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

Date of decision: 27th February, 2020

+ **CM(M) 881/2018 & CM APPL. 31006/2018**

KULDEEP GUPTA & ANR

..... Petitioners

Through: Mr. Ajay Gulati, Advocate.
(M:9891694634)

versus

MAHENDER KUMAR & ORS

..... Respondents

Through: Mr. Rohit Kumar, Advocate for R-1.
(M:9873215701)

Mr. Saransh Jain, Advocate for R-2.
(M:9891116807)

Mr. Bharat Deepak and Mr. Tarun
Kapoor, Advocates for R-3.
(M:9818202041)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J(Oral)

1. The present petition has been filed challenging the impugned orders dated 16th May, 2018 and 11th October, 2017 by which, in effect, the Plaintiff's evidence has been closed by the Trial Court.
2. The petition arises out of a suit initially filed by the Plaintiffs' predecessors-in-interest for recovery of possession, and damages for use and occupation in respect of Shop No. 38-A and 38-B, Khan Market, New Delhi. The suit was filed in the year 2005. During the pendency of the suit, the present Plaintiffs, who are the Petitioners before this Court claimed to have purchased the suit property and thereafter sought impleadment as Plaintiffs in the suit. Issues were framed in the suit initially in 2007 i.e., on 17th April,

2007. However, thereafter, on 27th September, 2017, owing to defences raised by the Defendants under Section 131 of Transfer of Property Act, 1882, an additional issue was framed to the following effect:

“Whether the present plaintiffs are entitled to past damages in view of Section 131 of Transfer of Property Act? Onus on parties”

3. On the said date, i.e., 27th September, 2017, opportunity was granted to the Plaintiffs to lead their evidence. The said order is relevant, and is extracted below:

“Written statement to the amended plaint filed by both the defendants. Copy supplied.

Ld. Counsel for defendant no. 1 submits that one issue is required to be framed particularly in view of the order of Hon'ble High Court passed in FAO No. 157/2012 whereby it has been stated that any observation made by Ld. Predecessor of this Court vide order dated 17.01.2012 will not reflect upon the merits of the matter as the current plaintiff has stepped into the shoes of original plaintiffs.

This Court is of the opinion that once Hon'ble High Court has given above noted observation, no particular issue is required to be framed. Plaintiff even otherwise will be required to prove the entitlement of the original plaintiffs as well as his own entitlement to the relief claimed in the plaint.

Ld. Counsel for the defendant submits that since defendant has raised objection with respect to Section 131 of Transfer of Property Act, plaintiffs cannot seek damages of the past period without assignment in favour of the present plaintiff. Accordingly, an additional issue is framed as under:

Whether the present plaintiffs are entitled to past damages in view of Section 131 of Transfer of Property Act? Onus on parties

Reader is directed to make endorsement in ordersheet

dated 17.04.2007 in respect of framing of additional issue.

List for PE on 11.10.2017. Plaintiff is directed to supply by hand advance copy of evidence affidavit of the witness to the opposite party atleast 3 days prior to next date of hearing.”

4. Vide the said order, the Plaintiff was directed to supply an advance copy of the affidavit in evidence before the next date i.e., 11th October, 2017. On 11th October, 2017, the Plaintiffs’ evidence was closed as none appeared for the Plaintiffs. The said order reads as under:

“No one has appeared on behalf of the plaintiff despite repeated calls since morning. It is already 2:30 pm.

It is also submitted by the defendants that advance copy of plaintiff witness has not been supplied to them. In these circumstances, plaintiff evidence is hereby closed.

Put up for DE on 27.10.2017. Advance copy of evidence affidavit of the defendant witness be supplied by hand to the opposite party.”

5. Immediately thereafter, i.e., on the next day itself, the Plaintiffs moved an application seeking recall of the said order along with an application under Order XI Rules 12 & 14 CPC. The case made out in these two applications by the Plaintiffs, in effect, was that on 11th October, 2017, lawyers were abstaining from work and hence the counsel could not appear. The application had been moved after noticing that the evidence had been closed.

6. The Plaintiffs further took a stand that after opportunity was given for filing of evidence on 29th September, 2017, the Plaintiffs learnt that in fact, the main Defendant is not running any business in the premises in question

and the same appears to have been sublet to one M/s Vintage Retail. An invoice of M/s Vintage Retail was attached with the said application, and discovery of various documents/ information as to the arrangement between the various Defendants was sought by the Plaintiffs. Thus, the Plaintiffs first wished to ascertain these facts prior to filing of evidence. These were developments which were not within the knowledge of the Plaintiffs earlier.

7. By the impugned order the trial court simply observes that the issues were framed way back on 17th April, 2007 and there is no cause for granting any further opportunity to the Plaintiffs to lead evidence in the matter. The said application for discovery continues to remain pending even till date. However, the application for recall of the order dated 11th October, 2017 has been rejected by the Trial Court and the matter was adjourned for Defendants evidence.

8. Ld. counsel appearing for the Defendants submits that the arrangements between the Defendant No. 1 - the original tenant, Defendant No.2 - M/s Levi Strauss India (P) Ltd., as also Defendant Nos.3 (a) and 3(b) who together are claiming to carry on businesses from the suit premises, is not within the knowledge of the Plaintiffs, thus, upon acquiring knowledge on 29th September, 2017, an application was moved for discovery and in response to the said application till date only a retailer agreement dated 13th February, 2014 has been disclosed. Till date, no other information has been disclosed and in any event until the orders on the said application was passed by the Trial Court, the Plaintiffs' evidence could not have been closed.

9. The further case of the Plaintiffs is that the premises itself has not been sublet to these Defendants and until and unless the financial

arrangements and the amounts earned by the Defendant No.1 are not ascertained by the Plaintiff, the objections raised insofar as applicability of the Delhi Rent Control Act cannot be dealt with by the Plaintiffs, and appropriate evidence cannot be lead in respect of damages. Thus, it is submitted that the application seeking recall has been erroneously dismissed by the Trial Court.

10. On behalf of M/s Levi Strauss India (P) Ltd., which is Respondent No. 2 herein, the said Defendant is *ex parte* in the Trial Court. However, ld. counsel has entered appearance today, and submits that while there is no doubt that there is a Levi Strauss showroom running in the said premises, the exact nature of the arrangement between the Defendant No.2 i.e., Levi Strauss with Defendant Nos.3 (a) and 3(b) is not available currently. He further agrees that the exact nature of the arrangement would be disclosed before the Trial Court in response to the application under Order XI Rules 12 and 14 CPC. Ld. counsel further submits that while he has filed his *vakalatnama* he is planning to move an application seeking setting aside of the *ex parte* order dated 19th February, 2015.

11. Insofar as Defendant Nos. 3(a) and 3(b) are concerned, ld. counsel appearing for the said parties submit that they are carrying on a business in the suit premises. The stand of Defendant Nos.2 - M/S Levi Strauss India (P) Ltd & Defendant nos. 3(a) and 3(b) is that they do not have any agreement with Defendant No.1, the original tenant and that they do not have any right, or interest in the suit premises. It is further submitted on behalf of the said Defendants that the Plaintiff has been very cavalier in the prosecution of the suit. Since 2007, no evidence has been filed, and the fact that further facts may have come to the notice of the Plaintiffs would not give any

justification for delaying the filing of the evidence. It is also argued on their behalf, that the lawyer's strike would not give any justification for the client not to appear or to the party not to have served the affidavit-in-evidence in advance. Reliance is placed on two judgments of a Id. Single Judge of this Court in *Amit Govil v. Sapient Corporation Private Limited & Anr. CM (M) 100/2010 (Decided on 25th January, 2010)* and *IKM Investors Services Ltd. v. Kiranpal Kapoor Crl. M. C. No. 393/2007 (Decided on 28th March, 2007)*.

12. It is also argued on behalf of Defendant Nos. 3 (a) and 3(b) that the Plaintiffs have also not exercised due diligence in this matter and the applications have also been filed quite belatedly, thus, no cause for interference is made out in the present petition.

13. Insofar as Defendant No.1 is concerned, the stand of Defendant No.1 is that the Plaintiff has delayed the filing of the evidence. The Trial Court has rightly closed the opportunity to file the evidence.

14. The question in this case is as to whether the impugned orders closing the evidence of the Plaintiff are sustainable. Both the impugned orders i.e., order dated 11th October, 2017 and 16th May, 2018 overlook the fact that an additional issue was framed on 27th September, 2017. Thus, after framing of the additional issue, opportunity was rightly granted to the Plaintiff to file evidence on 27th September, 2017. The date for which evidence was to be filed was 11th October, 2017 on which date, it is not disputed by counsels that lawyers were abstaining from work. While there is no doubt that the Plaintiffs did not personally appear on the date when lawyers were abstaining from work, which the Plaintiffs ought to have, the Plaintiffs did exercise due diligence by immediately thereafter

moving an application seeking recall and also filing an application under Order XI Rule 12 CPC, on the next day itself. The Trial Court has, while deciding the application for recall and dismissing the same, kept the application under Order XI Rule 12 and 14 CPC pending. The filing of the evidence owing to the subsequent facts which have come to the notice of the Plaintiffs i.e., the alleged possession of the shop with M/s Vintage Retail which has issued an invoice from the said shop, and no clarity having been given by the Defendants in respect thereof, the Plaintiffs could not have led evidence in the matter. Accordingly, the closure of the Plaintiff's evidence without deciding the application under Order XI Rule 12 and 14 CPC is clearly erroneous. Moreover, the closing of the evidence has a completely disproportionate consequence of the Plaintiffs evidence not being led with the right of the Plaintiffs to their property being severely jeopardised. Abstinance of lawyers from courts, cannot be permitted to have such unintended and severe consequences. While lawyers' strikes are illegal, Courts have a duty to safeguard the interest of litigants. Even if the evidence was presented or filed on the said date, there would have been no progress as no statement could have been recorded nor could cross examination be conducted. Thus, even the personal appearance of the Plaintiffs would have only been in vain.

15. Accordingly the impugned order is set aside. The application for discovery under Order XI Rule 12 shall now be decided by the Trial Court on merits. If the Defendants do not abide by the orders passed in the said application, if discovery is directed, adverse inference would be liable to be drawn. Any pending applications would all be decided and only thereafter the Plaintiffs' evidence shall commence in the matter in order to ensure that

there is no further delay in the disposal of the suit. Upon all the pending applications being decided, time shall be given to the Plaintiffs to file the evidence in accordance with law. Any party found to be filing applications merely to delay the trial would be liable to be burdened with heavy costs by the trial court. This would be the last and final opportunity for the Plaintiffs to lead evidence in the matter subject to payment of Rs.50,000/- as costs to the Defendants to be equally shared between the Defendant No.1 i.e., Rs.25,000/- and Defendant Nos.3(a) and (b) i.e., Rs.25,000/-.

16. The costs shall be paid on or before the next date before the Trial Court.

17. With these observations, the petition and all pending applications are disposed of.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 27, 2020
Dj/RG