

Order Sheet

IN THE HIGH COURT OF SINDH KARACHI

Constitutional Petition No. D – 533 of 2012

Date _____ Order with signature of Judge _____

Present :

1. Chief Justice
2. Mr. Justice Nadeem Akhtar

1. For Katcha Peshi :

2. For hearing of Misc. No.2929/2012 (U/O XXXIX R 1&2 CPC) :

Date of hearing : 16.04.2013

Petitioner : Muhammad Tariq Mansoori
through Mr. Zahid Farooq Mazari, Advocate.

Respondent No.1 : Abdul Ghani Mansoori
through Mirza Asif Baig, Advocate.

Respondents 2 – 4 : None present.

ORDER

Nadeem Akhtar, J. – Respondent No.1 filed Suit No. 663 of 2007 in the Court of IVth Senior Civil Judge, Karachi (Central), for declaration, cancellation, damages and permanent injunction against the petitioner, one Abdul Ghafoor Mansoori, the Sub-Registrar T. Division, Karachi, and the DDO CDGK (KDA Wing), Karachi. The petitioner was cited in the Suit as defendant No.2. The official defendants were ordered to be deleted from the array of defendants by the trial court vide order dated 10.08.2007. The Suit was dismissed on 28.08.2009 for non-prosecution. On 28.09.2009, respondent No.1 / plaintiff filed an application for recalling the said order dated 28.08.2009. By order dated 06.01.2010, the trial court allowed the application, that is, the Suit was restored, subject to payment of cost of Rs.10,000.00 each to defendant No.1 Abdul Ghafoor Mansoori and the petitioner / defendant No.2. Respondent No.1 / the plaintiff was specifically directed by the trial court “*to deposit cost of Rs.20,000/= with the Nazir of this Court by next date of hearing positively, in case of failure the Order dated 28.08.2009 will remain intact*”. Thereafter, the Suit came up before the trial

court on 18.01.2010 for the evidence of the plaintiff / respondent No.1 when the Presiding Officer was on leave, but the advocates for the parties were present. The matter then came up before the trial court on 25.01.2010 for the same purpose, when the counsel for the plaintiff / respondent No.1 was absent. It was observed by the trial court that the plaintiff / respondent No.1 had not complied with the order dated 06.01.2010 as the amount of cost imposed on him had not been deposited by him on the next date following 06.01.2010. In view of the above, the trial court held on 25.01.2010 that the order of dismissal of the Suit passed on 06.01.2010 became final. Against the order passed by the trial court, respondent No.1 filed Civil Revision Application No.20/2010 before the IVth Additional District Judge, Karachi (Central). By the impugned order dated 19.01.2012, the order passed by the trial court was set aside and the Revision was allowed.

2. At the very outset, the learned counsel for the petitioner submitted that, as the order of dismissal of the suit passed by the trial court was appealable under Section 96 CPC, the Revision filed by respondent No.1 thereagainst was not maintainable. He further submitted that, without prejudice to his above submission, the Revision could not be entertained also on the ground that it was barred by time and respondent No.1 had not filed any application for condonation of the delay in filing the same. It was urged that the impugned order passed by the Additional District Judge, in the purported exercise of his revisional jurisdiction, is not only illegal, but is also without jurisdiction.

3. On the other hand, the learned counsel for respondent No.1 contended that the order passed by the trial court was not appealable under Section 96 CPC, as the provisions of Section 96 CPC apply only to appeals from original decrees and not to orders. He relied on Clause (c) of Rule 1 of Order XLIII CPC, and submitted that only a Revision could be filed against the order passed in this case by the trial court. It was conceded by him that the Revision was not filed within the prescribed limitation of 90 days, and also that no application was filed for condonation of the delay in filing the Revision.

4. We have heard the respective contentions of the learned counsel and have also perused the relevant provisions of law relied upon by them. We shall first deal with the submission made on behalf of respondent No.1 regarding the applicability of Order XLIII Rule 1(c) CPC in the facts and circumstances of this case. Reliance on Order XLIII Rule 1(c) CPC by the learned counsel for respondent No.1 is misconceived. For the sake of argument, if his contention is accepted, even then the said Rule 1(c) shall not be applicable in this case for the simple reason that the said Rule 1(c) applies to cases where an application for

setting aside the dismissal of a Suit is rejected. In the present case, such an application filed by respondent No.1 was not rejected, but was allowed subject to deposit of cost by him.

5. Regarding the other submissions of the learned counsel, it may be noted that it is an admitted position that the Suit filed by respondent No.1 was restored by the trial court vide order dated 06.01.2010 subject to the deposit of cost by him, by the next date of hearing with the Nazir ; the cost was not deposited by respondent No.1 with the Nazir on or before the next date of hearing although his counsel was present before the trial court on the next date ; and, the order of dismissal of his Suit was to remain intact in case of his failure in depositing the cost. The learned counsel for respondent No.1 attempted to convince us that respondent No.1 was justified in not depositing the cost on the next date of hearing, that is, on 18.01.2010, as the Presiding Officer of the trial court was on leave on that date. This explanation cannot be accepted as respondent No.1 was directed to deposit the cost with the Nazir of the trial court, and he was bound to deposit the cost with the Nazir whether the Presiding Officer was present or not on the next date of hearing. Because of such failure on the part of respondent No.1, the conditional order of restoration of the Suit lost its efficacy and the order of dismissal passed by the trial court on 06.01.2010 became final.

6. A Revision can be filed before the High Court under Section 115(1) CPC or the District Court under Section 115(2) CPC in matters in which no appeal lies. Section 96 CPC provides that an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorised to hear appeals from decisions of such Court. It may be appreciated here that, under the provisions of the Code of Civil Procedure, 1908, a decree follows even if the Suit is dismissed for non-prosecution, and as such only a first appeal shall lie under Section 96 CPC against such decree. High Court has the inherent power and jurisdiction to convert a Revision into an Appeal and vice versa. But in this case, the Revision filed by respondent No.1, by bypassing the first appellate stage, could not be converted into an appeal mainly for two reasons : firstly, unlike an appeal, a Revision is not a continuation of the Suit ; and secondly, the appeal had become barred by time.

7. For the reasons discussed above, the question of filing the Revision beyond the prescribed period of limitation has become irrelevant. However, we would like to observe that the Revision was admittedly barred by time and, in the absence of an application for condonation of delay, the same was indeed not maintainable. In the impugned order, the Additional District Judge has not given

any reason for entertaining the time barred Revision and / or for condoning the delay in filing the same.

8. In view of the above discussion, we hold that the Revision filed by respondent No.1 against the decree / order of dismissal of the Suit, was not maintainable, and the impugned order passed by the Additional District Judge is *coram non judice*. Therefore, the impugned order cannot be allowed to remain in the field.

The above are the reasons of the short order announced by us on 16.04.2013, whereby this Constitutional Petition was allowed as prayed with no order as to costs.

Chief Justice

Judge

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