

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

C.P. No. 3- 283 of 2021

Muhammad Aslam	-----	Petitioner
VERSUS		
Muhammad Yasin and another	-----	Respondents

**Date of hearing:
& decision: 29.08.2022**

Mrs. Razia Ali Zaman, Advocate for petitioner.
Mr. Abdul Malik Shaikh, Advocate for respondent No.1
Mr. Allah Bachayo Soomro, Addl. A.G.

J U D G M E N T

ADNAN-UL-KARIM MEMON, J.- Through instant petition, the petitioner has challenged the order dated 8.5.2021 passed on an application under Section 5 of the Limitation Act 1908 along with an application under Order 9 Rule 9 CPC filed in FRA No. 41 of 2018, for setting aside the order dated 17.12.2019 dismissing the said appeal for non-prosecution. An excerpt of order dated 17.12.2019 is reproduced as under:-

“Matter called, Appellant and his Advocate are called absent. Perusal of the diaries shows that since last 05 dates of hearing neither appellant nor his Advocate has appeared nor such intimation has been received on their behalf. Such attitude of the appellant shows that he has lost his interest to proceed with the matter, I therefore in the above circumstances dismiss the instant F.R.A in non Prosecution with no order as to costs.”

2. Mrs. Razia Ali Zaman learned counsel for the petitioner has submitted that the petitioner filed suit for Specific Performance of Contract, Permanent Injunction, and Possession of Ground Floor on the premise that he purchased the suit property from respondent No.1 for a total sale consideration of Rs. 10,50,000/- through sale agreement dated 23.04.2004, as such he paid Rs. 8,50,000/- on 23.10.2004. Subsequently, in the first week of March 2005, he approached the respondent and offered a balance sale consideration of Rs. 1,00,000/- but he did not receive the same on the pretext that he would receive the entire balance amount of Rs.2,00,000/- in October 2005 before Sub-Registrar at the time of execution of sale deed, however, the possession of the suit property was handed over to him. The petitioner, in October 2005 approached the respondent and offered the balance sale consideration but he refused on the pretext that he had

been facing some domestic problems and also suffering from heart disease hence he requested for some time for execution of sale deed, thereafter the petitioner again approached the respondent but he avoided to receive the balance amount to execute the sale deed. The petitioner was compelled to pay the amount of Rs.1,00,000/- to the respondent and the same was paid as such the respondent received full sale consideration on 11.05.2011 and promised to execute the sale deed but he failed and neglected to do so; therefore, the petitioner filed F.C. Suit No. 727 of 2013 before the learned trial court. In the year 2015, respondent No.1 also filed Rent Application No. 178 of 2015 before the learned Rent Controller. Subsequently, after trial, F.C. Suit No. 727 of 2013 filed by the petitioner was dismissed vide Judgment and Decree dated 18.5.2018, while the Rent Application No. 178 of 2015 of respondent No.1 was allowed on 6.3.2018 with direction to the petitioner to vacate the premises within sixty days. The petitioner being aggrieved by and dissatisfied with the Judgment and Decree dated 18.5.2018 passed in F.C. Suit No. 727 of 2013, preferred Civil Appeal No. 106 of 2018 before learned appellate court, while respondent No.1 filed First Rent Appeal No. 41 of 2018 for fixation of fair rent. After trial, the Civil Appeal No. 106 of 2018 preferred by the petitioner was allowed vide Judgment dated 25.11.2019, by setting the Judgment and Decree of the trial court with direction to the petitioner to deposit the balance sale consideration of Rs. 1,00,000/- with the Nazir of the trial court and respondent No.1 was directed to execute the sale deed in respect of suit property in favour of appellant / petitioner, and in case of failure, the Nazir of the trial court was authorized to execute the sale deed in respect of suit property on behalf of respondent No.1 in favour of appellant. Meanwhile, the petitioner filed Execution Application No. 27 of 2020 for execution of Judgment dated 18.5.2018 passed in Rent Application No. 178 of 2015 and during the pendency of Execution Application the First Rent Appeal No. 41 of 2018 was dismissed for non-prosecution. The appellant subsequently applied under Order 9 Rule 9 CPC along with an application under Section 5 of the Limitation Act as the application was barred by time. The said application under Section 5 of the Limitation Act was considered and rejected on the premise that no sufficient cause had been shown by the appellant/petitioner to condone the delay in applying for Order 9 Rule 9 CPC for restoration of appeal. An excerpt of the order dated 8.5.2021 is reproduced as under:-

“In view of the above discussion it is concluded that period of thirty (30) days 13 for filing an application for re-admission of appeal dismissed for want of prosecution had been provided under Article 161 of the Limitation Act-1908. No sufficient cause has been shown by the learned counsel for appellant to condone the delay; hence the application U/s 5 of the Limitation Act-1908 is dismissed with no order as to costs. Consequently the application U/O IX Rule 9 CPC filed by the appellant for restoration of appeal being hopelessly time barred is also dismissed with no order as to costs.”

3. Mr. Abdul Malik Shaikh, Advocate for respondent No.1 has opposed this petition on the ground that in rent matter, Constitutional Jurisdiction of this Court is limited and confined only to ascertain whether the subordinate Courts have flouted the statute or failed to follow the law relating thereto; that in the instant case, mere denial of relationship of landlord and tenant between the parties and pendency of proceedings of civil nature does not take away the jurisdiction of Rent Controller to entertain a Rent Case; that there is no perversity, illegality and infirmity in the orders passed by learned Trial Court as well as Appellate Court; that on the basis of pendency of Civil Suit and / or civil revision cannot restrain the owner of the subject premises from claiming his legal right or deprive him from benefit accruing or arising out of the said property ; that no proceedings before the Rent Controller and/ or appellate can be stopped to wait for the final outcome of said suit; that in such circumstances, the tenant must vacate the subject property and if succeeds in obtaining Decree in the suit then he can be given easy access to the subject premises, subject to all just exceptions as provided under the law, as in the present case status-quo is operating in revision application filed by the respondent arising out of suit proceedings. He emphasized that the petitioner was inducted as a tenant of the demised premises, and he could not claim any exemption from payment of rent on account of institution of the suit in terms of Article 115 of the Qanun-e-Shahadat Order, 1984, which lays down that no tenant of immovable property shall, during the continuance of tenancy, be permitted to deny that his landlord had a title to such property. The relationship of landlord and tenant is not severed even if the execution of sale deed/agreement to sell is admitted; that determination of question-related to the legal status of the parties vis-a-vis the premises and the nature of their relationship inter se, would certainly be a mixed question of law and fact to be decided in the light of material available on record and evidence; furthermore, regarding the plea taken in the application for restoration that the appellant's default in appearance was not willful rather was due to non-service, is an afterthought as the appellant's counsel had been appearing in the past when the appeal was fixed for hearing, and there is no requirement of law that the parties have to be served for every date of hearing; and a notice was specifically sent by the court to the appellant's which was served upon him as per diary sheet. He lastly submitted that the petitioner is not entitled to discretionary relief after hibernating for so many years and finally waking up to belatedly claim restoration of his rent appeal which was rightly dismissed on account of non-prosecution by the trial court.

4. I have heard learned counsel for the parties and perused the record with their assistance and the case law cited at the bar. It is well settled that it is obligatory upon the parties to appear before the Court on the day already fixed for appearance and the transferee Court shall then communicate the order of transfer and direct the parties to appear before the transferee Court on the day to

be fixed. However, it is the primary obligation of the parties to pursue the case and the Court has been obliged to apprise them of the factum of transfer of the case and the date on which the parties present before it is to appear in the transferee Court.

5. Primarily, the law on the subject is very clear that the parties should be duly informed about the transfer of the case. It means that they cannot be condemned unheard by the transferee Court. It is well-established practice that when a case is transferred by an administrative order from one Court to another, the parties are entitled to notice after transfer in as much as they are still a party to the litigation, and when such a notice is not given the proceedings taken against such party since transfer will not meet the principle of natural justice. Furthermore, the law helps the vigilant not the indolent.

6. In the present case order for non-prosecution was passed against the petitioner on the premise that since last 05 dates of hearing neither appellant nor his advocate had appeared nor was such intimation given to the trial court for hearing of the appeal. However, the application was filed under Order IX, Rule 9, C.P.C. and one of the main grounds taken up was that the petitioner/appellant was not served with a notice about the transfer of the case from one Court to another. The petitioner/appellant also gave reasons explaining his absence on the date fixed for arguments; however, the trial court considered it to be not sufficient cause to explain his non-appearance.

7. Prima-facie no prejudice will be caused to either party if the subject First Rent Appeal is decided on merits, for the simple reason that law favors adjudication on merits rather than dismissal on technical grounds.

8. For the reasons given, I accept this petition and set aside the judgment of learned appellate court. The result is that the petitioner/appellant shall be heard on the subject appeal and a decision shall be made on merits after hearing both the parties, within one month.

JUDGE