

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 21ST January, 2011

+ CM(M) 360/2010 & CM No. 4849/2010

RAMESH MANN

..... Petitioner

Through : Ms. Sonia Arora, Adv.

versus

JITENDER KUMAR & ORS

..... Respondents

Through : Mr. Saleem Ahmed, ASC and
Mr. Aneesh T.S., Adv. for R-2
to 4 with ASI Jai Prakash, P.S.
Alipur

CORAM:-

HON'BLE MS. JUSTICE VEENA BIRBAL

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

VEENA BIRBAL, J.

1. By way of this petition under Article 227 of the Constitution of India, petitioner has challenged the impugned order dated 26.11.2009 by which application of respondents i.e. defendants before the trial court under Order 9 Rule 7 CPC read with Section 151 CPC along with an application under Section 5 of the Limitation Act have been allowed and the order dated 29.02.2008 whereby respondents/defendants were proceeded ex parte has been set aside subject to cost of ₹ 3,000/- each.

2. Petitioner (i.e. plaintiff before the trial court) has filed a suit for damages to the tune of ₹ 4 lakhs against

respondents/defendants for the loss and damages alleged to have been suffered by the petitioner/plaintiff on account of defamation, mental agony, loss of work and reputation along with interest @ 24% per annum. The suit was filed in the year 2004. It is stated that pleadings in the suit are complete. On 29.02.2008, when the matter was listed for evidence of the petitioner/plaintiff, the respondents/defendants did not appear and as such were proceeded ex parte. Thereafter also for few dates of hearing respondents did not appear. Ultimately on 09.09.2008, the respondents no. 1 to 3 appeared and moved an application under Order 9 Rule 7 CPC read with Section 151 CPC along with an application under Section 5 of the Limitation Act for condonation of delay. Another application under Section 11 and 12 of the Contempt of Courts Act was also moved by respondents/defendants. The applications for setting aside of order as well as condonation of delay were allowed by the learned trial court vide impugned order dated 26.11.2009.

Aggrieved with the same, the present petition is filed.

Vide same order, application under Section 11 and 12 of Contempt of Courts Act of respondents/defendants is dismissed. However, the respondents/defendants have not challenged dismissal of their application.

3. Counsel for petitioner has submitted that the respondents were proceeded ex parte on 29.02.2008 whereas application for setting aside the said order was moved on

08.09.2008. It is submitted that there was sufficient delay in moving the application which has not been properly explained. Further, no sufficient cause is shown in setting aside of ex parte order. It is contended that it is a case of total inaction on the part of respondents/defendants. They want to delay the matter for ulterior motives, as such impugned order is liable to be set aside.

4. On the other hand, the stand of the respondents is that they have been diligent in pursuing the matter. It is submitted that the petitioner/plaintiff had earlier challenged the order dated 01.02.2007 by which the respondents/defendants were proceeded ex parte by filing a CM(M) No. 309/2007 before this Court which was dismissed on 01.03.2007. However, the petitioner/plaintiff had been taking adjournments before the learned trial court from 07.02.2007 onwards on the ground that the said CM(M) was pending in this Court. Due to said reason, the trial court had been adjourning the case for further proceedings awaiting the outcome of said petition. It is further stated that respondents are police officials and are in the Government service and had entrusted the matter to their counsel with the bona fide belief that their counsel must be attending the matter. On 03.09.2008, the counsel for petitioner informed them that they had been proceeded ex parte. Thereafter, another counsel was engaged who had inspected the file and moved the application for setting aside of ex parte order on 08.09.2008 without any loss of time. It is

stated that there is no delay on the part of respondents/defendants in moving the application. Present is a case of bona fide mistake. Learned counsel further submits that considering the sufficient cause stated for non-appearance in the application and considering the explanation given in the application for condonation of delay, the learned trial court has allowed both the applications, and this court will not interfere in the discretionary order of the learned trial court in exercise of its jurisdiction under Article 227 of the Constitution of India.

5. I have considered the submissions made and perused the record.

6. The pleadings are already complete and the trial court has allowed the application of the respondents vide impugned order dated 26.11.2009. Issues have also been framed in the matter.

7. Perusal of record shows that the respondents/defendants were earlier proceeded ex parte by the order dated 01.02.2007 of learned trial court. The same was earlier challenged by the petitioner/plaintiff before this court vide CM(M) No. 309/2007 and the said petition was dismissed even without issuing notice to the respondents on 01.03.2007. The record shows that the petitioner/plaintiff did not inform the learned trial court correctly and rather had taken adjournments on the ground that the matter was pending before this Court. On that ground the case was being

adjourned from time to time before the learned trial court for further proceedings. Though the CM(M) was dismissed on 01.03.2007 but the learned trial court has been informed only on 29.02.2008. Prior to this, there has been appearance on behalf of respondents/defendants and the case was being adjourned from time to time for further proceedings. On 29.02.2008, the respondents/defendants did not appear and were proceeded ex parte. Even thereafter, the matter had been adjourned at the request of petitioner/plaintiff on 31.03.2008, 21.04.2008 and 29.05.2008. Again on 14.07.2008, the counsel for petitioner/plaintiff informed the court that though the affidavit of witnesses had been placed on record but the same had not been tendered in evidence and date was taken for producing the said witnesses. On 01.08.2008, the petitioner had produced the aforesaid witnesses and tendered their respective affidavits. On 09.09.2008, the aforesaid applications have been moved. Learned trial Judge considering the seriousness of the allegations in the suit against the respondents/defendants and also considering the conduct of the petitioner/plaintiff in not informing the court in time about the disposal of earlier CM(M) for about one year and thereafter not proceeding with the matter and also considering the reasoning given and after being satisfied that delay had been properly explained and that there was sufficient cause for non-appearance had allowed the application.

8. Having considered the matter in its entirety, I am of the view that the trial court was justified while exercising judicial discretion in favour of respondents/defendants and setting aside the order dated 29.02.2008 by which they were proceeded ex parte. The petitioner/plaintiff has also been suitably compensated by the learned trial court by imposing cost. There is no perversity in the order. There is nothing on record to show that respondents/defendants want to delay the matter for ulterior motives as is alleged. Rather, the record shows that petitioner/plaintiff himself has caused the delay in the matter. No case is made out for exercise of power of this court under Article 227 of the Constitution of India.

9. In *Mahendra Rathour v. Onkar Singh*; AIR 2002 SC 505, it has been held that justice oriented approach has to be adopted by courts while dealing with such matters.

10. I have gone through the judgments relied upon by the counsel for petitioner/plaintiff. The same have no applicability to the facts and circumstances of the present case.

11. The petition stands dismissed.

12. There are already directions by the earlier order of this court for expeditious hearing of the matter. No further directions are required in this regard. The parties are directed to cooperate with the learned trial court in the expeditious disposal of the matter.

13. Trial court record be sent back with a copy of the judgment. Parties to appear before the learned trial court on 14.2.2011.

VEENA BIRBAL, J

JANUARY 21st, 2011
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