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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Civil Revision No.3610 of 2018
Date of Decision: 16.07.2018**

Kamlesh Kumar

.....Petitioner

Vs

Mohamed Imran and another

....Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. Akshay Kumar Jindal, Advocate
for the petitioner.

RAJ MOHAN SINGH, J

[1]. In this revision petition, petitioner has laid challenge to the order dated 16.02.2016 passed by the Civil Judge (Jr. Divn.), Ferozepur Jhirka and order dated 28.07.2017 passed by the Addl. District Judge, Mewat vide which appeal against the order dated 16.02.2016 was dismissed.

[2]. An application for restoration of the suit was filed before the Civil Judge (Jr. Divn.) Ferozepur Jhirka. The suit was dismissed for non-prosecution on 10.12.2009 under Order 9 Rule 3 CPC. The order passed under Order 9 Rule 3 CPC is not appealable in terms of Order 43 Rule 1 CPC. Petitioner availed wrong remedy of appeal before the lower Appellate Court.

[3]. Perusal of the record would show that the case was pending before the trial Court on 10.12.2009 for plaintiff's evidence. Plaintiff had availed 21 opportunities including 15 last opportunities for leading his evidence. On the date fixed, neither the counsel for the plaintiff appeared, nor any witness was brought. The Court had no option, but to dismiss the suit for non-prosecution.

[4]. Learned counsel for the petitioner submitted that even if, the order passed under Order 9 Rule 3 CPC was not appealable, still the Court can entertain the prayer in revision, particularly when application for restoration of suit was filed within 30 days. The application was filed on 23.12.2009 for restoration of suit which was dismissed for non-prosecution on 10.12.2009.

[5]. The findings recorded by the trial Court would show that the plaintiff had availed numerous opportunities i.e. 21 in number and did not lead any evidence. 15 opportunities were granted as the last opportunities, but the plaintiff did not adduce any evidence. The Court could have passed the order in terms of Order 17 Rule 3 CPC in the absence of any evidence on behalf of the plaintiff, the suit could have been decided forthwith. Dismissal of suit for non-prosecution would have the same implication. The conduct of the plaintiff was not such in which

indulgence can be granted, even if the application was allowed, the Court could have decided the suit forthwith in terms of Order 17 Rule 3 CPC.

[6]. For an order passed in terms of Order 9 Rule 3 CPC, fresh suit is not barred, of course plea of limitation would apply. The facts on record would show that the plaintiff/petitioner had pathetic approach to the suit proceedings. Against the order dated 16.02.2016, wrong remedy was availed before the lower Appellate Court and the appeal remained pending for more than one year.

[7]. In view of facts and circumstances of the case, no indulgence can be granted to the petitioner as the petitioner was never alive to the situation, even though he was the plaintiff in the suit. Filing of application within 30 days cannot dilute the record of inaction on the part of the plaintiff, when he had availed 21 opportunities before the trial Court including 15 last opportunities for leading his evidence. No evidence was brought on record, rather on 10.12.2009 neither his counsel appeared in the Court, nor any witness was produced. Though the restoration is normally allowed when facts and circumstances are not glaring. In the present case, exception has to be carved out owing to the conduct of plaintiff in not remaining vigilant and alive to the situation.

[8]. In my considered opinion, the order dismissing the suit in default was inevitable and the Court was equally competent to pass the order in terms of Order 17 Rule 3 CPC. This revision petition is found to be totally bereft of merits and the same is accordingly dismissed.

July 16, 2018

(RAJ MOHAN SINGH)
JUDGE

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Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No