IN THE HIGH COURT OF SINDH
CIRCUIT COURT HYDERABAD

IInd Appeal No.06 of 2005

DATE	ORDER WITH SIGNATURE OF JUDGE(S)

Date of Hearing : 06.03.2018.
Date of Order : 06.03.2018.

Mr. Muhammad Ilyas Khan Tanoli, Advocate for appellant.
Mr. Sundar Das, Advocate for respondents.
Mr. Wali Muhammad Jamari, Assistant A.G.

O R D E R

AGHA FAISAL, J: The present matter is a restoration application under Order 41 Rule 19 of the C.P.C instituted on 18.5.2011, praying that this Court be pleased to set aside / recall the dismissal order passed in the subject appeal dated 01.03.2010, (hereinafter referred as to the "Impugned Order").

2. It may be pertinent to reproduce the content of the Impugned Order:

> *"This matter was called in the first round and kept aside. Now it is 11-10 a.m and this matter has been called again also but nobody is present. File shows that since 24-04-2009 nobody is appearing for the appellant, which shows that appellant has lost his interest, therefore, this appeal is dismissed in non-prosecution."*

3. The learned counsel for the applicant advanced three arguments in support of the application under consideration:

(i) It was contended that no express notice was issued by the Court to the legal counsel for the applicant for the hearing scheduled for 01.3.2010.

(ii) It was further argued that the aforesaid date of hearing was not fixed by the Court in the presence of either the applicant/appellant or his legal counsel.

(iii) It was also contended that on the said date the only matter fixed for hearing was an interlocutory application and hence the main appeal could not have been dismissed in any event.

4. The applicant had also filed another application under section 5 of the Limitation Act 1908, seeking the condonation of the delay occasioned in instituting the restoration application.

5. It was contended by the learned counsel for the applicant that neither the counsel nor the applicant were aware that the subject appeal had been dismissed on 1.3.2010, and that they only came to know of the same 14 months later in May 2011, where after the present applications were filed.

6. In view of the foregoing it was contended by learned counsel for the applicant that this Court may be pleased to set aside the Impugned Order, by which subject appeal was dismissed, and restore the same to its original position.

7. In response the learned counsel for the respondents, in the aforesaid applications, opened his arguments by directing the Court’s attention towards the diary sheet of the subject appeal from the inception thereof.

8. It was submitted that the chronology of the applicant's default, culminating in the Impugned Order, could be demonstrated as follows:

i. The learned counsel referred to the order dated 18.4.2005, wherein it was clearly stated that the learned counsel for appellants was required to argue the entire appeal on the next date of hearing.

ii. It may be pertinent to reproduce the content of said order.

> *"3. After hearing the learned counsel for the appellants and perusal of material placed on record I am of the opinion that there are various points which require consideration. Inter alia the points are 1) whether the Ist appellate Court was justified in dismissing the suit by entertaining the appeal on behalf of the respondent No.1 in respect of whom the application under Order 23 rule 1 CPC was allowed, 2) whether the learned trial Court committed an error in allowing the application under Order 23 rule 1 CPC without notice to the respondent No.1 and 3) whether in the facts and circumstances of the case the first appellate Court instead of dismissing the suit should have remand the matter to the trial Court to consider the contents raised by the respondent No.1 and to consider whether the compromise could be accepted by the Court in toto or in part to safe guard the interest of the respondent No.1 and decide the issue to the extent of the interest of the remaining defendants. The IInd appeal is therefore, admitted to regular hearing. Notice.*
>
> *4. Notice. In the meanwhile operation of the Impugned Order is suspended. Adjourned to 2.5.2005. The learned counsel for the appellants undertakes to argue the entire appeal on the next date of hearing. The respondents be intimated specifically that on the next date of hearing the entire appeal shall be heard and disposed of. Notice be issued to the learned Additional A.G and R & Ps of F.C. Suit No.74/2000, Suit No.66/2000 and Civil Appeal No.69/2004 may be called."*

iii. This matter was then fixed on 2.5.2005 on which date the matter could not be heard and the case was then fixed for 15.8.2005, in the presence of learned counsel for the applicant/appellant.

iv. That on the very next date, despite the said date having been fixed in presence of the learned counsel, the applicant/appellant chose to remain absent.

v. It may be pertinent to reproduce the content of order dated 15.8.2005.

> *"Appellants and their counsel called absent in spite of the fact that the date was given in presence of Learned Counsel for the appellants but he has failed to turn up. There is no intimation, however, in the interest of justice the matter is adjourned…."*

vi. Thereafter the matter was fixed for non-prosecution and remained so until 2008 when on successive dates either the counsel for the applicant/appellant sought adjournments or simply remained absent.

vii. The learned counsel pointed out the orders dated 19.03.2008, 26.03.2009, 24.04.2009, 21.05.2009, 09.10.2009 and 26.11.2009, wherein it was reported that the counsel for the applicant/appellant either chose to remain absent or did not proceed with the matter on the one pretext or another.

viii. It was demonstrated by the learned counsel that even on 01.03.2010, the matter was called and then kept aside in order to provide yet another chance to the appellants/applicants and that finally subject appeal was dismissed when the matter was taken up a second time on the said date.

9. The learned counsel for the respondents drew the court's attention to paragraph No.3 of the restoration application filed by the appellants/applicants, content whereof is reproduced herein below:

> *"3.That no notice of the date of hearing for the said date of hearing has ever been served upon the undersigned counsel but it appears from the file that under postal certificate dated 24.02.2010, a notice has been dispatched at the address of the undersigned counsel but the same never reached or received at the office of the undersigned counsel, as such the undersigned counsel has no notice of the date of hearing, hence could not appear, resulting which that the appeal has been dismissed in default."*

10. The learned counsel submitted that it was patently evident from the aforesaid paragraph that the deponent therein seeks to claim non receipt of a notice from this Court when in fact it is admittedly a matter of record that the same was duly dispatched.

11. The learned counsel further contended that notwithstanding the fact that a notice for the date of hearing was duly sent to the counsel for the appellants/applicants the same was not a requirement of law as publication of the case in daily cause list is sufficient notice to the counsel and it is the duty of counsel to remain vigilant in proceedings where they are engaged.

12. The learned counsel stated that the restoration application could be preferred within 30 days from the date of dismissal and that the present restoration application was instituted after more than 14 months from the date of the Impugned Order.

13. The learned counsel stated that it is well settled law that in an application of condonation of delay the appellants/applicants has to

satisfy the Court in respect of each and every day of delay took place, whereas the affidavit accompanying application under section 5 of the Limitation Act contained generalized statements and not a single cogent justification has been demonstrated for the delay.

14. The learned counsel further stated that the rights in the property, which was the subject matter under dispute in the subject appeal have already been determined judicially and that the successive judicial pronouncement thereupon have now attained the finality.

15. In support of the aforesaid contention the learned counsel for the respondents read out to the Court to the relevant content stated in his counter affidavit, which is reproduced herein below:

> *"9(i) That in respect of suit property viz. S.No.90 and 91 admeasuring 32-0 acres Chak No.8 Deh Kundo Taluka and District Sanghar this Respondent filed F.C.Suit No.58 of 2000 for Specific Performance of Contract which suit was dismissed by learned trial Court.*
>
> *(ii) That Civil Appeal No.47 of 2004 filed by this Respondent was allowed by learned appellate Court.*
>
> *(iii) That 2nd appeal No.05 of 2005 filed by the appellant through same learned counsel which was converted in Revision Application No.82 of 2005 was dismissed in limine by this Honourable Court vide judgment dated 02.05.2005. Copy of the order is filed as annexure-R/1.*
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> *(iv) That revision application No.406 of 2005 filed by same learned counsel in above R.A. No.82 of 2005 is dismissed by this Honourable Court on 28.08.2006. Copy of order is filed as annexure-R/2.*
>
> *(v) That restoration application C.M.A.2611 of 2006 filed in above R.A.NO.82 of 2005 is dismissed by this Honourable Court on 28.05.2011. Copy of order is filed as annexure-R/3.*
>
> *10. That since the judgment in connected Suit No.58 of 2000 filed by this respondent has attained finality I am advised to state that no purpose will be served in setting aside the order dated 01.03.2010.*

> *11. That appellant has no right, title or interest in the suit property. The suit, appeal and above 2nd Appeal No.06 of 2005 and present application u/o 41 Rule 19 CPC are filed to harass this respondent."*

16. The learned counsel also pointed out that the applicant/appellant has actively concealed the fact that the rights in the property, subject matter of the present appeal, had already been determined and such concealment should also be noted with concern by this Court.

17. The learned counsel argued that the restoration application was devoid of any merits and that the same is absolutely and hopelessly time barred.

18. Furthermore, the restoration of the subject appeal and hearing of the appeal on merits would be an exercise in futility because the rights in the property, subject matter therein, have already been judicially determined and that such determination has attained the finality.

19. The learned counsel cited the case of *Mrs. AKRAM YASEEN and others v. ASIF YASEEN and others,* reported as *2013 SCMR 1099* and drew the Court's attention to the following passage:

> *"6. Having examined the contention of the learned ASCs we are of the opinion that appellants have not be able to make out a case for condonation of delay and the judgment relied on by them also does not support their case and he has not been able to satisfy us that why it took 49 days after the office objection has been raised to file civil appeal and are of the opinion that this Court in its judgment relied on by the learned Advocate Supreme Court has made it clear that it shall be decided keeping in view the peculiar circumstances of the case. So even on this point the application for condonation fails and as a consequence to this disallowance the civil appeal should be dismissed."*

20. The learned counsel then cited the case *of Mst. RIYASAT BEGUM v. EJAZ AHMAD and another*, reported as *2013 CLC 593* and drew the Court's attention to the following passage.

> *"6. The object of law of limitation is to regulate the course and manner for providing relief and remedy, where substantive rights are pressed in litigation. The restriction of time limited is an outcome of public policy. Public policy to limit the time for bringing an action or claimed before the court of law is adopted in the legal system of all civilized State. No doubt the superior courts had time and time held and encourage the decision on merits instead of technicalities but it does not mean that in every case the law of limitation is ignored, which will put the law redundant. The law of limitation itself has provided an inbuilt remedy for that purpose in the shape of section-5 thus, an application for condonation of delay is mandatory whenever, any application or appeal etc, has been filed after prescribed period.*
>
> *7. It is worth to note that petitioner brought instant application after lapse of 5 months and 8 days but no application of condonation of delay was filed. If we go through the contents of the application for restoration it would indicate that firstly it was an application for setting aside ex parte proceedings secondly, and for restoration of the file. On merits it was contended in the application that the counsel for petitioner was ill; he had undergone surgery and was advised bed rest, with no reason of this appearance of plaintiff herself on the munshi/clerk of the counsel. Since there was no application for condonation of delay, therefore, the trial Court was not required to have recorded an evidence in this respect because on the face of it the application for restoration of suit was hopelessly barred by limitation and limitation cannot be condoned without there being justification for each and every day's delay. Courts would show indulgence only if error is one which be committed by a reasonable and prudent means exercising due diligence and caution, moreover leges vigilantibus, non-dormientibus jura sub veniunt (the law aid those who keep watch not those who sleep).*
>
> *8. The attitude of the petitioner was so careless that even during the proceedings she could have filed an application under section 5 of the Limitation Act, 1908 because no period has been provided for such application, but unfortunately she was not advised legally, in this respect, ignorantia excusotur non jurissed facti (ignorance of fact is excused but not ignorance of law).*
>
> *9. In the instant suit, the sufficient cause is also missing because it has been time and again held that*

> *sufficient cause is that cause which is beyond the control of a party whereas in the instant case, if the counsel was ill but petitioner/plaintiff herself was also not found to be vigilant. If at all, petitioner should have filed an application under section 5 of the Limitation Act then the trial Court was bound to have recorded the evidence, in this respect no doubt law has given wide discretion to the court in determining what is sufficient cause, but the discretion has to be exercised judicially and not arbitrarily. The courts are not supposed to go into the merits of the case then the question of limitation is not satisfactorily met with.*
>
> *10. Even otherwise, the learned courts below have attended to the matter by discussing each and every aspect on record and non-suited the petitioner on sound reasons. The petitioner has failed to prove her claim through overwhelming and reliable reasons, therefore, in this view of the matter when the concurrent findings recorded by lower courts are neither illegal nor suffer from any illegality, the impugned judgment and decree of both the lower courts are in accordance with law and material available on record. No misreading, non-reading or jurisdictional defect has been pointed out by the learned counsel for petitioner, which could justify interference by this court in its revisional jurisdiction, a limited one.*
>
> *11. As a corollary to the above, instant revision petition is dismissed in limine with no order as to costs.*

21. This Court has carefully considered the submissions of learned counsel and has also gone through the record available on file.

22. It would prima facie appear that the conduct of the appellants/applicants culminating in the Impugned Order is mirrored in the period thereafter as well.

23. The order on the next date of hearing, being 3.6.2011 on which the present applications were listed post institution, shows that the learned counsel for the appellants/applicants had chosen to remain absent yet again.

24. Thereafter on successive dates including on 29.3.2013, 07.05.2013 and 22.02.2018, the learned counsel for the appellants/applicants chose to remain absent.

25. It appears that the presence of the learned counsel for the appellants/applicants was made possible today due to the order passed herein on the last date of hearing, content whereof is reproduced herein below:

> *"Attorney Muhammad Farooq appears in person and states that no notice of today's date of hearing has been issued to his legal Counsel, therefore, he is unable to appear in this Court today. A question was put to the said attorney as to the provision of law which requires that specific notice be issued to each Counsel for the appellants for each date of hearing, to which he failed to respond.*
>
> *Counsel for respondent No.1 appears and states that this matter has been pending since 2005 and for the last 13 years it has remained pending due to non-serious attitude of the appellants.*
>
> *The Court appreciates the contention of the learned Counsel for the respondents, however, as an indulgence the matter is fixed for 06.03.2018. The said date has been fixed in the presence of the attorney for the appellants, who shall ensure the presence of his legal Counsel. It is noted that with caution that in the event the learned counsel for the appellants is not present on the next date of hearing and/or does not proceed with the matter for any reason whatsoever then either the appellants may choose to agitate the matter themselves or the Court will proceed with adjudication of the matter notwithstanding the absence of the learned Counsel for the appellants."*

26. It is the view of this Court, based on the record available on file, that the appellants/applicants appear to have attempted to prolong the subject appeal and disinterested in proceeding herewith from the first date of hearing herein wherein the learned counsel had undertaken to argue and conclude the subject appeal at the very next date.

27. The contention of learned counsel for the appellants/applicants that no notice of the date of hearing, on which the Impugned Order was passed, was ever sent to the learned counsel for the applicant/appellant cannot be sustained by this Court as the same is contradicted not only from the record but also by the statement to the contrary contained in restoration application itself. Furthermore the learned counsel for the appellants/applicants has also failed to point out an appropriate provision of law which required that the learned counsel for the appellants/applicants be sent express notice by this Court on each date of hearing.

28. The contention that the Impugned Order is not sustainable as the date of hearing upon which the same was recorded was not determined in the presence of learned counsel for the appellants/applicants also cannot be appreciated by this Court as there is no requirement for the presence of the learned counsel for the parties when the date of hearing are determined by this Court.

29. The contention that since it was only an interlocutory application that was stated to have been listed upon the order sheet on which the Impugned Order was passed and that main case could not have been heard or dismissed on the said date is also not sustained by this Court for the following reasons:

(i) The matter was adjourned from time to time at the behest of the appellants/applicants, however, the purpose of said hearing remained the same.

(ii) Therefore, the hearing that took place on 1.3.2010 was for the same purpose as it had been recorded

vide order dated 18.4.2005, which was to argue the entire appeal and not merely on an interlocutory application therein.

(iii) This Court had benefit of review the diary sheet prior to the date of the Impugned Order and it appears that the conduct of the appellants/applicants had compelled this Court to pass the Impugned Order in the first place.

(iv) This Court has now had benefit of review of the diary sheets since date of Impugned Order and it is prima facie apparent that the conduct of the appellants/applicants has been just as disinterested as it was prior to the date of the Impugned Order.

30. It is the considered view of this Court that the appellants/applicants have failed to raise any cogent grounds for the grant of the application under section 5 of the Limitation Act seeking condonation of the 14 months delay in filing of the restoration application, therefore, it is apparent that there appears to be no justification of said delay. The restoration application itself is self-contradicting and otherwise devoid of any merit.

31. It has been held by the august Supreme Court in the case of *Lt.Col. NASIR MALIK versus ADDITIONAL DISTRICT JUDGE LAHORE,* reported as *2016 SCMR 1821,* that each day of delay had to be explained in an application seeking condonation of delay and that in the absence of such an explanation the said application was liable to be dismissed.

32. In view of the foregoing the subject applications were dismissed vide the short order announced in Court earlier today, content whereof is reproduced herein below:

> *"Heard the learned counsel at length. For the reasons to be recorded latter, the restoration application being CMA No.547 of 2011 and the application for condonation of delay being CMA No.546 of 2011 are hereby dismissed."*

33. These are the reasons for the short order dated 06.03.2018, wherein subject applications were dismissed.

JUDGE

Shahid