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**Surendra Kumar and ors. Vs. Pappu Alias Jitendra and ors.**

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**SooperKanoon Citation : [sooperkanoon.com/510515](http://sooperkanoon.com/510515)**

**Court : Madhya Pradesh**

**Decided On : Sep-05-2005**

**Reported in : AIR2006MP83**

**Judge : N.K. Mody, J.**

**Acts : Code of Civil Procedure (CPC) - Order 6, Rule 16 - Order 9, Rules 4, 8 and 9**

**Appeal No. : Misc. Appeal No. 1303 of 2005**

**Appellant : Surendra Kumar and ors.**

**Respondent : Pappu Alias Jitendra and ors.**

**Advocate for Def. : Milind Phadke, Adv. (for Nos. 2 and 3)**

**Advocate for Pet/Ap. : A.S. Garg, Sr. Counsel and ;Rajesh Yadav, Adv.**

**Judgement :**

**N.K. Mody, J.**

1. Being aggrieved by the order dated 14-1-2005 passed by Additional District Judge, Shujalpur in MJC No. 26/ 2004, whereby the application filed by the appellant under Order 9, Rule 4, C.P.C. for setting aside the order dated 5-11-2004 and for restoration of Civil Suit No. 12-A/01 has been dismissed, the present

appeal has been filed.

2. Short facts of the case are that appellant filed a suit for declaration and permanent injunction against the respondent in the Court of Additional District Judge, Shujalpur. This suit was registered as 152-A/01 and was fixed for 12-3-2003 on the application filed by the appellants under Order 6, Rule 16, C.P.C. On this date at the time when case was called, neither appellants were present nor counsel was present. Hence learned Court below dismissed the suit in default. Immediately, thereafter an application under Order 9, Rule 4, C.P.C. was filed by the appellants wherein it was prayed that order be set-aside on the ground that Appellant No. 3, who is also an Advocate appeared in the Court at about 12 o'clock. At that time Court was busy in sessions trial. It was also alleged that Vishnu Narayan Joshi is counsel for appellants No. 1 and 2, who is not well, therefore, he could not appear before the Court. The application was registered as MJC No. 26/04. Application was opposed by the respondents on various grounds and it was prayed that application filed by the appellants be dismissed. After recording of the evidence learned Court below dismissed the application. Aggrieved by the impugned order dated 14-1-2005, present appeal has been filed.

3. Learned Counsel for the appellants submit that impugned order passed by the Court below is illegal and deserves to be set-aside. It is submitted that application was filed on that very date.

4. Learned Counsel for respondents submit that the suit was dismissed under Order 9, Rule 8, C.P.C., while the application was filed under Order 9, Rule 4, C.P.C., which is not maintainable. It is submitted that suit was filed in presence of some of the respondents, therefore, it will be deemed that the suit was dismissed under Order 9, Rule 8, C.P.C. Application ought to have been filed under Order 9, Rule 9, C.P.C. It is further submitted that no doubt application for restoration was filed, but it was not supported by an affidavit. To fill up the lacuna on the next date affidavit was filed which cannot be accepted. It is submitted that since litigation was pending for more than last 16 years, therefore, negligence on the part of the appellants is not tolerable. The application could have been filed under Order 9, Rule 9, C.P.C. because the suit was dismissed in presence of some of the

respondents. Hence it shall be deemed that the suit was dismissed by the learned trial Court in exercise of powers conferred under Order 9, Rule 8, C.P.C. However, only because of wrong provisions were mentioned, therefore, application cannot be dismissed. For this reliance is placed on M. P. Revenue Nirnaya, 1969 (1) Govardhan Das v. Sitabai, wherein Hon'ble Supreme Court has held that, 'jurisdiction of the Court cannot be challenged on the ground that application was under wrong section, while power to give relief existing under the same section by the same authority.

5. So far as filing of affidavit at later stage is concerned, learned Counsel submits that restoration application was filed at the end of the day, therefore, the affidavit has been filed on the next day. It is submitted that since oral evidence was adduced by the parties, therefore, filing of affidavit was of no consequence. On 12-3-2003, when the suit was dismissed the case was fixed for consideration of application filed under Order 6, Rule 16, C.P.C., therefore, on that day there was no justification on the part of the Court below to dismiss the suit. At the most the application under Order 6, Rule 16, C.P.C. could have been disposed of on that date,

6. In the matter of G.P. Srivastava v. R.K. Raizada and Ors. reported in : [2000]2SCR97 Hon'ble Apex Court has observed that the 'Courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. If 'sufficient cause' is made out for non-appearance on the date fixed for hearing when ex-parte proceedings were initiated against him, he cannot be penalized for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the party to the litigation approaches the Court immediately, the discretion is normally exercised in his favour'.

7. In the present case suit was dismissed on 12-3-2003 and application was filed on that very date. It is not the case of the respondents that dismissal was on account of mala-fides. In view of this appeal is allowed. Impugned order dated 14-1-2005 passed by Additional District Judge, Shujalpur in MJC No. 26/04 is set-aside subject to payment of costs of Rs. 1000. Consequently, the order dated 12-

3-2003 passed in CS 12-A/01 is also set aside. Parties are directed to remain present before the Court below on 29-10-2005. Learned Court below shall dispose of the suit at the earliest.

With the aforesaid observations, appeal stands disposed of.

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