

ORDER SHEET

HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

1st Appeal No.D-04 of 1999

1st Appeal No.D-11 of 1999

DATE	ORDER WITH SIGNATURE OF JUDGE(S)
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20.05.2026

Mrs.Razia Ali Zaman Patoli, Advocate for appellant in 1st Appeal No.D-11 of 1999 and for private respondents in 1st Appeal No.D-04 of 1999

Mr.Osama Yousuf Parhyar, Advocate for appellant in 1st Appeal No.D-04/1999 and for private respondents in 1st Appeal No.D-11 of 1999

Mr.Allah Bachayo Soomro, Additional A.G Sindh

Pervaiz Akhtar, one of the legal heirs of the appellant-Abdul Ghafoor on 23.11.2024 filed C.M.A. No.3531 of 2024 in 1st Appeal No.D-04 of 1999, seeking to recall the Order dated 28.03.2023, passed by a Division Bench of this Court, whereby the said 1st Appeal was dismissed for non-prosecution.

Learned counsel for the Legal Heirs (“L.R”) of appellant-Abdul Ghafoor contends that prior to the passing of the impugned order dismissing the 1st appeal for non-prosecution, the subject matter was being listed before a single bench. To this end, counsel had undertook on 11.11.2022, to enter appearance before the Single Bench. At that point in time, land acquisition matters before the High Court Circuit Court, Hyderabad Sindh, were proceeding before the single bench. He submits that the appellant-Abdul Ghafoor had already expired on 01.03.2015, thus, when the matter was taken up for the first time on 28.03.2023 and placed before the Division Bench, neither the legal heirs had notice nor did he, (as no Vakalatnama had been filed). Counsel contended he was still in the process of obtaining authority on behalf of all the legal heirs. According to counsel, 28.03.2023 was the first date of hearing before the Division Bench and as he had not obtained Vakalatnama from the legal

heirs. No notice of the proceedings being listed before the Division Bench was given by office, hence none had knowledge to the detriment of the L.Rs of the appellant-Abdul Ghafoor. He submits that the L.R of Appellant-Abdul Ghafoor found out about developments when they received notice in 1st Appeal No.11/1999 and on 19.09.2024, the counsel entered appearance in the said appeal undertaking to file Vakalatnama on behalf of the L.Rs of Abdul Ghafoor. On 23.11.2024, counsel finally obtained Vakalatnama on behalf of one of the legal heirs of the deceased in the 1st Appeal No.04/1999, and on the same date, filed an interlocutory application seeking to recall the Order dated 28.03.2023. He contended that the 1st Appeal is to be decided on merits and the legal heirs of the deceased were entitled to be heard in the matter particularly as the 1st Appeal No.D-04/1999, impugned the same judgment as the one impugned in 1st Appeal No.D-11 of 1999 and the L.R's of Abdul Ghafoor had already been transposed as respondents in their capacity as L.R as respondent No.1 in the 1st Appeal No.11/1999 vide Order dated 20.02.2025. They were also entitled to prosecute their appeal against the common judgment in 1st Appeal No.D-04/1999.

Learned A.A.G., Sindh, submits that he does not intend to file a Counter Affidavit and will proceed with today's hearing without filing one. Meanwhile, Counsel for respondent No.2 has placed objections to C.M.A No.3531/2024, but the same is not supported by an affidavit.

Heard Counsel and perused the record. At the outset, the facts alleged by the appellant in the C.M.A No.3531/2024 are supported by an affidavit duly sworn, containing specific averments on matters of fact for condonation of delay. Such facts could have been controverted by way of a Counter Affidavit. However, in the present case, there is no rebuttal to the appellant's assertions. In spite of repeated opportunities to the respondents to submit their Counter-Affidavit on the last several dates of hearing, including, once again, today none has been filed. Indeed, after lengthy arguments as we were dictating the orders at the very last stages of dictation, the learned counsel for the respondent No.2 (appellant in 1st Appeal No.D-11/1999) belatedly placed objections to C.M.A No.3531/2024, which were taken on record. On the last date of hearing, counsel were

directed to file Counter-Affidavit and yet only objections have been filed today and this is also not sworn. Clearly this bench cannot wait endlessly for replies. It is a trite principle that where the opposing party, by choice decides not to controvert a sworn testimony by a Counter Affidavit, the factual assertions contained in the affidavit are deemed to be admitted. Further still the facts as alleged by the counsel for the appellant, certainly to the extent of the court record in the two 1st Appeals, as recorded hereinabove, as part of his submission too, appear compelling and reasonable.

The L.R's of Abdul Ghafoor have filed application and affidavit in support thereof seeking to preserve their rights in the same property which is subject matter of another 1st Appeal wherein the legal heirs are also now defending the matter as respondents (1st Appeal No.D-11/1999). This aspect is particularly material, in the light of the observations of the Lahore High Court in **National Command Authority through D.G SPD, Rawalpindi and others v. Zahoor Azam and other** (2024 CLC 1). The Lahore High Court observed as follows in the National Command Authority case:

“25. It is also one of the contentions of learned counsel for the "land owners" that appeal has become barred by time on account of the fact that respondent No.8 was impleaded after the prescribed period of limitation, we may observe that it is trite law that if more than one appeals are arisen out of a common judgment and if one or more of those appeals are even barred by time, same could not be dismissed on account of limitation. Guidance in this respect can be sought from Mehreen Zaibun Nisa v. Land Commissioner, Multan and others (PLD 1975 Supreme Court 397) and Principal Public School Sangota, Government of Khyber Pakhtunkhwa through Chief Secretary and others v. Sarbiland and others (2022 SCMR 189).”

The above observations of the Division Bench of the Lahore High Court in the National Command Authority case merit consideration, particularly as they arise out of observations of the Supreme Court. In the present case, one of the arguments advanced at this point is not that the appeal is time barred, but that the application to set-aside the order dismissing the 1st Appeal No.D-04/1999 is filed belatedly and hit by laches. At this stage, the matter concerns the restoration of the 1st Appeal. In this regard, it must be appreciated that there are two appeals concerning the same property and these appeals arise out of a common

judgment. Indeed it would not be alien to apply principle laid down by the Supreme Court concerning admission of appeal in Land Acquisition matters, which may be time-barred as observed on para-25 above in the **National Command Authority through D.G SPD, Rawalpindi and others v. Zahoor Azam and other**, to cases of 1st Appeal being considered for restoration after being dismissed for non-prosecution. It would be keeping in line with principles of fair play for all the stake holders aggrieved by the common judgment to bring both appeals at par to be heard and decided together. The same will also facilitate in addressing all the questions involved in the two 1st Appeals to be effectually and completely adjudicated upon and finally decided viz the common judgment impugned in both 1st Appeals. Hyper technical knockouts at this stage may be avoided. Last but not least, the rights of the legal heirs and the parties are to be decided on merits and restoring the 1st Appeal dismissed for non-prosecution will not prejudice the parties. Given the observations articulated by us herein, we find persuasive grounds for “sufficient cause” to be made out and to restore the said 1st Appeal No.D-04/1999, which was dismissed earlier for non-prosecution.

Given the above, the First Appeal No.D-04 of 1999 stands restored and re-admitted in terms of Order XLI Rule 19 CPC r/w Section 151 CPC. It is clarified for removal of doubt that all legal pleas and challenges which stood prior to the dismissal of the 1st Appeal as agitated by respondents and/or the opposing parties also stand revived.

To come up for hearing on **18.08.2026**.

JUDGE

JUDGE