

*Before Sat Pal, J.*

CHHOTE LAL JAIN & COMPANY & ANOTHER,—*Petitioners.*

*versus*

BAHADUR CHAND,—*Respondent.*

C.R. No. 850 of 1997

- 19th March, 1998

*Code of Civil Procedure, 1908—0.17 Rl. 2—Plaintiff's evidence closed under section 35-B CPC on failure to examine witnesses despite several opportunities—Dismissal of suit on merits—Application for restoration not maintainable—However, challenge can be laid to the order of dismissal of suit in accordance with law.*

*Held that,* where the evidence of the plaintiff was closed under Section 35-B CPC and since the plaintiff had failed to examine any witness despite several opportunities given to the plaintiff, the suit of the plaintiff was dismissed. Since the suit was dismissed on merits vide order dated 21st October, 1995, the application filed by the plaintiffs on 21st October, 1995 for restoration of the suit, itself, was not maintainable. The petitioners—plaintiffs were, however, at liberty to challenge the order dated 21st October, 1995 by which their suit was dismissed on merits, before the appropriate form in accordance with the provisions of law but in any case the application for restoration of the suit did not lie against the said order.

(Para 3)

R.A. Sheoran, Advocate,—*for the petitioner.*

R.M. Singh, Advocate,—*for the respondent*

### ORDER

1. In the present case, the suit filed by the plaintiff-petitioners was dismissed on 21st October, 1995. On 21st October, 1995 the following order was passed by the learned trial court while dismissing the suit :

“No PW is present. Cost also not paid. Hence; the evidence of the plaintiff is hereby closed under section 35 B C.P.C. Since, the plaintiff has failed to examine even a single witness despite several opportunity, hence, the suit of the plaintiff is hereby dismissed. File be consigned to record room.”

Against the said order, an application dated 21st October, 1995 was filed before the learned trial court and it was prayed that the order

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dated 21st October, 1995 be set aside and the case be restored to its original number. This application was dismissed by the learned trial court *vide* order dated 10th August, 1996 which has been challenged in the present petition.

2. Mr. Sheoran, the learned counsel appearing on behalf of the petitioners submits that the learned trial court has failed to apply the mind properly while passing the impugned order as the application filed by the petitioners-plaintiffs has wrongly been mentioned as an application under order 21 Rule 93 CPC. He further submits that since neither the plaintiff nor his counsel was present on 21st October, 1995 when the suit of the plaintiff was dismissed, the learned trial court ought to have restored the suit of the plaintiff under order 17 Rule 2 CPC.

3. After hearing the learned counsel for the parties and having perused the records, I do not find any merit in this petition. The order dated 21st October, 1995 which has been re-produced herein above itself shows that on that date the evidence of the plaintiff was closed under section 35 B CPC and since the plaintiff had failed to examine any witness despite several opportunities given to the plaintiff, the suit of the plaintiff was dismissed. Since the suit was dismissed on merits,—*vide* order dated 21st October, 1995, the application filed by the plaintiffs on 21st October, 1995 for restoration of the suit, itself, at liberty to challenge the order dated 21st October, 1995 by which their suit was dismissed on merits, before the appropriate forum in accordance with the provisions of law but in any case the application for restoration of the suit did not lie against the said order. Accordingly, the petition is dismissed.

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**R.N.R.**

*Before G.S. Singhvi & M.S.Gill, JJ*

MUNICIPAL COMMITTEE, THANESAR,—*Petitioner.*

*versus*

STATE OF HARYANA & OTHERS,—*Respondents.*

C. W. P. 10156 of 1998

21st July, 1999

*Constitution of India, 1950—Art. 14—Haryana Municipal Act, 1973—Ss. 203, 205 (5) & 240—Building plans of proposed construction contrary to scheme—Application for sanction of construction of building*