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IN THE HIGH COURT OF DELHI AT NEW DELHI

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C.M. (Main) No.901 of 2009 & C.M. Appl. No.12189 of 2009

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01.02.2010

M/S. LAKHANI RUBBER WORKSPetitioner
Through: Mr. Abhinav Bajaj, Advocate.

Versus

M/S. RITZY POLYMERSRespondent
Through: Mr. Sanjeev Sharma, Advocate.

Date of Reserve: 19th January, 2010

Date of Order: 1st February, 2010

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.

J U D G M E N T

1. By this petition, the petitioner has assailed order dated 28th November, 2008 passed by the trial court whereby the trial court dismissed the application of the petitioner for leave to defend in default and decreed the suit of the plaintiff along with cost and pendentialite interest @ 12 per cent per annum.

2. It is submitted by counsel for the petitioner that even if the petitioner had not appeared on the date fixed for arguments, leave to defend could not have been dismissed by the trial court in default and the trial court was obliged to consider the defence raised by the petitioner and pass a speaking order whether leave to defend was permissible on merits or not and the suit of the plaintiff could not have been decreed without going into the merits of the case of the plaintiff.

3. Learned counsel for the respondent on the other hand supported the trial court order.

4. Under Order 37 Rule 3 sub-Rule 5 CPC, the defendant is obliged to disclose to the court by way of an affidavit such facts as may be deemed to be sufficient to entitle him leave to defend and if the court considers that the defendant had disclosed such facts which shows that the defendant had substantial defence to raise then the court has to grant him leave to defend either unconditionally or upon such terms as may appear to the court just.

5. Once defendant files an application for leave to defend disclosing such facts, even if on the date of arguments on application for leave to defend the defendant does not appear or the court is inclined not to give adjournment, the court has to consider the application for leave to defend made by the defendant on merits and to pass an order on the grounds raised by the defendant seeking leave to defend and state whether the facts as disclosed entitle the plaintiff to leave to defend or not. The first proviso under sub-Rule 5 makes it clear that leave to defend cannot be refused unless the court was satisfied that the facts disclosed by the defendant do not raise a substantial defence or defence put up by the defendant was frivolous or malicious.

6. Perusal of the trial court order shows that the trial court did not advert to any of the facts, either stated by the plaintiff in the plaint or by the defendant in leave to defend and just decreed the suit dismissing the application for leave to defend in default. Even where a suit is decreed ex-parte, the trial court is supposed to satisfy itself on the basis of facts as disclosed by the plaintiff and the documents as placed by the plaintiff on record whether the suit of the plaintiff was worth decreeing or not. The trial court has to look

into the admissibility of the documents, consider whether the documents filed were reliable or not and apply mind and then pass even an ex-parte decree.

7. The trial court here seems to have abdicated its functions altogether and did not exercise jurisdiction vested in it of considering the application for leave to defend on merits or the suit on merits. The order of the trial court is liable to be set aside being perverse and without jurisdiction and is hereby set aside. The trial court shall consider the application for leave to defend on merits and then pass an order. The parties shall appear before the trial court on 10th February, 2010.

8. The petition is allowed.

SHIV NARAYAN DHINGRA J.

FEBRUARY 01, 2010
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