IN THE HIGH COURT OF SINDH, CIRCUIT COURT, L A R K A N A

Civil Revision Application No.S-09 of 2018

Applicants/State:	Through Mr. Shafi Muhammad Chandio, Additional Advocate General.
Respondent:	Imamuddin son of Muhammad Suleman Qureshi, through Mr. Abdul Rehman Bhutto, Advocate.

Date of hearing: 24.12.2018.
Date of decision: 19.02.2019.

O R D E R

KHADIM HUSSAIN TUNIO, J.- Through the instant civil revision application filed under Section 115 CPC, the applicants have impugned the judgment and decree dated 06.01.2018, passed by the learned Additional District Judge, Ratodero, whereby the learned Judge maintained the judgment and preliminary decree dated 03.06.2017, passed by the learned IInd Senior Civil Judge, Larkana in F.C Suit No.108 of 2015 (Old No.25 of 2002) (*Re: Imamuddin v. Head Master, Government High School, Ratodero & Others*).

2. Precisely, the facts of the present matter are that the respondent / plaintiff filed F.C Suit No.25 of 2002 against Head Master, Government High School, Ratodero & Others, claiming that he had purchased 1-28 acres of land from one Muhammad Yousuf in the year 1981 and record was mutated in his favour. Later on, the property came within urban area and measurement of the same became 10,045 Sq.Yds. The possession of the property was received by plaintiff Muhammad Yousuf in the year 1992. Thereafter, the applicants /

defendants No.1 to 3 initiated proceedings under the Land Acquisition Act but ultimately the Assistant Commissioner / Acquisition Officer informed the plaintiff that Education Department was not interested in acquiring the suit property. It is also stated that in the year 1995, applicant / defendant No.1 i.e. Head Master of Government High School, Ratodero, tried to dispossess the respondent / plaintiff. Resultantly, the respondent / plaintiff filed a civil suit, which was dismissed. Thereafter, the appeal was filed and the Appellate Court remanded the matter to the trial Court for framing fresh issues. During pendency of the said proceedings, it is alleged that in the year 2001, the applicants / defendants No.1 to 3 forcibly dispossessed the respondent / plaintiff and completed boundary wall and also amalgamated the suit property within the High School. However, it was prayed in the suit that physical possession be ordered to be handed over to the respondent / plaintiff and alternatively compensation together with interest be paid to him. Thereafter, written statement was filed by the applicant / defendant No.1, in which he specifically denied that at the time of construction of school in the year 1973, the plaintiff / respondent was in possession and / or had any possessory right or title in respect of the suit property. It was also stated that the land was acquired from the actual owner i.e. Muhammad Yousuf, who had received the compensation and handed over the land to the applicant / defendant No.1 and since then the school is in his peaceful possession. It was specifically denied that at any time the plaintiff / respondent was ever dispossessed of the land in question because the plaintiff / respondent never remained in possession of the said land. Thereafter, the Civil Court, vide judgment dated 06.10.2004, passed the preliminary

decree and ordered that final decree will be prepared after receiving the report regarding compensation from the commissioner. The said decree was impugned by the applicants / defendants No.1 & 2 by filing appeal and the learned Appellate Court, vide judgment dated 31.05.2005, dismissed the said appeal and against the appellate order, the Civil Revision Application bearing No.60 of 2005 was filed, which was heard and allowed by this Court vide order dated 16.09.2011 and remanded the matter to the trial Court. After remand of the case, the learned trial Court recorded evidence of the parties.

3. In support of his case, the respondent / plaintiff examined himself at Ex-45. He produced true copy of record of rights at Ex-45/A, true copy of Extract at Ex-45/B and Original Rubkari dated 11.02.1993 at Ex-45/C and thereafter the side of the respondent / plaintiff was closed.

4. On the other hand, applicants/defendants examined one Roshan Ali, Head Master of Government High School, Ratodero (applicant / defendant No.1). He produced true copy of plaint in F.C Suit No.33 of 19956 at Ex-50/A, true copy of deposition of Aitbar Ali, attorney of plaintiff in F.C Suit No.33 of 1995 at Ex-50/B, true copy of deposition of D.W. Sikandar Ali in F.C Suit No.33 of 1995 at Ex.50/C, true copy of deposition of Rajib Ali, Clerk of Acquisition Officer, Ratodero at Ex-50/D, true copy of order of injunction dated 09.01.1998 at Ex-50/E, true copy of judgment in F.C Suit No.33 of 1995 dated 06.08.1995 at Ex-50/F, true copy of decree in F.C Suit No.33 of 1995 at Ex-50/G, true copy of Civil Appeal No.66 of 1999 dated 19.04.2000 at Ex-50/I, true copies of statements dated 12.08.2000 & 21.08.2000 at

Ex-50/J & 50/K, two statements dated 07.02.2000 & 24.11.2001 by Advocate for Plaintiff closing the side in F.C Suit No.33 of 1995 at Ex-50/L & 50/M. The applicants / defendants also examined D.W Altaf Ahmed at Ex-56. He produced attested copy of Deh Form No.VII, Deh Ratodero at Ex-56/A, photostat copy of Certificate dated 18.10.1989 at Ex-56/B, original Rubkari / letter No.348 dated 11.02.1993 at Ex-56/C, original letter No.1143-47 dated 03.08.1973 at Ex-56/D. Thereafter, side of the applicants / defendants was closed.

5. After hearing the parties, the learned trial Court vide judgment dated 13.08.2015 decide the case of the plaintiff / respondent to the effect that Mukhtiarkar and City Survey Officer, Ratodero, have already been appointed as Commissioners for assessment of the compensation of the plaintiff for an area occupied by the Government High School, Ratodero, and in this regard a preliminary decree was ordered to be prepared with direction that final decree will be prepared after receiving the reports of Commissioners, hence, the instant civil revision has been preferred by the applicants / defendants.

6. Learned Counsel for the applicants submits that the learned trial Court while passing the judgment and decree has erred in law and facts and has handed down the judgment and decree without proper discussion and considering the grounds, urged by the applicant by means of an application under Section 5 of the Limitation Act; that the judgments and decrees of both the learned Courts below are against the law and facts; that the learned Appellate Court has failed to appreciate the affidavit filed by the applicant / defendant No.1 in support of an application under Section 5 of the Limitation Act; that the

judgments and decrees passed by the learned two Courts below are suffering from misreading and non-reading of evidence and that the findings recorded are conjectural, erroneous and without any legal foundation; that the applicant / defendant No.1 / Head Master, who was dealing with the case authorized by the Education Department, has expired away; that the applicants / defendants are in physical possession of the land in dispute, which was purchased and acquired from the previous owner Muhammad Yousuf through due process of law and now the same is being used by the students of the said school; that the valuable rights of the applicants / defendants are involved in the subject matter; that the respondent / plaintiff want to usurp the school / government property on the basis of fake, forged and manipulated documents; that the learned two Courts below have failed to consider the oral as well as documentary evidence adduced by the parties and has handed down the judgment in a slipshod manner; that the delay in filing the appeal before the Appellate Court has been fully explained by the applicants / defendants. He lastly prayed for setting aside the impugned judgment.

7. On the other hand, the learned Counsel for the respondent / plaintiff has argued that the respondent is a lawful owner of the suit property, which was purchased by him from one Muhammad Yousuf through statements; that the suit property has been unlawfully kept by the applicants; that the respondent / plaintiff is deprived from his valuable rights; that the delay in filing of appeal, if any, has not been plausibly explained by the applicants / defendants; that the judgments and decrees passed by the learned Courts below are legal and proper as the same have been passed by applying their judicious mind,

therefore, do not call for any interference through the present revision application, which is meritless and the same is liable to be dismissed.

8. I have given due consideration to the arguments advanced by the learned Counsel for the parties and perused the record minutely.

9. A challenge has, since, been made with reference to limitation, therefore, it would be appropriate to examine the same first. The perusal of the record shows that though the appeal, filed before appellate Court, was delayed but condonation thereof was sought by making an application under Section 5 of the Limitation Act. It may well be said that if the language of the Section 5 of the Limitation Act is viewed, it leaves nothing ambiguous that power to condone the delay and grant an extension of time is ***'discretionary'*** and is subject to satisfaction of only one condition i.e**' sufficient cause'.** I would say that since technical knock-outs are not considered *'good'* when the question is that of substantive rights and party, seeking condonation, proves to have acted *bona fide* in filing the appeal in time but due to certain reasons it stood prevented. *Undeniably,* such reasons must not only be ***reasonable*** but also ***sufficient*** to convince the conscious of the Court that extension of time in *peculiar* case would foster the justice. If a party succeeds in, *prima facie,* establishing that delay, occasioned, was not deliberate; valuable rights are involved and it (*party)* has a case on merits then it would be within safe administration of justice to exercise discretion towards ***'dispensation of justice'*** and not to allow the opposite party to continue enjoying illegal gains in name of *technicalities.* In the case of *HAD v. Abdul Majeed* PLD 2002 SC 84 at Rel. P-91 as:-

> "…. Therefore, keeping in view the merits of the case which have been discussed hereinabove we are of the opinion that if there is delay of 8 days in filing the appeal that is to be condoned in the interest of justice because merely for such technical reason appellant cannot be non-suited and the impugned order dated 4th November, 1999 passed by the High Court cannot be upheld which on face of it is not sustainable in the eye of law as it has been pointed out hereinabove while discussing the merit of the case. Therefore, while condoning the delay it is held that the appeals were duly instituted. Even otherwise in such-like situation the Courts should not feel reluctant in condoning the delay depending upon facts of the case under-consideration.

10. From the perusal of record, it transpires that the respondent / plaintiff filed suit for Declaration and Permanent Injunction against the applicants / defendants. It also appears that summons were ordered to be issued to the applicant / defendant No.1 / Head Master, who was pursuing the matter, has expired away. It has also been pointed out that the present applicant / defendant No.1, who is presently working as Head Master, Government High School, Ratodero, namely Khadim Hussain Gopang, has been authorized by the government to pursue the matter before the Court of law vide Authority Letter dated 08.02.2018 issued by District Education Officer (E,S&Hs) Larkana, available at Page-103 of the Court file. Accordingly, the applicant No.1 / Head Master after getting approval from the competent authority filed an appeal before the Appellate Court without loss of further time. This, *prima facie,* shows that *bona fide* efforts were made to comply with a legal requirement i.e. proper authorization which, *however,* was not issued in time. Though, legally such correspondence *alone* is not sufficient to condone the delay but if interest of public at large is involved and government has a case on *merits* then it would never be advisable to let the *public interest* go wasted because of negligence of an *individual* which, arrangement, one shall have to

admit, can be managed. In this case, admittedly the valuable rights of the Education Department / Government are involved in the matter which exclusively connects with the future of the children of the locality who are getting education in the school and if the applicants are dispossessed from the premises in question, not only the students' future will badly suffer but also the public exchequer as it is categorical claim of government that compensation stood paid to original owner. It is settled law that the discretion to condone the delay is wide enough in a court depending upon variety of acts, particularly sufficient cause shown by a party to the satisfaction of the court. No hard and fast rule can be laid down to tie down the hands of court. Courts always act in aid of justice other than to it, subject however, to the law and the constitution. Technicalities of law are always avoided and discouraged in order to do complete justice and ensure that justice is not only done but also seen to have been done. There can be no cavil with the proposition that; the Court, in the exercise of its jurisdiction, is empowered to deal with the question of limitation before it. It cannot, thus, be said that while condoning the delay entertaining the appeal Court acted without jurisdiction. Once it is conceded that Court had the jurisdiction to exercise its discretion for condonation of delay unless it is made to appear on the face of record that the discretion was exercised illegally or arbitrarily. Legal formalities and technicalities are intended to safeguard the paramount interest of justice and devised with a view to impart certainty, consistency and uniformity to administration of justice and secure the same against arbitrariness, errors of individual judgment and malafide. Generally speaking the object of a superior Court, while exercising its discretionary jurisdiction is to faster the ends of justice,

preserve the rights of parties and to right a wrong and keeping this object in view, it may inequity set-aside or annul a void judgment are declined to enforce it by refusing to intervene in the circumstances of the case. It is also one of the cardinal principles that so long as substantial justice can be done and there is no serious technical or legal impediment, the decision of controversies on merits stands as a much higher level then the disposal on the basis of legal technicalities and technical bears. I am fortified in my view with the principal laid down in the case of Master Moosa Khan and three others v. Abdul Haque and another (1993 SCMR 1304). It is also settled principle of law that the case should normally be decided on merits rather than technicalities, I am inclined that some confusions might have been caused and would exercise the power to condone the delay under Section 5 of the Limitation Act. Even otherwise, from the perusal of record, it also contemplates that delay in filing of the appeal has been fully explained by the applicants / defendants and the grounds urged therein have not been fully controverted by the respondent / plaintiff. The preliminary objection is, therefore, repealed. In this respect, reliance may respectfully be placed on the case law reported in *2001 CLC 221 (Karachi Water & Sewerage Board, through Managing Director & another v. Muhammad Moosa).*

11. So far as, the merits of the case in hand are concerned, the respondent / plaintiff has produced documentary evidence i.e. true copy of Extract at Ex-45/B and Original Rubkari dated 11.02.1993 at Ex-45/C as well as record of rights at Ex-45/A. The applicants / defendants have challenged the authenticity and genuineness of the entries being illegal, forged and fabricated. The respondent / plaintiff

has neither adduced any evidence nor examined any official from the revenue authorities to ascertain the documents he has relied upon. He has produced the Extract but has not examined author of the said document. Learned two Courts below have unnecessarily given the weight to the entries though the same are not titled documents. It is well settled principal of law that mutation entries are only fiscal purpose and same are not title document. Said entry contemplates that the property in dispute was originally owned by one Muhammad Yousuf though these documents have been executed in evidence but their author has not been examined. Both the courts below seem to have ignored the well settled principle of law that there is considerable difference between production of a document on record and proving contents thereof. Thus, bringing papers on record cannot be considered as *synonymous* with that of *proving* them. Guidance is taken from the case of *Province of the Punjab through Collector v. Syed Ghazanfar Ali Shah & Others* 2017 SCMR 172 wherein it is held as:-

> "8. ….. Where did NOC come from, who issued, and countersigned it and what is the latter fate of this document is again anybody's guess. How did the Solicitor edge in and where did the letter purportedly written by him come from and how did it reach the hands of the person producing it in the Court? How did the Minister step in the matter when it was pending in the Court? Where did go the record of the letter and the register showing its dispatch, if at all it was written? Why did the respondents bypass the mode of proving the document prescribed by Articles 2 and 78 of the Qanun-e-Shahadat Order and what did constrain the Court to rely upon them? **How could, bringing of papers on the record, be considered synonymous with proving them?** All these questions are fundamental and foundational but the learned Additional; District Judge hearing the appeal and the learned Single Judge of the High Court hearing the revision petition relied on these documents without addressing anyone of them.

9. The argument that where a party did not raise objection as to the admission of a document and its exhibition, it cannot subsequently complain about its mode of proof has not impressed us **as the provisions governing the mode of proof cannot be compounded or dispensed with, nor can the Court, which has to pronounce a judgment, as to the proof or otherwise of the document be precluded to see whether the document has been proved in accordance with law, and can, as such, from basis of a judgment.** In the case of *Messrs Bengal Friends and Co. , DACCA v. Messrs Dour Benode Saha and Co., and The Deputy Registrar of Trade Marks, Chittagong (PLD 1969 SC 477)* this Court while dealing with the mode of proof of the document nor properly brought on the record held as under:-

> *"Besides the authenticity of the account books relied upon by the ……... It was omitted from consideration that under section 34 of the Evidence Act entries in books of account regularly kept in the course of business are only declared to be relevant whenever they refer to a matter into which the Court has to enquire. But this does not dispense with the requirement of section 67, that if a document is alleged to have been written by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.* **Mere production of account books kept in regular course of business, therefore, does not constitute evidence of entries contained therein.** *The Legislature….*

12. The Honourable Apex Court has been pleased to held in the *another* case of *Khan Muhammad Yousuf Khan Khattak v. S.M. Ayoub and 2 others reported in PLD 1973* Supreme Court 160 that;

> "Even documents are brought on record and exhibited without objection, they remain on the record as "exhibits" and faithful copies of the contents of the original but they cannot be treated as evidence of the original having been signed and written by the persons who support to have been written or signed them, unless the writing or the signature of that person is proved in terms of the mandatory provisions of section 67 of the evidence act".

13. In the case of *Khurshed Ali & 06 others v. Shah Nazar reported in PLD 1992 S.C 822*, it has been held by the Honourable Supreme Court that;

> "It is incorrect to think now under and Islamic dispensation that the Courts are only to sit and watch as to who commits a mistake and who does not commit a mistake and who does not commit a mistake, from amongst the contesting litigants, and one who commits a mistake, in procedural matter should be deprived of the right claimed; even if he is entitled to it. This court has not approved of such like practice. In the case of Muhammad Azam v. Muhammad Iqbal (PLD 1984 SC 95), even if the application had not been pressed "so called", if it was necessary for just decision of the case, as held by High Court (to summon the material relied upon by the appellants side), is should have been summoned and treated as evidence in the matter without any formalities. And mere failure to exhibit a document formally would not make any difference".

14. Coming to the facts of the present case, the respondent / plaintiff has produced the documents i.e. true copy of the Extract and Original Rubkari but has not examined the concerned Tapedar, who has made the entry in Dhakhil Kharji Register in favour of the respondent / plaintiff or in favour of Muhammad Yousuf from whom the said property alleged to have been purchased on the basis of the statements. In absence thereof, it was / is never safe to believe the ownership particularly when there is specific and categorical denial to such claim. The learned trial Court as well as Appellate Court have committed material irregularity and illegality while not summoning the original record as well as adducing the evidence in respect of the suit property though, per law, the Court(s) are competent to exercise such discretion even without an application from parties. Thus, the judgments and decrees passed by the learned two Courts below are not sustainable under the law and the same are liable to be set aside as both the Courts below have committed illegalities and irregularities while passing the impugned judgments and decrees.

15. In view of the above facts and circumstances, particularly the law laid down by the Honourable Supreme Court as referred hereinabove, the delay in filing of appeal, if any, on part of the applicants / defendants, is hereby condoned and consequently this Civil Revision Application is allowed and the judgments and decrees passed by the learned Courts below are set aside. The matter is remanded back to the learned trial Court i.e. IInd Senior Civil Judge, Larkana, to summon the original record from the concerned authorities in the light of the documents either produced by the respondent / plaintiff or by the

applicants / defendants, examine their representatives as Court witnesses and pass fresh judgment in accordance with law, within a period of six(6) months from the date of receipt of R&Ps. The parties are directed to appear before the IInd Senior Civil Judge, Larkana on 06.03.2019 without claiming further notice. The parties are also left to bear their own costs.

JUDGE

Shahid