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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CM (M) 1094/2019 & CM APPL. 33086/2019 (stay)**
SUDHAKAR SHARMA & ANR. Petitioners
Through: Mr. Rohit Valecha, Advocate.
(M:9013591914)
versus
MADHUKAR SHARMA (SINCE DECEASED)
THR LRS & ANR. Respondents
Through: Ms. Savita Sharma, wife of Mr.
Madhukar Sharma in person.
(M:9873714974)

CORAM:

JUSTICE PRATHIBA M. SINGH

ORDER

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02.03.2020

1. Ms. Savita Sharma, wife of Mr. Madhukar Sharma, is present in person and submits that she has filed the suit in the Trial Court and her children are not objecting to the suit being continued by her on their behalf. Proxy counsel on behalf of counsel appearing for her in the Trial Court had appeared on her behalf and submitted that he does not have instructions from the main counsel. The party in person however submits that she would like the matter to be sent back to the Trial Court for being adjudicated expeditiously.
2. The present petition arises out of two impugned orders dated 23rd January, 2019 and 16th April, 2019 by which the Petitioners'/Defendant Nos. 2 and 3's (*hereinafter*, "*Defendant Nos. 2 & 3*") list of witnesses was taken off the record and their evidence was closed.
3. A suit for partition and rendition of accounts was instituted in 1996 and is pending amongst the family members of Late Mr. B. D. Sharma.

Respondent No.1's/Plaintiff's (*hereinafter, "Plaintiffs"*) evidence stands concluded. On 9th January, 2019, after the conclusion of the Plaintiff's evidence, Defendant Nos. 2 & 3 were permitted to file their list of witnesses, which was filed on the same date. The said list of witnesses consists of 9 witnesses who are mostly official witnesses, including three attesting witnesses to the Wills of the parties' parents.

4. On 23rd January, 2019, the statement of three witnesses was recorded by the Court. Thereafter, an application was moved on behalf of the Plaintiff to strike down the said list of witnesses on the ground that the same was belated. Vide the impugned order dated 23rd January, 2019 the Trial Court has held the list of witnesses to be belated and observed that the witnesses were unnecessarily summoned to prolong the case. The observations of the Trial Court are set out below:

"On perusal of record, I find that defendants did not file the list of witnesses in time as per CPC and secondly, the application, wherein the list of witnesses was to be mentioned, has also not been made by the defendants in time and not even till the last date of hearing. Thirdly, I may note that witness summoned for today, Record Keeper, Department of Delhi Archives, stated on oath that he could not bring the record of the required sale deed as no detail of the said sale deed was mentioned on the summons. Similarly, witness Surjan Singh from office of Sub-Registrar III placed on record a letter issued from the office of Sub-Registrar III wherein it has been reported that documents up to the year 2000 have been transferred by their office to the office of Delhi Archives Govt. of NCT, Delhi.

In view of the above, I find that these witnesses were unnecessarily got summoned by the defendants just to prolong the trial of this case. Moreover, the defendants did not file the application in time stating therein the purpose for which these witnesses were to be summoned and examined."

In light of the above observations, Defendant Nos. 2 & 3's evidence was closed. Defendant Nos. 2 & 3 then sought recall/review of the said order *inter alia*, on the ground that Defendant No.3 is a deaf and dumb person who was not represented by any guardian. The review was also rejected vide the impugned order dated 16th April, 2019.

5. This Court has perused the order-sheet of the Trial Court. On 9th January, 2019, once the list of witnesses was accepted, there was no occasion for the Trial Court to thereafter go into the question as to whether the list of witnesses was belated or not. In fact, out of the list of witnesses filed, three witnesses were already examined on 23rd January, 2019 and thus, the observation of the Trial Court that the witnesses were unnecessarily summoned is completely erroneous. After permitting Defendant Nos. 2 and 3 to file the list of witnesses on 9th January 2019 and recording the statement of three witnesses, the Trial Court has closed the evidence without recording the evidence of the other witnesses. The Trial Court has recorded the past chronology of the case and held that since no application was filed by Defendant Nos. 2 and 3 for taking the list of witnesses, the same is liable to be taken off the record. This approach is contrary to law in as much as the Trial Court had already taken the list of witnesses on record vide order dated 9th January, 2019. Post the said event, the Trial Court has, by relying on the provisions of Order XVI Rules 2 & 3 CPC, held that since the list of witnesses was not filed within 15 days after framing of issues, the same is not liable to be taken on record. As held in ***Zile Singh v. Santosh @ Santra & Ors., [CM(M) 1296/2018, decided on 6th November, 2019]***, the list of witnesses ought to be filed as per the provisions of CPC. However, the Court has the power to permit the list of witnesses to be filed even at a later stage.

The relevant portion of **Zile Singh (Supra)** is extracted below:

“9. Insofar as the other witness present from the DJB is concerned, he was, in fact, present on 11th July, 2018 which is clear from the order sheet of the said date and hence, his evidence also ought to have been recorded by the ld. Trial Court. Once witnesses are summoned and are present before the Court, with notice to the opposite party, the usual procedure ought to be to record their evidence rather than sending them back.

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14. Considering the manner in which evidence has been recorded in this matter, wherein a non-existent affidavit was sought to be exhibited, the following directions are issued to the trial courts:

i. Prior to listing a case for PE, the court shall ensure that the list of witnesses by all the parties is on record. The court would have the power to prune the list of witnesses so as to ensure that unnecessary burden is not put on the Registry in preparing summons and only those witnesses whose oral evidence is necessary shall be summoned;

ii. Prior to recording the examination in chief, the judicial file shall be seen to confirm that the affidavit in evidence is on record. All the documents which the witness seeks to exhibit shall be examined and either exhibited or marked. Only thereafter the cross examination would commence.

iii. If the witness is a summoned witness and no affidavit in evidence is filed, then the examination in chief shall be recorded, the documents (either in original or copy) shall be exhibited or marked and thereafter cross examination would commence. The order for the day would reflect if originals, certified copies or if copies are being exhibited/marked – whether originals were seen and returned. On the copy the remark OSR shall be given with the signature of the Presiding officer.

iv. If any documents are confronted during cross examination, the above procedure would be followed in respect of the said documents as well.”

In the present case, the Trial Court had expressly permitted the filing of the

list of witnesses. Thereafter, the Trial Court could not have passed the impugned order, especially after three witnesses were examined. In fact, this approach has caused greater delay in a suit which is almost 25 years old. Notice was issued in the present petition on 24th July, 2019 when the final arguments were directed to be adjourned before the Trial Court.

6. This Court has perused the list of witnesses, which shows that these are mostly official witnesses, apart from three witnesses to the Wills. There was no cause for the Trial Court to strike out the list of witnesses and close the Defendant's evidence, after the same had commenced. The Trial Court has proceeded in a completely haphazard manner. The impugned orders are therefore liable to be set-aside. The Trial Court would now permit Defendant Nos. 2 & 3 to summon the remaining witnesses and their statements will be recorded in accordance with law. Considering the suit is of 1996, the trial in the suit shall be concluded and the matter shall be adjudicated within a period of 6 months from today.

7. Parties to appear before the Trial Court on 11th March, 2020 on which date the Trial Court shall summon the remaining witnesses and fix dates for recording their statements.

8. The present petition is disposed of in the above terms. All pending applications are also disposed of. Let a copy of this order be sent to ADJ-11, Central District, Tis Hazari Court in Suit No. 9625/2016 titled *Madhukar Sharma (deceased) thr LRs v. Kamlesh Sharma & Ors.*

PRATHIBA M. SINGH, J.

MARCH 02, 2020

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