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

+ **CS(OS) 186/1980**

TARUN KUMAR & ORS.

..... Plaintiffs

Through: None.

versus

AJAY KUMAR & ORS.

..... Defendants

Through: Ms. Neha Tandon and Mr. RB Phookar, Advocates for D-2.
Ms. Malavika Rajkotia, Mr. Ravi Awasthi and Ms. Trisha Gupta, Advocates for D-3 and D-4 along with LR of D-3.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

% **25.04.2022**

O.A. 13/2022 (u/ Chapter II Rule 5 of the Delhi High Court (Original Side) Rules, 2018 on behalf of the Legal Heirs of Defendant No. 3 and Defendant No. 4 for waiver of the cost imposed of Rs. 1 lakh vide Order dated 05th April, 2022 passed by the Ld. Joint Registrar)

1. The Appellants (viz. LRs of deceased Defendant No. 3 and Defendant No. 4) impugn the Order passed by the Ld. Joint Registrar dated 05th April, 2022 whereby cost of Rs. 1 lakh have been imposed on them for not filing their affidavits by way of examination-in-chief.

2. Defendant No. 3 viz. late Sh. Vijay Kumar [D3W1] was under cross-examination by the Plaintiffs before the Ld. Joint Registrar since August 2019. He was cross-examined for 19 days and 973 questions were put to him



spanning a period of three months. Unfortunately, before his statement could be completed, he passed away on 11th February, 2020 and is now survived by his LRs viz. Smt. Veena Kumar (his wife), Sh. Manu Kumar, and Smt. Nirja Shivani Chatrath (his two children). The Appellants moved an application on 17th February, 2020 for bringing the LRs of deceased Defendant No. 3 on record and were substituted. Since then, the matter has been now pending at the stage of recording the evidence on behalf of the LRs of deceased Defendant No. 3.

3. Ms. Malavika Rajkotia, counsel for the Appellants contends that since March 2020 on account of the COVID-19 pandemic and the consequent restricted functioning of the Court – the suit did not progress as expected. For this reason, the Appellants (LRs of deceased Defendant No. 3) were not able to contact their counsel and thus, the counsel was also unable to attend the matters scheduled on 16th September, 2020, 15th January, 2021 and 26th March, 2021. In April 2021, the Appellants contracted COVID-19 and the wife of deceased Defendant No. 3 also hospitalized for that reason. Thereafter, in October 2021, she even had to undergo hip replacement surgery and required intensive care.

4. Apart from the afore-noted reasons as stated in the application, Ms. Rajkotia urges that the Ld. Joint Registrar imposed cost which is entirely disproportionate to the default, side-stepping the provisions enshrined in the Code of Civil Procedure, 1908 [*hereinafter* “CPC”]. To buttress her arguments, she drew the attention of the Court to Section 35-A of the CPC and the decision of the Supreme Court in **Ashok Kumar Mittal v. Ram**



Kumar Gupta.¹

5. The Court has heard the counsel for the Appellants and perused the impugned Order, relevant portion whereof reads as under: -

“ Perusal of record shows that 6-7 adjournments have already been granted to defendant No.3 to lead evidence. Despite giving indulgence, no affidavit of evidence of D3 has been filed till date.

An application is stated to have been filed by defendant No.3 yesterday only which is not yet listed, which shows callous attitude of the party and their intention to delay the case. Had there been any bonafide intention to move any such application, it would have been filed well in time and not just a day before the case was listed for evidence. It is worthwhile to mention here that even on the last date of hearing, the conduct of defendant No.3 was noted and cost of Rs 5,000/- was imposed for not filing any affidavit. Today, the cost has been paid but still there is no affidavit.

The present case was instituted in the year 1980 and we are in the year 2022. It so appears that the application which is being referred to by learned counsel for defendant No.3 is an another attempt to delay the proceedings of the case as defendant No.3 had expired long back and the application could have been moved immediately thereafter. If not then, atleast the same could have been moved immediately after the last date of hearing i.e. on 06.01.2022. Though, no indulgence is warranted in the facts and circumstances, as discussed above, however, keeping in view the fact that LRs of deceased defendant No.3 wishes to get their application decided, one last and final opportunity is granted to lead evidence, subject to cost of Rs 1 Lac to be paid to plaintiffs.

Put up for recording of evidence of defendant No.3 on 08.07.2022.”

6. In light of the foregoing observations and findings made by the Ld. Joint Registrar, at the outset the Court has queried from the counsel whether the Appellants have filed affidavits by way of evidence. The answer is in the negative. The Court has further queried as to whether the Appellants would like to lead evidence. In response, the counsel states that an application

¹ (2009) 2 SCC 656. Reliance placed on paras 5 and 8.



under Section 151 of CPC [I.A. 5601/2022 on behalf of LR's of deceased Defendant No. 3, *inter-alia*, seeking entire evidence of deceased Defendant No. 3 be read as defence of the Defendant No. 3] is pending consideration and therefore, no call can be taken until the same is decided.

7. In the opinion of the Court, the stand of the Appellants is evasive. The Appellants do not exhibit the intention to lead evidence. The pendency of the afore-noted application cannot be a reason for Appellants not to lead evidence. The suit has to proceed further, and the Appellant have to elect if they would like to lead evidence or not. In such circumstances, and also keeping in view that the instant suit is of the year 1980, no infirmity can be seen in the impugned Order. The Ld. Joint Registrar has noted that despite 6 to 7 adjournments granted to Defendant No. 3 to lead evidence, no affidavit of evidence has been filed on their behalf, till date.

8. In view of the foregoing, the Court does not find any good ground to interfere in the impugned Order. That said, since the Appellants have cited medical reasons, which perhaps would have contributed to the delay in the matter, the only indulgence the Court is willing to extend is to reduce the cost to Rs. 75,000/-. It is ordered accordingly.

9. With the above directions, the present appeal stands disposed of.

SANJEEV NARULA, J

APRIL 25, 2022/nd