

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

+ **CM(M) No.1189/2009 & CM.No. 15037/2009 (u/S 151 CPC for Stay)**

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Date of decision: 30th November, 2009

SHRI ASHOK BISWAL

....Petitioner

Through: Mr Amit Jain, Advocate.

Versus

SHRI RAMESH ANEJA

... Respondent

Through: Mr M.L. Mahajan, Advocate.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? No
2. To be referred to the reporter or not? No
3. Whether the judgment should be reported
in the Digest? No

RAJIV SAHAI ENDLAW, J.

1. This petition under Article 227 of the Constitution of India has been preferred by the defendant in the suit before the trial court and against the order dated 18th September, 2009 striking off the defence of the petitioner/defendant to the suit filed by the respondent/plaintiff.

2. The respondent/plaintiff had instituted the suit for ejectment of the petitioner/defendant from immovable property claiming that the petitioner/defendant was a tenant under the respondent/plaintiff at a rent in excess of Rs 3,500/- per month; that the tenancy of the petitioner/defendant has been

terminated and as such the respondent/plaintiff has become entitled to eject the petitioner/defendant; the relief of recovery of arrears of rent and mesne profits was also claimed in the suit. The respondent/plaintiff filed an application under Order 39 Rule 10 of the CPC for directing the petitioner/defendant to pay the admitted amounts. The said application was allowed on 22nd May, 2009 and the petitioner/defendant was directed to pay the arrears and make future payment at the rates directed and within the time fixed by the court. However, the petitioner/defendant failed to make the said payment and on request of the respondent/plaintiff, the trial court finding the order to have not been complied with, struck off the defence of the petitioner/defendant. Aggrieved therefrom this petition was preferred.

3. This court issued notice for a short date to the respondent/plaintiff, being *prima facie* of the opinion that the defence cannot be struck off upon non compliance in each case and also in the light of the newly inserted order 15A in the CPC as applicable to Delhi.

4. The counsel for the petitioner/defendant has pleaded that though the petitioner/defendant had complied with the part of the order directing payment of arrears but the part regarding payment of future rent remained to be complied for the reason of the petitioner being required to go to his home State. It is also stated that immediately on default being pointed out, the petitioner/defendant got issued pay order of the entire amount due and tendered the same to the respondent/plaintiff. The petitioner/defendant had on 27th October, 2009 also given an undertaking to, in future comply with the order and also offered to compensate the respondent for default.

5. The counsel for the respondent/plaintiff has opposed the petition contending that the story set up for explaining the default is unbelievable; that it is a case of pure negligence on the part of the petitioner/defendant.

6. This court is of the opinion that the defence cannot be struck off merely on finding the order to have remained uncomplied as the trial court has done and without going in to the explanation if any therefor. Order 15A of the CPC also does not make it mandatory for the defence to be struck off in such situation. Discretion has been vested in the court. This court is also of the opinion that in considering whether the defence should be struck off or not, the law laid down in the *para materia* provision of Section 15 of the Delhi Rent Control Act should apply. In relation to the said provision it has been held that the defence is to be struck off not merely on default in payment being committed but only when it is found that the default in payment is contumacious or in willful defiance of the order of the court. Reference in this regard may be made to ***Miss Santosh Mehta Vs Om Prakash*** AIR 1980 SC 1664

7. In the present case no inquiry in the aforesaid respect has been conducted. In fact, it appears that no opportunity also was given to the petitioner/defendant to explain the default and on the oral request of the counsel for the respondent/plaintiff the defence of the petitioner/defendant was struck off though in the presence of the counsel for the petitioner/defendant.

8. In the aforesaid circumstances, I am satisfied with the explanation given in the petition, specially considering that the petitioner/defendant has immediately paid the entire amount due. In the opinion of this court the ends of justice would be met by directing the petitioner/defendant to compensate. Accordingly, subject to the petitioner/defendant paying costs of Rs 15,000/- to the counsel for the respondent/plaintiff on or before the next date of hearing before the trial court, the

order dated 18th September, 2009 insofar as striking off the defence of the petitioner/defendant to the suit filed by the respondent/plaintiff shall stand set aside and the petitioner/defendant shall be entitled to contest the suit on merits. The counsel for the respondent/plaintiff states that he has already filed an affidavit by way of examination in chief and the suit is listed before the trial court in the month of December, 2009 itself. In the circumstances, it is also directed that subject to payment of costs as aforesaid, the petitioner/defendant shall also cross examine the witnesses of the respondent/plaintiff on that date itself.

With the aforesaid directions, this petition and all the pending applications stand disposed of.

**RAJIV SAHAI ENDLAW
(JUDGE)**

November 30, 2009
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