

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

R.A No.212 / 2005

Date	Order with signature of Judge
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1. For hearing of CMA No.3496/2005
2. For hearing of Main Case

19.08.2016

Mr. S. Ashfaq Hussain Rizvi, advocate for the Applicant.
Mr. M. Iqbal Choudhry, advocate for Respondent No.1.

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This revision is arising out of the judgment passed by IInd Addl. District & Sessions Judge in Civil Misc. Appeal No.24/2003, whereby an application under Order IX Rule 9 CPC was allowed and the order of dismissal of said application by the Court of IInd Sr. Civil Judge (East) Karachi in J.M No.4/2001 (Suit No.228/1991) was set aside. Consequently application under Order 12(2) CPC (J.M. No.4/2001) filed by the Respondent was restored.

2. Briefly stated the restored of application under Order 12(2) CPC (J.M No.4/2001) was filed by Respondent No.1 challenging the judgment and decree dated 25.1.1994 in civil suit No.232/1991 passed by this Court for recovery of Rs.418529/- against the three respondents.

3. The application under Section 12(2) CPC was filed after seven years of the original decree dated 25.1.1991 and it was dismissed for non-prosecution after eighteen months on **19.11.2001**. Respondent No.1 after 18 months of dismissal of application under Section 12(2) CPC, (J.M No.4/2001) filed an application under **Order IX Rule 9 CPC**. The only ground for restoration of J.M No.4/2001 mentioned in para-3 of restoration application is reproduced below.

3. That I say that I, was in Punjab my address was change due to my counsel could not contact with me. As the proceeding before the Senior Civil Judge Sahiwal was stopped after the granting of statuesque thereafter suddenly a few days ago I saw auction (bid) paper of the said property,

I rushed and contact to my counsel, then I came to know that due to disconnection my application was dismissed for non-prosecution as such date of auction is fixed for 23.06.2003 for the suit property.

4. The trail court after hearing the counsel dismissed application under IX rule 9 CPC by order dated **12.9.2003**. The Respondent No.1 preferred an appeal, which was allowed by the impugned order without referring to the “sufficient cause” if any, shown by Respondent No.1/appellant. It is pertinent to mention here that two other Judgment Debtors have never shown their grievance against the judgment impugned in the J.M No.4/2001. I have gone through the impugned order and I have not found any discussion about “sufficient cause” for recalling the order of dismissal of application under **Order IX Rule 9 CPC** while restoring the application under Section 12(2) CPC by the Appellate Court.

5. Learned counsel for Respondent No.1 has attempted to argue that the dismissal of application under Section 12(2) CPC on the date of its dismissal was not fixed for hearing, therefore, it was not justified. He was trying to cite case law to his philosophy to distinguish between date of hearing and hearing of application under Section 12(2) CPC. The Respondent No.1 was required to show “sufficient cause” for his failure to pursue his application under Section 12(2) and also 18 month delay in approaching the Court for restoration. The justification given by him was lack of knowledge on the ground that his counsel was unable to contact him as his address was changed. Why was he unable to give his new address to his own counsel? He has no explanation as to why the applicant himself could not contact his counsel for 18 months. The burden was on him to show a justifiable “sufficient cause” to

find out fate of his application from his counsel. His property was in danger of sale by prosecuting Court. He did not pursue his case and wants to challenge it on technicalities of date of hearing and non-hearing. First burden on applicant is to give plausible explanation for not filing the restoration application for 18 months, even there was limitation or not, his case badly suffer from laches also.

6. Irrespective of the fact that no plausible explanation was offered by the Respondent No.1 for his failure to take care of his case for more than 18 months from the date of dismissal, the learned counsel for Respondent No.1 from the record and proceeding has failed to justify that how even J.M No.4/2001 was within time in **2001** when judgment & decree was passed in **1994**. After going through the entire application under Section 12(2) CPC. Learned counsel informed that in para-9 of the memo of application Respondent No.1 has given date of **16.1.2001** as a date of his knowledge and the source was a notice from executing court. However, the applicant has not filed any notice from executing court alongwith his application under Section 12(2) CPC **nor** such notice is available in the R&P. Respondent No.2 even in para-9 has **not** mentioned that copy of such notice is attached to the memo of application, therefore, on the face of it even J.M was time barred.

7. In the above circumstances, money decree pending execution since 1994 without security of its satisfaction in term of **Order XXI Rule 23-A CPC** cannot be held for indefinite period at the request of a party, who is not himself diligent and careful in looking after his own case since 2001.

8. In view of the above facts and circumstances, order of allowing the application under Order IX Rule 9 CPC by the Appellate Court without appreciating that no plausible explanation was offered by Respondent No.1 for seeking restoration of his application under Section 12(2) CPC after a delay of almost 18 months was unjustified and is liable to be set aside. Consequently this revision application is allowed.

JUDGE

SM