



2024: DHC: 3640



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

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Judgment reserved on: 05.02.2024
Judgment pronounced on: 06.05.2024

+ CM(M) 213/2024, CM APPL. 6704/2024—stay

RAJESH DHAMIJA & ORS.

..... Petitioners

Through: Ms.Vertika Sharma, Mr.Mayur
Srivastava and Mr.Kunal Goswami,
Advocates.

versus

INDER KUMAR DHAMIJA & ORS.

..... Respondents

Through: Ms.Sonali Malhotra, Advocate for R-
1.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. The present petition under Article 227 of the Constitution of India impugns the order dated 27.01.2024 passed by the Additional District Judge-02, North West, Rohini Courts, Delhi in CS DJ 579051/2016 titled as “*Inder Kumar Dhamija vs Vidya Dhamija & Ors*” whereby the learned Trial Court dismissed an application under Section 151 of the Code of Civil Procedure, 1908 (hereinafter “CPC”) as well as an application under Section 151 of the CPC read with Order XVIII Rule 17 of the CPC. The petitioners are the defendants and the respondent no.1 is the plaintiff before the learned Trial Court.



2. The respondent no.1 herein preferred a suit for partition under the claim of a benami transaction between his father and step mother. It is the case of the respondent no.1 that his father had sold the self-acquired property bearing No.AH-70, Shalimar Bagh, Delhi and that his father purchased another property bearing No.AP-47, Shalimar Bagh, Delhi by way of a benami transaction in the name of the petitioner no.2 as well as the step mother of the respondent no.1.

3. That during trial, once the respondent no.1/plaintiff had filed its evidence and completed evidence, the petitioner no.2/defendant no.2 proceeded to file her evidence, which was completed on the same day. On the next date of hearing, i.e. 04.10.2023, the newly engaged counsel preferred an application under Order VII Rule 11 of the CPC stating that the suit was barred under the Benami Transactions (Prohibitions) Act, 1988 (hereinafter “the Act”) , which came to be dismissed on the same date.

4. Upon engaging a new counsel again, the counsel advised the petitioners to file an application under Order VII Rule 11 of the CPC on the ground of pecuniary jurisdiction of the Court. The said application was disposed of vide the order dated 08.12.2023. Thereafter the defendant's evidence was closed.

5. The petitioner thereafter engaged another new counsel and preferred two applications; an application under Section 151 of the CPC for the review/modification of the order dated 08.12.2023 regarding closing the right of the defendant no.3 to lead evidence and an application under Order



XVIII Rule 17 read with Section 151 of the CPC for recalling of the plaintiff for further examination of behalf of the defendant no.3.

6. On 16.01.2024, arguments on the application were heard and on 27.01.2024, vide the impugned order, both the aforementioned applications filed by the petitioners were dismissed with a cost of Rs.10,000/- on the ground that these applications are frivolous and were dilatory tactics adopted by the petitioners.

7. Ms. Vertika Sharma, learned counsel for the petitioners submits that the Trial Court has failed to appreciate the fact that the petitioners do not reside in India and were reliant on the advice of their counsel therefore the Trial Court has erred in observing that petitioners were adopting dilatory tactics by changing counsels and filing frivolous applications which have been dismissed.

8. It is submitted that the learned Trial Court did not appreciate certain documents the petitioners sought to file with their evidence and dismissed the application with the prejudicial reasoning of delaying the case. Learned counsel placed reliance on the case titled as *Deepak vs Ramesh Sethi* in CM(M) 306/2022.

9. To the contrary, Ms. Sonal Malhotra, learned counsel for respondents submits that the impugned order does not suffer from any jurisdictional error as the learned Trial Court had given the petitioners sufficient opportunity to lead their evidence, however, due to the conduct of the petitioners in engaging new counsels, the same could not be done. The



learned counsel places reliance on the judgement of this Court in the case of *Shashi Sehdev vs Narender Kumar Sharma* [2022 LawSuit (Del) 1799].

10. The learned counsel for the respondents submits that the petitioners have delayed the entire case on account of not producing the bank accounts of the father of the petitioners no.1 & 3, to establish the source of funds to purchase the property bearing No. AP-47, Shalimar Bagh, Delhi.

11. It is submitted that the petitioners are seeking that petitioner no.1 be allowed to appear as a witness in the case and along with the evidence affidavit, the petitioner no.1 seeks to bring on record certain documents, which are not a part of the court record. It is submitted that under the provisions of Order VIII Rule 1A of the CPC, parties are required to file all documents which in their power and possession along with the written statement, which the petitioners have failed to do. Therefore, at this stage the petitioners cannot introduce fresh documents on record.

12. Evidently, respondent no. 1 has filed a suit for partition, declaration and permanent injunction in respect of property bearing number AP-47, Shalimar Bagh, Delhi wherein the petitioner no. 1 has been arrayed as defendant no. 2, his mother i.e., petitioner no. 2 is defendant no.1 and his sister i.e., petitioner no. 3 is defendant no. 3.

13. Apart from the above, there are two more defendants i.e., Dr. Ashok Dhamija, arrayed as defendant no. 4 and Smt. Reena Khurana, arrayed as defendant no. 5. The suit has been contested by all the defendants and written statements were filed. The learned Trial Court framed issues on the pleadings of the parties on 30.03.2017 and the case was posted for



recording the evidence of the plaintiff/respondent no. 1. A list of witnesses was filed by respondent no. 1 and he also filed his evidence affidavit with respect to the recording of examination in chief. His cross examination was conducted and came to be concluded on 23.03.2018 on behalf of the defendants. Apart from that respondent no. 1 also examined some official witnesses from State Bank of India. Pertinently, the petitioners had filed an application under Order XVIII Rule 17 CPC read with Section 151 CPC before the learned Trial Court for leading the evidence of petitioner no. 1, Sh. Rajesh Dhamija for which a fresh evidence affidavit has been placed on record. They also sought permission to place on record certain documents i.e., income tax records and certificate of Smt. Vidya Dhamija, the petitioner no. 2.

14. Needless to say, no application has been moved on behalf of petitioner no. 3 to seek leave of the court to file the aforesaid additional documents on record. Furthermore, respondent no. 1 has been cross examined on behalf of petitioner no. 3 on 23.03.2018. The petitioners have also not given a plausible reason for bringing respondent no. 1 in the witness box again.

15. To justify its claim to summon respondent no. 1 afresh for further cross-examination under Order XVIII Rule 17 CPC read with Section 151 CPC, the petitioners have taken a plea that respondent no. 1 had taken considerable time to conclude its evidence, therefore an opportunity should be granted to the petitioners to further cross examine respondent no. 1. The evidence of respondent no. 1 was earlier closed and subsequently, respondent no. 1 reopened its evidence, which was allowed vide order dated



29.05.2021 and ultimately same was closed on 21.11.2022. The submissions of the petitioners is that after closing of its evidence, the petitioners took fresh advice from another counsel and thus, moved an application for further cross-examination of the respondent no. 1 as the new counsel after going through the certified copies, was of the opinion that essential aspects of the case had not been raised while cross-examining respondent no. 1. It was submitted that such information was needed from respondent no. 1 to clarify the real position of the issues.

16. Needless to say, the petitioners have not disclosed the questions that were needed to put before respondent no.1 during his further examination and a vague application has been preferred by the petitioners seeking further cross examination of respondent no. 1 before the learned Trial Court. Even before this Court, the petitioner has raised three questions regarding which it seeks to cross-examine respondent no. 1 further, which are as under:-

- “i. How the Gift Deed and Will of Smt Vidya Dhamija/Step mother of the Inder Kumar Dhamija (Plaintiff in Suit) was received by Inder Kumar Dhamija, when the same was always in possession of Vidya Dhamija and her children?*
- ii. How the Gift Deed and Will of Smt. Vidya Dhamija was Exhibited before the Court as PW1/11 and PW1/12 and were not marked, specially when the originals were always in the possession of Smt. Vidya Dhamija and her children?*
- iii. Who told Inder Kumar Dhamija (Plaintiff in Suit) about the Benami transaction and when?”*

17. The questions proposed to be asked are equally vague, specifically the questions being at sr. no. (ii) & (iii).



18. The position of law has been clarified by the learned co-ordinate bench of this Court in the case of ***Shashi Sehdev vs. Narender Kumar Sharma*** (supra), which reads as under:-

“13. The resultant legal position is that, whether under Order XVIII Rule 17 or Order XVIII Rule 17 read with Section 151 of the CPC, a party may be permitted to recall a witness for further examination or cross examination if (i) there exists any doubt, remaining after the recording of the evidence of the said witness that has already taken place, which is required to be clarified or (ii) after the evidence of the witness has been recorded, the party seeking recall has come across evidence on which he could not lay his hands earlier, or (iii) evidence in regard to the conduct or action of the other party has come into existence.

14. The decision in Ram Rati11 makes it perfectly clear that the recall of a witness is not to be permitted to fill up omission in the evidence already led by the witness, or to fill up any lacuna or omission in the evidence of the witness which has already been recorded.

15. The ground on which the petitioner has, in her application under Order XVIII Rule 17, sought recall of PW-2 for further cross examination, clearly, envisages filling of a lacuna or omission in the evidence of PW-2, recorded during cross examination. The learned ADJ has also correctly observed that the only ground on which the said plea has been made is that the earlier Counsel who was prosecuting the matter, by inadvertence, failed to ask certain questions which, according to the Counsel who has later taken up the case, were relevant. Such requests, if accommodated, would result in endless protraction of matters and would frustrate expeditious disposal of proceedings.”

19. It is to be noted that the evidence of respondent no. 1 was concluded on 23.03.2018. The petitioners were being represented by a common advocate throughout the trial. Further, all of a sudden, petitioner no. 1 changed his advocate and moved an application under Order VII Rule 11 CPC through the new advocate, which came to be dismissed by the learned Trial Court. It is clear that the petitioners have not disclosed any cogent reason for not moving an application for further cross-examination of respondent no. 1 i.e. PW-1 since 23.03.2018. Therefore, in absence of any



valid reason, a further cross examination of respondent no. 1 cannot be permitted as it would delay the proceedings of the case. Hence, the impugned order dated 27.01.2024 vis-à-vis dismissal of application under Order XVIII Rule 17 of the CPC does not require any interference from this Court.

20. To consider the other submission of the petitioners regarding permitting them to lead their evidence in defence, it is clear from Trial Court proceedings that while the defendant's evidence was being led by the petitioners, the respondent no. 1 had moved two applications in between, one under Order XVIII Rule 17 CPC and another Order XI Rule 2 & 14 CPC. The applications were allowed by the learned Trial Court and the case got relegated to the stage of plaintiff's evidence and finally plaintiff's evidence was closed on 21.11.2022, therefore, it is only following that the petitioners effectively got a chance to lead their evidence in defence.

21. On 26.05.2023, one witness i.e. DW-1 was examined and the matter was listed for further defendant's evidence on 04.10.2023 on which date, the petitioner had moved application under Order VII Rule 11 CPC but did not file any evidence affidavit to lead his evidence in defence. The application was dismissed on 04.10.2023 and the matter was posted for leading defendant's evidence on 08.12.2023, on which date defendant's evidence was closed.

22. Undoubtedly, petitioner no. 1 should have been diligent and should have filed his evidence affidavit on record, however, in the interest of justice, one opportunity is granted to the petitioner no. 1 to lead defendant's



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evidence on the date already fixed before the learned Trial Court or any other date convenient, as per its Board, to the learned Trial Court.

23. In view of above, the impugned orders dated 08.12.2023 and 27.01.2024 are modified and set aside to the extent that petitioner no. 1 is granted an opportunity to lead its entire defence evidence, subject to cost of Rs.25,000/- to be paid by petitioner no. 1 to the respondents before the learned Trial Court on the next date of hearing. Consequently, the petition along with pending application is disposed of.

SHALINDER KAUR, J.

MAY 06, 2024/ss