

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

+ **FAO(OS) NO. 139/2009 and CM No. 5481/2009**

M/s. AGGARWAL PACKERS & LOGISTICS PVT. LTD. ....Appellant  
Through: Mr. L.B. Rai, Advocate.

versus

M/S. DRS LOGISTICS PVT. LTD. ....Respondents  
Through: Mr. Dushyant K. Mahant, Advocate.

**Reserved on : 23<sup>rd</sup> November, 2009**  
**Date of Decision: 25<sup>th</sup> November, 2009**

**CORAM:**

**HON'BLE MR. JUSTICE MUKUL MUDGAL**

**HON'BLE MS. JUSTICE REVA KHETRAPAL**

- |    |                                                                           |     |
|----|---------------------------------------------------------------------------|-----|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not?                                    | Yes |
| 3. | Whether the judgment should be reported in the Digest?                    | Yes |

%

**JUDGMENT**

**MUKUL MUDGAL,J.**

1. This is an appeal against the order of the learned Single Judge dated 17<sup>th</sup> February, 2009 dismissing the application filed by the appellant under Section 151 of the Code of Civil Procedure praying for recalling of the order dated 26<sup>th</sup> November, 2008. The order dated 26<sup>th</sup> November, 2009, of which recall was sought framed the issues and directed the filing of the list of witnesses and affidavits by way of evidence. The portion of the order by which the appellant is aggrieved arose in IA No. 12141/2006 and 13249/2006 which reads as under: -

“IA No. 12141/06 (by plaintiff U/o XXXIV R1 & R2 CPC; IA No. 13249/06 (by Defendant U/o XXXIV R4 CPC)

Counsel for the parties state that in view of the fact that a schedule has been fixed for recording of evidence in

the suit, they shall complete the trial as expeditiously as possible so that the suit itself can be heard and decided.

In these circumstances with consent of parties the interim order dated 3/11/06 is made absolute, till the disposal of the suit. Liberty is however granted to the parties to approach the court for any further orders for the purpose of expeditious disposal of the suit, if necessary.

The applications are disposed of.”

2. In IA No. 1228/2009, which was moved through another counsel who had not appeared on 26<sup>th</sup> November, 2008, sought the recall of the above order, notice was issued by the learned Single Judge on 28<sup>th</sup> January, 2009, which led to the impugned order on 17<sup>th</sup> February, 2009. The learned counsel for the respondent has submitted that the application under recall is not maintainable in view of judgment of the Division Bench of this Court in **Late Bawa Harbans Singh through his L.R.s vs. Lt. Governor and Ors. 132 (2006) DLT 535** decided on 7<sup>th</sup> August, 2006. The relevant portion of the said judgment reads as follows: -

10. Upon considering the above submissions, the records of the case and the judgments referred to, we are of the view that the present application is without merit. There are several reasons for our coming to this conclusion. In the first place, this application is itself not maintainable. The applicant seeks 'recall' of the order dated 31.3.1989 dismissing the writ petition. There is no provision in the CPC or the Rules of this Court that permits such an application to be filed. This Court has, in a judgment dated 25.7.2006 in CM No. 8513/2006 in W.P.(C) No. 3916 of 1990 [P.U.R. Polyurethane Products (P)Ltd v. Smt. Geeta Bhargava] held that such an application for recall is not maintainable and that it is nothing but a disguised form of a review petition. It has been further held that the Section 151 CPC cannot be pressed into service for justifying such an application when there are specific provisions in the CPC and in this Court's Rules governing the filing of review petitions. The said judgment refers to the specific procedure outlined in Para A(a) of Chapter I Vol. v. of this Court's Rules and Orders concerning the presentation and reception of review petitions and points out that the specific

procedure outlined there under cannot be bypassed by resorting to the filing of an application for 'recall'.

11. The Hon'ble Supreme Court has, in Delhi Administration v. Gurdeep Singh Uban (II) MANU/SC/0515/2000 : (2000)7 SCC 296 , held that such applications for recall are not maintainable. Para Nos. 17 and 18 of said judgment (page 309 SCC) are relevant and read as under:

17. We next come to applications described as applications for "clarification", "modification" or "recall" of judgments or orders finally passed. We may point out that under the relevant Rule XL of the Supreme Court Rules, 1966 a review application has first to go before the learned Judges in circulation and it will be for the Court to consider whether the application is to be rejected without giving an oral hearing or whether notice is to be issued.

Order XL Rule 3 states as follows:

3. Unless otherwise ordered by the Court, an application for review shall be disposed of by circulation without any arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party....

In case notice is issued, the review petition will be listed for hearing, after notice is served. This procedure is meant to save the time of the Court and to preclude frivolous review petitions being filed and heard in open Court. However, with a view to avoid this procedure of "no hearing", we find that sometimes applications are filed for "clarification", "modification" or "recall" etc. not because any such clarification, modification is indeed necessary but because the applicant in reality wants a review and also wants a hearing, thus avoiding listing of the same in chambers by way of circulation. Such applications, if they are in substance review applications, bypass Order XL Rule 3 relating to circulation of the application in Chambers for consideration without oral hearing. By describing an application as one for " clarification" or "modification", -- though it is really one of review-- a party cannot be permitted to circumvent or bypass the circulation procedure

and indirectly obtain a hearing in the open Court. What cannot be done detailed order of the then Registrar of this Court in *Sone Lal v. State of U.P.* deprecating a similar practice.)

18. We, therefore, agree with the learned Solicitor General that the Court should not permit hearing of such an application for "clarification", "modification" or "recall" if the application is in substance one for review. In that event, the Court could either reject the application straightway with or without costs or permit withdrawal with leave to file a review application to be listed initially in chambers.

12. This application is accordingly liable to be dismissed on this ground alone. However, with a view to avoiding multiplicity of proceedings, we proceed to treat the present application as a review petition and are disposing it of as such.”

3. The application for recall is indeed a euphemism for a review petition and should have been treated as a review petition at best and a Successor Judge in normal circumstances ought not to entertain such an application and should send the same to the Judge who passed the order sought to be recalled. Since the learned Single judge has already dismissed the application, we need say no further but would like to impress upon the Registry to treat all such application for recall of an order as an application for review of the order and list them accordingly.

4. The essence of this application, the dismissal of which has given rise to the present appeal, is that the defendant/appellant now seeks to retract through a fresh counsel the statement assenting to the continuation and confirmation of the interim order dated 3<sup>rd</sup> November, 2006 made by his erstwhile counsel on the ground that he had no authority to do so. We cannot put our stamp of approval on such a course of conduct. The Courts act on the statement of the counsel who are duly authorized to represent their clients fully and withdrawal of such statements by a fresh counsel betrays the trust reposed on counsel and their statements by the Court. Consequently, we cannot sustain the pleas raised in the application and this appeal even on merits and this appeal is dismissed on merits too. In the present case, the learned counsel having been changed, we deem it wholly inappropriate for the appellant to seek to back out of the

statement made on his behalf by his previous counsel. This is also contrary to the position of law laid down by the Hon'ble Supreme Court in the case of **BSNL and Ors. vs. Subash Chandra Kanchan and Anr.** 2006 (8) SCC 279 to the following effect: -

“Furthermore, in terms of Order III, Rule 1 of the Code of Civil Procedure, a litigant is represented by an advocate. A concession made by such an advocate is binding on the party whom he represents. If it is binding on the parties, again subject to just exceptions, they cannot at a later stage resile therefrom. The matter may, however, be different if a concession is made on a question of law. A wrong concession on legal question may not be binding upon his client. Here, however, despite the stand taken by the Appellant in its written statement before the High Court the learned Advocate consented to appointment of a person as an arbitrator by the High Court in exercise of its jurisdiction under Section 11 of the 1996 Act, in our considered view, the same should not be permitted to be resiled from. A person may have a legal right but if the same is waived, enforcement thereof cannot be insisted.”

Since the consent for the confirmation of an interim order cannot be termed as a concession in law nor has it even been urged to be so by the learned counsel for the appellant, the above position of law squarely applies to the facts of the present case.

5. Accordingly, we find no merit in this appeal and dismiss the same. The appeal thus stands disposed of. All the pending applications also stand disposed of.

**(MUKUL MUDGAL)**  
**JUDGE**

**(REVA KHETRAPAL)**  
**JUDGE**

**November 25, 2009**  
**sk**