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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 1160/2016 & CM No.31139/2017 (of the petitioners under
Section 151 CPC for preponment of date)
ANJU DAGAR & ORS Petitioners
Through: Mr. Ankit Jain, Adv.
Versus
DHARAMVIR SINGH DAGAR & ORS Respondents
Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **28.08.2017**

CM No.31140/2017 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

**CM(M) 1160/2016 & CM No.31139/2017 (of the petitioners under
Section 151 CPC for preponment of date)**

3. This petition under Article 227 of the Constitution of India impugns the order [dated 14th July, 2016 in Civil Suit No.13757/2016 of the Court of Additional District Judge (ADJ)-13 (Central), Tis Hazari Courts, Delhi] of dismissal of application under Order VIII Rule 1 of the CPC of the three petitioners seeking setting aside of the order dated 8th February, 2011 striking off the defence of the petitioners.
4. Notice of the petition was issued and the counsel for the respondents has been appearing and the matter is posted next on 19th February, 2018.
5. CM No.31139/2017 filed by the petitioners for pre-ponement of date of hearing has come up today. None appears for the respondents in spite of advance copy to have been served.

6. Pre-ponement is sought on the ground that the suit from which this petition arises is listed next before the Suit Court on 31st August, 2017 for final arguments and this petition would become infructuous if final arguments are heard and the suit is decided.

7. No stay of proceedings before the Suit Court for which application was filed along with the petition having been granted till now in spite of the petition having been listed on several dates, no error can be found with the order of the Suit Court of proceeding with the suit.

8. Be that as it may, *prima facie* not finding any merit in the petition, notwithstanding the absence of the respondents to whom notice was issued, the counsel for the petitioners has been asked to address on the main petition itself and has been heard.

9. The counsel for the petitioners has argued i) that the respondent no.1, in or about the year 2006, instituted the suit from which this petition arises, for partition of immovable properties impleading the respondents no.2 to 17 as defendants thereto; ii) that the respondents no.2 to 17, except respondents no.10 and 13, filed their written statement pleading a settlement between the parties and sale of a portion of the property to the petitioners herein in pursuance to the said settlement; iii) that the respondent no.1 / plaintiff on 21st November, 2006 applied for impleadment of the petitioners and which was allowed on 18th December, 2007 and the petitioners have been appearing in the suit as defendants (in the suit) since thereafter; iv) that petitioners however did not file any written statement (the explanation given therefor is that since the plaint had not been amended to incorporate any pleas concerning the petitioners, the need to file the written statement was

not felt); v) that the respondent no.1 / plaintiff on 13th January, 2008 filed an application for amendment of the plaint *inter alia* to incorporate the pleas concerning the petitioners / defendants therein and which application was allowed on 14th September, 2010 and opportunity given to all the defendants to file written statement thereto; vi) that neither the petitioners / defendants nor the other defendants filed any written statement to the amended plaint and vide order dated 8th February, 2011 the defence of all the defendants to the suit was struck off and the suit posted for evidence of the respondent no.1 / plaintiff; vii) that the respondent no.1 / plaintiff did not lead any evidence; viii) that issues were however framed in the suit on 28th February, 2013 and in view thereof vide order dated 30th January, 2014 option was given to the parties to lead evidence in terms of the issues; ix) that no evidence was led by the respondent no.1 / plaintiff pleading that the evidence led earlier, prior to the framing of issues, was sufficient; since the defence of the defendants had been struck off, need to give opportunity to the defendants to lead evidence was not felt and the suit posted for final arguments on 3rd July, 2014; x) that the respondent no.1 / plaintiff made an oral request for another opportunity to lead evidence and which was allowed on 11th February, 2015 and the suit posted for evidence of the respondent no.1 / plaintiff on 15th April, 2015; xi) that no evidence was led by the respondent no.1 / plaintiff and vide order dated 15th April, 2015, the opportunity given on 11th February, 2015 was closed; xii) that the respondent no.1 / plaintiff has applied for recall of the order dated 15th April, 2015 and which is pending consideration; xiii) that on 14th August, 2015, the petitioners applied for recall of the order dated 8th February, 2011 striking

off the defence of the petitioners / defendants and for an opportunity to file written statement; and, xiv) that vide the impugned order the said application has been dismissed.

10. Though the counsel for the petitioners / defendants has argued that the application of the respondent no.1 / plaintiff for recall of the order dated 15th April, 2015 is pending consideration but on enquiry clarifies that the respondent no.1 / plaintiff does not appear to be pressing the said application because the suit is now posted for final arguments.

11. The learned ADJ has in a detailed order given reasons for not allowing the application of the petitioners / defendants for recall of the order dated 8th February, 2011.

12. Not only no error has been argued in the detailed, well reasoned impugned order but even otherwise the failure of the petitioners / defendants to file written statement from 18th December, 2007 till now is unpardonable.

13. No merit is found in the contention that the petitioners / defendants were not required to file any written statement to the plaint as originally filed owing to the same not containing any averments / pleas against the petitioners. The application of the respondent no.1 / plaintiff for impleadment of the petitioners as subsequent purchasers having been allowed, the petitioners / plaintiffs if had any defence to the suit for partition, ought to have filed the written statement notwithstanding the same not containing any pleas against the petitioners / defendants. It cannot be lost sight of, that the petitioners / defendants by purchase had stepped into the shoes of the parties from whom they claim purchase and if wanted to or required to contest the suit for partition, ought to have filed written

statement notwithstanding there being no express pleas against petitioners in the plaint. The petitioners / defendants having not done so, cannot now, after nine years, be permitted to file the written statement.

14. Not only so, even after the plaint was amended, the petitioners / defendants did not file the written statement and allowed their defence to be struck off and applied for recall thereof only after more than four years. The conduct of the petitioners / defendants is of absolute neglect and no reason even is cited therefor.

15. Though the counsel for the petitioners / defendants has pointed out that in the application, the reason of the counsel having not advised the filing of the written statement was pleaded but the same has been rightly rejected by the learned ADJ. The Advocate is the agent of the litigant and by putting blame on Advocate, the advantage which has accrued to the opposite party, cannot be deprived of. Moreover the averments of putting blame on Advocate are also vague and no opportunity even has been given to Advocate. It is not pleaded, what steps did the petitioners took in the matter. Not only so, when repeated opportunities were being given to the respondent no.1 / plaintiff to lead evidence or when issues were framed even then the petitioners were not awakened from their slumber. I may mention that even on 30th January, 2014 when it was observed that there was no need to give an opportunity to the petitioners / defendants to lead evidence since their defence had been struck off, no request was made for leading evidence.

16. In the circumstances, now, when the suit has been pending for over 11 years and is ripe for final hearing, the petitioners / defendants cannot be permitted to set the clock back.

17. The counsel for the petitioners / defendants states that the petitioners / defendants be permitted to adopt the written statement which was filed by the respondents no.2 to 17 (except respondents no.10 and 13) in response to the plaint originally filed.

18. If the petitioners / defendants are entitled to so apply, they would be entitled to make an application before the Suit Court.

19. This Court in exercise of supervisory jurisdiction cannot in the first instance entertain such a request.

20. There is no merit in the petition.

Dismissed.

No costs.

Dasti under signature of Court Master.

20. The date already given of 19th February, 2018 is cancelled.

RAJIV SAHAI ENDLAW, J

AUGUST 28, 2017

‘gsr’..