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IN THE HIGH COURT OF DELHI AT NEW DELHI

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C.M. (Main) No.754 of 2009 & C.M. Appl. No.10711 of 2009

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08.01.2010

NARENDER KUMAR DHIMAN

.....Petitioner

Through: Mr. K.L. Bajaj, Advocate.

Versus

MS. KAMAL SAINI

.....Respondent

Through: None.

Date of Order: 8th January, 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 the present petition under Article 227 of Constitution of India, the petitioner has assailed the orders dated 12th May, 2009 and 26th May, 2009 whereby the learned trial court rejected the prayer of the petitioner seeking adjournment on the ground of illness of counsel for the petitioner.

2. The petitioner had earlier filed a petition being C.M. (Main) No.252 of 2009 challenging order of the trial court dated 4th December, 2008 whereby the plaintiff's evidence had been closed and the matter was fixed for defendant's evidence. The defendant had taken a plea that cross-examination of PW-2, Ms. Kamal Saini, was still continuing and the learned trial court without completion of cross-examination had closed the petitioner's evidence and defendant was not given opportunity to complete the cross-examination. This court disposed of the petition vide order dated 20th April, 2009

directing that the defendant be given one opportunity to cross-examine PW-2 on next date of hearing. Since the plaintiff had expressed an apprehension that the defendant was trying to delay the suit, this court also directed that the trial court should expeditiously dispose of the suit preferably within one year from 20th April, 2009. It was specifically directed that the trial court shall not unnecessarily adjourn the case at the request of either of the parties. After this, the matter was listed before the trial court on 12th May, 2009. PW-2, Ms. Kamal Saini, appeared for her cross-examination and on that day, counsel for the defendant did not appear for cross-examination of this witness. A plea was taken by the defendant that his counsel was not well and adjournment was sought. The court observed that the order was passed by the High Court on 20th April, 2009. The next date fixed in the case after 20th April, 2009 was 29th April, 2009 and thereafter the next date was 12th May, 2009. No cross-examination was done of this witness PW-2 on either of the two dates. He could not modify the order of the High Court and therefore, he closed the evidence.

3. Thereafter, an application was made by the defendant under Section 151 CPC to recall the order dated 12th May, 2009 which was taken up on 26th May, 2009. Even on that day, the defendant counsel did not appear and only proxy counsel appeared and sought adjournment. The proxy counsel was not able to answer any query of the court. On 12th May, 2009, the court had also directed the defendant to file affidavits of witnesses to be examined by the defendant. No affidavit of witnesses were filed by the defendant and only an adjournment was sought and, therefore, the trial court closed the defendant's evidence and fixed the matter for final arguments.

4. It is argued by counsel for the petitioner that on 20th April, 2009, the trial court fixed the matter for cross-examination of PW-2 on 29th April, 2009 but the advocates

were on strike on 29th April, 2009 so due to strike, he did not cross-examine the witnesses and the matter was then fixed for 12th May, 2009. On 12th May, 2009, the counsel could not come as he had suffered a knee injury on 9th May, 2009 and therefore, sent a request for adjournment of the case which was rejected. The petitioner then moved an application for recalling the order. The same was dismissed. The defendant's evidence was also closed as defendant failed to lead any evidence despite opportunities given. The petitioner's counsel has relied on medical certificate about his own injury which was not even filed before the trial court and was placed on record of this court only.

5. This matter was filed by the plaintiff in June, 1998. Thereafter when the matter came up for evidence, PW-2, Ms. Kamal Saini, was partly cross-examined on 15th April, 2004. The cross-examination of PW-2 was closed on 4th May, 2005. The defendant then made an application under Order XVIII Rule 17 CPC for allowing him to further cross-examine the witness. This application was allowed by the trial court subject to cost of Rs.2,000/- vide order dated 20th September, 2007 observing that the defendant filed application itself after lapse of one year and six months which shows casual attitude of the defendant and the defendant did not press the application on number of subsequent dates due to which there was substantial delay. The trial court, however, allowed the application for further cross-examination. Thereafter again, adjournment was sought and the matter was listed for cross-examination of plaintiff's witness on 1st August, 2008. On that day, the plaintiff made a statement for closing the evidence. The plaintiff's evidence was closed and defendant was directed to file affidavit of evidence. It is under these circumstances that this court had allowed the earlier miscellaneous petition and given one last opportunity to the defendant for cross-examination of plaintiff witness.

6. The defendant and his counsel were supposed to be diligent. The strike of advocates is no ground for non-appearance of counsel in the court and refusal to cross-examine the witness. The Supreme Court time and again had ruled that an advocate cannot run away from his obligations on the ground of strike and if he does not want to appear for his client due to strike, he should return the brief to the litigant. In the present case, the defendant's counsel, despite knowing that the High Court had given only one opportunity to him, did not conduct cross-examination of the witness on the ground of strike and on next date of hearing, he did not conduct cross-examination on the fake ground of his illness. The medical certificate which has been shown by defendant's counsel in this court is of 16th May, 2009 and it shows that he visited a private doctor only on 16th May, 2009 to say that he received injury on knee on 9th May, 2009. This clearly shows that the medical certificate was subsequently procured to meet the plea of illness on 12th May, 2009. I consider that the trial court did right thing in not acceding to request of adjournment on the sham ground of illness of the advocate. If the advocate had received knee injury on 9th May, 2009, then he would have visited the doctor for treatment on 9th May, 2009 and he would not have visited doctor for the first time on 16th May, 2009.

7. I also consider that once the trial court had ordered the defendant for filing defendant's evidence, the defendant was supposed to file affidavit of his witnesses. By making an application under Section 151 CPC, no party gets a right to overcome the order of the court. If the case is fixed for executing certain business on a date, that business has to be executed irrespective of interlocutory applications being made by the party. A plea cannot be taken that since an application under Section 151 CPC was made, the defendant was not supposed to file affidavit in evidence. It was made clear to the parties vide order

dated 20th April, 2009 in C.M. (M) No.252 of 2009 that the trial court shall not give unnecessary adjournments to either of the parties and this should have been understood by the parties. The cases cannot be allowed to drag perpetually. This case was filed in the year 1998 and in the year 2009, that is, after about eleven years, the case was still at the stage of PW-2's cross-examination. This court keeping this in mind had given clear directions that the case must be brought to an end expeditiously and this was required to be followed by the trial court.

8. I find no force in the petition and the petition is hereby dismissed.

SHIV NARAYAN DHINGRA J.

JANUARY 08, 2010
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