



2026:DHC:7048



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

*Reserved on: 31.07.2026
Date of Decision: 24.08.2026*

CNR No. DLHC010010852026

+ **CM(M) 117/2026 & CM APPL. 49647/2026**

M/S DARSHIKA ORTHOCARE Petitioner

Through: **Ms. Kranti Tiwari, Adv.**

versus

M/S CURE SURGICALS Respondent

Through: **Mr. Priyank Kher,**
Adv.(through VC)

CORAM:
HON'BLE MR. JUSTICE AJAY DIGPAUL

J U D G M E N T

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1. The petitioner/defendant, through the present petition under Article 227 of the Constitution of India seeks to assail the order dated 09.01.2026 passed by the learned District Judge -06 (South) Saket Courts, New Delhi whereby the respondent/plaintiff's application under section 151 of the Code of Civil Procedure, 1908, seeking re-recording of PW-1 and PW-2's evidences was allowed.
2. The brief facts of the present case are as follows -
3. The respondent instituted a civil suit for recovery of possession of medical equipment valued approximately at ₹17,36,738/-, purportedly loaned to the petitioner on rental charges of ₹5,000/- per day. The petitioner filed their written statement thereto, and seven issues came to be framed *vide* order dated 06.03.2019. The learned

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trial court, *vide* the same order also appointed a local commissioner for recording of evidence, and the parties were directed to appear before him on 30.03.2019. The report thereto was filed on 24.06.2019.

4. The parties appeared before the learned Local Commissioner on 30.05.2019 and 03.06.2019 for cross examination, however it was noted that the even though the chief examination of PW-1 and 2 was not recorded, the learned Local Commissioner had proceeded to cross examination. Soon thereafter, the learned Local Commissioner stopped appearing despite service of court notice. The learned trial court was then, on 05.07.2022 constrained to appoint a second Local Commissioner.

5. The second Local Commissioner, in his report dated 28.09.2022 also noted that the chief examination of PW-1 and 2 were not recorded and the documents had not been tendered before proceeding with the cross examination.

6. During the course of the proceedings, the counsel for the respondent before the learned trial court submitted that the examination in chief of PW-1 had not been properly recorded by the then Local Commissioner. The learned trial court *vide* order dated 05.08.2024 granted the respondent liberty to file an appropriate application regarding the same.

7. The respondent, on 31.08.2024, filed an application under section 151 CPC seeking re-tendering of the evidence of PW-1 on account of oversight and inadvertence on part of the learned Local Commissioner for not having recorded the Examination in Chief of PW-1 and proceeded with the cross-examination. The application came to be allowed *vide* order dated 26.09.2024.



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8. In the *interregnum*, the respondent moved an application under section 15(2) of the Commercial Courts Act seeking transfer of the case to the Commercial Court. The application came to be dismissed *vide* order dated 03.04.2025, and on the same date, the learned trial court, while noting the prolonged period of litigation, closed the PE for the respondent/plaintiff.

9. Aggrieved, the respondent on 19.07.2025 moved an application for recall of the order dated 03.04.2025 which came to be dismissed *vide* order dated 22.08.2025. The respondent then approached this Court *vide* CM(M) 1847/2025 seeking to set aside the orders dated 03.04.2025 and 22.08.2025. The petition came to be disposed of as withdrawn *vide* order dated 05.01.2026.

10. Meanwhile, in December 2025, the respondent filed yet another application under Section 151 CPC seeking re-tendering and re-recording of the examination-in-chief of PW-1 and PW-2, contending that their examination-in-chief had not been recorded, although their cross-examination had already been conducted and that the said procedural irregularity would prejudice the respondent. The petitioner filed a reply thereto on 13.12.2025, opposing the application and contending that the same amounted to an abuse of the process of law.

11. The learned trial court *vide* the impugned order dated 09.01.2026 allowed the respondent's application under section 151 CPC and appointed another Local Commissioner for collection and recording of evidence. While allowing the application, the learned trial court noted that in the interest of justice, and in order to ensure that a fair opportunity was being granted to both parties, it was important to record the Examination in Chief of the PW-1 and 2.

12. The learned counsel for the petitioner has submitted that the



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application seeking re-tendering and re-recording of evidence is barred by constructive *res-judicata*, and that the learned trial court has erred in failing to consider these submissions as raised in the reply to the application dated 13.12.2025. She has submitted that the respondent had already filed an identical application on 31.08.2024, which came to be allowed on 26.09.2024, and thus the application filed in December 2025, which came to be allowed *vide* the impugned order is barred by constructive *res-judicata*. In order to buttress these contentions, she places reliance on the judgments of the Hon'ble Supreme Court in ***Satyadhyan Ghosal and Ors. v Sm. Deorajin Debi & Anr. (1960) 3 SCR 590***, ***Hope Plantations Ltd. v Taluk Land Board (1999) 5 SCC 590*** and ***Shanmughasundram & Ors. Diravia Nadar (Dead) by LRs & Anr. (2005) 10 SCC 728***.

13. She further also submits that the application seeking re-tendering and re-recording of evidence is simply a dilatory tactic by the respondent to consistently delay the trial of a case which had been instituted in 2015. She submits that the impugned order has the effect of setting the clock back on an 11-year-old trial and allowing the respondent to lead fresh evidence and thereby delay the trial again.

14. *Per contra*, the learned counsel appearing for the respondent has submitted that the learned trial court was well within their inherent powers to correct a procedural irregularity which would otherwise have significantly prejudiced their case.

15. Heard. Perused the records.

16. The learned counsel for the petitioner has essentially assailed the impugned order on two major grounds – (a) once the respondent had already filed a similar application seeking similar reliefs which had been allowed *vide* order dated 26.09.2024, the impugned order



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which grants identical reliefs is violative of constructive *res-judicata*,
(b) the application by the respondent is a dilatory tactic merely intended to derail the trial.

17. This Court, at the outset, deems it relevant to note that section 143(1) of the Bharatiya Sakshiya Adhiniyam, 2023 (section 138 of the Indian Evidence Act) categorically mentions that the witnesses must first be examined in chief and then be subject to cross examination. The purport of the section, and the order of examination enshrined therein ought not to be allowed to be rendered illusory by not recording the evidence given in chief examination. As a corollary, if the examination in chief is not recorded, then there cannot be any cross-examination.

18. In the present case, admittedly, the chief examination of PW-1 and 2 was not recorded and the witnesses were partially cross-examined on 30.05.2019 and 03.06.2019. The same finds mention in the report of the second local commissioner and in numerous orders of the learned trial court. Similarly, it is also not disputed by the petitioner that the examination in chief of the witnesses has not been recorded, even after the order dated 26.09.2024. Lastly, the application seeking reopening of the evidence is constrained only to rectify this procedural irregularity and record the chief examination of PW-1 and 2. It is in this backdrop that the arguments of the petitioner need to be tested.

19. The argument that the second application, allowed *vide* the impugned order, being hit by *res-judicata* does not find favor with this Court in face of the glaring procedural irregularity, which not only impinges on the substantive rights of the parties, but also contravenes the provisions of section 143 BSA. It is trite law that procedural lapses



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which impinge upon the substantive rights of the parties can be cured and rectified. Furthermore, once the procedural impropriety was admittedly not cured after the order dated 26.09.2024 and the issue had not attained finality, allowing the same to be cured *vide* the impugned order cannot be barred by *resjudicata*.

20. Similarly, considering that the cross-examination was conducted without first recording the examination-in-chief, the application filed in December, 2025 cannot be treated as an attempt to delay the proceedings. The procedure prescribed by law has to be followed, and a procedural irregularity cannot be allowed to continue merely because it has already occurred, particularly when it may affect the rights of the parties.

21. Thus, this Court is of the considered opinion that there is no infirmity in the impugned order dated 09.01.2026 and the present petition deserves to be dismissed. Pending applications, if any, are also disposed of.

22. The judgment be uploaded on the website forthwith.

AJAY DIGPAUL, J.

AUGUST 24, 2026/gs/sg