

(165)

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

**Civil Revision Application No. S-37 of 2015**

**Dilbar Kartiyo**

**v/s.**

**Atta Muhammad Kartiyo and others**

Mr. Ghulam Dastagir A. Shahani, Advocate for the applicant.

Mr. Habibullah G. Ghouri, Advocate for the respondents.

Mr. Liaquat Ali Shar, Additional Advocate General, Sindh.

Date of hearing: 05.10.2020

Date of Order: 05.10.2020

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**ORDER**

**Muhammad Junaid Ghaffar, J.:** This Civil Revision Application is directed against Order dated 28.05.2015, passed by the Additional District Judge, Kamber, in Civil Miscellaneous Appeal No.02 of 2014, through which the Order dated 23.04.2014 passed by the Senior Civil Judge Kamber in F.C.Suit No.21 of 2011 (new number), dismissing the restoration application of the Suit has been maintained.

2. Learned counsel for the applicant submits that notwithstanding the alleged conduct of the applicant as recorded in the impugned orders, and the allegation that the suit was not being proceeded diligently; on the fateful day i.e. 19.12.2012, the matter was not fixed for evidence and or final hearing of the suit; hence, could not have been dismissed for non-prosecution by the Trial Court. According to him, at most, the pending applications could have been dismissed for non-prosecution, whereas, the restoration application ought to have been allowed on this ground by the Trial Court as well as Appellate Court and in support of his contention, he has relied upon the cases reported as 1987 SCMR 733 (*Qaim Ali Khan v/s. Muhammad Siddique*) and 2012 CLC 556 (*Jangoo v/s. Fasahatullah Khan and others*).

3. On the other hand, learned counsel for the respondents has opposed this Civil Revision Application and submits that the suit of the plaintiff was earlier dismissed for non-prosecution and was restored conditionally on 12.05.2011 and such conduct does not warrant any interference by the Court, therefore, this Civil Revision Application is liable to be dismissed.

4. I have heard both the learned counsel as well as learned Additional Advocate General. After briefly hearing the parties on an earlier date R&Ps were summoned and from the perusal of the same it reflects that on the date before the order of dismissal for non-prosecution was passed i.e. 12.12.2012, the matter was called and the plaintiff was in attendance along with his counsel and so also the defendants. The diary sheet of this date further reflects that the matter was fixed for arguments on interlocutory application under Order 16 Rules 6 and 7 C.P.C. read with Articles 76 and 77 of the Qanun-e-Shahadat Order, 1984 and 151 C.P.C. The matter was adjourned on the request of the plaintiff's counsel for 19.12.2012 and such adjournment was opposed. The diary sheet of 19.12.2012 reflects that the matter was called and since no one was in attendance on behalf of the plaintiff, it was dismissed for non-prosecution. Thereafter the restoration application under Order 9 C.P.C. was also dismissed by the Trial Court vide order dated 23.04.2014; the appeal also failed against which instant Revision Application has been filed.

5. On perusal of the record it clearly reflects that on the fateful day, i.e. 19.12.2012, the matter was never fixed for leading the evidence or for hearing of the main suit. It was fixed for hearing of application(s) and as per law settled the entire suit could not have been dismissed but only listed applications could have been dismissed for non-prosecution. The Hon'ble Supreme Court in the case reported as ***Qazi Muhammad Tariq v. Hasin Jahan and 3 others*** (1993 SCMR 1949), has settled this proposition as under: --

"It seems difficult to support the order dated 27.3.1986 of the trial Court and the orders of the Additional District Judge and the High Court. A perusal of the record indicates that the suit of the appellant was dismissed on a day which was not fixed for its hearing, it was a day appointed for hearing arguments on the application for temporary injunction filed by the appellant. In the absence of the appellant all that the learned trial Judge could do was to dismiss the application

for temporary injunction. It could not proceed beyond that and dismiss the suit as well. Quite clearly its order in this regard was without jurisdiction and void. This aspect of the case was noticed neither by the learned Additional District Judge nor by the High Court. The order of dismissal being void all that the appellant was required to do was to call upon the learned trial Court to treat his suit as still pending. We would therefore accept this appeal, set aside the orders of the three Courts below and direct that the suit of the appellant should be treated as still pending and disposed of in accordance with law. The costs in this appeal shall abide by the final event.

6. Similarly in the case of ***Pehalwan Goth Welfare Council through General Attorney v. District Co-Ordination Officer (DCO) Karachi and 13 (PLD 2012 Sindh 110)***, it has been held as follows: --

"From the perusal of the above order it is abundantly clear that the Court was fully cognizant of the fact that number of applications are fixed for hearing. Court also noted that one Imran Khan Bangash had filed an application informing the Court that the Power of Attorney executed in favour of Dilshad has since been withdrawn and so also the authority of the counsel appointed by him has come to an end yet the Court proceeded to dismiss the applications along with the Suit. It may be observed that application C.M.A No.2263 of 2004 fixed at serial No.1 for orders clearly shows that the Chairman of the appellant's Welfare Council had laid information before the Court that said Dilshad does not any more enjoy the blessing of the Welfare Council/appellant and so also the learned Advocate ought to have refrained from making such statement of no instructions. On the application fixed at serial No.1 for orders either this Court ought to have issued notice of intimation to Mr. Imran Khan Bangash and it seems that no such notice has been issued nor it is so pleaded by the respondents.

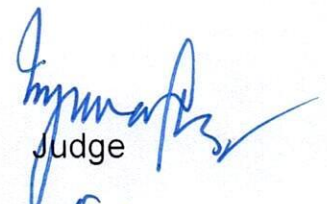
The crux of the case relied upon by the learned counsel for the appellant fully supports his contention. **When the matter is fixed for hearing of the application the Court could attend only such applications, admittedly the Suit was not fixed either for settlement of issues nor it was fixed for evidence of plaintiff which may entail dismissal for non-prosecution.** Accordingly fortified by the judgment relied upon by the learned counsel for appellant we are of the view that limitation in such cases where very foundation of the order could not be sustained and could not be treated as an order under Order IX, Rule 8, C.P.C. therefore, restoration application would lie under section 151, C.P.C. and not under Order IX, Rule 9, C.P.C. and limitation governed by the residuary Article 181 of the Limitation Act, and not by Article 163 of the Limitation Act. For the foregoing reasons we would allow this appeal. The application C.M.A No.386 of 2007 stands granted. Consequently, order dated 11.8.2004 stands set aside. The matter will be deemed to be at the same stage as on 11.8.2004.

7. Same view has been reiterated in the cases reported as ***KARACHI FISHERIES HARBOUR AUTHORITY v HUSSAIN (PVT.) LTD (2016 MLD 1037), 1987 SCMR 733 (Qaim Ali Khan v/s. Muhammad Siddique), Jangoo v Fasahatullah Khan (2012 CLC 556)***.

8. In view of such position, the trial Court was under an obligation to consider this aspect while deciding the restoration application and therefore, this Civil Revision Application merits consideration and is

accordingly allowed by setting aside the order dated 23.04.2014, passed by the Trial Court and order dated 28.05.20015 of the Appellate Court and as a consequence thereof, the application filed under Order 9 CPC by the Plaintiff stands restored to its original position, which the Trial Court shall decide in accordance with law settled by the Hon'ble Supreme Court of Pakistan as well as other Courts referred to hereinabove. Such exercise to be carried out by the Trial Court within thirty days from the receipt of this order. If the suit is restored, then the Trial Court may bound the plaintiff to pursue its case on day to day basis, with other conditions as may deemed necessary.

9. With these observations, this Civil Revision Application is allowed in the above terms. Office to make compliance by sending copy of the order to the trial court immediately.

  
Judge  
5.10.2020

Manzoor