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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: March 16, 2010

Date of Order: March 22, 2010

+ CM(M) 1192/2009

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Om Kumar

Through: Mr. M.K. Gautam, Advocate

22.03.2010

...Petitioner

Versus

Suresh Chanchal & Ors.

Through: Mr. V.K. Upadhyay, Advocate for R-1 to R-3

...Respondents

+ CM(M) 1195/2009

%

Om Kumar

Through: Mr. M.K. Gautam, Advocate

...Petitioner

Versus

Suresh Chanchal & Ors.

Through: Mr. V.K. Upadhyay, Advocate for R-1 to R-3

...Respondents

+ CM(M) 1193/2009

%

Suman Rawat

Through: Mr. M.K. Gautam, Advocate

...Petitioner

Versus

Suresh Chanchal & Ors.

Through: Mr. V.K. Upadhyay, Advocate for R-1 to R-3

...Respondents

+ CM(M) 1196/2009

%

Kalicharan

Through: Mr. M.K. Gautam, Advocate

...Petitioner

Versus

Suresh Chanchal & Ors.

Through: Mr. V.K. Upadhyay, Advocate for R-1 to R-3

...Respondents

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 these petitions, the petitioners have assailed an order dated 5th August, 2009 whereby the learned trial court allowed an application of the respondents for leave to defend.

2. The petitioners filed a suit for recovery of due amount with 24% interest and damages from the defendants (petitioners herein). In the suit, it was stated that the decree be passed against defendants' servants, employees, legal heirs of the due amount as claimed and damages of Rs.4,000/- be granted against defendants' servants and employees. The suit was filed against three defendants who were stated to be running a Lucky Draw in the name of "Adarsh Lucky Scheme and M/s Adarsh Thrift & Credit Society.

3. In the application for leave to defend, the defendants had taken the stand that the suit was not maintainable as it was not based on a written contract. No documents were filed and the membership of the lucky draw was in the name of different persons while the suit was filed by different person. Another defence taken was that the contract between the parties was in the nature of a wagering contract which was a void contract in view of Section 35 of the Contract Act and, therefore, the contract was not enforceable.

4. The trial court while disposing of the application for leave to defend observed that the agreement relied upon by the petitioners were in the name

of Smt. Manju Devi and Mohit but they were not party to the suit and the suit was filed by Mr. Om Kumar, who was the husband of Smt. Manju Devi and father of Mohit. No authorization on their behalf was also placed on record. He, therefore, observed that the sufficient triable issues have been raised.

5. It is submitted by counsel for the petitioner that the defendants in leave to defend application has not raised the issue on the basis of which leave to defend was granted by the trial court and the trial court went beyond the pleadings taken by the defendants. The defendants in fact had raised no defence and had not denied the liability.

6. It is correct that the defendants in his application for leave to defend had not raised issues on the basis of which the trial court considered and granted leave to defend, however, after going through the suit, it would become apparent that the suit should not have been entertained as one under Order 37 of Civil Procedure Code as in the suit apart from due amounts, damages were claimed, which were not liquidated damages under the contract and the damages were to be ascertained by the trial court. Such a suit cannot be a suit under Order 37. One of the conditions for entertaining a suit under Order 37 is that no relief should have been claimed by the plaintiff which falls outside the purview of Order 37 CPC. The damages, not in the nature of liquidated damages, do not fall within the ambit and scope of Order 37 CPC. It appears that summons of the suit under Order 37 CPC were wrongly issued by the trial court and the suit should have been treated as an ordinary suit in the very beginning.

7. The observations made by the trial court regarding suit having been

filed by the father/ husband are born out from the record. If the court on the basis of pleadings of the plaintiff comes to conclusion that there was a triable issue which needs to be addressed by the court, the court can treat the suit under Order 37 CPC to be one as an ordinary suit. I, therefore, find no force in these petitions. The petitions are hereby dismissed with no orders as to costs.

March 22, 2010
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SHIV NARAYAN DHINGRA J.