

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Revision Application No. 60 of 2016

Date	Order with signature of Judge
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Mr. Imran Ahmed, advocate for the applicants.

None present for the respondents.

Date of hearing : 12.09.2022

**ORDER**

**NADEEM AKHTAR, J.** – Through this Revision Application, the applicants have impugned the order passed on 30.03.2016 by the appellate Court in their Civil Appeal No.32/2009 whereby the application filed by them for restoration of the said appeal was dismissed as being barred by limitation. Their said appeal was dismissed by the learned appellate Court for non-prosecution vide order dated 10.08.2012.

2. As the notices issued to the respondents in the instant matter could not be served upon them despite repeated attempts through various modes, they were ordered, vide order dated 05.11.2020, to be served through substituted service by way of publication in newspaper. In pursuance of the said order, the notice was published on 15.12.2020 in Urdu daily 'Jang', whereafter service upon the respondents was held good vide order dated 31.08.2021. Despite the above, the respondents have chosen to remain absent.

3. It is contended by learned counsel for the applicants that during the pendency of the appeal, the R & P of the Suit before the trial Court was summoned by the appellate Court vide order dated 21.09.2011, but it was not received till the date on which the appeal was dismissed for non-prosecution. He submits that as compliance of the said direction of the appellate Court had not been made, the appeal could not be heard and or disposed of. He further submits that even otherwise the appeal could not be taken up or dismissed for non-prosecution because it was not listed for hearing on the relevant date. He also submits that after substituting the legal representatives of the deceased appellant No.3 in place of the said deceased and taking the amended title to this effect on record on 28.04.2012, the learned appellate Court was required to issue notice to the said legal representatives, which was never issued to them. It is urged by him that the appeal could not be proceeded with or dismissed without notice to them.

4. In addition to the above, learned counsel submits that the application filed by the applicants for restoration of their appeal was wrongly dismissed by the learned appellate Court by holding that the same, having been filed after about three and a half months from the order of dismissal, was barred by limitation. It is urged by him that the application of Article 168 of the Limitation Act, 1908, by the appellate Court was erroneous as Article 181 of the said Act was applicable in this case whereby the application for restoration could be filed by the applicants within three years. In support of this contention he has placed reliance on Tehsil Municipal Administrator, Faisalabad V/S Muhammad Saleem and others (2016 SCMR 2009) and Muhammad Adalat Khan and others V/S Additional Rent Controller and others (PLD 1982 Lahore 616).

5. In order to ascertain the fact regarding the summoning of the R & P and its non-receipt by the appellate Court and the other points highlighted by the learned counsel, the R & P of the appeal was called from the appellate Court vide order dated 02.11.2021, which has been closely examined by me. The record reflects that the R & P of the Suit was summoned by the appellate Court vide order dated 21.09.2011 and as it was not received, such direction was repeated by the appellate Court vide orders dated 08.10.2011 and 27.10.2011 ; the appeal was adjourned by the appellate Court on 17.11.2011 for bringing on record the legal representatives of the deceased appellant No.3 ; thereafter, the appeal was adjourned on all subsequent dates due to one reason or the other ; on 28.04.2012, the amended title was filed by substituting the legal representatives of the deceased appellant No.3 in his place ; on three subsequent dates, the matter was adjourned due to the strike called by KBA and the absence of the parties ; and, on 10.08.2012, the appeal was dismissed for non-prosecution.

6. It is apparent from the record that the appellate Court had felt the need to examine the R & P before deciding the appeal and pronouncing the judgment therein, and the matter was adjourned by the appellate Court on several dates for compliance of its above order as the R & P had not been received. It is also apparent that from 21.09.2011 when the R & P was summoned by the appellate Court till 10.08.2012 when the appeal was dismissed for non-prosecution, the R & P had not been received by the appellate Court. Thus, during the entire above mentioned period, the applicants / appellants were not in default nor were they required to argue the appeal. It must be kept in mind that a case can be dismissed in default or for non-prosecution only when the party who had filed the same is absent on the date of hearing or does not do any such act that was required to be done by it under the law on that date. The appeal could be

heard by the appellate Court only after examining the R & P or by recalling its earlier order for summoning the R & P, after recording reasons, and then fixing the appeal for hearing after notice to parties. However, such course was not adopted by the appellate Court. It is a matter of record that the appeal was not listed for hearing on the relevant date, and as such it could not be taken up or dismissed for non-prosecution on that date. Due to this reason, I am of the view that the order of its dismissal was without jurisdiction, void and a nullity.

7. The above view expressed by me is fortified by Tehsil Municipal Administrator, Faisalabad supra, cited and relied upon by learned counsel for the applicants. In the cited authority, it was held by the Hon'ble Supreme Court that Order XLI Rule 17(1) CPC specifically requires that if the appellant fails to appear on the date when the appeal is called for hearing, the Court may dismiss the appeal ; there was nothing on record to show that the appeal was fixed for hearing on the date when it was dismissed ; such order of dismissal was not an order under Rule 17(1) of Order XLI CPC ; due to this reason, Article 168 of the Limitation Act, 1908, was not applicable as it applies to the dismissal of an appeal for default under the provisions of Rule 17(1) ibid ; consequently, Article 181 of the Limitation Act, 1908, was applicable providing the limitation of three years for filing the application for restoration ; such application filed by the appellant in the cited case was within time ; and, as the application for restoration was not barred by time, the order of its dismissal on the ground of limitation was a nullity.

8. In the above context, I may also refer to Manager, Jammu and Kashmir, State Property in Pakistan V/S Khuda Yar and another (PLD 1975 S.C. 678). In the cited authority, the Hon'ble Supreme Court was pleased to hold, *inter alia*, that it was the duty of the appellate Court to ascertain that the respondent before it had been duly served and as this duty was not discharged by the appellate Court, the appeal could not be called for hearing on the relevant date ; the appellate Court had acted mechanically without being aware of its discretionary power to not dismiss the appeal ; and therefore, the order of dismissal, having been made in ignorance of jurisdiction, was void and a nullity.

9. In the instant case, we have seen that the appeal was dismissed by the appellate Court before receiving and without examining the R & P that was summoned by the appellate Court itself through a judicial order which order was in the field when the appeal was dismissed. The appellate Court was duty-bound to adjourn the matter on the relevant date for compliance of its direction for summoning the R & P and by not discharging this duty, it acted mechanically without being aware of its discretionary power to not

dismiss the appeal. Therefore, the order of dismissal, having been made by the appellate Court in ignorance of jurisdiction, was void and a nullity. The appeal was dismissed purportedly for non-prosecution under Rule 17(1) of Order XLI CPC although it was not listed for hearing on that date. Thus, the order of dismissal was not an order under Rule 17(1) *ibid* and due to this reason, Article 168 of the Limitation Act, 1908, was wrongly applied by the appellate Court to the application for restoration filed by the applicants. The said application was within time because Article 181 of the Limitation Act, 1908, was applicable providing the limitation of three years for its filing. As the application for restoration was not barred by time, the impugned order of its dismissal on the ground of limitation was a nullity.

10. The above discussion leads us to the conclusion that both the orders passed by the appellate Court viz. the order of dismissal of the appeal for non-prosecution as well as the order of dismissal of the application for its restoration, were without jurisdiction, void and a nullity. Therefore, the said orders cannot be allowed to remain in the field.

11. Foregoing are the reasons of the short order announced by me on 12.09.2020 whereby this Revision Application was allowed ; the above orders were set aside ; and, Civil Appeal No.32/2009 filed by the applicants was restored and was remanded to the learned appellate Court with direction to decide the same within sixty (60) days strictly in accordance with law.

12. Office is directed to return the R & P of Civil Appeal No.32/2009 forthwith to the learned appellate Court for compliance.

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