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

+ CM(M) 727/2017

MOHAN DASS HASSA NAND Petitioner
Through: Mr. Sourabh Ahuja, Adv.

Versus

DELHI DEVELOPMENT AUTHORITY & ANR Respondents
Through: Mr. Dhanesh Relan, Ms. Isha Garg,
Mr. Harshwardhan Goel and Ms.
Gauri, Advs. for DDA.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **18.07.2017**

CM No.24980/2017 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

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3. This petition under Article 227 of the Constitution of India has been preferred against the order (dated 15th July, 2016 of Civil Judge-06 (West), Tis Hazari Courts, Delhi) of dismissal for non-prosecution of suit being CS No.670/2014 filed by the petitioner.
4. The petitioner thereafter filed an application under Section 151 of the Code of Civil Procedure, 1908 (CPC) for review of the order dated 15th July, 2016. The said application was dismissed vide order dated 10th April, 2017 which is also impugned in this petition.

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5. An order of dismissal of a suit for non-prosecution i.e. under Order XVII Rule 3 of the CPC was held to be a decree and appealable as such.

6. Reference in this regard can be made to ***Panna Lal Mandawari Vs. Mt. Bishen Dei*** AIR 1946 All 353 (FB). Subsequently, in ***Sri Pitamber Prasad Vs. Sohan Lal*** AIR 1957 All 107, the Division Bench explained that the order of dismissal of the suit for want of prosecution must be construed and treated as a dismissal for want of evidence on merits. It was also held that against an order of dismissal for non-prosecution, an application under Order IX Rule 9 of CPC is not maintainable. The Full Bench of Madras High Court also in ***Prativadi Bhayankaram Pichamma Vs. Kamisettu*** AIR 1918 Mad 143 held that an order under Order XVII Rule 3 of CPC would be a decree and an application for setting aside whereof under Order IX Rule 13 would be maintainable. The same was the view of the High Court of Punjab & Haryana in ***The State of Punjab Vs. Jagan Nath Chhichara*** ILR 1967(2) P&H 352 and of the High Court of Calcutta in ***Lalit Chandra Das Vs. Sushil Chandra Guha*** AIR 1980 Cal 148, the High Court of Andhra Pradesh in ***Kalagara Hari Babu Vs. Edupuganti Krishna Rao (Died)*** (1996) 3 ALT 731, the High Court of Assam in ***Mst. Gigi Agarwallini Vs. Baleswar Tewari*** AIR 1961 Assam 99, the High Court of Rajasthan in ***Ganga Das Vs. Mst. Gopli*** AIR 1960 Raj 245 and the High Court of Orissa in ***Sudarsana Sundari Narasimma Vs. Judhisthi Padhi*** (1956) 22 CLT 395.

7. The counsel for the respondent Delhi Development Authority appearing on advance notice also states that the appeal lies before the District Judge.

8. However Supreme Court in *Firdous Omer Vs. Bankim Chandra Daw* (2006) 6 SCC 569, though concerned with dismissal of suit on default in appearance in exercise of powers under Rule 35 of Chapter X of Calcutta High Court Original Side Rules held that dismissal of a suit for non-prosecution or for non-appearance of the plaintiff is not a decree as specified in Section 2(2) of the CPC and not appealable as a decree and held even an application under Order IX Rule 9 of CPC to be applicable to a dismissal for non-prosecution. I may however mention that no reference to Order 17 of CPC was made, while so holding.
9. The counsel for the petitioner withdraws the petition with liberty to take appropriate remedy.
10. Dismissed as withdrawn with liberty in accordance with law.

RAJIV SAHAI ENDLAW, J.

JULY 18, 2017

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(corrected and released on 08.08.2017)