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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 923/2022, CM APPL. 39418/2022 and CM APPL. 39419/2022

PRIYA KHOSLA & ANR. Petitioners
Through: Mr. Siddhant Sharma, Adv.

versus

RAKESH KHOSLA Respondent
Through: Mr. Ankur Mahindra, Mr. Shresth Choudhary and Mr. Aditya Kapur, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **J U D G M E N T (O R A L)**
08.09.2022

1. This petition under Article 227 of the Constitution of India assails order dated 13th May 2013 passed by the learned Joint Registrar of this Court in CS (OS) 1478/2011, which was the earlier *avatar* of the suit instituted by the respondent against various defendants of which the petitioners were Defendants 9 and 10. Consequent to enhancement of pecuniary jurisdiction of District Courts, the suit was transferred to the Court of the learned Additional District Judge (“the learned ADJ”) and renumbered CS DJ 10027/2016.

Facts

The first impugned order – dated 13th May 2013



2. At the time when the suit was pending before this Court as CS (OS) 1478/2011, the learned Joint Registrar in this Court, *vide* order dated 20th September 2012, condoned the delay of 106 days in filing of written statement by the petitioners (who are Defendants 9 and 10 in the suit) subject to payment of costs. Costs not having been paid, a last opportunity to do so was granted to the petitioners by the learned Joint Registrar on 26th November 2012. Instead of paying the costs, an application was preferred by the petitioners seeking waiver of costs, which was also dismissed by order dated 5th December 2012.

3. Despite this, the petitioners did not pay the costs as directed on 20th September 2012. In view thereof, following the judgment of the Supreme Court in *Manohar Singh v. D.S. Sharma*¹, the learned Joint Registrar *vide* order dated 13th May 2013, struck the written statement filed by the petitioners (as Defendants 9 and 10) off the record.

4. This is the first order under challenge in the present petition.

The second impugned order – dated 17th October 2017

5. Consequent to the aforesaid order, on 13th May 2013, a preliminary decree was passed by a learned Single Judge of this Court on 5th September 2013, partitioning the suit property amongst various legal heirs, and referring the matter to a Local Commissioner to file a report regarding possibility of partition by metes and bounds.

¹ (2010) 1 SCC 53



6. The aforesaid order dated 5th September 2013 was challenged, by the petitioners, by way of two proceedings, one by an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 (CPC), (as the preliminary decree had been passed in the absence of the petitioners) and the second by way of a review application. The review application also assailed the order dated 13th May 2013, which, as already noted, is the first order under challenge in the present petition.

7. The application under Order IX Rule 13 of the CPC was filed by the petitioners on 7th November 2013 and the review application, challenging the order dated 13th May, 2013 and the preliminary decree dated 5th September 2013, was filed on 26th October 2016.

8. In the interregnum, consequent to enhancement of pecuniary jurisdiction of District Courts, CS(OS) 1478/2011 was transferred to the learned ADJ on 14th January 2016 and was renumbered as CS DJ 10027/2016.

9. Even while, the application filed by the petitioners on 7th November 2013 under Order IX Rule 13 of the CPC was pending, the learned ADJ, *vide* order dated 17th October 2017, dismissed the review application, preferred by the petitioners on 26th October 2016 seeking review of the orders dated 13th May 2013 and 5th September 2013.

10. This order dated 17th October 2017, whereby the review application was dismissed by the learned ADJ constitutes the second



order under challenge in the present proceedings.

Later Events

11. On 17th January 2018, the petitioners filed FAO (OS) 20/2018 challenging the preliminary decree drawn up by this Court on 5th September 2013.

12. The said FAO (OS) 20/2018 was disposed of, by a Division Bench of this Court *vide* order dated 25th November 2019. In the said order, the Division Bench specifically noted that the order dated 13th May 2013 had attained finality, as there was no challenge to the said order till that date. Nonetheless, as the application preferred by the petitioners on 7th November 2013 under Order IX Rule 13 of the CPC for setting aside the preliminary decree dated 5th September 2013 was still awaiting disposal, the Division Bench deemed it appropriate to direct the learned ADJ to dispose of the said application under Order IX Rule 13 of the CPC.

13. By order dated 18th December 2019, the learned ADJ allowed the aforesaid application under Order IX Rule 13 of the CPC and set aside the preliminary decree dated 5th September 2013.

14. Nine years after passing of the order dated 13th May 2013 and nearly five years after passing of the order dated 17th October 2017, the petitioners have, on or around 5th September 2022, preferred the present petition under Article 227 of the Constitution of India, seeking



to assail the said orders.

Analysis and Conclusion

15. In my considered opinion, the petition is bound to fail both on delay and laches as well as on merits.

16. No reasonable explanation, whatsoever, for the petitioners, not having challenged the orders dated 13th May 2013 and 17th October 2017 for nearly five years after the order dated 17th October 2017 had come to be passed. Even if one were to ignore the delay of 4½ years between 13th May 2013 and 17th October 2017, on the consideration that the review application, which stood dismissed on 17th October 2017, also sought review of the order dated 13th May 2013, there is still no explanation for the petitioners remaining silent for five years even after 17th October 2017, before filing the present petition.\

17. Predictably, the petitioners have sought to transfer the blame for this inaction to the shoulder of the Counsel whom the petitioners had then engaged.

18. Mr. Sharma, learned Counsel for the petitioners, submits that the petitioners had always been informed by learned Counsel that the order dated 13th May 2013 had been challenged and that the petitioners' written statement had been permitted to be brought on record. It is submitted that it was only on 29th July 2022, consequent to an order passed by the learned ADJ in CS DJ 10027/2016, that the



petitioners came to know that their written statement was not on record.

19. This is a completely unsatisfactory submission.

20. The petitioners are not illiterate, or people belonging to the underprivileged strata of society who are unaware of their rights and of the law. Mere engagement of a Counsel does not absolve the litigant of all responsibility to follow up the matter, for years on end. This is not a case in which the delay is of a few days or even of a few months. As already noted, even after 17th October 2017, nearly five years have passed before the present petition has been filed. This is despite the fact that, in the order dated 25th November 2019, passed by the Division Bench of this Court, in the presence of learned Counsel for the parties, there is a specific recital to the effect that the order dated 13th May 2013 had attained finality, as no challenge to the said order had been preferred till that date. Even after 17th October 2017, four years have passed without petitioners deeming it necessary to challenge the order dated 13th May 2013 or 17th October 2017.

21. In *Tilokchand Motichand v. H.B. Munshi*², widely regarded as the *locus classicus* on the issue, a Constitution Bench of the Supreme Court has clearly held that unconscionable laches disentitle the petitioners from relief in writ proceedings. To quote from the opinion of S.M. Sikri, J. (as he then was), as one of the majority opinions in the said decision, “a delay of 12 years or 6 years would make a strange

² (1969) 1 SCC 110



bed-fellow with a direction or order or writ in the nature of mandamus, certiorari and prohibition”. The petitioner in the present case seeks certiorari, nine years after the order dated 13th May 2013 and five years after the order dated 17th May 2017.

22. This, in my considered opinion, is a textbook case of laches, operating to disentitle the petitioners to relief.

23. Nonetheless, I have also examined the orders dated 13th May 2013 and 17th May 2017. Within the confines of the jurisdiction vested in this Court by Article 227 of the Constitution of India, no ground whatsoever can be said to exist for this Court to interfere. In fact, Mr. Sharma, too, was candid in acknowledging that no real legal infirmity existed in either on the said orders, but merely exhorts the Court to examine the matter from the point of view of equity, given the fact that the petitioners would be seriously prejudiced if their written statement is allowed to be taken on record and that, even till date, issues have not been framed.

24. The mere fact that the trial in the suit may still be at an incipient stage cannot be a ground for this Court to interfere with the orders dated 13th May 2013 and 17th October 2017, if there is no reason otherwise to interfere with the said orders. Besides, the jurisdiction of this Court under Article 227 is circumscribed by the enunciation of the law contained in a veritable plethora of judgments of the Supreme Court.



25. Proceeding through the said decisions chronologically, in *Estralla Rubber v. Dass Estate (P) Ltd.*³, the Supreme Court held thus:

“7. This Court in *Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahel Ramnand*⁴ in para 12 has stated that *the power under Article 227 of the Constitution is intended to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and, not for correcting mere errors.* Reference also has been made in this regard to the case *Waryam Singh v. Amarnath*⁵. This Court in *Bathutmal Raichand Oswal v. Laxmibai R. Tarte*⁶ has observed that the power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal and that *the High Court in exercising its jurisdiction under Article 227 cannot convert itself into a court of appeal when the legislature has not conferred a right of appeal.*”

(Emphasis supplied)

26. In *Garment Craft v. Prakash Chand Goel*⁷, the Supreme Court held:

“15. Having heard the counsel for the parties, we are clearly of the view that the impugned order [*Prakash Chand Goel v. Garment Craft*⁸] is contrary to law and cannot be sustained for several reasons, but *primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India.* The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. *Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own*

³ (2001) 8 SCC 97

⁴ AIR 1972 SC 1598

⁵ AIR 1954 SC 215

⁶ AIR 1975 SC 1297

⁷ 2022 SCC Online SC 29

⁸ 2019 SCC OnLine Del 11943



decision on facts and conclusion, for that of the inferior court or tribunal. [Celina Coelho Pereira v. Ulhas Mahabaleshwar Kholkar⁹] The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.

16. Explaining the scope of jurisdiction under Article 227, this Court in ***Estralla Rubber v. Dass Estate (P) Ltd***² has observed: (SCC pp. 101-102, para 6)

“6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. *The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected.* It is also well settled that the High Court while acting under this Article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person

⁹ (2010) 1 SCC 217



can possibly come to such a conclusion, which the court or tribunal has come to.”

(Emphasis supplied)

27. To the same effect is the following enunciation of the law, to be found in *Ibrat Faizan v. Omaxe Buildhome Pvt. Ltd.*¹⁰, in which the Supreme Court has again reiterated the limited parameters of Article 227 jurisdiction in para 28 of the report, thus:

“28. The scope and ambit of jurisdiction of Article 227 of the Constitution has been explained by this Court in the case of *Estralla Rubber v. Dass Estate (P) Ltd*², which has been consistently followed by this Court (see the recent decision of this Court in the case of *Garment Craft v. Prakash Chand Goel*⁶. Therefore, while exercising the powers under Article 227 of the Constitution, the High Court has to act within the parameters to exercise the powers under Article 227 of the Constitution. It goes without saying that even while considering the grant of interim stay/relief in a writ petition under Article 227 of the Constitution of India, the High Court has to bear in mind the limited jurisdiction of superintendence under Article 227 of the Constitution. Therefore, while granting any interim stay/relief in a writ petition under Article 227 of the Constitution against an order passed by the National Commission, the same shall always be subject to the rigour of the powers to be exercised under Article 227 of the Constitution of India.”

28. To the same effect are the following words in paras 14 to 16 of the report in *Puri Investments v. Young Friends and Co.*¹¹, the Supreme Court held thus:

“14. In the case before us, occupation of a portion of the subject-premises by the three doctors stands admitted. What has been argued by the learned counsel for the appellant is that once the Tribunal had arrived at a finding on fact based on the principles of law, which have been enunciated by this

¹⁰ 2022 SCC Online SC 620

¹¹ 2022 SCC Online SC 283



Court, and reflected in the aforesaid passages quoted from the three authorities, the interference by the High Court under Article 227 of the Constitution of India was unwarranted. To persuade us to sustain the High Court's order, learned counsel appearing for the respondents has emphasized that full control over the premises was never ceded to the medical practitioners and the entry and exit to the premises in question remained under exclusive control of the respondent(s)-tenant. This is the main defence of the tenant. We have considered the submissions of the respective counsel and also gone through the decisions of the fact-finding fora and also that of the High Court. At this stage, we cannot revisit the factual aspects of the dispute. Nor can we re-appreciate evidence to assess the quality thereof, which has been considered by the two fact-finding fora. The view of the forum of first instance was reversed by the Appellate Tribunal. *The High Court was conscious of the restrictive nature of jurisdiction under Article 227 of the Constitution of India. In the judgment under appeal, it has been recorded that it could not subject the decision of the appellate forum in a manner which would project as if it was sitting in appeal. It proceeded, on such observation being made, to opine that it was the duty of the supervisory Court to interdict if it was found that findings of the appellate forum were perverse. Three situations were spelt out in the judgment under appeal as to when a finding on facts or questions of law would be perverse. These are: —*

- (i) *Erroneous on account of non-consideration of material evidence, or*
- (ii) *Being conclusions which are contrary to the evidence, or*
- (iii) *Based on inferences that are impermissible in law.*

15. *We are in agreement with the High Court's enunciation of the principles of law on scope of interference by the supervisory Court on decisions of the fact-finding forum.* But having gone through the decisions of the two stages of fact-finding by the statutory fora, we are of the view that there was overstepping of this boundary by the supervisory Court. In its exercise of scrutinizing the evidence to find out if any of the three aforesaid conditions were breached, there was re-appreciation of evidence itself by the supervisory Court.



16. In our opinion, the High Court in exercise of its jurisdiction under Article 227 of the Constitution of India in the judgment under appeal had gone deep into the factual arena to disagree with the final fact-finding forum.”

(Emphasis supplied)

29. One may, in this context, also advert to the following passage from *Sadhana Lodh v. National Insurance Co. Ltd*¹², which succinctly states the point:

“7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined *only to see whether an inferior court or tribunal has proceeded within its parameters* and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or the tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision.”

(Emphasis supplied)

30. This Court, therefore, is not expected, while exercising Article 227 jurisdiction, to sit in appeal of the orders of the Courts below under challenge, especially where the orders are discretionary in nature. The scope of interference is heavily circumscribed.

31. The order dated 13th May 2013 has struck the written statement filed by the petitioners off the record, following the judgment of the Supreme Court in *Manohar Singh*¹, as costs had not been paid on as many as four occasions, despite opportunities having been granted to

¹² (2003) 3 SSC 524



the petitioners.

32. In *Manohar Singh*¹³, as in the present case, after repeated adjournments, a final opportunity to cross-examine DW-1 was granted to the plaintiff subject to payment of costs of ₹ 5000/-. Finally, on default in payment of costs despite grant of repeated opportunities, the learned Trial Court dismissed the suit, relying, for the purpose, on Section 35-B(1)¹³ of the CPC. An appeal, and a subsequent application for review, thereagainst, before this Court having failed, Manohar Singh, the plaintiff in the suit, petitioned the Supreme Court. The Supreme Court held that the failure to pay costs disentitled the defaulter to “further prosecute the suit”, but the suit itself could not be dismissed on that ground. The Supreme Court clarified the legal position, in paras 8 and 11 of the report, thus:

“8. This takes us to the meaning of the words “further prosecution of the suit” and “further prosecution of the defence”. If the legislature intended that the suit should be dismissed in the event of non-payment of costs by the plaintiff, or that the defence should be struck off and the suit should be decreed in the event of non-payment of costs by the

¹³ 35-B. Costs for causing delay. –

(1) If, on any date fixed for the hearing of a suit or for taking any step therein, a party to the suit –

(a) fails to take the step which he was required by or under this Code to take on that date, or
(b) obtains an adjournment for taking such step or for producing evidence or on any other ground,

the Court may, for reasons to be recorded, make an order requiring such party to pay to the other party such costs as would, in the opinion of the Court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date, and payment of such costs, on the date next following the date of such order, shall be a condition precedent to the further prosecution of –

(a) the suit by the plaintiff, where the plaintiff was ordered to pay such costs,
(b) the defence by the defendant, where the defendant was ordered to pay such costs.

Explanation.—Where separate defences have been raised by the defendants or groups of defendants, payment of such costs shall be a condition precedent to the further prosecution of the defence by such defendants or groups of defendants as have been ordered by the Court to pay such costs.



defendant, the legislature would have said so. On the other hand, the legislature stated in the Rule that payment of costs on the next date shall be a condition precedent to the further prosecution of the suit by the plaintiff (where the plaintiff was ordered to pay such costs), and a condition precedent to the further prosecution of the defence by the defendant (where the defendant was ordered to pay such costs). *This would mean that if the costs levied were not paid by the party on whom it is levied, such defaulting party is prohibited from any further participation in the suit. In other words, he ceases to have any further right to participate in the suit and he will not be permitted to let in any further evidence or address arguments. The other party will of course be permitted to place his evidence and address arguments, and the court will then decide the matter in accordance with law.* We therefore reject the contention of the respondents that Section 35-B contemplates or requires dismissal of the suit as an automatic consequence of non-payment of costs by the plaintiff.

11. A conspectus of the above provisions clearly demonstrates that under the scheme of CPC, a suit cannot be dismissed for non-payment of costs. *Non-payment of costs results in forfeiture of the right to further prosecute the suit or defence as the case may be.* Award of costs, is an alternative available to the court, instead of dispensing with the cross-examination and closing the evidence of the witness. *If the costs levied for seeking an adjournment to cross-examine a witness are not paid, the appropriate course is to close the cross-examination of the witness and prohibit the further prosecution of the suit or the defence, as the case may be by the defaulting party.”*

(Emphasis supplied)

33. The impugned order dated 13th May 2013, therefore, adopts what, according to the Supreme Court, is “the appropriate course”. No exception can, therefore, be taken thereto.

34. The order dated 17th October 2017 examined the plea for review



of the order dated 13th May 2013. The only ground urged, for review of the order dated 13th May 2013, was that the father of the Counsel was seriously unwell, and that the Counsel had been unable, therefore, to communicate the requirement of payment of costs to the petitioners.

35. The learned ADJ has observed that the review was itself unconscionably delayed. He observed that there was no explanation for the delay between 13th May 2013 and 26th October 2016, when the review application was filed, given the fact that the period of limitation for filing a review application under Article 124 of the Limitation Act, 1963 is 30 days.

36. Nonetheless, the learned ADJ has also proceeded to examine the review application on merits. As the learned ADJ correctly holds, Order XLVII of the CPC envisages review on either where there is an error apparent on the face of the record or where the party has come into position of new or important matters of evidence which were not within the review applicants' knowledge despite exercise of due diligence or for any other sufficient reasons. The learned ADJ has relied on the judgment of this Court in *Deutsche Ranco GmbH v. Mohan Murti*¹⁴, which holds that the expression "any other sufficient reason" in Order XLVII of the CPC has to be read *ejusdem generis* to the other two exigencies in which review jurisdiction may be exercised. To the same effect, I may observe, are the judgments of the Supreme Court in *Meera Bhanja v. Nirmala Kumari Choudhury*¹⁵

¹⁴ (176) 2011 DLT 280 (DB)

¹⁵ (1995) 1 SCC 170



and of the Privy Council in *Chhajju Ram v. Neki*¹⁶, which was approved by the Supreme Court in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius*¹⁷ and *Parsion Devi v. Sumitri Devi*¹⁸, which hold that the words “or any other sufficient reason” would imply a reason analogous to the other reasons statutorily envisaged for review.

37. Within the parameters of review jurisdiction, the learned ADJ has held that no case for review of the order dated 13th May 2013 had been made out.

38. Besides the fact that the decision of the learned ADJ was fundamentally discretionary in nature, it cannot, even otherwise, be said to be suffering from any such error of fact, law or jurisdiction as would justify supervisory correction by this Court in exercise of the jurisdiction vested in it by Article 227 of the Constitution of India.

39. The present petition, therefore, fails both on the grounds of laches as well as on merits.

40. This petition is accordingly dismissed *in limine* with no orders as to costs. Miscellaneous applications are also disposed of.

41. The Court appreciates the fact that Mr. Siddhant Sharma, learned Counsel, argued this rather difficult case with considerable

¹⁶ AIR 1922 PC 112

¹⁷ AIR 1954 SC 526

¹⁸ (1997) 8 SCC 715



competence.

C.HARI SHANKAR, J

SEPTEMBER 8, 2022

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