

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD**

Revision Application No. 88 of 2012

Date of hearing:	<u>24.08.2020</u>
Date of decision:	<u>09.2020</u>
Applicants:	Ali Anwar and Walidino (through his L.Rs) through Mr. Sundar Das advocate
Respondents No. 1, 5 to 7	Through Mr. Wali Muhammad Jamari, Assistant. A.G
Respondent No. 2	Nemo
Respondents No. 3 & 4	Through Mr. Shabeer Hussain Memon advocate

**ORDER**

**Rashida Asad, J.**—Through this Civil Revision Application, the applicants Ali Anwar and Walidino have assailed the judgment dated 17.02.2012, passed by learned Additional District Judge, Kotri in Civil Misc. Appeal No.05 of 2011, whereby learned appellate Court after hearing the arguments of the respective parties, allowed the Appeal and set aside the order dated 11.07.2011 passed by Senior Civil Judge, Sehwan Sharif on applications under Order IX Rule 13 C.P.C and under section 5 of the Limitation Act as well as ex-parte Judgment and Decree dated 22.10.2010 and 23.10.2010 respectively, passed in F.C.Suit No.12 of 2010 (re-Ali Anwar and another vs. Province of Sindh and others) and remanded the case to the trial Court with directions to decide it on merits.

2. The relevant facts for disposal of the instant Revision Application are that applicants have filed a suit for Declaration, Compensation and Mandatory Injunction, claiming the applicant No 1 to be the owner of land measuring 11-12 acres and applicant No 2 for 2 acres, situated in Deh Baid, Taluka Sehwan, which land was utilized/acquired by the WAPDA in RBOD Project, and applicants were not paid its compensation. Notice were issued to the respondents, who instead of filing written statements, filed an application under Order 7 Rule 11

C.P.C, which was dismissed in non-prosecution and case was proceeded ex-parte and after recording evidence of applicant Ali Anwar, ultimately ex-parte Judgment and Decree was passed. Thereafter, respondents appeared before the trial court and filed applications under Order IX Rule 13 r/w section 151 of C.P.C and under section 5 of the Limitation Act, but the same were dismissed. Against said dismissal, an appeal, preferred by the respondents was allowed by the learned Additional District Judge, Kotri, consequently, the ex-parte judgment and decree dated 22-10-2010 and 23-10-2010 were set aside and case was remanded to the learned trial Court to decide the same on merits with directions to the respondents to file their written statements, hence this Revision Application.

3. Learned counsel for the applicants has contended that applications under order IX Rule 13 CPC and under section 5 of the Limitation Act, for setting aside the ex parte decree were moved with as unexplained delay of about 2½ months, which being not entertainable was barred by time and rightly dismissed by the trial court. The learned counsel argued that respondents deliberately did not file written statements and absented themselves from the proceedings, though several opportunities were provided to them and finally, the learned trial Court passed ex-parte Judgment and Decree; that no satisfactory explanation was offered in the application under section 5 of the Limitation Act, 1908 moved by the respondents for condonation of delay but the Appellate Court without assigning any valid and cogent reason in a slipshod manner allowed the appeal and set aside the ex-parte judgment and decree and in doing so, applicants have been seriously prejudiced. The learned counsel while placing reliance on Messrs Brooke Bond Pakistan Ltd. Vs Muhammad Shafiq and another 2008 MLD 922 contended that it was the duty of the appellate Court to take into consideration the question of limitation even if the said question was not agitated before it and should have consciously decided the question of limitation. Learned counsel added that Government departments stand at par in the matter of legal rights and no preferential treatment can be given to the Government to that of ordinary litigants.

4. Conversely, learned counsel for the respondents supported the impugned judgment of the Appellate Court while arguing that ex-parte judgment and decree was based on fraud and misrepresentation of facts; that the learned trial Court has not considered the fact that the compensation for the land in question has already been paid to its owner much prior to the filing of the suit, hence the said suit was not maintainable; that the delay in contesting the matter was caused as they being subordinate to Chief Engineer WAPDA were under strict directions to save the areas which were badly affected by flood on those days, hence the delay was neither deliberate nor intentional; that applicants are neither owners of the land nor entitled for any compensation as the land was acquired much prior to the date on which they alleged to have purchased the same; that in this matter valuable rights of the Government are involved, hence instant Revision Application does not merit consideration and the same is liable to be dismissed.

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

6 Admittedly official respondents through their authorized officer Meer Ahmad Bajkani, Executive Engineer Field Division RBOD,1 WAPDA, Dadu, appeared at the initial stage of the suit but did not participate in the proceedings as a result of which suit was decreed ex-parte. No doubt it was within the knowledge of respondents that suit was pending against them and they were declared ex parte, as such Art.164 of Limitation Act, 1908, was applicable, whereby period to move application for condonation of delay was 30 days.

7. Dealing with such a situation, when delay was caused by government officials, the Honourable Apex Court in number of cases held that court must always take a justice-oriented approach by considering an application for condonation of delay, if the court is convinced that it is sought for on sufficient grounds otherwise in absence thereof no special indulgence can be shown to such department because no preferential treatment can be offered to the Government department or autonomous bodies Their cases have to be dealt with in the same manner as the cases of an ordinary litigant/citizen.

8. Perusal of the record shows that the applications under Order IX Rule 13 C.P.C along with section 5 of the Limitation Act against the ex-parte Judgment and Decree were filed after lapse of required time, however, learned counsel for the respondents have submitted that delay was neither willful or deliberate as in those days District Dadu and Jamshoro were very grievously affected by massive floods and the respondents, being subordinates to Chief Engineer WAPDA, were busy in saving the affected areas, therefore, they could not contest the matter. There is no cavil with the proposition that under Section 5 of the Limitation Act, each and every day delay is to be explained, however, the Appellate Court accepted the explanation furnished by the respondents regarding delay in contesting the matter with following observation: -

*“ I am convinced with the contentions raised by learned counsel for the appellants that such delay was not willful or deliberate for the obvious reason that District Dadu in particular and Bhan Town in special of District Jamshoro were badly effected due to super flood in those days, therefore, the appellants being subordinates of chief engineer WAPDA were under the strict directions to save the affected areas, hence it was beyond their control to appear in the court and file written statement within specified time. Besides, during arguments, it has been observed that land in question is admittedly acquired by the Government, such award passed and compensation amount has already been paid to the attorney of original owner Umed Ali Rodnani by appellants and according to the learned counsel for the respondents No.1 and 2, fraud has been committed by the official defendants in connivance of the so called power of attorney, therefore, I am of the considered opinion that such complicated questions requires evidence and if opportunity of being heard is not provided to the appellants, there will be burden on the exchequer of the Government, specially in the circumstances in which the compensation amount has already been paid and the respondents No.1 & 2 claims fraud against the appellants and official respondents.”*

9. It is also noted that the learned counsel for the applicants while arguing the matter, has not denied occurring of massive flood in particular areas and period. Even otherwise, if it was the negligence on the part of any subordinate official, representing the suit on behalf of the government, they cannot be non –suited on technical grounds as serious disputed question of facts are involved which requires evidence. In this regard I am fortified by the dictum laid down in case titled as Ashiq Hussain v. Province of Punjab and others 2003 SCMR 1840 wherein the honorable Supreme Court held as under:

*“We having gone through the judgment in appeal find that the question of limitation was not dealt with as such and respondent also did not offer sufficient explanation for non-appearance in the Court but we cannot permit*

*the taking away the Government property for the negligence of subordinate officials. The manner in which the matter was pursued by the subordinate officials would show that they did not properly watch the Government interest and the possibility of their being in league with the petitioner being not ruled out, we are not in favour of non-suiting the respondents on technical grounds and would prefer that the rights of LA parties should be determined in the property on merits, therefore, notwithstanding the disposal of appeal on merits without dealing with the question of limitation in express words, it would be deemed that there was implied condonation of delay”.*

(Underlining is mine)

10. It is further observed that the claim of the applicants was that, their land was acquired in the year 2008 and the compensation of the said acquirement was paid in the year 1996 to one Ali Akber, the so-called Attorney of original owner Umaid Ali, on the basis of fake and forged Power of Attorney which was allegedly executed on 21.08.1996 as Umaid Ali died in the year 1982, therefore, no question of execution of any Power of Attorney arises, therefore, fraud was committed by the respondents in connivance with said Ali Akbar. However, as per respondents, the land was acquired in the year 1996 and payment was made in same year to the Attorney of Umaid Ali and no fraud was committed by them, therefore, under these circumstances and in order to unearth the truth, evidence is required to be recorded to reach at correct conclusion.

11. As observed above that matter in hand has already been decreed ex-parte against the official respondents without giving them fair opportunity to contest the matter. I have examined the judgment / order passed by the learned Appellate Court and also come to the conclusion that the Appellate Court has dealt with all aspects of the matter quite comprehensively in the light of all relevant laws and now before me, the learned counsel for applicants was unable to demonstrate the impugned judgment/order suffers from any illegality or irregularity, miscomprehension or non-appreciation of documents available on record, thus, the Appellate Court allowed the appeal and set aside the judgment and decree dated 22.10.2010 and 23.10.2010. respectively, which does not require any interference.

12. For the above stated reasons, I have come to the conclusion that the instant Revision Application does not merit consideration and the same stands dismissed.

13. Since the matter is pending adjudication since 2010, therefore, learned trial Court is directed to decide the case preferably within a period of six months positively and submit report to this court through Additional Registrar of this court. Parties and their counsel are directed to cooperate with the trial Court so that the case may be disposed within the stipulated period.

JUDGE