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

+ **CM(M) 695/2017**

ALPHA ENGINEERS & ORS

..... Petitioners

Through: Mr. Rajesh Banati & Mr. Vikram
Singh, Advs.

Versus

UNITECH SOUTH CITY MEDICAL

CHARITABLE TRUST

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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14.07.2017

CM No.24176/2017 (for exemption)

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

CM(M) 695/2017 & CM No.24175/2017 (for stay)

3. This petition under Article 227 of the Constitution of India impugns the order dated 19th May, 2017 of the Court of learned Additional District Judge-05, South-East District, Saket Courts, New Delhi in CS No.10056/2016 filed by the respondent / plaintiff against the petitioners / defendants no.1,2 and 3 for permanent injunction restraining the petitioners / defendants from entering into the premises of the respondent / plaintiff Trust for recovery of damages in the sum of Rs.30.05 lacs.
4. Vide the impugned order, the application of the petitioners / defendants under Section 151 CPC for recall of the order dated 20th November, 2015 has been dismissed.

5. Vide order dated 20th November, 2015 the evidence of the petitioners / defendants was closed on the statement of the counsel for the petitioners / defendants.
6. The counsel for the petitioners / defendants has been heard. He states that the suit is listed next before the learned ADJ on 9th August, 2017 and that an opportunity, even if before that date, be granted to the petitioners / defendants to lead evidence.
7. Opportunities as sought for leading evidence or for that matter for filling any gap in a proceeding are not to be granted on asking. The learned ADJ in the impugned order has given detailed reasons for holding the petitioners / defendants to be not entitled to any such opportunity.
8. The suit from which this petition arises was filed in the year 2006 and has thus now been pending for eleven years.
9. It is not in dispute that the i) respondent / plaintiff concluded its evidence on 3rd December, 2012 and the petitioners / defendants were granted six weeks time to file affidavits by way of evidence and the suit posted to 18th April, 2013 for evidence of the petitioners / defendants; ii) the petitioners / defendants did not file any affidavits within six weeks or even thereafter till 18th April, 2013 and on which date sought adjournment; iii) the suit was accordingly adjourned to 1st November, 2013; iv) by 1st November, 2013 also no affidavits had been filed and another opportunity was sought and granted by adjourning the suit to 17th February, 2014; v) the position remained the same on 17th February, 2014 also and yet another opportunity was granted to the petitioners / defendants by adjourning the suit to 25th

March, 2014; vi) on 25th March, 2014 also no affidavits by way of examination-in-chief were filed but yet another opportunity was given to the petitioners / defendants subject to payment of costs of Rs.10,000/-; vii) thereafter on 20th May, 2014, 15th July, 2014 and 8th April, 2015 some other miscellaneous proceedings were taking place in the suit; viii) the petitioners / defendants finally on 14th May, 2015 i.e. after availing four earlier opportunities filed affidavit by way of examination-in-chief of one witness but who was not present in the Court on that date and the suit adjourned to 18th August, 2015 for the evidence of the petitioners / defendants; ix) on 18th August, 2015 also no witness of the petitioners / defendants appeared and adjournment was sought and granted subject to payment of costs of Rs.10,000/- and the suit adjourned to 20th November, 2015; x) on 20th November, 2015 the following order was passed:

“CS(OS) 451/2006

UNITECH SOUTH CITY MEDICAL CHARITABLE TRUST ...Plaintiff
Through: Ms. Pooja Dhar, Adv.

Versus

M/s ALPHA ENGINEERS AND ORS. ... Defendant
Through: Ms. Anchal Mehrotra, Adv. along with defendant
in person.

CORAM:

**DR. SATINDER KUMAR GAUTAM (DHJS), JOINT REGISTRAR
(JUDICIAL)**

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ORDER
20.11.2015

Learned counsel for the defendant submits that defendant does not examine more witnesses and requests that the DE may be closed. Though, the matter is listed today for defendant's evidence.

No DW is present nor cost been deposited by the defendant despite last and final opportunity granted.

In view of the submission and circumstances, DE is hereby closed.

The matter is ripe up for final argument.

As such, the matter be placed before the Hon'ble Court on 04.03.2016.”

10. It is owing to the aforesaid that the learned ADJ did not find the petitioners / defendants to be entitled to any further opportunity.

11. The counsel for the petitioners / defendants has argued i) that on 20th November, 2015 a junior / proxy counsel of the advocate for the petitioners / defendants had appeared before the Court; ii) that even though the witness of the petitioners / defendants whose affidavit by way of examination-in-chief had been filed, was present before the Court as is evident from the appearance of the advocate for the petitioners / defendants “along with defendant in person” but his affidavit by way of examination-in-chief was not tendered; iii) that though the junior / proxy counsel was to make a statement that the defendant did not want to file any other affidavit by way of examination-in-chief but erroneously closed the evidence under the impression that the affidavit by way of examination-in-chief of one of the witnesses was already on record; iv) that after 20th November, 2015 the suit was transferred from this Court to the District Court owing to the change in minimum pecuniary jurisdiction of this Court; v) that the advocate for the petitioners / defendants who was appearing before this Court refused to appear before the District Court and the petitioners / defendants engaged another advocate, when the mistake aforesaid was discovered and the application against dismissal of which this petition was filed on 20th March, 2017.

12. The order dated 20th November, 2015 expressly records that no witness of the petitioners / defendants was present before the Court on that date. In view of the said express order, the argument of the counsel for the petitioners / defendants that the said witness was in fact present cannot be accepted. As far as the order records the appearance of the defendant along with the advocate for the defendant, such appearances are noted in the order as per the appearance / presence slips submitted by the advocates to the Court Master and merely because presence is shown of some person in the said appearance slip cannot contradict substantial part of the order recording that “no DW is present”.

13. The petitioners / defendants have to be bound by the advocate engaged by them and cannot in the veil of the advocate wriggle out of their own failures. In fact, the blame sought to be put on the advocate today is unjustified. It is not as if any communication was sent to the advocate to give an opportunity to the advocate to respond. It is possible that the advocate represented the state of affairs as existed on that date and the petitioners / defendants are now as an afterthought changing their stand. The petitioners / defendants are highly educated business persons and cannot have the benefit of case law of yesteryears that no litigant suffers for the fault of the advocate, pronounced in the context of illiterate litigant. Moreover, the mistake of a litigant’s own agent, as an advocate, cannot be allowed to cause prejudice to the opposing litigant.

14. The counsel for the petitioners / defendants has also contended that the order dated 20th November, 2015 does not correctly record that cost had not been deposited.

15. What has been recorded on that date is on the basis of what has transpired in the Court and again it was for the advocate for the defendant to on that date state that the cost had been paid.

16. The respondents / defendants having themselves closed their evidence were rightly refused an opportunity of recall of that order.

17. In fact, it is inexplicable as to why there was a delay of one and a half years in applying for recall of the order.

18. The only inference that can be drawn from the aforesaid is that the intent of the petitioners / defendants is to delay the disposal of the suit.

19. No case for interference is made out.

Dismissed.

RAJIV SAHAI ENDLAW, J

JULY 14, 2017

‘gsr’..