

\$~41 (Appellate)

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

+ CM(M) 1199/2022 & CM APPL. 48000/2022, CM APPL. 48001/2022

MEHROON NISHA Petitioner
Through: Mr. Nitish Banka, Mr. Lakshay
Manchanda and Mr. Shubham Kumar, Advs.

versus

BEDO Respondent
Through:

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

JUDGEMENT (ORAL)

% **10.11.2022**

1. The impugned order dated 20th September 2022, passed by the learned Additional District Judge (the learned ADJ) in CS DJ 1068/2018 (*Mehroon Nisha v. Bedo*) reads as under:

“CS DJ 1068/18

MEHROON NISHA Vs. BEDO

20.09.2022

Present: Sh. Vishwa Bhushan Arya and Sh. Harsh Khatana,
Ld. Counsel for Plaintiff.
Sh. Ajit Singh Dahiya, Ld. Counsel for Defendant.

1. Vide this Order I shall dispose off the application under Order 18 Rule 17 CPC to lead PE in the present case.

2. It is averred in the application that the Plaintiff has lead Plaintiff Evidence and same was pending cross-examination and the Plaintiff lost touch with his counsel due to Covid-19 pandemic. It is submitted that subsequently PE was closed on 05.04.2022. It is stated that the Plaintiff would suffer irreparable loss if the Plaintiff Evidence is not allowed.

3. Reply has been filed to the aforesaid application by Ld. Counsel for Defendant wherein it has been stated that the present application is not tenable since the language of Order 18 Rule 17 CPC makes it clear that it is for the purpose of recalling of witness who have already been examined and in the present case, examination in chief of the witness has not been filed till date. It is stated that the Plaintiff is guilty of non appearance and present application should be dismissed.

4. Arguments heard. Record perused.

5. Perusal of the record reflects that matter was fixed for PE on 18.02.2019 by the Ld. Predecessor of this court after framing of issues. On 25.04.2019, no evidence was lead on behalf of the Plaintiff and the matter was adjourned on the ground of non availability of Plaintiff. For similar reasons, another date was sought on NDOH .i.e. 30.07.2019. Again on 23.10.2019, witness was not present and the matter was fixed for PE. Even on 20.12.2019, witness was not present. There has been no appearance of the Plaintiff to lead PE and consequently the PE was closed vide order dated 05.04.2022. At this juncture it is relevant to reproduce the provision of Order 18 Rule 17 CPC as follows:-

“Court may recall and examine witness- the court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such question to him as the Court thinks fit”

6. Perusal of the aforesaid provision reflects that court has been enabled to recall any witness at any stage of suit, who has already been examined. The perusal of the present file reflects that the Plaintiff witness was never present before the court ever since the matter was put for Plaintiff evidence and the counsel for Plaintiff cannot take the plea of Covid-19 pandemic since the matter had already been adjourned five times prior to restrictive functioning of the court on account of Covid-19 pandemic. The judgment relied upon by the Plaintiff titled as ***Pankaj Kumar Vs. Chhaya and Ors., Civil Revision Defective No. 240 of 2015*** in support of his case is also not applicable in the present case as in that case evidence has been lead by the Plaintiff and the Plaintiff was seeking to recall the witnesses already examined.

7. In view of the aforesaid facts, the application is hereby dismissed.

8. Put up for final arguments on 09.11.2022.

(GURMOHINA KAUR)

2. Aggrieved by the aforesaid order, the petitioner has invoked the jurisdiction vested in this Court by Article 227 of the Constitution of India, praying that the impugned order be quashed and set aside and that the application of the petitioner under Order XVIII Rule 17 of the Code of Civil Procedure, 1908 (CPC) be allowed.

3. As the learned ADJ has correctly noted, the very invocation of Order XVIII Rule 17 of the CPC was misguided.

4. Order XVIII Rule 17 of the CPC reads thus:

“17. Court may recall and examine witness. – The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.”

5. On its very wording, Order XVIII Rule 17 of the CPC, applies only for recall of a witness who has already been examined. Inasmuch as the petitioner’s witness had not been examined, Order XVIII Rule 17 of the CPC would not apply.

6. That apart, there are two other compelling reasons which this Court, in exercise of its jurisdiction under Article 227 of the Constitution of India, in which equity is an essential ingredient, is not inclined to interfere in the present matter.

7. The first reason pertains to para 2 of the impugned order, which records the submission, in the application of the petitioner-plaintiff,

that the petitioner had already led plaintiff's evidence and that the matter was pending cross examination.

8. Disturbingly, a specific averment to this effect is also contained in para 2 of the application filed by the petitioner under Order XVIII Rule 17 of the CPC, which reads thus:

“2. That, plaintiff has already lead the PE in the above stated matter and was pending cross. examination.”

9. As against this, in para 5 of the impugned order, the learned ADJ has clearly noted that no evidence had been led by the petitioner at any point of time till PE was closed on 5th April 2022.

10. To a pointed query from the court, learned Counsel for the petitioner acknowledges that the position as recorded in para 5 of the impugned order is correct and that, in fact, no affidavit in evidence on behalf of the petitioner was tendered prior to 5th April 2022. He submits that the affidavit in evidence was tendered only thereafter.

11. In that view of the matter, it is clear that para 2 of the application filed by the petitioner was false.

12. The second reason that that this Court is not inclined to interfere with the present matter is because, despite ample opportunities, the petitioner defaulted in leading PE.

13. Para 5 of the impugned order clearly records that the matter was initially fixed for PE on 18th February 2019 and thereafter adjourned to 25th April 2019, 30th July 2019, 23rd October 2019, 20th December

2019 and 5th April 2022, when PE was finally closed.

14. This court is normally lenient in allowing parties complete opportunities to represent their respective cases in trial. This, however, is a case of unconscionable disregard of the responsibility to lead PE. The petitioner was given six opportunities to lead PE, before PE was closed.

15. No court, exercising writ jurisdiction, can come to the aid of such an indolent litigant.

16. I have already observed, in *Kailesh Sewani v. Manish Kumar Chaudhary*¹ that that Article 227 of the Constitution of India is not intended to operate as mercy jurisdiction, to tide over repeated defaults in prosecuting the matter before the court below. Litigants cannot be casual about prosecuting proceedings before the learned Court below and expect sanctuary from this Court.

17. In that view of the matter, this case does not merit any interference under Article 227 of the Constitution of India.

18. The petition is accordingly dismissed *in limine*, with no order as to costs.

C. HARI SHANKAR, J.

NOVEMBER 10, 2022

dsn