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

+ CM(M) 706/2016

TARUN KHANDPUR Petitioner
Through Mr.J.S.Bakshi and Mr. A.S. Bakshi,
Advocates.
versus
PREMA KHANDPUR & ANR Respondents
Through None.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

ORDER

% **25.07.2016**

CM No. 26188/2016 (exemption)

Exemption is allowed subject to all just exceptions.

CM(M) 706/2016 and CM No. 26187/2016 (stay)

1. As none is appearing for the plaintiffs/respondents in the trial court and the impugned order has been passed in the absence of the respondents/counsel for the respondents, no necessity is felt to serve a notice on the respondents.
2. By the present petition, the petitioner seeks to impugn the orders dated 16.02.2016, 30.03.2016, 10.05.2016 and 13.07.2016. It is the grievance of the petitioner that on the said dates, none appeared for the respondents/plaintiffs yet the trial court has directed the petitioner/defendant to complete his evidence and continued to hear the suit on each date and now, has fixed the matter for final arguments. On none of these dates, the plaintiffs or the counsel for the plaintiffs had appeared. He further submits

that the court had granted the plaintiffs right to cross-examine DWs subject to costs of Rs.10,000/- which cost was also not paid.

3. Learned counsel appearing for the petitioner submits that the trial court had no other option but to dismiss the suit under Order 9 Rule 8 CPC. He also relies upon Order 17 Rules 2 & 3 CPC to contend that when the plaintiffs are not interested in pursuing the matter, the petitioner could not be made to lead evidence and the matter should have been dismissed in default.

4. A perusal of the plaint shows that the respondents who are the mother and the brother of petitioner had filed a suit seeking cancellation of documents of title dated 09.11.1987 executed in favour of the petitioner which was said to have got fraudulently executed by him in respect of flat No. B-2/34 Azad Apartment, Shri Aurobindo Marg, New Delhi. The documents of title are dated 09.11.1987 and the suit has been filed in August 2009.

5. A perusal of the order sheet dated 30.03.2016 shows that none was present for the plaintiffs on that date. Hence, a costs of Rs.10,000/- was imposed on the plaintiffs and an opportunity was given to the plaintiffs to cross-examine DWs on the next date i.e. 10.05.2016. Again on 10.05.2016 none appeared for the plaintiffs. DW-3 was cross-examined and discharged on that date. On 13.07.2016, again none appeared for the plaintiffs. The court noted that cost was also not paid and instead of that, the court examined and discharged DW-4 and put the matter for final arguments.

6. The Order 9 Rule 8 CPC reads as follows:-

“8. Procedure where defendant only appears.- Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an Order that the suit be dismissed, unless the defendant admits the claim, or

part thereof, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.”

7. It would follow that where the defendant appears and the plaintiff does not appear when the suit is called out for hearing of the suit, the court is obliged to dismiss the suit unless the defendant admits the claim thereof or part thereof.

8. Similarly, Order 17 Rules 2 & 3 CPC as follows:-

“2. Procedure if parties fail to appear on day fixed.- Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other orders as it thinks fit.

Explanation : Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the court may, in its discretion proceed with the case as if such party were present.

3. Court may proceed notwithstanding either party fails to produce evidence, etc.- Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default,—

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under rule 2.”

9. As per Order 17 Rule 2 explanation, where evidence has been led by a party who is absent the court had discretion to proceed with the case as if such party is present. However, in the present case, a perusal of the impugned order sheets show that no special reasons have been given as to why a special discretion has been exercised by the court in favour of the plaintiff. Four hearings have been held and neither the plaintiff nor the learned counsel for the plaintiff has been present. Cost has not been paid. DW3 and DW4 have been examined and discharged without any cross-examination by the plaintiff. Normally, it would be for the plaintiff to pursue his case. In fact, Section 35-B of CPC provides that cost is to be paid on the next date of hearing and this shall be a condition to the further prosecution of the suit by the plaintiff where the plaintiff has been ordered to pay such costs. Keeping in view the facts and circumstances of the case, in my opinion, there was no ground for the trial court to exercise discretion in continuing the suit assuming that the plaintiff is present.

10. It was a fit case to be dismissed in default under Order 9 Rule 8 CPC. Accordingly, order dated 13.07.2016 is quashed and the suit is directed to be dismissed in default.

11. Respondents have not appeared before the trial court for the last several dates of hearing. There is no necessity to serve the respondents keeping in view the nature of the present petition.

12. The petition stands disposed of.

JAYANT NATH, J.

JULY 25, 2016

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