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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) No.965/2017 & CM No.32348/2017 (for stay).
ZULFIQAR ALI & ANR Petitioners
Through: Mr. J.C. Mahindro, Adv.
versus
MOHD IDRISH & ANR Respondents
Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **05.09.2017**

CM No.32349/2017 (for exemption) and CM No.32350/2017 (exemption from filing part Trial Court record).

1. Allowed, subject to just exceptions.
2. The applications stand disposed of.

CM(M) No.965/2017 & CM No.32348/2017 (for stay).

3. This petition under Article 227 of the Constitution of India impugns the order (dated 1st August, 2017 in CS No.162/2015 of the Court of Additional Civil Judge, Shahdara, Karkardooma Courts, Delhi) of dismissal in *limine* of the application filed by the petitioners / defendants no.2&3 under Section 151 of the Code of Civil Procedure, 1908 (CPC) seeking recall of the order dated 7th July, 2017 striking off the right of the petitioners / defendants no.2&3 to defend the suit filed by the respondent no.1 / plaintiff against the petitioners / defendants no.2&3 and the respondent no.2 / defendant no.1.
4. The counsel for the petitioners / defendants no.2&3 has at the outset stated that some of the orders of the trial court remained to be filed and has in Court handed over copies of orders dated 12th April, 2017 and 5th June, 2017

and which are taken on record.

5. Having found the learned Additional Civil Judge, in the impugned order, to have mentioned that the conduct of the petitioners / defendants no.2&3 does not deserve any show of leniency because neither the petitioners / defendants no.2&3 nor their Advocate had appeared in the Court after 30th May, 2016 and had been protracting trial of the suit by only appearing through proxy advocates and having further found the petitioners / defendants no.2&3 to have, along with this paper book, not filed the entire order sheet of the suit, I have at the outset only cautioned the counsel for the petitioners / defendants no.2&3 that either he should produce the entire order sheet or it will be presumed that what has been recorded in the impugned order is correct and after hearing, no adjournment to produce any other document shall be granted.

6. The counsel for the petitioners / defendants no.2&3 opted to argue today itself.

7. The counsel for the petitioners / defendants no.2&3 has been heard.

8. The order dated 7th July, 2017 striking off right of the petitioners / defendants no.2&3 in exercise of powers under Section 35B of the Code of Civil Procedure, 1908 (CPC), to defend the suit records (i) that neither the petitioners / defendants no.2&3 nor their Advocate had appeared before the Court since 23rd July, 2016 and the proxy counsel for the petitioners / defendants no.2&3 had no instructions regarding admission / denial of documents; (ii) that the petitioners / defendants no.2&3 had also not paid the cost imposed on 'the last date of hearing'; and, (iii) that the proxy Advocate appearing for the petitioners / defendants no.2&3 stated that he will inform the

counsel for the petitioners / defendants no.2&3.

9. The petitioners / defendants no.2&3 allowed the said order dated 7th July, 2017 to attain finality and have not challenged the same in this petition also, the challenge wherein is confined to the order dated 1st August, 2017 of dismissal of the application for recall. The counsel for the petitioners / defendants no.2&3 at this stage interrupts to say that the order dated 7th July, 2017 has also been challenged. However after reading the prayer paragraph and the title of this petition he, in an attempt to justify the same, states that it is a case of bad drafting.

10. The same confirms what the learned Additional Civil Judge has observed, of the manner in which the petitioners / defendants no.2&3 and their Advocate have been conducting the suit.

11. The learned Additional Civil Judge in the impugned order dated 1st August, 2017 has also recorded that even on that date the counsel for the petitioners / defendants no.2&3 did not appear himself and had sent a proxy counsel.

12. The first argument of the counsel for the petitioners / defendants no.2&3 before this Court is that in the memorandum of this petition it has been erroneously stated that the costs, for non-payment whereof the defence was struck off, was of Rs.10,000/- when in fact it was of Rs.1,000/- only.

13. I have enquired from the counsel for the petitioners / defendants no.2&3, whether it would make any difference in the default committed by the petitioners / defendants if the cost is of Rs.1,000/- instead of Rs.10,000/-. The fact of the matter remains that the petitioners / defendants no.2&3 did not pay

the said costs. The amount thereof is irrelevant.

14. The next argument of the counsel for the petitioners / defendants no.2&3 is that the counsel for the petitioners / defendants no.2&3 was unwell.

15. From the number of the suit as available in the impugned order, the suit is of 2015. Issues were framed in the suit only on 7th July, 2017. The counsel for the petitioners / defendants no.2&3 having chosen not to contradict the findings in the orders dated 7th July, 2017 and 1st August, 2017 of the conduct of the petitioners / defendants no.2&3, the same have to be believed and if the same are believed, no case for grant of indulgence to the petitioners / defendants no.2&3 is made out.

16. Unless the Courts start enforcing discipline and refuse to grant indulgence and dates at the mere asking, as has grown to be a practice, the Advocates and the litigants would refuse to respect the dates and take the dates of hearing before the Courts casually, without any seriousness attached thereto and without any preparation for participation in the hearing for which the matter is listed and which will result in the suits continuing to languish and all the efforts being made on the Administrative side to expedite the disposal of the suits going waste. It is only when the Courts, acting judicially refuse to grant indulgence will the measures prescribed on the Administrative side will bear any fruit. If this Court continues to, in exercise of appellate / revisional powers / jurisdiction under Article 227 of the Constitution of India, interfere with such orders, the trial courts will not be encouraged to stick to the deadlines stipulated in the CPC and thus prescribed on Administrative Side and the dates of hearing.

17. There is no merit in the petition.

18. Dismissed.

19. The counsel for the petitioners / defendants no.2&3 at this stage states that the written statement of the petitioners / defendants no.2&3 is already on record and the petitioners / defendants no.2&3 be permitted to cross-examine the witnesses of the respondent no.1 / plaintiff.

20. The said argument is totally contrary to law. Once the right of the petitioners / defendants no.2&3 to defend the suit has been struck off, notwithstanding the written statement remaining on record, no benefit thereof can be availed of. Reference in this regard can be made to ***Kulbhushan Seth Vs. Seema Sethi*** ILR (2008) 11 Delhi 698.

21. It can only be clarified that the entitlement of the petitioners / defendants no.2&3 to cross-examine the witnesses of the respondent no.1 / plaintiff will be to the extent permitted by law to a defendant whose right to defend the suit has been struck off.

No costs.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 05, 2017

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