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

% Reserved on: 02nd June, 2022
Decided on:18th July, 2022

\+ **CS(OS) 587/2017**
& I.A.No.10136/2018

SMT. POONAM BHANOT ... Plaintiff

Represented by: Ms. Deepika V. Marwaha, Sr.Adocate with Ms.Meghna Katari, Ms.Raunika Johar and Ms.Ishita Nagpaul, Advocates.

versus

VIRENDER SHARMA & ORS ...Defendants

Represented by: Mr.Prabhjit Jauhar and Ms.Tulika Bhatnagar, Advocates for D-1.
Mr.Prosenjeet Banerjee, Ms.Samapika Biswal and Ms.Prachi Datta, Advocates for D-2 to 4.

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

J U D G M E N T

MINI PUSHKARNA, J.

I.A. No. 4997/2022 (on behalf of plaintiff under Order XVIII Rule 1 read with Section 151 of CPC)

1. This application seeks a direction to defendant nos. 3 and 1 to lead their evidence first instead of the plaintiff doing so.

2. Brief facts of the case are that the plaintiff is one of the daughters of late Sh. Devender Nath Sharma and has filed the present suit for partition, injunction, mandatory injunction and rendition of accounts claiming 1/6th share in the properties and assets owned by her late father. In the plaint, the plaintiff averred that the father of the parties had expired on 17.09.2016 without a Will. Thus, it was claimed that the parties to the suit who are all legal heirs of late Sh. Devender Nath Sharma are in joint possession of the following properties, from which the share is claimed by the plaintiff ;

a) Free hold residential property D-14-A/18, Model Town, Delhi-110009.

b) Commercial Flat No.203, K-1 Building, 412 Gurgaon Mehrauli Road, Sector 14, Gurgaon, Haryana.

c) Plot No.A-12, Jhilmil lndustrial Area, G.T. Road Shahdara, Delhi-110032.

3. On the other hand, defendant no. 1, who is brother of the plaintiff has stated in his written statement dated 13.12.2017 that there was an unregistered Will dated 12.07.2016 drawn by father of the parties, by which their father had bequeathed his residential property bearing No. D-14-A/18, Model town, Delhi-110009 and commercial flat no. 203, K1 Building, 412, Gurgaon Mehrauli road, Sector-14, Gurgaon, Haryana to the defendant no. 1 exclusively. The defendant no. 1 had further submitted in his written statement that the father of the parties had revoked his earlier Will dated 05.09.2014.

4. Contrary to the aforesaid facts, the written statements filed on behalf of defendant no. 2 and defendant no. 3, sisters of the plaintiff and defendant no. 1, stated that their father had executed a registered

Will dated 15.01.2013. In this Will their father had given a fair share of his properties and assets to his daughters and also to defendant no. 1. Their father subsequently executed another registered Will dated 05.09.2014 in which he had given a similar share of his property and assets to his daughters as in the Will dated 15.01.2013 and also to defendant no. 1 with slight modification. The original of the Will dated 05.09.2014 was given by their father to Sh. Anil Bagai, resident of 42, Bungalow Road, New Delhi who was the chartered accountant of their late father. This fact was disclosed to the defendant no. 3 by her late father. The chartered accountant was instructed to declare the Will to all the children of late Sh. Devender Nath Sharma after his demise.

5. In view of the pleadings and the respective stands of the parties, the following issues were framed by this Court vide order dated 12.07.2019 :-

> *"1. Whether late Shri Devender Nath Shatma legally and validly in a sound disposing mind executed his last Will and Testament dated 12.07.2016? lt so, its effect? OPD-1*
> *2. Whether late Shri Devender Nath Sharma validly and legally executed his last Will dated 5.9.2014? If so, its effect? OPD3*
> *3. Whether the relinquishment deed dated 17.3.2008 pertaining to the industrial plot No.12 Block A, Jhilmil Industial Area, G.T.Road, Shahdara is void ab initio and not binding on the plaintiff? OPP*
> *4. Whether the plaintiff has any share in the suit properties, namely, the commercial flat No.203, K-1 Building 412 Gurgaon Mehrauli Road, Sector-l4, Gurgaon; plot at Jhilmil Industial Area, Shahdara Delhi and; property at Model Town, Delhi? If so its effect: OPP*
> *5. Whether the present suit has not been valued*

properly for the purposes of Court Fees and jurisdiction and whether the plaintiff ought to have valued the present suit on the basis of the market value of her alleged share in the suit properties? OPD-1

6. Relief."

6. By way of the aforesaid order dated 12.07.2019, this Court had directed the parties to file list of witnesses within three weeks, with further direction to the plaintiff to file affidavit by way of evidence of its witnesses within three weeks thereafter. Pursuant to this order, the plaintiff filed her evidence by way of affidavit in the year 2019 itself. However, the matter has not proceeded any further thereafter.

7. Subsequent to the aforesaid, the plaintiff filed the present application under Order 18 Rule 1 CPC with prayer that the defendants no. 3 and 1 be called upon to lead their evidence first.

8. It is the stand of the plaintiff that the onus of proving the validity and legality of the last Will dated 05.09.2014, executed by their father was cast upon defendant no. 3 as per issue no. 2. Thus, the onus of issue no. 4 which is on the plaintiff as regards her entitlement of share in the suit properties, can be decided only after defendant no. 3 and defendant no. 1 lead evidence on the issues no. 1 and 2, onus of which is cast upon the defendants no. 1 and 3 respectively.

9. It is contended on behalf of the plaintiff that the initial burden of proof for proving the last true Will of the father is on defendant no. 3, the eldest sister of the plaintiff who is in the true knowledge of the facts of the family affairs. The plaintiff's claim for partition of assets and properties of their father is supported by the defendant no. 3's claim, that the father of the parties had executed registered Will dated

05.09.2014, which according to defendant no. 3 was the last Will of their father.

10. The defendant nos. 2 and 3 have filed on record the registered Wills of their father dated 15.01.2013 and 05.09.2014. As per the last Will dated 05.09.2014 of the father of the parties, he had bequeathed and devised a sum of Rs. 1,00,00,000/- (Rs. 1 crore) in favour of all his four daughters including the plaintiff out of his estate and property bearing no. 18, Plot no. D–14A, measuring 474.75 sq. Yards, Model Town, Delhi-110009. As per the said Will dated 05.09.2014, it is devised that the defendant no. 1 shall be liable to pay the sum of Rs. 1,00,00,000/- (Rs. 1 crore) to the daughters including the plaintiff within one year of testator's demise. It is also devised that if the defendant no. 1 does not make this payment to the daughters of the testator, then in that eventuality the said property shall devolve upon the defendant no. 1 and all the four daughters including the plaintiff, in equal ratio i.e. 1/5th undivided share each. Further, as per the said Will, the flat no. 203,K1 Building, 412, Gurgaon Mehrauli Road, Gurgaon, Haryana has been bequeathed in equal share to the plaintiff and her sisters.

11. Thus, it is averred on behalf of the plaintiff that considering the facts and circumstances of the case, directions should be issued to defendant no. 3 and 1 to lead their evidence first. In support thereof, the plaintiff has relied upon the following judgments:-

(i) Desh Bandhu Vs Harish Bindal, 2001 AIHC 712
(ii) Jagran Vs Basanti Bai, 2001 AIHC 1030
(iii) Vikram Kaushik and Ors Vs Vivek Kaushik, 2011 Law Suit (Del) 3533

(iv) *Rama Krushna Mohanty and Anr. Vs Bala Krushna Mohanty and Ors., 2017 Law Suit (Ori) 582*

(v) *Shradhamani Panda & Ors. Vs Chintamani Panda & Ors., 2018 Law Suit (Ori) 697.*

12. The defendant no. 1 has vehemently opposed the application of the plaintiff. He has contended that the present application is not maintainable and is liable to be dismissed since the same is in the disguise of a Review Petition seeking modification/review of the order dated 12.07.2019 passed by this Court, whereby this Court after framing of issues had directed the plaintiff to file affidavit by way of evidence of its witnesses within three weeks. The order dated 12.07.2019 directing the plaintiff to file affidavit by way of evidence and also of its witnesses, has not been assailed in appeal and therefore, the said order has attained finality.

13. The defendant no. 1 contended that the plaintiff herself had relinquished her share in the property bearing plot no. A-12, Jhilmil Industrial area, GT Road, Shahdara, Delhi-110095 vide a duly registered relinquishment deed dated 17.03.2008, in which she had relinquished her share in favour of defendant no. 1.

14. Defendant no. 1 has also opposed the present application on the ground that the claim made by the plaintiff in the present suit has not at all been admitted by the defendant no. 1 in his written statement. Therefore, the onus lies upon the plaintiff to establish her case. The defendant no. 1 or defendant no. 3 cannot be allowed to begin the recording of the evidence prior to the plaintiff, since plaintiff has to be examined first to prove her case. Further, the present application is by the plaintiff and not defendant, thus, the present application is liable to

be dismissed. To support his contention, the defendant no. 1 has relied upon the judgment in the case of ***Om Prakash Vs Amit Chaudhary and Ors,*** 2019 VII AD (Delhi) 170.

15. On the other hand, counsel appearing on behalf of defendants 2, 3 and 4 has supported the application of the plaintiff. He submits that the Court can direct who will begin the evidence and that provisions of Order 18 Rule 1 CPC do no curb the power of the Court in this regard. He further contends that no one has disputed the Wills as mentioned by the said defendants in their written statements. In a suit for partition, every claimant is a plaintiff, therefore, strict distinction cannot be made in a suit for partition as regards the plaintiffs and defendants. As regards the relinquishment deed, he submits that the property which is subject matter of the relinquishment deed, is not part of the bequest in the Will. He further contends that correction of a procedural order is an inherent power and procedural orders may be corrected by the Court and the same does not amount to review of the earlier order. To support his contentions, counsel for defendants 2, 3 and 4 has relied upon the following judgments :-

(i) Grindlays Bank Ltd. Vs Central Government Industrial Tribunal and Others., 1980 (Supp) SCC 420

(ii) Liberty Footwear Company Vs M/s Force Footwear Company & Ors., (2009) 41 PTC 474

(iii) Srihari Vs Syed Maqdoom Shah & Ors., (2015) 1 SCC 607

(iv) Samarendra Nath Sinha & Anr. Vs Krishna Kumar Nag, (1967) 2 SCR 18

16. I have heard the counsels for the parties and perused the record.

17. At the outset, reference may be made to Order 18 Rule 1 of

CPC which reads as under:-

> *"1. Right to begin. - The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin."*

18. In the present case, the plaintiff has submitted in the plaint in para 5 that the father of the parties expired on 17.09.2016 without a Will. On the other hand, defendant no. 1 in his written statement has categorically stated that the father of the parties did not die intestate, but had made a testamentary disposition of all his assets. The defendant no. 1 in para 5 of the written statement under the head *preliminary objections* has clearly stated that the father of the parties had executed a Will dated 12.07.2016 bequeathing the residential property in Model Town and commercial plot in Gurgaon in favour of defendant no. 1. He has further stated that by way of the Will dated 12.07.2016, father of the parties revoked his earlier Will dated 05.09.2014. Thus, defendant No. 1 admits to Will dated 05.09.2014 by way of which the plaintiff was bequeathed certain share in the suit properties; though as per him, the same stands revoked.

19. Perusal of the written statement on behalf of defendant no. 3 discloses that in para 15 it has been stated that father of the parties executed a registered Will dated 15.01.2013, in which he gave a fair share of his properties and assets to his daughters and also to defendant no. 1. In para 16 of the written statement of defendant no. 3, it is submitted that father of the parties executed another registered Will dated 05.09.2014 in which he had given a similar share of his

property and assets to his daughters as in the Will dated 15.01.2013 and also to defendant no. 1 with slight modification. Para 16 of the written statement of defendant no. 3 is reproduced for ready reference:-

> *"16. Late Sh Devender Nath Sharma executed another registered WILL dated 5-9-2014 in which he had given a similar share of his property and assets to his daughters as in the WILL dated 15-1-2013 and also to defendant no. 1 with slight modification. The Original of this WILL was given by Late Sh Devender Nath Sharma to Sh Anil Bagai, 42 Bunglow Road New Delhi the Chartered Accountant of Late Sh Devender Sharma and this fact was disclosed to defendant no.3 by her father Late Sh Devender Nath Sharma. The Chartered Accountant was instructed to declare the WILL to all the children of Late Sh Devender Nath Sharma after his demise."*

20. It has further been submitted in paras 19, 21, 22 and 23 of the written statement of defendant no. 3 as follows:-

> *"19. Late Sh Devender Nath Sharma has NOT executed any other WILL after the registered WILL dated 5-9-2014 and any WILL being produced otherwise by any one is forged and fabricated and does not carry his wishes nor his signatures .*
> *20. .....*
> *21. The Chartered Accountant Sh Anil Bagai went to the house of Late Sh Devender Nath Sharma at Model Town on or about 22-9-2016 to declare the registered WILL dated 5-9-2014 where he found only defendant no. 1. Defendant no. 1 told the Chartered Accounted that all his sisters are out of town and assured him that he would inform all of them and took the original of the registered WILL from the Chartered Accountant.*
> *22. The replying defendant was never informed by defendant no. 1 about the registered WILL dated 5-9-2014. Defendant no.3 had been requesting defendant no. 1 to*

partition the properties of the Late Sh Devender Nath Sharma as per his WILL but he had been dili dallying.
23. When it came to knowledge that the plaintiff filed this suit for partition the defendant no. 3 approached the Chartered Accountant who informed her that he has already given original of the WILL dated 5- 9-2014 to defendant no. 1 about 6-7 days after the demise of Late Sh Devender Nath Sharma and also told that he had promised to tell about it to all the sisters. A copy of the WILL dated 5-9-2014 was also obtained from him."

21. Perusal of the aforesaid written statements on behalf of the defendants categorically show that defendants 2 to 4 have not denied the claim of the plaintiff. The said defendants have disputed the fact that their father died intestate, but they do not dispute the claim of the plaintiff regarding her entitlement in the share in the properties of her father. The said defendants have stated in their reply regarding Will dated 15.01.2013 by their father, which was subsequently revoked by his later registered Will dated 05.09.2014, in which shares in the property was given by their father in favour of the all the four sisters, including the plaintiff herein, as well as defendant no.1, who is the brother of plaintiff as well as defendants 2 to 4.

22. The defendant no. 1 has also not denied the existence of the registered Will dated 05.09.2014, by which all the parties, including the plaintiff herein, were bequeathed shares in the properties owned by their father. The defendant no. 1 in his written statement has put up a case that their father revoked his earlier registered Will dated 05.09.2014 by a subsequent Will dated 12.07.2016, which was unregistered, by which he had bequeathed the properties in Model Town and Gurgaon in his favour. Thus, the defendant no. 1 has

admitted to the existence of the registered Will dated 05.09.2014, by which the plaintiff had also got certain shares from the properties, which are subject matter of partition in the present suit, which as per defendant no. 2 to 4 is the last Will of the father of the parties, though as per defendant no. 1, the same has been revoked.

23. In view of the aforesaid, it is clear that the defendants have set up a case, which if proved, would decide the issues raised in the suit itself. The present suit is a suit for partition filed by one of the sisters. The defendant no. 1 being the brother has denied the share of the plaintiff as well as other defendants who are his sisters on the basis of an unregistered Will dated 12.07.2016. If the defendant no. 1 proves his case regarding the execution of unregistered Will dated 12.07.2016 by the father of the parties, by which properties have been bequeathed in his name, then the case of the plaintiff for partition of suit properties in her favour, would be completely demolished.

24. Likewise, if the defendant nos. 2 to 4, the sisters of plaintiff and defendant no. 1, are able to prove that the registered Will dated 05.09.2014 was the last Will of their father and that he had not executed any other Will after the registered Will dated 05.09.2014, then also the issues raised in the suit will be decided. In case it is proved that the registered Will dated 05.09.2014 was the last and final Will executed by the father of the parties, then the plaintiff will get her share in the property as per the bequeathment in the said Will dated 05.09.2014.

25. Thus, in view of the aforesaid, it is clear that if the defendants are able to prove the issues no. 1 and 2 with respect to which the onus

is on defendant no. 1 and defendant no. 3 respectively, then it will facilitate and streamline the whole trial and also shorten the litigation. If the defendant no. 1 is successful in discharging the onus that Will dated 12.07.2016 was the last Will executed by the father of the parties, then the suit of the plaintiff is bound to fail and she will not be entitled to any relief. Likewise, if defendant no. 3 is able to prove that the father of the parties validly and legally executed his last Will dated 05.09.2014, by which all the parties were endowed with certain shares in the suit properties, then also the whole case will be decided accordingly. There would be no necessity to delve in the further aspects of the matter. Accordingly, it will be in the fitness of things if the defendants are directed to lead evidence first on the issues qua which onus is cast upon them.

26. A Coordinate Bench of this Court in the case of ***Achala Mohan Vs Jayashree Singh***, reported as MANU/DE/0798/2020 has held as follows:-

> *"19. Thus, the consistent view has been that if the Defendant sets up a case, the proving of which, would completely decide the issues which have been raised in the suit itself, then the Defendant under Order XVIII Rule 1 CPC can be directed to lead evidence first.*
>
> .....
>
> *25. The ld. counsel for the Defendant submits that unless and until the Defendant voluntarily opts for leading evidence first, the Court would not have the power to direct so. This would not be in accordance with law inasmuch as the Court has the power to curtail the trial of any suit at the time of framing of issues. The manner in which the issues have been framed in the present case shows that insofar as the issue no.1 and issue no.2, the*

onus has been cast clearly on the Defendant. If the Defendant is able to prove or not prove these issues, the decision in the suit would get quite expedited.

26. Under these circumstances, it is not necessary that in every suit, unless and until, the Defendant opts, the Court cannot direct the Defendant to lead evidence first. The question as to whether who should lead evidence first, would have to be decided by the Court after ascertaining the respective stands of the parties and after seeing as to what are the actual issues which arise for adjudication in the suit itself."

27. In the aforesaid case of *Achala Mohan* (supra), this Court has further held as follows:-

"15. ***In Vikram Kaushik v. Vivek Kaushik (supra)***[*1] *a ld. Single Judge of this Court, after perusing the issues, discussed the question of who should lead evidence first. The Court in the said case held that when the Defendant pleaded oral partition as its defense, the Defendant ought to be directed to lead evidence first. Since the main defense of the Defendant, if proved, would have dis-entitled the Plaintiffs to any relief, the Court directed the Defendant to commence evidence in the said case. Similar was the view taken by various other High Courts in the judgments cited by the Respondents including the Madhya Pradesh High Court in* ***Jagran and Ors. v. Basanti Bai and Ors. (supra)***[*2]*, wherein the Court observed as under:*

> *"8. ...Applying the aforesaid enunciation of law to the obtaining factual matrix it becomes graphically clear that Issue No. 2 (b) is answered in favour of the defendants then the plaintiff's suit is bound to fail, and therefore, the learned Trial Judge has rightly directed the contesting defendants to lead the evidence first."*

16. In ***Purastam @ Purosottam Gaigouria and Ors. v. Chatru @ Chatrubhuja Gaigouria (supra)***[*3]*, the Orissa High Court also observed as:*

"6. In this case, the plaintiff sought partition alleging that the property was joint family property and had not been decided by metes and bounds. The defendant-petitioners placed a previous partition since 1960-61 to defeat the plaintiff's suit. In view of the plea of the defendants that there was a previous partition, the learned Subordinate Judge called upon the defendants to begin. The plaintiff's plea that the property was joint family property having been admitted by the defendants and the latter having pleaded previous partition, the defendants are to lose if neither party adduced evidence, the burden being on the defendants to prove previous partition. Only when the defendants lead some evidence in proof of previous partition, the plaintiff would be obliged to lead evidence in rebuttal. Rightly, therefore, the learned Subordinate Judge called upon the defendants to begin. We, therefore, see no merit in this revision which is accordingly dismissed. There would be no order as to costs."

17. *In* ***Keshavlal Durlabhasinbhai's Firm and Another v. Shri Jalaram Pulse Mills (supra)***[*1]*, the Gujarat High Court observed as under:*

"7. In view of the fact that the plaintiff's claim is substantially admitted and the plaintiff-firm is also prima facie shown to be a registered firm, the trial court has rightly directed the defendant to lead the evidence first. The trial Court is entitled even to record the statements of the parties before framing issues under Order XIV, Rule 1 read with Order X, Rule 2. ...

8. These provisions enable the trial Court to narrow down the controversy and focus the attention of the parties to the barest minimum. In large number of cases, the matters would be expeditiously disposed of. This is a very salutary provision for expeditious disposal of suits and it should ordinarily be resorted to and followed, by all trial courts.

9. In the present case, though this procedure is not followed and though the stage of framing of issues has passed, the trial court has on correct appreciation the rival contentions of the parties come to a proper conclusion that the defendant should lead the evidence first. This order is perfectly legal and proper and no interference is called for on any of the grounds canvassed by the learned advocate for the petitioner. Though the defendant has chosen to deny the claim of the plaintiff in totality, that is a denial without any substance in view of the other admitted facts of receipt of goods, part payments, issuance of cheques and a claim of having made further payments and, therefore, onus lies on the defendant. The denial of registration of partnership is also prima facie frivolous. The plaintiff has given the registration number of the partnership firm of the plaintiff."

18. *In* ***Krishnakumar v. V. Seethalakshmi (supra)***[*1]*, the Madras High Court observed as under:*

"7. In this case too, the burden of proof lies on the party, who asserts a particular fact. The particular fact, which is asserted is, whether the property belonged to Narayana Asari absolutely. That fact has been asserted by the plaintiffs and also admitted by the defendants. Therefore, there is no burden of proof on the plaintiffs to prove that fact. Insofar as the onus of proof is concerned, it is held in that judgment, referred to above, that onus of proof by a party would cease, the moment, the opposite party admits the transaction. In this case, the onus of proof is on the defendants to prove the execution of the Will, that has been denied by the plaintiffs. Once defendants are able to prove the Will to the satisfaction of the court, the suit filed by the plaintiffs will be dismissed and there is no necessity to go into the further aspects of the matter, by letting evidence by the plaintiffs.

Considering all these aspects, the Court below initially directed the defendants to lead evidence first and that was properly appreciated, while considering the Review Application. Further, I do not find any infirmity in the order passed by the Court below in the Review Application and there is no error apparent on the face of record to interfere with the same. In the result, the Civil Revision Petition fails and it is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed."

28. In the case of ***Desh Bandhu Vs Harish Bindal***, MANU/DE/0095/2000, this Court has held as follows:-

"7. Petitioner's case is no better on the other issue and suffers from a fallacy on the face of it. Order 18 Rule 1 indeed provides for plaintiff's right to begin the evidence but not the court's obligation to ask the plaintiffs to begin first. There is no impediment for the court to call upon either party to lead evidence first, depending upon the facts and circumstances of the case and the nature of the issues framed. Neither party can insist that the other one should be asked to lead it first. It all depends upon what the Court deems proper in the circumstances. Where it finds that defendant's plea strikes of the root of the case, there would be no hitch in asking him/her to prove such plea first which can lead to disposal of the case. There can be no water tight compartmentalisation in matters of justice and all rules of procedure are designed and directed to achieve and secure ends of justice."

29. Keeping in the mind the aforesaid discussion, the unequivocal position that emerges is that if the defendants set up a case, which if decided, would decide the issues raised in the suit completely, then the defendants can be directed to lead evidence first under Order 18 Rule 1 CPC.

30. The contention raised on behalf of defendant no. 1 that the order dated 12.07.2019 by which directions were given to the plaintiff to lead evidence first, has attained finality in the absence of any appeal against thereto, does not hold any water. The directions as regards the filing of list of witnesses and evidence by way of affidavit, is in the nature of a procedural order. Order 16 CPC deals with summoning and attendance of witnesses, which are procedural in nature. Therefore, this Court has the authority to give necessary directions under Order 18 Rule 1 CPC on the procedural aspect as regards which party will begin the evidence. The order dated 12.07.2019 being a procedural order, this Court has power under Section 151 CPC to issue necessary directions on the procedural aspects. This Court has the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Correction of a procedural order is an inherent power and may be corrected *ex debito justitiae* to prevent the abuse of its process.

31. Hon'ble Supreme Court in the case of ***Grindlays Bank Ltd. Vs Central Government Industrial Tribunal and Ors.***, 1980 (Supp.) SCC 420 held as follows:-

> *"6. We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well-known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the*

Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary."

.....

"13. We are unable to appreciate the contention that merely because the ex parte award was based on the statement of the manager of the appellant, the order setting aside the ex parte award, in fact, amounts to review. The decision in Patel Narshi Thakershi Vs Pradyumansinghji Arjunsinghji is distinguishable. It is an authority for the proposition that the power of review is not an inherent power, it must be conferred either specifically or by necessary implication. Sub-sections (1) and (3) of Section 11 of the Act themselves make a distinction between procedure and powers of the Tribunal under the Act. While the procedure is left to be devised by the Tribunal to suit carrying out its functions under the Act, the powers of civil court conferred upon it are clearly defined. The question whether a party must be heard before it is proceeded against is one of procedure and not of power in the sense in which the words are used in Section 11. The answer to the question is, therefore, to be found in sub-section (1) of Section 11 and not in sub-section (3) of Section 11. Furthermore, different considerations arise on review. The expression 'review' is used in two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the Court in Patel Narshi Thakershi case held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse

of its process, and such power inheres in every court or Tribunal."

32. Similarly, it has been held in a catena of judgments that procedural orders may be corrected by the Court and the same does not amount to review of the earlier order. Reference may be made to the judgment of this Court in the case of ***Liberty Footwear Company Vs M/s Force Footwear Company and Ors.***, 2009 SCC Online Del 2983, wherein it has been held as follows:-

"7. Courts and tribunals during hearing of any case do pass orders fixing and granting the time and giving directions to the parties like file documents, replies, etc. The courts or the tribunal in such cases retain the power to extend the time granted, unless there is a specific bar or prohibition in the Act or the Rules. Time once fixed by the Court or the tribunal is not sacrosanct or the final word. These orders or directions fixing the time for compliance are procedural orders and in terrorem and are passed for a purpose to avoid delay and expedite the proceedings. Courts or tribunals do have the power to extend the period/time fixed by them. Extension of time does not amount to review of the earlier order.

8. There is difference between procedural review and substantive review. As explained by the Supreme court in the case of Grindlays Bank Ltd. versus Central Government Industrial Tribunal 1980 (Supp) SCC 420, the Court or a tribunal have inherent power of procedural review but right to substantive review has to be specifically conferred. In the said case, application for setting aside of ex parte award was held to be maintainable on the ground that it falls in the category of procedural review and cannot be categorized as substantive review. It was observed as under:-

"The Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed there under giving

the Tribunal jurisdiction to do so. But it is a well known rule of statutory construction that a Tribunal or a body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary."

9. The Supreme Court in Mahanth Ram Das versus Ganga Das AIR 1961 SC 882, had examined the question whether the courts have the inherent power to extend the time when a case is not covered by any specific provision. In the said case time for payment of deficient court fee as fixed had expired. The order fixing the time was peremptory. Referring to the powers of the Court to extend the time, when by an earlier order a specific time limit was fixed and had expired, it was observed as under:-

"Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians. Cases are known in which Courts have moulded their practice to meet a situation such as this and to have restored a suit or proceeding, even though a final order had been passed."

10. In Ganesh Prashad Sah Kesari versus Lakshmi Narayan Gupta (1985) 3 SCC 53, the Supreme Court observed that when a time is fixed or granted by a court for doing any prescribed act or thing, the court in its discretion can enlarge the time fixed though the period originally fixed/granted had expired. Time once fixed, does not whittle down the discretion of the court to further extend the time. In the said case the question was whether a court can extend the time to enable a tenant to deposit rent.

11. The Calcutta High Court in Sethia Mining & Manufacturing Corporation Ltd v. Khas Dharmaband Colliery Company Pvt Ltd AIR 1982 Cal 413 examined the question whether after passing an order fixing specific time, the court becomes functus officio and has no jurisdiction to entertain a prayer for extension of time. It was observed that courts in procedural matters do pass conditional or even peremptory orders but these orders are in terrorem for purpose of compelling a litigant to comply with the procedure and avoid prolongation of a suit or proceeding. It would be incorrect to state that the court is rendered powerless to extend time initially granted. Similar view has also been expressed by the Bombay High Court in the case of Marketing and Advertising Associates Pvt. Ltd versus Telerad Private Ltd. (1969) 39 Comp cas 436 (Bom). While dealing with the Companies (Court) Rules, 1959, it was observed that in procedural matters time granted and fixed by the court can be extended. In the said case by a consent order, time was fixed for payment of amounts in a petition for winding up. There was a default. However, referring to Rule 7 of the Company (Court) Rules, 1959, it was observed that power of Courts to extend time applied even to consent orders, as long as the matter is alive and not disposed of. The Division bench quoted with approval the following observations in Haridas Gangalbhai v Vijayalakshmi Navinchnadra Mafatlal, Appeal No 84 of 1956:

> *"Now the principle of law is well settled and does not require much elaboration. The Court has always the jurisdiction to extend time for the*

doing of any act by a party. Section 148 of the Civil Procedure Code deals with those matters which have got to be done under the Code or allowed under the Code, but independently of Section 148 the Court has inherent jurisdiction to extend time for the doing of any order made by the Court, and there can be no question that the Court has jurisdiction to extend the time for payment."

12. The Punjab & Haryana High Court in the case of Hukma and others versus Manga AIR 2003 P&H 287 examined Sections 148 and 149 of the Code and has observed that extension of time to pay court fee when the extended time originally granted has expired, exists and the power to further extend time is not exhausted. The court retains the power to grant further extension. Time in such cases can also be enlarged even where the first extension of time has expired. In United Commercial Bank v. Mani Ram AIR 2003 HP 63 it was observed that when time is fixed by the court and not by any statute, the court retains the inherent power to extend the time. However when time is fixed by a statute and the provision is mandatory then the position may be different.

13. Rules of procedure, it is well settled, are handmaid of justice and are normally treated as directory and not mandatory unless legislative intent is opposite. Most of the procedural rules are enacted with the object to ensure expeditious trial and do not normally impose a prohibition and bar on the power of the court/tribunal to extend time. A prohibition or bar requires a penal consequence which should flow from non-compliance of a procedural provision. In Kailash v. Nankhu (2005) SCC 480: AIR 2005 SC 2441 and Salem Advocate Bar Association, Tamilnadu v. Union of India (2005) 6 SCC 344: AIR 2005 SC 3353 it has been held that there may be many cases where non-grant of extension would amount to failure of justice. The object of procedural rules is not to promote failure of justice. Procedural rules deserve to be read down to mean that

where sufficient cause exists or events are beyond the control of a party, the Court would have inherent power to extend the time."

33. On a holistic reading of the written statements filed by the defendants in the present case and detailed discussion of the law laid down by various Courts, it is considered a fit case where the defendants should lead the evidence first. It is accordingly directed that defendants 2 to 4 will lead their evidence first followed by evidence of defendant no. 1. The defendant no. 5 has already been proceeded *ex-parte*, therefore, no orders are being issued in respect of defendant no. 5. The present application is allowed on the aforesaid terms.

34. The application stands disposed of accordingly.

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35. Perusal of record shows that list of witnesses has already been filed on behalf of defendant no. 2 to 4. Defendants 2 to 4 are directed to file affidavit by way of evidence of their witnesses within four weeks.

36. List on 29th August, 2022 before Joint Registrar for fixing dates for cross examination of witnesses of defendants 2 to 4.

(MINI PUSHKARNA)
JUDGE

JULY 18, 2022*/c*