

Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

First Appeal No. 16 of 2012

1. For Katcha Peshi :
2. For orders on M.A. No.452/2012 :

Appellant : Province of Sindh, Secretary Board of Revenue, Govt. of Sindh, through the District Officer (Rev.), Naushehro Feroze, through Mr. Imtiaz Ali Soomro, A.A.G.

Respondent No.1 : Deputy District Officer (Rev.) and Land Acquisition Officer Naushehro Feroze, through Abdul Sattar Bhayo, Assistant Commissioner, Naushehro Feroze.

Respondents 2 & 3 : Mst. Mariam and Haji Shah Muhammad, through their respective legal heirs, through Mr. Imran Qureshi, Advocate.

Date of hearing : 27.08.2013.

J U D G M E N T

NADEEM AKHTAR, J. – The appellant filed an application under Section 18 of the Land Acquisition Act, 1894, against the respondents before the learned Additional District Judge Naushehro Feroze, which was dismissed for non-prosecution vide order dated 10.12.2010. The application for restoration of the said application filed by the appellant was dismissed vide order dated 07.04.2012, which has been impugned in this appeal.

2. The relevant facts of the case are that Land Acquisition Application No.02/2004 was filed by the appellant against the respondents before the learned Additional District Judge, Naushehro Feroze (‘the trial Court’) under Section 18 of the Land Acquisition Act, 1894. Vide order passed on 27.11.2004, the application was ordered to be admitted and registered, and notice was ordered to be issued to the respondents. It appears from the order sheet of the trial Court filed by the appellant that the matter could not proceed for one reason or the other, and was pending till 10.12.2010. On 10.12.2010, the following order was passed whereby the application was dismissed for non-prosecution by the trial Court :-

“Matter called repeatedly, but none appeared without intimation. A perusal of case file shows that since last 4 dates of hearing, none appeared from applicant/plaintiff side without intimation. However, matter was being adjourned in the interest of justice. Today, as usual, none is present from applicant/plaintiff side without intimation. It is now 3-05 P.M of Friday. This

conduct of applicant/plaintiff shows that they have lost their interest in the matter. Land Acquisition Reference No.02/2004 Re (P.O Sindh Versus D.D.O (Revenue & others)-in-hand is, therefore, dismissed in non-prosecution.”

3. On 07.12.2011, an application under Order XLI Rule 19 CPC was filed by the appellant for setting aside the order dated 10.12.2010 and for re-admission of the application. Counter affidavit to this application was filed by respondents 2(a) to 2(e), wherein specific objections to the maintainability of this application were raised that it was not maintainable in law under Order XLI Rule 19 CPC, and was barred by 360 days. After hearing the learned counsel for the parties, the application for restoration was dismissed by the impugned order as being barred by 232 days, and also as no application for condonation of delay was filed by the appellant.

4. Mr. Imtiaz Ali Soomro, the learned A.A.G., contended that the impugned order is illegal as the appellant's application for restoration was not barred by time. By relying upon Article 181 of the Limitation Act, 1908, which provides limitation of three years, he submitted that the application for restoration was within time. He submitted that apart from the said illegality committed by the trial Court, the application for restoration was wrongly dismissed as the appellant had explained and disclosed sufficient cause for not attending the matter on the relevant date ; the concerned officials of the appellant, which is the Government of Sindh, were occupied at the relevant time in discharging official duties assigned to them in connection with extraordinary and urgent relief work due to heavy rains and flood in the year 2011 ; the said officials were busy in shifting the affectees and providing food and shelter to them ; and, the explanation tendered by the appellant was sufficient not only for restoration of the application, but also for condoning the delay, if any, in filing the application for restoration. In addition to the above, the learned A.A.G. submitted that the learned trial Court failed to appreciate that huge revenue of the Government was involved in the matter, and as such the same ought to have been decided on merits after giving full opportunity to the Government to prove its claim. In support of his submissions, the learned A.A.G. relied upon (1) Board of Governors, Area Study Centre for Africa and North America, Quaid-e-Azam, University, Islamabad and another V/S Ms. Farah Zahra, PLD 2005 SC 153, (2) Allah Dad V/S The Board of Revenue, Sind and 5 others, PLD 1981 Karachi 73, (3) Ali Muhammad V/S Additional District Judge, Faisalabad and 2 others, 1987 MLD 536, and (4) Gregory & Cook S.A. through Hussain Abuzar Pirzada V/S Oil & Gas Development Company Limited, 2009 YLR 228. The Assistant Commissioner, Naushehro Feroze, adopted the arguments advanced by the learned A.A.G.

5. On the other hand, Mr. Imran Qureshi, learned counsel for the legal heirs of respondents 2 and 3, raised a preliminary objection regarding the very

maintainability of this appeal that the same is hopelessly barred by time. He contended that since the instant appeal has been filed against the order of dismissal of an application for restoration of the main application, the limitation for filing this appeal will be governed by Article 163 of the Limitation Act, 1908, which specifically provides limitation of 30 days for setting aside an order of dismissal for default, to be computed from the date of dismissal. He further contended that by virtue of Section 53 of the Land Acquisition Act, 1894, the provisions of CPC have been made applicable to the proceedings before the Court under the said Act. It was submitted by him that even under Article 153 of the Limitation Act, 1908, the limitation that is prescribed for an appeal under CPC to High Court from an order of a subordinate Court is 30 days. He argued that the appeal is barred by time as it was not filed within the limitation prescribed in Articles 153 and 163 *ibid*. He emphasized that the appellant has not filed any application for condonation of the delay in filing this appeal. It was urged that since the appeal has not been filed within the prescribed period of limitation and no application for condonation of delay has been filed, the same is liable to be dismissed on this ground alone.

6. In reply to the submissions of the learned A.A.G., Mr. Imran Qureshi Advocate submitted that Article 181 *ibid* is applicable only to cases where no limitation is provided elsewhere in the Limitation Act, 1908. He further submitted that the restoration application filed by the appellant was also governed by Article 163 *ibid* specifically providing thirty days for setting aside the order of dismissal of the main application for non-prosecution, and in view of this specific provision, Article 181 *ibid* was inapplicable to the restoration application. The learned counsel contended that in addition and without prejudice to his preliminary objection, his other objection is that this First Appeal under Section 54 of the Land Acquisition Act, 1894, read with Section 96 CPC, is not maintainable as an appeal under the said Section 54 is competent only against the judgment and decree passed by the Court referred to in the said Section 54. He argued that as the impugned order is not a judgment or decree, the appeal is not maintainable in law. He further argued that an appeal against an order under Order IX Rule 9 CPC rejecting an application to set aside the dismissal of a Suit, is specifically provided in Rule 1(c) of Order XLIII CPC, therefore, the remedy of the appellant was to file an appeal under the said Rule. He contended that the application was rightly dismissed by the trial Court in view of the gross negligence of the appellant, which is evident from the order sheet of the trial Court filed by the appellant itself. He submitted that the Government is not entitled to any preferential treatment before the Court as far as rights and liabilities of the parties are concerned. In support of his submissions, the learned counsel relied upon (1) Government of Pakistan through Ministry of Works and another V/S Messrs Malbrow Builders, Contractor, Sialkot, 2006 SCMR 1248, (2) Bundoo Khan and 2 others V/S Karachi Development Authority, 1988 MLD 860, (3)

Khushi Muhammad V/S Member, Board of Revenue and others, 2008 SCMR 358, (4) Mian Muhammad Asif V/S Fahad and another, 2009 SCMR 1030, (5) Messrs Ciba-Geigy (Pak.) Limited V/S Muhammad Safdar, 1995 CLC 461, (6) Sabzal and others V/S Bingo and others, 1989 CLC 656, and (7) Honda Atlas Cars (Pakistan) Ltd. V/S Honda Sarhad (Pvt.) Ltd. and others, 2005 SCMR 609,

7. I have heard the learned A.A.G. and the learned counsel for respondents 2 and 3, perused the record, and have also examined the law cited at the bar. I shall first deal with the preliminary objection that this appeal is barred by limitation. By virtue of Section 53 of the Land Acquisition Act, 1894, the provisions of CPC have been made applicable to all proceedings under the said Act before the Court. Section 54 of the said Act provides that subject to the provisions of CPC applicable to appeals from original decrees, an appeal shall only lie in any proceedings under the said Act to the High Court from the award, or any part of the award, of the Court. It is clear from the language of Section 54 *ibid* that no appeal shall lie to the High Court from an order of the Court which is not an award or any part thereof. In my view, the provisions of CPC applicable to appeals from original decrees have been made applicable to appeals against the award or any part thereof because of the reason that rights and liabilities of the parties are determined finally and conclusively in awards as are determined in original decrees. In the instant case, admittedly the award, or any part thereof, was not given by the Court and the application was dismissed for non-prosecution without any conclusive determination or adjudication of the rights and liabilities of the parties. Therefore, the appeal could not be filed under Section 54 *ibid* or under Section 96 CPC.

8. In view of the applicability of the provisions of CPC to the proceedings under the Land Acquisition Act, 1894, I agree with the learned counsel for respondents 2 and 3 that the appeal ought to have been filed by the appellant before this Court under Rule 1(c) of Order XLIII CPC, which specifically provides an appeal against an order under Order IX Rule 9 CPC rejecting an application to set aside the dismissal of a Suit. Since the impugned order of rejecting the application for setting aside the dismissal of application was passed by a Court subordinate to this Court, the relevant provision of limitation for filing an appeal in this case would be Article 153 of the First Schedule of the Limitation Act, 1908. Article 153 *ibid* prescribes limitation of 30 days for filing an appeal under CPC to High Court from an order of a subordinate Court, and the period is to be computed from the date of the order. In view of the said specific provision for a specific situation, residuary Article 181 of the First Schedule of the Limitation Act, 1908, relied upon by the learned A.A.G., shall not apply in the present case as the said Article is attracted only to cases where no limitation is provided elsewhere in the First Schedule of the Limitation Act, 1908.

9. The impugned order was passed on 07.04.2012 ; the application for its certified copy was made by the appellant on 03.05.2012 ; the fee was estimated on 05.05.2012 ; and, the copy was made ready and was delivered to the appellant on the same day, that is, on 05.05.2012. It is clear from the record that the appeal, which was presented on 20.06.2012, was not filed within 30 days. Thus, the appeal, having been filed beyond the limitation prescribed in Article 153 *ibid*, is hopelessly barred by time. This position was not disputed by the learned A.A.G., who in fact insisted that the delay is liable to be condoned on the ground that valuable rights of the Government were involved in this matter, and where such valuable rights of any Government are at stake, the Courts generally lean in favour of the Government by condoning the delay. I am not at all impressed with the ground for condonation urged by the learned A.A.G., and I am afraid that such indulgence cannot be granted to the appellant in view of the authorities of the Hon'ble Supreme Court and reported cases of this Court and the Lahore High Court discussed in the subsequent paragraphs.

10. In the case of Muhammad Bashir & another V/S Province of Punjab, 2003 SCMR 83, 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. In Imtiaz Ali V/S Atta Muhammad and another, PLD 2008 SC 462, it was held by the Hon'ble Supreme Court that the appeal, having been filed after one day of the period of limitation, had created valuable right in favour of the respondents, and 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 in the cited case. In Lahore Development Authority V/S Messrs Sea Hawk International (Pvt.) Ltd., Lahore, 2003 CLC 269, it was held by the learned Lahore High Court that it is a settled principle of law that the Government statutory bodies are at par with the general public. In Pakistan Handicrafts, Sindh Small Industries Corporation, Government of Sindh V/S Pakistan Industrial Development Corporation (Pvt.) Ltd. and two others, 2010 CLC 323, it was held by this Court 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). The case reported in 2006 SCMR 1248 (supra) relied upon by the learned counsel for respondents 2 and 3 also supports the above view.

11. I shall now discuss the cases cited and relied upon by the learned A.A.G. In Board of Governors, Area Study Centre for Africa and North America (supra), it was held by the Hon'ble Supreme Court that in a suitable case the Court for reasons to be recorded can *suo moto* enlarge the time and condone the delay. I am afraid this authority cannot be applied to the instant case for the reason that this is not a suitable case for condoning the delay in my humble opinion, and also as the Hon'ble Supreme Court in the authorities referred to in the preceding paragraph was pleased to hold otherwise specifically in cases where delay was caused due to negligence of the Government and / or their functionaries and officials. The cases reported in Allah Dad (supra), Ali Muhammad (supra), and Gregory & Cook S.A. (supra), are not relevant at all to the issue in hand as the question of limitation or condonation of delay was not discussed or decided therein. In all the said cases, the question of restoration was involved.

12. It is to be noted that instead of filing the appeal promptly after receiving the certified copy on 05.05.2012, the appeal was filed on 20.06.2012 after a long delay of 46 days. In order to seek the concession of condonation and the discretion of this Court in this behalf, the appellant was duty-bound to file an application for condonation of the delay explaining the delay of each and every day up to the date of filing of the appeal. However, no such application was filed by the appellant. Having already held that this appeal is barred by limitation, it is further held that the delay in filing the appeal cannot be condoned in view of the well-settled law that in the absence of an application for condonation of delay justifying therein the delay of each and every day, the delay cannot be condoned. The cases reported in 2006 SCMR 1248, 2005 SCMR 609 and 1995 CLC 461, relied upon by the learned counsel for respondents 2 and 3, also support the above view.

13. As a result of the above discussion and in view of the law laid down by the Hon'ble Supreme Court as discussed above, this appeal is liable to be dismissed. These are the reasons of the short order announced by me on 27.08.2013, whereby this appeal was dismissed. The parties are left to bear their own costs.

J U D G E