

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: 9th February, 2010
Date of Order: 2nd March, 2010

CM (M) No. 1342/2008

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02.03.2010

Union of India & Ors.

... Petitioner

Through: Nemo

Versus

Lt. Col. Bhim Sen

... Respondents

Through: Mr. Anil Kumar, Advocate

JUSTICE SHIV NARAYAN DHINGRA

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

By this petition under Article 227 of the Constitution of India, the petitioner has assailed order dated 13th May, 2008 whereby an application of the petitioner made under Order 9 Rule 7 CPC for setting aside ex parte order dated 25th November, 2006 was dismissed.

2. Brief facts relevant for the purpose of deciding this petition are that respondent/Lt. Col. Bhim Sen filed a suit against Col. Arup Sen & Others including Union of India. Summons of the suit were sent to the defendants. Since nobody appeared for the defendants, the defendants were proceeded ex parte on 25th November, 2006. An application under Order 9 Rule 7 CPC was made on 17th January, 2007 along with affidavit of Major Sanjeev Nair wherein circumstances were explained regarding non-appearance on 25th November, 2006 and a prayer was made for setting aside ex parte order. The respondent/plaintiff took objection that the application and the affidavits were not made by a proper person and stated that as per provision of para 547 of the Defence Services Regulations of Army, a Staff Officer of MS Branch/Army Headquarter including MS(Legal) could only represent the defendants. The plea taken by the petitioner was that the matter related to Headquarter 5, Signal Group, Delhi Cantt and Major Sanjeev Nair represented it as

an Officer detailed to defend the case. This plea was not agreed to, and the application was dismissed on the ground that the application as well as affidavit in support of the application filed by Major Sanjeev Nair could not be entertained since Major Sanjeev Nair was not working as Staff Officer MS Branch/Army Headquarter or MS(Legal).

3. It is submitted by the Counsel for the petitioners that all Court notices received by the Secretariat of Chief of Army Staff are forwarded to the Judge Advocate General department, who further forward the same to the Complaint Advisory Board and Complaint Advisory Board forwards the same to MS Legal and this procedure was followed in this case also and the summons were sent to MS(Legal) on 17th November, 2006. Thereafter, a Counsel was engaged and the Counsel inspected the case file and on inspection it was found that the petitioner had already been proceeded ex parte. An application setting out the reasons for non appearance on 25th November 2006 was filed along with affidavit of Major Sanjeev Nair who was the Officer detailed by the defending unit. It was submitted that the matter pertained to the Unit where Major Sanjeev Nair was employed and the unit could detail any officer to represent it. It was not necessary that in all cases relating to Army, only MS(Legal) or MS Branch Officer had to represent. It was submitted that looking into the quantum of litigation in different parts of India against the Army, each summons and notice is sent to the concerned division, since only concerned division is well equipped with the facts. Since an affidavit about facts is to be filed in the Court, only an Officer well known with the facts can represent the matter. The Regulation relied upon by the trial Court cannot be considered as statutory binding law and dismissal of the application by the trial Court on this ground was not warranted and was illegal. It was also submitted that even regulation 547 with latest amendment provided that Officer Commanding Station or an Administrative Officer was authorized to represent the Central Government in the Court; a copy of Regulation was placed on record.

4. The petition is opposed by the respondent on the ground that the amended Regulation would not be applicable in this case and it is stated that the order was perfectly right.

5. I consider that the order passed by the learned trial Court is contrary to the spirit of law and principles of natural justice. The effort of the Court is to see that the litigation comes to an end as early as possible and technicalities should not defeat the substantive justice. In the present case, the only rightful person to file

affidavit was a person from the concerned unit/division. A person duly authorized filed affidavit. It was not a question if the affidavit was filed by a Major or a Colonel. Even a *hawaldar* could be duly authorized by Union of India to represent it and he can also file an affidavit. It was for the department to see as to who was to be authorized for representing it in the Court. It is not for the Court to see as to why the department had sent a Major of concerned Unit to represent it in the Court. The Regulations relied upon by the Court are only for the aid of the department and to regularize its functions and business. These Regulations can be changed from time to time and amended from time to time. They do not have statutory force and are only meant for smooth transaction of business.

6. I, therefore consider that the dismissal of the application by the trial Court on the ground that Major Sanjeev Nair was not a staff officer of MS Branch was illegal. In *United Bank of India v. Naresh Kumar & Ors.* (1996) 6 SSC 660 Supreme Court had observed that it would be a travesity of justice if a party is non-suited for technical reasons which does not go to the root of the matter. Similarly, in *Dharampal Arora v. Punjab State Electricity Board & Anr.* (2006) 13 SCC 593 Supreme Court again observed that the substantial relief must not be denied merely on technicalities.

7. I, therefore allow this petition under Article 227 of the Constitution of India. The order dated 13th May, 2008 passed by the trial Court is set aside. The application made by the petitioner under Order 9 Rule 7 CPC is allowed for the reasons stated therein. The ex parte order dated 25th November, 2006 is set aside.

Parties shall appear before the trial Court on 17th March, 2010.

March 02, 2010
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SHIV NARAYAN DHINGRA, J.