

(2013) 08 DEL CK 0385

Delhi High Court

Case No: O.A. No. 52 of 2013 in CS (OS) 1276 of 2005

Doctor Morepen Ltd. and
Another

APPELLANT

Vs

Poysha Power Generation P. Ltd.

RESPONDENT

Date of Decision: Aug. 8, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 17
- Evidence Act, 1872 - Section 64, 65, 66

Citation: (2013) 137 DRJ 261

Hon'ble Judges: Mukta Gupta, J

Bench: Single Bench

Advocate: Suparna Srivastava and Ms. Anooja Srivastava, for the Appellant; Manmeet Arora, Prosenjeet Banerjee and Ms. Vasundhara, Advocates for Defendant No. 1 and Ms. Pooja M. Saigal and Mr. Jitender Datta, Advocates for Defendant No. 2, for the Respondent

Final Decision: Disposed Off

Judgement

Mukta Gupta, J.

This chamber appeal is directed against the order dated 22nd March, 2013 passed by the learned Joint Registrar wherein the objections raised by the defendants/Respondents herein as regards the chief affidavit tendered by PW2 have been upheld and while rejecting chief affidavit of PW2 he has been directed to file a fresh affidavit. It also challenges the order of learned Joint Registrar holding EX. PW2/11 to be inadmissible. Learned counsel for the plaintiff/Appellant contends that the twin objections of the defendants to the chief affidavit of PW-2 i.e. non-admissibility of the documents for marking them as exhibits on the ground of mode of proof and the non-admissibility of testimony in chief affidavit on the ground of it being beyond pleadings of the plaintiff, are unsustainable. Learned counsel for the plaintiff fairly contends that out of the four paragraphs in chief affidavit of PW-2 i.e. part of para 13 and para 16 are admittedly beyond pleadings.

She, however, submits that part of para 15 and part of para 18 of the chief affidavit of PW2 which has been rejected by the learned Joint Registrar to be beyond pleadings, is within the pleadings contained in the plaint, though may have been worded differently and thus the impugned order to this extent is unsustainable. Learned counsel for the plaintiff further states that the two paragraphs which are beyond pleadings relate to the additional documents permitted to be taken on record by this Court at a time when issues had already been framed, the trial in the suit had begun and thus amendment in the pleading was not possible in view of the provision of Order VI Rule 17 of the CPC. Reliance is placed on [State of Madhya Pradesh Vs. Union of India \(UOI\) and Another](#), As regards the objection of the defendant qua the non-admissibility of documents, the impugned order is contrary to the principles of res judicata as PW1 also exhibited the same documents for which the objection of the defendant was kept open to be decided at the time of final hearing by the Court, however the same objection when taken while PW2 was exhibiting the same document has been decided against the plaintiff. Reliance is placed on [Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another](#), ; [Prahlad Singh Vs. Col. Sukhdev Singh](#), and [Bhanu Kumar Jain Vs. Archana Kumar and Another](#), The recourse of the learned Joint Registrar to the order dated 1st March, 2013 passed by the Hon"ble Division Bench in FAO (OS) 302/2006 is also erroneous as an order of the Court cannot be read as a Statute. Further, the doctrine of issue of estoppels which is a species of res judicata is applicable in the facts of the present case. The learned Joint Registrar was bound to take the identical decision on the objections raised with respect to same documents and same pleadings to be open for adjudication by the Court at the time of final hearing. As per Delhi High Court Rules it is not a compulsory mandate to decide the objections forthwith and the reliance of the learned Joint Registrar to re-determine the objections already decided by it is erroneous (Ref. Asif Balwa Vs. CBI decided on 6th February, 2012 in W.P. (CRL) 60/2012). The objections in respect of photocopy of exhibit PW-2/11 is unsustainable because as per Sections 65-66 of the Evidence Act the plaintiff can prove the documents by leading secondary evidence in case the primary evidence is not in its possession. Reference is made to [Bipin Shantilal Panchal Vs. State of Gujarat and Another](#),; Coca Cola India Vs. C.P. Malik decided on 18th April, 2009 in CS (OS) 2781/1999 to contend that the objections should not be decided during recording of evidence as the same results in protraction of trial and in case the appellate authority decides the other way round on a particular objection, the exclusion of the material during the trial deprives the Appellate Court of the benefit of that evidence as the same is not on record and thus the matter is required to be sent for trial afresh by the High Court for disposal.

2. Learned counsel for the defendant on the other hand contends that the learned Joint Registrar vide the impugned order rightly de-exhibited PW-2/11 which was a photocopy of the letter dated 5th April, 2004. In the plaint the plaintiffs never pleaded that the original of the purported letter is in possession of the defendant

and thus as per Section 64 of the Evidence Act only primary evidence could be lead and exhibited by the parties. To lead secondary evidence, the plaintiffs were required to comply with the mandate of Section 65 and 66 of the Evidence Act. The plaintiffs must have either sought the permission of this Court by filing an application or at least set out the circumstances in the affidavit of evidence of his witness explaining why the primary evidence is not in possession of the plaintiffs, as held in *Shri Prem Chandra Jain (Deceased) Vs. Shri Ram (Deceased) & Ors.* 1764-66/2005 decided on 12th October, 2009. As a matter of fact PW1 in his cross-examination himself asserted that a copy of the purported letter dated 5th April, 2004 was served on the defendant No. 2 and hence the claim of the plaintiff that the original is in the possession of defendants is neither borne out from the pleadings nor from the statement on oath of PW-1. When PW1 exhibited photocopy of the same letter dated 5th April, 2004 the same was objected to by the learned counsel for the defendant on the ground of mode of proof as the same was a photocopy. There was no submission made by the learned counsel for the plaintiff or PW-1 at that time that the original of the same was in possession of the defendant. Thus, the plea is clearly an after-thought. In terms of Rule 3 (29) read with instructions to Civil Court as contained in part "C" Vol. I of the High Court Rules and Orders, a duty is cast on the Court to promptly dispose of all legal objections as to the admissibility of a document as far as possible. The decisions in *Bipin Shantilal and Asif Balwa (supra)* relied upon by the learned counsel for the plaintiff relates to criminal matters. As regards civil matters, the Court is obliged to form its opinion on the question of admissibility on an objection regarding admissibility of document when raised. Reliance is placed on [R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another,](#) [Shail Kumari Vs. Saraswati Devi,](#) [Mrs. Surender Bala and Another Vs. M/s. Sandeep Foam Industries P. Ltd.,](#) and [Sh. Nand Ram Bagri Vs. Sh. Jai Kishan and Others,](#) It is well settled principle of law that evidence of a party cannot be beyond pleadings, as the party cannot take the other side by a surprise and the opposite side is required to be put to adequate notice thereof. Reliance is placed on [Kattinokkula Murali Krishna Vs. Veeramalla Koteswara Rao and Others,](#) [Prakash Rattan Lal Vs. Mankey Ram,](#) and [Jayram Banan and Another Vs. Anand Prakash Gupta and Others,](#) The principle of res judicata is not applicable to objections regarding admissibility of the documents or the pleadings, as the same is applicable to the issues in the lis arising between the parties only. Hence the appeal be dismissed being devoid of merits.

3. Heard learned counsel for the parties. The grievance of the plaintiff with regard to the impugned order dated 22nd March, 2013 passed by the learned Joint Registrar is two fold; firstly that it held exhibit PW-2/11 as inadmissible on the ground of mode of proof and secondly that it held four paragraphs of the testimony of PW-2 in chief affidavit as inadmissible on the ground that the same were beyond the pleadings of the plaintiff.

4. As regards non-admissibility of the document, the contention of learned counsel for the plaintiff is that the same is barred by res judicata as the same document was permitted to be exhibited by the learned Joint Registrar when PW-1 was examined. The objection regarding the admissibility of the document was not decided when PW-1 was examined, however the document was held to be non-admissible on the very same objection when PW-2 sought to exhibit the said document. "Res-judicata" means "a thing adjudicated" that is an issue that is finally decided between the parties. In the present case when PW-1 was examined the same objection was taken by the learned counsel for the defendant and the learned Joint Registrar kept the objection open. Even if it is assumed that the question of admissibility of a document is an issue to be decided in the lis between the parties, the said issue was not decided by the learned Joint Registrar and was kept open. Merely, because in the first instance when PW-1 was examined the learned Joint Registrar did not decide the objections he is not barred from deciding the objections when the same is taken again during the examination of next witness. Reliance of learned counsel for the plaintiff on Bipin Shantilal Panchal Vs. State of Gujarat and Ors. and Coca Cola India (supra) is misconceived. In Bipin Shantilal Panchal the Hon'ble Supreme Court held that archaic practice that during the evidence collecting stage on every objection raised regarding admissibility of any material, the Court should proceed to pass an order thereon has a fall out and results in delay in trial. It was further held that the exclusion of the material from being admitted in evidence deprives the benefit of that evidence to the Appellate Court, in case the higher Court decides that the said material was admissible in evidence. There can be no dispute to this proposition. However, the same would be relevant where the objection is of such a nature wherein the Appellate Court can take a different view. In the present case the objection of the defendant to the admissibility in evidence of Exhibit PW-2/11 was that it was a photocopy and thus could not have been exhibited. Learned counsel for the plaintiff has taken the plea that PW-2 was constrained to exhibit the photocopy as the original was in possession of the defendant. However, the said plea does not find mention in the plaint. Further PW-1 in his cross-examination admitted that a "copy" of the letter dated 5th April, 2004 was served on the defendant No. 2 and thus it is not the case of the plaintiff that the original was in the possession of defendants. When the objection is with regard to the admissibility of a secondary evidence, the Court receiving evidence cannot shut its eyes to the primary requirements of the Evidence Act and permit every document to be exhibited. Hence, I find no infirmity in the impugned order passed by the learned Joint Registrar to the extent he held Exhibit PW-2/11 to be inadmissible in evidence.

5. As regards the second grievance is concerned, in order to decide whether parts of Para 15 & 18 which were rejected were "within the pleadings" or "beyond the pleadings", it would be appropriate to reproduce them:

15. I say that...[That during the course of negotiation, the demand from defendant No. 2 was that the plaintiff No. 1 company assign one of its Brand is in favour of

defendant No. 2]....agreed to the following:

18. [I say that firstly, no negotiation or talks had taken place between the representatives of defendant No. 1 and representatives of plaintiff No. 1 with respect to any sale or transfer of the Brand Burnol.] Moreover,...the following.

6. The bracketed portions in the paragraphs have been directed to be deleted from the chief affidavit. The case of the plaintiff is that in Para 14 of the plaint it is clearly stated that the plaintiff No. 2 were caused into arranging for additional security in the form of submitting alleged agreements, assignment deeds, etc. with blanks therein, in favour of defendant No. 1, in respect of brand "Burnol" owned by plaintiff No. 1 whereas in affidavits in Para 15 it is stated that during the course of negotiations the demand from defendant No. 2 was that the plaintiff No. 1 company assign one of its brand in favour of defendant No. 2. Further in Para 18 of the chief affidavit, it is only clarified that no negotiations or talks took place between the representative of defendant No. 1 and representatives of plaintiff No. 1, whereas in Para 2 it is stated that in the course of negotiations the demand was from defendant No. 2. A perusal of the plaint and chief affidavit shows that the directions to delete parts of Para 15 and 18 from the chief affidavit being beyond pleadings by the learned Joint Registrar is erroneous. Thus, the impugned order is set aside to that extent.

7. Learned counsel for the plaintiff has fairly conceded that so far as paragraphs 13 and 16 in the affidavit are concerned, they are beyond pleadings. Paragraphs 13 & 16 are reproduced as under:

13. I say that, however due to default in repaying the amount claimed to be due as per the repayment schedule mentioned in the Award, an Execution Petition was filed by Morgan Securities and Credits Pvt. Ltd. (defendant No. 2 herein), in January 2004, and was registered as Ex. Petition No. 13/2004 before this Hon'ble Court and an attachment order were passed against plaintiff No. 2/Morepen Laboratories Limited and others, but attachment warrants were not issued for want of process fee. I say that during this period, as it was later revealed that defendant No. 2 had beaten down the price of the said pledged shares of Blue Coast Hotels and Resorts Limited from around Rs. 70/- per share to around Rs. 10/- per share and had lodged/parked these shares with its associate companies and companies controlled by the friends and relatives of the Directors of the defendants.

This sale when objected to by the officers of plaintiff No. 2, a meeting took place on 24.2.2004 at the office of defendant No. 2 between the plaintiff No. 2 who were represented by late Shri Arun Suri, Shri I.S. Deo and Mr. P.K. Singh and Shri Suresh Chand Goel, Shri P.K. Gupta and Shri V.P. Gupta, representatives of defendant No. 2 Shri Suresh Chand Goel stated the said meeting that the shares of Blue Coast Hotels and Resorts Ltd., roughly around Rs. 1,00,000 shares or so have been sold in the share market and the balance shares are with them. On further probing by late Shri

Arun Suri as to why was he then beating down the prices and corresponding shares are not being reflected in the pledgor companies" demat accounts, Shri Suresh Chand Goel replied that they are doing some internal arrangements to handle their taxation issues. He further assured that defendant No. 2 has an interest limited only to the recovery of its money alone and not in destabilizing the plaintiff No. 2 company of an interest in its shares. On being asked by late Shri Arun Suri that how these shares would be returned to the pledgors, Mr. Suresh Chand Goel replied that the shares will come back to the pledgors. This explains by no objection was taken immediately from plaintiff No. 2 and is also corroborated by the fact that defendant No. 2 had not given credit of the sale of these shares. Subsequently, however when the entire principal amount stood paid by plaintiff No. 2 to defendant No. 2, defendant No. 2, tried to give credit of the fraudulent Sale and thus that was when the fraud came out before this Hon"ble Court and the same has been objected to by plaintiff No. 2 and the owners of the said shares before this Hon"ble Court. Copy of Execution Petition No. 13 of 2004 which has been filed by defendant No. 2 is marked and exhibited as exhibit PW-2/10.

16. That initially the assignment was to be done in favour of defendant No. 2, but subsequently, on account of the insistence by Mr. Suresh Goyal, the Chairman and Managing Director of defendant No. 1, 2 and the Goyal Group, the assignment was done in favour of defendant No. 1 company, which is under the same management as that of defendant No. 2, with Mr. Suresh Goyal and his wife Smt. Meera Goyal, controlling both the companies.

8. A perusal of the plaint shows that the substance in these paragraphs has also not been mentioned in any of the paras of the plaint. Hence, I find no infirmity in the impugned order passed by the learned Joint Registrar to the extent it directs deletion of paragraphs 13 and 16 from the chief affidavit of the PW2. In view of the aforesaid discussion, the impugned order is modified only to the extent that the chief affidavit to be filed by PW-2 now would delete paragraphs 13 & 16 from the same. The affidavit be filed within four weeks. Appeal is consequently disposed of.