

suit for evidence of the applicants. On **19.12.2002** the suit was dismissed for non-prosecution on the ground of non-appearance of the applicants. On **09.01.2003** the applicants filed an application under **Order IX Rule 9 C.P.C** for restoration of suit which was dismissed by order dated **12.4.2003**. The applicants challenged the order dated **12.04.2003** through Civil Misc: Appeal No.14/2003. The learned IInd Additional District Judge, Karachi (South) after hearing counsel for the parties by order dated **18.8.2009** dismissed the Civil Misc: Appeal. The applicants through this Civil Revision Application have questioned the order of the two courts below.

4. The respondents have appeared through **Mr. Muhammad A.H Baloch, Advocate**, who filed vakalatnama on **22.4.2010** and **17.5.2010** separately on their behalf. But except on one or two dates, he had not appeared before the court nor the counsel filed objections/counter affidavit to this Revision.

5. I have heard learned counsel for the applicants and perused record.

6. The counsel for the applicants has contended that the learned courts below failed to appreciate the well settled principle of law that the law always favours adjudication on merits and not trapping the parties merely on technicalities. He further contended that the suit was fixed for evidence on 25.11.2002 and the same was adjourned for 19.12.2002 on the request of the respondents. On **19.12.2002** the suit was fixed for evidence of applicants and the counsel for applicants filed an application for adjournment on the ground of illness of applicant No.2 but the learned trial Court rejected the application for adjournment and dismissed the suit without

considering the fact that the valuable legal rights of the applicants are involved in the matter.

7. In rebuttal, the counsel for the respondent is neither present nor sent even intimation. He has not even filed counter affidavit to the Revision. There is hardly any application of mind in the order for dismissing the suit despite the facts that affidavit-in-evidence was on record, therefore, exercise of authority for dismissing the suit by invoking provision of **Order IX Rule 8 CPC** was sudden and without proper application of mind to the facts of the case. The Court should have given at least one chance before taking penal action. Even otherwise it was not mandatory for the trial Court to dismiss the suit on non-appearance of witness for cross-examination, instead the trial court should have treated cross nil instead of dismissing the suit. The appellate Court also endorsed the finding mechanically without giving due consideration to the facts and circumstances of the case. In the given facts and circumstances of this particular case Court could have closed the side of the Plaintiffs/applicants for evidence and allowed the respondents to lead evidence.

8. In view of the above facts since the case has not been decided on merits and obviously the circumstances discussed hereinabove warrants interference, therefore, orders of the trial court and appellate court are set aside. The case is remanded to the trial court for decision on merit after recording evidence and to re-start the trial from the stage of cross-examination of the applicants subject to payment of cost of **Rs.50,000/-** with the Nazir of trial Court within ONE WEEK of receipt of this order in trial Court. Cost, if deposited by the applicant in the Trial Court is to be paid to the Respondents prior to cross-examination of the applicants or witnesses, if any. The trial

Court should send court motion notice to the respondents after deposit of cost since the counsel for the respondent is absent despite the fact that his name has appeared in the cause list. The applicant's affidavit-in-evidence is already on record. He should be present before the Court of VIIIth Sr. Civil Judge (South) Karachi on **19.11.2016** for the purpose of his cross-examination subject to service of court motion notices to the respondents. If the cost of Rs.50,000/- is not deposited by the applicant within ONE WEEK, the trial Court should not issue court motion notice and the suit shall be deemed to have been dismissed by the trial Court. However, if the cost is paid the trial Court should bear in mind that this case was pending in High Court for well only seven years and there was no order against the respondents, therefore, the suit should not proceeded exparte on remand and proper service of court motion notice on the respondents step by step through the required mode of service be ensured at the cost of the applicant.

The Revision is disposed of in the above terms.

J U D G E