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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 13th December, 2019

+ **CM (M) 934/2018 & CM APPL. 32852/2018**

KAMLESH KUMAR JHA Petitioner
Through: Mr. Kumar Amit, Advocate.
(M:8851425623)

versus

KHAZANI DEVI & ORS. Respondents
Through: Mr. Suresh Kumar, Respondent No.6
in person. (M:7827264262)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition arises out of the impugned order dated 7th July, 2018 by which the application under Order IX Rule 9 CPC filed by the Petitioner/Plaintiff (*hereinafter 'Plaintiff'*) was dismissed and the order by which the suit was dismissed for non-prosecution dated 15th April, 2017 was maintained by the Trial Court. The suit was instituted in the year 1998 seeking partition and injunction in respect of many properties including vacant plot of land measuring 400 sq. yds. at Khasra No. 62/10/1, situated at Raj Nagar, Part-II, Palam, Delhi.

2. A perusal of the list of dates shows that during the pendency of the suit, one of the parties had expired and thereafter, evidence was led spanning over a period of 20 years. The Plaintiffs and the Defendants have concluded their evidence and the matter was at the stage of final arguments. At that stage on 15th April, 2017 the suit was dismissed with the following order.

“Court notice issued to non appearing parties as well their counsel for today. On perusal of the record shows that for the last 4 dates of hearing plaintiffs were not

appearing. It seems that plaintiffs are not interested in prosecuting their case. Today also, despite repeated calls since morning no one has appeared for the plaintiff. It is 12.40 p.m. The present suit is dismissed in default for non prosecuting and for non appearance. No injunction order is now in operation. File be consigned to record room.”

3. The application under Order IX Rule 9 CPC came to be filed by the Plaintiff seeking restoration of the suit in which the Plaintiff’s counsel has averred that the counsel was under the impression that the matter was listed at 12:30 pm for final arguments. However, by the time the counsel reached the Court, he was informed that the suit had been dismissed for non-prosecution.

4. The Trial Court has, in the impugned order, also recorded the previous chronological events, which took place in the suit and has observed as under:

“40.14. Further more, the present suit was dismissed for non appearance of plaintiff in the presence of counsel for the applicant/defendant no.6 and at that time he raised no objection against the dismissal of the suit. Furthermore, as observed above, the similar application filed by the applicant has been withdrawn by the applicant without any liberty. In the present application of the applicant under Order 9 Rule 9, the reasons given by the applicant for restoration of the suit is not sufficient as it is being contended by applicant/defendant no.6 that his counsel could not remain present on 15.04.2017 at 12.30p.m. when the matter was dismissed however perusal of the order dated 15.04.2017 reveals that the present suit was dismissed for non prosecution at 12.40p.m. in the presence of counsel for the applicant. For the similar reasons given above, the application of the applicant

under Section 5 of the Limitation Act to the effect that applicant/defendant no.6 was undergoing treatment with doctor and could not file restoration application in time is without any support of medical document in this regard, therefore, the same is dismissed.”

5. A perusal of the impugned order shows that while dismissing the application, the Court has observed that no prejudice would be caused to the applicant as he is in possession of 177 sq. yards out of 400 sq. yards. The Court also observes that the dismissal of the suit occurred at 12:40 pm whereas the applicant stated that the counsel came around 12:30 pm.

6. The Supreme Court has recently in ***Robin Thapa v. Rohit Dora***, [CA No. 4507/2019, decided on 8th July, 2019] held as under:

“8. Ordinarily, a litigation is based on adjudication on the merits of the contentions of the parties. Litigation should not be terminated by default, either of the Plaintiff or the Defendant. The cause of justice does require that as far as possible, adjudication be done on merits.”

7. Thus, an endeavour ought to be made to decide matters on merits and not simply by default. The observations of the trial court are hyper-technical in nature, attempting to narrow down the difference between 12:30pm and 12:40pm. Such an approach is clearly not prudent. There is no doubt that the Plaintiff did not appear for four dates but a suit for partition brings to an end disputes amongst family members and endeavour ought to be made to decide the disputes on merits in such cases rather than on default as the families then continue to live with acrimony. The sequence of events in this case, do not warrant dismissal of the suit, which is pending for 20 years before the Court in which evidence had concluded. Accordingly, the

impugned order is set aside. The suit is restored to its original number. The suit shall now be heard on all the issues that have been framed and adjudicated on merits. Parties to appear before the Trial Court on 29th January, 2020.

8. The petition along with the pending application is disposed of in the above terms.

9. Copy of this order be sent to Id. District Judge, Dwarka for being marked to the appropriate Court.

PRATHIBA M. SINGH
JUDGE

DECEMBER 13, 2019/dk

