

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.126 of 2005

Plaintiff : Muhammad Ibrahim Suleman  
Through Mr. Noman Jamali, advocate.

Defendant No.1 : Shaikh Muhammad Islam  
Through Mr. Abdul Wajid Wyne, advocate.

Defendants No.2 & 3: Mrs. Farhat Islam & Deputy District Officer,  
Through Mr. Faisal Siddiqui, advocate.

Defendant No.4 : Deputy District Officer, Jamshed Town,  
CDGK, Karachi.

Defendant No.5 : The Sub-Registrar 'T'-Division VI-B, Lyari,  
Karachi.

Defendant No.6 : Province of Sindh  
through Secretary L/U, Board of Revenue  
BL79, Karachi.  
Through Jam Habibullah, State counsel.

Date of Hearing : 12.01.2015

For hearing of CMA No.14916/2014  
For hearing of CMA No.14917/2014

**ORDER**

**NAZAR AKBAR, J.** Through this application (CMA No.14916/2014) the Plaintiff has sought restoration of his suit dismissed for non-prosecution on 06.08.2014. This application has been filed on 10.11.2014 and, therefore, the Plaintiff has also filed an application (CMA No.14917/2014) under Section 5 of the Limitation Act, 1908 seeking condonation of delay in filing the application for restoration of suit. Defendants No.1 to 3 have filed their respective counter affidavits to both these applications and these applications after

hearing of parties were allowed by short order. Following are the reasons for the short order dated 12.01.2015.

2. Both these applications are supported by affidavits of counsel for the Plaintiff as well as affidavit of the Plaintiff. The main contention of the Plaintiff is that on the fateful day, his counsel was busy before Divisional Bench in High Court Appeal No.20/2014 and four other cases fixed before different benches of this Court and his himself was not in Karachi. He has filed copy of cause list showing the engagement of his counsel and he has also filed air ticket showing that Plaintiff himself was out of city and, therefore, he was prevented by the circumstances beyond their control to attend the Court. To show his seriousness in contesting the matter, the Plaintiff has narrated the facts which includes that the Plaintiff has already deposited the balance sale consideration in Court on **05.04.2005** and solvent surety for almost the equivalent amount. It is further contended by the counsel for the plaintiff that even his examination-in-chief was completed on 26.04.2008 before the Commissioner for recording evidence. The Plaintiff was cross-examined on 23.6.2008 by the counsel for the Defendants No.2 & 3 and on 14.1.2009 counsel for the Defendant No.1 also cross-examined the Plaintiff which was completed on 4.2.2009 but thereafter before recording of evidence of the other witnesses of the Plaintiff, by order dated 17.8.2009, the appointment of commissioner for recording evidence was recalled and the evidence was ordered to be recorded before the Court. In the meanwhile previous counsel of the Plaintiff was elevated to the bench and the fresh counsel filed his power on **07.2.2014**. The further

ground taken up by him in the application and during course of arguments were that on **06.08.2014**, his court clerk informed him that the case has been discharged which he believed and later on it transpired that it was wrongly noted by court clerk. The Plaintiff's counsel and the Plaintiff himself has stated on oath that it transpired to them on **05.11.2014** that the suit has been dismissed for non-prosecution when they enquired from the office that why the suit has not been listed.

The Defendants in their counter affidavit have disputed the claim of the Plaintiffs for restoration of the suit. However, they have not denied and disputed the fact that partial evidence of the Plaintiff was recorded before the Commissioner and even cross-examination was completed and after recalling of the order of appointment of commissioner, the case has only been listed four times before **6.8.2014**. This fact has also not been denied by the counsel for the Defendant that the counsel of the Plaintiff was elevated and therefore, it could also be one of the reasons for the delay.

I have carefully examined the order of dismissal of the suit and noticed that impression given to the learned Judge in absence of the Plaintiff's counsel was that the Plaintiff has failed to lead "any evidence" before the commissioner. This fact is contrary to the record and the counsel for the Defendant had not pointed out the correct position to the Court that the Plaintiff's evidence including his cross-examination has been completed by Defendants No.1 to 3 respectively on different dates. The case on 06.08.2014 was listed for further evidence of the plaintiff. But it was not reflected so in order

sheet and, therefore, learned Judge was misled and he dismissed the suit instead of closing side of the Plaintiff for evidence. The denial of para 11 in the counter affidavit to the effect that the Court has rightly observed failure of the Plaintiff to lead **“any evidence”** for the last several years as stated above is not correct in view of record of Commissioner for recording evidence. It was not the case of failure of plaintiff to lead **“any evidence”** it was the case of further evidence therefore, order of dismissing the suit for non-prosecution was under the impression that no evidence has been led was contrary to record. In fact it was duty of the Defendant to have properly assisted the Court on facts from record while passing the order in their favour by misreading of record. Suit could not have been dismissed for non-prosecution, had it been brought to the notice of the Court that it was listed for “further evidence of the Plaintiff” and the evidence of Plaintiff himself had been recorded, which could not have been ignored by the Court but for the lack of assistance at the bar on the facts available on record.

Regarding application for condonation of delay in filing the application for restoration of suit, suffice is to say that learned counsel for the Plaintiff and his counsel have stated on oath that they came to know about dismissal of suit on **05.11.2014** and the limitation start from the date of knowledge. The Defendants have denied such fact in their counter affidavit, however, mere denial by defendant is not sufficient to disbelieve the Plaintiff and his counsel regarding date of knowledge of passing the impugn order. The counsel for the plaintiff has relied upon the case law reported as

**1989 SCMR 883** (Mst. Begum and others ..Vs.. Mst. Begum Kaniz Fatima Hayat and others) & **PLD 1992 SC 577** (Ghulam Qasim ..VS.. Ghulam Hussain), squarely covers the facts and circumstances of the case in hand. Even otherwise, it is settled law that cases should be decided on merits rather on technicalities.

In view of the above, both applications were allowed and these are the reasons.

**Karachi**

**Dated:** \_\_\_\_\_

**J U D G E**