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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: February 16, 2010

Date of Order: March 03, 2010

+ CM(M) 219/2010

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Surbir Singh & Ors.

Through: Mr. O.P. Khadaria, Advocate

03.03.2010

...Petitioners

Versus

Surinder Singh Decd. Through Lrs & Ors

...Respondents

Through: Mr. Pramod Ahuja & Mr. M. Zafar Khan, Advocates

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?

JUDGMENT

1. By this petition, the petitioners have assailed orders dated 11th December 2009 and 14th January 2010 whereby the learned trial court dismissed an application under Section 151 CPC made by the petitioners.

2. Brief facts relevant for the purpose deciding this petition are that the respondents had approached this Court with a petition under Article 227 of the Constitution of India. On the first date of hearing the petition was disposed of, without notice to the present petitioner. This Court passed following order:

*"The counsel for the petitioner on or before 7th December 2009 serve against the acknowledgment to the contesting respondents/ their counsel, a copy of this order (to be given dasti to the counsel for the petitioner) are sought to be proved and also a cheque of Rs.25,000/- in the name of the counsel for the contesting respondent. **If the contesting respondent is agreeable to another opportunity being granted to the petitioner on cost aforesaid,** should come prepared on 11th December 2009 for the cross examining of the said witnesses.*

The counsel for the petitioner, at this stage states that his son is getting married on 11.12.2009 and he would be requesting for postponement of the date in any case. In that case the Trial court to give another date for the purpose of cross examination, if the counsel for the contesting respondent is agreeable. The petitioner to produce the witness on such date. It is made clear that no further opportunity shall be granted and if the witness of the petitioner fails to appear, notwithstanding the payment of the cost the petitioner shall not be entitled to any further opportunity. The counsel for the petitioner further states that only one witness would be required to prove the documents aforesaid and no other witness would be required.

However, if the counsel for the respondent is not agreeable to the opportunity as aforesaid being given to the petitioner on payment of cost, the trial court to proceed with the suit. In that case, this petition shall be deemed to be dismissed.

With the aforesaid directions the petition is disposed of."

3. In terms of the order of this Court, counsel for respondent sent a cheque of Rs.25,000/- to the counsel for the petitioner along with the order of this Court through his junior advocate. This cheque of Rs.25,000/- was accepted by the counsel for the petitioner and he handed over cheque to his clerk who deposited it in the bank account of the petitioner's counsel. Since the cheque of costs as observed by the High Court was accepted, the trial court acted in accordance with the order of this Court and took up the matter on 11th February 2009. The counsel for the petitioner did not appear before the trial on that date, the trial court waited for the counsel for the petitioner up to 2 pm. The respondent submitted to the trial court that the costs of Rs.25,000/- has been accepted by the counsel for the plaintiff and the cheque has been encashed. The trial court, therefore, observed that the plaintiff had exercised option given by High Court and took the affidavit of the witnesses of defendant on record by way of additional evidence and copy was supplied to the petitioner and the trial Court fixed the date for cross examination on 14th January, 2009. On 14th January, 2009, three applications were moved under Section 151 CPC by the

petitioner, one was for return of costs, another for refusal to accept the costs of Rs.25,000/- and the third for supply of copy of documents which were exhibited as Ex.PW1/3 to PW1/12. The trial court observed that since the costs has already been accepted and cheque given by the respondent was got encashed, now the petitioner cannot return the costs and withdraw the option already exercised and, therefore, rejected the first application for return of costs through cheque issued by the counsel. The application for not accepting the costs was also dismissed. Regarding supply of documents, the Court observed that the documents were already on record for so many years and had been filed along with the written statement and it was not stated by the counsel for the petitioner that copies had not been supplied to him. Thus, this application was also dismissed. The cross examination of the respondents witnesses was conducted on that date and the matter was listed for final arguments.

4. The counsel for the petitioner submits that the costs had been accepted by the counsel for the petitioner without instructions. The counsel had no authority to accept the costs and the counsel could not have acted to the prejudice of his client. I consider that this plea is untenable. The counsel for the petitioner could not have received the cheque of Rs.25,000/- without asking as to why the cheque was being handed over to him and under whose directions. The copy of the order of this Court was read by the counsel for the petitioner and since it was very clear in the order itself that the costs would be tendered to the counsel for the petitioner on behalf of the petitioner, if the petitioner's counsel was not agreeable to receiving the costs, he could have returned the costs then and there. If he wanted to take instructions from the petitioner, he could have telephoned the petitioner and asked for these instructions. The very fact that the cheque of the costs was accepted and was deposited in the bank account of the petitioners' counsel and encashed, shows that the petitioner had given consent to acceptance of the costs and this consent was being later on withdrawn.

5. It is not disputed that after passing of the conditional order by this Court, the petitioners' counsel accepted the costs. He knew the consequences of acceptance of the costs. Thereafter, the evidence has been recorded, cross examination is complete and the matter is now listed for arguments.

6. I consider that it would not be appropriate and fair to set aside the impugned orders passed by the trial court on the ground taken in this petition that counsel accepted costs without instructions. I find no force in this petition. The petition is hereby dismissed. No orders as to costs.

March 03, 2010
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SHIV NARAYAN DHINGRA J.