IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Civil Revision Appln.No.S-31 of 2018
(Muhammad Yousif & Ors Vs. Dr. Allah Nawaz & Ors)

Applicants	:	Muhammad Yousif and others, *through* Mr. Ghulam Dastagir A. Shahani, Advocate.
Respondents	:	Dr. Allah Nawaz Bugti Suhrab Khan, Mst. Nafeesa Hayat Khan, (*Nemo)* & Others. Mr.Abdul Waris Bhutto, Assistant Advocate General, Sindh
Date of Hearing	:	18.09.2025.
Date of Decision	:	18.09.2025.

JUDGMENT

Ali Haider 'Ada'.J:- Through the instant Civil Revision Application, the applicant has assailed the order dated 23.10.2017, passed by the learned District Judge, Kashmore @ Kandhkot, in Civil Appeal No.06 of 2017, whereby the said appeal was dismissed for non-prosecution. Thereafter, the applicant moved an application under Order XLI Rule 19 read with Section 151, C.P.C., seeking restoration of the appeal along with an application for condonation of delay. However, both applications were dismissed by the learned 1st Additional District Judge, Kandhkot, vide order dated 31.01.2018.

2. The applicant has also challenged the validity of the impugned judgment and decree dated 14.02.2017, passed by the learned Senior Civil Judge, Kandhkot (Trial Court). The suit had been instituted by the applicant, as plaintiff, seeking declaration to the effect that the plaintiffs/applicants are joint owners of the suit property and that the revenue record be corrected accordingly. The applicants had further prayed for a permanent injunction restraining the defendants /respondents from dispossessing them, as well as for correction of the record of rights, which had earlier been mutated on the basis of a gift deed executed by father on 23.03.1987. The learned trial Court, through the impugned judgment, partly decreed the suit to the extent of recognizing the applicants' entitlement to their respective legal shares in the property, while declining their claim regarding the validity of the gift deed. Being aggrieved and dissatisfied with such findings, the applicants preferred Civil Appeal No.06 of 2017 before the

learned District Judge, Kashmore @ Kandhkot. The said appeal, however, was dismissed for non-prosecution on 23.10.2017, and the subsequent application for restoration under Order XLI Rule 19 read with Section 151, C.P.C., was also dismissed on 31.01.2018 by the learned 1st Additional District Judge, Kandhkot. The applicants have now assailed both orders through the present Civil Revision Application.

3. Learned counsel for the applicant contended that on 09.02.2017, the Civil Appeal was fixed before the Appellate Court for the purpose of service upon the respondents and not for hearing. On the said date, the Appellate Court adjourned the matter to 23.02.2017 for completion of service upon the respondents. However, contrary to the record, the Civil Appeal was subsequently dismissed for non-prosecution, despite the fact that it was not fixed for hearing. Learned counsel further argued that although the application for restoration was filed after a lapse of two months, the delay was supported by sufficient cause and exceptional circumstances. It was explained that the counsel for the applicant had sustained injuries, was cited as an injured witness in Crime No.65/2017, and had also produced a medical certificate in support thereof. These facts, according to counsel, were not taken into account by the learned Appellate Court, which dismissed the restoration application and thereby deprived the applicants of their lawful rights. He, therefore, prayed that the matter be remanded to the Appellate Court for decision on merits rather than dismissal on technicalities.

4. On the other hand, despite service through all modes, including publication, effected as far back as 2018 and up to 25.08.2025, the respondents have remained absent, and the service upon them is held good.

5. Mr. Abdul Waris Bhutto, learned Assistant Advocate General Sindh, appearing on behalf of the public functionaries, submitted that although the dispute essentially lies between private parties, the law on the subject is clear. He pointed out that while the prescribed limitation for filing an application for restoration is 30 days, such limitation is not to be applied especially when exceptional circumstances are available on record. He added that the Appellate Court had dismissed both the application for condonation of delay as well as the restoration application without rendering a speaking order or recording any finding as to whether the cause shown was sufficient. In his submission, technicalities cannot be allowed to defeat the lawful rights of the parties, and the

Appellate Court ought to have exercised its discretion to decide the appeal on merits.

6. Heard the arguments and perused the material available on record.

7. Firstly, it is a settled principle of law that parties cannot be debarred from pursuing their remedy merely on technicalities. Every litigant is entitled to be afforded an opportunity to plead and contest their case, and the Courts are under an obligation to act in accordance with the provisions of law and follow the prescribed procedure. The paramount duty of the Court is to decide matters on merits rather than to avoid adjudication on technical grounds. Reliance be placed upon the case of ***Faryal Arif Latif vs Arif Latif 2025 SCMR 395 and Hashim Khan vs Mst. Musarat Begum 2025 SCMR 564.***

8. In the present case, the appeal was dismissed by the learned Appellate Court vide order dated 23.10.2017, on the ground of non-prosecution. However, the record reflects that on the said date the appeal was not fixed for hearing, but rather for service of notice upon the respondents. It is significant to note that prior to its dismissal, the appeal had been fixed on 09.10.2017, when the learned Appellate Court adjourned the matter to 23.10.2017 specifically for completion of service upon the respondents and accordingly directed issuance of process against them. Despite this, the appeal was dismissed for non-prosecution on 23.10.2017, without affording the applicant a proper opportunity to proceed further, which clearly reflects an error in procedure.

9. There exists a substantial difference under the concept of law between ***appearance*** and ***hearing***. The mere requirement of appearance does not, by itself, amount to the matter being fixed for hearing. In procedural jurisprudence, *appearance* and *hearing* are distinct stages of a case: In **Black law Dictionary** the words hearing and appearance are defined as: *A judicial session, open to the public held for the purpose of deciding issues of fact or of law, something with witnesses testifying –Also termed judicial hearing.* ***Appearance****- A coming into court as a party or interested person, or as a lawyer on behalf of the party or interested person*

10. As per the verdict of the appellate Court, the appeal was dismissed under Order XLI Rule 11(2), CPC**,** vide order dated 31.01.2018. In this context, it is pertinent to elaborate upon the scope of Order XLI Rule 11(2) CPC. Whilst, Order XLI Rule 19, C.P.C., specifically provides that where an appeal has been dismissed in default under Rule 17, the Court has jurisdiction to re-admit the

appeal, subject to sufficient cause being shown. For ready reference, the relevant provisions of Order XLI Rules 11(2), 17 and 19, C.P.C., are reproduced as under:

> **11. Power to dismiss appeal without sending notice to Lower Court.– (1) The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.**
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> **(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.**
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> **(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.**
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> **17. Dismissal of appeal for appellant"s default.– (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.**
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> **19. Re-admission of appeal dismissed for default.– (1) Where an appeal is dismissed under rule 11, sub-rule (2), or rule 17 or rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.**
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> **(2) The provisions of section 5 of the Limitation Act 1908 (IX of 1908), shall apply to an application for re-admission of an appeal dismissed under sub-rule (2) of rule 11 or sub-rule (1) of rule 17.**

11. The significance of this provision is that dismissal of an appeal under Order XLI Rule 11 must be preceded by fixation of the matter for hearing and by affording the appellant (or his counsel) an opportunity to be heard. In other words, a mere date of *appearance* cannot be equated with a date of *hearing* within the contemplation of Rule 11(2). The legislative intent is to ensure compliance with the principles of natural justice, so that no appeal is dismissed in limine without a reasonable opportunity of being heard. Accordingly, when an appellate Court dismisses an appeal under Rule 11(2), it must be demonstrably clear from the record that the matter was in fact fixed for hearing. Any dismissal in the absence of such compliance would not fall within the true spirit of Rule 11(2) CPC.

12. On a bare reading of Order XLI Rule 17, C.P.C., it is clear that the said

provision applies only where an appeal has been fixed for hearing and, on the day so fixed, the appellant fails to appear. In the present case, however, the record demonstrates that on 23.10.2017 the appeal was not fixed for hearing but was adjourned for service of notice upon the respondents. Therefore, the dismissal of the appeal on the ground of non-prosecution does not strictly fall within the ambit of Order XLI Rule 11(2) or 17, C.P.C. The Appellate Court, in fact, treated the absence of the appellant as a default, but such default could not be brought under the *stricto senso* application of Rule 11(2) or 17, as the stage of hearing had not yet arrived. In this context, reliance is placed upon the case of ***Tehsil Municipal Administration Faisalabad vs Muhammad Saleem and others 2016 SCMR 2009.*** Similarly further support is drawn from the case of ***State Property in Pakistan vs Khuda Yar and another PLD 1975 Supreme Court 678,*** as it was held that:

> ***The first question to be considered is as to what precisely is meant by the expression "called on for hearing" in the context in which it is used in Order XLI, rule 17. It may be recalled that on the basis of a large number of authorities mentioned earlier, learned counsel for the appellant bad contended before us that the word "hearing" as used in this context meant "an effective bearing" when anything germane to the appeal would be done or had to be done. The expression as used in Order IX, rule 8 and Order XVII, rule 2 was interpreted in Sheikh Abdul Rahman v. Shib Lal Sahu and others (A I R 1922 Pat. 252). It was observed as follows:-***
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> ***"The word `hearing' has not been defined in the Code but it is obvious that it is used in different rules with a view to state the different purposes for which a date for bearing of the suit is, fixed. Now Order IX, rule 1, read with Rule 3, it would appear that after the institution of the suit when the summons is issued upon the defendants calling upon them to appear upon a particular date and that date is the first hearing of the suit and if the parties fail to appear when the suit is called on for hearing on that date the plaintiff's suit is dismissed for default. Various steps have to be taken by the parties in a suit in order that it may be ready for final hearing which means the examination of witnesses, the tendering of documents, and the hearing of arguments. At the intermediate stage in order to enable or compel the parties to take necessary steps in the prosecution of the case the Court may fix dates for some particular action to be taken. These dates are dates for hearing of that, particular matter which is specified is the order of the Court."***
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> ***During the intermediate stage in a suit the word "hearing" is used in the context of those particular matters as mentioned above and not for the hearing of the case: as such. In this case the dismissal of suit in default on the day fixed for appointment of a Guardian was considered to be without jurisdiction. In Mst. Barkat Bibi v. Fateh Ali, the word "hearing" as used in Order IX, rule 3 was explained by Cornelius, J. as the date on which the investigation of any matter germane to the suit was to be performed by the Court. In***

Ghulam Farid Muhammad Latif v. The Central Bank; of India Ltd., Lahore, the order of dismissal in default made under Order IX, rule 8 was set aside on, the ground that the word "hearing" as used in this provision as also in Order XVII, rule 2 meant "effective hearing" and not merely a day fixed for the appearance of the parties. In Sh. Ghulam Mujraba and others v. Noor Muhammad Khan (P L D 1971 Lah. 746), same view was taken and "hearing" was interpreted to be a date on which the matter is fixed before the Court towards further proceedings of the case. It was held that in the circumstances of the case the date fixed was only to see as to whether a file which was being summoned for the last two yearn had been received or not and therefore, it f did not amount to the hearing of the suit which could not, therefore, be dismissed for the non-appearance of the plaintiff: the order was set aside. In Muhammad Swaleh and another v. Messrs United Grain & Fodder Agencies on 16th March, 1960 a date fixed for evidence, when both the parties were present, the plaintiff sought adjournment on the ground that his counsel was busy in the High Court. The case was then adjourned to 21-4-1960 which was subsequently declared to be a holiday. It was put up before the trial Judge on the next day, i.e. 22-4-1960 when the defendant and his counsel absented. Proceedings were taken ex parte against them, which were set aside on the ground that, it was not date fixed for hearing. In Rahim Bux and another v. Gul Muhammad and 2 others (P L D 1971 Lah. 746), 30th of September 1963 was fixed for filing of written statement by defendants but owing to a mistake on the part of the Reader the case was taken up, instead on 26th July 1963 and dismissed for non-appearance of the plaintiffs. It was held that it was not a date fixed for hearing of the case but for filing of the written statement and further that the order of dismissal was void ab initio and no period of limitation ran against a void order. It was further held that in the circumstances of the case section 151, C. P. C. could also be resorted to for restitution of the same. In Haji Ghulam Rasul v. Allah Ditta the case was fixed for arguments but was dismissed in default for the absence of the plaintiff. It was held that the Court should have heard arguments of defendants and disposed of the case on merits or waited till the end of the day. The order of dismissal was set aside.

As would appear from the foregoing discussion, all these authorities dealt with cases of dismissal of suits. The expression "called on for hearing" as used in Order XLI, rule 17 obviously presumes the completion of all earlier steps envisaged by rules 11 to 16 of Order XLI. Unlike the suit there would be no question of filing the written statement or of recording of evidence and therefore, an effective hearing would be one on which arguments were to be heard. This obviously presupposes the service of the parties and therefore, the Court was under an obligation to ascertain in the first instance that the respondent had been served. It is evident that the appeal bad been received by the Additional District Judge on transfer from the District Judge on 10-12-1970 and was straightaway fixed for arguments for 11-1-1971 with notice to the parties. Rule 12 of Order XLI clearly envisages the essentiality of the service of the respondent. Of course, the appeal could be dismissed for the non-appearance of the appellant on two earlier stages: Firstly, it can be dismissed in limine if the Court is not satisfied that a prima facie case is made out and in that event neither the record may be sent for, nor a notice may be issued to the

respondent. That is the stage envisaged by rule 11. If, therefore, on a day fixed under this rule the appellant does not appear the Court may make an order that the appeal be dismissed. Dismissal at this stage is also discretionary and furthermore the order of dismissal is appealable It cannot be disputed that in the case before us the order of dismissal was not made under this provision. Straightaway on receipt of the file the Additional District Judge sent for the record, issued notices to the parties and fixed the case for arguments. Once the appeal crosses the hurdle of preliminary hearing under rule 11, then under rules 14 and 15 of Order XLI the appeal cannot be heard and decided without the service of the respondent or his counsel. The mandatory provision contained in rules 14 and 15 makes the position absolutely clear that the notice issued to the respondent shall be delivered and in the event of his non-appearance, the appeal will be heard ex parte. Rule 16 envasages the presence of the parties and if having heard the appellant in support of his appeal the Court finds that no case is made out it may even dismiss the appeal without calling upon the respondent to reply. Rule 16, therefore, clearly proceeds on the presumption of the presence of the parties. If, however, the appellant does not appear at this stage the Court may make an order of dismissal in default. Here too a discretionary power has been conferred on the Court and it is under no obligation to dismiss the appeal. On the other hand the view taken by the High Court in the impugned order proceeds on the assumption as if no discretion or option vested in the Additional District Judge not to dismiss the appeal which he was under an obligation to dismiss. The conclusions we have reached, therefore, are: Firstly that it was the duty of the Additional District Judge to ascertain that the respondent had been duly served and this he did not discharge and, therefore, the case could notes be called for hearing on that date, Secondly, that be had acted rather mechanically without being aware of his discretionary power not to dismiss the appeal and therefore, the order of dismissal having been made in ignorance of jurisdiction was void and a nullity.

In Musaliarakath Muhammad v. Nanaviakrama The Zamorin Raja Avergal and others (A I R 1923 Mad. 13), the learned Judges traced the history of Order XLI, rule 17 which corresponded to section 556 of old Code, the only difference between the two provisions, however, being that the expression "shall be dismissed" as existing in the earlier provision was substituted by the expression "the Court may make an order that the appeal be dismissed", the obligation to dismiss yielding place to a discretion. While interpreting the change in law, the learned Judge held that under the old Code, the Court had no power to adjourn the case and give a further chance to the absenting appellant which power was available to it under the new provision. In this case the learned judge proceeded to deal with the case on merits in the absence of the appellant and the judgment was treated as one without jurisdiction. We might also refer in this context to the argument of Haji Ghias Muhammad based on the Chitley's Commentary under Order XLI, rule 17, that in the event of absence of the appellant dismissal of appeal on merits would be illegal. This does not help the respondent. The view taken by most of the High Courts is that "the fact that the Court is bound to dismiss the appeal for default Joes not enable it to dismiss the appeal on merits but only to adjourn to another date."

> ***Lastly, we would like to observe that even otherwise, the peculiar circumstances of the case would fully justify the invocation of this Court's Constitutional power to do complete justice notwithstanding the technical objections urged on behalf of the respondent each one of which has been separately dealt with and found to be untenable. The dispute relates to a very valuable piece of property situated close to Lahore Railway Station and justice of the case demands that the appeal should be heard and decided on merits, particularly in view of the conduct of the counsel should not only allow the appeal to be dismissed in default in the first instance but also allow the subsequent applications for restoration to meet the same fate. The observation made in this Court's Judgment in Zulfiqar Ali v. Lal Din that if a person "engages a counsel who was lacking in his sense of responsibility to the Court it is he who should suffer and not the other side", does not lay down an inflexible rule to be rigidly and blindly followed regardless of the circumstances of the case. In the very special circumstances of the case before us a departure is amply justified in the interest of justice.***

13. The appellate Court further dismissed the restoration application on the ground of limitation. So, on such aspect, reference may be made to Article 168 of the Limitation Act, 1908, which prescribes a limitation of thirty days for the re-admission of an appeal dismissed for want of prosecution under Order XLI Rule 17, C.P.C. However, in the present case, the appeal was not dismissed under Rule 17, therefore, Article 168 was inapplicable. Consequently, the restoration application alongwith an application for condonation of delay with given reasons on account of any delay should have been examined and not rejected by mechanically applying Article 168. Support for this proposition is drawn from ***Muhammad Qasim and others v. Moujuddin and others (1995 SCMR 218).***

14. Apart from the foregoing, when valuable legal rights of the parties are involved, the matter should be adjudicated on its merits. Consequently, this Civil Revision Application is partly allowed. The impugned orders dated 23.10.2017 and 31.01.2018 are hereby set aside, and the case is remanded to the learned Appellate Court with a direction to re-fix the appeal on its original footing, hear the parties, and decide the matter strictly in accordance with law on the basis of the material available on record. Accordingly, the present Civil Revision Application stands disposed of in the above terms.

JUDGE