



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

% ***Judgment reserved on: 05.04.2024***
Judgment pronounced on: 22.04.2024

+ CM(M) 347/2023, CM APPL. 10498/2023—stay

SHACHI HATA INDIA PRIVATE LIMITED Petitioner

Through: Mr. Manish Sharma, Ms. Shivangi
Agnihotri, Mr. Manav G. Thomas and
Mr. Shailesh Chauhan, Advs.

versus

GKW RETAIL SOLUTIONS PRIVATE LIMITED Respondent

Through: Mr. Rajiv K. Garg and Mr. Shiven
Banga, Advs.

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 09.02.2023 passed by the Additional District Judge-07, West, Tis Hazari Courts, Delhi in Suit No.914/2017 whereby the learned Trial Court dismissed an application filed by the petitioner under Order XVIII Rule 17 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter "CPC"). The petitioner herein is the defendant and the respondent herein is the plaintiff before the learned Trial Court.

2. The parties entered into a contract for the supply of goods, the respondent herein being a company engaged in the business of manufacturing and marketing steel products. The petitioners herein through



its authorized representatives approached the respondent for the purchase of goods at its office in Mundka Udyog Nagar, Delhi. The petitioner then purchased goods from the respondent from time to time on the basis of purchase orders. As per the respondent/plaintiff, a sum of Rs.3,33,983/- was outstanding on account of goods sold to petitioner/defendant and that the petitioner/defendant was further liable to pay interest at 24% per annum as per the terms on the sale invoice, on an outstanding amount beyond the period of 30 days from the supply of goods.

3. On 04.08.2017, the respondent herein filed a suit for recovery of money for an amount of Rs.3,33,983/-. The petitioner thereafter on 07.07.2018 filed his written statement whereby it was stated that the respondent had failed to supply the goods as per the specifications of the purchase order and that the goods were delivered late and were not of good quality. On 29.04.2019, the evidence affidavit of the respondent/plaintiff witness was filed. On 19.12.2019, the PW1 was cross examined in part and thereafter on 04.02.2020, the PW1 was further cross examined and the PW2 was examined in chief and his cross examination was deferred.

4. Due to the COVID pandemic, the matter was adjourned on various occasions as the cross examination of a witness was not permissible on virtual hearings. The matter then came up on 15.07.2022 wherein the Trial Court closed the right of the petitioner/defendant to cross examine PW2 and the matter was listed for the evidence of the petitioner/defendant. On 02.09.2022, due to the non-availability of the counsel, the learned Trial Court closed the right of the petitioner to lead evidence.

5. Aggrieved by the decision of the learned Trial Court, the petitioner filed an application for the recalling the orders dated 15.07.2022 and



02.09.2022, stating that the counsel for the petitioner had not appeared on only two occasions and regularly appeared otherwise. On 09.02.2023, the learned Trial Court while dismissing the application filed by the petitioner under Order XVIII Rule 17 read with Section 151 of the CPC observed that the petitioner had various opportunities to conduct the cross examination of the plaintiff's witnesses and as it did not do so, the application be dismissed. Vide the impugned order, the petitioner's right to cross examine the witnesses of the respondent/plaintiff as well as the right to lead defence evidence on behalf of the petitioner were closed.

6. The learned counsel for the petitioner states the cross examination could not be conducted owing to the pandemic. It is submitted that even on 15.07.2022, there were multiple COVID cases throughout Delhi and the petitioner was a victim. Further, as per the notice 322/RG/DHC/2020 dated 15.08.2020, cross examination of the witnesses during virtual hearings was not permitted.

7. It is submitted that on 15.07.2022, the counsel was on his legs before another court and therefore could not reach on time. Similarly, on 02.09.2022, the counsel for the petitioner awaited the courier containing the application under Order XVIII Rule 17 read with Section 151 of the CPC sent by the Hyderabad law firm and due to the delay in the courier service, he could not get the same on time.

8. Conversely, the learned counsel for the respondent submitted that the petitioner has failed to take appropriate recourse for its grievances within the statutory period of limitation and that the order dated 15.07.2022 has attained finality. The counsel further submits that the application filed by the petitioner under Order XVIII Rule 17 read with Section 151 of the CPC is



frivolous and no cogent reason as to why the petitioner did not appear has been given.

9. It is submitted that the petitioner has clandestinely averred in its petition to seek recall of all the witnesses of the respondent, however the prayer clause is devoid of any such relief qua recall of witnesses. The learned counsel submits that the impugned order is not devoid of merits and is to be upheld.

10. Pertinently on 29.04.2019, the evidence by way of affidavit of PW1 Mr. Shreesh Sharma was filed on behalf of the respondent, however, the same was not tendered in evidence and the copy of the affidavit was furnished to the other side on the said date of hearing, the matter was listed for recording the evidence of the respondent for 24.07.2019. On the said date of hearing as the witness of the respondent was not available and even the respondent was not available, the matter was listed for 17.10.2019. The examination in chief of PW1 was conducted on 17.10.2019 but the cross examination was deferred for want of time, the matter was listed for 19.12.2019. On the said date of hearing, the evidence affidavit of another witness, Mr. Muna Nand Jha was filed, a copy was supplied and PW1 Mr. Shreesh Sharma was partly cross examined on behalf of the petitioner, and a further cross examination was deferred at the request of the learned counsel for the petitioner. The matter came to be adjourned for 18.01.2020 for further cross examination of PW1. On 18.01.2020 due to personal difficulty of learned counsel for the petitioner, the matter was adjourned to 04.02.2020 and the adjournment was not opposed on behalf of the respondent. On 04.02.2020, PW1 was cross examined and discharged. PW2 was examined in chief and cross examination was deferred at the request of the learned



counsel for the petitioner. The matter then came to be fixed for 24.03.2020. It appears that perceptibly on account of COVID pandemic, the matter could not be taken up on 24.03.2020 and was taken up on 08.09.2020 through video conferencing, however, the matter further was postponed for PE on 03.12.2020 in view of the COVID pandemic.

11. Subsequently on 03.12.2020, it was adjourned to 04.03.2021. However, the matter was taken up on 25.08.2021 as the cases were being adjourned enbloc due to the COVID pandemic. On 25.08.2021, the matter was listed for cross examination of PW1 and remaining PE on 12.11.2021. Once again, the matter was not taken up on the said date of hearing but was taken up on 15.07.2021 and when the petitioner was not present, the learned Trial Court closed his right to cross examine PW2 and listed the matter for DE on 02.09.2022. On the said date of hearing as neither the petitioner appeared nor supplied the affidavit in evidence, his right to lead DE was closed. Subsequent thereto, the application moved on behalf of the petitioner under Order XVIII Rule 17 read with Section 151 CPC, recalling the previous orders dated 15.07.2022 and 02.09.2022 was dismissed as the court was not satisfied with the reasons assigned on behalf of the petitioner.

12. The learned counsel for the petitioner submitted that on 15.07.2022, the counsel could not appear as he was held up in another court, owing to which the right of the petitioner to cross examine PW2 was closed. Similarly, on 02.09.2022, the counsel could not appear due to traffic jam and reached the court at about 11 am and he was informed that the matter was already adjourned for 26.09.2022.

13. The submission of the respondent is that the conduct of the petitioner is not only negligent but callous in cross examining the witnesses of the



respondent and producing its own witness. It was also submitted that very conveniently, the petitioner had tried to shift the burden solely on the outbreak of COVID pandemic whereas on the subsequent two dates of hearing when the courts were functioning normally, it failed to appear and to cross examine PW2. The petitioner also failed to furnish copy of the evidence affidavit of its witness to the respondent, which clearly establishes that the petitioner was not interested to pursue its remedies assiduously.

14. There can be no doubt that the conduct of the litigant should not be negligent. Appearance in the court has to be made either by a party in person or by a recognised agent or by a pleader. Therefore, the litigant is required to diligently pursue its case and not to delay the proceedings in any manner.

15. The crux of the matter is that initially, the case was adjourned either due to non furnishing of copy of evidence affidavit of PW1 and PW2 to the petitioner and on one occasion the witness of the petitioner was not available. It is also not disputed that with effect from 15.03.2020 to 28.02.2022, the courts were not functioning normally due to COVID pandemic and were functioning either through video conferencing or hybrid mode. In the meanwhile, for some time, only the urgent matters were being taken up.

16. In light of the aforesaid and in the interest of justice, the impugned order dated 09.02.2023 is set aside and only one opportunity is granted to the petitioner to cross examine PW2 and similarly a single opportunity is afforded to it to lead entire Defendant's Evidence (DE), subject to cost of Rs. 15,000/- to be tendered to the respondent before the learned Trial Court on the next date fixed before it. The date for cross examination as well as



2024:DHC:3110



for the DE shall be fixed by the learned Trial Court as per its convenience, however, the dates shall be given keeping in mind that the case is an old case pending before it. Apart from granting only two dates of hearing, one for cross examination of PW2 and another for DE, no other opportunity shall be afforded to the petitioner either for cross examination of PW2 or for leading DE on behalf of the petitioner.

17. With the above observations, the petition along with pending application stands disposed of.

SHALINDER KAUR, J.

APRIL 22, 2024
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