

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Muhammad Ali Mazhar** and **Agha Faisal, JJ.**

High Court Appeals No.173 & 174 of 2016

Mehmood Khan Mahar
Versus
Qamar Hussain Puri & 5 others

For the Appellant : Mr. Rafiq Ahmed Kalwar
Advocate.

For Respondent No.1 : Mr. Mayhar Kazi, Advocate

: Mr. Ghulam Shabbir Shah
Additional Advocate General
Sindh

Date of Hearing : 15.05.2018

ORDER

Agha Faisal, J: This matter pertains to two ostensibly time barred appeals and it has to be determined upon the facts and circumstances pleaded, in the respective applications under section 5 of the Limitation Act 1908 read with section 151 CPC, whether sufficient grounds exist for the Court to condone the delay occasioned. Since the appeals arise from two consolidated suits and assail a common judgment, hence the issue of limitation, in both appeals respectively, is being addressed by this common order.

2. A brief summary upon the factual aspect of the present appeals is delineated in chronological order herein below:

- i. Suit No. 419 of 2001 ("**Suit 1**") was filed by the Respondents No.1 and 2 herein for declaration, injunction and cancellation of documents with respect to the property, being residential leased hold Plot bearing No.40-A-3 measuring 2000 square yards or thereabouts situated in Muhammad Ali Memorial Cooperative Housing Society Limited, Karachi ("**Property**").
- ii. Suit No. 1138 of 2005 ("**Suit 2**") was filed by the present appellant in respect of the same Property seeking a declaration and mandatory injunction in respect of the same Property.
- iii. The two respective suits mentioned supra were consolidated vide order dated 16.10.2016 and thereafter common issues were settled on 30.11.2016.
- iv. Evidence was led by the respective parties and after conclusion of the final arguments in the respective suits, a common judgment was rendered dated 08.04.2015 ("**Impugned Judgment**").
- v. The learned Single Bench of this Court, vide the Impugned Judgment, was pleased to decree the Suit 1 in favour of the plaintiff therein to the extent of defendant No.1 therein and was further pleased to dismiss Suit 2 with costs. The Court also directed the Nazir of this Court to de-seal the Property and handover its possession to the plaintiff in Suit 1.
- vi. The decree, in respect of the Impugned Judgment, was prepared on 19.04.2016 ("**Decree**").
- vii. The record available before the Court, duly admitted by the parties herein, reflects that a copy of Impugned Judgment and

Decree was applied for by the Appellant herein on 21.05.2016 and that the said certified copy was delivered thereto on 24.05.2016. The present appeals were presented before this Court on 26.05.2016.

viii. Since the Limitation Act 1908 provides for filing an appeal against a decree or order of the High Court in exercise of the original jurisdiction within 20 days from the date of decree or order, it would appear that the subject appeals were time-barred.

ix. It is in this context that the Appellant filed CMAs No.2152 and 2156 of 2016 ("**Condonation Applications**"), in the respective appeals, seeking the condonation of delay in filing the appeals.

3. It is in this backdrop that detailed arguments were led by the respective learned counsel upon the issue of whether in the facts and circumstances of the case sufficient grounds were made out to condone the admitted delay in filing of the present appeals.

4. Learned counsel for the Appellant argued that sufficient grounds were present, supported by the ratio of sound judgments of the Superior Courts, to demonstrate that the Appellant was entitled to the grant of condonation of delay. The submissions of the learned counsel may be encapsulated in the manner appearing herein below:

i. It was submitted that the Appellant is a permanent resident of Mirpurkhas and hence was unable to keep abreast of the proceedings, which took place at Karachi.

- ii. It was further submitted that pursuant to order dated 23.09.2005 passed in Suit 2 learned Single Bench of this Court was pleased to direct the Nazir to seal the Property and post two (2) chowkidars thereat. Learned Single Bench of this Court vide the said order was further pleased to direct that the salary of one chowkidar will be borne by the Appellant whereas that of the other by the Respondents No.1 & 2.
- iii. It was submitted that the Appellant came to know on 20.05.2016, through the chowkidar posted at the Property that the Nazir of this Court visited the Property on the same day i.e. 20.05.2016 to de-seal the same and handover its possession to the Respondents No.1&2. Thereafter, after inquiry from the Court the Appellant on 21.05.2016 for the first time gained knowledge about passing of the Impugned Judgment and Decree by the learned Single Bench of this Court. Thus the Appellant came into knowledge about passing of the Impugned Judgment and Decree on 21.05.2016 and the present appeals were filed within the limitation period provided from the date of knowledge of the Impugned Judgment and Decree.
- iv. It was further submitted that In facts and circumstances as mentioned above, the Appellant had no knowledge regarding passing of the Impugned Judgment and Decree and after the Appellant has gained knowledge the same has filed the present appeals within the time provided for filing appeal under the Limitation Act 1908 and hence any delay in filing of

the instant appeals is not deliberate and/or attributable to the Appellant and hence the same may graciously be condoned in the interest of justice.

- v. It was admitted that the Appellant had been unable to maintain the requisite level of contact with his legal counsel and in respect thereto it was submitted that the same could not be made the ground for denial of the application for condonation of delay.
- vi. In order to bolster his submissions, the learned counsel placed reliance on the judgments in the following cases:
 - i. *Muhammad Shafi vs. Muhammad Hussain reported as 2001 SCMR 827 (“Shafi”)*.
 - ii. *Mst. Fatima Bibi vs. Nur Muhammad Shah and others reported as PLD 1951 Lahore 147 (“Fatima Bibi”)*.
 - iii. *Gulab vs. Mst. Malkani reported as 1992 CLC 2123 (“Gulab”)*.
 - iv. *Hyderabad Development Authority vs. Abdul Majeed & Others reported as PLD 2002 SC 84 (“HDA”)*.
 - v. *Board of Governors Area Study Centre for Africa and North America Quaid E Azam University Islamabad vs. Ms. Farah Zahra reported as PLD 2005 SC 153 (“QAU”)*.

5. In response it was contended by the learned counsel for the Respondents No.1 and 2 that the appeals are, prima facie, time-barred and that no grounds exist for the condonation of the delay that has been admittedly occasioned. A brief upon the submissions of the learned counsel is presented herein below:

- i. It was demonstrated from the record that the Impugned Judgment was dated 08.04.2016 and that the Decree was issued on 19.04.2016.
- ii. It was submitted that applying the relevant provisions of Limitation Act 1908, being Article 151 thereof, the Appellant had 20 days within which to prefer an appeal there against, however, the Appellant failed to do so and even the application filed to obtain a certified copy of the Impugned Judgment and Decree is dated 21.05.2016, by which date the limitation period had already expired.
- iii. It was contended by the learned counsel that ignorance of proceedings is no ground for condonation of delay especially in view of the fact that the present Appellant was himself the plaintiff in Suit 2.
- iv. It was argued that being a permanent resident of Mirpurkhas does not provide any sanction to the Appellant to flout the statutory prescription of limitation.
- v. It was demonstrated that prior to final arguments having been conducted in Suit 1 and Suit 2, a notice was issued directly to the present Appellant at his last known / represented address.
- vi. It was contended that it was the duty of the litigant party to inform the Court regarding change in the address, if any, and that the same could not be made pretext for avoidance of the statutory obligations. Learned counsel placed reliance on the judgments in the cases of (1) *Mubarak Ali vs. First Prudential Modaraba through Chief Executive* reported as 2006 CLD 829

and (2) *Amir Ullah Jan vs. Member Board of Revenue (Colonies) Punjab* reported as 2013 PLD Lahore 445 in order to augment the contentions made herein.

- vii. Learned counsel submitted that the admitted intermittent contact between the Appellant and his counsel could not be pleaded as ground for condonation of delay, as it is a well settled principle of law that delay cannot be condoned when a party fails to keep abreast of the proceedings and/or fails to make requisite inquiry from their own counsel. Reliance was placed in this regard upon the judgments in the cases of (1) *Sh. Bashir Ahmed vs. Muddassar Hayat* reported as 2005 SCMR 1120 (2) *Mst. Khalida Khatoon vs. Askari Bank Limited* reported as 2012 CLD 194.
 - viii. It was further contended that it is trite law that a party is obliged to be vigilant and is solely culpable for the consequences of failure in respect thereof. Reliance in such regard was placed on the judgment in the case of *Abdul Hamid vs. Abdul Qadir* reported as PLD 2001 SC 49.
 - ix. It was thus contended by the learned counsel that the law of limitation is statutory prescription and the same stands admittedly violated and, unless this Court is of the opinion that such violation may be justifiably condoned, it is imperative that the present appeals are dismissed on the ground of limitation alone.
6. This Court heard the detailed arguments of the respective learned counsel and reviewed the record available before this Court.

7. The fact that the appeals are time-barred is demonstrated not only by the record augmented by the arguments of the Respondents, but also by virtue of the applications for condonation of delay filed by the Appellant. It is thus the duty of this Court to determine whether sufficient ground exist to condone the delay occasioned in institution of the present appeals.

8. The record reveals that evidence was being led before the Commissioner and in respect thereof, a report was submitted by the Commissioner for recording evidence dated 17.07.2007. It may be pertinent to reproduce the relevant portions of the said report:

“Accordingly, a provisional report was submitted to this Hon’ble Court vide report dated 12.05.2007 as by that time evidence could not be concluded. However, subsequently evidence of both the plaintiffs concluded on 23.06.2007, whereas the defendants and their counsels did not come forward to cross-examine the plaintiffs despite repeated notice.

The defendants and their respective counsels did not show any interest in these proceedings through out the proceedings despite notice, therefore, I mark their cross-examination nil. Copies of notices sent to the respective counsels through registered post as well as original applications filed by the defendant No.5 for adjournments.

Since the time allowed by this Hon’ble Court for return of Commission has already been expired, whereas defendants have lost their interest in the matter therefore, I return this commission.

9. The reference to the defendants, in the aforesaid report, is a reference to the defendants in Suit 1 (being the Appellant herein).

10. There is another Commissioner’s report dated 09.04.2013 on file and a perusal thereof lends credence to an inference suggesting the disinterest of the Appellant in the proceedings. It is pertinent to reproduce the content of said report:

“It is respectfully submitted that by an order dated 30.01.2013 (“Order”) this Hon’ble Court was pleased to extent four months’ further time to conclude the evidence of the parties for return of commission.

That accordingly pursuant to the Order the undersigned commissioner issued notices to the respective learned counsel vide notice dated 21.01.2013 and fixed the matter on 09.03.2013 for cross-examination of Plaintiffs. On the above date following were present;

- i) Mr. Shahab Sarki, Advocate.*
- ii) Mr. Nazar Akbar, Advocate.*
- iii) Mr. Qamar Hussain Puri, the PW-1.*

Given that on the above date the witness did not bring the original documents that were exhibited in the evidence, the matters were adjourned to 16.03.2013 for the cross-examination of PW-1.

On 16.3.2013 the matters were again adjourned at the request of Mr. Nazar Akbar as his client was in contact with him and accordingly, the matter was adjourned to 06.4.2013 for the same purpose.

On 06.04.2013, Mr. Nazar Akbar filed a letter dated 05.04.2013 addressed to the undersigned. In the said letter he has stated that after receiving notice from the commissioner for recording of evidence, he sent a letter to his client through TCS on or about 16.3.2013 in order to inform him about the evidence and to seek instructions from him before he cross-examine the witnesses but his letter returned undelivered. In his said letter he further stated he has no proper instructions from his client as such not in a position to represent him anymore.

(The original letter is annexed herewith)

In view of foregoing position, I have no option but to return the commission unexecuted. Accordingly, I return this commission alongwith Original Court’s Evidence File (Pages from 01 to 89).

Submitted for further order please.”

11. It was expressed by the Appellant, in his affidavit supporting Condonation Applications, that he came to know about the Impugned Judgment / Decree from the information received from the chowkidars posted at the Property.

12. It is observed that the Property was sealed pursuant to order dated 23.09.2005 in Suit 2, which suit was filed by the present Appellant, wherein the Nazir was directed to seal the Property and post two chowkidars thereat.

13. It has also been demonstrated that salary of one of the chowkidars was being paid by the present Appellant.

14. It would appear that the Appellant would have been required to maintain some degree of contact with the Court / Nazir of the Court in order to deposit the said salary in a timely manner, therefore, the same contradicts the plea of the Appellant that he was detached from the Court proceedings and has no knowledge of what was transpiring therein.

15. The argument that the Appellant had intermittent or little contact with his counsel cannot be sustained as the grounds for waiver of limitation and reliance in such regard is placed upon the judgment of the honorable Supreme Court in the case of *Altaf Hussain & 2 Others vs. Muhammad Nawaz & 2 Others* reported as *2001 SCMR 405*.

16. It appears to this Court that after obtaining an order to seal the Property on 23.09.2005, the Appellant was interested more in the preservation of status quo, than in the resolution of the dispute inter se. The two Commissioner's reports, dated 17.7.2007 and 09.4.2013 respectively, lend substance to the aforesaid inference.

17. It is demonstrated from the record that a notice was sent directly to the present Appellant by the Court prior to the final arguments being conducted in the subject suits and in addition

thereto pasting of notice was also undertaken by the bailiff as demonstrated from the bailiff report dated 16.12.2015.

18. It is further apparent from the record that the address upon which the notice was sent to the Appellant, prior to final arguments, and where pasting was affected by the bailiff of this Court, was the same address as had been provided by the Appellant in Suit 2, which was filed by the Appellant himself.

19. In the facts and circumstances under review it is patently apparent that even the application, seeking certified copies of the Impugned Judgment / Decree, was preferred after the lapse of the period of limitation prescribed for filing of an appeal there against.

20. The Appellant has been unable to raise and / or substantiate any cogent justification for the delay that was occasioned.

21. It is also apparent from the record of the proceedings that the learned Single Judge took all plausible steps to keep the Appellant abreast of the proceedings and extended every possible indulgence to the Appellant, despite the apparent disregard of the proceedings by the Appellant.

22. The authorities cited by the Appellant are duly distinguishable in the present facts and circumstances for the reasons ascribed in seriatim herein below:

- i. *Shafi* is a pronouncement of the honorable Supreme Court wherein delay in the filing of proceedings was *explained properly* and hence such a delay was condoned. There is no cavil to the proposition that the Court does enjoy the inherent power to condone delay

in cases where the delay is duly explained and justified.

In the present circumstances the Appellant was unable to justify the delay and hence the said authority does no merit to the Appellant.

- ii. *HAD, QAU, Fatima Bibi and Gulab* are distinguishable herein for the same rationale as ascribed to *Shafi* supra.

23. It has been maintained by the honorable 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.

24. In the present circumstances it is maintained that the Appellant has been unable to justify the delay in filing the present appeals, and on the contrary such comportment appears to be consistent with the conduct of the Appellant during the pendency of Suit 1 and Suit 2.

25. It is the considered view of this Court that in the facts and circumstances of the present case no sufficient grounds were made out to condone the admitted delay in institution of the present appeals and that the Appellant has failed to raise any cogent grounds for the grant of the Condonation Applications.

26. In view of the reasons enumerated supra the Condonation Applications are hereby dismissed.

27. As a consequence thereof the present appeals, along with listed applications, also stand dismissed, with no order as to costs, on account of being unjustifiably time barred.

JUDGE

JUDGE