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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: October 03, 2008
Date of Order: November 03, 2008

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03.11.2008

RADHEY SHYAM

..... Petitioner

Through: Mr. V.C. Rishi and Ms. Mukta Sharma, Advocate

Versus

NIRMAL KANT & ORS.

..... Respondent

Through:

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? *Yes.*
2. To be referred to the reporter or not? *Yes.*
3. Whether judgment should be reported in Digest? *Yes.*

JUDGMENT:

1. The petitioner is aggrieved by an order dated 17th September 2008 whereby the trial court imposed a cost of Rs.20,000/- on the petitioner for not bringing the evidence and seeking adjournment.
2. Brief facts relevant for the purpose of deciding this petition are that vide order dated 21st July 08 the defendant was directed to produce all his witnesses and a cost of Rs.5,000/- was imposed on that day on the defendant for not bringing the evidence. Thereafter, the matter was listed on 17th September 2008. The defendant had also made an application under Order 18 Rule 17 CPC for recalling the plaintiff's witnesses for cross examination. This application was kept pending for arguments. On 17th September 2008 again no affidavit of defendant witnesses had been filed and no evidence was

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produced by the defendant. When the matter was taken up, counsel for the defendant insisted that his application under Order 18 Rule 17 be disposed of first and he may be allowed to lead evidence only later on. The trial court observed that the matter was pending since 1999 and the effort of the defendant was just to delay the proceedings. The defendant had earlier been proceeded ex parte in 2004 and thereafter this ex parte order was set aside. The Court observed that the matter was adjourned for 17th September 2008 with specific instructions to the defendant to file affidavits and lead evidence. However, no affidavit of the witnesses was filed by the defendant and no evidence was led. The Court also made it clear that the defendant should first complete his evidence then only the application under Order 18 Rule 17 shall be heard and decided. On this, counsel for the defendant (petitioner herein) sought one more opportunity which was granted to the defendant subject to cost of Rs.20,000/-, 50% of the cost was to be deposited in Advocate's Welfare Fund of Delhi Bar Council.

3. The petitioner's counsel argued that his witnesses were present but their attendance was not marked. I consider that this kind of argument is a malafide argument. The record of proceedings maintained in the Court is considered as an authentic record. The record of court below shows that no evidence was produced, the counsel for the petitioner cannot be allowed to argue that the witnesses were there but their attendance was not recorded.

4. The other argument of the counsel for the petitioner is that the suit was filed in 1999 and was to be governed by the old un-amended CPC. The examination in chief evidence of the witnesses should be recorded under dictation of the Court and the defendants should not be compelled to file

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examination in chief by way of affidavits. I consider this argument is a baseless argument. The defendant has no vested right in the procedural aspect. Once the CPC stands amended, the proceedings of all suits before the Court are to be governed by the amended CPC. Counsel for the petitioner placed reliance on **2007(1) SCC 765 State Bank of Hyderabad v. Town Municipal Council** wherein the Supreme Court observed that where a suit has been filed in the year 1999, proviso to Order 6 Rule 17 of the CPC shall not apply. The reliance on this judgment by the counsel for the petitioner is misconceived. In this case, the Supreme Court made observations in view of Section 16(2) of the amendment Act of 2002 which made a special provision qua applicability of amendment in Order 6 Rule 17 CPC. No such saving clause has been made qua Order 18 or other Orders of CPC.

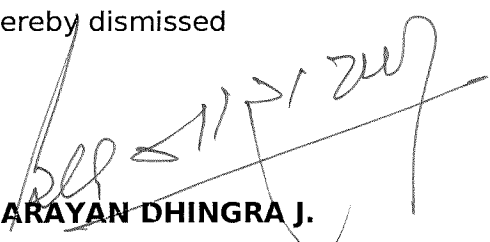
5. The next argument of the petitioner is that the petitioner should be allowed to cross examine the plaintiff's witness by recalling him first and then only the petitioner should be asked to lead defendant's evidence. This argument, is also a baseless argument. An opportunity for cross examination of plaintiff's witness by the defendant was given by the Court below, but the petitioner and his counsel chose not to appear for cross examination of the plaintiff's witness. The Court can give opportunity for cross examination but the Court cannot force a party to cross examine a witness. If a party chooses not appear at the time of cross examination or even if appears, does not chose to cross examine or the counsel does not appear and remains busy in some other case or busy in some personal work, the wheels of justice cannot keep waiting for him and trial cannot remain suspended because the counsel or the party was not coming to the Court.

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6. When a case is fixed in the Court for a particular purpose and for execution of some business like examination of a witness, that business cannot be just brushed aside and postponed because an application has been made by the party. The application made by the party has to be dealt with separately and the business for which the case is fixed has to be executed first unless an exception is provided under law. Just by making an application under some provision of CPC or other Act, the party cannot ask the Court not to proceed with the proceedings and first decide the application.

7. I find no force in this petition. The petition is hereby dismissed

November 03, 2008
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SHIV NARAYAN DHINGRA J.