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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Order: March 08, 2010

+ **CM(M) 919/2009**

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Raj Kumar

Through: Mr. Rajat Aneja, Advocate

08.03.2010

...Petitioner

Versus

M/s Barsat Investment Pvt. Ltd.

Through: Mr. Sushil Kumar, Advocate

...Respondent

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?

ORAL

1. The petitioner by way of present petition under Article 227 of the Constitution has assailed an order dated 17th July, 2009 whereby the learned trial court allowed an application of the petitioner for leave to defend on the condition that the petitioner shall deposit the defaulted amount of Rs.3,94,666/- in the Court before next date of hearing.
2. It is contended by the counsel for petitioner that the petitioner was entitled for unconditional leave to defend since the suit of the respondent was not covered under Order 37 CPC. He submitted that the learned trial court in its order observed that not only the petitioner had raised triable issue which require due consideration and adjudication but also observed that the reliefs beyond the scope of Order 37 CPC was also claimed, still a conditional leave to defend was given to the defendant (petitioner herein).
3. The respondent/plaintiff filed a suit for recovery and possession of five TSRs (numbers given) and for recovery of mesne profits. The suit was valued for the purpose of jurisdiction at Rs.16 lac being value of TSRs and Rs.2,60,000/- for mesne profits. The prayer made in the suit was also for recovery of five TSRs and recovery

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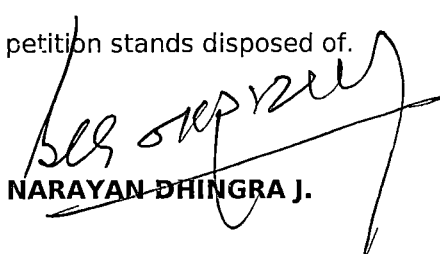
of mesne profits for use of TSRs @ Rs.2600/- per day.

4. It is obvious that the suit contained a claim which was not liquidated damages and which required determination and evidence on the part of the parties to prove as to what should be mesne profits per day. It is also apparent that the suit was not a money suit but a suit for recovery of possession of TSRs. The petitioner herein admittedly raised a triable issue included the issue that the suit was not covered under Order 37. The trial court despite this fact, granted a conditional leave to defend.

5. I consider that at the time of issuing summons of the suit under Order 37 CPC, the trial court is obliged to go through the suit and the claims made in the suit to find out if the suit was covered under Order 37 or not. Order 37 specifically provides that there should be no relief which does not fall within the ambit of Order 37 and Order 37 Rule 2 informs plaintiff that a plaint shall contain the averments to the effect that there was no relief which does not fall within the ambit of this Rule (Order 37) and the inscription, immediately below the number of the suit in the title of the suit shall also mention that it was a suit under Order 37 CPC. In the present case, initially the suit was drafted as an ordinary suit, but by pen an insertion was made in the title of it being under Order 37 CPC. There is no averment in the suit that no relief that did not fall within the ambit of Order 37 was claimed. Obviously, the suit was to be treated as an ordinary suit and could not be treated as a suit under Order 37.

6. I consider that the trial court followed a wrong procedure and acted beyond jurisdiction. The order passed by the trial court is hereby set aside. The suit be treated as ordinary suit and defendant shall file the written statement without depositing any amount within 30 days from today. The petition stands disposed of.

March 08, 2010
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SHIV NARAYAN DHINGRA J.