ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.1057/2008

DATE   ORDER WITH SIGNATURE OF JUDGE
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1. For hearing of CMA No.7470/14
2. For examination of parties/settlement of issues

16.4.2015
Mr. Rehan Aziz Malik Advocate for plaintiff.
Mr. M.G. Dastagir Advocate for defendant
Ms. Naheed Naz State Counsel
.x.x.x.

I have heard the learned Counsels and perused the material available on record.

The application bearing No.12661/10 is in fact partly heard which has not been fixed by the office today inadvertently and both the learned Counsels agree that in fact it is an application bearing CMA No.12661/10 which was/is heard and to be disposed of. In addition learned Counsel for the defendant submits that although the application bearing CMA No.12660/10 was disposed of but it was inadvertently as the question of limitation would still remain open as to the application bearing CMA No.12661/10.

It is the case of the plaintiff that when the suit was fixed for settlement of issues on 28.4.2010 the matter was dismissed for non-prosecution. Learned Counsel has agreed that although on the crucial date the matter was fixed for hearing of applications as well as for settlement of issues however it could not have been dismissed on account of the fact that the summons as required in terms of Rule 135 of the Sindh Chief Court Rules has not been issued. Apart from this mandatory provision of law learned Counsel has taken me to the facts incorporated in the affidavit which entail delay in filing of the application and none appearance. Learned Counsel further added that insofar as the limitation is concerned, the application bearing CMA

No.12660/10 was filed along with CMA No.12661/10 which was granted on 27.1.2011 and hence for all intents and purposes the reasons appear to have been accepted by the Court. Learned Counsel for the plaintiff has relied upon the cases of Yawar Farooqui vs. Standard Chartered Bank (2014 CLD 01) and Elbow Room & another vs. MCB Bank Limited (2014 CLD 985) and for the purposes of limitation he has relied upon the case of Muhammad Shafi v. Mushtaque Ahmed (1996 SCMR 856). In relation to the orders which are being held to be void and erroneous he has relied upon the case of Land Acquisition Collector Nowshera & others v. Sarfraz Khan & others (PLD 2001 SC 514).

On the other hand learned Counsel for the defendant has contended that the order dated 27.1.2011 in terms whereof the application under section 5 of the Limitation Act was granted was an error and has been granted as if it is an urgent application. Learned Counsel further submits that without prejudice to such grant even as of now such delay on the part of the plaintiff to move application for restoration can be taken as a defence in respect of the application for restoration. Learned Counsel submits that the matter on the crucial date was fixed for settlement of issues and it is considered to be a date of hearing and hence the matter was rightly dismissed for non-prosecution. Learned Counsel has relied upon Rule 193 of the Sindh Chief Court Rules and submits that after closure of direction, the matter was fixed for settlement of issues and there was no necessity for issuance of summons in pursuance of Rule 135 of the Sindh Chief Court Rules and hence the same cannot be termed to be mandatory. He argued that summons in terms of Order 5 of CPC have already been served.

Heard the learned Counsel and perused the material available on record. It is a matter of fact that insofar as the application bearing CMA No.12660/10 is concerned that apparently was granted on 27.1.2011and since then no reservation, objection or appeal is preferred by the

defendant insofar as the grant of application is concerned. All that has been argued in relation to such order was that the question of limitation should always remain open and it ought to have been considered at this stage while considering the application for restoration of the suit.

In view of above facts and circumstances, I am of the view that insofar as the application under section 5 of the Limitation is concerned that apparently was allowed. It would have remained open, had it not been disposed of even if such defence has not taken it could have been agitated at the time of arguments, however such is not situation here. The reasons assigned for delay in support are available and is supported by an affidavit and it was granted on 27.1.2011. It is to be presumed that in consideration of such grounds the application was granted.

Now I would deal with the application bearing CMA No.12661/10. Though the Counsel has agitated number of facts and reasons of his none appearance, however one crucial point that he has taken is that on the crucial date when the matter was dismissed for non-prosecution it was fixed for settlement of issues. He concedes that it is a date of hearing, however for the purpose of settlement of issues as it also involves the appearance of parties and/or for settlement of disputes, hence in consequence by invoking Rule 135 of the Sindh Chief Court Rules summons ought to have been issued to the parties. It has no relevance in terms of summons issued in pursuance of Order 5 as it is for the defendants to come forward and defend themselves/ itself. However such Rule 135 of the Sindh Chief Court Rules cannot be brushed aside in view of the provisions of Order 5(1) CPC nor they are at par. It seems that the parties were not informed in view of the fact that they were required to appear for the framing of issue, hence on this score alone the limitation would not apply as held by the Hon'ble Supreme Court in case of Land Acquisition Collector Nowshera & others v. Sarfraz Khan & others (PLD 2001 SC 514) and in the case of Muhammad Shafi v.

Mushtaque Ahmed reported in 1996 SCMR 856. I am of the view that since a substantial provision of law has not been considered and acted upon, hence the application under consideration bearing CMA No.12661/10 is to be allowed. The application is therefore allowed and the suit is restored to its original stage as it was on 28.4.2010.

The application stands disposed of in the above terms.

Judge