ORDER SHEET

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision Application No. S – 185 of 2010

1. For orders on office note a/w reply as Flag 'A' :
2. For orders on CMA No.600/2010 :
3. For Katcha Peshi :

Mr. Abdul Ghaffar Memon, State Counsel for the applicants.

Mr. Ghulam Shabbir Dayo, Advocate for respondent No.1.

Date of hearing : 09.10.2012.

O R D E R

Nadeem Akhtar, J. - Respondents No.1 to 4 filed F.C. Suit No. 134/2008 against the applicants herein before the IInd Senior Civil Judge, Sukkur, which was renumbered as F.C. Suit No.165/2008 and was transferred to the 1st Senior Civil Judge, Sukkur. The suit was decreed against the applicants on 20.06.2009, and the decree was drawn on 22.06.2009. The said judgment and decree were challenged by the applicants in Civil Appeal No.85/2009, which was dismissed by the Vth Additional District Judge, Sukkur, vide judgment delivered on 13.05.2010. Through this Civil Revision Application, the applicants have impugned the said judgment dated 13.05.2010.

2. Briefly stated, the facts of this case are that a land measuring 29-21 acres, out of Block UA No.12, situated in Deh Ponath, Taluka Rohri, District Sukkur **(the land)**, was allotted on *harap* condition to respondents No.2 to 4 by applicant No.4 ; namely, the Colonization Officer, Sukkur Barrage / Estate Mukhtiarkar, Sukkur, in an open katchery held on 01.01.1993. In pursuance of the allotment, Form 'A' was issued in the names of respondents No.2 to 4, and they remained in physical possession of the land without any interference or interruption since the date of allotment. Respondents No.2 to 4 deposited an amount of Rs.2,700.00 on 23.11.2004 towards the charges for measurement of the land and for issuance of *Ghat-Wadh* Form. After issuance of the T.O. Form, the *khata* was mutated in the names of respondents No.2 to 4 vide Entry No.144 dated 14.12.2005. After completion of all the necessary requirements as to the title of respondents No.2 to 4, the land was purchased from them for valuable consideration by respondent

No.1 through a registered Sale Deed dated 21.12.2005. Accordingly, the *khata* was mutated in favour of respondent No.1 vide Entry No.149 dated 26.12.2005.

3. Subsequently, a number of grants / allotments, including the allotment of the land in favour of respondents No.2 to 4, were cancelled by the Government of Sindh (applicant No.9). At the time of such cancellation, the Government of Sindh constituted a Committee headed by the Divisional Commissioner to examine the legality of the grants / allotments after conducting detailed inquiry. After holding a detailed inquiry, the Committee, under the supervision of the Commissioner and the EDO (Revenue), maintained the grant in favour of respondents No.2 to 4 vide order dated 08.11.2004, the relevant portion whereof is reproduced below for convenience and ready reference :-

> *"………In the present case grantees belongs (!) to Hari Class and they are also resident of the respective Deh and are in cultivating possession of the grant area. The Grantees otherwise were eligible for grant of land and **cancellation is not warranted**. The record of Barrage Department discloses the formalities for holding katchery were fulfilled before the grant of land by granting authority. **Accordingly Show Cause Notice issued to the grantees is hereby vacated and their grant is maintained**."* (Emphasis added)

4. The aforementioned order maintaining the grant in favour of respondents No.2 to 4 was never challenged by the Government of Sindh, or by any of the other applicants. One Nasir Ali filed Constitutional Petition No.D-858/2006 against the respondents herein as well as the Revenue Authorities and Mineral Department. In the said petition, the EDO (Revenue) and Mukhtiarkar (Revenue) filed comments dated 09.12.2006, wherein the grant in favour of respondents No.2 to 4 was admitted by them as genuine. In the year 2007, one Najeebullah filed an application to the DCO Sukkur for conducting an inquiry in respect of the grant in favour of respondents No.2 to 4. The inquiry was conducted by the Mukhtiarkar (Revenue), Rohri, who submitted his report dated 16.05.2007. As nothing wrong was found in this inquiry, the application of Najeebullah was consigned to record.

5. Despite all the above, the EDO Revenue (applicant No.2) issued a Show Cause Notice dated 17.10.2008 to respondents No.2 to 4 under Section 164(1)(4) of the Sindh Land Revenue Act, 1967, whereby their title to the land was once again questioned. No such notice was issued to respondent No.1, who was / is the bonafide purchaser and the registered

owner of the land. In this background, the Suit for declaration and permanent injunction was filed by all the four respondents against all the nine applicants. The respondents filed an application under Order VI Rule 17 CPC in the Suit praying that they may be allowed to amend the plaint by adding a prayer for declaration that respondent No.1 is the lawful owner of the land and he is in the legal possession and enjoyment thereof. The said application for amendment of the plaint was allowed on 11.06.2009.

6. During the pendency of the respondents' Suit, the Show Cause Notice issued to respondents No.2 to 4 was withdrawn by the EDO (Revenue), Sukkur, vide order dated 30.10.2008 in the following terms:-

> *" **30.10.2008***
> *Show Cause Notice were issued. Defendants present. Mukhtiarkar Estate (HQ) and Mukhtiarkar (R) Rohri were present with record and from the perusal of record, it is shows (!) that proceeding U/s 164(2)(4) of Sindh Land Revenue Act 1967 was already used by the then Executive District Officer (R) Sukkur (Mr. Muhammad Mubin Khan), therefore, **the Notices are vacated**."* (Emphasis added)

7. Despite grant of several opportunities to the applicants by the trial Court, none of them filed the written statement in the respondents' Suit even after more than six months from the date of service on them. As such the applicants were declared ex-parte on 15.06.2009. In view of the fact that the Show Cause Notice, that had been impugned in the Suit, had been vacated / withdrawn by the competent authority during the pendency of the Suit, the respondents filed an application under Order XII Rule 6 CPC praying that the Suit be decreed. The respondents also filed an application under Order VIII Rule 10 CPC praying that the Suit be decreed also on the ground that the applicants had not filed the written statement. The application under Order VIII Rule 10 CPC was allowed, and the Suit was decreed. It may be noted that, although the applicants had been proceeded against ex-parte, but the learned DDA and a private counsel were present on behalf of defendants No.1 to 5 and 7, and defendant No.6, respectively.

8. The judgment and decree passed in the respondents' Suit was challenged by the applicants by filing Civil Appeal No.85/2009 before the Vth Additional District Judge, Sukkur. The said appeal was barred by time as the same was filed after five days of the prescribed period of limitation. The appeal was dismissed vide judgment delivered on 13.05.2010 mainly on two grounds, the first, that the appeal was barred by time and it was not accompanied by an application for condonation of delay ; and the second,

that the applicants herein (the appellants in appeal) were not aggrieved parties as the impugned Show Cause Notice had been vacated / withdrawn by the applicants' competent authority itself during the pendency of the Suit. The aforementioned judgment of the lower appellate court has been impugned in this Civil Revision Application.

9. On 09.10.2012 when this case was fixed in Court for Katcha Peshi, both the learned counsel agreed that the same may be finally decided at the stage of Katcha Peshi. At the very outset, Mr. Ghulam Shabbir Dayo, the learned counsel for the respondents, raised a preliminary objection about the maintainability of this Application. He submitted that this Application is barred by time, therefore, it should be dismissed in limine without considering the other grounds urged therein. After examining the record carefully, I have noticed that the impugned judgment was delivered and the impugned decree was drawn on the same day, that is, on 13.05.2010. The application for certified copy of the impugned judgment was filed by the applicants on 05.07.2010, and on 07.07.2010 the copy was made ready and was delivered to the applicants. The application for certified copy of the impugned decree was filed by the applicants on 23.08.2010, and on 24.08.2010 the copy of the impugned decree was made ready and was delivered to the applicants. The prescribed period of limitation for filing a Civil Revision Application is 90 days, which in the present case expired on 13.08.2010. This Application was presented on 14.09.2010.

10. It is a settled principle of law that an appeal is filed against the decree and not against the judgment. The same principle is applicable when the judgment and decree of an appellate court is challenged through a Revision Application. In the present case, it is important to note that the limitation of 90 days expired on 13.08.2010, and the applicants applied for the certified copy of the impugned decree on 23.08.2010. Thus, the application for obtaining the certified copy of the impugned decree was filed by the applicants when the prescribed limitation had already expired. The submission of the learned counsel for the respondents that the present Application is barred by time is, therefore, correct. The learned State counsel frankly conceded that the present Application is barred by more than 30 days, and he submitted that due to this reason the applicants have filed CMA No.600/2010 under Section 5 of the Limitation Act, 1908, for condonation of the delay.

11. The learned State counsel submitted that this Court has inherent powers to condone the delay. The only reason that has been given by the applicants in the affidavit filed by them in support of the application for condonation of delay is that the applicants were busy in the flood rescue work. There are nine applicants, out of whom, eight are senior officers of the Government of Sindh, and the ninth applicant is the Government of Sindh. No details have been disclosed in the affidavit as to which of the applicants was busy in the rescue work, in which of the affected areas, when the rescue work started and when the same ended. It has consistently been held by the superior Courts that each and every day's delay has to be explained by the person seeking condonation of delay. The reason submitted by the applicants can hardly be treated as a reasonable, lawful or justifiable ground or explanation for condoning a delay of as long as more than thirty days.

12. The learned State counsel submitted that the Hon'ble Supreme Court was pleased to condone substantial delay in a number of cases where valuable Government lands were involved. In support of his submission, the learned State counsel cited and relied upon the following authorities which are discussed below in brief :-

A. **2003 SCMR 83**
Muhammad Bashir & another V/S Province of Punjab.

In the above cited authority, the Hon'ble Supreme Court maintained the decision of the Lahore High Court, whereby the delay of 26 days in filing the revision application by the Government was condoned and the case was remanded to the trial court for decision afresh. It was held that the paramount consideration behind the exercise of discretion in remanding the case to the trial court after condoning the delay was the public interest rather than any other consideration. In the present case, the competent authority [EDO (Revenue), Sukkur / applicant No.2], vide order dated 08.11.2004, vacated / withdrew the earlier Show Cause Notice and maintained the grant in favour of respondents No.2 to 4. Thereafter, two competent authorities [EDO (Revenue) / applicant No.2 and Mukhtiarkar (Revenue) / applicant No.5] filed comments dated 09.12.2006 in Constitutional Petition No.D-858/2006, wherein the grant in favour of respondents No.2 to 4 was admitted by them as genuine. Finally on 30.10.2010 during the pendency of this Suit, the competent authority [EDO (Revenue),

Sukkur] vacated / withdrew the Show Cause Notice issued to respondents No.2 to 4. The above shows that the title of respondents No.2 to 4 was admitted by the applicants on three occasions, therefore, the question of public interest was / is not involved in the present case. In any event, the applicants never pleaded before any forum that the land was meant for the public use, or for the Government itself. In my humble opinion, the above authority shall not apply to the present case as the facts of the above case and the facts of the case in hand are distinguishable.

The above authority is not applicable to the present case also in view of the law laid down by the Hon'ble Supreme Court in the case of *Sheikh Muhammad Sadiq V/S Elahi Bukhsh and 2 others*, ***2006 SCMR 12***, wherein it was held that where no useful purpose would have been served in remanding the case to the trial court, the suit was rightly dismissed by the Lahore High Court instead of remanding it back to the trial court. Similarly in the present case, no useful purpose would be served in remanding the case to the trial court as the Show Cause Notice was vacated / withdrawn by the competent authority / applicants during the pendency of the Suit admitting the title of respondents No.2 to 4.

In fact, the above authority relied upon by the learned State counsel goes against the applicants. In paragraph 5 at page 87 of the aforementioned authority, the Hon'ble Supreme Court was pleased to hold that **"***We are in no manner of doubt in reiterating and reaffirming the well-settled principle that public functionaries are not entitled to any preferential treatment in the matter of condonation of delay and they are to be treated on equal footing with an ordinary litigant. There is also no cavil with the proposition that with the passage of time a valuable right accrues in favour of the opposite party, which should not be slightly disturbed and destroyed* **".** It was further held that the object of a superior Court, while exercising its discretionary jurisdiction, is to foster the ends of justice, preserve the rights of parties and to right a wrong and keeping this object in view, it may in equity, set aside or annul a void judgment or decline to enforce it by refusing to intervene in the circumstances of the case. In the present

case, it is not the case of the applicants that the impugned judgment is void. On the other hand, the impugned judgment is well reasoned and was passed with proper application of mind. The appeal filed by the applicants was dismissed on merits and after detailed discussion on the ground of limitation and also on the ground that the applicants were not aggrieved with the impugned judgment and decree passed by the trial court as the competent authority had already vacated / withdrew the Show Cause Notice during the pendency of the Suit.

B. **PLJ 2008 Supreme Court 03**
Government of Balochistan V/S Muhammad Ali & 11 others.

In the above case, the decree was not assailed before the *Majlis-e-Shoora* within the prescribed period of limitation, and for such reason alone, the appeal was dismissed. The order of dismissal was maintained by the High Court. The Hon'ble Supreme Court was pleased to condone the delay of 320 days in filing the CPLA by the Government mainly on the ground that no actual loss, damages or deprivation of rights had accrued to the public functionaries concerned in the matter, rather, the Government and the Forest Department stood completely deprived of the public property solely meant to be used, utilized and dealt with in the public interest being a public property of which the Government and the department through its functionaries were the custodian. As observed earlier, the title of respondents No.2 to 4 was admitted by the applicants on three occasions, therefore, the question of public interest was / is not involved in the present case, and that the applicants never pleaded before any forum that the land was meant for the public use, or for the Government itself. In my humble opinion, the above authority shall also not apply to the present case as the facts of the above case and the case in hand are distinguishable.

C. **PLD 2010 Supreme Court 582**
Province of Punjab V/S Muhammad Farooq & others.

The Hon'ble Supreme Court was pleased to hold in the above cited case that the delay in filing a revision application under Section 115 CPC could not be condoned under Section 5 of the Limitation Act, 1908. It was further held that the limitation of 90 days fixed in the

second Proviso to Section 115 CPC for filing a revision restricts a party to the proceedings, but not the Court while exercising power under Section 115(1) CPC. It was also held that the Court could assume jurisdiction provided the merits of the case so demands. The condition for assuming jurisdiction by the High Court under Section 115 CPC held by the Hon'ble Supreme Court, is of great importance, that the merits of the case should demand such assumption of jurisdiction. In the present case, the merits of the case do not demand assumption of jurisdiction by this Court in view of the reasons already discussed above.

13. The other submission of the learned State Counsel was that the Suit of the respondents could not have been decreed ex-parte without affording the opportunity of hearing to the applicants. He submitted that the impugned judgments and decrees passed by the trial court as well as by the lower appellate court are void due to this reason. The learned State Counsel was asked to satisfy the Court as to on what basis the impugned judgments and decrees were being termed by him as void instead of illegal. He was unable to give any satisfactory reply as to the difference between void and illegal order / decree. However, he relied upon the following authorities and reported cases :-

A. **2002 SCMR 1954**
Wak Orient Power and Light Ltd. V/S Westinghouse Electric Corporation and others.

This authority cited by the learned State Counsel goes against the applicants as the Hon'ble Supreme Court was pleased to hold therein that **"***There is no cavil to the proposition that the court is empowered to strike off the defense of defendant who despite the direction of the Court in terms of Order VIII, rule 1, C.P.C. fails to file written statement within the specified time but the penal provision of Order VIII, rule 10, C.P.C. cannot be invoked in a case in which the defendant was not required by the Court to file the written statement* **".**

B. PLD 2002 Supreme Court 630
Col. (Retd.) Ayub Ali Rana V/S Dr. Carlite S. Pune & another.

In the above cited case, the defendants had filed an application for rejection of the plaint, which was heard, but the order thereon could

not be passed by the trial court due to heavy load of cases. During the entire period, the defendants were given a number of opportunities to file the written statement, but they failed to do so. Ultimately, the defence of the defendants was struck off. The defendants filed an application for review of the order for striking off their defence, which was rejected. The defendants then filed a revision application before the District Judge, which was barred by time, but the same was allowed. The order of the District Judge was challenged before the Lahore High Court, where the said order was upheld. It was held by the Hon'ble Supreme Court that the question of limitation has to be decided keeping in view particular circumstances of each case. In the instant case, although the applicants were declared ex-parte on 15.06.2009, but at the time of hearing the learned DDA and a private counsel were present on behalf of the applicants / defendants No.1 to 5 and 7, and defendant No.6, respectively. No application was filed by any of the applicants for recalling or setting aside the ex-parte order. The above authority is not applicable in the instant case as the facts thereof are clearly distinguishable.

14. In support of the same proposition that the penal consequences under Order VIII Rule 10 CPC could not have been invoked due to the non-filing of the written statement by the applicants, the learned State Counsel also relied upon the cases of *Sardar Sakhawatuddin and 3 others V/S Muhammad Iqbal and 4 others,* ***1987 SCMR 1365***, and *Province of Punjab and another V/S Sheikh Abdul Ghafoor & Co.,* ***PLD 1997 Lahore 722.*** With respect to the learned State Counsel, these cases are also not applicable in the instant case, as I have already observed that no application was filed by any of the applicants for recalling or setting aside the ex-parte order despite the fact that they were being represented in the Suit by their counsel.

15. On the other hand, Mr. Ghulam Shabbir Dayo, the learned counsel for the respondents, vehemently opposed the present application and prayed for its dismissal. He submitted that, for exercising discretion in order to condone the delay in filing this Application, the applicants were required to show very strong and solid grounds, and they were also required to explain the delay of each and every day. He further submitted that there is no question of exercising such discretion when the Show Cause Notice impugned by the respondents in their Suit was vacated / withdrawn by the applicants themselves during the pendency of the Suit. He also submitted that valuable

vested rights were created in the land in favour of respondents 2 to 4, which now vest in respondent No.1, who cannot be deprived of such valuable vested and proprietary rights in the land. In support of his submissions, the learned counsel for the respondents cited and relied upon the following authorities of the Hon'ble Supreme Court and reported cases of the High Court, which are briefly discussed below :

A. **PLD 2008 Supreme Court 462**
Imtiaz Ali V/S Atta Muhammad and another.

In the above cited authority, the Hon'ble Supreme Court was pleased to hold that the appeal, having been filed after one day of the period of limitation, had created valuable right in favour of the respondents. No sufficient cause was found for filing the appeal beyond the period of limitation. The delay of only one day was not condoned by the Hon'ble Supreme Court.

B. 2**001 SCMR 286**
Allah Dino and another V/S Muhammad Shah and others.

In the above authority, the Hon'ble Supreme Court was pleased to hold that where the law under which proceedings have been launched itself prescribes a period of limitation, like under Section 115 CPC, then the benefit of Section 5 of the Limitation Act, 1908, cannot be availed unless it has been made applicable as per Section 29(2) of the Limitation Act, 1908.

C. **2012 SCMR 1373**
Noor Muhammad and others V/S Mst. Azmat-e-Bibi.

It was held by the Hon'ble Supreme Court in the above case that the jurisdiction of the High Court under Section 115 CPC is narrower and that the concurrent findings of fact cannot be disturbed in revisional jurisdiction unless courts below while recording findings of fact had either misread the evidence or have ignored any material piece of evidence or those are perverse and reflect some jurisdictional error.

D. 2003 CLC 269
Lahore Development Authority V/S Messers Sea Hawk Inter-national (Pvt.) Ltd., Lahore.

It was held by the Lahore High Court in the above case that it is a settled principle of law that the Government statutory bodies are at par with the general public. It was further held that Section 5 of the

Limitation Act is not applicable in the revision proceedings as held by the Hon'ble Supreme Court. I may point out here that in the case of *Muhammad Bashir* (supra) cited by the learned State Counsel, the same principle was laid down by the Hon'ble Supreme Court that it is well-settled principle that public functionaries are not entitled to any preferential treatment in the matter of condonation of delay and they are to be treated on equal footing with an ordinary litigant, and that with the passage of time a valuable right accrues in favour of the opposite party, which should not be slightly disturbed and destroyed.

E. **2010 CLC 323**
Pakistan Handicrafts, Sindh Small Industries Corporation, Government of Sindh V/S Pakistan Industrial Development Corporation (Pvt.) Ltd. and two others.

It was held by this Court in the above case that limitation is not a technicality because it confers very valuable rights as held by the Hon'ble Supreme Court in the case of *Imtiaz Ali* (supra).

In the end, the learned counsel for the respondents submitted that only a civil court is competent to cancel the registered sale deed in favour of respondent No.1. In support of this submission he relied upon the Division Bench case of this Court reported as *Mst. Ghulam Sakina V/S Member (J), Board of Revenue, Hyderabad, and 4 others*, ***PLD 2004 Karachi 391***.

16. After hearing the learned counsel, examining the record and going through the law cited at the Bar, it can be safely concluded that the benefit of Section 5 of the Limitation Act, 1908, cannot be availed in revisional proceedings filed under Section 115 CPC ; High Court has inherent power to exercise its discretion for condoning the delay, provided the merits of the case so demands ; delay can be condoned only when sufficient and strong cause is shown to the Court ; for exercising such discretion, the Court is required to look into the facts and circumstances of each case, which may vary in each case ; it is a well-settled principle that the Government or the public functionaries are not entitled to any preferential treatment in the matter of condonation of delay and they are to be treated on equal footing with an ordinary litigant ; with the passage of time, valuable rights accrue in favour of the opposite party which should not be disturbed and destroyed ; that the Court is empowered to strike off the defense of the defendant who, despite the direction of the Court, fails to file written statement ; the jurisdiction of High Court under Section 115 CPC is limited and narrow ; and the

paramount consideration behind the exercise of discretion in remanding the case to the trial court after condoning the delay should be the public interest rather than any other consideration.

17. In the present case, it is an admitted position that the competent authority, vide order dated 08.11.2004, vacated / withdrew the earlier Show Cause Notice and maintained the grant in favour of respondents No.2 to 4. It is also an admitted position that two competent authorities filed comments dated 09.12.2006 in Constitutional Petition No.D-858/2006, wherein the grant in favour of respondents No.2 to 4 was admitted by them as genuine. It is also an admitted position that on 30.10.2010 during the pendency of this Suit, the competent authority vacated / withdrew the Show Cause Notice issued to respondents No.2 to 4. Thus the title of respondents No.2 to 4 throughout remained admitted by the applicants. This clearly proves not only that the dispute unnecessarily raised by the applicants was not a question of public interest, but it also proves that the applicants were not aggrieved or affected by the ownership of the land in favour of the respondents. Had the applicants been actually aggrieved or affected, they would not have vacated / withdrawn the show cause notices, especially the second one which was withdrawn during the pendency of the Suit. Moreover the applicants would have initiated proper proceedings against the respondents in case they had a cause of action against them. In view of the admitted position mentioned above, the applicants are *estopped* from challenging or questioning the title of the respondents at this belated stage. In my humble opinion, the trial court rightly decreed the respondents' Suit as there was no *lis* before it in view of the withdrawal of the Show Cause Notice during the pendency of the Suit. The time barred appeal was also rightly dismissed, as the applicants admittedly filed the appeal without an application for condonation of the admitted delay. It is a settled law that no time barred proceedings can be entertained without first deciding the question of condonation of delay. Since there was no application for condonation delay before the lower appellate court, the question of condoning the delay could neither be decided nor could it be condoned.

18. As far as the present Application is concerned, the delay in filing the same cannot be condoned merely on the ground that the purported rights of the Government are involved in the land. The authorities of the Hon'ble Supreme Court discussed above are very clear on the points that the Government and its functionaries are not entitled to any preferential treatment in the matter of condonation of delay and they are to be treated on

equal footing with an ordinary litigant, and that valuable rights accrued to the other party with the passage of time cannot be disturbed. Moreover, in view of the case of *Sheikh Muhammad Sadiq* (supra) decided by the Hon'ble Supreme Court, no useful purpose would be served in remanding the case to the trial court as the Show Cause Notice was vacated / withdrawn by the competent authority / applicants during the pendency of the Suit admitting the title of respondents No.2 to 4.

In view of the above discussion, I do not find any merit in this Civil Revision Application, which is accordingly dismissed along with C.M.A. No. 600 of 2010.

J U D G E