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IN THE HIGH COURT OF DELHI AT NEW DELHI

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C.M. (Main) No.347 of 2010 & C.M. Appl. Nos.4678-4679 of 2010

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22.03.2010

AVTAR KRISHAN AHUJA

.....Petitioner

Through: Mr. Sudhir K. Saneja, Advocate.

Versus

DR. GURBINDER SINGH SADANA

.....Respondent

Date of Reserve: 15th March, 2010

Date of Order: 22nd March, 2010

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

J U D G M E N T

1. By this petition, the petitioner has assailed order dated 22nd October, 2009 passed by learned Additional Rent Controller dismissing an application under Order IX Rule 7 CPC made by the petitioner.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner was proceeded ex-parte on 19th January, 2009 and the matter was listed on 20th January, 2009. On 20th January, 2009, the matter was adjourned to 7th March, 2009 and then to 1st April, 2009 on which dated two PWs, namely, PW-2 and PW-3 were examined and discharged. Proxy counsel for petitioner's counsel was present in the court on 1st April, 2009 when the witnesses were recorded, however, he did not act in the case. An application for setting aside ex-parte order dated 19th January, 2009 was moved on 15th April, 2009. In the application, the petitioner took a stand that on 2nd January, 2009

when the matter was transferred to Patiala House Courts before learned Additional Rent Controller, the petitioner contacted his counsel who informed him that he was not in a position to conduct the matter and he returned the file to the petitioner for engaging another counsel. The matter was listed before Additional Rent Controller, Patiala House Courts on 15th January, 2010 and 16th January, 2010. The petitioner had to go to Fazilka, Punjab regarding some urgent work on 7th January, 2009 and was to return back on 10th January, 2009 but unfortunately he sustained injuries from a fall at Fazilka, Punjab and even could not walk and he remained under medical observation and was advised complete bed rest. Since he was aware that the next date in the case was 15th January, 2009 and 16th January, 2009, he tried to contact his previous counsel but could not contact him ultimately he contacted his present counsel through his friend to put appearance in the court on his behalf. The present counsel made inquiries about this case from the court of the learned Additional Rent Controller, Patiala House and learnt that the matter was adjourned to 16th January, 2009. On 16th January, 2009, counsel for respondent came to the court and found that Presiding Officer was on leave and dates were to be given by the Reader. He sent his junior to note down the next date and his junior noted down the next date of hearing as 16th July, 2009 instead of 19th January, 2009. On 27th March, 2009, the petitioner formally engaged services of the present counsel and gave him *vakalatnama* and requested him to inspect the file. Accordingly, counsel for the petitioner moved inspection application on 31st March, 2009 but since the next date of hearing was mentioned as 16th July, 2009, the file was not made available. Then counsel for the applicant made personal inquiries and came to know that the matter was fixed for 1st April, 2009 instead of 16th July, 2009. It is submitted that on 19th January, 2009 since the petitioner was injured, could not even walk and was held up in Fazilka, Punjab, therefore, the order dated 19th January, 2009 be set aside.

3. The trial court dismissed the application observing that the application was not made in terms of Order IX Rule 7 CPC which required that where the court had adjourned the hearing of the suit ex-parte, the defendant was supposed to make application on or before such hearing and assign good cause for previous non-appearance. The trial court also observed that on 1st April, 2009 when two witnesses were examined, proxy counsel Mr. Dharmender Prasad on behalf of petitioner's counsel was present in the court, however, no application for setting aside ex-parte was made and there was no participation by him in the proceedings. He also found that there was no good cause shown for non-appearance of the petitioner on 19th January, 2009. The date of hearing of 16th January, 2009 was within the knowledge of counsel for the respondent and the plea taken that the date was wrongly noted as 16th July, 2009 or was wrongly informed by the Reader of the court was a false plea. He further observed that despite noting date of 16th July, 2009, petitioner's counsel had moved an application for inspection and had learnt that next date was 1st April, 2009. The trial court also noted that even earlier the court had made observation that the petitioner was trying to delay the proceedings and earlier application of setting aside ex-parte order was allowed, subject to cost of Rs.10,000/-.

4. Counsel for the petitioner submitted that the trial court did not consider the ground of non-appearance of the petitioner on 19th January, 2009 while the petitioner had shown good cause for non-appearance on 19th January, 2009 and the observation made by the trial court regarding limitation that the application should have been made on or before the next date of hearing was contrary to law.

5. It seems that it has become practice to serve lies in a platter to the court and it is expected that the court must eat the dish of lies so served. In the application, the petitioner had taken a stand that he had a fall and received injuries to the extent that he was not able to move from the bed. The certificate filed by the petitioner on record of this court is from a body fitness and physiotherapy centre dated 18th January, 2009 which records that petitioner has “chronic pain in low back area due to muscle sprain due to fall down by 3-4 days back”. There is no mention of any injury and the certificate is issued not by a doctor but by a physiotherapist. This certificate prescribes one week bed rest. The subsequent certificate is of 20th February, 2009, that is, after more than a month and this also says that the petitioner still has pain in the low back and he is advised complete bed rest for five days. Simultaneously, he has produced another certificate on 20th February, 2009 of a physiotherapist where oil massage is prescribed. It is obvious that these certificates are procured certificates. A person who receives injuries by fall to the extent that he is not able to move would always suspect that it may be a case of fracture and would immediately go to an Orthopedician or a hospital for his X-ray. He would not contact a body fitness center or a massage centre after 3-4 days of the fall. These certificates, on the face of it, do not support the version given by the petitioner. Similarly, the plea taken by the petitioner that the next date told by Reader was 16th July, 2009 is a baseless plea. A new Additional Rent Controller court was started in Patiala House Courts where the load of work to the knowledge of advocates in Patiala House Courts was very less and only short dates were being given by the courts.

6. The other noticeable thing is that even if the petitioner had been proceeded ex-parte on 19th January, 2009, nothing happened on 19th January, 2009 or 20th January, 2009. The petitioner even if had been proceeded ex-parte, had a right to participate in the

proceedings thereafter and he had a right to cross-examine the witnesses who were produced on next date of hearing. It is petitioner's own case that his counsel had come to know that next date of hearing was 1st April, 2009. The two witnesses of respondent were recorded only on 1st April, 2009. The counsel and the petitioner did not bother to participate in the proceedings and to cross-examine the witnesses. Only a proxy counsel was sent there to watch the proceedings and when it was found that the witnesses have been examined and their testimony was over, on 15th April, 2009, this application was made for setting aside ex-parte order dated 19th January, 2009. Even if the ex-parte order dated 19th January, 2009 is set aside that would not give an opportunity to the petitioner to cross-examine PW-1 and PW-2 who were examined when the petitioner's counsel knew that the next date was 1st April, 2009 and the petitioner and the counsel both were at liberty to participate and cross-examine the witnesses but they sent a proxy counsel.

7. I, therefore, find no merits in this petition. The petition is hereby dismissed.

SHIV NARAYAN DHINGRA J.

MARCH 22, 2010
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