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

% ***Date of Decision: 04th November, 2024***

+ **CM(M) 470/2023 & CM APPL. 14019/2023**

SH.JOGINDER SINGH

.....Petitioner

Through: Mr. M.S.Bammi with Ms. Lovee
Tyagi and Ms. Meenakshi Tyagi,
Advocates (through V.C.)

versus

SH.KULDEEP SINGH AND OTHERS & ANR.Respondents

Through: Mr. Umesh Suri, Advocate.

CORAM:

HON'BLE MR. JUSTICE MANOJ JAIN

J U D G M E N T (oral)

1. The point raised in the present petition seems to be very short.
2. The petitioner herein is plaintiff before the learned Trial Court, who has filed a suit seeking partition.
3. It needs to be highlighted that when the case was at the stage of plaintiff's evidence, though the plaintiff Joginder Singh had submitted his evidence-affidavit and also entered into witness box, the learned Trial Court made observation raising concern about his being in fit state of mind to depose before the Court. Reference be made to order dated 23.11.2019.
4. Be that as it may, thereafter, an application was moved from the side of the plaintiff under Order XVI Rule 1(3) read with Section 151



CPC praying therein that instead of plaintiff, his wife may be permitted to enter into witness box. Reason assigned was mental illness and memory loss of plaintiff on account of surgery undergone by him. It also needs to be supplemented, right here, that such fact was brought to the knowledge of the court by his wife even on 29.05.2017. Though, the learned Trial Court had asked the plaintiff to place on record documents showing the exact ailment with which he was allegedly suffering, no such document was ever placed on record.

5. Fact remains that such application was, eventually, allowed by the learned Trial Court vide order dated 22.09.2022. Simultaneously, the plaintiff was burdened with a cost of Rs.15,000/-, half of which was to be paid to the defendant and the balance to be deposited with the *Army Central Welfare Fund*.

6. Thereafter, when the matter was taken up by the learned Trial Court on 25.01.2023, it noticed that there was no documentary proof to show that the cost of Rs.7,500/- had been deposited with *Army Central Welfare Fund*. There was also a request for adjournment from the side of the plaintiff on the ground that their counsel was not available and, therefore, the plaintiff was not in apposition to lead his evidence in the absence of their such counsel. However, the learned Trial Court closed the right of the plaintiff to lead further evidence, particularly, in view of the numerous opportunities which the plaintiff had already been given.

7. The abovesaid order dated 25.01.2023 is under challenge.



8. The petition has been opposed and a comprehensive reply has been filed by Sh. Suri, learned counsel for the respondents. Para 17 of such reply would, clearly, indicate that numerous opportunities had, in fact, been granted to the plaintiff which he did not seem to avail of in the desired manner.

9. The issues were framed way back on 24.03.2015 and thereafter, for one reason or the other, the plaintiff could not get himself examined.

10. Be that as it may, it is already noticed that when the statement of the plaintiff was being recorded in the Court, the learned Trial Court itself observed that he was not looking in fit state of mind and it was in the above said peculiar factual background that the plaintiff had to move an application seeking permission to examine his wife. It was submitted that the plaintiff had suffered *memory loss* and, therefore, he was not in a fit state of mind to make deposition and, therefore, his wife had sought permission to enter into witness box.

11. At the same time, it needs to be stressed that the learned Trial Court was fully conscious and mindful of the fact that it was a suit for partition and the parties were siblings and, therefore, such suit, in the nature of partition, should rather be adjudicated on merits and in case there was some delay, the other side could always be compensated with cost.

12. It was with the above said good objective that the learned Trial Court had granted permission to his wife to enter into witness box and



to file evidence affidavit.

13. After such application was allowed, on the first available date i.e. 25.01.2023, since the counsel for the plaintiff was not available and since there was nothing to indicate that the cost had been cleared *in toto*, the learned Trial Court was constrained to close the plaintiff's evidence.

14. Though the plaintiff seems to be pursuing his suit for partition in a little bit casual manner, it can't be disregarded that he was not in a fit state of mind even as per the observation recorded by the court and moreover, it was only the first opportunity for his wife to have filed an affidavit and to have got herself examined, on which date her counsel was not available, which resulted in closure of PE.

15. Keeping in mind the above peculiar fact, this Court, in the interest of justice, deems it fit and proper to grant one last and final opportunity to the plaintiff, *albeit*, subject to cost.

16. Resultantly, the present petition is allowed while permitting the plaintiff to examine his wife, in terms of his own application moved under Order XVI Rule 1(3) read with Section 151 CPC.

17. The next date before the learned Trial Court is stated to be 06.12.2024.

18. The evidence affidavit of wife of the plaintiff shall, if not already filed, be filed before the learned Trial Court on or before 06.12.2024 with advance copy to opposite counsel and she would also



make herself available before the learned Trial Court on 06.12.2024. It is expected that her counsel also appears before the learned Trial Court that day so that there is no further delay in the matter. It will be upto the learned Trial Court to assess whether the cross-examination of such witness can also be conducted on the same date or not. However, at the cost of repetition, it is clarified that the plaintiff would be permitted to avail one opportunity in this regard. For causing delay in the matter, the plaintiff is burdened with further cost of Rs.10,000/-, which would also be cleared on the next date of hearing i.e. 06.12.2024 before the learned Trial Court. Admittedly, the plaintiff would also place on record the proof regarding clearance of previously imposed cost upon him.

19. The petition stands disposed of in the aforesaid terms.

20. Copy of the order be given dasti under the signatures of Court Master.

(MANOJ JAIN)
JUDGE

NOVEMBER 04, 2024/st