



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

% *Judgment reserved on: January 15, 2024*
Judgment pronounced on: March 11, 2024

+ CM(M) 664/2023, CM APPL. 20670/2023 (stay)

SMT. PUSHPA DEVI & ANR. Petitioners

Through: Mr. Raghav Kapoor, Mr. Ranu,
Ms. Kajal Tyagi, Advs. with petitioner
in person.

versus

SH. PAWAN SEHRAWAT @ FOJI & ORS.

..... Respondents

Through: Mr. J.K. Kalia and Mr. Dhruv Kalia,
Advs.
Mr. Tushar Sannu, St. Counsel for
MCD with Mr. Devvrat Tiwari, Adv.

CORAM:
HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. The present Civil Miscellaneous (Main) petition no. 664/2023 has been filed by the petitioners under Article 227 of the Constitution of India for setting aside the impugned order dated 06.03.2023 passed by the learned Civil Judge-01, Patiala House Courts, New Delhi (hereinafter referred to as "Trial Court") in CS SCJ 326/2017 titled as "*Smt. Pushpa Devi & Anr vs. Sh. Pawan Sehrawat & Ors*" whereby the learned Trial Court allowed the application filed by respondent no. 1 & 2 herein under Section 151 of Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") for seeking permission to lead defence evidence and recalling of order dated 23.11.2022.



2. For the purpose of adjudication of the present petition, the relevant facts are that petitioner nos. 1 & 2 are husband and wife and owners of the properties bearing no. F/1 & F/7 respectively in the khasra no. 847/1 situated in Harijan Basti, Mahipalpur village, Vasant Vihar, New Delhi.

3. It is the case of the petitioners that they were enjoying the peaceful possession of their properties till 20.01.2017 and thereafter, on the same day, respondent no. 1 & 2 accompanied by labourers started digging the common road in front of the property of petitioner no.1 in order to erect an illegal wall. Thereby causing hindrance in the free movement of petitioner no. 1 and her family members. Further, the extension of the said wall is from the unauthorised enclosed room of 17 sq. yards which was built by respondent no. 1 & 2 on the common public road measuring 18 feet wide outside the house of the petitioners.

4. Subsequently, on 05.04.2017, the petitioners filed a civil suit bearing no. CS SCJ 326/2017 before the learned Trial Court for permanent and mandatory injunction along with an application for ad-interim injunction under Order XXXIX Rule 1 & 2 read with Section 151 CPC to restrain respondent no. 1 & 2 from raising or extending any illegal wall. Moreso, the petitioners are seeking mandatory injunction to stop the unauthorised digging in front of their house and permanent injunction directing respondent no. 1 & 2 to observe status quo against any unauthorised construction after demolishing the same.

5. Respondent no.1 & 2 filed their written statement wherein they denied all the allegations and submitted that the property on which the construction is being raised is their own. On 09.06.2017, the learned Trial Court allowed



the application under Order XXXIX Rule 1 & 2 CPC and restrained the respondent no. 1 & 2 from extending or raising the wall any further. Moreover, the respondent no. 1 & 2 were also directed to maintain the status quo till the final disposal of the suit. Thereafter, respondent no. 1 & 2 in their defence, filed an application under Order VII Rule 11 CPC for rejection of plaint which was dismissed vide order dated 09.11.2017.

6. Respondent no.1 & 2 filed another application under Order XXXIX Rule 4 CPC for vacation of stay which was also dismissed by the learned Trial Court on 17.03.2018. Subsequently, respondent no. 1 & 2 filed an appeal bearing MCA no. 01/18, under Order XLIII read with Section 104 CPC challenging the orders dated 09.06.2017 and 17.03.2018. Vide order dated 22.10.2018, the learned Appellate Court dismissed the appeal. After exhausting all the remedies, respondent no. 1 & 2 cross examined the petitioners and its witnesses at length, wherein the petitioners' evidence was concluded after four long years on 23.04.2022.

7. Thereafter, the learned Trial Court directed respondent no. 1 & 2 to file their evidence by way of an affidavit. On the next date of hearing, respondent no. 1 & 2 failed to file their evidence and the learned Trial Court provided them another opportunity to file the same. On 10.10.2022, last opportunity was granted to respondent no. 1 & 2 for leading their evidence subject to a cost of Rs. 5000/-. Despite numerous opportunities, respondent no. 1 & 2 did not lead their evidence and eventually their right was closed on 23.11.2022.

8. On the next date of hearing, the final arguments were addressed by the petitioners and respondent no.3 herein. Subsequent thereto, the learned



Trial Court closed the right of respondent no. 1 & 2 to lead arguments for not filing their evidence but gave them liberty to file written submissions and re-notified the matter for the purpose of reserving it for judgment.

9. On 06.03.2023, respondent no.1 & 2 did not file their written submissions instead moved a miscellaneous application under Section 151 of CPC seeking to recall the order dated 23.11.2022. On the same day, the learned Trial Court granted another opportunity to respondent no. 1 & 2 to lead defence evidence subject to cost of Rs. 20,000/- to be paid to the petitioners on or before the next date of hearing. The petitioners being aggrieved by the impugned order dated 06.03.2023 have filed the present petition.

Submissions by the petitioners

10. Learned counsel for the petitioners submitted that the learned Trial Court failed to appreciate that the application under Section 151 of CPC was filed by respondent no. 1 & 2 at a belated stage. Moreso, the respondent no. 1 & 2 were given several opportunities to file their evidence by way of affidavit, but the respondent no. 1 & 2 miserably failed to do the same for which no valid reason has been given. Further, false claims have been made in the application moved under Section 151 of CPC which do not appeal to reason.

11. It is submitted that despite the learned Trial Court noting in the penultimate paragraph that no grounds are made out on merit, yet it had granted an opportunity to the respondent no. 1 & 2 to lead evidence subject to cost of Rs.20,000/-.



12. Learned counsel also submitted that the application was filed on the same day when the impugned order was passed i.e. 06.03.2023 without affording any opportunity to the petitioners to file any reply thereto. Therefore, the learned Trial Court has committed judicial impropriety and acted with material irregularity and as such, the impugned order deserves to be set aside.

Submissions by the respondent no. 1 & 2

13. On the other hand, respondent no. 1 & 2 refuted the submissions of the petitioners. Learned counsel submitted that the learned Trial Court has rightly allowed the application filed by respondent no. 1 & 2 under Section 151 of CPC. It is the case of respondent no. 1 & 2 that Mr. Sagar Sherawat, son of respondent no. 1 was taking care of the matter and used to give regular instructions to the learned counsel representing respondent no. 1 & 2 before the learned Trial Court. However, Mr. Sagar was dealing with depression due to which he could not take care of the matter and stopped giving instructions to the learned counsel. In absence of any instructions, the learned counsel did not appear before the learned Trial Court.

14. Further, it is submitted that respondent no. 1 & 2 are the only witnesses in the present matter and they do not want to lead the evidence of any other witness other than themselves, thus, the petition be dismissed.

Analysis and conclusion

15. It is clear from the impugned order that respondent no. 1 & 2 have acted irresponsibly and even with negligence. The conduct of respondent no. 1 & 2 certainly has invited criticism, yet the learned Trial Court exercised its



discretion in favour of respondent no. 1 & 2 by granting them a single opportunity to lead defence evidence subject to cost. It is also true, when respondent no. 1 & 2 failed to lead evidence in defence, a right has accrued in favour of the petitioners which is disturbed by opening the evidence of the respondent no. 1 & 2.

16. In the present case, three opportunities were granted to the respondent no. 1 & 2 on 08.08.2022, 10.10.2022 and 23.11.2022 to lead their evidence in defence. But they neither filed list of witnesses nor placed evidence affidavits on record. The record reveals that on 08.08.2022, the learned Presiding Officer was not available, thus matter was listed on 10.10.2022 for recording evidence. Pertinently, the evidence could not be recorded on 10.10.2022 and 23.11.2022 due to fault of respondent no. 1 & 2.

17. Undoubtedly, the inherent power under Section 151 of CPC, subject to its limitations can be invoked in appropriate cases to re-open the evidence or to recall witness for further examination. Needless to say, the power under Section 151 of CPC will have to be used with circumspection and in cases, only where it is absolutely needed and not intended to be used routinely, otherwise it will defeat the very purpose of various amendments made to CPC to expedite trials.

18. In the present case, the plea of the respondent no. 1 & 2 before the learned Trial Court for not-examining their witnesses on two occasions i.e. on 10.10.2022 and 23.11.2022 was that the son of respondent no.1, who was following the trial of the case was undergoing depression therefore he could not be vigilant with respect to the proceedings of the case.



19. Having considered the aforesaid circumstance, the learned Trial Court has rightly exercised its discretion by permitting respondent no. 1 & 2 to avail one opportunity for leading their evidence.

20. Thus, subject to payment of cost of Rs. 20,000/- imposed by the learned Trial Court & previous cost of Rs. 5,000/- within a week from today, respondent no. 1 & 2 shall conclude its evidence on a single date to be fixed by the learned Trial Court. It is made clear that on the said date of hearing, no further opportunity for leading the evidence shall be granted on whatsoever ground.

21. With above observations, the petition along with pending application, if any, is dismissed.

SHALINDER KAUR, J.

MARCH 11, 2024