I.A. No.13580/2019 (under Order VII Rule 11 CPC)

1. Issue notice.

2. Learned counsel for the plaintiff/non-applicant accepts notice.

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3. Reply affidavit be filed within two weeks.

4. Rejoinder affidavit, if any, be filed within one week thereafter.

5. List on 30th October, 2019, the date fixed before the Court

MUKTA GUPTA, J.

SEPTEMBER 27, 2019
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