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

% *Date of Decision : 26th November, 2015*

+ **CM(M) 131/2015**

PRITHIPAL SINGH Petitioner

Through: Sh. Rajiv Bakshi, Advocate

versus

AVTAR SINGH WALIA Respondent

Through: Sh. D.K. Mehta, Advocate

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER

% **26.11.2015**

PRATIBHA RANI, J. (Oral)

1. The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India with a prayer to set aside the order dated 15th July, 2014 passed in M.No.20/14 whereby the learned ADJ dismissed the applications filed on behalf of the petitioner under Order IX Rule 4 CPC for restoration of the suit which has been dismissed in default by the learned Trial Court as well as application under Section 5 of the Limitation Act for condonation of delay.

2. The impugned order vide which the application seeking restoration of the suit as well as application for condonation of delay have been dismissed reads as under:-

“15.07.2014

File taken up today on an application filed under Order 9 Rule 4 CPC for seeking recall of the order dated 10.05.2011

whereby the suit of the plaintiff was dismissed in default as well as application under Section 5 of Limitation Act.

Present : Sh. Manoj Sharma, Ld. Counsel for the applicant/plaintiff.

I have heard Ld. counsel for the applicant/plaintiff and also perused the application. Vide this application, applicant/plaintiff is seeking recall of the order dated 10.05.2011 whereby the suit of the plaintiff was dismissed in default. The application for restoration of the suit can be filed within 30 days from the date of dismissal of the suit. However, the instant application has been filed on 03.06.2014 i.e. after more than three years from the date of passing of the order dated 10.05.2011.

The ground for condonation of delay of more than 3 years is that plaintiff was not aware about the dismissal of the suit and he come to know only on 19.05.2014. The plea is not acceptable for the simple reason that plaintiff is presume to know about his case and he cannot be allowed to say that he was not aware of the suit. No ground is made out for condonation of more than 3 years in filing the application under Order 9 Rule 4 CPC. Accordingly, application under Section 5 of Limitation is dismissed. The application under Order 9 Rule 4 CPC is also dismissed being barred by limitation. File be consigned to record room after due compliance.”

3. Mr. Rajiv Bakshi, Advocate appearing on behalf of the petitioner has submitted that in this case respondent has been proceeded ex-parte. Arguments have been concluded and the case was listed for orders. However, on the date fixed for pronouncement of order, the order was not pronounced. Thereafter the matter was repeatedly adjourned and on 10th May, 2011 it was dismissed in default. It has been further submitted that in the application seeking restoration in the suit and also the reason under which restoration application could not be filed within time, have not been dealt with by learned Trial Court. Thus, without considering the grounds mentioned in the restoration application as well as application seeking

condonation of delay, learned Trial Court has declined the prayer of the petitioner to restore the said suit. Learned counsel for the petitioner has drawn the attention of this Court to the circumstances under which petitioner could not appear before the learned Trial Court i.e. kidnapping of the son of the petitioner for which FIR No. 25/2011 was registered at PS Vidya Nagar, Hubli, Karnataka as well as matrimonial dispute with the daughter of the petitioner which also led the initiation of the criminal proceedings and registration of FIR No.84/2013 at Mahila Police Station, Hubli. These instances mentally disturbed the petitioner and he could not interact with his counsel and follow up the matter.

4. The petitioner has placed on record copy of proceedings of the learned Trial Court. A Civil Suit for Rendition of Accounts, recovery of Monies, return of Machinery and Cancellation of documents was filed by the petitioner in the year 2005 against the respondent Avtar Singh Walia S/o Sh. Jawala Singh, Partner, M/s APCON ENGINEERS AND CONSTRUCTORS, A-17, Lajpat Nagar-II, New Delhi. The petitioner led ex-parte evidence and at the stage of judgment it was dismissed in default.

5. Sh. D.K. Mehta, Advocate appeared on behalf of respondents submits that on the grounds mentioned in the restoration application, the orders does not call for interference as there is huge delay in filing the restoration application without giving any sufficient cause for condonation of delay.

6. Perusal of the record reveals that on 26th February, 2008, learned Trial Court ordered the respondent/defendant to be served through publication. On failure of the respondent/defendant to appear before the learned Trial Court, he was proceeded ex-parte on 1st April, 2010. Thereafter ex-parte evidence by way of affidavit was led by the petitioner on 31st August, 2010 and PE was closed on the same date. The case was listed for 29th September,

2010 on which date part arguments were heard and the matter was adjourned on 6th October, 2010 for further arguments.

7. On hearing the final arguments on the next date i.e. 6th October, 2010 the matter was listed for order on 19th October, 2010.

8. The proceedings thereafter are as under:-

On 19.10.2010

Present : None.

Due to paucity of time matter is adjourned for orders/clarifications on 09.11.2010.

On 09.11.2010 Presiding Officer on leave and the matter is adjourned for 11.11.2010.

On 11.11.2010

Present : None.

No time left today.

Put up for orders/clarifications on 25.11.2010

On 25.11.2010

Present : None.

Renotify for final arguments on 06.01.2011.

On 06.01.2011

Present : Ld. counsel for the plaintiff.

Renotify for final arguments on 09.02.2011.

On 09.02.2011 Presiding Officer on leave and the matter is adjourned for 25.02.2011.

On 25.02.2011

Present : Ld. counsel for the plaintiff.

Ex-parte arguments heard. Put up for orders on 08.03.2011.

On 08.03.2011 Presiding Officer on leave and the matter is adjourned for 23.03.2011.

On 23.03.2011

Present ; None for the plaintiff.

Put up for ex-parte final arguments on 10.05.2011.

On 10.05.2011

Present : None for the plaintiff.

Since morning despite various calls, none has appeared on behalf of the plaintiff. It is 02:15 pm, in the facts and circumstances, suit is dismissed in default. File be consigned to record room after due compliance.

9. The proceedings conducted by the learned Trial Court reveal that prior to 19th October 2010 when the case was fixed for order, final arguments have been heard by the learned Trial Court. The matter was again listed for orders on 25.2.2011.

10. Order IX Rule 2 to 4 CPC provide as under:-

“2. Dismissal of suit where summons not served in consequence of plaintiff’s failure to pay costs.- Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges, if any, chargeable for such service, or failure to present copies of the plaint as required by Rule 9 of Order VII, the Court may make an order that the suit be dismissed:

Provided that no such order shall be made, if notwithstanding such failure, the defendant attends in person or by agent when he is allowed to appear by agent on the day fixed for him to appear and answer.

3. Where neither party appears, suit to be dismissed.- Where neither party appears when the suit is called on for hearing, the court may make an Order that the Suit be dismissed.

4. Plaintiff may bring fresh suit or court may restore Suit to file.- Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an Order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for such failure as is referred to in rule 2, or for his non appearance, as the case may be, the court shall make an Order setting aside the dismissal and shall appoint a day for proceeding with the suit.”

11. On 10.05.2011, when the suit filed by the petitioner has been dismissed in default, was not fixed for hearing.

12. In the case of ***Arjun Singh Vs. Mohindra Kumar and Ors., AIR 1964 SC 993*** the Apex Court held as under:-

“On that very date the Court took evidence of the plaintiff and reserved judgment. In other words, the hearing had been completed and the only part of the case that remained thereafter was the pronouncing of the judgment. O. XX, r. 1 provides for this contingency and it reads:-

“The court, after the case has been heard, shall pronounce judgment in open Court, either at once or, as soon thereafter as may be practicable, on some future day; and when the judgment is to be pronounced on some future day, the Court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleaders.”

13. After the trial was concluded and arguments were heard by the learned Trial Court, irrespective of the fact whether the plaintiff's counsel appeared or not learned Trial Court was expected to pronounce the order on the basis of the ex-parte evidence led by the plaintiff. On 22nd March, 2011, the matter was listed for orders and the Reader adjourned the matter to 23rd March, 2011. On 23rd March, 2011 learned Trial Court has not recorded any reason as to why the order was not pronounced and the matter was adjourned for ex-parte final arguments.

14. Thereafter, again final arguments were re-heard on 31st October, 2010. There is no other evidence except the testimony of plaintiff on affidavit which was required to be considered by learned trial Court for pronouncing the judgment. The matter could not have been dismissed in default at the stage of judgment by learned Trial Court.

15. The restoration application filed by petitioner along with application seeking condonation of delay describing the circumstances under which the petitioner found himself after this case was dismissed in default. The impugned order dismissing the suit for non-appearance of the plaintiff at the stage of judgment as well not even dealing with the grounds made by the

petitioner/plaintiff for restoration of the suit being grossly illegal has caused injustice to the petitioner and warrants interference. This Court is duty bound to exercise its power under Article 227 of the Constitution of India to remedy the injustice caused.

16. The order dismissing the suit in default at the stage of judgment as well dismissing the two applications under Order IX Rule 4 CPC and Under Section 5 of Limitation Act has adversely affected interest of the petitioner. The order dated 10.05.2011 dismissing the suit in default as well the order dated 15.07.2014 dismissing the two applications under Order IX Rule 4 CPC and Under Section 5 of Limitation Act filed by the petitioner are set aside. The suit is restored to its original number.

17. Petitioner is directed to appear before the learned Trial Court on 15th December, 2015. Though the respondent herein, who is defendant in Civil Suit No.368/2009 has been proceeded exparte, in this petition Mr.D.K.Mehta, Advocate has appeared on behalf of the respondent/defendant, the respondent/defendant is also at liberty to make his submissions by appearing before learned Trial Court, if so desired.

18. The Trial Court, if feel necessary, may give an opportunity to the parties to make submissions and thereafter dispose of the suit on merits within three months.

19. Petition stands disposed of in above terms.

20. Copy of this order be sent to the learned Trial Court and be given to dasti learned counsel for the parties, as prayed.

PRATIBHA RANI, J.

NOVEMBER 26, 2015

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