

DAVINDER PAL SEHGAL AND ANR.

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v.

M/S PARTAP STEEL ROLLING MILLS PVT. LTD. AND ORS.

DECEMBER 13, 2001

[M.B. SHAH AND B.N. AGRAWAL, JJ.]

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*Code of Civil Procedure, 1908/Limitation Act, 1963—Order 9, Rule 9/Section 5—Dismissal of suit of appellants for non prosecution and subsequent dismissal of restoration applications by trial Court—High Court remanding and directing the trial Court to dispose the suit on merits—Filing of petition for condonation of delay in filing the restoration application before the trial court by the appellants—Restoration of suit ordered by the trial court—Dismissal of restoration application by High Court as condonation of delay petition not considered by the trial court—On appeal, held, the trial court considered the condonation of delay petition before restoring the suit—Hence restoration of suit valid.*

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Appellant-plaintiffs, who were settled abroad, filed a suit for declaration for recovery of possession of property against defendants before trial court. The appellants appointed an attorney who in turn appointed an advocate to represent the case before the trial court. On the date of hearing, the advocate for the appellants could not attend the court since on that day his father suffered a heart attack and died later. On the next day, the attorney, on enquiry, came to know that the trial court issued notices to the appellants as nobody appeared but he was not informed of the next date of hearing. Neither the appellants nor the counsel received any notices from the trial Court regarding the next hearing in the suit. After about 3 months, the advocate, on enquiry, came to know that the next date of hearing was already over and the trial court dismissed the suit for non prosecution.

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An application for restoration of the suit under Order 9 Rule 9 CPC was filed by the appellants before the trial court. The application was dismissed as nobody appeared for the appellants. Another application was also dismissed by the trial court. On appeal, the High Court set aside the order of the trial Court and directed it to dispose of the suit on merits. After remand, the appellants filed a petition under Section 5 of the Limitation Act, 1963 before the trial court for condonation of delay in filing the

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A restoration application. The trial court allowed the application and restored the suit. High Court allowed the appeal filed by the respondents and dismissed the restoration application filed by the appellants on the ground that there was no consideration by the trial court on the point of limitation.

B In appeal to this Court, the appellants contended that the grounds for application for restoration of the suit and the condonation of delay, which were fully stated in the restoration application were considered by the trial court and the trial court deemed to have condoned the delay in filing the restoration application.

C The respondents contended that the application for restoration of the suit by the appellants was earlier dismissed for non prosecution by the trial court.

#### Allowing the appeal, the Court

D HELD: 1.1. A perusal of the restoration application and the petition filed for condonation of delay under Section 5 of the Limitation Act, 1963 shows all relevant facts were stated not only to show that the appellants had sufficient cause for non-appearance on the date of hearing but also to show sufficient cause for condonation of delay in filing the restoration application. That is why in the petition for Condonation of delay, it has been simply stated that facts stated in the restoration application may be taken into consideration for condonation of delay in filing the restoration application. Therefore, merely because in the order of trial court, specifically, there is no reference to the petition for condonation of delay, it cannot be said that it did not consider the same. From a bare perusal of the order, it appears that the grounds stated in the restoration application for non appearance on the date of hearing and the delay in filing the restoration application were considered by the trial court and it had restored the suit. Hence, it cannot be said that the order of restoration has been passed without condoning the delay in filing the restoration application.[635-B-D]

G 1.2 The submission of the respondents cannot be taken to be a ground for throwing out the restoration application since the High court, on the earlier occasion, set aside order of the trial court whereby restoration application was dismissed for non prosecution and the said order attained finality. In view of these facts, the trial court had not acted in the exercise of its jurisdiction illegally or with material irregularity and ac-

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**cordingly the High court was not justified in interfering with its order in exercise of its revisional jurisdiction. [635-E-F]**

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**CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8503 of 2001.**

From the Judgment and Order dated 3.11.2000 of the Punjab and Haryana High Court in C.R. No. 397 of 1998.

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Rachana Joshi Issar for the Appellants.

Ranjeet Kumar, Ms. Rakhi Ray, Divya Roy, Ms. Bina Gupta for the Respondents.

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The Judgment of the Court was delivered by

**B.N.AGRAWAL, J.** Leave granted.

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This appeal is against the order dated 30th November, 2000 passed by Punjab & Haryana High Court in C.R. No. 397 of 1998 whereby order passed by trial court restoring the suit which was dismissed for default, has been set aside and application under Order 9 Rule 9 of the Code of Civil Procedure (hereinafter referred to as the 'Code') has been dismissed.

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The plaintiffs/appellants filed a suit for declaration that deed of conveyance dated 10th October, 1980 executed by defendant No.2 in favour of defendant No.1 was void and for recovery of possession of the property conveyed thereunder. The plaintiffs had settled abroad in Thailand and appointed one Shri Gurdip Singh as their attorney who appointed one Shri Suresh Sharma, Advocate, to represent them in the suit. On 13th June, 1988, the suit was adjourned to 20th July, 1988 but as during the night intervening between 19th and 20th July, 1988, father of the aforesaid Shri Suresh Sharma suffered heart attack, he remained busy in the treatment of his father who later died. Due to that reason, Shri Suresh Sharma, Advocate, could not appear in court on 20th July, 1988, on which date the trial court directed to issue notices to the plaintiffs. In the evening of 20th July, 1988, the plaintiffs' counsel Shri Suresh Sharma informed Shri Gurdip Singh that he could not appear on 20th July, 1988 and on the next day, i.e., on 21st July, 1988, Shri Gurdip Singh came to Palwal court and learnt that as nobody appeared in the suit on the 20th July, 1988, notices were directed to be issued to the plaintiffs, but he was not told about next date fixed in the case. The plaintiffs did not receive any notice as

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A they were abroad nor any notice was served upon their attorney who after waiting for the notice, came to court with Shri Suresh Sharma on 18th October, 1988 for making inquiry about the case when it transpired that 24th August, 1988 was the next date fixed in the suit on which date, the court recorded in the order that the notice was ordered to be issued on 20th July, 1988 for being served upon the plaintiffs, but in spite of the fact that service report had not been received back, as nobody appeared on behalf of the plaintiffs, the suit was dismissed for non prosecution. Thereupon on the same day, an application under Order 9 Rule 9 of the Code was filed stating therein the aforesaid facts.

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C The application for restoration was dismissed for non prosecution on 21st November, 1994 as nobody appeared on behalf of the plaintiffs whereupon another application was filed on 21st December, 1994 for restoration of the same, which was dismissed on 19th September, 1995 by the trial court. When the said order was challenged by way of C.R. No. 556 of 1996 filed before the High Court, the same was allowed on 27th August, 1996, by which order of trial court was set aside and application under Order 9 Rule 9 of the Code which was filed on 18th October, 1988 for restoration of the suit was restored and the trial court was directed to dispose of the same on merit. It may be stated that after remand, on 28th October, 1997 a petition was filed under Section 5 of the Limitation Act for condonation of delay in filing the restoration application.

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E The trial court by its order dated 12th December, 1997 having found that sufficient cause was shown for restoration, allowed the application and restored the suit to its original file. When the said order was challenged before the High Court in revision, the same has been allowed, the order of the trial court restoring the suit set aside and application for restoration dismissed on the ground that there was no consideration by the trial court on the point of limitation. Hence, this appeal by way of special leave.

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G Learned counsel appearing on behalf of the appellants submitted that the grounds for restoration as well as condonation of delay were fully enumerated in the restoration application, a rejoinder whereto was filed and the trial court while passing the order for restoration, having considered facts stated in the restoration application and rejoinder and being satisfied with the cause shown in the restoration application would be deemed to have condoned the delay in filing the restoration application as such the High Court was not justified in interfering with the order of the trial court as there was no error of jurisdiction therein. On the other hand, learned counsel appearing on behalf of the respond-

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ents submitted that this Court should not interfere with the impugned order as the application for restoration was earlier dismissed for non prosecution.

We have perused the restoration application as well as petition filed under Section 5 of the Limitation Act for condonation of delay in filing the same. It appears that in the application for restoration, all relevant facts have been stated not only to show that the plaintiffs had sufficient cause for non appearance on 24th August, 1988 but also to show sufficient cause for condonation of delay in filing the restoration application. This is the reason why in the petition for condonation of delay, it has been simply stated that facts stated in the restoration application may be taken into consideration for condonation of delay in filing the restoration application. Therefore, merely because in the order of trial court, specifically, there is no reference to petition for condonation of delay, it cannot be said that it did not consider the same. From a bare perusal of the order, it would appear that the grounds stated in the restoration application for non appearance on 24th August, 1988 as well as delay in filing the restoration application having found favour with the trial court, the suit has been restored, therefore, it cannot be said that the order of restoration has been passed without condoning the delay in filing the restoration application. The submission of the learned counsel appearing on behalf of the respondents that application for restoration filed on behalf of the plaintiffs was dismissed earlier for non prosecution cannot be taken to be a ground for throwing out the restoration application as the High Court on the earlier occasion set aside order of the trial court whereby restoration application was dismissed for non prosecution and the said order attained finality. In view of these facts, we are of the opinion that trial court had not acted in the exercise of its jurisdiction illegally or with material irregularity and accordingly the High Court was not justified in interfering with its order in the exercise of revisional jurisdiction.

The appeal is accordingly allowed, impugned order passed by the High Court is set aside and that passed by the trial court is restored. In the circumstances of the case, there shall be no order as to costs.

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Appeal allowed.

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