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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CM(M) 1362/2009

MUNSHI LAL Petitioner
Through: Mr. D.S. Dalal, Advocate.

versus

RAJEEV GUPTA ... Respondent
Through: None.

AND

+ CM(M) 1363/2009

MUNSHI LAL Petitioner
Through: Mr. D.S. Dalal, Advocate.

versus

RAJEEV GUPTA Respondent
Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

24.11.2009

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Both these petitions under Article 227 of the Constitution of India arise from the orders made in the same suit and/or in the proceedings arising therefrom. The suit has been filed by the petitioner herein against the respondent. It is *inter alia* the case of the petitioner that the respondent was a tenant in the premises under the petitioner and the petitioner has sued for possession and mesne profits. The respondent was contesting the said suit. The respondent was proceeded against *ex parte* vide order dated 23rd February, 2005 of the trial court. The respondent on 24th March, 2005 filed an application under Order 9 Rule 7 of the CPC for setting aside of the order proceeding *ex parte* against him. It was *inter alia* stated in the

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physical file have been compared and
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file and no page is missing.

said application that on an earlier date, the next date had been wrongly noted in the diary of the counsel for the respondent. A photocopy of the relevant page of the said diary was filed along with the application. It is the case of the petitioner herein that owing to some ambiguity in the said photocopy, the trial court vide order dated 21st April, 2005 directed the original diary of the counsel for the respondent to be filed in the court and upon the same being filed the same was ordered to be retained in the court.

The petitioner contested the application under Order 9 Rule 7 of the CPC and also filed an application under Section 340 of the Cr.PC for prosecuting the respondent for offences under Section 468 and 471 of the IPC. It was *inter alia* the case of the petitioner in the application under Section 340 of the Cr.PC that the advocate's diary which was filed in support of the application under Order 9 Rule 7 had been forged and fabricated. The respondent is stated to have filed a reply to the said application under Section 340 of the Cr.PC taking *inter alia* the stand that he was not responsible for filing the diary but his counsel was responsible for the same.

The trial court was of the opinion that the application under Section 340 of the Cr.PC could not be decided without an issue being framed and evidence being led. Issue was framed and evidence ordered to be led. Thereafter, the trial court dismissed the application under Section 340 of the Cr. PC. The petitioner preferred an appeal against the order of dismissal of the said application under Section 340 of the Cr.PC and which has also been dismissed by the first appellate court. Aggrieved therefrom the CM (M) 1362/2009 has been filed.

The trial court thereafter vide order dated 18 September, 2009 also allowed the application under Order 9 Rule 7 of the CPC and which has been impugned in CM(M) No.1363/2009.

The trial court as well as the first appellate court dismissed the application under Section 340 of the Cr. PC *inter alia* on the ground that as per the dicta in ***Iqbal Singh Marwah Vs. Meenakshi Marwah*** (2005) 4 SCC 370, for Section 340

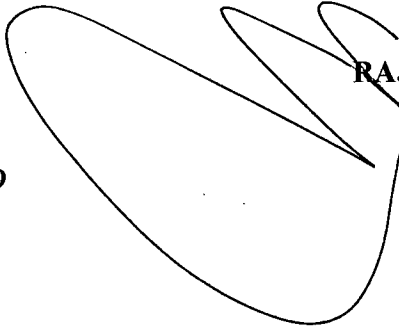
impleaded and/or examined. The counsel states that it was for the respondent to have examined the said advocate.

The provisions of Section 340 of the Cr.PC vest a discretion in the court, even when the court *prima facie* is of an opinion that an offence within the meaning of the said provision to have committed in relation to the proceedings pending before it. In the present case considering that the document in relation where to forgery and fabrication is averred, irrespective of the legal grounds taken in the orders of the courts below, I do not find it expedient or in the interest of justice to proceed against the respondent or to file a complaint against the respondent in this regard. The counsel for the respondent at this stage also relies upon the order dated 20th October, 2009 in *Savita Khatri Vs. Rai Singh Tewethia* CS(OS) No.465/2007 of this court where another single judge of this court directed a complaint to be filed against the advocate as well as the client, on the basis of issuance of gate pass of this court at the instance of advocate showing that the client was in the court for the case and of which date both had feigned ignorance. In the circumstances, the client as well as the advocate were found to have taken a wrong stand. Here, the document of which forgery is alleged in this case is the diary of the advocate alone and against whom no action has been taken in spite of the matter having remained pending for the last over four years and the prosecution of the respondent is not found in the interest of justice.

As far as the order setting aside of the *ex parte* against the respondent is concerned, the trial court has found that the respondent prior to being proceeded *ex parte* had filed affidavit by way of his examination in chief and had been cross examined at length prior thereto and the suit had been adjourned for further cross examination when the respondent was proceeded *ex parte* and because of which the evidence of the respondent was closed and the matter adjourned for final arguments. The trial court found it expedient that the cross examination of the respondent be permitted to be completed so that the evidence of the respondent can be read. The counsel for the respondent has also given a statement that besides the

respondent no other witness is to be examined. The trial court in the circumstances set aside the *ex parte* by permitting the cross examination of the respondent to be completed. No jurisdictional error is found or interference under Article 227 of the Constitution of India is called for with respect to the said order also.

Resultantly, there is no merit in either of the petitions and they are dismissed. All pending applications are also disposed of.


RAJIV SAHAI ENDLAW, J

NOVEMBER 24, 2009
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