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Kusum Kishore Vs. Kamla Singh

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Court : Delhi

Decided On : Oct-10-2001

Reported in : 95(2002)DLT873

Judge : R.C. Jain, J.

Acts : Constitution of India - Article 227; Code of Civil Procedure (CPC), 1908 - Order 9, Rule 9

Appeal No. : CM (M) No. 183/2001

Appellant : Kusum Kishore

Respondent : Kamla Singh

Advocate for Def. : Hitender Kapoor, Adv.

Advocate for Pet/Ap. : Rekha Aggarwal, Adv

Disposition : Petition dismissed

Judgement :

R.C. Jain, J.

1. In this writ petition under Article 227 of the Constitution, challenge is made to an order dated 24.5.2000 passed by the learned Additional Rent Controller, Delhi, thereby disposing of an application under Order 9 Rule 9 CPC moved on behalf of

the petitioner-landlord praying for setting aside the dismissal of a petition, dismissed in default on 19th January, 2000, and for its restoration.

2. On 19.1.2000, petition of the writ petitioner was listed for recording of evidence before the learned Controller but neither the petitioner nor her counsel or any other representative put in appearance and consequently the petition was dismissed in the post lunch session after waiting for the petitioner. Application under Order 9 Rule 9 CPC was moved on behalf of the petitioner herein stating that the counsel for the petitioner Ms. Rekha Aggarwal being busy in connection with her personal case listed in the Hon'ble High Court, she had asked a colleague Mr. Ashok Rawal, Advocate, to attend the case who unfortunately fell sick on that day and could not attend the hearing leading to the dismissal of the petition. The application was supported by affidavit of the counsel for the petitioner and Sh. Ashok Rawal, Advocate. The application was opposed on behalf of the respondent thereby denying the averments made in the application and there being any sufficient reason for non-appearance of the petitioner or her counsel and any good cause for restoration of the petition. The learned trial court although took note of the affidavits filed by the above named two advocates but has dismissed the application primarily on the ground that the absence of the petitioner on the date of hearing was not explained.

3. Aggrieved by the said order, the petitioner approached this court by means of a Civil Revision Petition bearing No. 878/00 which was disposed of by this court vide order dated 13th February, 2001. The order reads as under :-

'When the case was called out earlier a request for pass over was made by Mr. Shiv Kumar on the ground that Ms. Rekha Aggarwal has gone to Ghaziabad. It can scarcely be appreciated why the learned Counsel has to o to Ghaziabad and not attend the case here. The matter has been called out twice but there is no appearance on behalf of he petitioner.

I have perused the impugned order dated 24.5.2000. The Additional Rent Controller had dismissed the application under Order 9 Rule 9 CPC for the reason that the case had been posted before him on that day for recording the petitioner's evidence. It was his view that even if the counsel is not available (as also

transpires before me), there was no justification for the petitioner not be present. I find no infirmity with this order. Instead of filing an appeal against this order, a Revision has been filed.

The Revision is not maintainable.

Dismissed.'

4. Later, the petitioner filed Civil Miscellaneous applications bearing No, 524/00 and 525/00 which were disposed of by the learned Single Judge on 28th February, 2001, with the following orders:-

'After some hearing, learned counsel appearing on behalf of petitioner prays that the applications be permitted to be withdrawn as she will approach the Court Under Article 227 of the Constitution of India.

CMs. 524-525/00 are dismissed as withdrawn.'

5. I have heard the learned counsel for the parties and have given my anxious consideration to their respective submissions. On behalf of the petitioner it is urged that there was sufficient cause shown in the application under Order 9 Rule 9 CPC which explains the entire circumstances due to which there could be no appearance on behalf of the petitioner on the date of hearing and that it was a fit case where the application ought to have been allowed and the petition restored for trial on merits. It is also stated that the earlier proceedings by way of revision petition in this court were owning to incorrect application of correct law and do not come in the way of petitioner in the present proceedings.

6. On the other hand learned counsel for the respondent has strenuously argued that in view of the dismissal of the revision petitioner by the order of this court dated 13th February, 2001, and later dismissal of the applications on 28th February, 2001, the present petition for the same relief is not maintainable. The basis of this contention is that the Civil Revision Petition No. 878/00 was not only dismissed on the ground of its non-maintainability alone but also on merits. After due consideration of the matter there appears to be considerable force in this submission. A bare reading of the order dated 13th February, 2001, leaves hardly

any doubt that the matter has been considered and dismissed on merits. The sentence 'I find no infirmity with this order (impugned order)' clearly brings out the opinion and mind of the court that it was formed on a consideration of the merits of the matter. The petitioner perhaps would have been within her rights to maintain the present petition, had the revision petition filed by her had been dismissed on the ground of its non-maintainability alone and no opinion had been expressed or finding recorded on merits. The said order has become final as neither any appeal etc. was filed against the same nor any liberty sought or granted by the court to file a writ petition at the time of disposing of the revision petition. This court while exercising its extra ordinary jurisdiction under Article 227 is not expected to sit over the judgment of the learned Single Judge of this court.

7. For the foregoing reasons, this court is of the opinion that the present petition under Article 227 of the Constitution is misconceived and not maintainable before this court. The same is accordingly dismissed leaving the parties to bear their own costs.

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