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

+ CM(M) 629/2022, CM APPL. 29642/2022--stay

SUSHILA DEVI & ORS.

..... Petitioners

Through: Mr. Mahipal Singh Rajput, Adv.

versus

ASHOK KUMAR MITTAL

..... Respondent

Through: Mr. Siddharth Mullick and Mr.
Sachin Bandooni, Advs.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

ORDER

25.04.2024

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1. The supervisory jurisdiction of this Court under Article 227 of the Constitution of India has been invoked against the order dated 09.03.2022 passed by the learned Additional District Judge-01, East, Karkardooma Courts, Delhi (hereinafter referred as 'Trial Court') in CS No.2058/2016 titled as "*Sohan Lal (Since Deceased) through his LR's vs Ashok Kumar Mittal*" whereby the right of the petitioners to lead their evidence was closed. The petitioners herein are the legal heirs of the deceased plaintiff and respondent herein is the defendant before the learned Trial Court.

2. The dissension that has led to the filing of the Civil Suit before the learned Trial Court is that the respondent had received a sum of Rs.5,00,000/- from the deceased plaintiff on a false pretext that he would be made a partner in the business the respondent was carrying out in his Gandhi



Nagar shop. Despite repeated requests, the respondent failed to return the money, compelling the deceased plaintiff to send a legal notice to respondent dated 08.04.2009, thereby calling upon the respondent to pay the outstanding amount of Rs.6,88,240/-.

3. A Civil Suit bearing No.1116/2019 was filed by the deceased plaintiff, titled as "*Sohan Lal vs Ashok Kumar Mittal*". Thereafter, pleading in the suit were completed and the examination in chief as well as the cross examination of the deceased plaintiff was conducted on 23.07.2011. Due to certain typographical errors in the plaint, an amendment application was moved on behalf of the plaintiff, which came to be allowed and thereafter amended pleadings were completed by both the parties. The examination in chief of the plaintiff came to be recorded on 11.02.2015 and the plaintiff was partly cross examined on 15.04.2015.

4. Due to the ill health of the plaintiff, he was admitted in hospital for several months in 2015 and succumbed to his illness on 13.08.2015, leaving behind the petitioners and one Raj Kumar as his legal heirs. The aforementioned Civil Suit came to be dismissed on account of non-appearance of the plaintiff on 06.01.2016. Thereupon, petitioners herein became aware of the aforesaid suit and filed an application for the substitution of the legal heirs, which came to be allowed and the suit was restored. The petitioners pursued the present case, which came to be listed on 15.10.2018 for plaintiff evidence.

5. The matter was came to be adjourned on different dates due to various reasons recorded by the court and on 28.08.2019, due to non-appearance of the counsel, the learned Trial Court closed the plaintiff evidence. The



petitioners then proceeded to move an application under Section 151 of the Code of Civil Procedure, 1908 (hereinafter “CPC”) to recall the order dated 28.08.2019. Owing to the COVID pandemic, the matter was taken up through video conferencing on various occasions.

6. On 09.03.2022, arguments on the application filed by the petitioners were heard and the learned Trial Court dismissed the application under Section 151 of the CPC while stating that the issues were framed in February 2011 and that the plaintiff could not conclude his evidence, despite ample opportunities being granted over the span of eight and a half years. The matter was then listed for final arguments on 20.07.2022.

7. The learned counsel for the petitioners submits that the order passed by the learned Trial Court is erroneous insomuch as the petitioners were actively pursuing the case before the learned Trial Court and that on 15.08.2018, none appeared on behalf of the respondent and on 27.03.2019, and the Presiding Officer was on leave. Further, the counsel for the respondent on 01.05.2019 sought time to examine the court record and for the cross examination of the plaintiff’s witnesses.

8. The learned counsel further submits that the learned Trial Court has erred in stating that the petitioners possess a lethargic attitude as the case was adjourned due to the death of the plaintiff and for amending the plaint. Further, the learned Trial Court while deciding an application for setting aside such an order, should consider the reason for non-appearance of the party. The petitioners state that due to matrimonial talks in the family, they could not present in court. It is prayed that one opportunity may be granted for conducting the cross examination of plaintiff’s witnesses as their



evidence is already on record.

9. The learned counsel for the respondent has contradicted the submissions made by the petitioners and states that there is no infirmity with the order of the learned Trial Court order. Further, it is submitted that the petitioners were granted multiple opportunities to lead their evidence, however due to their lackadaisical attitude, it was not completed.

10. Submissions heard, the impugned order and record perused.

11. The deceased plaintiff Shri Sohan Lal filed a civil suit in July 2006 against the respondent for recovery of Rs.6,88,240/- with *pendent lite* and future interest. On the pleadings of the parties, learned Trial Court framed the issues on 02.02.2009. On 30.04.2011, the deceased plaintiff Shri Sohan Lal filed his evidence by way of affidavit and was partly cross examined on behalf of the respondent on 23.07.2011. In the meanwhile, the plaintiff filed an application for amendment of the plaint which came to be allowed on 03.04.2013. On 29.05.2013, the respondent filed an amended written statement with counter claim. Thereupon, issues were reframed vide order dated 27.11.2013 as the pleadings with respect to the counter claim were included. Shri Sohan Lal filed fresh evidence affidavit on 26.11.2014 which was partly tendered on 11.02.2015. On 15.04.2015, he was partly cross examined. The record further reveals that on 06.01.2016, the suit was dismissed in default for non-appearance of Shri Sohan Lal who had expired due to long illness and the suit came to be restored on the basis of application moved on behalf of LR's on 15.10.2018. The trial resumed and the legal heirs being petitioner nos.1 & 3 filed their evidence affidavit on 15.10.2018. No one appeared on behalf of the respondent on the said date



and the matter was adjourned on 23.03.2019. However, on the said date of hearing, the learned Presiding Officer was on leave and the suit was further adjourned to 01.05.2019. On the said date of hearing, petitioner nos.1 & 3 appeared before the learned Trial Court for their cross examination to be conducted on behalf of the respondent which could not happen as the copies of the affidavit which could not be furnished to the respondent on 15.10.2018 due to non-appearance of the respondent were furnished on the said date of hearing. The matter was further deferred for cross examination for 28.08.2019.

12. It is the case of the petitioners that on 28.08.2019, they came late to the Court on account of some marriage in their family and came to know from the court staff that the matter was adjourned on 30.10.2019. On the said date of hearing, the petitioners came to know that their evidence was closed on 28.08.2019. It is submitted on behalf of the petitioners that the petitioners had been diligently following and appearing in their case, however, due to certain circumstances beyond their control, they could not be cross examined. The application moved by them to recall the impugned order dated 28.08.2020 erroneously came to be dismissed by the learned Trial Court which refused to appreciate the aforementioned reasons for not recalling of their cross examination.

13. It is undisputed that the civil suit pending before the learned Trial Court is an old case, instituted in July, 2019. However, the entire burden for non-cross examination of the petitioners could not be directly shifted on the shoulders of the petitioners as it is clear from the record that on account of reasons as mentioned hereinabove, the cross examination could not be held.



14. In these circumstances, a single opportunity is granted to the petitioners to conduct cross examination subject to cost of Rs.10,000/- to be paid to the respondent on the date before the learned Trial Court.

15. In view of above, petition as well as pending application, if any, stands allowed and disposed of.

SHALINDER KAUR, J.

APRIL 25, 2024
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