

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

% **Reserved on : 29th November, 2021**
Decided on : 15th December, 2021

+ **CM(M) 951/2021 & CM No.42520/2021 (for early hearing), CM No.38639/2021 (for stay)**

MANOHAR LAL Petitioner
Through: **Mr. Praveen Suri, Advocate.**

versus

TARA CHAND Respondent
Through: **Mr. Anil Kumar Bhasin, Advocate.**

+ **CM(M) 1066/2021 & CM No.42055/2021 (for Stay)**

MANOHAR LAL AND ORS Petitioners
Through: **Mr. Praveen Suri, Advocate.**

versus

TARA CHAND (SINCE DECEASED)
THR HIS LRS AND ORS Respondents
Through: **Mr. Anil Kumar Bhasin, Advocate.**

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

1. Both these petitions have been filed under Article 227 of the Constitution of India impugning orders of the Trial Court, whereby the

applications of the petitioners/defendants [hereinafter ‘defendants’] for placing on record documents, have been dismissed.

2. In CM(M) 951/2021, the defendant has impugned orders passed by the Civil Judge-03, Central, Tis Hazari Courts, Delhi, being (i) the order dated 10th October, 2019, whereby the application of the defendants under Order VIII Rule 1A and Rule 3 read with Section 151 of the Code of Civil Procedure, 1908 (CPC) has been dismissed; and, (ii) the order dated 26th February, 2020, whereby the review of the aforesaid application preferred by the defendants has been dismissed.

3. In CM(M) 1066/2021, the defendants have impugned the order dated 09th November, 2021 passed by the Civil Judge-03, Central, Tis Hazari Courts, whereby the application filed on behalf of the defendants under Order XIII Rules 1 and 2 of the CPC has been dismissed.

4. CM(M) 951/2021 came up for hearing on 28th October, 2021, when the counsel for the defendants apprised this Court of the application filed on behalf of the defendants under Order XIII Rules 1 and 2 of the CPC, which was listed for orders before the Trial Court. Accordingly, the matter was adjourned to 29th November, 2021 and CM(M) 1066/2021 challenging the order dated 09th November, 2021 was tagged with the aforesaid petition. Arguments were heard in both the petitions on 29th November, 2021 and judgment was reserved.

5. Both the captioned petitions are between the same parties and in relation to the same suit and therefore, are being disposed of by a common judgment.

6. Before dealing with the submissions of the parties, it is deemed appropriate to detail the facts preceding the filing of the present petitions.

6.1 The suit from which the present petitions arise was filed on 19th April, 1995 by the respondents/plaintiffs [hereinafter 'plaintiffs'] against the defendants for mandatory and permanent injunction.

6.2 Written statement was filed by the defendants 4th May, 1995 and replication was filed on 16th August, 1995.

6.3 Thereafter, issues were framed in the suit on 1st April, 2004 and evidence by way of affidavit of evidence of PW1 and PW2 was filed on 14th May, 2004, which was finally closed on 05th September, 2018.

6.4 On 23rd February, 2019, the Trial Court allowed the application of the defendants for filing list of witnesses, subject to costs of Rs.8,000/- as it was filed at a belated stage.

6.5 The matter was put up for defendants' evidence and on 03rd June, 2019, the Trial Court was informed by the counsel for the defendants that the documents sought to be relied on by the defendants were not on record. Therefore, the counsel for the defendants sought time to inspect the court file.

6.6 Counsel for the defendants moved an application under Order VIII Rule 1A and Rule 3 read with Section 151 of the CPC in August, 2019 for placing on record two sale deeds dated 16th February, 1987.

6.7 Reply to the application was filed on 16th August, 2019 by the plaintiffs in opposition to the said application.

6.8 Arguments were heard on the application under Order VIII Rule 1A of the CPC by the Trial Court and vide the impugned order dated 10th October, 2019, the said application was dismissed.

6.9 Against the impugned order dated 10th October, 2019, the defendants preferred a review under Order XLVII read with Section 114 of the CPC, which was also dismissed by the Trial Court by the impugned order dated 26th February, 2020.

6.10 Subsequently, the defendants engaged a new counsel and two applications were moved on behalf of the defendants on 21st October, 2021, under (i) Order XIII Rules 1 and 2 of the CPC for placing on record certain documents; and, (ii) Section 151 of the CPC for allowing defendants to lead evidence.

6.11 Both the aforesaid applications were dismissed by the Trial Court vide the impugned order dated 09th November, 2021.

7. The application filed on behalf of the defendants under Order VIII Rule 1A of the CPC was dismissed by the impugned order dated 10th October, 2019 by observing that (i) on one hand, the defendants contend that the aforesaid documents were placed on record at the time of filing of the written statement and the same might have been misplaced from the judicial file and on the other hand, the defendants have contended that the said documents might have not been placed on record inadvertently by the earlier counsel; (ii) there is no mention of any sale deed executed in favour of the defendant no.3, Ishwar Dass in the written statement of the defendants; and,

(iii) it is hard to believe that the defendants did not inspect the file after filing their written statement way back in 1995.

8. Thereafter, vide the impugned order dated 26th February, 2020, the review filed by the defendants against the order dated 10th October, 2019 was also dismissed with costs of Rs.2,000/- by observing that (i) the facts which are required to be proved by documentary evidence cannot be allowed to be proved by oral evidence; (ii) therefore, by way of affidavit of evidence of the defendant no.3, no new documents can be filed which were not already on record; (iii) there is no mistake or error apparent in the order dated 10th October, 2019; and, (iv) the application was filed only to cause delay in the suit.

9. The application filed on behalf of the defendants under Order XIII Rules 1 and 2 of the CPC was dismissed the Trial Court vide the impugned order dated 09th November, 2021 by observing that (i) in the garb of the present application, the defendants are seeking review of the order dated 26th October, 2020, which dismissed the review application filed on behalf of the defendants seeking review of the order dated 10th October, 2019; and, (ii) since no application can be filed to review an order passed in an application for review, the said application was not maintainable.

10. Aggrieved by the refusal of the Trial Court to take on record documents filed by the defendants, the present petitions have been preferred under Article 227 of the Constitution of India.

11. Counsel for the defendants has made the following submissions:

- (i) Both the plaintiffs and the defendants were tenants in respect of the same property. Both the plaintiffs and the defendants purchased their respective tenanted portion of the property vide separate sale deeds dated 16th February, 1987. The factum of the sale deed in favour of the defendants has been specifically pleaded in paragraph 4 of the written statement, which is a registered document. Therefore, the finding in the impugned order dated 10th October, 2019, that there was no reference to the sale deed in the written statement of the defendants, is erroneous.
- (ii) Since the aforesaid document is relevant for the adjudication of the suit between the parties, liberal view should have been taken by the Trial Court in allowing the additional documents. Reliance in this regard has been placed on the judgment of this Court in ***Tyagi and Co. Vs. Yash Pal and Sat Pal***, 1985 SCC OnLine Del 119 and the order of this Court in ***Delhi State Industrial Development Corporation Vs. Exports Unlimited***, 1995 SCC OnLine Del 892.
- (iii) The text of Order XIII Rule 2, as it read prior to the Code of Civil Procedure (Amendment) Act, 1999 (1999 Amendment Act) was more liberal in allowing documents to be filed at a belated stage. Order XIII Rule 2 was removed by the amendments made to the CPC by the 1999 Amendment Act, but since the present suit was filed in 1995, the provisions of Order XIII Rule 2 of the CPC, as it read prior to the 1999 Amendment Act, would be applicable in the present case.

- (iv) Therefore, after the dismissal of the application of the defendants under Order VIII Rule 1A of the CPC, a fresh application was filed by the defendants under Order XIII Rules 1 and 2 of the CPC.
- (v) Order VIII Rule 1A of the CPC came into being for the first time vide the amendment carried out to the CPC by the Code of Civil Procedure (Amendment) Act, 2002 (2002 Amendment Act) and is more stringent than Order XIII. However, the same would not be applicable to the facts of the present case. Reliance has also been placed on the judgment of the Supreme Court in **Sumesh Singh Vs. Phoolan Devi**, 2009 12 SCC 689 to contend that if the suit was filed before 2002, the amended provisions would not apply.

12. *Per contra*, counsel appearing on behalf of the plaintiffs has made the following submissions:

- (i) The written statement was filed on 4th May, 1995. The defendants should have inspected the court file to find out if the documents filed by them were missing from the judicial file. This is more so in view of the categorical stand taken by the plaintiffs in their replication that no such documents were filed with the written statement of the defendants.
- (ii) There is no mention in the written statement of any sale deed executed by Amar Nath specifically in favour of the defendant no.3, Ishwar Dass.

- (iii) Since it was not pleaded by the defendants in the written statement that the said documents were not in their possession though relied upon by them, the same could not be placed on record at this stage.
- (iv) Defendants had knowledge about the said documents from the very beginning and no explanation has been given for not filing the same for several years. Documents cannot be taken on record at such a belated stage by blaming the previous counsel.
- (v) The stand taken by the defendants in the application under Order VIII Rule 1A is inconsistent – on one hand it is stated that the documents were not filed by the earlier counsel and on the other hand, it is stated that the said documents were misplaced from the judicial file. The Trial Court has also taken note of the inconsistent stand of the defendants in the impugned order dated 10th October, 2019.
- (vi) The scope of proceedings under Article 227 is that of supervisory nature and interference can only be made if there is a manifest error which is apparent in the order passed by the courts below. There is no such manifest error in the present case.

13. I have heard the counsels for the parties.

14. There is merit in the submissions made on behalf of the plaintiffs that by belatedly filing applications under Order VIII Rule 1A and Order XIII Rules 1 and 2 of the CPC, the defendants are seeking to add new facts and introduce new documents that were never filed by them earlier. The suit from which the present petitions arise was filed on 19th April, 1995. On 4th May, 1995, written statement was filed by the defendants and the plaintiffs

filed their replication on 16th August, 1995, which specifically objected to non-filing of the documents sought to be relied on by the defendants. It was only after a delay of more than two decades that the defendants, in August, 2019, moved an application under Order VIII Rules 1A and 3 read with Section 151 of the CPC, seeking to place on record the documents in question. The application of the defendants under Order XIII Rules 1 and 2 was also filed only on 21st October, 2021.

15. The impugned order dated 10th October, 2019 observed that the defendants had taken an ambivalent stand before the Trial Court, that the documents sought to be placed on record were misplaced from the court file, as also that the said documents were never filed by the previous counsel. A mere inspection of the court file would have revealed whether or not the said documents were ever filed on behalf of the defendants. The plaintiffs in their replication filed on 16th August, 1995 specifically denied the fact that the aforesaid documents were ever filed on behalf of the defendants. Still the defendants did not take any steps for placing the aforesaid documents on record.

16. The application under Order VIII Rule 1A of the CPC was filed by the defendants only after plaintiffs' evidence was closed and the defendants had to lead their evidence. In terms of Order VIII Rule 1A and Rule 3 of the CPC, proper reasons have to be given by the defendant for not filing the documents along with his written statement. Order VIII Rule 1A was introduced in the CPC by the 1999 Amendment Act and came into effect on 01st July, 2002. Sub-rule 3 to Order VIII Rule 1A was further substituted by the Code of Civil Procedure (Amendment) Act, 2002 (2002 Amendment

Act) and also came into effect on 01st July, 2002. Relevant portions of Order VIII of the CPC are set out below:

“1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him. – (1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and copy thereof, to be filed with the written statement.

(2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) ...”

17. In terms of the aforesaid provisions, the documents can only be allowed to be filed by the defendant at a belated stage if it can be shown that despite due diligence, the said documents were not within the knowledge of the defendant or could not have been produced earlier.

18. In the present case, the Trial Court was correct in its conclusion that the defendants failed to exercise due diligence. The aforesaid documents were always in the knowledge of the defendants and in their possession. Yet, the defendants failed to place the same on record in a timely manner. At the very least, when a specific objection was taken by the plaintiffs in their replication with regard to non-filing of the said documents along with a

written statement, the defendants should have inspected the court file and immediately taken steps for filing the aforesaid documents. The defendants cannot claim that the said documents, which are sale deeds in their favour, were not in their knowledge and/or possession as the factum of such sale deeds, as per the counsel for the defendants, was pleaded in the written statement filed in 1995. Counsel for the plaintiffs has correctly pointed out that even in the written statement, there is a reference to a sale deed executed in favour of the defendant no.2, Tulsi Dass. However, there is no mention of any sale deed executed in favour of the defendant no.3, Ishwar Dass. The defendants have been grossly negligent in pursuing the aforesaid case. The application under Order VIII Rule 1A was filed twenty four years after the written statement was filed. Even the present petition, being CM(M) 951/2021, has been filed very belatedly, two years after the impugned orders dated 10th October, 2019 and 26th February, 2020 were passed.

19. After dismissal of the application under Order VIII Rule 1A and subsequently, the review application on 26th February, 2020, the defendants filed an application under Order XIII Rules 1 and 2 read with Section 151 of the CPC only on 21st October, 2021 after a delay of more than one and a half years. The said application was filed when the final hearing in the suit had been concluded and the case was at the stage of judgment.

20. The aforesaid application was premised on the ground that since the suit was filed in 1995, the relevant provisions applicable would be Order XIII Rules 1 and 2 of the CPC and not Order VIII Rule 1A of the CPC, which was introduced only with effect from 01st July, 2002. The provisions

of Order XIII Rules 1 and 2 of the CPC, as they existed prior to the 1999 Amendment Act, are set out below:

“Documentary evidence to be produced at or before settlement of issues.

1. (1) The parties or their pleaders shall produce at or before the settlement of issues, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced: Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.”

Effect of non-production of documents.

2. (1) No documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

(2) ...”

21. Order XIII Rule 2 was deleted from the CPC with effect from 01st July, 2002 in view of Order VIII Rule 1A being introduced in the CPC. Even in terms of Order XIII Rule 2 that existed before 01st July, 2002, no document could be received after the settlement of issues unless good cause was shown to the satisfaction of the court, for non-production thereof. Further, the court receiving such documents at a later stage was to record reasons for belatedly allowing documents to be taken on record. Therefore, even in terms of Order XIII Rules 1 and 2 of the CPC, as it existed prior to

the 1999 Amendment Act, the defendants have failed to show any good cause for filing the aforesaid documents at a belated stage. The attempt of the defendants has, throughout, been to cause delay in the adjudication of the suit by filing repeated applications.

22. This Court, in *Tyagi and Co.* (supra) has observed that Order XIII Rule 2 of the CPC clearly vests the court with discretion to allow production of documents, which discretion is dependent on the particular facts and circumstances of each case. The judgment in *Tyagi and Co.* (supra) does not come to the aid of the defendants as the plaintiff therein had filed the application under Order XIII Rule 2 of the CPC stating that he had misplaced the documents originally sought to be placed on record and subsequently, had also successfully demonstrated good cause for filing the said documents at a belated stage.

23. Similarly, the case of *Delhi State Industrial Development Corporation* (supra) is premised on a different factual matrix since the xerox copies of some of the documents sought to be placed on record were already annexed to the plaint by the petitioner with copies supplied to the respondents therein. Further, the cause for filing the documents belatedly was found to be directly attributable to negligence of the officers/officials of the petitioner therein. In view thereof, the Court held that the said documents would not play surprise on the parties but allow the case to reach a just conclusion.

24. However, in the instant case, it is clear that the defendants had knowledge about the aforesaid documents and the said documents were in their possession from the very beginning. Therefore, there is no justification

for filing the same several years from the date of filing of the written statement or even from the date of settlement of issues. The defendants have only made vague and unsubstantiated averments with regard to the documents either being misplaced from the judicial file, or not being filed by the previous counsel, which have rightly been rejected by the Trial Court.

25. It is a settled position of law that while exercising jurisdiction under Article 227 of the Constitution of India, the Court is not sitting as an appellate court over the orders passed by the subordinate courts. It is only in the cases of patent illegality or manifest error causing prejudice to a party that the High Courts can interfere under Article 227 of the Constitution of India. Reference in this regard may be made to *Surya Dev Rai Vs. Ram Chander Rai*, (2003) 6 SCC 675.

26. In light of the above, no grounds are made out for interference with the impugned orders in exercise of jurisdiction under Article 227 of the Constitution of India.

27. The present petitions along with the pending applications are dismissed with costs of Rs.20,000/-.

AMIT BANSAL, J.

DECEMBER 15, 2021

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