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

+ CM(M) 434/2014 & CMs No.12348/2017 (u/O IX R-9 CPC),
12349/2017 & 12350/2017 (both for condonation of delay of 715 days
in filing and 13 days in re-filing respectively)

MUNNI DEVI Petitioner

Through: Mr. Shamim A. Khan, Adv.

Versus

PREM GUPTA Respondent

Through: Mr. S.C. Sharma and Mr. Charan
Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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16.08.2017

1. The matter has been taken up today as 14th August, 2017 was declared a holiday.
2. This petition under Article 227 of the Constitution of India was filed impugning the order [dated 21st February, 2014 in M No.7/2014 of the Court of Additional District Judge (ADJ), Tis Hazari Courts, Delhi] of dismissal of an application filed by the petitioner/plaintiff under Order IX Rule 4 of the Code of Civil Procedure, 1908 (CPC) for restoration of the suit dismissed in default of appearance of the petitioner/plaintiff on 18th November, 2013.
3. Notice of the petition was ordered to be issued.
4. However on the after notice date i.e. 4th February, 2015, though the respondent/defendant was unserved, the counsel for the petitioner/plaintiff did not appear and the petition was dismissed for non-prosecution.

5. CMs No.12348/2017, 12349/2017 & 12350/2017 have been filed for restoration of the petition and for condonation of 715 days delay in filing and 13 days delay in re-filing thereof.
6. Notice of the said CMs was ordered to be issued to the respondent/defendant and Mr. S.C. Sharma, Advocate for the respondent/defendant appears.
7. Considering that the respondent/defendant had not been served for 4th February, 2015 and also did not appear on that date, the delay in filing and re-filing of application for restoration of the petition is condoned for the reasons stated therein and the petition is restored to its earlier position.
8. CMs No.12348/2017, 12349/2017 & 12350/2017 are disposed of.
9. The counsel for the respondent/defendant states that he does not know anything about the case.
10. A perusal of the court file shows that the suit was dismissed in default of appearance and the application filed under Order IX Rule 4 of the CPC filed for its restoration was also dismissed vide the impugned order dated 21st February, 2014 on the ground of having been filed beyond the prescribed period of limitation and nothing having been placed before the Court to substantiate the grounds pleaded.
11. I have enquired from the counsel for the petitioner/plaintiff Mr. Shamim A. Khan, what was the stage of the suit when it was dismissed.
12. The counsel states that the suit was instituted in the year 2007.
13. On enquiry, whether the respondent/defendant was appearing in the suit, the counsel for the petitioner/plaintiff replies in the affirmative. Mr. S.C. Sharma, Advocate for the respondent/defendant however has no idea

about this either.

14. I have next enquired from the counsel for the petitioner/plaintiff that if the respondent/defendant was appearing, then why was the application filed under Order IX Rule 4 of the CPC, inasmuch as the same is applicable only when the suit is dismissed either before the service of summons on the defendant or when neither party appears. For dismissal in default when the defendant only appears, the remedy is under Order IX Rule 9 of the CPC.

15. The counsel does not answer the question.

16. A perusal of the paper book shows that the application filed by the petitioner/plaintiff was indeed under Order IX Rule 9 of the CPC, though the learned ADJ, in the impugned order, has treated the same under Order IX Rule 4 of the CPC.

17. An order of dismissal of an application under Order IX Rule 9 of CPC is appealable under Order XLIII Rule 1(c) of the CPC and once that remedy was available to the petitioner/plaintiff, the invocation of Article 227 of the Constitution is misconceived.

18. Be that as it may, since both the counsels are at sea and since the learned ADJ also committed an error in treating the application as under Order IX Rule 4 of the CPC and dismissal whereof is not appealable, it is deemed appropriate to dispose of the petition by setting aside the impugned order dated 21st February, 2014 and by restoring the suit filed by the petitioner/plaintiff to its original position, subject to the petitioner/plaintiff paying costs of Rs.10,000/- to the counsel for the respondent/defendant before the Trial Court.

19. The parties to appear before the Court concerned on 22nd September, 2017.

20. The petition is disposed of.

RAJIV SAHAI ENDLAW, J.

AUGUST 16, 2017

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