

IN THE HIGH COURT OF SINDH, KARACHI

Civil Revision Application No. 26 of 2016

Muhammad Ahsan Mushtaq Paracha.....Versus.....Sheikh Arif-ur-Rehman.

J U D G M E N T

Date of hearing : 09TH February, 2018.
Date of Judgment : 02nd April, 2018.
Appellant : Mr. Muhammad Taqi, advocate.
Respondent : Mr. Munir-ur-Rehman, advocate.

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Mrs. Kausar Sultana Hussain, J:- This Civil Revision Application under Section 115 C.P.C. assails judgment dated 01.12.2015 passed by the learned IInd Additional District & Sessions Judge East, Karachi, whereby Civil Suit No. 748 of 2014, filed by the appellant was dismissed under Order 17 Rule 3 C.P.C by the learned VIth Senior Civil judge, Karachi East as not proved, upholding judgment dated 03.09.2015 passed by the said trial Court.

2. Short factual background of the case is that the appellant/plaintiff has filed a suit for recovery of Rs. 27,00,000/- and damages of Rs. 25,00,000/- against respondent/defendant stating therein that the appellant/plaintiff on 07.03.2014 entered into an irrevocable agreement of sale with the respondent/defendant in respect of House No. A-141, PIA Employees Co-operative Housing Society Limited, Block-9, situated in K.D.A Scheme No. 36, Gulistan-e-Jauhar, Karachi admeasuring 400 Sq.yards against sale consideration of Rs. 13,800,000/- and the appellant/plaintiff had paid Rs. 10,00,000/- as token money, vide Cheque drawn in M.C.B Limited, Siemense Chowrangi Branch, Karachi. The remaining amount of sale consideration i.e. Rs. 12,800,000/- was decided to be paid to the respondent/defendant within 60

days commencing from the date of agreement. On 12.3.2014 on demand of respondent/defendant the appellant/plaintiff paid Rs. 1,700,000/- through two Cheques amounting to Rs. 900,000/- and Rs. 800,000/-. On 17.3.2014 appellant/plaintiff informed the respondent/defendant regarding publication of advertisement of sale through his estate agent in newspaper "Daily Jasarat Karachi" and requested him for execution of sale consideration within 30 days instead of 60 days with payment of remaining amount of Rs. 11,100,000/- by the appellant/plaintiff to respondent/defendant, however respondent/defendant refused the same request and verbally cancelled the agreement of sale dated 07.03.2014 without any reason and explanation. On 18.3.2014 after verbal cancellation of sale agreement by the respondent/defendant the appellant/plaintiff demanded his money back amounting to Rs. 10,00,000/- and Rs. 1,700,000/- in all Rs. 27,00,000/-. The respondent/defendant issued two cheques to the appellant/plaintiff for Rs. 1,700,000/- but the same got dishonored as signatures differs. On 27.3.2014 the respondent/defendant through publication in "Daily Jasarat Karachi" cancelled the agreement of sale. Thereafter appellant/plaintiff repeatedly demanded from the respondent/defendant for return of paid amount but instead to return his amount, respondent/defendant become emotional and extended threats of dire consequences. Consequently appellant/plaintiff moved application against him and lodged F.I.R bearing No. 142 of 2014, under Section 489-F PPC at Police Station Aziz Bhatti, Karachi. The appellant/plaintiff claimed compensation of Rs. 2,500,000/- with mark up @ 15 % per anum as damages on account of suffering mental torture, agony and perplexities. He further prayed for return of Rs. 2,700,000/- paid as token/part payment.

3. Appellant/plaintiff states that before trial Court, the learned counsel for the respondent/defendant submitted written statement, in which the respondent/defendant admitted the claimed amount of the appellant/plaintiff. After framing of issues, on the directions of the trial Court, the appellant/plaintiff had submitted his Affidavit in Evidence alongwith two affidavits of supporting witnesses but thereafter on 18.12.2014 when the matter was fixed for cross-examination of the appellant/plaintiff, the respondent/defendant filed adjournment application. Later on, on 17.01.2015 due to K.B.A. strike matter could not proceed and adjourned for 30.1.2015, however respondent/defendant side again obtained adjournment. On 21.2.2015 matter was adjourned by consent of the parties for 17.3.2015 but none was present from both the sides. On 09.4.2015 learned trial Court adjourned the matter and on 18.4.2015 and 02.5.2015 the court was lying vacant and on 21.5.2015 and 13.7.2015 the respondent/defendant side was called absent. Matter was then fixed for 25.7.2015, when appellant/plaintiff was present but due to absence of the respondent/defendant, the trial Court closed the side of appellant/plaintiff and matter was adjourned to 19.8.2015 for filing of Affidavit-in-Evidence of the respondent/defendant. Since 16.8.2015 till 29.10.2015, the appellant/plaintiff counsel was seriously ill and when he approached the trial Court, he came to know regarding the impugned judgment and decree dated 03.09.2015 passed by the learned trial Court under Order 17 Rule 3 of C.P.C.

4. The appellant/plaintiff could not file the appeal within the stipulated period of prescribed limit as his counsel was suffering from serious illness as well as appellant/plaintiff also proceeded to Saudi Arabia for performing Hajj. The

appellant/plaintiff has filed an application under Section 5 of the Limitation Act alongwith the appeal, but the learned Appellate Court did not consider the same and dismissed the said application of appellant/plaintiff, hence this Revision.

5. I have heard the learned counsel for the parties and perused the material available on record.

6. The learned counsel for the appellant/plaintiff has argued that the order of the learned trial Court is illegal and void ab-initio, thus no limitation run against such order. He further argued that learned appellate court failed to consider the judgment and decree passed by the learned trial Court and laid down procedure mentioned in the provision under Order 17 Rule 3 of C.P.C. He further pointed out that on 25.7.2015, when appellant/plaintiff's side was present while respondent/defendant side was absent, the learned trial Court had closed the side of the appellant/plaintiff. On 03.09.2015 the learned trial Court in hasty manner announced the judgment under Order 17 Rule 3 of C.P.C, therefore, the said judgment and decree are liable to be set aside. The learned counsel for the appellant/plaintiff further argued that the learned appellate court's view on the limitation application is a result of jurisdiction defect and material irregularity.

7. The learned counsel for the respondent/defendant in rebuttal has argued that learned appellate court has not considered the appeal of the appellant/plaintiff on merits, on the contrary the appeal of the appellant/plaintiff was decided on the point of limitation as the appellant/plaintiff has filed time barred appeal before the learned appellate court, hence it was rightly dismissed by the appellate court.

8. The learned counsel for the appellant/plaintiff has contended while arguing the matter that the learned trial Court has wrongly and illegally decided the Civil Suit No. 748 of 2014 under Order 17 Rule 3 of C.P.C filed by him. He has assailed the said decision of learned trial Court before the learned appellate court. The learned appellate court after hearing arguments of both the sides on the point of limitation, dismissed the said appeal of the appellant/plaintiff while observing that appellant/plaintiff has filed the said appeal after laps of statutory period as provided in law.

9. I have gone through the order passed by the learned appellate court, which reveals that the learned Judge of appellate Court did not discuss the merits of the case in its judgment, rather the appeal was dismissed on the point of Limitation only and application of the appellant/plaintiff for condonation of delay under Section 5 of Limitation Act was not considered, therefore, this Court shall keep itself constraint to the extent of point of limitation only. While perusing the impugned judgment of learned appellate court, it reveals that the trial Court has announced the judgment in Civil Suit No. 748 of 2014 on 03.09.2015 and the appellant/plaintiff has applied to the learned trial Court for issuance of certified copy of the said judgment on 02.11.2015 and received the same on 12.11.2015, he then submitted an appeal bearing No. 202 of 2015 on 23.11.2015 alongwith an application under Section 5 of Limitation Act, in the office of learned appellate court, whereby he raised plea for condonation of delay in filing such appeal on the grounds that he at the relevant time proceeded to Saudi Arabia for performing Hajj, while his counsel was seriously ill,

therefore, he could not submit an appeal before learned appellate Court within stipulated time. The learned appellate Court in its judgment dated 01.12.2015 has not accepted the reason of delay i.e. illness of the learned counsel for the appellant, for which the learned Court is of the view that Mr. Fazal Rahim, Advocate for the appellant/plaintiff was regularly appearing in Court and perusing his cases. Besides, this the learned appellate court is also of the view that he did not explain the reasons of delay of each and every day in filing of appeal. In support of its view the learned appellate court has mentioned Sessions case No. 1670 of 2015, wherein per record of the Sessions case, Mr. Fazal Rahim had appeared on 21.10.2015 and on the same date the learned appellate court has announced order in bail application in another crime No. 79 of 2014, wherein Mr. Fazal Rahim had advanced his arguments. The learned appellate court has also mentioned few dates in its judgment, wherein Mr. Fazal Rahim had appeared in his cases i.e. 5.11.2015, 09.11.2015, 20.11.2015 and 23.11.2015. The learned appellate court made thorough enquiry of Mr. Fazal Rahim's cases, by inspecting pending cases, wherein Mr. Fazal Rahim Advocate was appearing as an Advocate, but the learned appellate court did not consider the said dates when Mr. Fazal Advocate was also pursuing the matter of the appellant as on 2.11.2015 he applied to the learned trial Court for obtaining certified copy of the judgment, which was delivered to him on 12.11.2015, therefore, the reasons for not considering the plea of appellant's counsel for condonation of delay seems not justified.

10. The learned judge of the appellate court while deciding the appeal of the appellant has relied upon the case law of Hon'ble Supreme Court of Pakistan reported in 2015 P.L.D 1

S.C. Azad Kashmir, wherein the Hon'ble Supreme Court has discussed the point of limitation. As per facts of said case, limitation for petition for leave to appeal from the judgment of High Court was 60 days but it was filed 141 days from the announcement of judgment of High Court, which was 81 days beyond the period of limitation, application for obtaining copy of judgment was filed after the expiry of limitation for petition for leave to appeal. It was further held in the said case law that party has to show sufficient cause for condonation of delay- Condonation of delay of even one day could be refused, when no sufficient cause was shown by the party.

11. The learned appellate court neither considered the cause of delay as described by the learned counsel for the appellant of his part nor on the part of appellant. The Hon'ble Supreme Court of Pakistan in P.L.D. 2001 S.C. 355, has been defined that what is the sufficient cause for the purpose of condoning delay by holding that sufficient cause means the "Circumstances beyond control of the party concerned. In my view illness of any one is always beyond his/her control, therefore, not considering the plea of illness, raised before the court is amount to throw his case without hearing on merits. Likewise the plea of the appellant/plaintiff that he proceeded for performing Hajj in those days is also beyond his control because no one can change the time of occasion of Hajj and it was the right of the appellant/plaintiff to proceed for performing his religious obligation/duty. In such circumstances the learned appellate court should oblige to consider the plea raised by the appellant and his counsel in application under Section 5 of Limitation Act filed alongwith an appeal. Other than this the appellant has challenged the

impugned judgment of the learned trial Court dated 01.12.2015 in his appeal as illegal and had been passed without jurisdiction, therefore, question of limitation would not arise in case of setting aside a void order for having no legal worth in eye of law. I therefore, allow the Revision Application in hand and set aside the judgment passed by the learned IInd Additional District Judge East, Karachi (appellate court) dated 01.12.2015 and remand this matter to the appellate court with direction to provide opportunity to both the parties for making their respective arguments on merits of the case. There shall be no order as to cost.

JUDGE

Faheem Memon/PA