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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 911/2017
JANAK KUMARI (DECEASED) THR LAL CHAND..... Petitioner

Through: Ms. Arti Anupriya, Adv.

Versus

DALJIT SINGH & ORS Respondents

Through: Mr. Vinod Kumar Goel, Adv. for R-3.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **25.08.2017**

CM No.30510/2017 (for exemption)

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

CM No.30511/2017 (for condonation of 10 days delay in re-filing the petition)

3. For the reasons stated in the application, the delay is condoned.
4. The application is disposed of.

CM(M) 911/2017 & CM No.30509/2017 (for stay)

5. This petition under Article 227 of the Constitution of India impugns the order [dated 13th April, 2017 in Civil Suit No.84510/2016 of the Court of Civil Judge-02 (South), Saket Courts, New Delhi] of dismissal of the application of the petitioner / plaintiff under Order IX Rule 4 of the CPC for restoration of the suit dismissed in default on 16th July, 2015.
6. On enquiry, the counsel for the petitioner / plaintiff states that the suit filed by the petitioner / plaintiff was only for the relief of permanent injunction to restrain the respondents / defendants from forcibly

dispossessing the petitioner / plaintiff from property No.2/29 and 2/30 (Front & Back Portion), Double Story, Masjid Road, Jagpura, Bhogal, New Delhi and from carrying out any repair or replacement of roof of the suit property and from selling the suit property.

7. A perusal of the order dated 16th July, 2015 shows that neither the petitioner / plaintiff nor the respondents / defendants had appeared before the Civil Judge on that date.

8. On yet further enquiry, it is informed that the suit, when it was dismissed in default of appearance under Order IX Rule 3 of the CPC on 16th July, 2015, was at the stage of petitioner's/plaintiff's evidence.

9. In the circumstances, it has been enquired from the counsel for the petitioner / plaintiff as to why the petitioner / plaintiff cannot institute a fresh suit in accordance with Order IX Rule 4 of the CPC, instead of pursuing the application for restoration of the suit.

10. It is not as if the petitioner / plaintiff has paid any substantial court fees on the suit which has been dismissed.

11. Considering the nature of the relief and the recurring cause of action therefor, it is also not as if the fresh suit if any filed would be barred by limitation.

12. The counsel for the petitioner /plaintiff states that though the remedy of filing a fresh suit is available under Order IX Rule 4 of the CPC but the petitioner / plaintiff is also entitled in law to challenge the order of dismissal of the application for restoration.

13. Undoubtedly so, but it is felt that instead of issuing notice of this petition and keeping the same pending and during which time no proceedings will take place in the suit, it will be expedient that the option of filing a fresh suit is availed.

14. The petition is thus dismissed with liberty aforesaid to the petitioner / plaintiff to file a fresh suit for the same reliefs.

No costs.

RAJIV SAHAI ENDLAW, J

AUGUST 25, 2017
'gsr'..