

said suit was dismissed by the trial Court under Order XVII Rule 3 CPC by judgment dated **29.10.2007**. The said judgment was challenged by the applicant before the appellate Court and by order dated **12.11.2012** appeal was allowed and the case was remanded to the trial Court for decision on merit after recording evidence of the parties. Thereafter on **11.12.2012** the said suit was again dismissed for non-prosecution as no one has appeared from applicant/plaintiff side before the trial Court. On **17.12.2012** the counsel for the applicant/ Plaintiff filed application under Order IX Rule 9 CPC for recalling/ setting aside the order dated **11.12.2012** along with his personal affidavit. The trial Court after hearing the parties, by order dated **10.03.2016** dismissed the said application in the following terms:-

The Plaintiff side has failed to establish their contentions for which he did not appear on the relevant date of hearing. While it is a settled law that for getting the order of recalling, he must satisfied or prove/submit the sufficient reason/cause, but in this case plaintiff has failed to do so. Even otherwise law does not favour indolent person but on the contrary it favours vigilant persons.

In view of the above reasons & above cited case laws, I have reached to the conclusion that application merits no consideration and same is hereby dismissed with no order as to costs.

The applicant preferred Civil Misc. Appeal No.06/2016 against the aforesaid order, which was also dismissed by the appellate Court by order dated **14.03.2018** as follows:-

*On the perusal of R&Ps of Civil Suit No.315/2003 it appears that on 16.11.2012 R&Ps were received from appellate court by the learned Trial Court. Advocate for plaintiff namely S. Zahir Hussain Chishti filed power on the same date and the matter was adjourned to 22.11.2012. On **22.11.2012 another counsel namely Syed Nadeem Abbas filed undertaking on behalf of plaintiff and the matter was adjourned to 01.12.2012 on which date Syed Nadeem***

Abbas advocate filed power on behalf of plaintiff and informed the learned trial court about the death of plaintiff, therefore, the matter was adjourned for filing application in this respect. On the next date viz. 06.12.2012 the learned counsel for plaintiff filed statement regarding death of plaintiff and mentioned therein the names of legal heirs on which the matter was adjourned with direction to file amended title. On the next date viz. 10.12.2012 advocate for plaintiff filed application U/O XXXII Rule 3 CPC, therefore, the matter was adjourned for one day for filing amended title and plaintiff's evidence. On 11.12.2012 the suit was dismissed in non prosecution due to absence of plaintiff side. **In view of the above facts and circumstances, I am of the humble opinion that S. Zahir Hussain Chishti Advocate was superseded by Syed Nadeem Abbas Advocate (same Advocate for appellant in this appeal) but the personal affidavit was sworn by S. Zahir Hussain Chishti advocate in support of application U/O IX Rule 9 CPC.** Nothing is available on record regarding absence of plaintiff as well as his advocate who superseded the previous advocate S. Zahir Hussain Chishti and still representing the plaintiff/appellant in this appeal. Therefore, the affidavit and documentary proof filed by S. Zahir Hussain Chishti, Advocate in support of application U/O IX Rule 9 CPC could not be considered. Accordingly, the impugned order is unexceptionable and the instant appeal is dismissed.

3. The applicant preferred instant Revision Application against the concurrent findings of the two Courts below.

4. I have heard learned counsel for the parties and perused the record. The perusal of impugned order of appellate Court shows the appellate Court was of the view that the application under Order IX Rule 9 for restoration of suit was filed by his previous lawyer Mr. S. Zahir Hussain Chishti, Advocate supported by his personal affidavit, after he had been superseded by another lawyer Syed Nadeem Abbas, Advocate. It is also observed that even after change of lawyer, the applicant has died and his legal heirs were brought on record by Syed Nadeem Abbas Advocate and he has filed amended title. The appellate Court held that S. Zahir Hussain Chishti, Advocate was no

more lawyer of the applicant on death of his client, even then he has filed application under **Order IX Rule 9 CPC** with his personal affidavit, ignoring the fact that he was no more lawyer of legal heirs of his deceased client. These observations of Court have been highlighted by me in the impugned order reproduced above.

5. Learned counsel for the applicant has contended that unfortunately both the trial Courts have failed to examine record of civil suit before them. He has contended that the application for restoration was filed by the previous counsel and rightly so as at the relevant time he was representing the applicant and nobody had superseded him. Learned counsel for the respondent controverted this position but he was unable to justify the statement of fact borne from the record that the observation of appellate Court that Nadeem Abbas, advocate has superseded Mr. Zaheer Hussain Chishti, advocate by the time the suit was dismissed for non-prosecution is incorrect. However, to make sure I had to call the R&Ps of the two Courts below. The date wise appearance of the lawyers from the record is as follows:-

- (i) On **16.11.2012** when R&P was received by the trial Court learned counsel for the applicant **Mr. Zaheer Hussain Chishti, Advocate** has only filed undertaking that he would be filing power on behalf of the applicant. (Page 17 of R&Ps in part-II).
- (ii) On **01.12.2012** Mr. **Zaheer Hussain Chishti**, Advocate filed power **on behalf of legal heirs** of applicant/plaintiff since he has died even before the remand orders. (Page-7 of R&Ps in part-II).
- (iii) Then on **06.12.2020** Mr. **Zaheer Hussain Chishti**, Advocate filed an statement that the applicant has died

and survived by the legal heirs mentioned in the statement. (Page-29 of R&Ps in part-II).

- (iv) On **10.12.2012** Mr. **Zaheer Husain Chishti**, Advocate also filed an application under **Order 32 Rule 3 CPC** whereby the applicant has prayed for appointment of guardian of the minors of the applicant and he was directed to file amended title on the next morning i.e. **11.12.2012**. Mr. Zaheer Hussain Chishti, Advocate for the applicant has requested the learned Court **not** to fix the case next morning as he had to go to Larkana. However, the Court adjourned the case for next morning and dismissed it for non-prosecution when both the sides were absent by following order:-

11.12.2012

Case called, Advocate for the Both sides called absent, neither any intimation received, so matter is D/off as Dismissed non prosecution. Announced in open court, order kept in R. file.

- (v) On **18.12.2012** Mr. **Zaheer Hussain Chishti**, Advocate filed application under **Order 9 Rule 9 CPC** with his affidavit. He continued to represent applicants till **11.08.2015** when Mr. Nadeem Abbas, Advocate filed his power. (Page-7 of R&P part-II).

6. In view of above facts from the record of suit file Mr. Nadeem Abbas, advocate has not superseded Mr. Zaheer Hussain Chishti, Advocate on **11.12.2012**, therefore, the observation of the appellate Court that Mr. Zaheer Hussain Chishti has been superseded on **11.12.2012** and yet he has filed his personal affidavit from the Court on **11.12.2012** is contrary on record and has caused serious miscarriage of justice to the applicant. Unfortunately the appellate Court has not checked the date of filling power by Mr. Nadeem Abbas, advocate in the proceeding before the trial Court. The appellate Court also failed to appreciate that trial Court has adjourned the case from **10.12.2012** to **11.12.2012** for filing

amended title and dismissed the suit on a date when it was fixed for filing amended title and even counsel for the other side was also absent. I have also noticed from the record that during course of arguments before the trial Court probably on the directions of the trial Court to satisfy itself that whether Mr. Zaheer Hussain Chishti was at Larkana on **11.12.2012** or not Mr. Nadeem Abbas, Advocate has filed a statement on **12.10.2015** showing record of engagement of Mr. Zaheer Hussain Chishti, Advocate in Larkana. (Page-107 of R&Ps of part-II). May be the learned Court misconstrued this fact and declared that Mr. Nadeem Abbas has superseded Mr. Zaheer Hussain Chishti, advocate even in **2012**.

7. In view of the above factual position as the Courts below have failed to appreciate facts on record, the impugned orders are set aside and the suit is restored to its original position as it was on **11.12.2012**. However, it is regretted to note that an application for restoration of suit dismissed on **11.12.2012** could not be disposed of by the trial Court until **10.3.2016**. Then the appeal filed in **2016** again consumed two years' time for this small issue and even in this Court almost two years have been consumed.

8. In view of the above, this Revision Application is allowed. However, case is quite old, therefore, parties are directed to appear before the trial Court on first day of reopening of Court after summer vacations without waiting for Court motion notice. The trial Court should dispose of the suit within four months.

JUDGE

Karachi, Dated:18.05.2020

Ayaz Gul