

*Order Sheet*

IN THE HIGH COURT OF SINDH, KARACHI

Execution Application No.71/2010

Date	Order with signature of Judge
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FOR HEARING OF CMA NO. 478/2015

Date of Hearing: 25.08.2017.

Mirza Sarfaraz Ahmed, Advocate for Decree Holder/Applicant.  
Mr. Umer Hayat Sandhu Advocate for Judgment Debtor/Respondent. Mr.  
Saleemuddin A. Patoli, AAG.

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**ARSHAD HUSSAIN KHAN, J:-** This is an application filed by the Applicant/ Decree Holder under Order IX Rules 9 of C.P.C read with Section of 151 C.P.C. (CMA No. 478/2015), praying therein to recall/set aside order dated 18.11.2015 passed by this Court whereby the present Execution Application was dismissed for non-prosecution.

2. Material facts for deciding instant application as averred therein are that on 18.11.2015, when the order, which is sought to be recalled, was passed, the counsel appearing for the applicant/decree holder was on general adjournment, granted by this Court without exception w.e.f. 09.11.2015 to 21.11.2015. This fact though had been brought into the knowledge of the Court by the counsel held brief for the applicant/decree holder, yet this Court dismissed the Execution Application for non-prosecution.

3. Upon notice of this application the judgment debtor/respondent filed counter affidavit denying the contentions/allegations has stated that learned counsel for the applicant/decree holder on 27.10.2015 was put on notice to argue the matter on the next date i.e. 18.11.2015, which he had agreed but failed to appear; resultantly the execution was dismissed. Further stated that learned counsel for the applicant/decree holder pm 27.10.2015 had also been granted adjournment by the Court, however, despite clear direction, he failed to appear and argue the matter, therefore, Execution Application was dismissed by the court. Further, it

is alleged that the Execution Application was dismissed on merits and not for non-prosecution; it is stated that orders passed on 27.10.2015 and 18.11.2015 are on merits and hence no violation of Article 10-A of the constitution of Islamic Republic of Pakistan has been violated as alleged; it is also alleged that the order which is sought to be recalled was passed on merits and the applicant has failed to file appeal against the said order hence the order dated 18.11.2015 has attained finality and cannot be challenged through present application, hence the same is liable to be dismissed being misconceived and frivolous in nature.

4. Learned counsel for the applicant/decreed holder during the course of arguments has reiterated the contents of application and affidavit in support thereof and has relied upon (i) **1997 SCMR 1986** *Haji KHUDAI NAZAR and another v. Haji ABDUL BARI*, (ii) **1991 SCMR 2321** *M. MUHAMMAD SADIQ and another v PUNJAB ROAD TRANSPORT BOARD, LAHORE through MANAGING DIRECTOR* and (iii) **2005 SCMR 882** *Messrs SUHAIL PRINTING PRESS v. Syed ALEY EBA ZAIDI*

5. On the other hand, learned counsel for the respondent /judgment debtor during the course of arguments has reiterated the stance taken in the counter affidavit to the restoration application.

6. I have heard the arguments of learned counsel for the parties and with their assistance also perused the material available on record and have also gone through the law on the point as well as the case law cited at Bar.

7. Before going into any further discussion, it would be appropriate to reproduce the relevant portions of the orders dated 27.10.2015 and 18.11.2015 as under:

**Order dated 27.10.2015**

“On filing of the instant Execution Application the J.D. have filed reply to the Counter Objections filed by the D.H (available on page 67 of the Court file). In Para 8 of the reply it has been specifically stated that J.D have scrupulously implemented the judgment and decree dated 26.04.2004. As such, rejection of the instant Execution has been sought summarily.

Today learned counsel for the D.H is not in attendance. Nonetheless the Execution application is adjourned, however, in case learned counsel for D.H failed to proceed with the Execution Application on the next date of hearing, then this Execution Application apparently seems not maintainable may be dismissed without giving any further opportunity to the Decree Holder.

Adjourned to 18.11.2015.”

**Order dated 18.11.2015.**

“In view of Para-8 of the reply filed by the judgment-debtors the judgment-debtors have scrupulously implemented the judgment and decree dated 26-04-2004 of which the present execution application is arising and to this effect the learned counsel for the decree-holder was put on notice on 27-10-2015. Despite such ‘note of caution’ learned counsel for the decree-holder is not in attendance. It appears that the decree-holder has lost interest in proceeding of this execution application. Accordingly, the same is dismissed.”

For the sake of ready reference, para-8 of the reply to the Counter objection of filed by the JD (available at page 67 of the Court file) is reproduced as under:

“8. That the Defendants/Judgment Debtor have scrupulously implemented this Hon’ble court’s Judgment /Decree dated 26<sup>th</sup> April, 2004. It is therefore, prayed that this Hon’ble court may graciously be pleased to reject the plaintiff/Decree Holder’s ‘Counter Objections’ and dismissed the Execution Application summarily.”

8. From the perusal of the above orders, it appears that the Execution Application was not decided on merit but dismissed for non-prosecution. It is settled law that a decree passed by a competent civil Court cannot be dismissed in default. Further there is no express provision provided in C.P.C. for an execution application under which it can be dismissed in default or non-prosecution except under Rule-57 of Order XXI, which provides as follow:-

**“Determination of attachment.**

Where any property has been attached in execution of a decree but by reason of the decree-holder’s default the Court is unable to

proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease”.

As far as the provisions provided under Orders IX and XVII of the C.P.C. are concerned, the same relate to consequences for non-appearance of the parties during the trial and adjournments, respectively. The said provisions do not relate to execution proceedings. The majesty of the command of a Court, as reflected in a valid lawful ‘decree’ to be implemented and executed in letter and spirit, so as to ensure the supremacy of “rule of law”. Now it is also settled proposition of law that once the decree holder has invoked the execution of the decree within the prescribed time, then it is the duty and obligation of the Executing Court to ensure the complete enforcement of the same. In case of failure on the part of the decree holder to appear before the executing Court, the said application for execution can best be adjourned ‘sine die’ but cannot be dismissed without complete satisfaction of the decree.

9. Reverting to the case in hand, this Court on 18.11.2015 dismissed the Execution Application when learned counsel was on general adjournment granted by this Court without exception and in this regard he has also filed the copy of the cause list dated 04.11.2015 reflecting that he was on general adjournment without exception w.e.f 09.11.2015 to 21.11.2015. Such fact is also not controverted by the judgment debtor in his counter affidavit to restoration application. Learned counsel for the Applicant along with the restoration application has also annexed copy of the cause list dated 27.10.2015, which reflects that on 27.10.2015 when the Execution application was fixed in the Court learned counsel for the applicant/decree holder was busy in number of cases before different benches of this Court and further on both the occasions i.e. 27.10.2015 and 18.11.2015, the fact of the preoccupation of the learned counsel for the applicant/decree holder have been duly informed to the Court through the counsel who held the brief of the learned counsel for the decree holder.

10. The reasons assigned in the order which is sought to be recalled are that since Defendants/Judgment Debtors have scrupulously implemented this court's Judgment /Decree dated 26<sup>th</sup> April, 2004, as mentioned in the reply to the counter objection, therefore, from non appearance of the counsel for the applicant/ decree holder on the dates i.e. 27.10.2015 and 18.11.2015, the court assumed that the decree holder had lost his interest in the case and resultantly the Execution application was dismissed.

11. The question arises here is that whether in the restoration application sufficient grounds for restoration have been made out or not and, if Order IX, Rule 9, C.P.C. is not strictly applicable, even then keeping in view the sufficient cause, the execution application can be restored under the inherent powers conferred upon this Court under Section 151, C.P.C. The expression 'sufficient cause' is not capable of being confined to precise, identical, and invariable definition, nor any hard and fast rule can be propounded as to encompass all possible eventualities which may arise due to particular fact and circumstances of each case. This Court has also inherent powers under Section 151, C.P.C.; to make such orders, as may be necessary for the ends of justice and to prevent the abuse of the process of the Court. These are all enabling provisions; the powers, thereunder can be exercised by the Court to cover ostensibly impossible situations, for complete dispensation of justice, for which C.P.C. has been designed, but despite the best efforts of the draftsman, to cater for all possible situations, if it is found lacking in meeting some eventualities, the Court can act *ex delicto justitiae*, supply the omission in the procedure, adopt methodology, for effectually carrying out the purpose in view. Reference in this regard can be made to the case **PLD 1993 SC 418** *NORTH-WEST FRONTIER PROVINCE GOVERNMENT, PESHAWAR through Collector, Abbottabad and another v. ABDUL GHAFUOR KHAN through Legal Heirs and 2 others.*

12. The inherent power of the Court has been preserved to meet a situation where no express provision of law is applicable and such power can be exercised if there is no specific prohibition from a particular Act. The Order IX, rule 9, C.P.C. has basically been designed

for the restoration of suit wholly or partly dismissed under rule 8, and this provision does not speak anything about the restoration of application dismissed in default. It is also well-settled principle of law that absence of necessary provision does not necessarily lead to absence of jurisdiction in a "civil Court for restoration of execution application dismissed in default upon proof of sufficient cause. It can be restored in exercise of inherent powers. In support of the restoration application learned counsel for the decree holder sworn his personal affidavit besides the affidavit of the decree holder which clearly mentioned that learned counsel for the applicant/decree holder was on general adjournment without exception, hence his non appearance on the date when the order which is sought to be recalled was passed was neither willful nor deliberate but on account of general adjournment which was published on 4.11.2015 well before date of hearing. Above said facts demonstrate sufficient cause for non-appearance of the learned counsel of the decree holder on 18.11.2015.

13. The upshot of the discussion, I am of the view that the applicant has clearly demonstrated sufficient cause for non-appearance on 27.10.2015 and 18.11.2015. Accordingly, present application is allowed and the order dated 18.11.2015 passed by this Court is recalled and Execution Application is restored to its original position.

JUDGE

Karachi

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