**APPLICATION UNDER ORDER 9, RULE 9, C. P. C.**

APPLICATION FOR RESTORATION OF SUIT WHERE SUIT WAS DISMISSED IN DEFAULT OF THE PLAINTIFF ONLY.

IN THE COURT OF THE....................

Application No..................... of 19....................

Under Order 9, Rule 9 C. P. C.

in

Suit No..................... of 19........................................

A. B................................................................... Plaintiff

versus

C. D............................................................... Defendant

Application for restoration of the suit dismissed in default on.................... 19....................

Sir,

The plaintiff most respectfully submits as under:

1. That the suit was fixed for.......... 19.......... for evidence/arguments............... It was called at 11 a. m. and the plaintiff went to call his counsel Shri.................... who was not available at his seat at that time, and the plaintiff informed the Court of this fact, and again went to call his counsel, whom he found in Court No..................... arguing another matter and he said to the plaintiff to ask the Court for time upto lunch hours. Accordingly the plaintiff requested the Court to wait till lunch hours. But, however, the learned Court dismissed the suit in default of the plaintiff.

2. That in the circumstances it is expedient that the suit be restored to its original number setting aside the *ex-pane* order aforesaid.

**PRAYER**

It is, therefore, most respectfully prayed that your Honour may be pleased to set aside the *ex-pane* dismissal order and restore the suit in its original number, and dispute it of on merits after taking evidence and hearing the parties.

It is accordingly prayed.

Applicant

Through

Advocate

Place:....................

Dated:....................

Affidavit in support of the application to be filed.

**CASE LAW**

***Order 9, Rule 9.***

**WHETHER AN ELECTION PETITION CAN BE RESTORED? —(YES) — WHO CAN FILE PETITION FOR RESTORATION OF AN ELECTION PETITION — (THE PETITIONER HIMSELF AND NOT ANYBODY ELSE).**

Order 9 Rule 9 of the Code (and not Rule 13) relied by the appellant, would be the relevant provision for restoration of an election petition. That can be invoked in an appropriate case by the election petitioner only and not by a respondent. By its own language, Rule 9 provides that where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit but he may apply for an order to set the dismissal aside. Under this rule, therefore, an application for restoration can be made by the petitioner. Since it is a provision for restoration, it is logical that the provision should be applicable only when the party on account of whose default in appearance the petition was dismissed, makes an application to revive the petition to its former stage prior to its dismissal. In the instant case the election petitioner and not the respondent 19 who is in appeal before us, could have asked for the relief of restoration. The appellant contended that the statutory scheme authorises an elector at whose instance an election petition could have been filed to get substituted in the event of withdrawal or abatement and applying that analogy, he urged that a petition for restoration would also lies at the instance of a respondent. The ambit of the provisions relating to withdrawal and abatement cannot be extended to meet other situations. Specific provisions have been made in the Act to deal with the two situations of withdrawal and abatement and a person neither to not a party or one of the respondents who was entitled to file an election petition has been permitted to substitute himself in the election petition and to pursue the same in accordance with law. These provisions cannot be extended to an application under Order 9, Rule 9 of the Code and at the instance of a respondent or any other elector a dismissed petition cannot be restored1.

**BAR UNDER THE RULE AGAINST LEGAL REPRESENTATIVES.**

We are however not impressed by the argument that the ban imposed by Order 9, Rule 9 creates merely a personal bar or estoppel against the particular plaintiff suing on the same cause of action and leaves the matter at large for those claiming under him. Beyond the absence in Order 9, Rule 9 of the words referring "to those claiming under the plaintiff there is nothing to warrant this argument. It has neither principle, nor logic to commend it...................... The rule would obviously have no value and the bar imposed by it would be rendered meaningless if the plaintiff whose suit was dismissed for default had only to transfer the property to another and the latter was able to agitate rights which his vendor was precluded by law from putting forward.

In the instant case it was appellant who brought the previous suit which resulted in a decree for eviction of the tenant on July 31, 1961 a date when respondent 1 had already taken possession of the premises by virtue of the transfer made by the Official Liquidator. Thus the identity of the subject-matter being substantially the same, thus case clearly falls within the ambit of the ratio in the case supra. On this ground alone therefore the appellant is entitled to succeed because the High Court with due respect does not appeal to have construed the scope of Order 9, rule 9, C. P. C. properly2.

**SCOPE OF THE RULE.**

It is inherent in the constitution of the Court that it may own its mistake and rescind an illegal order which may not be having any sanction of law. The Court can do that as soon as it becomes obvious to it that it passed the order on an erroneous view of law when it was not conscious of the true scope of its own jurisdiction3.

An application under 0. 9, R. 9 in a proceeding in a Court of Civil jurisdiction, there is no reason why the procedure provided in regard to suits cannot be made applicable to a proceeding under this Rule. There is no justification to read any such restrictive words in Section 141. The expression "all proceedings" is of a very wide connotation and to restrict it to a proceeding which is original in nature and wholly independent of a suit will be doing violence to the language of the section4.

It is true that under O. 9, Rule 9, if the first suit has been dismissed either wholly or partly under Rule 8, the plaintiff would not be permitted for bringing a fresh suit on the same cause of action. He is however entitled to make an application for an order to set aside the dismissal in default of the first suit5.

**SCOPE OF ENQUIRY UNDER THE RULE**

The scope of enquiry in an application under this Rule is confined to questions regarding the service of summons and whether there was any sufficient cause preventing the appearance of the defendant, when the suit was called on for hearing6.

**APPLICABILITY TO PAUPER APPLICATION.**

The provisions of Order 9 apply to pauper applications by virtue of Section 141 and a pauper application dismissed for default of appearance of the petitioner can be restored under this Rule7.

**CONDITION PRECEDENT FOR PASSING ORDER UNDER THIS RULE.**

In case the Court makes a finding that sufficient cause has not been made out, then only the Court would be in a position to dismiss an application but until that finding is arrived at and if on the contrary there was sufficient cause for non-appearance, the Court would be bound to make an order setting aside the dismissal. In such circumstances there is no question of exercising any option or discretion in the matter8.

**NON—APPLICABILITY OF THE RULE.**

The Rule does not apply to applications for probate or letters of Administration9.

A judgment in probate proceedings operates as a judgment in rem unlike a judgment in an ordinary suit which operates inter-parties and hence it will not be appropriate to apply the provisions of this Order which are intended to apply to ordinary suits to applications for probate or letters of administration10.

**NO DIFFERENCE BETWEEN A MAJOR AND MINOR.**

When a suit is dismissed for default whether the plaintiff is a major or minor, that dismissal can be set aside only on sufficient ground being shown".

When a suit is restored after it was dismissed on ground that neither plaintiff nor defendant has appeared on date fixed, defendant is entitled both in equity and has all right to notice of the date fixed for hearing of the case after its restoration12.

Once the court post the case for judgment, there can be no application to recall or advance the hearing for any purpose other than pronouncement of judgment13.

**SUIT FOR RECOVERY OF MONEY.**

The document writer cannot be treated as an attesting witness for the will to prove its execution14.

1. Dr. P. NallaThampy Thera v. B. L. Shankar and others. (1984) Supp. S. C. C. 631: A. I. R. 1984 S. C. 135.

2. M/s. Parasram Hanand Rao v. M/s. Shanti Prasad Narinder Kumar Jain and another, (1980) 2 S. C. C. 565: A. I. R. 1980 S. C. 1655: 1980 U. J. (S. C. ) 719: 1980 Cr. L. J. (Civ.) 367.

3. Jaspal Singh v. Municipal Corporation of Delhi, A. I. R. 1972 Delhi 230.

4. Nathu Prasad v. Singhai Kapurchand, A. I. R. 1976 M. P. 136 (F. B. ) relied in Mahabir Prasad v. Des Raj, A. I. R. 1981 H. P. 58: 1981 Sim. L. C. 368.

5. Shiv Lal v. Pt. Ishar Das, 1972 Cur. L. J. 46: 74 Punj. L. R. 181.

6. Manmatha Nath Maity v. Smt. Provavati Roy, A. I. R. 1983 Cal. 198.

7. Gulam Mohammad v. AH Mohammad, A. I. R. 1972 J&K 5.

8. Industrial Minerals & Mill Stores Traders v. K. M. Chemicals, A. I. R. 1983 Cal. 215.

9. His Highness Shrimant Sadashivrao Raghunathrao Gandekar v. Srhimant Raj Kumar Anandrao Raghunathrao Gandekar, (1973) 75 Bom. L. R. 175.

10. Sadashiv Rao v. Anand Rao, A. I. R. 1973 Bom. 284: 75 Bom. L. R. 175.

11. Sarwan Ram v. Tehal Singh, 1973 Cur. L. J. 125.

12. Ram Kishore Saxena v. Smt. Raj Kumari. 1996 (2) C. C. C. 351 (All. ).

13. Smt. Sujatha v. Indian Bank, 1996 (2) C. C. C. 273 (Kant. ).

14. J. Venkataraman v. V. Mathi Booshanam, 1996 (3) C. C. C. 91 (Mad.).