

#12 & 13

% 12.10.2009

Present: Mr. K.R. Chawla , Advocate for the Petitioner.
Mr. Saurabh Tiwari, Advocate for Respondent No.1.
Mr. Ehtesham Hashmi, Advocate for Saleem Ahmed,
Advocate for Respondent No.5,6 & 7 along with SI
Satbir Singh, P.S. C.R. Park.
Ms. Pratibha M. Singh, Advocate with Mr. Abrar
Mohamad Abdullah, Advocate for the Respondents
No.8 & 9.

+CMs (M) No.614/2009 & 615/2009

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1. Both these petitions under Article 227 of the Constitution of India arise from the suit instituted by the petitioner/plaintiff before the Trial Court. The counsels confirm that in the said suit, there was an interim order restraining the defendants in the suit from raising construction over property No.E-385, Greater Kailash, Part II, New Delhi.
2. The counsel for the respondents M/s R.R. Constructions and M/s D.L. Nagpal Finance & Leasing Co. Pvt. Ltd. (Respondents No.8&9) has today in Court handed over the photocopy of the order dated 4th February, 2009 in the suit. It is recorded therein that the parties had submitted to the court that they had compromised all their disputes with each other and nothing remained due in the case. The attorney holder of the plaintiff was personally present before the court on that date. However, since the defendant was stated to be on way from Chandigarh, further

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proceedings in the suit were adjourned to 5th February, 2009 and thereafter to 9th February, 2009. On 9th February 2009, the attorney of the plaintiff was present before the Court. However, another counsel than the counsel who had instituted the suit and who had till then been appearing on behalf of the plaintiff appeared before the court, though without vakalatnama; he made a statement that he had been authorized by the plaintiff acting through a new power of attorney holder of the plaintiff, to appear in the court. The Trial Court found that neither had the earlier advocate been discharged nor was the new power of attorney holder of the plaintiff present in the court. The Trial Court observed that either the plaintiff had become dishonest after the settlement arrived at by the earlier power of attorney of the plaintiff or the earlier power of attorney holder of plaintiff had acted beyond jurisdiction. In the circumstances, it was felt by the Trial Court that the personal appearance of the plaintiff before the Court was essential. Since the plaintiff was stated to be then at Canada, the matter was adjourned to 12th March, 2009 for appearance of the plaintiff with further observation that failure of the plaintiff to appear would lead to adverse inference. The Trial Court in the circumstances also vacated the interim order.

3. The plaintiff did not appear on 12th March, 2009 and adjournment was sought. The suit was adjourned for 20th April, 2009 for appearance of the plaintiff subject to cost of Rs.10,000/-.

4. On 20th April, 2009 though cost earlier imposed was paid but the plaintiff still failed to appear. The court in the circumstances, imposed exemplary cost of Rs.1,50,000/- on the plaintiff, of which Rs.1,00,000/- was directed to be deposited in Advocate's Welfare Fund of Delhi Bar Council and Rs.50,000/- with the Delhi Legal Services Authority. Further opportunity for appearance of the plaintiff on 8th July, 2009 was given.

5. CM (M) No.615/2009 has been preferred against the order of imposition of costs and CM (M) No.614/2009 is preferred against the order of vacation of the interim order.

6. This court while issuing notice of the petitions, directed the petitioner to deposit Rs.50,000/- in this Court and also gave opportunity to the petitioner to produce the medical certificates of the petitioner. The said sum of Rs.50,000/- has been deposited. However, the petitioner failed to appear before the Trial Court on 8th July, 2009 as directed. On 16th July, 2009, the counsel for the petitioner made a statement in this Court that the petitioner would certainly appear before the Trial Court on any date fixed after three months, as he was stated to have been advised rest for that

period. Perhaps for this reason, petitions were adjourned for today.

7. Today, also the counsel for the petitioner has stated that the petitioner is still unwell and will appear before the Trial Court. Though during hearing the counsel for the petitioner had stated that he will inform the date by evening but no date has been informed.

8. The counsel for the respondents No. 8 and 9 has stated that since after the vacation of the interim order on 9th February, 2009, the property has been constructed and the construction is complete. It is thus contended that thus the petition against the vacation of the interim order has become infructuous.

9. I have enquired from the counsel for the petitioner as to how the petition under Article 227 of the Constitution is maintainable with respect to the order vacating the interim order. He has drawn attention to ***Municipal Corporation of Delhi Vs. M/s Adways*** AIR 1998 Delhi 141. In that case, it was held that against the ex parte order of injunction, a petition under Article 227 of the Constitution would lie. However that is not the position here. The Trial Court for the reasons recorded in the order dated 9th February, 2009 has vacated the interim order in the presence of counsel for both the parties. The petition under Article 227 of the

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Constitution would not lie against such an order. Such an order is on the merits and the remedy of first appeal being available there against, the petition under Article 227 would not be maintainable.

10. The Division Bench of this court has even otherwise in ***Magotteaux Industries Pvt. Ltd Vs AIA Engineering Ltd.*** 155 (2008) DLT 73 held an appeal under Order 43 Rule 1(R) to lie against an ex parte order of injunction also. That being the position, CM(M) 614/2009 against the order of vacation of interim order is not maintainable. The counsel for the petitioner seeks to withdraw the petition. The same is dismissed as withdrawn.

11. As far as CM(M) 615/2009 qua imposition of costs is concerned, the court under Order 10 of the CPC is always empowered to direct presence of any of the parties before it for the purpose of recording their statement. No error can be found with the order of the Trial Court directing the appearance of the petitioner. The same is not under challenge before this Court. The Trial Court was perturbed by the conduct of the plaintiff/petitioner. The plaintiff / petitioner was throughout represented by the same advocate. From the conduct of the plaintiff, it appeared to the Trial Court, that the plaintiff was attempting to renege from the compromise entered into by his earlier attorney and advocate. The trial court as such gave

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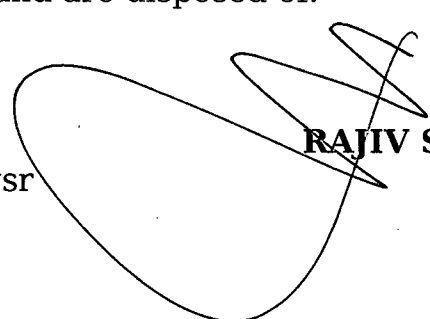
opportunity to the plaintiff to explain. However, the plaintiff in spite of opportunities failed to appear. The same conduct has been adopted before this court also. In the circumstances no error can be found in the order imposing costs. Nothing has been pointed out by counsel for the petitioner also. However, since the plaintiff had already deposited Rs.50,000/- before this court and which is now directed to be deposited by the Registry with the Delhi Legal Services Authority, payment of balance costs of Rs.1,00,000/- be held in abeyance till the appearance of the plaintiff before the Court. If the Trial Court, after recording the evidence of the plaintiff finds lack of bona fide on the part of the plaintiff, the plaintiff would remain liable to pay the aforesaid costs. If however the trial court is satisfied by the explanation of the plaintiff, then the court would waive or reduce the payment of the costs aforesaid.

12. With the aforesaid direction CM(M) 615/2009 is also disposed of.

CM Nos.9020/2009(u/s 151 CPC for stay), 9021/2009(for condonation of delay) in CM(M) 614/2009 & CM.No. 9026/2009 (of petitioner u/s 151 CPC for stay) in CM(M) 615/2009

With the disposal of main petitions, these applications have become infructuous and are disposed of.

October 12, 2009/gsr


RAJIV SAHAI ENDLAW, J
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