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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: January 25, 2010
Date of Order: February 08, 2010

+ CM(M) 97/2010

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Shri Hanuman Mal Bothra
Through: Mr. Sunil Dutt Dixit, Advocate

08.02.2010
...Petitioner

Versus

Shri Suraj Mal Jain
Through: nemo

...Respondent

JUSTICE SHIV NARAYAN DHINGRA

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| 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. By this petition under Article 227 of the Constitution of India, the petitioner has assailed an order dated 16th December 2009 passed by learned ARCT in appeal against the order dated 7th July, 2009 passed by Additional Rent Controller. The appeal was dismissed.

2. Brief facts relevant for the purpose of deciding this petition are that in an eviction petition under Section 14(1) (a) (d) (e) (j) and (h) of Delhi Rent Control Act preferred by the landlord, an order under Section 14(1)(a) of the DRC Act was passed and the petition on other grounds was dismissed. Benefit of Section 14(2) of DRC Act was given by the trial court. The respondent preferred an appeal before the Rent Control Tribunal, which was disposed of on 4th March, 2005 and the matter was remanded back to the trial court and the trial court was directed to relook into the record about challan of deposit of rent. When the matter was remanded back by ARC, the petitioner could not show deposit of rent and the benefit of Section 14(2) of DRC Act was not extended to the petitioner and an order of eviction was passed by the trial court on 2nd July 2005. Against this order, an appeal was preferred. This appeal was accepted by learned ARCT and a cost of Rs.5000/- was imposed for late deposit of rent and the appellant was directed to deposit

costs within one month. The appellant/ petitioner herein failed to deposit cost imposed by learned ARCT vide order dated 23rd December 2006 and the landlord thereafter filed an execution. Notice of this execution was served upon the petitioner herein and a report was called from Nazir about deposit of costs. The petitioner herein filed objections against execution under Order 21 Rule 58 CPC. The trial court decided this objection petition vide order dated 26th September 2007 and the petitioner was directed to deposit the amount of costs within two days. The petitioner still did not deposit the costs within this period and deposited costs only on 31st October, 2007. An application for revival of execution was moved by respondent on 7th July 2009. The trial court allowed the application for revival of execution on the ground of non -payment of costs within extended period and execution was restored by the trial court. Against this order an appeal was preferred before learned ARCT. After considering the entire facts and the pleas taken by the petitioner herein, the appellate court observed that the appeal under Section 38 was not maintainable since an appeal under Section 38 was maintainable only on the question of law. However, the learned ARCT still considered the appeal on merits and found that the petitioner had been just flouting the orders of the Court one after another and despite condonation of delay in depositing the rent subject to costs, the costs were not deposited by the petitioner even after the orders of learned ARCT and after the orders of learned Additional Rent Controller passed while allowing objection petition. The order of learned Rent Control Tribunal for depositing of costs was made on 23rd December 2006. The costs were deposited on 31st October 2007. The learned Rent Controller had, giving two days' more time on 26th September 2007, but still the costs was not deposited within time. Various pleas taken by petitioner were found to be devoid of merits and the Tribunal, therefore, came to conclusion that the petitioner was negligent throughout and there was no scope of interference.

3. It is vehemently argued by learned counsel for petitioner that the petitioner was suffering only for non-payment of costs.

4. I consider that in view Section 35-B of CPC, the petition of the petitioner is liable to be dismissed. Section 35B reads as under:-

35B. Costs for causing delay.

¹[35B. Costs for causing delay.

(1) If, on any date fixed for the hearing of a suit or for taking any step therein, a party to the suit-

(a) fails to take the step which he was required by or under this Code to take on that date, or

(b) obtains an adjournment for taking such step or for producing evidence or on any other ground,

the Court may, for reasons to be recorded, make an order requiring such party to pay to the other party such costs as would, in the opinion of the Court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date, and payment of such costs, on the date next following the date of such order, shall be a condition precedent to the further prosecution of-

(a) the suit by the plaintiff, where the plaintiff was ordered to pay such costs.

(b) the defence by the defendant, where the defendant was ordered to pay such costs.

Explanation.-Where separate defences have been raised by the defendants or groups of defendants, payment of such costs shall be a condition precedent to the further prosecution of the defence by such defendants or groups of defendants as have been ordered by the Court to pay such costs.

(2) The costs, ordered to be paid under sub-section (1) shall not, if paid, be included in the costs awarded in the decree passed in the suit; but, if such costs are not paid, a separate order shall be drawn up indicating the amount of such costs and the names and addresses of the persons by whom such costs are payable and the order so drawn up shall be executable against such persons].

5. It is a case where the petitioner did not deposit the costs imposed by the Court for giving benefit under Section 14(2) of Delhi Rent Control Act. Initially, the rent was not deposited in time, thereafter, when the delay was condoned, he did not deposit the costs imposed for condonation of delay within 30 days. He did not deposit cost even during extended period.

6. In *Manoher Singh v. D.S. Sharma (2010) 1 SCC 53*, Supreme Court considered the effect of not depositing costs in the light of Section 35B CPC and observed as under:-

"9. We may also refer to an incidental issue. When Section 35-B states that payment of such costs on the date next following the date of the order shall be a condition precedent for further prosecution, it clearly indicates that when the costs are levied, it should be paid on the next date of hearing and if it is not paid, the consequences mentioned herein shall follow. But the said provision will not come in the way of the court, in its discretion in extending the time for such payment, in exercise of its general power to extend time under Section 148 CPC. Having regard to the scheme and object of Section 35-B, it is needless to say that such extension can be only in exceptional circumstances and by subjecting the defaulting party to further terms. No party can routinely be given extension of time for payment of costs, having regard to the fact that such costs under Section 35-B were itself levied for causing delay.

11. A conspectus of the above provisions clearly demonstrates that under the scheme of CPC, a suit cannot be dismissed for non-payment of costs. Non-payment of costs results in forfeiture of the right to further prosecute the suit or defence as the case may be, Award of costs, is an alternative available to the court, instead of dispensing with the cross examination and closing the evidence of the witness. If the costs, levied for seeking an adjournment to cross examine a witness are not paid, the appropriate course is to close the cross examination of the witness and prohibit the further prosecution of the suit or the defence, as the case may be by the defaulting party.

12. in this case, the plaintiff has harassed the defendants and its witness by seeking repeated adjournments. In view of it, the plaintiff's right to cross examine DW2 stands forfeited. However, as costs were levied, but were not paid, the court should have closed the evidence of DW2, permitted the defendants to produce any further evidence (without any right to the plaintiff to cross examine such witnesses) and then ought to have proceeded to dispose of the suit on merits by considering the material available and hearing the arguments of the defendants. The court could not have dismissed the suit."

Since in this case, payment of cost within 30 days was a condition for giving benefit under Section 14(2) of DRT Act and cost was not paid even during extended period. The order of

learned ARC of restoring the execution petition was justified and appeal was rightly dismissed.

7. I find no merits in this petition. The execution order is rightly restored by the trial court.
The petition is hereby dismissed with no orders as to costs.

February 08, 2010
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SHIV NARAYAN DHINGRA J.