

ORDER SHEET
HIGH COURT OF SINDH, KARACHI

C.P. No. S- 722 of 2010

PETITIONER : Through Ms. Rukhsana Umar
Advocate

RESPONDENT NO.1 : In person

DATES OF HEARING : 11.11.2016, 29.11.2016 and 30.11.2016

DATE OF ORDER : 30.11.2016

ORDER

Muhammad Humayon Khan, J: This petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, is filed against the Judgment dated 19.05.2010 and Decree dated 22.05.2010 passed by the learned IIIrd Additional District Judge, Karachi-West, in Family Appeal No.37 of 2008, whereby, the learned Additional District Judge dismissed the appeal of the petitioner and upheld the Judgment and Decree dated 30.08.2008 passed by the learned Xth Civil and Family Judge, Karachi-West, in Family Suit No.450 of 2005.

2. This petition was filed on 05.07.2010 by the petitioner through his Advocates M/s. Raees Ahmed and Munir-ur-Rehman, which was fixed for katcha peshi on 09.08.2010 but none was present on behalf of the petitioner, however, the matter was adjourned to a date-in-office in the interest of justice. Again this petition was fixed for katcha peshi on 22.11.2010, when order of notice to the respondents was passed and the matter was adjourned to 06.12.2010. It is apparent from the record that the respondent No.1 was served after three years from the date of filing the instant petition.

3. The respondent No.1, upon service, entered appearance through her advocate Mr. Irshad Khan Yousufzai on 26.08.2013.

4. Subsequently, the instant petition was fixed on 04.10.2013, when none was present on behalf of the petitioner and the matter was adjourned to 04.11.2013. Again on 04.11.2013, none was present on behalf of the petitioner and consequently the instant petition was dismissed for non-prosecution.

5. Later on, an application under Section 151 CPC (CMA No. 6911/2013) was moved on behalf of the petitioner for recalling the Order dated 04.11.2013. This application was supported only by the affidavit of Mr. Raees Ahmed advocate. Neither affidavit of petitioner nor affidavit of another advocate Mr. Munir-ur-Rehman was filed. Even in the affidavit of Mr. Raees Ahmed advocate, no sufficient cause has been disclosed for his non-appearance nor any cause sufficient or otherwise has been disclosed for the absence of Mr. Munir-ur-Rehman advocate and the petitioner. However, this application was placed in Court for orders on 11.04.2014, when Mr. Raees Ahmed advocate was unwell and therefore the matter was adjourned. Again, it was placed on 16.05.2014, when Mr. Munir-ur-Rehman advocate was present and notice was ordered. On 24.09.2014, the said application was fixed for hearing but neither petitioner nor his advocates were present till 12:00 noon and therefore the said application was also dismissed for non-prosecution.

6. After more than three months, the petitioner filed application under Section 5 of Limitation Act (CMA No. 570/2015) and application for recalling the Orders dated 04.11.2013 and 24.09.2014 (CMA No. 571/2015)

duly supported by the affidavit of petitioner through Ms. Rukhsana Umar advocate.

7. I have heard the learned counsel for the petitioner and respondent No.1 in person and perused the material available on the record.

8. The learned counsel for the petitioner contended that the petitioner has shown sufficient cause for the condonation of delay in filing application for recalling the Order dated 24.09.2014 and also shown sufficient cause for his non-appearance. She further contended that the previous advocate did not inform the petitioner regarding dismissal of the instant petition and therefore the petitioner should not be penalized for the negligence of his advocate. In support of her arguments, the learned counsel for the petitioner relied upon the following case-laws:-

- i) Farid Ullah Khan Vs. Jamshed Ahmed (2008 CLC (Peshawar) 1419);
- ii) Shamim Khan vs. Islamic Republic of Pakistan and others (2010 YLR (Karachi) 2196);
- iii) Al-Waqar Corporation Vs. Rice Export Corporation and another (2011 MLD (Karachi) 266).

9. The respondent No.1 appeared in person and strongly opposed these applications by stating that the Execution Application No. 06 of 2010 in Family Suit No. 450 of 2005 is pending before the Family Judge, Kot Addu, and the petitioner is harassing and pressuring her to withdraw the said execution application and the only purpose to file these applications is to delay the proceedings of execution application.

10. I have carefully gone through the above-noted case-laws referred to by the learned counsel for the petitioner and came to the conclusion that none of them is applicable to the facts and circumstances of this case.

11. The case of Farid Ullah Khan Vs. Jamshed Ahmed reported in 2008 CLC (Peshawar) 1419 is on different footing in as much as the plaintiff was in prison and his advocate withdrew vakalatnama without any intimation to him and therefore the case was remanded by the High Court to the Trial Court with direction to take evidence on the application for restoration of suit. Accordingly, this reported case is not applicable to the facts and circumstances of the instant case.

12. The case of Shamim Khan vs. Islamic Republic of Pakistan and others reported in 2010 YLR (Karachi) 2196 is on different footing in as much as the advocate for the plaintiff was admitted in hospital and he was granted general adjournment and therefore it was held that there is a sufficient cause for restoration of suit. Accordingly, this reported case is not applicable to the facts and circumstances of the instant case.

13. The case of Al-Waqar Corporation Vs. Rice Export Corporation and another reported in 2011 MLD (Karachi) 266 is on different footing in as much as the advocate for the plaintiff was seriously ill and therefore it was held that there is a sufficient cause for restoration of suit. Accordingly, this reported case is not applicable to the facts and circumstances of the instant case.

14. It is a well settled principle of law that it is the duty of a party to litigation to keep himself informed of the proceedings and progress of the case by keeping in touch with his counsel and if the counsel is negligent, it is

he who should suffer. Reliance can be placed upon the cases of (i) Zulfiqar Ali Vs. Lal Din and another (1974 SCMR 162), (ii) Rafiq Ahmed Khawaja Vs. Abdul Haleem (1982 SCMR 1229), (iii) Government of Pakistan through Secretary, Ministry of Defence and another Vs. Haji Zain Khan and another (1984 SCMR 910), (iv) Messers National Bank of Pakistan Vs. Mst. Perveen Akhtar (PLD 1985 Karachi 60) and (v) Zahid Ahmed Vs. Deputy Director Adjudication and 2 others (PLD 2006 Karachi 252).

15. There is no cavil to the proposition of law that law favours adjudications of cases on merits rather than on technicalities. Nevertheless, in the exercise of discretion in this regard, the Courts are required to be fair with the rival parties and rational/balanced in their approach in a way that no party should be allowed to misuse the indulgence or concession shown by the Courts so as to make the whole system an abuse of process of law. Reliance can be placed upon the case of Rex Talkies (Pvt.) Ltd. & another vs. Sami Oosman & others (SBLR 2007 Sindh 915).

16. It is a well settled principle of law that the advocate is duty bound to appear in Court and proceed with the matter till such time he withdraws his power or it was cancelled according to rules by his client. Reliance can be placed upon the cases of (i) Ex-Hav. Mirza Mushtaq Baig Vs. General Court Martial (1994 SCMR 1948) and (ii) Rex Talkies (Pvt.) Ltd. & another vs. Sami Oosman & others (SBLR 2007 Sindh 915).

17. I have already discussed the facts in detail, which clearly show that it is a case of gross negligence not only on the part of the previous advocates of the petitioner, whose vakalatnama has not been withdrawn till this date but also on the part of the petitioner and accordingly no sufficient cause has been disclosed to restore the instant petition.

18. Application under Section 5 of the Limitation Act (CMA No. 570/2015) is misconceived and irrelevant for the simple reason that the limitation for an application to recall the order whereby the restoration application was dismissed, is three years and not 30 days in terms of Article 181 of Limitation Act. Reliance can be placed upon the case of Ghulam Qadir and others Vs. Sh. Abdul Wadood and others (PLD 2016 Supreme Court 712).

19. In view of the above discussion, CMA Nos. 570 and 571 of 2015 were dismissed with no order as to costs and consequently CMA No.947/2015 became infructuous by short Order dated 30.11.2016 and the above are the reasons for the said short order.

J U D G E