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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: February 04, 2010

Date of Order: February 22, 2010

+ CM(M) 434/2007

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Sukhbir Singh

Through: Mr. Amit Sharma, Advocate

22.02.2010

...Petitioner

Versus

Jitender Sharma & Anr.

Through: Mr. Anil Sharma, Advocate

...Respondents

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 way of present petition under Article 227 of the Constitution of India, the petitioner has assailed an order dated 12th February, 2007 passed by Additional District Judge, Delhi whereby applications under Order IX Rule 4 read with Section 151 and Section 5 of Limitation Act for condonation of delay were dismissed.

2. Brief facts relevant for the purpose of deciding the present petition are that the petitioner had filed a suit under Order XXXVII Civil Procedure Code for recovery of Rs.9,78,750/- from respondent. The summons of the suit were served upon the respondent and respondent entered appearance. Thereafter, summons for judgment were served upon respondent and respondent filed an application for leave to defend and the matter was pending before the trial court for arguments on an application for leave to defend on 30th January 2006, when the petitioner did not appear and the suit of the plaintiff was dismissed for want of prosecution. The petitioner's contention is that on 30th January 2006 when the matter was listed for arguments, the bar lawyers were on strike in the District Court and the lawyers as well as the litigants both were prevented by office bearers of bar association. As a consequence, the suit went unattended and when it was called up for hearing, the suit was dismissed. On 2nd February, 2006, the agitation was still continued. The petitioner however moved an application for restoration of the suit, written in his own handwriting, because the lawyers had prevented typists and other persons also from operating in the Court complex so typists or bar menders were not available. However, the

trial court refused to accept this application as there was no court fee stamp on it. It is submitted that the petitioner had been attending the court religiously prior to that date, when the matter was fixed for arguments on leave to defend application on previous date, the plaintiff's counsel was available and it was defendant's counsel who was absent and the Court had adjourned the case to 30th January 2006 and on 30th January 2006 he could not appear for above circumstances. Regarding late filing of the subsequent application, an application under Section 5 of the Limitation Act was filed and the ground taken was that the applicant's wife had fallen ill and the applicant had to leave Delhi and go to his in-laws. The applicant also stated that father of the applicant had undergone angiography in February-March, 2006 and he was not in a position to appear in the Court during that period.

3. There is no denial of the fact that there is a delay of about six months in moving application by the petitioner for restoration of the suit, however, I consider that the present petition is to be allowed on different grounds. In this case a summary suit under Order XXXVII CPC was pending before the Court. The respondent had entered appearance and leave to defend was filed by the defendant. Thus, what was pending consideration before the Court was defendant's leave to defend application and the Court was to consider the facts as set out by the defendant in leave to defend and to see if the application for leave to defend was to be allowed or not. Order XXXVII Rule 6 (a) provides as to what is to be done at the hearing for such summons of judgment by the trial court. Order XXXVII Rule 6(a) is reproduced herein-below:

"6 At the hearing of such summons for judgment-

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith."

4. It is thus apparent that in case leave to defend application has not been filed or the application made by defendant does not disclose sufficient cause to grant leave to defend, the trial court has to pass a judgment forthwith and if the leave to defend is allowed for whole or part of the claim, the trial court has to pass an order according to Sub Rule 6-part (b).

5. Thus, even if the petitioner was absent and had not appeared on the date fixed for arguments, the application for leave to defend could have been disposed of by the trial court in absence of the petitioner considering the defence of defendant. In terms of Order XXXVII Rule 3(5), the trial court was obliged to consider the facts raised by defendant and pass an order on the application for leave to defend even in absence of the petitioner. The petitioner was respondent in application for leave to defend. If the petitioner had not appeared, still the facts set out by defendant were before the trial court and the trial court in absence of the petitioner could have considered the application for leave to defend and passed a speaking order.

6. In a suit under Order XXXVII where an application for leave to defend is pending for arguments, the application cannot be dismissed for non appearance of the defendant and the Court is supposed to pass an order on merits and on facts stated by defendant. Similarly, where plaintiff does not appear, the Court is supposed to pass an order on an application for leave to defend without assistance of the plaintiff. Dismissal of the suit for non prosecution is not warranted, more so when the Court knew that there was possibility that the plaintiff or his counsel could not have appeared due to strike of advocates. The advocates were on strike but the courts were not on strike. The court ought to have discharged its duty and considered application for leave to defend on merits even in absence of parties.

7. I, therefore, set aside the impugned order passed by the trial court. The petition in the result is allowed. The matter is remanded back to the trial court for deciding the application for leave to defend on merits.

8. The petition stands disposed of with above.

February 22, 2010
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SHIV NARAYAN DHINGRA J.