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

\+ CM(M) 840/2018

SAIEDAN (DECEASED) THR LRS ..... Petitioners

Through: Counsel for petitioner. (appearance not given.)

versus

STATE OF NCT OF DELHI & ORS ..... Respondents

Through

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

O R D E R

% 21.08.2018

CM APPL. 33756/2018 in CM(M)-840/2018

The matter is fixed for 12.09.2018 and is taken up on CM.APPL. No.33756/18, an application filed on behalf of the petitioner seeking an early hearing submitting to the effect that the matter is pending before the learned Trial Court for the date 23.08.2018 for final arguments and that part final arguments have already been addressed. In view of the submission of the urgency, the matter has been taken up now for hearing today.

Submissions have been made on behalf of the petitioners by the learned counsel present and the petitioners herein are the defendant nos. 1 & 2 in CS No.82275/16. Vide the present petition, the petitioners assail the impugned order dated 22.02.2018 of the

learned ASCJ-cum-JSCC-cum-GJ (South) in CS No.82275/16 whereby the defence evidence of the defendant nos. 1 & 2, i.e., the present petitioners herein was closed on account of the petitioner nos. 1 & 2 herein having not utilized the three opportunities granted to them for leading defence evidence. The proceedings dated 22.02.2018 categorically indicate that steps were not taken for the date of hearing 22.02.2018, that the matter on 22.02.2018 was fixed for payment of costs and also for defence evidence by way of last opportunity and a submission was made on 22.02.2018 that the defendant was not keeping well. It was further indicated vide proceedings dated 22.02.2018 that no cogent reason had also been assigned for not taking steps as per the previous orders and till the date 22.02.2018 the costs as imposed previously had remained unpaid and thus, there was no further opportunity granted for leading the defence evidence.

A perusal of the records of the present petition also indicates that subsequent to order dated 22.02.2018, though, there is no prayer made in the present petition seeking the setting aside of the said order made subsequent to the order dated 22.02.2018, the same being placed on record dated 21.04.2018 is taken into consideration, taking into account the factum that it is annexed as Annexure-P2 to the present petition. The proceedings dated 21.04.2018 before the learned Trial Court indicate that the petitioners herein moved an application before the learned Trial Court seeking the setting aside of the order dated 22.02.2018, i.e. the impugned order herein submitting to the

effect that the defendant no.1, i.e., petitioner no.1 herein was the only earning person in his family and was a driver by profession, therefore, he was required to go out of station for his duties assigned by the company to him and it is also submitted that two days prior to the last date of hearing, i.e., on 22.02.2018, the defendant no.1 fell sick on the way from Bangalore because of which, he could not attend the last date of hearing and also could not give any instructions to his counsel and that the defendants had been appearing regularly before the Court and had not missed any single date of hearing and that the non leading of defendant evidence was neither intentional nor deliberate but due to the reasons explained and that the defendants would suffer irreparable loss and injuries which could not be compensated in any manner if the order dated 22.02.2018 was not set aside.

The order dated 21.04.2018 which is subsequent to the impugned order indicates that there were no medical documents filed in support of the contention of the ailment of the defendant no.1, i.e., the petitioner no.1 herein that costs imposed previously remained unpaid and that the application despite being delayed, no prayer neither in writing through an application under Section 5 of the Limitation Act, 1963 seeking condonation of delay and not even an oral prayer during the course of arguments were made seeking condonation of delay and that in fact as indicated vide order dated 21.04.2018, the defendants, i.e., the petitioners herein were afforded as many as four opportunities to lead the defendant evidence which they did not avail on some pretext or the other and no cogent reason

was assigned for not leading the defence evidence.

During the course of the submissions made in the present petition and as also indicated vide the impugned order dated 22.02.2018, and the order dated 21.04.2018 subsequent to the order dated 22.02.2018 of the learned Trial Court, it is essential to observe that the contention of the petitioners that the petitioner no.1 being a driver and as a consequence of which he had to go out of Delhi for his duties was taken into account by the learned Trial Court and the defendants are indicated vide paragraph (d) of the order dated 21.04.2018 to have been allowed to be accommodated for the date 11.01.2018 on the ground that the defendant no.1, i.e, the petitioner no.1 herein was out of Delhi on account of performing his duties as a driver and the next date was given as per his ***availability*** and despite the same, the defendants failed to take steps for leading the defence evidence. *Inter alia,* the order dated 21.04.2018 indicates that the contentions of the defendants were not supported any documentary proof and that costs imposed on 11.01.2018 & 22.02.2018 have remained unpaid till date.

On behalf of the petitioners, it is urged and contended that it would put them to grave prejudice if the application filed by them seeking permission to lead the evidence is not allowed and if the impugned order dated 22.02.2018 and the order subsequent thereto dated 21.04.2018 of the learned Trial Court in CS No. 82275/16 are not set aside.

It is essential to observe that orders dated 22.02.2018 and

21.04.2018 of the learned Trial Court placed on record specifically indicate that there has been an ample opportunity granted to the defendant nos. 1 & 2, i.e., the petitioner nos. 1 & 2 herein to lead defence evidence. Significantly, it is essential to observe that the provisions of Order XVII Rule 1 and the proviso thereto have essentially to the given effect to and cannot be given a go by repeatedly. Order XVII Rule 1 read to the effect:

> **"1. Court may grant time and adjourn hearing**.—*[(1) The Court may, if sufficient cause is shown, at any stage of the suit, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing:*
>
> *Provided that no such adjournment shall be granted more than three times to a party during hearing of the suits.]*

The specific mandate prescribes categorically to the effect that there can be no adjournment granted more than three times to a party during the hearing of the suit and the hearing in the suit in the instant case having already commenced and the defendants in terms of order dated 21.04.2018 which is subsequent to the order dated 22.02.2018,i.e., the impugned order indicating that **four** opportunities for leading the defence evidence were granted to the defendants who did not even take steps for production of the evidence and did not make the payment of the requisite costs imposed on 11.01.2018 and 22.02.2018 and there being no documentary proof in support of their contentions, despite the factum that on the date 11.01.2018 on account of non availability of the defendant no.1 being out of Delhi due to

discharge of his duties and the date having been fixed thereafter as per his own availability and despite the same having not been availed of, it is apparent that there is no merit in the petition.

The date 12.09.2018 stands cancelled.

The petition and the accompanying applications are declined.

ANU MALHOTRA, J

AUGUST 21, 2018/NC