



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

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Judgment reserved on: 08.04.2024
Judgment pronounced on: 01.07.2024

+ CM(M) 26/2023 & CM APPL. 952/2023--stay

YASHODA ORGANIC FOODS PVT LTD Petitioner

Through: Mr. Anuj R. Yadav and Ms. Kajol
Kumar, Advs.

versus

BHARAT BHUSHAN GERA Respondent

Through: Mr. Suresh Agarwal, Adv.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. The petitioner is aggrieved by the order dated 02.11.2022 passed by the learned District Judge (Comm-02), West, Tis Hazari Court, New Delhi (in short "Trial Court") in CS (Comm.) no. 12/2021, titled as "*Bharat Bhushan Gera vs. Yashoda Organic Food Pvt. Ltd. and Ors.*" whereby the learned Trial Court has taken off from the record, the list of witnesses filed by the petitioner. Thus, the present petition has been preferred invoking the supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

2. Petitioner herein is the defendant and the respondent herein is the plaintiff in CS (Comm.) no. 12/2021 which is pending adjudication before the learned Trial Court.



3. To put it succinctly, the short controversy emanates from the facts that on 24.12.2020, the respondent instituted a commercial suit against the petitioner seeking recovery of Rs. 43,20,120/- along with pendente lite interest for the alleged sale of skimmed milk powder weighing 15,000 kgs.
4. The petitioner filed written statement on 06.09.2021 denying the alleged sale and asserting that no such transaction of skimmed milk powder took place between the petitioner and the respondent. Furthermore, it was submitted that the broker of the respondent, Mr. Sanjay Pathak had sent the alleged skimmed milk powder to the petitioner to sell in the market on a commission basis. The petitioner sold some of the purported skimmed milk in the market. However, due to the expiration of the alleged skimmed milk powder, the entire quantity supplied was not sold.
5. In response, the respondent filed a replication to the written statement wherein he denied the averments made by the petitioner in his written statement.
6. After the completion of pleadings, the learned Trial Court framed issues by order dated 28.03.2022. Vide this order, the learned Trial Court also directed the parties to file evidence by way of affidavit along with a list of witnesses. Subsequently, the learned Trial Court closed the evidence of the plaintiff/respondent herein on 13.09.2022 and listed the matter for defendant's evidence on 02.11.2022.
7. In the meanwhile, the petitioner filed a list of witnesses along with evidence by way of affidavit of Sh. R.D Sharma/DW-1 before the learned Trial Court on 23.09.2022. However, the learned Trial Court vide impugned order dated 02.11.2022 struck off the list of witnesses filed by the petitioner due to delay in filing, thereby permitting only DW-1 to be



examined. Further, the learned Trial Court also closed the evidence of the defendant/petitioner herein and listed the matter for final arguments.

8. Afterwards, the petitioner moved an application before the learned Trial Court under Order XLVII Rule 1 & 2 read with Section 151 and Section 114 CPC seeking review or recall of the impugned order dated 02.11.2022. However, the learned Trial Court finding no merit in the application, dismissed the same vide order dated 15.12.2022. Therefore, the petitioner being aggrieved by the impugned order 02.11.2022 has filed the present petition.

9. The learned counsel for the petitioner submitted that the learned Trial Court failed to appreciate that the names of witnesses mentioned in the list of witnesses had already been disclosed in the written statement and no new witness was added to the list that would cause any prejudice to the respondent.

10. The learned counsel also submitted that the delay in filing the list of witnesses was due to a human error on part of the previous counsel. Therefore, it is submitted that the learned Trial Court failed to appreciate the well settled law that a litigant should not suffer for the mistakes of its counsel. Moreover, the petitioner has a fundamental right to a fair trial and the petitioner would not be able to get a fair trial unless, it is given the opportunity to lead its entire evidence and prove on record the facts in its favour.

11. The learned counsel for the petitioner submitted that the learned Trial Court failed to observe that the time period for filing the list of witnesses mentioned in Order XVI of CPC is procedural in nature. Therefore, the learned Trial Court should not have taken off the list of



witnesses from the record but should have allowed it to remain on record, subject to payment of costs.

12. The learned counsel also submitted that it is crucial for the petitioner to lead evidence as the defence taken by the petitioner in the written statement is that the goods in question were consumable but expired over time, resulting in them being fed to cows. Therefore, it is essential for the petitioner to lead evidence.

13. On the other hand, the learned counsel for the respondent supported the impugned order and submitted that the petitioner blatantly failed to comply with the directions of the learned Trial Court passed on 28.03.2022, whereby the parties were directed to file their list of witnesses as the petitioner failed to file the list of witnesses till 02.11.2022, hence, the respondent was taken by surprise, when the list of witnesses was filed on 02.11.2022, the petitioner thus failed to comply with the directions of the learned Trial Court. Accordingly, the impugned order does not require any interference by this Court.

14. I have heard the arguments advanced on behalf of the parties and perused the record.

15. It is to be noted that on 28.03.2022 pursuant to completion of pleadings, the learned Trial Court framed issues on the pleadings of the parties to initiate trial. Additionally, it directed the parties to the suit to file evidence by way of affidavit along with the list of witnesses and the suit was posted for 11.07.2022. On 11.07.2022, respondent filed evidence by way of affidavit and supplied the copy of the affidavit on the same date to the petitioner. It did not file any list of witnesses, however, sought adjournment on medical grounds which was allowed by the learned Trial



Court and the matter was adjourned to 13.09.2022. On the said date of hearing, the respondent examined only one witness and the plaintiff's evidence was closed. Thereafter, the learned Trial Court listed the matter for defendant's evidence for 02.11.2022. However, on 23.09.2022, the petitioner filed the evidence by way of affidavit and list of witnesses before the Trial Court and also supplied the advance copy of the same to the learned counsel for the respondent. It is not disputed that the parties did not comply with the directions dated 28.03.2022 of the learned Trial Court to file their list of witnesses, nonetheless, the same was filed on 23.09.2022 i.e., before the next date of hearing being 02.11.2022 before the learned Trial Court.

16. The learned counsel for the petitioner has strongly submitted that no prejudice shall be caused to the respondent in case he is allowed to examine the witnesses as one of the witnesses namely Mr. Sanjay Pathak is already named in paragraph 3 of the preliminary objections of its written statement, which is already in the knowledge of the respondent. Moreso, the other witness Mr. Ravi Kumar Gaur Karmakar has been cited as a witness in the list of witnesses furnished by the petitioner to the respondent on 23.09.2022.

17. Undoubtedly, it was expected that the petitioner should have filed its list of witnesses as per directions of the Court to get the witnesses required to be summoned to be examined. However, in view of the circumstances as mentioned above coupled with the fact that the petitioner had filed the list of witnesses before the date of hearing fixed for 02.11.2022 when his evidence was to be recorded, in the interest of justice, the list of witnesses filed on his behalf is permitted to be taken on record. Additionally, he is



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afforded only one opportunity to examine its witnesses on the date to be fixed by the learned Trial Court subject to cost of Rs. 20,000/- to be paid to the respondent before the learned Trial Court. It is abundantly made clear that except for the date of hearing which shall be fixed by the learned Trial Court for recording of defendant's evidence, no further opportunity shall be afforded to the petitioner in case he fails to examine the witnesses on his behalf on the date fixed by the learned Trial Court.

18. Having considered the above, the petition is allowed. Pending application stands disposed of.

SHALINDER KAUR, J.

JULY 01, 2024
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