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

+ CM(M) 2128/2023

M/S L.A. COLLECTION Petitioner

Through: Mr. C.M. Grover, Adv.

versus

M/S VIDHU TEXTILES Respondent

Through: Mr. Naveen Kumar Goyal, Adv.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

ORDER

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19.01.2024

1. The present petition has been preferred under Article 227 of Constitution of India read with section 151 CPC to set aside the order dated 08.11.2023 passed by learned District Judge (Commercial Court- 01), Shahdara, Karkardooma Court, Delhi [in short 'the learned Trial Court'] whereby the learned Trial Court dismissed the application under Order XVIII Rule 17 CPC and also declined to review its order dated 24.05.2023 in Civil Suit (Comm.) No.360/2021 titled as "M/s Vidhu Textiles vs. M/s L.A. Collection" filed by the respondent herein. The petitioner herein is the defendant before the learned Trial Court.

2. The relevant facts for disposal of the present petition are that the respondent herein has filed a civil suit (commercial) for recovery under Order XXXVII of Code of Civil Procedure, 1908 [in short 'CPC'] for a sum of Rs. 26,76,890/- against the petitioner herein. However, subsequent thereto, the aforesaid suit was converted into an ordinary suit which is being



contested by the petitioner herein before the learned Trial Court. On the pleadings of the parties, vide order dated 16.07.2022, the issues were framed and the matter was set for recording of evidence of the respondent through the Local Commissioner [in short 'LC']. The respondent concluded the recording of his evidence, however, the petitioner was also directed to get his evidence recorded through LC on 16.08.2022, subject to payment of fee fixed at Rs. 20,000/-. The petitioner due to financial difficulty could not pay the said fees and he was granted another opportunity on 01.03.2023 to get his evidence recorded through LC. Again citing financial constraints, the petitioner moved an application under Section 151 CPC which was treated by the learned Trial Court under Order XVIII Rule 17 CPC and was dismissed vide order dated 24.05.2023.

3. The learned counsel for the petitioner submits that the aforesaid order has grossly prejudiced the defence of the petitioner as he has to only examine himself in the witness box and the crucial right is being denied to him. He further submits that earlier he was unable to afford the fee of the LC therefore, he could not get his evidence recorded through LC which he brought to the notice of the learned Trial Court by moving an appropriate application but the same was not considered, though he was always willing to get his evidence recorded before the learned Trial Court. Subsequent thereto, he was burdened with the cost of Rs. 5000/- vide order dated 01.03.2023 while granting him a further opportunity to lead further defence evidence which he had already paid to the respondent. Learned counsel submits that the petitioner is diligently pursuing his defence in the aforesaid suit filed by the respondent but due to the reasons stated hereinabove, he could not get his evidence recorded though he has always been willing to



stand in the witness box. He further submits that after dismissing the so called application under Order XVIII Rule 17 CPC on 08.11.2023, the learned Trial Court had afforded an opportunity to the respondent to address arguments on the amendment application moved by him after granting four opportunities to him. Therefore, the case is at the stage of reply and arguments on the amendment application moved on behalf of the respondent, and not fixed for final arguments, thus by giving another opportunity to the petitioner to lead his evidence in no manner is going to delay the proceedings/trial of the suit. The learned counsel further submits that he is ready to abide by any condition that may be imposed by this Court as his financial condition is better now and he is now able to get his evidence recorded even through LC.

4. The petition is strongly opposed on behalf of the respondent. Learned counsel for the respondent submits that the petitioner has concealed material facts. He has not disclosed about his conduct that time and again he was granted opportunity for leading his evidence but deliberately he did not appear before the LC and delayed the proceedings of the suit. He submits that in the impugned order the learned Trial Court has recorded the conduct of the petitioner and thereafter had declined to grant him opportunity to lead his evidence. Therefore, there is no illegality in the impugned order and the petition be dismissed.

5. Be it, noted that the learned Trial Court had listed the matter for plaintiff's evidence on 08.08.2022 and for defendant's evidence on 16.08.2022. In the meanwhile, the case was transferred and came to be tried by the learned District Judge, Commercial -01. Subsequent thereto, the learned Trial Court vide order dated 21.11.2022 with the consent of parties



appointed a LC to record the evidence of the parties and refixed the date for recording of the evidence of the parties as well as for final arguments to be addressed by the parties. The learned Trial Court has observed in the impugned order as under:-

“...But, the said order was not complied by the defendant. In the meantime, an application under Order XI Rule 1 r/w Sec. 151 CPC was also filed, on behalf of the plaintiff, on 09.01.2023 and the same was dismissed by this court vide order dated 01.03.2023. Vide order, dated 01.03.2023, the dates for recording the evidence of the defendant and for addressing the final arguments were again refixed.

11. Perusal of the record further shows that in compliance of the order dated 21.11.2022, the Ld. Local Commissioner had recorded the evidence of the plaintiff, on 09.12.2022. But, despite opportunity and despite filing his affidavit, the defendant failed to pay the fees of the Ld. Local Commissioner and failed to examine his witnesses before the Ld. Local Commissioner.

12. Perusal of the record further shows that vide order dated 01.03.2023, another opportunity was granted to the defendant for examination of his witnesses, subject to imposition of a cost of Rs.5,000/-on him. But, the said order was again not complied by the defendant.”

6. The power to recall a witness is referable under Order XVIII Rule 17 of the CPC. The position of law is well settled that the power to recall a witness under Order XVIII Rule 17 of the CPC can be exercised by a Court either on its own motion or on an application filed by any of the parties to the suit, however, such power is to be invoked not to fill up the lacunae in the evidence of the witness, which has already been recorded but to clear any ambiguity that may have arisen during the course of the examination of the witnesses.



7. It is pertinent to mention that the petitioner had requested for grant of an opportunity to examine his witness and had also moved an application on 11.10.2023 for review of the order dated 24.05.2023. The learned Trial Court declined his request and dismissed the review application by imposing cost of Rs. 3000/-.

8. No doubt the learned Trial Court has passed a detailed order after perusing the entire record and disallowed the application under Order XVIII Rule 17 CPC as well as the review application. However, the petitioner has submitted that since he could not afford the fee of the LC, therefore, was not able to get his evidence recorded before the LC which probably was not considered by the learned Trial Court. It is also not disputed that the respondent herein has moved an application seeking amendment of his own suit, therefore, at this stage, the delay in the proceedings cannot be attributed to the petitioner.

9. In these facts and circumstances, the petition is allowed, subject to the cost of Rs. 10,000/- to be paid by the petitioner to the respondent within a week.

10. The learned Trial Court shall fix a date as per its convenience within two weeks of passing of this order for recording of the evidence of the petitioner before the learned Trial Court. Only a single opportunity shall be granted and the matter shall not be adjourned in any manner on whatsoever grounds.

SHALINDER KAUR, J.

JANUARY 19, 2024 / SU