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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 1013/2018 & CM APPL. 35135/2018
M/S AVENIR EXPRESS Petitioner
Through: Mr. Anuj Kapoor, Adv.

versus

M/S MAHALAXMI CARGO Respondent
Through:

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER
% **12.10.2018**
CM APPL. 35135/2018 (Exemption)

Exemption allowed, subject to just exceptions.

CM(M) 1013/2018

Submissions have been made on behalf of the petitioner. Vide the present petition, the petitioner assails the impugned order dated 09.07.2018 of the Sr. Civil Judge-cum-Rent Controller, New Delhi in CS 58589/2016 vide which the application under Order 9 Rule 4 r/w Section 151 of the CPC filed on behalf of the petitioner as plaintiff of the suit seeking restoration of the plaint and setting aside of the order dated 17.04.2018, was declined taking into account the factum that the plaintiff i.e. the petitioner herein had not put in appearance on three consecutive dates i.e. 31.01.2017, 02.03.2017 & 17.04.2017 and that even thereafter after the suit had been dismissed for non-prosecution on 17.04.2017, the plaintiff after learning of the dismissal

of the suit on 20.02.2018 and obtaining certified copy thereof on 02.04.2018, did not take swift action for seeking restoration of the suit and for setting aside the dismissal for non-prosecution. Vide the impugned order, it is *inter alia* observed to the effect that application was barred by limitation and no cogent reasons had been made out for allowing the application. It has been submitted on behalf of the petitioner that though there have been learned counsel putting in appearance on behalf of the petitioner previously and steps were being taken for effecting service on the defendant i.e. the respondent to the present petition, the learned counsel for the petitioner suddenly stopped appearing and chose not to appear on the date 31.01.2017, 02.03.2017 & 17.04.2017, as a consequence of which, the petitioner also lost track of the case.

Inter alia it has been submitted through the application under Order 9 Rule 4 of the CPC that had been filed before the learned trial Court dated 04.06.2018 supported with an affidavit of the partner of the plaintiff firm vouching the contents of the application under Order 9 Rule 4 of the CPC to be correct and true to the effect that when he met his counsel in December, 2017, he was apprised that the matter was still pending and the date of hearing was fixed for 20.02.2018 and that on 20.02.2018 on making a call to the counsel it was apprised that the counsel could not attend the Court and as a consequence thereof, the petitioner made inquiries and learnt of the dismissal in default of the suit on 17.04.2017 and then on applying a certified copy of the complete record of the suit which was received only on

02.04.2018 and on a perusal of the order sheet, the plaintiff i.e. the petitioner learnt the non-appearance of his counsel w.e.f. January, 2017, as a consequence of which, the suit was dismissed for non-prosecution on 17.04.2017.

Inter alia it has been submitted through the application that had been submitted before the learned trial Court that due to demise in the family of the plaintiff he could not visit the office of the counsel for the plaintiff for signature and attestation of the affidavit.

Taking into account the factum that the suit is at its preliminary stages inasmuch as service has not been effected on the defendant, and for reasons explained in the application that had been filed before the learned trial Court as also averments made through the present petition. The petition is allowed and CS 58589/2016 pending before the SCJ-cum-RC, New Delhi is restored to its original number and stage subject to deposit a cost of Rs.15,000/- which be deposited with the Delhi State Legal Services Authority, Patiala House Courts and the proof of deposit be placed before the learned trial Court before whom the petitioner is directed to put in appearance on the date 03.12.2018.

The petition is disposed of accordingly.

ANU MALHOTRA, J

OCTOBER 12, 2018

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