

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No.118 of 2013

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before: Mr. Justice Nazar Akbar

Appellant : M/s. Interflow Communication (Pvt.) Ltd.
Through Mr. Bashir Ahmed Khan, advocate.

Versus

Respondent No.1 : Aamir Ali. (Nemo).

Date of hearing : **20.02.2020**

Date of Decision : **20.02.2020**

JUDGEMENT

NAZAR AKBAR, J. The appellant through this IInd Appeal has challenged the concurrent findings of the two Courts below. The VIIIth Senior Civil Judge, East Karachi by Judgment dated **20.05.2009** decreed Civil Suit No.617/2003 filed by the Respondent and the IIIrd Additional District Judge, East Karachi by Judgment dated **19.10.2013** dismissed Civil Appeal No.128/2009 filed by the appellant and maintained the findings of the trial Court.

2. To be very precise, the facts of the case are that the Respondent had filed civil suit No.617/2003 for recovery of **Rs.1200,000/-** against the Respondent stating therein that the Appellant/ Defendant introduced a Price Scheme known as Hero Card to raise so-called funds for the 9th Safe Games with the Association of an English Company namely Ogilvy & Mather with malafide intention to extract money from innocent public as such, the said cards were spread out throughout the country for sale. The Respondent on **28.12.2002** purchased Hero Card No.B-36-463-714

from one of the authorized mobile vans of the appellant/defendant and has destined **Rs.10,00,000/-**, therefore, as per instructions printed on the said card, he approached the National Bank of Pakistan, Shaheed-e-Millat Road Branch, Karachi on **29.12.2002** for receiving his winning cash prize, whereby he was asked to verify the said card from the appellant, therefore, he approached the appellant's office and met with an authorized person namely Mr. Naqi Mustafa, Marketing Manager, who assured him that since he has won the prize, therefore, he is entitled to receive the same after completion of formalities. On his direction, the Respondent brought stamp paper of Rs.100/- and he was pressurized to sign blank stamp paper but he refused to do so, as a result he was detained in the office of the appellant with collusion of other office staff for more than four hours. It was further contended that thereafter the appellant made harsh attitude towards the Respondent and extended threats to sign blank stamp paper to confess for having forged Hero Card, otherwise he should face dire consequences to his life and the lives of his family members. Thereafter on **01.01.2003** the Respondent then lodged complaint before the Chief CPLC, Karachi and sent legal notice to the appellant on **06.01.2003** which was evasively replied by them vide letter dated **17.01.2003**, therefore, the Respondent filed the said suit.

3. After service, the appellant/Defendant filed his written statement wherein they denied the contents of plaint as well as allegations leveled against them. They also denied that the Respondent/ Plaintiff destined for Rs.10,00,000/- and contended that in fact the Card was forged one and tempered, as the Respondent himself has made acceptance deed in writing wherein he

has admitted that said Card is tempered and forged one and also made publication in newspaper in daily Awam wherein he stated that he has mistakenly produced the said Card but he shall not produce the same for claiming the prize. They further contended that the said Card was also sent for verification to the issuing authority, whereupon it revealed that the number of the said card of forged and tempered. However, at the trial, the appellant failed to even step into the witness box to prove contents of written statement.

4. The trial Court after framing issues, recorded evidence of the Respondent/plaintiff who closed his side for evidence on **11.5.2005**. Then witness of the appellant after filing affidavit-in-evidence did not turn up for cross-examination and, therefore, on **30.3.2009**, the affidavit-in-evidence was discarded. The trial Court after hearing learned counsel for the parties, decreed the suit filed by the Respondent by judgment dated **20.05.2009**. The appellant against the said judgment preferred Civil Appeal No.128/2009 before the appellate Court which was dismissed by judgment dated **19.10.2013**. The appellant has impugned both the judgments herein this IInd Appeal.

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

6. Both the Court below have decreed the suit of the respondent on the basis of unimpeachable evidence of the Respondent since the appellant has not produced any witness to discharge their burden, irrespective of the fact that they have filed affidavit-in-evidence of their witness. Learned counsel for the applicant has not been able to point out any misreading or non-reading of evidence.

7. Beside the merit, if any, the instant IInd Appeal is time barred since the Court Fee was paid after about **one year and nine months** of filing of this IInd Appeal even without permission from the Court. The office, amongst others, has raised objection to the effect:-
“Proper Court Fee to be affixed”. This objection was raised by the Court on **12.11.2013**. Then this case was repeatedly listed for non-prosecution on **16.12.2013**, **26.8.2014**, **19.12.2014** and **19.2.2015**, therefore, fifth time on **04.5.2015** when the case was listed for non-prosecution the Court warned in the order as under:-

One week’s time is granted for compliance. This may be treated as last chance.

On **15.8.2015** after six months from the above warning and two years since the filing of appeal, Court Fee was presented in the office, that too, without seeking any extension in time for providing Court Fee. Learned counsel for the appellant concedes and even record also confirms that the appellant subsequently filed an application under **Section 148 CPC (CMA No.5501/2015)** which was listed in Court for orders on **26.11.2015** when following order was passed:-

Mr. Artiza Zaidi, holding brief for Mr. Mansoor Ahmed Khan, Advocate for the Appellants. Issue notice to Respondent. In the meanwhile, the appellant is directed to comply with the office objection.

The record further shows that since **26.11.2015** the **CMA No.5501/2015** has always been listed for non-prosecution with office note that **“notice to CMA No.5501/2015 could not be issued as cost not paid nor copy supplied”**. During the last four years on **28.10.2016**, **02.4.2018**, **18.10.2019** and on **12.11.2019** Mr. Bashir Ahmed Khan, learned counsel for the appellant was repeatedly given

time “**to pay cost and supply copies of CMA No.5501/2015**” to the office for issuing notice.

8. Finally on **17.02.2020** when CMA No.5501/2015 was again listed for non-prosecution, learned counsel Mr. Bashir Ahmed Khan was directed to satisfy the Court that how the appeal is in time in the following order:-

*The learned counsel for the appellant is directed to satisfy the Court that how an appeal against the order of **October, 2013** is within time when the Court fee has been filed after more than **two years** in 2015 even without seeking permission from the Court for extension of filing of the Court fee. To come up on **20.02.2020** at **11:00 am**.*

Learned counsel for the appellant has contended that the delay in filing court fee cannot be treated as bar by limitation. He referred to **Section 149 C.P.C** which provides an opportunity to the appellant to seek condonation of delay in payment of Court fee and if allowed and time is given by the Court, the Court Fee can be paid even beyond a reasonable time after expiry of limitation. But in the case in hand the applicant has not filed application under **Section 149 CPC** on **12.11.2013** when this appeal was filed nor till today any order for extension of time for payment of Court fee has been passed by this Court. On top of it even today the application under **Section 148 C.P.C** (CMA No.5501/2015) is listed for non-prosecution, therefore, it cannot be said that Court has given him time to file Court Fee at any later stage. There is series of case-laws from the Hon'ble Supreme Court on the point of inordinate delay and contumacy of litigant in matter of payment of Court Fee. In the case of Hassan Bakhsh and others vs. Syed Afzal Shah and others (**1974 SCMR 364**), the Hon'ble Supreme Court has held that:-

3. The petitioner's Regular Second Appeal No. 354 of 1967 having been dismissed by a learned Single Judge, they have moved this leave petition.

4. Learned counsel for the petitioners argued that the petitioners were victims of a bona fide error and that there was no deliberate default or neglect on their part to make up the deficiency in the court-fee. Reliance was also placed upon the provisions of section 28 of the Court Fee Act which gives wide discretion to a Court to allow opportunity to make up the deficiency in the court-fee if a document is found to be insufficiently stamped. It is, however, not denied that on the basis of the report of the local Commissioner, the learned trial Court had fixed the value of the suit for purposes of court-fee and jurisdiction at Rs.18,000-1-9 on which court fee of the value of Rs. 1,095 was paid by respondent No. 1 as plaintiff. **The petitioners had only to peruse the record of the trial Court to find out the correct valuation of the appeal for purposes of court-fee. Having failed to do so, and to avail of at least three opportunities to make up the deficiency, the learned Additional District Judge was amply justified not to further extend time to enable them to make up the deficiency. Needless to say, a valuable right had accrued to the respondent No. 1, of which he cannot be justly deprived when the petitioners did not show due diligence and care in the prosecution of their appeal.**

Similar view was expressed by the Hon'ble Supreme Court in the case of Allah Yar vs Muhammad Riaz and others (**PLD 1981 SC 489**) as follows:-

5. We have considered these contentions and find no force in them. No doubt time for making up the deficiency in the court-fee can be extended by the trial Court as well as by the appellate Court, but as held by this Court in *Mst. Walayat Khatoon v. Khalil Khan and another* (**PLD 1979 SC 821**) the discretion has, 'to be exercised very carefully and the Court has to strike a balance between prejudice likely to be caused to each party. **Whereas it should not be unduly harsh on the plaintiff by giving them an opportunity to make up the deficiency, at the same time it should not be harsh on the defendants by/ easily taking away the valuable right of limitation from them.** In *Abdus-Sattar and another v. Haji Muhammad Bakhsh and another* (**1979 S C M R 243**), this Court again considered the principle

regarding extension of time under section 149, C. P. C., for making up the deficiency in the court-fee. In that case also a question came up for hearing for making up the deficiency of court-fee on the memorandum of appeal and it was held that Court should extend the time only in cases of a bona fide mistake, and when good reason is shown as to why proper court-fee had not been paid in the first instance, but not in cases where the party is guilty of contumacy, as in the present case.

In the case of Assistant Commissioner and land Acquisition Collector, Badin vs. Haji Abdul Shakoor and others (1997 SCMR 919) after reiterating the above principles of law the Hon'ble Supreme Court has defined the term **contumacy** in the following observations:-

***Contumacy** in the context is used in the general dictionary sense and not as a word of art. It means contempt of lawful authority, obstinacy, or stubbornness. It is not difficult to discover the connotation of these attitude with the subject under discussion. If a plaintiff is allowed time to supply the deficiency in court-fee under Order VII, rule 11(c) as a matter of course and obligation (because, the rejection of plaint cannot take place without doing so) then in case he fails to do so, and asks for more time without some justification, it would amount to his being obstinate and stubborn in ignoring or denying the requirement and authority of law. **The repetition of such a conduct would amount to contumacy.** Similarly interpretation of this word in *Sohara v. Rashid Ahmed (PLD 1981 Lahore 261)* by Aftab Hussain, J., (as he then was), is approved.*

9. The conduct of appellant from **12.11.2013** till today when the case is listed for non-prosecution of CMA No.5501/2015 confirms that the appellant is guilty of contumacy. He has not shown any respect to the authority of Law. Consequently, this appeal cannot be considered as filed within limitation and a valuable right of limitation has accrued to the Respondent.

10. In view of the above facts and discussion, this IInd Appeal was dismissed by short order dated **20.02.2020** and above are the reasons for the same.

JUDGE

Karachi, Dated: 25.02.2020

Ayaz Gul