

\$~25

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

+ CM(M) 743/2016

KIRAN AGGARWAL

..... Petitioner

Through: Mr.Naveen Sharma & Mr.Ashok Jain,
Advocates.

versus

JAWAHAR LAL AGGARWAL & ANR

..... Respondents

Through: Mr.Tushar Singh, Advocate.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER

%

22.05.2017

CM(M) 743/2016

1. By filing the instant petition, the petitioner/plaintiff is assailing the order dated 1st April, 2016 whereby the learned Trial Court allowed the prayer of the respondents No.1 and 2/defendants No.1 and 2 examine themselves as defendant witnesses.

2. The petitioner is plaintiff in Civil Suit No.14/2016. Initially this civil suit was filed in the High Court of Delhi and registered as CS(OS) No.2791/2011. With the enhancement of pecuniary jurisdiction of District Courts, the suit was transferred to the District Court and renumbered as Civil Suit No.14/2016.

3. The grievance of the petitioner is that the learned ADJ could not have granted further liberty to the respondents/defendants to examine defendant No.1 and defendant No.2 as in the chamber appeal, when the said suit was

pending before the High Court, this Court has permitted examination of DW-3 only who is son/Special Power of Attorney of the defendants.

4. Learned counsel for the petitioner has drawn the attention of this Court to the submissions made on behalf of the respondents/defendants in O.A. No.174/2015 (Chamber Appeal by the defendants against the order dated 12.01.2015 passed by the Joint Registrar) and I.A. 9407/2015 (for condonation of delay in filing the Chamber Appeal) and recorded in para 7 of the order dated 05th May, 2015 to the following effect:-

‘7. Counsel for the defendants states that the defendants No.1 and 2 are senior citizens and the defendant No.1 had suffered a heart attack on 04.12.2014 whereafter, he had to undergo a surgery. He states that the defendant No.2 (wife of defendant No.1) had been busy attending to the defendant No.1 and they have been residing with their son and daughter-in-law at Bangalore. He submits that the absence of the defendant No.2 and third witness, i.e. son the defendants was bonafide and adds on instructions, that now the defendants wish to confine the evidence to the deposition of Mr.Sameer Aggarwal (DW-3) alone and if one more opportunity is granted for said purpose, the defendants shall ensure that the said witness is present on the date that may be fixed by the joint Registrar for his cross-examination.’

5. DW-3, who is Special Power of Attorney of defendants has already been examined and defence evidence has been closed. Despite that, after the case was transferred to the District Court, learned ADJ has allowed the application under Section 151 CPC dated 13th August, 2015 and permitted examination of defendants No.1 and 2 as defence witnesses subject to cost of Rs.15,000/-.

6. Learned counsel for the respondent has submitted on 28th August, 2015 when DW-3 was cross examined, defendant No.1 was also present in

person and prior to that the application had already been filed on 13th August, 2015 as by that date defendant Nos. 1 & 2 were in a position to appear and examine themselves as defence witness.

7. Before dealing with the rival contentions, it is necessary to mention here that while filing the application on 13th August, 2015, no certificate was annexed with the application, declaring the fitness of defendant No.1. This application was not even signed by defendants No.1 and 2 nor any medical record was annexed to show the change in circumstances.

8. Learned counsel for the petitioner, after some arguments submits that he has no objection if defendants No.1 and 2 are allowed to be examined by giving them limited opportunity subject to such terms and conditions as deemed fit by this Court.

9. In view of the no-objection given by learned counsel of the petitioner, the respondents/defendant Nos.1 & 2 are allowed to examine themselves as defence witnesses, subject to the following conditions:

(i) Defendant No.1 shall be examined subject to cost of ₹50,000/- on 31st May, 2017 which is already fixed before the learned Trial Court for defence evidence.

(ii) Defendant No.2 shall also be examined subject to cost of ₹50,000/- on a date to be fixed by learned ADJ after 31st May, 2017.

(iii) The cost shall be paid before the commencement of the examination of the defendants No.1 and 2.

(iv) If defendant No.1 fails to appear and pay the cost on 31st May, 2017 and defendant No.2 fails to appear and pay the cost on subsequent date to be fixed by the learned Trial Court, no further opportunity shall be granted by the learned Trial Court for the purpose of defence evidence.

(v) This amount of ₹50,000/- for each defendant (defendant Nos. 1 & 2) shall include the cost of ₹15,000/- imposed by learned Trial Court vide order impugned herein.

10. The petition stands disposed of in the above terms.

11. Copy of the order be given dasti, as prayed and be sent to the Court concerned for information and compliance.

CM No.27913/2016 (stay)

Dismissed as infructuous.

PRATIBHA RANI, J.

MAY 22, 2017

'hkaur'