

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.436 of 2001

Date	Order with Signature of Judge
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For hearing of CMA No.9280/2018 (u/s 151 CPC)

02-11-2023

Mr. Qaiser Qazi, Advocate for Plaintiff

1. **Sana Akram Minhas J**: This order will dispose of application (CMA No.9280/2018) ("**Restoration Application**") filed by the Plaintiff under section 151 read with Order 9 rule 9 of the *Code of Civil Procedure, 1908* ("**CPC**") for recall of order dated 28.8.2015, whereby the instant Suit was dismissed for non-prosecution due to absence of both sides, which Suit was fixed for "Final Arguments" on that date. The dismissal order records as follows:

28.08.2015

"This case was ordered to be fixed for final arguments on 10.10.2011, since then nobody is appearing on behalf of any of the party, except once on 2.5.2013, when parties and their counsel were present only to take date by consent, therefore, suit is dismissed for non-prosecution."

2. As per contents of the Restoration Application, the Plaintiff on acquiring knowledge of dismissal of the instant Suit for non-prosecution, swiftly filed the listed application on 03.09.2015 for reinstatement of the Suit to its original position.
3. I have heard the learned Counsel for the Plaintiff and have also gone through the record of the case.
4. Though the order of the learned Single Judge, whereby the Suit was dismissed for non-prosecution, does not mention that the same was being dismissed under Order 9 rule 3 CPC, but it is apparent that the Suit has been dismissed under the latter provision since, as recorded in the order dated 28.8.2015 no one was present that day (i.e. neither the Counsel for Plaintiff nor the Counsel for Defendants were present). Consequently, the Restoration Application shall be treated as one filed under Order 9 rule 4 CPC (and not as one under Order 9 rule 9 CPC as incorrectly stated in the heading/caption of the Restoration Application).

5. The provision of Order 9 CPC deals with appearance of parties and consequences of non-appearance. Where neither party appears when the suit is called on for hearing, the Court may make an order dismissing the suit. When the suit is dismissed under rule 2 or 3, the plaintiff may under rule 4 bring a fresh suit (subject to law of limitation) or he may apply for an order to set the dismissal aside. The expression "*called on for hearing*" has been deliberated upon in numerous cases and there is a consensus that "*hearing*" is interpreted to, inter alia, mean (a) a date fixed for hearing of final arguments on the subject-matter (b) a date fixed for evidence (c) a date fixed for framing of issues by the Court. However, a date fixed for consideration of interlocutory matters does not constitute a date of "*hearing*" within the context of Order 9 rule 3 or rule 8 CPC.
6. The record of this Court chronicles that notice on the Restoration Application to the Defendants No.1 & 2 were first issued on 21.9.2020 and, thereafter, repeated on 16.11.2020 but since the bailiff's/process server's report was not available on record, the Court on 1.2.2021 ordered repeat notice to the Defendants for 9.3.2021. On 9.3.2021, the Court affirmed that notice issued to the Defendants had been served but since no one had appeared, the Court once again issued notice to the Defendants. The instant Suit has come up for hearing today and as per last bailiff report, service has been duly effected upon them (pursuant to last order dated 9.3.2021). Despite this, no one has appeared on behalf of the Defendants and nor any counter-affidavit has been filed to the Restoration Application to-date.
7. In **Northern Polythene Limited (NPL) v. National Bank of Pakistan** (2013 CLD 1053) a learned Single Judge of this Court has summated that the expression "*sufficient cause*" for restoration of a suit is not susceptible of any exact definition and no hard and fast rule can be laid down. There is no straitjacket formula for ascertaining what constitutes sufficient cause and its determination has been left to the good sense and discretion of the court. Therefore, sufficient cause depends on the facts and circumstances of each case and the court has to be satisfied whether sufficient cause was shown or not and which is a subjective satisfaction. Sufficient cause has been given a meaning to embrace all relevant circumstances. The question would be whether the plaintiff honestly intended to be in court and did his best to get there in time, but for intervention of some inevitable cause he failed to appear which is sufficient cause inviting order for restoration.
8. The Restoration Application is supported by the personal Affidavit of the then Counsel for Plaintiff (viz. Mr. Nasir Maqsood, Advocate) who, inter alia, deposed that on that day he also had other cases fixed before other single benches of this Court, one of which he attended early in the morning and got

held up there. Thereafter, at about 9:10 am when he reached the court room where the instant Suit was fixed, he was informed by other advocates present there that the instant Suit had been dismissed for non-prosecution.

9. There is nothing to contradict the statement made by the then Plaintiff's Counsel in his Affidavit and there is no reason to disbelieve his version of events. His engagement in the High Court is to be taken into due consideration, particularly when the said Advocate, by filing his personal affidavit, has given specific reference to the case number in which he was busy in on that date and had also shown sufficient cause for his absence at the time of the dismissal of the Suit. Reference in this regard is made to a decision of this Court passed in somewhat similar circumstances and reported as **Convell Laboratories Ltd v. m. v. Alexanders Faith** (1998 CLC 1383).
10. Furthermore, the Restoration Application has been filed within five (5) days of its dismissal and is, thus, also well within time since Article 163 of the First Schedule of the *Limitation Act, 1908* (which deals with application for restoration of the suits dismissed for non-prosecution) provides for a period of 30 days from the date of dismissal for filing such an application. Though a court is not bound to restore a suit merely because an application for restoration is within time, nevertheless the promptness in the filing of the Restoration Application and the quick action on behalf of the Plaintiff may be a factor indicative of the latter's bonafides.
11. In addition, ordinarily generous consideration should weigh with the Court in dealing with applications for restoration of cases and all out efforts should be made to decide the cases on merit as law favours adjudication of the cases on merits which principle is to be followed unless there are practical difficulties which cannot be overcome. Non-suiting a party on technical considerations has generally not been approved as held in **Anwar Khan v. Fazal Manan** (2010 SCMR 973). This being a Suit under the provisions of *Fatal Accidents Act, 1855* and the fact that evidence had been recorded (as affirmed from order dated 10.10.2011) and the matter was listed on 28.08.2015 for "Final Arguments", which could not be attended to by the Counsel for the Plaintiff on that date for the reason disclosed in his affidavit, which has remained un-rebutted to date and which in my view constitutes sufficient cause.
12. For the foregoing reasons, the order dated 28.8.2015 is recalled with the result that the listed Restoration Application of the Plaintiff is allowed and the instant Suit is restored to its original position. Office shall fix this Suit on **29.11.2023** according to roster and after intimation notice to all concerned.