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

+ CM(M) 546/2014

SHAKUNTALA RATHI ..... Petitioner  
Through: Mr. K.S. Verma, Adv.

Versus

VIJAY LAXMI & ORS .... Respondents  
Through: None.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**ORDER**

% **27.07.2017**

**CM No.17402/2016 (of petitioner for restoration of the petition dismissed in default of appearance of the petitioner on 4<sup>th</sup> April, 2016)**

1. Vide order dated 9<sup>th</sup> May, 2016, notice of this application was ordered to be issued to the non-applicants “directly as also through counsel” for 19<sup>th</sup> October, 2016.
2. The endorsement of the Court Master on the order sheet of 9<sup>th</sup> May, 2016 is of the service being complete. On the next date of hearing i.e. 19<sup>th</sup> October, 2016, none appeared for the respondents but the counsel for the petitioner sought adjournment. Accordingly, the application was adjourned to 24<sup>th</sup> February, 2017. There is however an endorsement of the Court Master on the order sheet dated 19<sup>th</sup> October, 2016 also, of the respondents having been served. On 27<sup>th</sup> February, 2017 also none appeared for the respondents but the counsel for the petitioner again sought adjournment and the application was adjourned for today.

3. Today also none appears for the respondents. Need to await the respondents any further when they have failed to appear despite service is not felt.
4. The counsel for the petitioner has been heard.
5. For the reasons stated, the application is allowed.
6. The petition is restored to its original position.
7. The application is disposed of.

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8. The respondents are proceeded against *ex-parte*.
9. The counsel for the petitioner has been heard.
10. This petition under Article 227 of the Constitution of India impugns the order dated 26<sup>th</sup> April, 2014 in Suit No.411/2011 of the Court of Civil Judge-03 (Central), Tis Hazari Courts, Delhi to the extent the same dismisses the application of the petitioner/plaintiff under Order XVIII Rule 3 of the Code of Civil Procedure, 1908 (CPC) for leading rebuttal evidence.
11. The petition was entertained and notice thereof ordered to be issued to the respondents and vide *ex-parte* order dated 19<sup>th</sup> August, 2014 which continues to be in force, the proceedings in the suit before the Trial Court were stayed.
12. The respondents/defendants appeared through advocate and the matter was adjourned from time to time till it was dismissed in default of appearance of the petitioner/plaintiff as aforesaid on 4<sup>th</sup> April, 2016.
13. The counsel for the petitioner/plaintiff has argued that though in the suit, following issues were framed:

*“A. Whether the plaintiff is entitled to a decree of permanent injunction as prayed for? OPP*

*B. Whether the suit of the plaintiff is not maintainable in its present form? OPD*

*C. Whether the plaintiff has no cause of action to file the present suit?OPD*

*D. Whether the suit of the plaintiff has not been properly valued for the purpose of court fees and jurisdiction? OPD*

*E. Relief.”*

with onus of as many as three issues being on the respondents/defendants, but the trial Court has erred in not granting an opportunity to the petitioner/plaintiff to lead rebuttal evidence.

14. A perusal of the order dated 26<sup>th</sup> April, 2014 of the Trial Court shows that vide a detailed order, the application of the petitioner/plaintiff under Order VI Rule 17 of CPC for amendment of the plaint was dismissed and as far as the application of the petitioner/plaintiff under Order XVIII Rule 3 of CPC was concerned, the same was also dismissed observing that the petitioner/plaintiff by way of rebuttal evidence wanted to prove additional documents which the petitioner/plaintiff wanted to bring on record by virtue of the application under Order VI Rule 17 of CPC. As a consequence of dismissal of the application under Order VI Rule 17 of CPC, the application under Order XVIII Rule 3 of CPC for opportunity to lead rebuttal evidence was also closed.

15. A perusal of the issues, the burden of which is on the respondents/defendants, does not disclose the pleas on which the issues have been framed. The petitioner/plaintiff though has filed a copy of the plaint

before this Court, has not filed copy of the written statement. It thus cannot be known, on what pleas in the written statement of the respondents/defendants, the issues, onus whereof is on the respondents/defendants, have been framed and what would be the scope of rebuttal evidence.

16. All that can be observed is that the learned Civil Judge in the order dated 26<sup>th</sup> April, 2014 has not dealt with the application of the petitioner/plaintiff under Order XVIII Rule 3 of CPC on the anvil of the scope of rebuttal evidence.

17. This petition having remained pending in this Court already for a sufficiently long time, it is not deemed appropriate at this stage to call for the trial Court record or to give an opportunity to the counsel for the petitioner/plaintiff to file copies of the relevant Trial Court record.

18. Though the counsel for the respondents/defendants has not appeared but written arguments filed by him are on record and which have been perused by me. It is stated therein (i) that the evidence of the parties was closed and the suit listed for final arguments for 18<sup>th</sup> May, 2013; (ii) that on 18<sup>th</sup> May, 2013, part arguments were addressed and the suit adjourned to 6<sup>th</sup> July, 2013; (iii) that the petitioner/plaintiff having realised that the suit could be dismissed, filed the application under Order XVIII Rule 3 of CPC and thereafter application under Order VI Rule 17 of CPC; (iv) that the petitioner/plaintiff in her evidence, led evidence not only on the issues, onus whereof was on the petitioner/plaintiff but also on other issues onus whereof was on the respondents/defendants and is now not entitled to lead rebuttal evidence; (v) that the petitioner/plaintiff while closing her evidence also, did

not reserve any right to lead rebuttal evidence and is deemed to have waived the right to lead rebuttal evidence.

19. I have considered the aforesaid contentions.

20. The counsel for the petitioner/plaintiff states that the petitioner/plaintiff had closed her evidence only in affirmative and which *ipso facto* means that the right to lead rebuttal evidence was reserved. He further controverts that rebuttal evidence has already been led.

21. In the entirety of the aforesaid facts and circumstances, I am of the view that the present petition should be allowed to the extent of setting aside the impugned order to the extent dismissing the application of the petitioner/plaintiff under Order XVIII Rule 3 of CPC and by allowing the said application but on the condition that the petitioner/plaintiff, in rebuttal, would be entitled to lead evidence strictly within the confines of the rebuttal evidence and shall not expand the scope thereof.

22. The petition is disposed of.

**RAJIV SAHAI ENDLAW, J.**

**JULY 27, 2017**

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