

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

% **Date of decision: 14th September, 2017**

+ **CM(M) 924/2017 & CM No.23685/2016 (for stay)**

RITA SHARMA

..... Petitioner

Through: Mr. Amit Chadha, Mr. Anuj Soni,
Mr. Atin Chadha, Mr. Jugal Bagga
and Mr. Deepak Goel, Advs.

Versus

B.K. SHARMA

..... Respondent

Through: Ms. Suman Arora, Adv. with
respondent in person.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition (earlier filed as FAO No.287/2016 under Order XLIII Rule 1(u) of the Code of Civil Procedure, 1908 (CPC) and ordered on 16th August, 2017 to be converted into a CM(M) petition) under Article 227 of the Constitution of India impugns the order dated 3rd June, 2016 in RCA No.139/2016 of the Court of Additional District Judge (ADJ)-1 (North), Rohini Courts, Delhi.
2. Notice was issued and the counsel for the respondent has been appearing.
3. RCA No.139/2016, wherein the impugned order was made, was preferred by the respondent/defendant against the judgment and decree dated 11th May, 2015 in Suit No.194/2013 filed by the petitioner/plaintiff. In the said appeal, the respondent/defendant filed an application under Order XLI Rule 27 of CPC as well as an application under Order VI Rule 17 of CPC for amendment of written statement in the suit.
4. The learned ADJ has vide the impugned order allowed the

application of the respondent/defendant under Order XLI Rule 27 of CPC merely observing (a) “if defendant/appellant has now come up with certain documents which as per him were not available with him at the time of trial, then in my considered opinion it would be appropriate to give opportunity to the appellant/defendant to bring and prove said documents on record which would throw more light on the controversy”; (b) that no party would like to conceal documents which would be beneficial for his or her case and there was thus no reason why the respondent/defendant herein would not have filed the documents if had been available with him, at appropriate stage in the suit; (c) it would be appropriate to grant opportunity to the respondent/defendant to bring on record the documents which “would be” relevant in decision of the case. After observing so, the learned Additional District Judge has “without commenting on the impugned judgment” allowed the application under Order XLI Rule 27 of CPC and remanded the matter to the Suit Court. No decision was given on the application under Order VI Rule 17 of CPC reasoning that since the matter was being remanded, the respondent/defendant could apply to the Suit Court for amendment of the written statement also.

5. To say the least, the procedure followed by the learned ADJ is in total ignorance of law and merely dilatory.

6. It is the settled position in law (reference in this regard can be made to *Union of India Vs. Ibrahim Uddin* (2012) 8 SCC 148 and *A. Andisamy Chettiar Vs. Subburaj Chettiar* (2015) 17 SCC 713) that an application under Order XLI Rule 27 of CPC has to be heard at the time

of final hearing of the appeal and at a stage, when after appreciating the evidence on record, the Court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce judgment or for other substantial cause. The learned ADJ in the impugned order though has recorded that the application under Order XLI Rule 27 of CPC was filed after arguments in the appeal had been heard but has chosen not to discuss the appeal and/or appreciate the evidence already on record or to even find if any of the situations in which the powers under Order XLI Rule 27 of CPC can be exercised were made out.

7. The counsel for the petitioner / plaintiff during the hearing has referred to ***Jegannathan Vs. Raju Sigamani*** (2012) 5 SCC 540 and the counsel for the respondent/defendant has relied ***J. Balaji Singh Vs. Diwakar Cole*** 2017 SCC OnLine SC 460. The former judgment is with respect to Order XLIII Rule 1(u) of CPC which is not the case here, inasmuch as the impugned order does not remand the matter, neither in exercise of powers under Order XLI Rule 23 nor under Order XLI Rule 23A of CPC nor in exercise of powers under Order XLI Rule 25 of CPC but merely on an application under Order XLI Rule 27 of CPC and without considering the appeal and which is impermissible in law. The latter is a judgment only on the proposition that against an order merely under Order XLI Rule 27 of CPC, without deciding appeal, the entire gamut cannot be considered in second appeal. The said judgment cited by the counsel for the respondent/defendant in fact supports what has been observed by me hereinabove, inasmuch as I am not going into the appeal on merits as was argued on the previous dates but merely dealing with the order made on application under Order XLI Rule 27 of CPC which is

undoubtedly in contravention of the judgments aforesaid.

8. The only order to be passed in this petition is thus of setting aside of the order dated 3rd June, 2016 and directing the learned ADJ-01 (North), Rohini Courts, Delhi to hear the appeal being RCA No.139/2016 afresh along with applications under Order XLI Rule 27 and Order VI Rule 17 of CPC supra and thereafter consider, whether after appreciating the evidence already led in the suit, there is any need for additional evidence as sought by the respondent/defendant or for amendment of the written statement as also sought by the respondent/defendant.

9. It is ordered accordingly and the petition is disposed of.

10. The counsel for the respondent/defendant at this stage draws attention to the order dated 23rd March, 2017 in this proceeding on CM No.170/2017 releasing the amount of Rs.1,65,101/- along with interest deposited by the respondent/defendant before the ADJ in favour of the petitioner / plaintiff.

11. The counsel for the petitioner / plaintiff states that the petitioner plaintiff has since received the amount.

12. The fate of the said amount is made dependent upon the decision of the appeal and the petitioner / plaintiff shall till then continue to remain bound by the undertaking given in pursuance to the order dated 23rd March, 2017.

13. The learned ADJ is also requested to decide RCA No.139/2016 on or before 31st December, 2017.

14. The suit record and the appeal record requisitioned in this Court be sent back forthwith.

15. The parties to appear before the ADJ-01 (North), Rohini Courts, Delhi on 23rd October, 2017.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 14, 2017

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