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

+ CM(M) 866/2017

DR. ANIL GUPTA & ORS

..... Petitioners

Through: Mr. Sumit Bansal, Mr. Pankaj Gupta
and Mr. Prateek Kohli, Advs.

Versus

PANNA LAL GUPTA & ORS

..... Respondents

Through: Ms. Payal Jain, Adv. for R-1.

Mr. Pawan Mathur, Adv. for DDA.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

11.08.2017

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Caveat No.715/2017

1. The counsel for the caveator/respondent No.1 appears.
2. The caveat stands discharged.

CMs No.28822/2017 & 28823/2017 (both for exemption)

3. Allowed, subject to just exceptions.
4. The applications are disposed of.

CM(M) 866/2017 & CM No.28821/2017 (for stay)

5. This petition under Article 227 of the Constitution of India impugns the order [dated 10th July, 2017 in CS No.07/17/05 (New No.8876/16) of the Court of Additional District Judge (ADJ), (West)-02, Tis Hazari Courts, Delhi] of dismissal of the application under Order XVI Rule 3 read with Section 151 of the Code of Civil Procedure, 1908 (CPC) of the three petitioners, being the legal representatives (LRs) of the defendant No.3, in the suit for declaration and cancellation of documents and for ancillary reliefs.
6. The application aforesaid was filed seeking permission to file list of

witnesses and to examine six witnesses.

7. The learned ADJ has dismissed the application reasoning (i) that the suit was instituted as far back as on 12th January, 2005; (ii) that issues were framed in the suit on 20th April, 2007; (iii) that evidence of the respondent No.1/plaintiff was closed on 17th September, 2009; (iv) that the evidence of the defendants commenced on 2nd June, 2010; (v) that the petitioners were impleaded as LR's of defendant No.3 on 3rd September, 2013; (vi) that though the defence of the respondent No.2/defendant No.2 and the petitioners to the suit filed by the respondent No.1/plaintiff was the same but they opted to lead separate evidence; (vii) that first the respondent No.2/defendant No.2 delayed leading evidence; (viii) that neither the defendant No.3 nor the petitioners filed any list of witnesses; (ix) that the petitioners had filed only affidavit by way of examination-in-chief of one Dr. Anil Gupta and who had been examined; (x) that on 16th January, 2017, another affidavit by way of examination-in-chief of Smt. Anarkali was filed in the Court but she was not the LR of the defendant No.3; and, (xi) that since the petitioners had neither filed any list of witnesses nor affidavit of any other witnesses for three years, the evidence of the petitioners was closed on 16th January, 2017 and the suit posted for final arguments on 17th April, 2017.

8. On enquiry, it is informed that the suit is now listed for final arguments on 17th August, 2017.

9. I have enquired from the counsel for the petitioners, whether the said Smt. Anarkali was present in the Court on 16th January, 2017.

10. The counsel for the petitioners fairly states that she was not. The counsel however contends that her affidavit had been filed on that date and a

date should have been given at least for her evidence.

11. Admittedly 16th January, 2017 was the date for the evidence of the petitioners. I have enquired from the counsel for the petitioners, as to under which procedure, first the affidavit by way of examination in chief is to be filed and adjournment taken for tendering the said affidavit in evidence by calling the deponent of the said affidavit on the next date of hearing. Ordinarily, a direction for filing and delivery of advance copies of affidavits by way of examination-in-chief before the date is issued.

12. Once the petitioners wanted to examine Smt. Anarkali, she should have appeared before the Court on 16th January, 2017 and the mere fact that her affidavit was filed is not enough for the matter to be adjourned for the appearance of the witness.

13. It may be mentioned that against the order dated 16th January, 2017 aforesaid, the petitioners preferred CM(M) No.404/2016 before this Court, in which on 22nd May, 2017 the following order was passed:

“CM(M) 404/2017

1. Learned counsel for the petitioner seeks leave to withdraw the present petition with liberty to the petitioner to approach the learned Trial Court for disposing of the application under Order XVI Rule 3 read with Section 151 CPC seeking permission to file list of witnesses and examination of defendant witnesses.

2. The petition is dismissed as withdrawn granting the liberty as prayed.”

14. The counsel for the petitioners argues that the petition was withdrawn to pursue the application against dismissal whereof this petition has been filed.

15. Judicial notice can be taken of the fact that the counsels ordinarily

withdraw the petition after failing to convince the Court and to take a chance elsewhere. Be that as it may, the order of 16th January, 2017 closing the evidence of the petitioners stands and the petitioners cannot re-agitate the same. The matter has to be viewed purely from the aspect of Order XVI Rule 3 of the CPC.

16. In fact, the nomenclature given to the application, as under Order XVI Rule 3 of the CPC is misconceived. Rule 3 of Order XVI is titled “Tender of expenses to witness” and provides for payment of travel expenses to the summoned witnesses and has no relevance to the matter. Perhaps the petitioners wanted to refer to Order XVI Rule 1(3) of the CPC which provides that the Court may, for the reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list of witnesses, if such party shows sufficient cause for the omission to mention the name of such witness in the said list.

17. The application under Order XVI Rule 1(3) supra is dated 4th August, 2016 i.e. prior to the order dated 16th January, 2017 closing the evidence of the petitioners.

18. The petitioners by the said application show intention to examine as many as six witnesses, one of whom was Smt. Anarkali aforesaid.

19. However, a perusal of the application shows that the petitioners therein did not give any cause, lest sufficient cause, for omission to file the list of witnesses or mentioning the names of the said six witnesses who were sought to be summoned therein. It was only stated in the application that the said witnesses be permitted to be examined “in the interest of justice” and that it was “due to inadvertence” that the list of witnesses was not filed.

20. The said application was filed, as per the statement in the application itself, before the evidence of the petitioners had started. However, the petitioners did not produce any of the said witnesses on the dates given for their evidence. Though evidence by way of examination-in-chief of Smt. Anarkali was sought to be presented but even she was not produced.

21. The aforesaid application became infructuous with the order of 16th January, 2017 closing the evidence of the petitioners. Against the order dated 16th January, 2017 closing the evidence of the petitioners, CM(M) No.404/2016 though preferred was withdrawn. The said order has attained finality. No application was filed for re-call of the order closing the evidence of the petitioners. The application under Order 16 Rule 1(3) of the CPC having become infructuous on 16th January, 2017 cannot entitle the petitioners to avail another opportunity to lead evidence.

22. Order XVIII Rule 17A of the CPC, as it stood prior to deletion vide amendment of the CPC of the year 2002, provided for production of evidence which could not be produced earlier inspite of due diligence. Though the said deletion does not affect the inherent power of this Court to, in appropriate cases, re-open the evidence and / or re-call any witness but Supreme Court in *K.K. Velusamy Vs. N. Palanisamy* (2011) 11 SCC 275 held that is to be exercised only to allow evidence which the litigant could not lay his hands on earlier or for any other justifiable reason. The petitioners have not stated any reason, lest justifiable reason. In the name of interest of justice, indulgence cannot be shown.

23. It cannot be lost sight of that the Chief Justice of this Court, on the Administrative Side has been issuing Circulars to the Judicial Officers to expedite hearing of cases and not to give adjournments at the mere asking.

Similarly, National Court Management Systems Committee of the Supreme Court and State Court Management Systems Committees of each of the High Courts are seized of the issue of expediting the disposal of suits and in which Committees, the adjournments and the lackadaisical attitude of the advocates in pursuing the litigation and the indulgence shown by the Courts including the Appellate Courts by allowing opportunities in the name of interest of justice has been found to be a major factor for delay. The Courts cannot on the one hand administratively attempt to expedite disposal of litigations and on the other hand, on the judicial side, continue to grant indulgence in the name of “interest of justice” and “no prejudice being caused to the other side”.

24. There is thus no merit in the petition.

25. Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

AUGUST 11, 2017

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