

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

% **Date of decision: 22nd August, 2017**

+ **CM(M) No.740/2017**

EINO S MEHTA

..... Petitioner

Through: Mr. Rajshekhar Rao, Mr. Nakul Sachdeva, Ms. Tahira Karanjawala, Ms. Natasha Saharawat and Mr. Ankit Rajgarhia, Advs.

Versus

SANMATI MOTORS & ANR

..... Respondents

Through: Mr. Ashok Chhabra, Mr. Nikhil Karwal and Mr. B. Shekhar, Advs. for R-2.

AND

+ **CM(M) No.741/2017**

KANTA MEHTA

..... Petitioner

Through: Mr. Rajshekhar Rao, Mr. Nakul Sachdeva, Ms. Tahira Karanjawala, Ms. Natasha Saharawat and Mr. Ankit Rajgarhia, Advs.

Versus

SANMATI MOTORS & ANR

..... Respondents

Through: Mr. Ashok Chhabra, Mr. Nikhil Karwal and Mr. B. Shekhar, Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petitions, both under Article 227 of the Constitution of India, impugn separate but identical orders of the same learned Additional District Judge (ADJ) (West) in two suits filed by each of the petitioner, of dismissal of the application filed by the petitioner/plaintiff on 14th

February, 2017 for restoration of the suits dismissed in default on 2nd July, 2016.

2. On 2nd July, 2016, the respondents/defendants also had not appeared before the ADJ. Thus the applications were under Order IX Rule 4 of the CPC.

3. The learned ADJ has dismissed the applications reasoning that the limitation for filing the application for restoration of the suit is governed by Article 122 of the Schedule to the Limitation Act, 1963 and since the applications were not accompanied with any application for condonation of delay, they were liable to be dismissed as barred by time.

4. The impugned orders also record that on transfer of the suits from this Court to the Court of the ADJ, no fresh notice had been issued.

5. The petitions were entertained and notice thereof issued.

6. The counsel for the respondent No.2 Mirkana Engineering in both the petitions appears and states that the respondent No.1 Sanmati Motors in both the petitions has not been served.

7. As per the noting of the Court Master, the respondent No.1 Sanmati Motors has been served through Mr. Ashok Chhabra & Associates, Advocates.

8. The counsel for the respondent No.2 states that he is also from Mr. Ashok Chhabra & Associates Advocates who are advocates for respondent No.2 Mirkana Engineering only and who have never been advocates for respondent No.1 Sanmati Motors.

9. The counsel for the petitioners states that though the respondent No.1 had at one time appeared in the suits from which these petitions arise and had also filed written statement but thereafter has not been appearing.

It is further stated that the respondent No.2 Mirkana Engineering, in Special Leave Petitions (SLPs) preferred by them to the Supreme Court with respect to the orders in the suits from which these petitions arise, have stated that they are unable to locate the respondent No.1 Sanmati Motors and have sought service on respondent no.1 Sanmati Motors of notice issued of the SLPs, by publication.

10. On enquiry, it is stated that the suits from which these petitions arise have been filed by each of the petitioner for recovery of *mesne* profits/damages for use and occupation of the property let out by the petitioner to the respondent No.1 Sanmati Motors; the respondent No.2 Mirkana Engineering is stated to be the sub-tenant (of respondent no.1 Sanmati Motors) in unauthorised occupation of the property.

11. In the aforesaid circumstances and considering that the orders impugned in these petitions are of dismissal of the applications filed by the petitioners/plaintiffs under Order IX Rule 4 of the Code of Civil Procedure, 1908 (CPC) for restoration of the suits dismissed under Order IX Rule 3 of CPC i.e. when the respondents/defendants had also not appeared on the date when the suits were dismissed, need to issue fresh notice to the respondent No.1 Sanmati Motors or to await their service is not felt.

12. The counsel for the petitioners/plaintiffs and the counsel for the respondent/defendant No.2 have been heard.

13. The counsel for the petitioners/plaintiffs has argued that though no separate application for condonation of delay was filed but the petitioners/plaintiffs in the applications under Order IX Rule 4 of CPC itself stated the circumstances in which the petitioners/plaintiffs did not

come to know of the proceedings in the suit. It is stated that the suits were instituted in this Court and were pending in this Court; that against an order under Order XVA of CPC in the suits, the respondent/defendant No.2 preferred appeals which were dismissed and against which order the respondent/defendant No.2 had preferred SLPs aforesaid to the Supreme Court; that the petitioners/plaintiffs, for the purposes of the Supreme Court, briefed an advocate different from the advocate who had been conducting the suits; that the advocate who had been conducting the suits, on transfer of the suits to the District Court on enhancement of the minimum pecuniary jurisdiction of this Court and being under the impression that the advocate who had been entrusted with the matters in the Supreme Court only will be doing the matters, did not appear before the District Court and which led to dismissal in default of the suits.

14. The counsel for the respondent/defendant No.2 Mirkana Engineering has argued that the application should have been under Order IX Rule 9 of CPC and not under Order IX Rule 4 of CPC and against the order of dismissal of an application under Order IX Rule 9 of CPC, the remedy of appeal is available.

15. I am unable to accept the aforesaid contention. The application under Order IX Rule 9 of CPC for restoration of the suit is required to be filed when the suit is dismissed under Order IX Rule 8 of CPC i.e. when the plaintiff does not appear and only the defendant appears. In the suits from which these petitions arise, on the date when the suits were dismissed, neither the counsel for the petitioners/plaintiffs nor the counsels for the respondents/defendants appeared and thus the dismissal

would be deemed to be under Order IX Rule 3 of CPC and the remedy thereagainst is by way of an application under Order IX Rule 4 of CPC.

16. The counsel for the respondent No.2 Mirkana Engineering has next contended that while Order IX Rule 3 only states that the suit will be dismissed, Order IX Rule 8 mentions 'dismissed in default'. He argues that dismissal under Order IX Rule 3 of the CPC being not 'in default', the only remedy is to file a fresh suit and not of restoration of the suit.

17. The said contention is contrary to express language of Order IX Rule 4 of the CPC which entitles the plaintiff, where a suit is dismissed under Order IX Rule 3 of the CPC, to either bring a fresh suit or to apply for an order to set dismissal aside, if satisfies the Court that there was sufficient cause for non-appearance on the day when the suit was dismissed. In fact even in Order IX Rule 8 of CPC, the word 'default' is not found and Order IX Rule 9 of CPC also does not use the words 'dismissed in default' and it is only the title thereof which provides "decree against plaintiff by default bars fresh suit". Both, Order IX Rule 4 and Order IX Rule 9 provide for restoration of the suit dismissed, whether it be under Order IX Rule 3 or under Order IX Rule 8 of CPC. Thus, no merit is found in the said contention also.

18. I am further of the view that the learned ADJ erred in taking a hyper-technical view in holding that the applications under Order IX Rule 4 of CPC could not be considered without a separate application for condonation of delay in filing thereof, when the cause for the delay in applying was already contained in the applications. Supreme Court, in **Bhagmal Vs. Kunwar Lal** (2010) 12 SCC 159, set-aside the order of the High Court of dismissal of application under Order IX Rule 13

of the CPC as barred by time and not accompanied with separate application under Section 5 of the Limitation Act, finding that the delay in filing the application was fully explained in the application under Order IX Rule 13 of the CPC itself. This Court also in ***Nirmal Chaudhary Vs. Bishambar Lal*** ILR (1979) I Delhi 782, in the context of proviso to Section 38(2) of the Delhi Rent Control Act, 1958 held that the Court can be satisfied, even from the affidavits or the documents on record, that there was sufficient cause for not filing the appeal within the time and that it is not necessary in law that an application must be filed, though as a matter of practice, an application is filed. It was further held that the exercise of power by the Court to condone delay is not necessarily dependent on a formal application being made and the Court is not powerless and if there is material on record to show facts constituting sufficient cause for condonation of delay, an oral prayer for condonation of delay can also be entertained. It was yet further held that the language of Section 5 of the Limitation Act also does not provide that an application in writing must be filed before relief thereunder can be granted and the power of condoning delay conferred by the Limitation Act is not subject to any rules or practice. Similarly, in ***Virender Singh Bahl Vs. Y.K. Kapoor*** AIR 2001 Del 79, it was held that dismissal of an application under Order IX Rule 4 of the CPC as barred by time is bad when it was stated in the application under Order IX Rule 4 of the CPC that the plaintiff came to know of the dismissal of the suit in default of appearance only 15 days prior to the date of filing of the application. To the same effect is the comparatively recent judgment

in *Universal Builders & Contractors Vs. Sheila Singh Uppal* (2008) 154 DLT 69 relying on host of other judgments.

19. It cannot also be lost sight of, that dismissal under Order IX Rule 3 does not bar the filing of a fresh suit by the plaintiff on the same cause of action, as is the case in the event of dismissal under Order IX Rule 8 of CPC. Not only so, unlike Order IX Rule 9, Order IX Rule 4 of the CPC does not authorise the Court to, while allowing restoration, impose any terms as to costs. The reason therefor is obvious. The legislative intent is clearly to consider dismissal of a suit in default of appearance of the plaintiff when the defendant also does not appear as a lesser default than dismissal of a suit in default of appearance of the plaintiff when defendant appears. In fact, this Court in *V. Bhagat Vs. Usha Bhagat* 1986 (30) DLT 307, as also several other High Courts, has held that when the suit is dismissed in default of appearance of the plaintiff, in the absence of the defendant, it is not even necessary for the Court to issue notice of the restoration application to the defendant and the action of the Court of issuing notice of the application under Order IX Rule 4 of the CPC to the defendant is without jurisdiction, illegal and not warranted by law. Considering all the said factors also, it is felt that the view taken by the learned ADJ in the impugned orders is indeed harsh and uncalled for. Even in *Sewa Singh Vs. Harbans Singh* AIR 2004 P&H 19, it was held that if a suit is dismissed under Order IX Rule 3 of the CPC, the Court has jurisdiction or power to restore the suit even without issuing notice to the opposite side and if notice is issued, it is not necessary to frame an issue and then to try the matter and then to find

out whether the suit is to be restored or not and that such matters are not to be strictly decided like the rights in the main suit and as far as possible the parties should be allowed to contest their claims on merit instead of dismissing the suit by refusing to restore it.

20. Considering the fact that the suits were instituted as far back as in 2009, the petitioners/plaintiffs cannot be relegated to the remedy of filing fresh suits on same cause of action at this stage and the only remedy available was to apply for restoration.

21. The petitioners/plaintiffs, for the reasons stated in the applications, have disclosed sufficient cause for non-appearance on the date when the suits were dismissed and for not applying for restoration within thirty days.

22. The petitions thus succeed. The impugned orders are set aside. The applications of the petitioners/plaintiffs under Order IX Rule 4 of CPC are allowed and the suits restored to their original position, as prior to the orders of dismissal.

23. The parties to appear before the Court of ADJ (West), Tis Hazari Courts, Delhi on 22nd September, 2017.

24. It will be open to the respondents/defendants to, in the event of the petitioners/plaintiffs succeeding in the suit, contend that the petitioners/plaintiffs are not entitled to interest for the period when the suits were dismissed in default and till today and such contention, if made, shall be considered as per its own merits.

25. A copy of this order be forwarded to the District Judge, West Delhi.

RAJIV SAHAI ENDLAW, J.

AUGUST 22, 2017/bs/gsr