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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CM(M) 1160/2018 & CM APPL. 39336/2018**
HARSHVARDHAN MALHOTRA Petitioner
Through: Mr. AK Vashishta, Adv.

versus

STATE OF NCT OF DELHI & ORS Respondent
Through: Mr. Santosh Kumar, Adv. for R-2,3.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER
% **20.12.2018**

The respondent no.1 arrayed on record is a proforma party.

In terms of proceedings dated 18.12.2018, on behalf of the petitioner has been submitted the copy of proceedings dated 18.07.2018 in PC No.66/2015 pending before the learned ADJ-02, West.

Submissions have been made on behalf of either side. Vide the present petition, the petitioner assails the impugned order dated 23.08.2018 in PC No.66/15 of the learned ADJ-02, West whereby the right of cross examination of the petitioner herein of the respondent witness examined as RW-1 Smt. Samta Choudhary arrayed as the respondent no.3 to the petition was closed on account of failure of the learned counsel for the petitioner of the said probate petition who is also arrayed as the present petitioner to put in appearance. The said proceedings dated 23.08.2018 indicated that on the date of hearing

prior to the date 23.08.2018 vide detailed order, it had been observed that the date 23.08.2018 was the last and final opportunity and the date 23.08.2018 had been given as per diary of the counsel for the petitioner but despite that counsel for the petitioner had failed to put in appearance and thus the opportunity to cross examination was given as 'Nil'. *Inter alia* it is indicated vide the impugned order that as per the statement of the counsel for the respondent nos.2 & 3, evidence of respondent nos.2 & 3 stood closed.

It has been submitted on behalf of the petitioner by counsel for the petitioner that the petitioner's counsel could not put in appearance at the time when the matter was taken up by the learned trial Court in as much as the counsel for the petitioner was before the MM (Mahila Court), South-East in proceedings in relation to FIR No.416/2013 and that only a pass over had been sought inasmuch as the counsel was stuck in the traffic due to waterlogging due to heavy rainfall and the request was made at 11:30 am when the matter had been taken up by the learned trial Court that the counsel would reach by 12:30 pm, which was however not granted. It is thus submitted on behalf of the petitioner that an opportunity be granted to the petitioner for cross examination of the respondent witness RW-1 Smt. Samta Choudhary and that furthermore, there has been no opportunity given even for the cross examination of the respondent no.2.

On behalf of the respondent nos.2 & 3, the prayer made on behalf of the petitioner is vehemently opposed submitting *inter alia* to the effect that there have been dilatory tactics adopted repeatedly on

behalf of the petitioner and the same is reflected vide proceedings dated 18.01.2018 of the learned trial Court. It has also been submitted on behalf of the respondent nos.2 & 3 that as indicated vide the impugned order dated 23.08.2018 itself the respondent had closed the evidence of the respondent nos.2 & 3 and thus the respondent no.2 on the date 23.08.2018 was not put forth into the witness box.

A perusal of the proceedings dated 18.07.2018 of the learned trial Court indicates that on the said date, counsel for the petitioner was unwell and stated to be suffering from gum infection and unable to speak and thus an adjournment had been sought, which had been opposed on behalf of the respondent nos.2 & 3 submitting to the effect that even on the date of hearing prior to the same, the counsel for the petitioner sought an adjournment due to demise of his mother-in-law and prior to that, counsel for the petitioner sought an adjournment on the ground that he had to cross-examine the witness in a connected case before another ADJ and vide proceedings dated 18.07.2018, it was thus observed by the learned trial Court to the effect that counsel for the petitioner was avoiding cross examination on one pretext or the other and in the interest of justice, one last and final opportunity was given to the petitioner and in case of default, the Court would proceed further as per law. The proceedings dated 18.07.2018 indicate that the matter had been renotified for the date 21.08.2018 but the matter was taken up on the request of the petitioner as per diary brought by the clerk (Munshi) and thus the date was changed to 23.08.2018.

Though undoubtedly, there appear to have been several opportunities taken on behalf of the petitioner for cross examination of the respondent witness, a perusal of the proceedings dated 23.08.2018 in PC No.66/2015 and the proceedings before the learned MM (Mahila Court), South-East of the date 23.08.2018 in FIR No.416/2013 which indicate the presence of the counsel for the accused therein i.e. Counsel Mr. AK Vashishtha, the submissions that was made on behalf of the petitioner to the effect that the counsel was enroute from the South-East District Court and could not put in appearance due to waterlogging on that day is taken into account and in the interest of justice, one single opportunity is granted to the petitioner for cross examination of RW-1 Smt. Samta Choudhary on 21.12.2018 subject to payment of cost of Rs.20,000/-.

The petition is disposed of accordingly.

Copy of this order be sent to the learned trial Court.

Learned counsel for the petitioner apologizes for the use of the terminology of '*capriciously closed right of the petitioner*' in para-5 of the petition which is directed to be expunged from the record.

ANU MALHOTRA, J

DECEMBER 20, 2018

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