

\$~2(Appellate-2022 list)

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

+ CM(M) 271/2022 & CM No.14743/2022, CM No.14744/2022,
CM No. 14745/2022, CM No.14746/022, CM No. 14747/2022

KENYA AIRWAYS

..... Petitioner

Through: Mr. Nikhil Chawla, Mr. Hasan
Murtaza, Mr. Aditya Panda and Mr. Sameer
Sharma, Advs.

versus

BASANT INDIA INC

..... Respondent

Through: Ms. Stuti Gupta, Adv.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

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

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01.04.2022

CM(M) 271/2022

1. By an order dated 18th July, 2018, passed in CM(M) 752/2018 and CM Nos. 26905-26906/2018, this Court directed grant of one opportunity to the petitioner, as the defendant in CS 618533/2016, to cross examine PW-2.

2. It appears that, thereafter, certain attempts at settlement were explored between the parties, but that, on 22nd November, 2018, the present respondent (the plaintiff in the suit) informed the learned Additional District Judge ("learned ADJ"), that amicable resolution had failed. The learned ADJ, thereupon, fixed the matter on 6th December, 2018 for allowing the petitioners-defendant an opportunity

to examine PW-2.

3. There was no appearance before the learned ADJ on 6th December, 2018, whereupon, the learned ADJ proceeded to discharge PW-2 and closed the opportunity of the petitioner to cross examine him.

4. The petitioner, thereafter, moved an application before the learned ADJ under Order IX Rule 7 of the CPC, seeking recall of PW-2 so that the petitioner could cross examine him. It was submitted, in the said application, that the date of 6th December, 2018 had been wrongly noted by the clerk of the Counsel of the petitioner, who had appeared on the petitioner's behalf before the learned ADJ on 22nd December, 2018 as 7th December, 2018. An affidavit of the Counsel vouchsafing this fact was also filed with the application.

5. While the impugned order dated 23rd November, 2021 rejects the said application of the petitioner, preferred under Order IX Rule 7, the reasoning in the impugned order is to be found in the following passage:

“Before, discussing this application, there are some orders to be discussed. The court passed an order on 25.05.2018 in which the opportunity of defendant, to cross-examine PW2 Mayank Gupta was closed. This order was challenged by the defendant in Hon. High Court. Hon. High Court vide order dated 18.07.2018 allowed the defendant to cross-examine PW2 Mayank Gupta for one date only. It was also observed *“no adjournment be sought by the defendant for cross-examination of the said witness as well as of PW-2”*. However when this witness PW2 was present on 06.12.2018, none appeared on behalf of defendant and the court closed the

opportunity of the defendant to cross examine PW2. In this application, defendant had taken the plea that the clerk noted down wrong date of hearing i.e. 06.12.2018 instead of 07.12.2018.

No affidavit of this clerk filed. On the other hand advocate himself filed his affidavit.

Considering the totality of the circumstances, the plea taken by the defendant regarding noting down of wrong date of hearing does not appears to be bonafide and rejected.”

6. *Stricto sensu*, it cannot be said that the learned ADJ has acted illegally or incorrectly, in rejecting the petitioner’s application. That said, however, substantial justice requires, at every stage, to trump technical considerations. Ms. Stuti Gupta, learned Counsel for the respondent has contended, with all the emphasis at her command that the petitioner has been repeatedly remiss in prosecuting the proceedings before the learned ADJ as far back as 2007, when they were proceeded *ex parte* for the first time. She submits, therefore, that such an indolent litigant who take proceedings of the Court for granted, is not entitled to any equitable relief from the Court.

7. In *State Bank of India v. Chandra Govindji*¹, the Supreme Court was concerned with a situation in which a litigant had taken repeated adjournments from the Court and, on an adverse order being passed against the litigant consequent to rejection of the last adjournment, the Supreme Court was petitioned. The opposite party drew the attention of the Supreme Court to the number of adjournments that have been taken by the litigant prior to the last

¹ (2000) 8 SCC 532

adjournment being taken. The Supreme Court observed that, once an adjournment has granted, the number of adjournments earlier taken ceased to be of relevance as the Court granting the last adjournment was expected to be aware of the position which obtained prior thereto. All that was required to be seen, therefore, according to the Supreme Court, was whether there was valid ground for the party to remain absent on the last adjourned date.

8. Borrowing a leaf from the said decision, the indiscretions and defaults of the petitioner, prior to the order dated 18th July, 2018 passed by this Court, could not have influenced the court in deciding whether the petitioner was entitled to relief or not. The Court ought, in my view, to have granted the petitioner one additional opportunity to cross examine PW-2 keeping in mind the course of litigation prior to the passing of its order. There is no dispute about the fact that the sole opportunity granted to the petitioner to cross examine PW-2, on the basis of the order dated 18th July, 2018, was on 6th December, 2018. According to the petitioner, the said date had been wrongly noted by the clerk of his Counsel. A reading of the order dated 22nd November, 2018 reveals that, indeed, the petitioner was represented, on the said date, not by Counsel but by the clerk of the Counsel. This may not be a happy state of affairs, as it is improper for a Counsel to send his court clerk to represent him in court proceedings; the least that is expected is that the Counsel would send a junior associate. Be that as it may, as there has been only one date of default i.e. 6th December, 2018, and as the application under Order IX Rule 7 was accompanied by an affidavit of Counsel vouchsafing to the fact that

the clerk had entered the wrong date in his diary, and keeping in mind the fact that this Court had, by its order dated 18th July, 2018, directed that the petitioner be granted one opportunity to cross examine PW-2, I am of the opinion that the interests of justice would be subserved if the petitioner is directed to cross examine PW-2 on the next date of hearing before the learned ADJ on 19th April, 2022, on which date the respondent would make PW-2 available for cross examination.

9. It is made clear that, subject to PW-2 being available on the said date, the plaintiff should cross examine him. No adjournment for cross examining PW-2 would be taken or granted by the learned Trial Court. No further opportunity to cross examine PW-2 would either be granted to the petitioner.

10. I am informed that the suit is listed for plaintiff's further evidence on 4th April, 2022. This order does not amount to any interdiction on the Trial Court continuing with the proceedings on 4th April, 2022. It is merely clarified that PW-2 would be permitted to be cross examined on 19th April, 2022.

11. This petition stands disposed of in the aforesaid terms.

C. HARI SHANKAR, J

APRIL 1, 2022/kr