ORDER SHEET

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Revision Application No.S-62 of 2017

Date	Order with signature of Judge

Hearing of cases (priority);

1. For orders on office objection at Flag "A"
2. For hearing of main case
3. For hearing of CMA No.585/2017

29.11.2021

Applicant Ghulam Sarwar present in person
Mr. Abdul Ghani Abro, Advocate for respondent No.1
Mr. Noor Hassan Malik, Assistant Advocate General

O R D E R

KHADIM HUSSAIN TUNIO, J –. Through instant Revision Application, the applicant has challenged the impugned order dated 05.05.2017, passed in Civil Appeal No. 60/2015 Re- Ghulam Sarwar Vs. Mir Shabbir & others, by the learned Additional District Judge Pano Akil and order dated 03.04.2015 passed by the learned II-Senior Civil Judge, Sukkur on an application under Order IX Rule 9 CPC read with Section 151 CPC and an application under Section 5 of Limitation Act, 1908 filed in F.C Suit No.10/2010 Re- Ghulam Sarwar Vs. Mir Shabbir & others, for recalling of order dated 19.03.2014 whereby the suit of plaintiff was dismissed in default for non-prosecution.

2. Briefly, the facts leading to instant appeal are that the applicant filed suit for Declaration and Permanent Injunction against the respondents in the Court of learned II-Senior Civil Judge, Sukkur being F.C Suit No.10/2010 stating therein that the applicant was granted agricultural land bearing S. Nos. 524 (3-8) and 525 (4-32) total area 8-0 acres situated in Deh Januji Taluka Salehpat, vide order dated 05.04.1975 and accordingly revised "A" Form was issued to him. Originally, the suit land was granted in the name of one Mir Musrat Ali Khan and subsequently the same was transferred by Mir Bakhat Ali in favour of applicant as mentioned in the order of respondent No. 3. Since its grant the applicant is in

cultivating possession of the suit land. The respondent No.1 challenged the grant of plaintiff before respondent No.2 but the same was dismissed by order dated 03.09.2003 being aggrieved of above order, the respondent No.1 filed appeal before respondent No.3 which was also rejected by order dated 07.05.2005. Thereafter, the respondent No.1 filed revision before the respondent No. 4, who without any notice or giving any opportunity of hearing allowed the same land to respondent No.1 vide order dated 14.12.2006. Being aggrieved and dissatisfied with the said order, applicant filed review application, which was also dismissed vide order dated 12.11.2009, therefore, applicant filed suit for Declaration and Permanent Injunction against the respondents. After service of summons, the respondents filed their written statements and out of pleadings of the parties, issues were settled by the learned trial Court. Thereafter, matter was fixed for recording of evidence of applicant/plaintiff but due to non-appearance of applicant, suit was dismissed in default for non-prosecution vide order dated; 19.03.2014, therefore, applicant filed an application under Order IX Rule 9 CPC for restoration of the suit and application under Section 5 of Limitation Act for condonation of delay in filing an application under Order IX Rule 9 CPC, which were demised vide order dated; 03.04.2015, thereafter, applicant has filed Civil Appeal No.60/2015 which was heard and dismissed by the learned Additional District Judge, Pano Akil vide order dated; 05.05.2017. Hence, this revision application.

3. Learned counsel for the applicant/plaintiff has contended that the impugned order passed by the learned IInd Senior Civil Judge, Sukkur is opposed to law, facts, equity justice which is liable to be set aside; that learned Senior Civil Judge has seriously erred while dismissing the application of the appellant/plaintiff under Order IX Rule 9 CPC for restoration of the suit which was dismissed for non-prosecution; that non-appearance of the appellant in the trial Court was neither wilful nor deliberate

but due to the unawareness and misunderstanding about actual date of hearing; that the appellant is residing in District Sukkur whereas his counsel is residing in District Khairpur, hence the appellant could not contact his Advocate and could not appear on the alleged date viz. 19.03.2014; that appellant shall suffer if impugned orders passed by two Courts below are not set aside and suit is not restored to original position as valuable rights of applicant or involved in the matter; that law favours adjudication of the cases on merits and technicalities should be avoided in dispensation of justice.

4. As against this, learned counsel for respondent No.1 has argued that no sufficient cause has been shown by the applicant for restoration of the suit; that the application under Order IX Rule 9 CPC has been filed after expiry of thirty (30) days; that the applicant has not annexed the medical certificate though same has been produced during the pendency of Civil Appeal before the District Court; that the delay in filing of restoration application has not been plausibly explained by the applicant; that the orders passed by the learned two Courts below are legal, proper and within their jurisdiction; that the present application may be dismissed. However, learned AAG after arguing the case to some extent recorded his no objection for setting aside the impugned orders and restoration of suit to its original wherefrom same was dismissed subject to payment of reasonable cost.

5. I have heard the learned counsel for the parties and perused the material available on record with their able assistance.

6. From the perusal of record, it reveals that the applicant/plaintiff had filed a suit for declaration and permanent injunction against the respondents/defendants. After service of summons, the respondents/defendants filed their written statement and thereafter the suit was fixed for recording of evidence. Due to the absence of the applicant/plaintiff and his counsel, however, the

learned trial Court dismissed the suit due to non-prosecution while mainly emphasizing on the National Judicial Policy, the object of which was to decide the matters properly and within due time and not thwart proceedings on mere technicalities where valuable rights of parties are involved. It is now well established principle of law that technicalities in dispensation of justice should be avoided and, as far practicable, cases should be decided on merits. Non-appearance of the applicant/plaintiff counsel was neither intentional nor wilful, but beyond their control. However, this Court did not visualize such disposal of the appeal which is a strangulation of justice. It would have been prudent for the learned trial Court to have adjourned the case to a later date to provide a chance to the applicant/ plaintiff to proceed with the case.

7. In the case of **Imtiaz Ahmed v. Ghulam Ali (PLD 1963 SC 382)**, the Hon'ble Supreme Court has been pleased to hold that "*the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it is essential to comply with them on grounds of public policy*." It was further held in the same judgment that "*any system which by giving effect to the form and not the substance defeats substantive rights is defective to that extent.*"

8. The observations of the Hon'ble Apex Court in the case of **Inam-ur-Rehman Gillani v. Jalal Din and another (1992 SCMR 1985)** read as under:-

> "*B. Normally, Courts should try to adjudicate the matters placed before them on merits and deviate this course only if they find that process of the court is being abused. The dismissal of cases for non-prosecution should normally be the exception and not rule.*"

9. In the case of **Mst. Sardar Begum v. Muhammad Anwar Shah (1993 SCMR 363),** the Hon'ble Apex Court has held that a

party should not be denied relief on account of technicalities in the procedural law, as the same are framed for the purpose of regulating the legal proceeding, they are intended and designed to foster the cause of justice rather than defeating it. Moreover, in the case of **Pirzada Niaz Ahmed Farooqui v. Muhammad Bux (2004 SCMR 862),** the Hon'ble Supreme Court has also restored the petition dismissed by the High Court and has held that conduct of the counsel may be reprehensible, ends of substantial justice demand that the parties should not suffer on account of negligence or indifferent attitude on the part of their counsel in whom they repose full confidence.

10. In the case of **Anwar Khan v. Fazal Manan (2010 SCMR 973),** Hon'ble Apex Court has been pleased to observe that it is well settled principle that the most important duty of the Courts of law is to do justice between the parties and in the absence of any express power, normally on technical grounds they should not hesitate to give proper relief. It must also be mentioned that civil Courts are Courts of both law and equity and in the absence of special reasons they should also be inclined to do substantial justice and matter of controversy should also be disposed of on merits and not on technical consideration. It is also settled principle of law that the principal object of formalities and procedural provision is safeguard the interest of justice and the procedural provisions unless insurmountable should not be allowed to defeat the ends of justice. The duty of the court is to do justice between the parties. The procedure prescribed is always for the purpose of doing justice between them and should not come in the way of doing substantial justice.

11. In the case of Mst. Begum and others Vs. Mst. Begum Kanzia Fatima Hayat and others (1989 SCMR 883), The Hon'ble Supreme Court has held that:

> *"8. In a civil case issues of fact are to be decided on the principle of preponderance of evidence. The facts relied upon in support of the two applications were sought to be proved by the affidavits of the attorney of the appellants and the Advocate. On the other side was a bold denial on the part of respondent No.4, whose affidavit mostly consists of matters of opinion to the effect that the explanation of the appellants was vague and insufficient. We arc of the firm opinion that in a matter of this nature the finding of the High Court that the facts relied upon were not sufficiently established is unsustainable. The learned Division Bench was conscious of the rules laid down by this Court in this behalf and we can only reassert them. It has been laid down by this Court that the words "sufficient cause" for restoration of suit dismissed for default are not susceptible of any exact definition and no hard and fast rules can be laid down and if non - appearance is not intentional it should not be viewed very strictly. This Court has also emphasised that the rules of procedure are not to be too technically applied but are reconstructed to foster the cause of justice. It, therefore, follows that a party is to be visited with the penalty of being deprived of a fair trial on merits not by way of penalty except when there is positive evidence of negligence beyond explanation. In the light of these principles the facts on record do not make out a case of gross negligence on the part of the Advocate or the appellants, even if their conduct leaves something to be desired in the matter of meticulous care in ascertaining the date for the fixation of the suit."*

12. Keeping in view of the above position, circumstances, I am of the considered view that the learned trial Court as well as appellate Court were not justified in dismissing the suit due to absence of the applicant/ plaintiff and their counsel only on one day and thereafter for dismissing the restoration application and application for condonation of delay in restoration application again on the same grounds without considering the cause shown by the applicant/plaintiff for non-appearance on the date of hearing. Therefore, instant Revision Application was allowed vide short order dated 29.11.2021 and impugned order dated 05.05.2017 passed in Civil Appeal No. 60/2015 by the learned Additional District Judge Pano Akil and order dated 03.04.2015, passed by the learned II-

Senior Civil Judge Sukkur on application u/o IX Rule 9 CPC r/w Section 151 and an application under Section 5 of the Limitation Act, 1908 passed in FC Suit No.10/2010 for restoration of suit to its original position wherefrom same was dismissed in default for non-prosecution vide order dated; 19.03.2014 were set-aside, subject to payment of cost of Rs.5,000/-. The learned trial Court is directed to record evidence of the parties and decide the matter afresh on merit fully in accordance with law, after providing full opportunity of hearing to the parties. Parties were directed to appear before the IInd Senior Civil Judge, Sukkur on 23.12.2021. These are the reasons for the short order even dated.

JUDGE