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

+ **CS(OS) 1518/2009**

M/S AHLUWALIA CONTRACTS (INDIA) LIMITED Plaintiff

Through: Mr. M. S. Rahman, Adv.
versus

DELHI DEVELOPMENT AUTHORITY & ANOTHER.....
Defendant

Through: Mr. Pawan Mathur, Standing counsel
(mobile no. 9810129577)

CORAM:
SH. RAKESH KUMAR (DHJS), JOINT REGISTRAR
(JUDICIAL)

ORDER

% **22.11.2019**

IA no. 11342/2018 (application u/s 151 PC on behalf of defendant)

1. By way of present application, the applicant/DDA seeking direction that the evidence by way of affidavit now filed by Mr. M. K. Higorani be taken off the record.

2. It is averred in the application the issues in the present case were framed on 08.07.2013 and pursuant thereto the plaintiff filed evidence by way of affidavit of PW-1 Shri Gulshan Jhamb, as the plaintiff wanted to lead only one witness in support of his case.

3. It is further averred in the application that on enquiry from the Hon'ble Court as to how many witnesses are to be examined, the plaintiff submitted that plaintiff has to examine two witnesses giving



an impression to the court that there were two witnesses which were to be examined by the plaintiff as per list of witnesses.

4. It is further submitted that the Hon'ble Court allowed the plaintiff to file evidence of the second witness within thirty days. That the plaintiff supplied the defendant with a copy of the evidence of one Mr. M. K. Hingorani. The said evidence by way of affidavit is the copy of the evidence by way of affidavit which was filed by Shri Gulshan Jhamb as PW-1. That the plaintiff cannot be permitted nor was permitted to file the same evidence by way of affidavit, for which evidence by way of affidavit has already been filed by PW-1 Shri Gulshan Jhamb as witness for and on behalf of the plaintiff who has already been admitted in his cross-examination that DDA and also admitted the correctness of the documents of the DDA, which also includes all the Running Accounts Bills and the Final Bill which were exhibited as Exhibit PW-1/D-18 to PW-1/D-60. Needless to say the Hon'ble Court had not permitted the plaintiff to lead evidence by witnesses for and on behalf of the plaintiff and give the same deposition.

5. On the other hand, reply to the application filed wherein it is stated that the application filed by the defendant no. 1 is not maintainable and misconceived, as such liable to be dismissed.

6. On merit all the contents of the application has been denied. The Hon'ble Court vide Order dated 24.05.2018 permitted the



plaintiff to file the affidavit by way of examination-in-chief of other witness. Accordingly, the plaintiff filed the affidavit of Shri M. K. Hingorani, Asst. Vice President of the plaintiff's company. Herein, the plaintiffs both witnesses in their respective affidavits affirmed the facts referred in the plaint based upon the documents on record and also based upon the proceedings and orders of Court.

7. Further it is admitted that initially plaintiff wanted to lead only one witness in support of its case as recorded in the proceeding 05.02.14 before learned Local Commissioner. So far as the admission part of the PW-1, during the cross-examination, is concerned, it is submitted that the documents which are exhibited are matters of record and certainly the arguments are yet to address having regard among other to the documents marked exhibits PW-1/D-18 to PW-1/D-60. This is submit that the law itself provide the remedy in the event, **if the witness is not coming forward for cross-examination, despite the plaintiff's sincere efforts in producing the witness.**

8. Rejoinder to reply is filed in which contents of reply are denied and reiterate the contents of the application.

IA no. 6210/2019 (application u/s 151 CPC on behalf of defendant for summoning PW-1 for completion of his cross-examination)

1. By way of present application, the applicant/DDA seeking direction that plaintiff be directed to produce Sh. Gulshan Jhamb PW-1 for completion of his cross-examination.



2. It is averred, in the application that the issues, in the present case were framed on 08.07.2013 and pursuant thereto the plaintiff filed evidence by way of affidavit of PW-1 Shri Gulshan Jhamb, as the plaintiff wanted to lead only one witness in support of his case.

3. It is further averred in the application that on enquiry from the Hon'ble Court as to how many witnesses are to be examined, the plaintiff submitted that plaintiff has to examine two witnesses giving an impression to the court that there were two witnesses which were to be examined by the plaintiff as per list of witnesses.

4. It is further submitted that the Hon'ble Court allowed the plaintiff to file evidence of the second witness within thirty days. Despite that the evidence of one Mr. M. K. Hingorani filed and reproduced the same evidence similarly to the evidence by way of affidavit filed by Shri Gulshan Jhamb as PW-1 who is under cross-examination. That the plaintiff witness in his cross-examination has admitted the case of the defendant –DDA and also admitted the correctness of the documents of the DDA, which also includes all the Running Accounts Bills and the Final Bill which were exhibited as Exhibit PW-1/D-18 to PW-1/D-60.

5. In reply it is contended that the witness PW-1, Sh. G. K. Jhamb who was working as Manager (Contracts) with the plaintiff had abruptly stopped attending the office since 28.02.2018 without any prior notice. By the said date he was about 74 years. For the dates



fixed by the learned Local Commissioner for recording of further cross-examination of the plaintiff's witness Shri G. K. Jhamb, PW-1 on 8, 13 & 16 August 2018 at 3 pm in Room No 4 of Delhi High Court Bar Association, the plaintiff sent a letter dated 20.7.2018 to its witness PW-1 Sh. G. K. Jhamb through courier DTDC Express Ltd at his last known address available in the plaintiff's record and as well referred in his evidence by way of affidavit dated 13.01.2014 filed before this Hon'ble Court whereby, informing him that the case is now fixed for his further cross-examination before the learned Local Commissioner on 8, 13 & 16 August 2018 at 3 pm in Room no. 4 of Delhi High Court Bar Association. The Tract Report of such communication reflects that it was delivered to PW-1, Shri G. K. Jhamb.

6. Since the plaintiff did not receive any confirmation or communication from the said witness PW-1 Shri G. K. Jhamb for recording of his further cross-examination on 8,13 & 16 August 2018, hence as an abundant caution, the plaintiff vide letter dated 01.08.2018 sent a reminder to the witness PW-1, Shri G. K. Jhamb through courier, DTDC Express Ltd. with a request to attend positively before learned Local Commissioner. However, the Tract Record shows that it was 'Not Delivered (RECEIVER SHIFTED)' and further the said Tract Record does not show the place of his shifting. Hence, no further communication were sent or issued to the witness, Shri G. K. Jhamb, PW-1.



7. I have heard and perused the case file.
8. Since both the prayer made in the applications are interconnected, hence both the applications are taken together.
9. Before proceeding further, it is important to mention the brief fact of the case of the plaintiff. The plaintiff has filed present case for recovery of money on the ground that the plaintiff's tender for the work was accepted by the defendant vide letter No. F.54(150)SWD-9/DWK/DDA/A/2001-02/386-446 dated 10.1.2002 issued by its Executive Engineer, South Western Division No.9:D.D.A., Central Nursery: Sector: 5: Dwarka, New Delhi at the negotiated cost of Rs.39,86,13,600/-. In the said letter of acceptance, it was inter alia stated the time allowed for completion of work is 30 months as reckoned from 15th day after issue of the said letter to commence the work i.e. with effect from 25.1.2002 and the due date for completion of the work as such was 24.7.2004.
10. On the other hand, the defendant contested the present suit on the ground that the delay occurred in completion of work assigned to the plaintiff in terms of agreement which are on account of the plaintiff and the claim which are subject matter of the present suit are the expenses incurred on account of plaintiff, as such defendant is not liable to pay any amount.
11. On these pleading, issues has been framed on 08.07.2013 and direction was given to parties to file list of witnesses but till today no



list of witnesses filed on behalf of either of the parties.

12. In compliance of direction, the evidence were ordered to be recorded before the learned Local Commissioner and plaintiff has filed the evidence by way of affidavit of Sh. Gulshan Jhamb in which it is deposed 'that I am Manager (Contracts) of the plaintiff company above-named and fully acquainted with the facts of the case and competent to depose and swear this affidavit. I say that the above suit was signed, verified and instituted by Shri K.K. Sharma, the then Vice President (Projects) of the plaintiff company and he was authorised by a Resolution passed by the plaintiff's Board of Directors on 30.06.2009 to institute the above suit and to sign and verify the plaint and all affidavits etc. I identify the signature Shri Vipin Kumar, Company Secretary of the Plaintiff company on the said resolution passed by the Plaintiff's Board of Directors. I also identify the signature of Shri K. K. Sharma, the then Vice President (Project) of the plaintiff and the above suit is signed by the said Shri K. K. Sharma in my presence and I identify his signature on the said suit.'

13. During the examination of PW-1 Gulshan Jhamb both applications filed on behalf of defendant when another evidence by way of affidavit of Mr. M. K. Hingorani filed claiming himself that he is the Chairman of the plaintiff company without filing any authorisation on behalf of plaintiff/company and reproduced all the contents of the plaint.



14. Here it is important to mention that in case titled as ‘Sri Mohammed Abdul Ahmad Vs. Sri Mohammed Abdul Gafoor in case C.R.P. No. 237 of 2012 dated 06.09.2012, it has been observed by Hon’ble High Court of Andhra Pradesh, while discussing the judgment of Hon’ble Supreme Court of India that :

The question as to when an affidavit filed, in lieu of chief-examination would form part of record, was dealt with by a Full Bench of this Court in RITA PANDIT v. ATUL PANDIT¹. The judgments of the Supreme Court in SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU v. UNION OF INDIA² and AMEER TRADING CORPORATION LTD., v. SHAPOORJI DATA PROCESSING Ltd.,³ apart from the judgments rendered by the High Courts of Kerala and Bombay, were discussed at length. The Full Bench summed up its observations in paragraph 24, as under:

"An affidavit is merely an affidavit when it is filed in the Court. But when a witness appears for cross-examination, it is necessary for the witness either to confirm or differ with the contents of the affidavit. After his confirmation or denial of the contents of affidavit, whatever recorded is the evidence and if the witness confirms the affidavit, the affidavit would become part of the statement made by the deponent



before the Court. Therefore what is finally taken as evidence by the Court is not the affidavit, but what is contained in the affidavit, if confirmed by the deponent when he appears before the Court for cross-examination. Going by the two judgments of the Supreme Court reported in Salem Advocate Bar Association, Tamil Nadu v. Union of India (supra) and Ameer Trading Corporation Ltd. v. Shapoorji Data Processing Ltd., (supra) we hold, (1) that in all cases the examination-in-chief has to be conducted by way of affidavits;

(2) that in cases where the witness is not under the control of the party who wants to examine him as a witness, recourse can be taken to Order 16, Rule 1 of the Code of Civil Procedure and after taking recourse to Order 16, Rule 1 of CPC and after he is summoned by the Court, the witness can be asked either to file an affidavit or can be examined in the Court itself".

From this, it is evident that an affidavit becomes part of evidence, only on its being confirmed by the person, who filed it. The expressions "confirmation" or "denial" were, no doubt, employed by the Full Bench. However, as to when an affidavit of this nature can be said to have been confirmed or denied, is not explained



elaborately, and there is possibility for the existence of some untouched areas.

15. Further it would be appropriate to mention here that in case Civil Appeal no. 4379 of 1983 (decided on 03.08.1983) titled as Mange Ram Vs. Brij Mohan and Others (1983) 4 Supreme Court Cases 36, it has been held that:-

The underlying scheme under Order 16, Rules 1 and 1-A, CPC and Rule 22 (1) of the High Court Rules is that after the court frames issues and serves notice on the parties enabling them to determine what evidence, oral and documentary they would like to lead, a party can act either in accordance with Rule 1 or Rule 2. Where the party wants the assistance of the court to procure presence of a witness on being summoned through the court, it is obligatory on the party to file the list with the gist of evidence of witness in the court as directed by sub-rule (1) of Rule 1 and make an application as provide by sub-rule (2) of Rule 1. But where the party would be in a position to produce its witnesses without the assistance of the court, it can do so under Rule 1-A of Order XVI irrespective of the fact whether the name of such witness is mentioned in the list or not



and the court has no jurisdiction to decline to examine such witnesses except on grounds set out in proviso to Section 87 (1) of the R.P. Act. 1951 (Para 9)

Sub-rule (3) of Rule 1 and Rule 1-A operate in two different areas and cater to two different situations, and there is no inner conflict between the two. Sub-rule (3) of Rule 1 confers a wider jurisdiction on the court to cater to a situation where the party has failed to name the witness in the list and yet the party is unable to produce him or her on his own under Rule 1-A and in such a situation the party of necessity has to seek the assistance of the court under sub-rule (3) to procure the presence of the witness. (Para 10)

16. In view of the law laid down by Hon'ble Supreme Court of India, I am of the view that though the evidence of PW-1 Gulshan Jhamb after part cross-examination become part of the record, therefore, cannot be withdrawn, however his testimony is incomplete and his examination in chief cannot be read in evidence but it cannot be said that anything or admission which have been come up on record, during cross-examination of PW-1 Gulshan Jhamb, cannot be read in favour of defendant as objected and contended by defendant. Since it is settled law that any admission made in the



incomplete cross-examination is always be admissible and can be read against the person who made admission as in the present case PW-1/plaintiff.

17. Further, it is also settled law that the parties should not be deprived to contest the suit on merit and fair chance should be given to the parties to prove their case and allow them to lead evidence for this purpose, therefore, I am of the considered view that the prayer made in the IA no. 11342/2018 in respect to taken off the record the evidence of Mr. M. K. Hingorani, cannot be considered on the basis of objection that the testimony of this PW is the reproduction of the case of plaintiff/PW-1 Sh. Gulshan Jhamb in as much as the defendant has right to cross-examine the testimony of Mr. M. K. Hingorani. In this regard reliance can be placed upon the following judgments:-

- (i) Mange Ram Vs. Brij Mohan and Others in Civil Appeal No. 4379 of 1983 (decided on August 3, 1983) (1983) 4 Supreme Court Cases 36
- (ii) Sangram Singh Vs. Election Tribunal, Kotah in Civil Appeal No. 214 of 1954 (decided on March 22, 1955) (1955) 2 SCR 1: AIR 1955 SC 425: 10 ELR 293
- (iii) Link Engineers (P) Ltd. Vs. Asea Brown Boveri Limited & Ors. in IA no. 12897/2006 in CS (OS) No. 1180/2002 (Date of decision: 24.04.2007) ILR (2007) II Delhi 181
- (iv) Achutananda Sahoo Vs. Dhruba Ch. Sahoo and Others in Civil Revn. No. 304 of 1986 (decided on August 6, 1986) 1986 SCC OnLine Ori 59: AIR 1987 Ori 179: (1986) 62 CLT 416



(v) Chekka Krishna Prasad Vs. Kotha Appa Rao in CRP No. 4890 of 1997 dated 03.12.1997 1998 (1) A.P.L.J. 170 (HC).

18. Further, in view of the discussion above, the prayer made in the second application no. 6210/2019 is also not maintainable as it has been submitted that whereabouts of the PW-1 is not traceable, despite efforts made, who had stopped to attend the plaintiff company and in support of the contention, the affidavit has already been filed.

19. After taking into consideration facts and circumstances, I am of the considered view that both the applications are devoid on merit, in view of the discussion above and liable to be dismissed. Hence, it would be appropriate in the interest of justice and the end of justice would be met, when the opportunity for examination of PW-1 Gulshan Jhamb is closed and only opportunity for examination of PW Sh. M. K. Hingorani is given to the plaintiff. Accordingly both the applications (IA no. 11342/2018 and IA no. 6210/2019) are dismissed and disposed of with direction that the opportunity for examination of PW-1 Gulshan Jhamb is closed and plaintiff to examine Mr. M. K. Hingorani in terms of previous direction.

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Parties are directed to lead evidence in terms of directions of Hon'ble Court vide order dated 28.10.2013 and 24.05.2018.

Put up for report on evidence on 29.01.2020.

**RAKESH KUMAR (DHJS)
JOINT REGISTRAR (JUDICIAL)**

NOVEMBER 22, 2019/NR

