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

+ CM(M) 1002/2017 & CM No.33285/2017 (for stay)

UMESH GUPTA & ANR

..... Petitioners

Through: Mr. Avneesh Garg & Mr. M.P. Singh,
Advs.

Versus

BRIJ MOHAM GOEL & ORS.

..... Respondents

Through: Mr. S.P. Singh Chaudhari, for R-1.
Mr. S.K. Bansal, Mr. Ajay Amitabh
Suman, Mr. Pankaj Kumar & Mr.
Kapil Kumar Giri, Advs. for R-2&3.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **02.11.2017**

1. This order is in continuation of the earlier order dated 12th September, 2017.
2. All the three respondents have been served and the counsel for the respondent no.1 and the counsel for the respondents no.2&3 appear.
3. The counsel for the respondents no.2&3 states that respondents No.2&3 are not concerned with the present controversy.
4. The counsel for the petitioners / plaintiffs, with respect to the query made from him and as recorded in para no.8 of the earlier order dated 12th September, 2017, states that the respondent / defendant no.1, taking cue therefrom has filed an application before the Suit Court for rejection of the plaint and the said aspect be permitted to be decided in the first instance by the Suit Court.
5. The aforesaid suggestion of the counsel for the petitioners / plaintiffs is accepted.

6. As far as the challenge to the order impugned in this petition is concerned, a perusal of the copies of the order sheet annexed to the paper book show i) that the issues in the suit were framed on 3rd August, 2010 and the petitioners / plaintiffs were ordered to lead evidence first; ii) neither the petitioners / plaintiffs nor the respondents / defendants led any evidence and the evidence of the petitioners / plaintiffs was closed on 16th December, 2011 and the evidence of the respondents / defendants was closed on 6th July, 2012; iii) that however vide order dated 28th August, 2012 evidence was re-opened; iv) that PW1 of the petitioners / plaintiffs was examined on 13th February, 2013 and the suit adjourned to 1st August, 2013 for cross-examination of PW1; v) that on 1st August, 2013 none appeared for the respondents / defendants no.1&2 despite repeated calls and the right of the respondents / defendants no.1&2 to cross-examine PW1 was closed and the matter adjourned for cross-examination of PW1 by respondent / defendant no.3; vi) that though the right of the respondents / defendants no.1&2 to cross-examine PW1 already so stood closed but again vide order dated 1st August, 2013, the said right was closed; vii) that none was appearing for the respondents / defendants no.1&2 at that time though were not proceeded against *ex parte*; viii) that petitioners / plaintiffs closed their evidence in affirmative on 9th September, 2014 and the suit was adjourned for evidence of the respondents / defendants; and, ix) that it is not as if the respondent / defendant no.1 was not appearing at all thereafter; the counsel for the respondent / defendant no.1 was appearing intermittently.

7. On enquiry, it is informed that the respondent / defendant no.1 has filed an affidavit by way of examination-in-chief of one of the witnesses and whose cross-examination by the counsel for the petitioners / plaintiffs is yet to take place.

8. The respondent / defendant no.1 filed the application, against the order allowing which this petition has been preferred, in or about the month of July, 2016 for opportunity to cross-examine PW1 blaming the advocates then engaged by the respondent / defendant no.1 for neglect.

9. The contention of the counsel for the respondent / defendant no.1 before this Court also is the same i.e. that the advocates then engaged by the respondent / defendant no.1 being negligent.

10. However, neither is there any whisper in the application nor has anything been argued today as to what diligence the respondent / defendant no.1 himself was observing in pursuing the suit. Today also the argument is that the then advocate for the respondent / defendant no.1 kept the respondent / defendant no.1 in the dark and did not inform.

11. Recording of evidence in the suit invariably requires instructions to be given by the client to the advocate as to the deposition of the witnesses of the other side. It is thus not understandable as to on what premise the respondent / defendant no.1 chose not to pursue the suit by contacting the advocates.

12. The counsel for the respondent / defendant no.1 has however raised the argument that the litigant should not suffer for the negligence of the advocate.

13. The respondent / defendant no.1 is not an illiterate villager in whose context, it has been so held by the Courts a century ago and which logic applied today to litigations in the capital city of the country has led to litigants as well as the advocates taking it for granted that any amount of negligence on their part will be condoned, if not by the first Court, in appeals / revisions/ constitutional remedies provided under the law only for correction of genuine human/legal errors. However, the indulgence shown by the Courts in yesteryears and the origin whereof is to be found in the British era, the Judges of which era, thought that the Indian lawyers are not competent and the Indians are rustics not aware of their rights, has led to a state of affairs as prevalent today and which is affecting the administration of Justice, thereby endlessly delaying the disposal of the suit.

14. The counsel for the respondent / defendant no.1 states that the son of the respondent / defendant no.1 was implicated in a murder case and the respondent / defendant no.1 was busy in the same.

15. The aforesaid plea in the application as well as urged today is without any particulars of dates and the proceedings in the murder case. Moreover, the interaction of the respondent / defendant no.1 with advocates in the murder trial if any at the contemporaneous time should have made the respondent / defendant no.1 wiser and aware of the manner in which cases are to be followed and should have wizened instead of making the respondent / defendant no.1 negligent.

16. The learned ADJ is not found to have dealt with the application in the correct perspective and has also proceeded on the premise that opportunities to contest even if once given up are to be granted at the asking. It is for this reason only that the application has been decided vide the following order:

“Arguments heard on the application of defendant no.1 U/Sec.151 CPC for giving opportunity to him to cross-examine PW-1. The application has been filed after three years of the date on which his right to cross-examine PW-1 was closed. However, on perusal of statement of PW-1 recorded before Hon’ble Court on 15.12.2008 as well as report of Local Commissioner dated 24.05.2008, the application is allowed to decide the case on merits subject to cost of Rs.15,000/- to be paid by defendant no.1 to plaintiffs and also with direction to cross-examine PW-1 on one and the only date i.e. on 07.09.2017 at 02:00 p.m. Cost be paid on the next date of hearing.”

which is without dealing with the facts or the principles of law applicable in this regard.

17. Mere imposition of costs of Rs.15,000/- and which the counsel for the respondent / defendant no.1 today also states that the respondent / defendant no.1 is willing to pay, cannot allow a litigant to so wash away his past sins and to purchase opportunities from the Court.

18. Merit is thus found in the contention of the counsel for the petitioners / plaintiffs that discretion has been wrongly exercised by the learned ADJ in favour of the respondent / defendant no.1.

19. The discretion is indeed found to have been exercised by the learned ADJ, contrary to law and is thus found to be perverse.

20. The petition thus succeeds.
21. The order dated 24th August, 2017 impugned in this petition is set aside.
22. Resultantly, the application of the respondent / defendant no.1 for cross-examination of PW1 of the petitioners / plaintiffs is dismissed.
23. I refrain from imposing any costs on the respondent / defendant no.1.
24. It is clarified that the learned ADJ, while deciding the application stated to have been filed by the respondent / defendant no.1 under Order VII Rule 11 of the CPC, shall decide the same without being influenced in any manner with the observations contained in the earlier order dated 12th September, 2017.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 02, 2017

‘gsr’..