

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

% **Date of decision: 4th September, 2017**

+ **CM(M) 955/2017**

HEMANT VERMA

..... Petitioner

Through: Mr. Rakesh Mukhija, Adv.

Versus

NAZIBULLA KHAN & ANR

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.32043/2017 (for exemption)

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

CM(M) 955/2017 & CM No.32042/2017 (for stay)

3. This petition under Article 227 of the Constitution of India impugns the order [dated 23rd May, 2017 in CS No.771/16/15 of the Court of Additional District Judge (ADJ)-03, (Central), Tis Hazari Courts, Delhi] allowing the application of the respondents/defendants under Section 151 of the Code of Civil Procedure, 1908 (CPC) for recall of the order striking off the defence of the respondents/defendants.
4. The counsel for the petitioner/plaintiff has been heard and record perused.
5. The petitioner/plaintiff instituted the suit, from which this petition arises, for recovery of possession and for recovery of Rs.1,20,000/- towards *mesne* profits and for permanent and mandatory injunction *inter alia* pleading that the respondent/defendant No.1 was a tenant under the petitioner/plaintiff at a rent of Rs.15,000/- per month and the term for which

the premises were let out to the respondent/defendant No.1 had expired but the respondent/defendant No.1 was not vacating the premises and the respondent/defendant No.2 Ashma Khatoon, who is the wife of the respondent/defendant No.1, by claiming to be the owner of the property, was attempting to sell the same.

6. Summons of the said suit were ordered to be issued on 31st August, 2015 for 16th September, 2015. The respondents/defendants were served on 6th September, 2015 and appeared before the Court on 16th September, 2015 and sought time to file written statement and the suit was adjourned to 15th October, 2015 for filing of written statement. On 15th October, 2015, again time was sought for filing written statement and was granted subject to costs of Rs.5,000/- and the suit listed on 18th November, 2015 for written statement and payment of costs. On 18th November, 2015, the suit was adjourned to 19th November, 2015. On 19th November, 2015, though written statement was filed but costs not paid and an application for waiving the costs filed.

7. However, the counsel for the petitioner/plaintiff pointed out that the date on the affidavit accompanying the written statement and the date of attestation were different and thus the affidavit was not as per the law.

8. The application for waiver of costs was dismissed and finding, that the written statement filed was not in terms of law, the defence of the respondents/defendants was struck off and the petitioner/plaintiff asked to lead evidence on 19th December, 2015.

9. On 19th December, 2015, an application for review was filed by the respondents/defendants and vide detailed order dated 11th February, 2016,

the said application was dismissed and the suit posted on 18th March, 2016, again for petitioner/plaintiff's evidence.

10. There was a change in the Presiding Judge at that stage and before the new Judge, though none appeared for the respondents/defendants on 2nd November, 2016 and the defence of the respondents/defendants also stood struck off but court notices were ordered to be issued to the respondents/defendants.

11. The respondents/defendants appeared on 14th February, 2017 and sought adjournment and which was readily granted and the suit adjourned to 23rd May, 2017 for the evidence of the petitioner/plaintiff.

12. At that stage, the respondents/defendants filed the application, though recorded in the order as under Section 151 of CPC but under Order IX Rule 7 of CPC and which application has been allowed vide impugned order dated 23rd May, 2017. The reason given is that the written statement earlier filed on 19th November, 2015 was not taken on record owing to technical reasons and the suit should be permitted to be decided on merits. The respondents/defendants were accordingly permitted to file fresh written statement within one week and were burdened with costs of Rs.25,000/- and the suit adjourned to 30th May, 2017.

13. On 30th May, 2017, the following order was passed:

*“Present: Sh. Sunny Gupta, counsel for the plaintiff
Sh. Muntazir Mehdi, ld counsel for defendant nos.1
and 2.*

*This Court on the last date of hearing allowed the
application of defendants filed U/s 151 CPC subject to cost of
Rs.25,000/-. Today on behalf of defendant nos.1 and 2, WS has
been filed, copy of the same has been supplied to counsel for*

the plaintiff, who submits that he is accepting the copy, without prejudice to this rights to challenge the order dt. 23.5.17 by way of revision.

Cost of Rs.25000/- has also been received by counsel for the plaintiff.

Put up now this case for filing of replication, 1/d and framing of issues on 11.09.2017. Long date given as per convenience of the counsel for the plaintiff.”

14. I am of the opinion that the impugned order dated 23rd May, 2017 is in breach of well-settled principles of *res judicata* applying at successive stages of the same proceedings (see ***Y.B. Patil Vs. Y.L. Patil*** (1976) 4 SCC 66 and ***Erach Boman Khavar Vs. Tukaram Shridhar Bhat*** (2013) 15 SCC 655) and the learned ADJ did err in recalling the order striking off defence when by a reasoned order the predecessor of the learned ADJ had not only struck off the defence of the respondents/defendants but also dismissed the application for review of the said order.

15. Though undoubtedly, the Court, even after striking off defence, has the power to recall the order as held in ***Sada Ram Vs. Delhi Development Authority*** AIR 1974 Del 35, ***Municipal Committee Kharkhoda Vs. Bhim Singh*** ILR (1988) 1 Punjab & Haryana 175 & ***Kiddy Palace Vs. State Bank of India*** 1997 SCC OnLine P&H 147 but such recall has to be on grounds which disclose a mistake to have been committed by the Court while so striking off the defence and/or some relevant factor having been glanced over and which is of relevance to the action of striking off the defence.

16. This is more so, when there is a change of the Presiding Judge and it appears, the change of advocate as well. Such orders of the Court, taking a diametrically opposite view than earlier taken, howsoever *bona fide*, shake the

confidence of the consumers of justice in the Courts and send a signal that with the change in Judge and change in advocate, the orders can be got changed.

17. Supreme Court, in *Union of India Vs. Paras Laminates (P) Ltd.* (1990) 4 SCC 453 held that the rationale of this rule is the need for continuity, certainty and predictability in the administration of justice and that judicial inconsistency shakes public confidence in the administration of justice. This Court in *Registrar of Companies Vs. Dharmendra Kumar Garg* ILR (2012) VI Delhi 499 held that if this discipline is breached, the same would lead to complete chaos and confusion in the minds of the litigating public and also to discrimination.

18. That is more so, when in the impugned order, the learned ADJ has not said any mistake having been committed by his predecessor in striking off the defence of the respondents/defendants or any material fact having been glanced over. The reasons given in the impugned order of (i) defence having been struck off for the reason of failure of the respondents/defendants to file proper written statement despite opportunity; (ii) only because of the lapse of the advocate, the litigant should not suffer; (iii) the respondents/defendants, if have a plausible defence to prove, cannot be deprived of their right to prove their case; (iv) the petitioner/plaintiff can always be compensated with money, were all such which cannot be said to have not been in the realm, while the defence was struck off and the application for review of that order sought. Merely by filing repeated applications, the orders passed in the suit and which have attained finality cannot be undone. The earlier orders in the suit which had attained finality and which were incapable of review or recall following the settled principles of review and recall, howsoever wrong,

cannot be altered by the same Judge at a subsequent stage or by a different Judge and the only remedy thereagainst, of appeal or revision etc. have to be availed of.

19. Though the petition ought to have been entertained on the aforesaid ground but I find that the petitioner/plaintiff in the present case was too eager to accept the costs subject to which the opportunity was given to the respondents/defendants to file the written statement and though on 30th May, 2017 was cautious in taking copy of the written statement without prejudice to his right to challenge the order dated 23rd May, 2017 but no such rider was put to receipt of costs which was accepted unconditionally. The petitioner/plaintiff having accepted the costs unconditionally, cannot now challenge the order.

20. Though the counsel for the petitioner/plaintiff states that the receipt was not unconditional but the order dated 30th May, 2017 reproduced above clearly reads so and even after taking the copy of the order, the petitioner/plaintiff did not make any application to the Court for correction thereof.

21. Not only so, this petition has been filed after considerable delay, again showing that the petitioner/plaintiff does not appear to have any urgency to proceed with his case. I have in this context also enquired from the counsel for the petitioner/plaintiff, as to what is the defence of the respondent/defendant in the written statement filed, so as to gauge whether the respondents/defendants have any substantial defence to the suit which otherwise from the averments in the plaint appears to be between the landlord and tenant and for the relief of ejectment of tenant after determination of tenancy.

22. However the counsel for the petitioner/plaintiff states that he has neither filed the copy of the written statement nor even gone through the same to be able to tell what is the defence of the respondents/defendants.

23. In the aforesaid circumstances, it is not deemed appropriate to interfere with the impugned order, though found to be wrong and erroneous, at this stage.

24. The petition is disposed of.

A copy of this order be forwarded to the author of the impugned order.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 04, 2017

‘bs’..

(Corrected & released on 11th October, 2017)

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