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| Serial No. 15      |
| Regular Cause List |

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT SRINAGAR**

CM(M) 357/2025

**SHEIKH MOHAMMAD YASEEN(SENIOR CITIZEN)**

..... Appellant/petitioner(s)

Through: -

*Mr. Javeed Malik, Advocate*

V/s

**ALI MOHAMMAD SHORA**

..... Respondent(s)

Through: -

*Mr. S. R. Hussain, Advocate*

**CORAM:**

**HON'BLE MR JUSTICE RAJESH SEKHRI, JUDGE**

**JUDGMENT**

**(Oral)**

**01.** Petitioner has invoked supervisory jurisdiction of this Court, under Article 227 of the Constitution of India, to assail order dated 09.06.2025, passed by 3<sup>rd</sup> Additional District Judge, Srinagar [“the appellate Court”], whereby Civil Miscellaneous appeal preferred by the respondent against order dated 17.06.2023, passed by learned 1<sup>st</sup> Additional Munsiff, Srinagar [“the trial Court”], dismissing his restoration application, came to be allowed.

**02.** The factual matrix of the case lies in a narrow compass.

**2.1** Respondent filed a suit for ejectment against the petitioner in the trial Court, which came to be dismissed for non-prosecution on 20.05.2022. He preferred an application for restoration of the suit on 27.05.2022, which came to be dismissed by the trial Court on 17.06.2023, primarily on the ground that no sufficient cause was shown by him, plaintiff in the suit,

which prevented him and his counsel from appearing regularly during the trial.

**03.** This order came to be assailed by the respondent/plaintiff, by way of a Civil Miscellaneous Appeal, under order XLIII CPC *inter alia* on the grounds that he being an old age person and suffering severe joint problems, could not appear in the Court due to ill health and his counsel also remained absent. According to the plaintiff, the absence on his part was neither intentional nor deliberate but due to the reasons beyond his control.

**04.** The appeal was opposed by the petitioner/defendant primarily on the ground that since plaintiff was continuously absent for 12 dates of hearings, there was no sufficient ground for restoration of the suit.

**05.** Learned appellate Court is of the view that the only requirement for allowing an application for restoration of suit is to satisfy the Court that there was sufficient cause for the absence of the plaintiff on the date of hearing, when suit is dismissed for non-prosecution and it cannot be stretched to rely upon other circumstances anterior in time. According to the appellate Court, order IX Rule 9 being procedural in nature, “sufficient cause” should receive liberal interpretation in order to do substantial justice and allow the parties to prove their case, so that the controversy between the parties could be settled on merits and not otherwise.

**06.** Petitioner is aggrieved of the impugned order passed by the appellate Court, primarily on the ground that dismissal of restoration application is equivalent to a civil decree, which on challenge is amenable to civil first appeal, but appellate Court considered the miscellaneous appeal, which is erroneous. It is also contention of the petitioner that since respondent was

continuously absent on 12 consecutive hearings, his application for restoration of suit was rightly dismissed by learned trial Court.

**07.** Having heard learned counsel for the parties, I have gone through the record.

**08.** Learned counsel for the petitioner has relied upon a Judgment rendered by Hon'ble Supreme Court in "**Rajneesh Kumar Vs. Ved Prakash SLP**";[(civil) 935-936 of 2021, decided on 21.11.2024], to reiterate the grounds of challenge.

**09.** Hon'ble Supreme Court in "**Rajneesh Kumar**" (supra), noticed a tendency over a period of time, on the part of the litigants to blame their lawyers of negligence and carelessness in attending the Court proceedings. Supreme Court held that even if it is assumed for a moment that a concerned lawyer was careless and negligent, that, by itself, cannot be a ground to condone long and inordinate delay as litigant owes a duty to be vigilant of his own right about the judicial proceedings. In this backdrop, Hon'ble Supreme Court in "**Rajneesh Kumar**" refuses to condone 534 days inordinate delay on the part of the petitioner in filing appeal before the appellate Court below.

**10.** In the present case, however, the respondent/plaintiff filed application for restoration of his suit on 27.05.2022, i.e., within seven days from the date his suit came to be dismissed in default for non-prosecution on 20.05.2022. Therefore, the reliance placed by learned counsel for the petitioner in "**Rajneesh Kumar**" is clearly distinguishable.

**11.** Be that as it may, as stated, petitioner has questioned the impugned order passed by the appellate Court, primarily on the ground that dismissal

of a restoration application is a decree, which can be questioned by way of civil first appeal under order XLI CPC and not order XLIII.

**12.** Order IX CPC, deals with appearance of parties and consequences of non-appearance. Where neither party appears, Court is vested with the power, under Rule 3 to make an order that suit be dismissed and where the defendant only appears and plaintiff does not appear when suit is called for hearing, Court is empowered under Rule 8 to make an order that suit be dismissed unless claim of the plaintiff is admitted in whole or in part. It is evident from a plain reading of rule 3 and rule 8 of order IX CPC that there can be dismissal of a suit either under Rule 3, if both the sides are absent, when suit is called for hearing or under Rule 8, if defendant alone appears and plaintiff does not appear. In either case, plaintiff can apply for restoration of the suit either under Rule 4 or under Rule 9 of order IX of the Code on showing sufficient cause for his non-appearance, provided application for restoration is made within the period, prescribed therefor under the Limitation Act, which is 30 days from the date of dismissal of the suit in terms of order 122 of the Limitation Act, 1963.

**13.** Contention of the petitioner is that dismissal of restoration application by the Court is equivalent to a decree, which can be challenged by way of a regular civil first appeal only and not as a miscellaneous appeal under order XLIII CPC.

**14.** Decree as defined under Section 2 (2) CPC means a formal expression of an adjudication which, so far as regards the Code expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It is evident from a plain reading of the definition of decree that dismissal of a suit for non-prosecution by the

plaintiff is not a decree because it does not contain a formal expression of adjudication conclusively determining the rights of the parties with regard to all or any of the matters in controversy in the suit.

**15.** A decree requires a formal or conclusive determination of the rights of the parties regarding the matters in dispute in a suit. When a suit or a restoration application is dismissed in default or non-appearance, the Court does not conclusively decide the substantive rights or liabilities of the parties and because there is no conclusive trial or evaluation of the claim on its merits, the order of dismissal is treated as an order rather than a Judgment or decree.

**16.** Be that as it may, an order under Rule 9 of order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of the suit, is appealable under Clause (c) of rule 9 of order XLIII CPC. Therefore, the only plea urged by the petitioner in the present case that dismissal of the restoration application is equivalent to a decree and amenable to a civil first appeal under order XLI CPC is legally flawed.

**17.** True it is, that careless and negligence on the part of a counsel by itself cannot be a ground to condone the delay because litigant also owes a duty to be vigilant of his own right, as held by Hon'ble Supreme Court in "**Rajneesh Kumar**", however, a perusal of the record of the present case reveals that respondent within seven days of dismissal of his suit by the trial Court, approached for restoration of the same on the ground that he being an old age person and suffering severe joint problems could not appear on the due date, due to his health condition. In the circumstances of the case, I find myself in agreement with the observation of learned trial Court that respondent succeeded to make out a case for restoration of the suit by

providing sufficient reason which prevented him from appearing in the Court on the due date, i.e., 20.05.2022, on which his suit came to be dismissed for non-prosecution.

**18.** For the foregoing reasons, present petition is found devoid of merit, hence dismissed. As a result, the impugned order of the appellate Court is upheld and application preferred by the respondent/plaintiff for restoration of the suit is allowed and suit is ordered to be restored to its original position.

**19.** Trial Court is directed to proceed with the trial in accordance with law.

**20.** Parties shall appear before the trial Court on 14.10.2026.

**21. Disposed of.**

**(RAJESH SEKHRI)**  
**JUDGE**

**SRINAGAR**

**06.10.2026**

*"Mohammad Yaseen Dar"*



*Whether the Judgment is reportable: Yes*

*Whether the Judgment is speaking: Yes*