

**(2023) 11 DEL CK 0174**

**Delhi High Court**

**Case No:** Civil Miscellaneous (Main) No. 1266 Of 2023, Civil Miscellaneous Application No. 40388 Of 2023

Pawan Saraswat

APPELLANT

Vs

Munish Gupta & Ors

RESPONDENT

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**Date of Decision:** Nov. 21, 2023

**Acts Referred:**

- Constitution of India, 1950 - Article 227
- Code of Civil Procedure, 1908 - Section 114, 151, Order 18 Rule 17
- Limitation Act, 1963 - Section 5

**Hon'ble Judges:** Manmeet Pritam Singh Arora, J

**Bench:** Single Bench

**Advocate:** P. N. Dhar, Anmol Singh, Puneet Yadav

**Final Decision:** Disposed Of

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### **Judgement**

Manmeet Pritam Singh Arora, J

1. This petition filed under Article 227 of Constitution of India impugns the order dated 22.03.2023 passed by the Additional Senior Civil Judge, Central District, Tis Hazari Courts, Delhi ('Trial Court') in civil suit no. 3298/2017, titled as 'Munish Gupta v. Pawan Sarawat and Ors.', whereby the Respondent's application dated 14.02.2022, filed under Order XVIII Rule 17 read with Section 114 and 151 of Code of Civil Procedure, 1908 ('CPC') and Section 5 of the Limitation Act, 1963, for recall the order dated 15.12.2021 was allowed.

1.1. The Trial Court vide order dated 15.12.2021 closed the Respondent i.e., plaintiff's right to lead evidence.

1.2. The Petitioner herein is the defendant no.1, the Respondent No. 1 is the plaintiff and Respondent Nos. 2 to 4 are defendant nos. 2 to 4 respectively, in the civil suit. The suit has been filed seeking permanent, mandatory injunction and damages with

respect to first floor of property no. 1933 (Old No. 29/50 & 29/51), Aargraa fountain, Delhi-06 ('suit property').

2. Learned counsel for the Petitioner states that the Trial Court failed to deal with the preliminary objection raised by the defendant no.1, pointing out that the application filed for recalling of the order dated 15.12.2021 was not supported with the affidavit of the plaintiff; and in fact, the affidavit has been sworn by his counsel, which is impermissible in law.

2.1. He states that in the facts of this case, the plaintiff has been grossly negligent in prosecuting his suit in as much as though the issues were framed on 09.07.2019, the plaintiff has till date not served his witness's evidence affidavit on the Petitioner herein.

2.2. He states that the callousness of the plaintiff is also evident from the fact that the costs imposed on him vide impugned order dated 22.03.2023 have not been tendered to the Petitioner till date. He states on this ground alone, the impugned order should be set aside.

3. This Court has considered the submissions of the counsel for the defendant and perused the record.

4. This Court finds merit in the submissions of the counsel for the Petitioner that the application dated 14.02.2022 filed under Order XVIII Rule 17 of CPC could not have been maintained in the absence of an affidavit of the plaintiff himself.

5. It is, in fact, alarming to note that the plaintiff, who's right to lead evidence was closed on 15.12.2021 and thereafter, reopened vide impugned order dated 22.03.2023, has till date failed to either lead his witness evidence or pay the costs.

6. However, since substantial time has elapsed since the passing of the impugned order, this Court is not inclined to set aside the order as it would further delay trial.

7. However, the learned Trial Court is requested to exercise its jurisdiction under Order XVII CPC, in case the plaintiff fails to lead evidence on 19.12.2023 i.e., the next date of hearing already scheduled before the Trial Court.

8. The Trial Court is further requested to pass appropriate directions against the Respondent No.1 for non-compliance of the impugned order dated 22.03.2023.

9. In the facts of this case, considering that the Plaintiff has been negligent in pursuing his suit, the Trial Court is requested to bear this fact in mind during final adjudication and more specifically, the claim of damages for the period of 2019 to 2024 (pendente lite), considering the fact that the plaintiff has itself not prosecuted the suit.

10. The Trial Court is further requested to complete recording of the plaintiff's evidence within a period of two (2) months from 19.12.2023 i.e., the date already

fixed before the Trial Court, failing which, the rights of the plaintiff to lead evidence shall stand closed.

11. The defendant is directed to e-mail a copy of this order to the plaintiff and the counsel for the plaintiff appearing before the Trial Court.

12. The defendant is at liberty to place this order on record of the Trial Court by filing an appropriate application within two (2) weeks.

13. With the aforesaid directions, the petition is disposed of. Pending applications are also stands disposed of.