

\$~64(Appellate Side)

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

+ CM(M) 331/2022 & CM APPL. 17532/2022

MANSI JAIN

..... Petitioner

Through: Ms. Kusum & Ms. Shruti Jain,
Adv.

versus

ABHINAV JAIN & ANR.

..... Respondents

Through: None

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGEMENT (O R A L)

% **08.04.2022**

1. This petition, under Article 227 of the Constitution of India, assails the following order dated 03rd March, 2022, passed by the learned Additional District Judge (“the learned ADJ”), in CSDJ No. 6668/2018:

CSDJ No. 6668/18

Mansi Jain vs. Abhinav Jain

03.03.2022

Present: Ms. Manju Jain, Ld. Counsel for the plaintiff.

Defendant in person.

An application u/o IX Rule 7 R/w Section 114 and 151 CPC has been moved by defendant for setting aside the ex-parte order dated 30.11.2021 and review of the order passed by the court on aforesaid date.

Defendant no.1 Sh. Abhinav Jain, also happens to be an Advocate, states that due to pandemic conditions he could not pay the cost, though, the WS was filed on record. Ld. Counsel for the plaintiff states that the defendant is taking all steps for delaying the matter.

The court has considered the rival arguments. The present suit is suit for Possession/ Damages and Mesne Profit which was filed on 21.12.2018. Opportunity has been granted repeatedly to the

defendant and cost was imposed. Though, as such no ground for recall order is made out however keeping in view the pandemic condition, the WS being filed on record and fact that defendant should be given an opportunity to defend his case, the court take lenient view that delay caused cannot be compensated in terms of money, the application is accordingly sympathetically considered and allowed subject to further cost of Rs. 10,000/- (Total cost Rs. 25,000/-).

At this stage, part cost of Rs. 15000/- paid. Let remaining cost of Rs. 10,000/- be paid within one week from today. Receipt thereof be filed on record. If receipt is filed on record, WS filed on 30.07.2019 be taken on record. Replication thereof if any, be filed within 30 days from today. Copy be supplied to the other side.

Put up for admission and denial of documents and framing of issues on 04.05.2022.”

2. The sole contention of learned Counsel for the petitioner is that the learned ADJ erred in allowing the written statement of the respondent to be taken on record subject to payment of costs, and on that ground, allowing the application of the defendant, filed under Order IX, Rule 7, read with Sections 114 and 151 of the Code of Civil Procedure, 1908 (CPC).

3. The only issue before the Court is, therefore, whether, in exercise of the jurisdiction vested in this Court by Article 227 of the Constitution of India, subject to well understood constraints, a case for interference with the exercise of jurisdiction, by the learned ADJ, in the impugned order dated 03rd March, 2022, can be said to exist.

4. On 17th July, 2019, the following order was passed by the learned ADJ:

“CS No. 6668/18
Mansi Jain Vs. Abhinav Jain

17.07.2019

Present : Ms. Anju Jain, Ld. Counsel for the plaintiff.
Defendant No. 1 in person and also representing defendant No. 2

An application under Order VIII Rule 10 CPC r/w Section 151 CPC is filed on behalf of the plaintiff, same is taken on record.
Copy supplied.

Also, two applications are filed on behalf of the defendant under Order VIII Rule 1 r/w Section 151 CPC and Order VII Rule 11 r/w Section 151 CPC, same are also taken on record. Copies thereof are also supplied to the plaintiff.

By virtue of the application under Order VIII Rule 10 CPC plaintiff is praying that the defence of the defendant be struck off.

Contrary to it, defendant vide their application under Order VIII Rule 1 CPC has prayed that copies of documents filed along with the plaint has not been supplied to them and a prayer is made that it be supplied and an opportunity be given to the defendant to file WS/reply.

Submissions made on behalf of the defendant are strongly opposed by the Ld. Counsel for the plaintiff.

Heard. Record perused from which it is reflected that defendant had entered their appearance on previous date of hearing i.e. on 18.03.2019, as per record, however, they have been served on 08.02.2019. Nothing has been stated on their behalf regarding deficiency of documents on the previous date of hearing and the submission regarding deficiency of documents is made for the first time today only.

More than 120 days have been elapsed since the service of defendants and no plausible reason for delay in filing the WS is given besides the plea of deficiency of documents being raised by the defendant. It is also not explained as to why no such application was filed at the earlier stage.

Keeping in mind the strong opposition of Ld. Counsel for the plaintiff adjournment is granted for today only, however, subject to cost of Rs.15,000/-. Let copy of complete set of documents along with

the plaint be supplied to the defendant within 2 days from today, pursuant to which Ld. Counsel for defendant is directed to file WS, within two weeks on record of the court with advance copy of the same to the opposite side, against due acknowledgment.

Ld. Counsel for the plaintiff submits that she will file the copy of the set of documents and plaint within 2 days from today, on the judicial record and defendant may collect the same from the court itself.

Be put up for payment of cost and completion of pleadings on 24.09.2019.”

5. For the purposes of the present petition, one may commence the recital of facts from 17th July, 2019.

6. On the said date, the defendants – being the respondents in the present petition, who were represented by Defendant 1/ Respondent 1, prayed for permission to take their written statement on record. The petitioner objected to the request, pointing out that more than 120 days had elapsed since service of notice on the defendants and that there was no plausible explanation for the defendant failing to file written statement within time. “Keeping in mind the strong opposition of learned Counsel for the plaintiff”, the learned ADJ permitted the written statement to be filed within two weeks, subject to costs of ₹ 15,000/-.

7. This order, indisputably, was not challenged by the petitioners.

8. It is also a matter of record that the written statement was, in fact, filed by the respondents within the time granted by the learned ADJ, on 30th July, 2019.

9. Apparently because there was default in payment of costs, the written statement was not taken on record. By order dated 30th November, 2021 – work during the intervening period having been disrupted owing to the COVID-2019 pandemic – the learned ADJ, noting the fact that costs as imposed by the order dated 17th July, 2019, were yet to be paid by the respondents, held that, “looking the conduct of defendant, due to non-payment of cost, WS filed by defendant cannot be taken on record”.

10. Clearly, therefore, the only ground for refusing to take the written statement of the respondents on record, was failure, on the part of the respondents, to pay the costs imposed by the order dated 17th July, 2019, the admitted position being that, but for this default, the written statement was, in fact, filed by the respondents on 30th July, 2019, within the time granted by the order dated 17th July, 2019.

11. The learned ADJ, having struck off the right of the defendants to file the written statement, proceeded against the defendant *ex parte* by the order dated 30th November, 2021.

12. The respondents filed an application under Order IX Rule 7, read with Section 114 of the CPC, 1908, for setting aside the aforementioned *ex parte* order dated 30th November, 2021, and seeking a review thereof.

13. The impugned order disposes of this application thus:

“The court has considered the rival arguments. The present suit is

suit for Possession/ Damages and Mesne Profit which was filed on 21.12.2018. Opportunity has been granted repeatedly to the defendant and cost was imposed. Though, as such no ground for recall order is made out however keeping in view the pandemic condition, the WS being filed on record and fact that defendant should be given an opportunity to defend his case, the court take lenient view that delay caused cannot be compensated in terms of money, the application is accordingly sympathetically considered and allowed subject to further cost of Rs. 10,000/- (Total cost Rs. 25,000/-).

At this stage, part cost of Rs. 15000/- paid. Let remaining cost of Rs. 10,000/- be paid within one week from today. Receipt thereof be filed on record. If receipt is filed on record, WS filed on 30.07.2019 be taken on record. Replication thereof if any, be filed within 30 days from today. Copy be supplied to the other side.”

14. Ms. Shruti Jain, learned Counsel for the petitioner, emphatically contends that the learned ADJ ought not to have permitted the written statement to be taken on record subject to enhancement of costs, in view of the conduct of the respondents and the negligent attitude exhibited by them. The fact that the written statement was filed beyond the maximum period of 120 days, envisaged by Order VIII, Rule 1 of the CPC, 1908, has also been underscored by her.

15. The record of proceedings, as noted hereinabove, indicate that, owing to the opposition of the petitioners to the taking on record of the written statement, having been filed beyond 120 days from service of summons, the learned ADJ, on 17th July, 2019, granted the respondents two more weeks to file the written statement, subject to costs of ₹ 15,000/- . This order was never assailed by the petitioners and has attained finality. It is not open today, therefore, for the petitioners to take up the issue of the written statement having been filed beyond 120 days as fixed by Order VIII Rule 1 of the CPC, 1908,

as the written statement was in fact filed by the respondents within the period of two weeks granted by the order dated 17th July, 2019.

16. The only default on the part of the defendants was, therefore, in paying costs as directed by the said order.

17. The order dated 30th November, 2021 also discloses that the right of the defendants to have their written statement taken on record was closed only due to the default on the part of the defendant in paying costs and for no other reason.

18. The defendants moved for a re-consideration of this order. Keeping in view the fact that the defendants had, in fact, filed the written statement within the period of two weeks granted by the order dated 17th July, 2019, and the only default on the part of the defendants was in paying costs as directed, I do not find that the decision of the learned ADJ, in the impugned order, to allow the written statement to be taken on record and to allow the defendant to continue to prosecute the proceedings, subject to enhancement of costs by a further amount of ₹ 10,000/-, calls for any interference, least of all in exercise of the jurisdiction vested in this Court by Article 227 of the Constitution of India.

19. The impugned order dated 30th March, 2022, is unquestionably, discretionary in nature. The learned ADJ has kept in mind the conduct of the defendant and has taken a sympathetic view, by enhancing the costs that the defendant was required to pay.

20. In exercise of the jurisdiction vested in this Court by Article 227 of the Constitution of India, it would be completely impermissible for me to substitute my subjective view regarding the conditions to which the defendant ought to have been subjected in order to take its written statement on record, and to substitute the view adopted by the learned ADJ. There was no absolute prohibition in law on the learned ADJ permitting the written statement to be taken on record, especially as it was filed within the time granted in the order dated 17th July, 2019. No jurisdictional error can, therefore, be set to vitiate the impugned order dated 30th March, 2022.

21. The scope of Article 227 of the Constitution of India jurisdiction is extremely constricted. The Supreme Court has, time and again, been emphasizing the fact that High Courts should not treat the jurisdiction vested in them by Article 227 to be appellate or revisionary in nature. The jurisdiction vested by Article 227 is merely supervisory. So long as the courts below are acting within the parameters of their jurisdiction, and no patent illegality or perversity can be said to vitiate such action, no case for interference under Article 227 can be said to be made out. One may refer, for this purpose, to the judgments of the Supreme Court in *Estralla Rubber v. Dass Estate (P) Ltd.*¹, *Puri Investments v. Young Friends & Co.*², *Garment Craft v. Prakash Chand Goel*³.

¹ (2001) 8 SCC 97

² 2022 SCC OnLine SC 283

³ 2022 SCC OnLine SC 29

22. Ms. Shruti Jain also sought to contend that, by the impugned order dated 30th March, 2022, the learned ADJ could not have revived or recalled the order dated 17th July, 2019, especially as the said order had attained finality. The submission, to my mind, is completely misconceived. The learned ADJ has not, in the impugned order dated 30th March, 2022, recalled or revived the order dated 17th July, 2019. That order required the respondents to file the written statement within two weeks, subject to payment of cost ₹ 15,000/- . For non-payment of costs, the right to file written statement was struck off by the subsequent order dated 30th November, 2021. It is *that* order that has been recalled by the learned ADJ by the impugned order dated 30th March, 2022, and not the order dated 17th July, 2019.

23. I do not find, therefore, that any case for interference with the impugned order can be said to exist within the parameters of the jurisdiction vested in this Court by Article 227 of the Constitution of India. The petition is accordingly dismissed.

C. HARI SHANKAR, J

APRIL 8, 2022

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