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

+ CM(M) 966/2022 & CM APPL. 40571/2022

SURAJ PRAKASH GARG (SINCE DECEASED)

THR LR SANDEEP GARG Petitioner

Through: Mr. Aman Rastogi and Mr.
Sanjay Rastogi, Advs.

versus

PREM LATA Respondent

Through: Ms. Ritu Sobti and Mr. S.S.
Sobti, Advs.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT (ORAL)

15.09.2022

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1. The order dated 6th August 2022 under challenge in the present petition under Article 227 of the Constitution of India, passed by the learned Senior Civil Judge (“the learned SCJ”) in CS 9223/2016 (*Prem Lata v. Suraj Prakash Garg*), dismisses an application preferred by the petitioner, as the defendant in the suit, under Order XIII Rule 10 of the Code of Civil Procedure, 1908 (CPC) read with Sections 63 and 65 of the Indian Evidence Act, 1872.

2. Order XIII Rule 10 of the CPC reads thus:

“10. Court may send for papers from its own records or from other Courts. -

(1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other suit or proceedings, and inspect the same.



(2) Every application made under this rule (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.”

3. Sub-rule (1) of Order XIII Rule 10 of the CPC allows parties to a suit to apply for summoning, by a court, either from its own record or from any other Court, the record of any other suit or proceeding, and inspect the same. Sub-rule (2) of Order XIII Rule 10 of the CPC requires an applicant to file an affidavit explaining how the record, which is requisitioned, is material to the suit and also a declaration that the applicant could, without unreasonable delay or expense, obtain a duly authenticated copy of the record from the court from which the record is being sought to be requisitioned, or that the production of the original is necessary in the interests of justice.

4. CS 9223/2016, instituted by the respondent against the petitioner, sought a decree of possession in favour of the respondent and against the petitioner in respect of a plot of land situated at Plot No. 12, Friends Colony, G.T. Road, Shahdara, New Delhi (“the suit property”) along with damages/mesne profits and future interest.

5. After conclusion of the evidence of the respondent, “as the



plaintiff”, the suit was fixed for defendant’s evidence (DE), i.e. the evidence of the petitioner, on 12th November 2018. The petitioner had tendered the list of nine defendant witnesses (DWs). On the said date, DW-1 was examined, cross-examined and discharged.

6. The learned SCJ *vide* order passed on the said date (12th November 2018) allowed leading of the evidence of DW-3 to DW-9, but disallowed leading of the evidence of DW-4 to DW-8. Apropos DW-4 to DW-8, the learned SCJ recorded thus:

“Coming to witnesses mentioned at serial no. 4 to 8, defendant wants to call judicial file through them. It is settled principle of law that the certified copies of the documents can be exhibited in evidence and the option is not exercised by the defendant in his evidence. In view of the same, said witnesses are hereby dropped.”

7. The petitioner, thereafter, moved an application under Order XIII Rule 10 read with Section 151 CPC and Sections 63 and 65 of the Evidence Act. The application is not very happily worded. However, on a holistic reading of the application, it is clear that the record that the petitioner sought to summon under Order XIII Rule 10 was the record of RFA 271/1979, which was disposed of by this Court. The documents in the said record which, according to the application, were necessary for the petitioner to establish his case, were enumerated in para 11 of the application.

8. As already noted, Order XIII Rule 10(2) of the CPC requires an application under Order XIII Rule 10(1) to be accompanied with an affidavit specifically setting out how the record, which is sought to be summoned, is material to the suit. The applicant is required to



explain, in the affidavit, why he was not in a position to obtain a duly authenticated copy of the record without unreasonable delay; else, that the production of the original was necessary for the purposes of justice.

9. The application was not accompanied by the requisite affidavit under Order XIII Rule 10(2) of the CPC. However, the learned SCJ, on 18th February 2020, passed the following order:

“Present:- Sr. S.S. Soti, Ld. Counsel for the plaintiff.
Sr. Sanjay Rastogi, Ld. Counsel for the defendant.

Heard on the application under Section 63 and 65 of Indian Evidence Act which was moved by the defendant.

The applicant/defendant has not identified with certainly, the documents of which he wants to lead secondary evidence. The applicant/defendant is therefore directed to produce a list of documents identifying therein the documents by their title and date of execution/making, of which he wants to lead secondary evidence, in form of an affidavit.

Put up on 27.03.2020.”

10. Following the aforesaid, the petitioner filed an affidavit, paras 3 and 4 of which read thus:

“3. That the certified copies of the certified copies of documents submitted by the DW-2, Shri. Suresh Rastogi of his case bearing R.F.A. No. 271 of 1979, as following:-

A. Civil Suit No. 156 of 1977, in the Hon'ble Court of Sh. D.S. Bawa, Sub Judge, Delhi filed by the Plaintiff against M.C.D. dated 19.11.1976, wherein Plaintiff has duly admitted in her cross examination that she has herself constructed three godowns in her property bearing Municipal No. 368 & 369.



B. Survey Report of the MCD Department for the year 1976 executed/issued as on 29.03.1977, of the entire industrial premises owned by the Plaintiff.

C. Photographs of the demise premises taken in the year 1973 alongwith evidence of the photographer.

D. Contempt petition bearing Cri. No. 2349 of 2002 in RFA No. 271 of 1979, filed as on 6.9.2002.

4. That vide application under Section 65 & 63 of the Evidence Act & Order 13 Rule 10 Read with Section 151 CPC, the defendant has prayed that the documents tendered by him as on 12.11.2018 alongwith his affidavit of evidence dated 12/11/2018 and being marked as **Mark-X and Mark-Y**, be duly marked as Exhibits and this Hon'ble Court shall decide the said issue before final arguments.”

11. On 12th April 2019, the following order came to be passed by the learned SCJ:

“Present: Sh. S.S. Sobti, Ld. Counsel for plaintiff.
Sh. Sanjay Rastogi, Ld. Counsel for defendant.

Matter is fixed for DE however adjournment is sought by Ld. Counsel for defendant on the ground that witness is not available which is strongly opposed by Ld. Counsel for plaintiff. In the interest of justice adjournment is allowed and last and final opportunity is given for DE.

At this stage, Ld. Counsel for defendant has moved an application u/s 65 and 63 of Evidence Act and Order 13 Rule 10 CPC. Copy supplied. Reply, if any be filed by the next date with advance copy to the opposite party. *Said application will be considered after conclusion of DE.*

Put up for DE on 21.05.2019.”

(Emphasis supplied)



12. Clearly, therefore, the learned SCJ had deferred the consideration of the application filed by the petitioner under Order XIII Rule 10 of the CPC read with Sections 63 and 65 of the Indian Evidence Act to a stage after conclusion of DE.

13. DE was concluded on 19th August 2019.

14. Thereafter, the petitioner's application under Order XIII Rule 10 of the CPC read with Sections 63 and 65 of the Indian Evidence Act was taken up for consideration. The application stands rejected by the order dated 6th August 2022, which is subject matter of challenge in the present petition.

15. The order has two "para 5"s, which read thus:

"5. In this case, the perusal of record shows that the defendant had moved an application for summoning the record of M.C.D. and when it was found that complete record was not produced by the witness, the defendant moved another application for summoning the record but the said application was withdrawn by the defendant on 18.07.2018 and the matter proceeded for recording of defendant evidence. Thereafter, the present application was moved by the defendant on 12.04.2019 but the defendant closed his evidence on 19.08.2019 without pressing the application.

5. *Once the evidence has been closed by the defendant, the present application for summoning the documents from some record loses significance* because power to sent for record and to inspect the record in terms of order 13 Rule 10 CPC does not render the document ipso facto evidence in the case and anything which requires prove must be formally proved, In this case, the defendant did not make any prayer for calling the record during the recording of his evidence and the application which was moved was withdrawn by the



defendant. Under Order 13 Rule 10 CPC, the court is not competent to reopen the evidence or allow the party to produce further evidence. Most of the record sought to be summoned by the defendant belongs to M.C.D. Department and there is nothing to indicate that prior to moving the present application, the defendant made any endeavour to call for the record from the M.C.D. Therefore, the application is without merits and the same is dismissed.”

(Emphasis supplied)

16. A reading of the aforesaid paragraphs reveals that the learned SCJ has not considered the petitioner’s application on merits. All that is stated is that, once DE was concluded, the application for summoning record lost significance as, even if the record was summoned, it would not, *ipso facto*, become evidence.

17. It was clearly not open to the learned SCJ to adopt such a view after having already held, in the order dated 12th April 2019, that the application shall be considered after DE was concluded. The learned SCJ was duty bound to consider the application and return a finding thereon on merits.

18. The observation that the application had lost significance as DE was concluded is also equally fallacious. The prayer of the petitioner was to summon the record of RFA 271/1979, which was pending before this Court and was disposed of by this Court. Reasons for summoning the record were also set out in the application. The sufficiency of such reason is a matter which has to be examined by the learned SCJ while adjudicating on the application. The petitioner had specifically pleaded that the record had been destroyed in a fire which had broken out in the District Courts. In the event the learned SCJ



was of the view that the order was required to be summoned, if a report to the effect that the record stood destroyed was received from the concerned Court, it would be open to the petitioner, at that stage, to seek to lead secondary evidence in respect of the said documents under Sections 63 and 65 of the Indian Evidence Act, subject, of course, to leave in that regard being granted by the learned SCJ.

19. This entire exercise stands jettisoned by the impugned order which has not condescended to examine the petitioner's application under Order XIII Rule 10 of the CPC read with Sections 63 and 65 of the Indian Evidence Act on merits.

20. In view thereof, the impugned order cannot sustain in law.

21. As such, the impugned order is quashed and set aside. The learned SCJ is directed to consider the petitioner's application under Order XIII Rule 10 of the CPC read with Sections 63 and 65 of the Evidence Act *de novo*.

22. This Court is not expressing any opinion either on the merits of the application or as to whether the application conforms to the provisions of Order XIII Rule 10(1) and 10(2) of the CPC, or as to whether the affidavit which was filed by the petitioner is in terms of Order XIII Rule 10(2) of the CPC. However, the Court confirms that the affidavit would not be eschewed from consideration merely on the ground that it was not filed *along with* the application, if it is otherwise found to be in terms of Order XIII Rule 10(2) of the CPC.



23. All the aforesaid aspects would be decided by the learned SCJ in accordance with law.

24. For the said purpose and in order to expedite proceedings, this Court directs the parties to appear before the learned SCJ on 21st September 2022, on which date the learned SCJ is stated to have fixed the matter for pronouncement of orders.

25. Needless to say, orders would not be pronounced by the learned SCJ in the main suit on the said date as the application of the petitioner under Order XIII Rule 10 of the CPC read with Sections 63 and 65 of the Indian Evidence Act has to be taken up for consideration and decided in terms of the orders passed today. Learned Counsel for the parties are permitted to rely on any judicial authorities on which they may seek to place reliance in the *de novo* proceedings.

26. The petition is, accordingly, allowed with no orders as to costs.

27. Miscellaneous application is also disposed of.

28. The Registry is directed to communicate a copy of this order to the learned SCJ forthwith, so that he is spared the effort of preparing a final judgement for pronouncement on 21st September 2022.

C. HARI SHANKAR, J.

SEPTEMBER 15, 2022/ r.bararia