

**(2010) 09 DEL CK 0432**

**Delhi High Court**

**Case No:** C.M. (M) No. 1142 of 2010

Dr. Sudeshna Bhattacharya,  
Manisha X-Ray and Ultrasound  
Clinic, Manisha Pathology Clinic,  
Manisha Imaging

APPELLANT

Vs

Dr. Kamal K. Dutta, Tanya  
Diagnostic Centre Pvt. Ltd. and  
Sh. Mukul Chandra Dass

RESPONDENT

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**Date of Decision:** Sept. 8, 2010

**Acts Referred:**

- Constitution of India, 1950 - Article 227

**Hon'ble Judges:** Vidya Bhushan Gupta, J

**Bench:** Single Bench

**Advocate:** Purbali Bora, for the Appellant; Nemo, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

V.B. Gupta, J.

Present petition has been filed under Article 227 of the Constitution of India in which following prayers have been made;

(a) Restore the application for re-calling of order dated 28/8/2008 which has been dismissed vide order dated 7/7/2010 by Additional District Judge, Delhi and;

(b) Permit the petitioner to lead her evidence.

2. Brief facts are that respondent No. 1 (petitioner before trial court), filed a suit for damages to the tune of Rs. 5,10,000/- against present petitioner (defendant No. 2 before trial court) and respondent No. 3 (defendant No. 1 before trial court).

3. Petitioner has been contesting the suit and has filed her written statement. On 28th August, 2008, Counsel for petitioner filed an application for withdrawal of the

vakalatnama, which was dismissed by trial court, vide order dated 28th August, 2008.

4. Thereafter, petitioner filed application for recalling of order dated 28th August, 2008, which was also dismissed, vide order dated 7th July, 2010 passed by the trial court.

5. It is contended by Learned Counsel for petitioner that on 28th August, 2008, petitioner could not appear since this date was not known to her. Similarly, non appearance of her Counsel on 7th July, 2010 was on account of ill health of the counsel. Counsel has requested one of his fellow colleague to appear in the trial court and seek an adjournment, but unfortunately, he could not appear in time.

6. It is further contended that matter is pending before the trial court since 28th August, 2008 for final arguments and if petitioner is given opportunity to lead evidence, no prejudice would be caused to the opposite party.

7. Present petition has been filed under Article 227 of the Constitution of India. It is well settled that jurisdiction of this Court under this Article is limited.

8. In [Waryam Singh and Another Vs. Amarnath and Another](#), the court observed;

This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in - [Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee](#), to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

9. In light of principles laid down in the above decision, it is to be seen as to whether present petition under Article 227 of the Constitution of India against impugned order is maintainable or not.

10. As apparent from record, application for recall of order dated 28th August, 2008 was filed on 11th May, 2010, which means about twenty months after the order was passed.

11. Relevant portion of impugned order read as under;

28.8.2008

Present: Shri Kesha Ranjan, proxy Counsel for Shri K.S. Pathania, Counsel for plaintiff.

Shri Umesh Gupta, Counsel for defendant No. 1.

Shri Kirat Singh Counsel for defendant No. 2.

He has moved an application for withdrawal of the vakalatnama on the ground that defendant is not giving him any further instructions and he has tried to contact the defendant.

The application is opposed. As per the vakalanama placed on record, Shri Pramod Kumar Singh, Shri Kirat Singh, Shri Manoj Kumar, Shri V.K. Gupta, Shri Rajiv Nain are the counsels for the defendant in the present suit and vakalatnama is signed by all of them. So, the application by one of the Counsel without any supporting document, otherwise, does not inspire any confidence and is rather a delay tactics to seek a date. Rather it shows that the interest of the client is still in the mind of the Counsel and knowing fully well that the witness is not present and the costs has not been paid and escape route has been tried to be found out, by withdrawing the vakalatnama.

As per the order sheet of the previous date, today is the fourth opportunity for defendant No. 2 to lead evidence and earlier also, cost was imposed. Initially, it was stated by the Counsel Shri Rupesh Kumar that he has not brought the costs and then the cost was paid. Now, in the application, it is stated that the cost was paid by the Counsel from his own pocket. If that is so, it further goes to show that the sole intention of the Counsel is to protect defendant No. 2 from any adverse order and rather the conduct shows that cost was available with the Counsel on the previous date so paid by defendant No. 2 to him.

Today's opportunity was granted subject to further costs of Rs. 5,000/- out of which Rs. 3,000/- have to be deposited with DLSA and the balance is to be paid to the plaintiff. No cost has been deposited with DLSA nor any amount has been paid to the plaintiff. The application is dismissed.

No DW is present. As such, evidence of defendant No. 2 is closed and for non-payment of costs, defence of defendant No. 2 is stuck off.

12. Thereafter, petitioner filed application for recall of above order. On 7th July, 2010 when application for recall of the order was listed, neither petitioner nor her Counsel appeared. Under these circumstances, trial court rightly dismissed that application observing as under;

7.7.2010

Present: Counsel for plaintiff. Sh. Abhinav Kumar, advocate for defendant No. 1.

None for defendant No. 2.

To come up at 11.30 am today.

ADJ : Delhi.

At 12 noon.

Present: Proxy for plaintiff.

None for defendant No. 1 and 2.

Today case was fixed for consideration on an application filed by defendant No. 2.

This is an application with a request to recall order of this Court dated 28.8.2008 and to permit the applicant to lead its evidence.

The applicant /deft. No. 2 had filed an affidavit by way of evidence but did not offer himself for cross-examination. It is averred that applicant could not appear in court due to some personal problem. It is not explained as what was that problem due to which applicant could not appear in court on that dat.

None appeared on behalf of applicant even today.

No reason to recall impugned order dated 28.8.2008. Request in this regard is declined.

13. As per order dated 28th August, 2008, four opportunities were given to petitioner to produce her evidence but she did not examine any witness nor did she pay the adjournment costs. Under these circumstances, trial court rightly closed the evidence of petitioner and also due to non-payment of costs her defence was also stuck off.

14. Again, on 7th July, 2010 when petitioner's application for recall of order dated 28th August, 2008 was pending, neither she nor her Counsel appeared. Thus, the trial court had no option but to dismiss the application, which it did so rightly. The only purpose of filling of the present petition is to delay the trial with regard to suit for damages filed by respondent No. 1. To a great extent, petitioner has been able to delay the trial which is pending for final arguments since August, 2008.

15. It is well settled that bogus and frivolous applications being filed deliberately by the litigants in order to delay the trial, should be dealt with heavy hands. No leniency should be shown to those litigants who in order to cover up their own inefficiency and negligent act try to cause obstruction in the administration of justice. Strong message is required to be sent to those litigants who are in the habit of challenging each and every order of the trial court even if the same is based on sound reasoning and also to those litigants who chose to file meritless applications.

16. Since, there is no infirmity or illegality in the impugned order, the present petition under Article 227 of the Constitution of India is not maintainable.

17. This petition being most bogus and frivolous one which has been filed just to delay the trial and to waste time of the court, is hereby dismissed with costs of Rs. 20,000/- (Rupees Twenty Thousand only).

18. Petitioner is directed to deposit the costs by way of cross-cheque with Registrar General of this Court, within four weeks from today

19. List for compliance on 18th October, 2010.