

Order Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision Application No. 165 of 2011

1. For orders on office objection at flag 'A' :
2. For Katcha Peshi :

Mr. Ahmed Ali Memon, Advocate for the Applicant.

Date of hearing : 19.10.2012.

ORDER

Nadeem Akhtar, J. : This Civil Revision Application has been filed by the applicant against the order passed on 04.08.2011 in Civil Misc. Appeal No.06 of 2008 by the learned Additional District Judge, Naushero Feroze, whereby the application filed by the applicant under Order IX Rule 9 CPC for restoration of his said appeal was dismissed.

2. Relevant facts of this case are that a suit for recovery of money was filed by the respondent against the applicant before the Civil Judge, Naushero Feroze (trial Court), which was decreed ex-parte against the applicant on 11.09.2007. The applicant filed an application under Order IX Rule 13 CPC on 25.04.2008 for setting aside of the said ex-parte decree. By order dated 09.06.2008 passed by the learned trial Court, the application filed by the applicant for setting aside of the ex-parte decree was dismissed on merits after hearing the parties. Through Civil Misc. Appeal No.06 of 2008 filed on 05.08.2008 before the learned District Judge, Naushero Feroze, the applicant challenged only the said order dated 09.06.2008 passed by the learned trial Court and not the ex-parte decree.

3. The appeal filed by the applicant was ordered to be admitted and registered on 08.08.2008. On 04.03.2010, the appeal was fixed for hearing, but the applicant and his counsel remained absent till 01.00 p.m. Accordingly, the appeal was dismissed on 04.03.2010 for non-prosecution. On 11.02.2011, that is, after about eleven (11) months and seven (7) days of dismissal of the appeal, the applicant filed an application for its restoration, which was accompanied by an application for condonation of delay under Section 5 of the Limitation Act, 1908. By the

impugned order, the said application filed by the applicant for restoration of his appeal was dismissed by the learned lower appellate Court after hearing the counsel for the applicant.

4. The application filed by the applicant for restoration of the appeal was vague and it did not disclose any sufficient reason for the absence of the applicant and his counsel on the date of dismissal of the appeal. In his application for condonation of delay, it was admitted by the applicant that there was a delay of eleven (11) months and nine (9) days. Only one reason was disclosed by the applicant in his affidavit that he broke his leg as a result of a road accident on 21.11.2009, whereafter he was advised complete bed rest for two months by his consultant / orthopedic surgeon. Along with his application for condonation of delay, the applicant filed a "Discharge Certificate" issued by Services Institute of Medical Sciences Services Hospital, Lahore.

5. A perusal of the above Certificate shows that the date of discharge of the applicant from the above mentioned hospital was 21.11.2009, and that only "conservative management" and "dressing" were recommended. It was nowhere mentioned in the said Certificate that applicant's leg was broken or that he was required to observe complete bed rest for two month, nor the said Certificate was signed or certified by any consultant or orthopedic surgeon. The said Certificate, therefore, did not support the case set up by the applicant for condonation of delay. In fact it completely belied the stand taken by the applicant as it was admittedly a Discharge Certificate dated 21.11.2009 showing that the applicant was discharged from the hospital on the same day when he met with the alleged accident.

6. The dates are extremely important for accepting or rejecting the ground urged by the applicant for condoning the delay. According to the applicant, the accident took place on 21.11.2009 and he was advised complete bed rest for two months, which period expired on 21.01.2010. As per applicant's own case, he must have fully recovered and must have been physically and medically fit after 21.01.2010. His appeal was fixed for hearing on 04.03.2010, that is, after about one and half month of his recovery, but he and his counsel remained absent on that date. Due to their absence the appeal was dismissed on 04.03.2010. The application for restoration of appeal was filed by the applicant on 11.02.2011, that is, after about eleven (11) months and seven (7) days. Since as per

applicant's own contention he had recovered after 21.01.2010, his absence on 04.03.2010 and filing of application for restoration of the appeal on 11.02.2011 were totally unjustified.

7. It is a well established principle of law that the appellate court should not exercise discretion and should not disturb the findings of the lower court unless the lower court has exercised discretion arbitrarily or has adopted un-judicial approach. In support of this view, I refer to the case of Muhammad Nawaz and others V/S Muhammad Sadiq and another, reported as **1995 SCMR 105**, wherein the Hon'ble Supreme Court was pleased to hold that *“a revisional Court cannot interfere with the exercise of discretion by a competent Court unless such exercise of discretion is arbitrary, fanciful and whimsical, and can be brought within the ambit of section 115 C.P.C. which confers revisional jurisdiction on the High Court in the matters in which a subordinate Court has exercised a jurisdiction not vested in it by law or has failed to exercise jurisdiction so vested or has acted in exercise of jurisdiction illegally or with material irregularity.”*

8. The facts and circumstances of this case show that the learned Additional District Judge had the jurisdiction in this matter and the discretion exercised by him was not arbitrary, fanciful or whimsical. On the contrary, the discretion was exercised by him judiciously, in an equitable manner and with full application of mind. In view of the above discussion, I do not find any infirmity or illegality in the impugned order which in my humble opinion does not require any interference by this Court. This Civil Revision Application is, therefore, dismissed in limine.

J U D G E