

**IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR**

**Civil Revision Application No. S- 172 of 2010**

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE.
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For Hearing of Main Case

Mr. Ahmed Ali Shahani, Assistant Advocate General for Applicants.  
M/s Tariq G.Hanif Mangi and Mehfooz Ahmed Awan, Advocates for the  
Respondent.

Date of hearing:   **26-02-2021**  
Date of Judgment: **15-03-2021**

**J U D G M E N T**

**Aftab Ahmed Gorar J.** Initially, the F.C. Suit No.02 of 2002 filed by the respondent/plaintiff was decreed vide judgment and decree dated 25.04.2003 and 26.04.2003 respectively, passed by learned Senior Civil Judge, Ghotki. Against that judgment and decree, the Applicants/ Defendants preferred Civil Appeal No. Nil of 2009 against the respondent/plaintiff and vide judgment dated 28.05.2010, delivered by learned 1<sup>st</sup> Additional District Judge, Ghotki, the Application moved by the Applicants in terms of Sections 5 and 14 of the Limitation Act was dismissed and the Civil Appeal filed by the Applicants was dismissed in limine being time barred without touching the merits of the case. The said judgment dated 28.05.1010 has been assailed by the Applicants i.e. Government of Sindh through Secretary, Agriculture, Livestock and Fisheries Department, Karachi and others through this Civil Revision Application.

2. Facts of the case leading to disposal of this Civil Revision Application are that respondent/plaintiff filed Civil Suit for declaration, cancellation, possession, mense profits and mandatory injunction alleging therein that Agriculture Form Adilpur, situated in Deh Changulani Taluka and District Ghotki land measuring about 96-Acres was placed for auction by the Government of Sindh, and open auction was held at place of Baradari, previously known as Polo Ground. So many persons participated in the auction and one Muhammad Bachal Kalwar having given the highest bid of Rs.1,40,000/- per Acre was declared successful bidder by committee and under terms and conditions of the auction and bidder was required to pay order and paid cash amount of Rs. 33,60,000/- as 25% of the auction price on 05.11.1997. According to claim of respondent/plaintiff that one Muhammad Bachal was only the benami, who is concerned with the auction land and even an amount of Rs.33,60,000/- was deposited by the respondent in the name of Sindh Privatization Committee Government of Sindh. After the auction proceedings, one Mumtaz Ali and 17 others filed a Constitutional Petition No.D-968 of 1997 against the said Muhammad Bachal and others before this Court claiming to be "Hari" of the auctioned land. The said petition was heard and finally dismissed on 14.09.1998, as such the chapter of Mumtaz Ali and others was over. After the decision of Petition No.D-968 of 1997 dated 14.09.1998, the possession virtually was handed over by the Deputy Director, Agriculture Extension Ghotki at Mirpur Mathelo to one

Muhammad Bux on 03.12.1998. Thereafter, Sub-Divisional Magistrate, Ghotki passed an order under Section 145 Cr.P.C and took over the possession of auctioned land vide order dated 14.04.1999 and said warrant of attachment of disputed property under Section 146 Cr.P.C was given to the SHO, P.S, Ghotki and he appointed Mukhtiarkar, Ghotki as receiver of the said property vide letter dated 10.07.1999. Then respondent filed suit No.560 of 1999 against Muhammad Bachal before this Court at principal Seat Karachi in original side jurisdiction. During proceedings of that suit, the respondent and Muhammad Bachal moved an application under Order 23 Rule 3 CPC and thereby compromised the matter, according to which said Muhammad Bachal admitted the payment of Rs. 33,60,000/- deposited by him were actually paid by the respondent for the said deposition and also left his claim in favour of present respondent, over the suit land. The compromise was accepted by this Court at principal seat Karachi vide order dated 27.10.1999. Thereafter, since the dispute from all the corners in respect of the suit land was over, the respondent appeared before the District Administration of Ghotki i.e. the then Sub-Divisional Magistrate, Ghotki for restoration of possession and de-attachment the order under Section 145 Cr.P.C, but he was kept on false hopes, hence the respondent/plaintiff filed the civil suit for declaration, cancellation, possession, mesne profit and mandatory injunction in the Court of Senior Civil Judge, Ghotki as F.C.Suit No.02 of 2002 with the following prayer:-

“a. To declare that the order U/S 145 Cr.P.C passed by the then Sub-Divisional Magistrate (Now the defendant No.2) is filed malafide and without jurisdiction.

b. To cancel the order U/S 145 Cr.P.C on dated: 14-04-1999 passed by the defendant No.3 and cancel the order of attachment U/S 146 Cr. P.C passed by the defendant No.3 dated:14-04-1999.

c. To direct the defendants No. 2 to 4 to hand over the possession of suit land viz. same measuring of 96-Acres of Agricultural Farm Adilpur of Deh Changlani, Taluka e& District Ghotki to the plaintiff by meets and bound.

d. To pass a preliminary decree in respect of means profits of the suit land w.e.f 14-04-1999 till the vacant possession of the suit land is handed over to the plaintiff by appointing a local commissioner as admittedly the suit land as per the order of defendant No.3 have remained in possession of Mukhtiarkar Ghokti the defendant No.3 as a receiver and the report of the local commissioner is final decree of means profits may be passed.

e. To issue the mandatory injunction in favour of the plaintiff e. against the defendants No.3 to 4 for handing over possession of the suit land viz. an area 96 Acres of Agricultural Farm Adilpur of Deh Changlani Taluka & District Ghotki. The costs of the suit be awarded to the plaintiff.

g. Any other equitable relief which this Hon'ble Court deems just and proper under the circumstances of the case.

h. To declare that the defendants No.5 to 8 have absolutely no concern with the present suit”.

3. After service, applicants No.2 to 4 filed their written statement, wherein they categorically submitted that the orders under Sections 145 and 146 Cr.P.C passed by the then SDM, Ghotki on 14.04.1999 were proper and to safeguard the interest/property of the Government

institution by handing over its possession to the applicants/defendants, hence suit merits no consideration and the same was liable to be dismissed.

4. Thereafter, issues were framed and the respondent/plaintiff recorded his evidence through his attorney so also evidence of his witnesses, namely, Rabdino and Haji Abdul Hakeem and produced certain documents as exhibits. In rebuttal, the applicants/defendants led the evidence of defendant No.3 Sajjad Hussain, DDO (Revenue), Ghotki so also defendant No.3 Ghulam Qadir, Mukhtiarkar (Revenue), Ghotki.

5. Consequently on consideration of the evidence and documents produced, the civil suit of the respondent/plaintiff was decreed vide judgment and decree dated 25.04.2003 and 26.04.2003 respectively. Aggrieved of the said judgment and decree, the applicants being government officials preferred 1<sup>st</sup> Civil Appeals No.S-24 and 25 of 2003 before this Court due to bonafide mistake or otherwise, however, on the orders dated 24.10.2008 and 05.12.2008, the applicants filed Civil Appeal No. Nil of 2009 before learned District Judge, Ghotki, however, vide judgment dated 28.05.2010, delivered by learned 1<sup>st</sup> Additional District Judge, Ghotki, the Application moved by the Applicants in terms of Sections 5 and 14 of the Limitation Act was dismissed and the Civil Appeal filed by the Applicants was also dismissed in limine being time barred without touching the merits of the case.

6. It was argued by the learned counsel for the applicants/defendants that the impugned judgment was patently against the law, unlawful and passed in violation of the procedure prescribed under the law; that the suit filed by the respondent/plaintiff before learned trial Court was not maintainable for the reason that the respondent was not proper person nor the auction of land was in his favour; that under Section 42 of the Specific Relief Act, the suit for possession without declaration was not maintainable, but these very important aspects of the case were ignored by learned Appellate Court while passing the impugned judgment and even otherwise order under Sections 145 & 146 CrPC cannot be challenged by way of civil litigation; that the delay in filing the appeals before higher forum occurred due to omission and ill advise any delay so consumed in such forum may well be condoned under Sections 5 and 14 of the Limitation Act, when the judgment sought to be impugned is illegal on the face of it. In support of his contentions, learned AAG placed his reliance on the cases of Muhammad Bashir and another v. P.O. Punjab **(2003 SCMR 83)**, Sultan Mahmood Shah v. Muhammad Din **(2005 SCMR 1872)**, Muhammad Yaqub v. Pakistan Petroleum **(2000 SCMR 830)**, Pir Muhammad Azam v. Pir Azizullah **(2011 CLC 355)**, Jehan Shah v. P.O.Sindh & others **(PLD 2003 Karachi 691)**, Muhammad Ayub v. Barkat Ali Shaikh **(2011 CLC 349)**, Sherin v. Fazal Muhammad **(1995 SCMR 584)**, Jawad Mir Muhammad v. Haroon Mirza **(PLD 2007 SC 472)**, Munawar Kashan v.

Government of Balochistan **(2000 MLD 2015)** and Messrs National Highway Authority v. P.O. Punjab **(2014 CLC 1578)**.

7. As against that, the learned counsel appearing on behalf of the respondent/plaintiff supported the impugned judgment by arguing that the filing or prosecution of Civil Appeal in a wrong forum even in good faith or on account of mistaken advice of counsel does not furnish a justification for condonation of delay, therefore, the Civil Appeal being hopelessly time-barred was liable to be dismissed. In support of their contentions, reliance has been placed on the cases of Raja Khan v. Manager (Operation) Faisalabad Electric Supply Company **(2011 SCMR 676)** and Mrs. Nasreen Jehan Siddiqui v. Mrs. Amber **(2018 MLD 1866)**.

8. I have gone through the record carefully and considered the submissions of learned counsel for the parties so also relevant law applicable to the facts and circumstances of the case, relied upon by learned counsel for the parties in support of their arguments.

9. A perusal of record reveals that no doubt, F.C.Suit filed by the respondent/plaintiff was decreed vide judgment and decree dated 25.04.2003 and 26.04.2003 respectively, passed by learned trial Court i.e. Senior Civil Judge, Ghotki, however, against that judgment and decree, the applicants/defendants preferred 1<sup>st</sup> Civil Appeals before this Court bearing No.24 of 2003 and 25 of 2003 against the respondent/plaintiff due to some bonafide mistake or otherwise, in

which notices were issued to the respondent/plaintiff and after hearing the parties, this Court passed order dated 24.10.2008, whereby learned District Judge, Ghotki was directed to dispose of both these Civil Appeals within a period of three months positively. Thereafter, an application under Order 7 Rule 10(2) CPC for returning the Memos of the Appeals was filed by learned Assistant Advocate General Sindh, which was allowed by this Court vide order dated 05.12.2008, and pursuant to that said order, the applicants preferred Civil Appeal before learned District Judge, Ghotki along with application in terms of Sections 5 and 14 of the Limitation Act. The said Civil Appeal was transferred to the Court of learned 1<sup>st</sup> Additional District Judge, Ghotki who after hearing both the parties dismissed the said Civil Appeal on the limitation ground vide impugned judgment dated 28.05.2010 and did not consider the affidavits annexed along with the application disclosing the facts of the case regarding decision of learned trial Court as to whether learned trial Court had jurisdiction and so also did not consider the maintainability of the suit. In the case of Sherin **(supra)** a Bench of the Hon'ble Supreme Court of Pakistan consisting of three Hon'ble Judges while dealing with a similar aspect has been pleased to hold as under:-

"4. The appellants' case is that they entrusted the case to their learned counsel, who after completion of the file, instituted the same in the Court of the learned District Judge; that the appellants themselves were not posted with the knowledge of the provisions of law as to the pecuniary jurisdiction of the District Judge to entertain the



appeal, and they wholly depended on their counsel. The delay has been thus, sought to be excused on the plea that the appeal was instituted in the District Court on the mistaken advice of the counsel. In order to plead that the latter was not negligent, it has been asserted that the value of the suit for the purpose of the court-fee and jurisdiction was neither incorporated in the decree sheet nor explicitly shown in the judgment of the trial Court. Conversely, the learned counsel for the respondents has dubbed it a case of gross negligence on the part of the appellants and their counsel, and added that the mistaken advice of the counsel cannot furnish a good ground for condonation of delay.

5. Diligence is a state of human conduct. What should be the standard for assessing the behavior of an appellant to style him as diligent. Because of fluidity of the notion of diligence, it is difficult to set up a precise yardstick. Whether or not litigant has acted diligently and with care, would differ from case to case. Speaking broadly, a person may be said to have acted diligently, when he has informed himself of all relevant factors, taken all obvious steps and precautions, characterized by a degree of effort, as in a given situation a reasonable person would do. But, the epithet of "reasonable" opens wide the measure of application of this yardstick, on the factual plane, for the word "reasonable" is not susceptible of any precise definition. Etymologically, it signifies according to reason, which expression itself is open to difference of opinion. Whether or not a person has acted diligently, in ultimate analysis, would depend on the circumstances of each case and cannot be determined on the foundation of any judicial syllogism.

6. The criterion of "due diligence" for enlargement of time is prescribed by section 14 of the Limitation Act, which upon its terms applies only to the suits and applications and not to the appeals. On the other hand section 5 is applicable to the appeals but it does not apply to suits. The question of condonation of delay, therefore, has to be examined on the basis of section 5 and not section 14 of the Limitation Act. Not unoften, while examining the

question of condonation of delay, in filing the appeal, the Courts have been invoking the principles underlying section 14 of the Act. The High Court has declined to condone the delay entirely on the touchstone of section 14. It is, however, to be remembered that expression "due diligence" and "good faith" appearing in section 14 do not figure in section 5. The condition prescribed in the latter section for its applicability is "sufficient cause" but what is sufficient cause is not capable of connotation, with exactitude and would differ from case to case. We; may observe that filing of appeal in a wrong Court on account of mistaken advice tendered by the counsel canvassed on behalf of the appellants for condonation of delay by itself would not attract section 5 but when the litigant and the counsel have acted with due care and caution and their conduct does not smack of negligence, the institution of the appeal in the wrong forum may constitute a "sufficient cause" within the meaning of section 5 of condonation of the delay."

10. It is also a matter of record that during pendency of litigation between applicants and the respondent, a stranger, namely, Subhan Ali filed Suit No.512 of 2015 against respondent Allana Shaikh before principal seat of this Court at Karachi for specific performance in respect of the land in question and obtained judgment and decree dated 17.08.2016 and 27.08.2016 respectively by way of misrepresentation and fraud, but during proceedings of instant Civil Revision, Director, Sindh Agriculture Farms and Major Crops Development, Sindh filed compliance report, wherein he has categorically disclosed that the applicants filed Application No.2386 of 2016 in terms of Section 12(2) CPC against the plaintiff Subhan Ali and defendant Allana Shaikh in Suit No.512 of 2015 and this Court at principal seat, Karachi vide order dated 04.11.2016 suspended the

operation of judgment and decree dated 17.08.2016 and 27.08.2016 respectively.

11. In view of the above, the observations made by learned appellate Court carry no weight and normally in view of these observations, there was a case for condonation of delay in filing of the Civil Appeal, therefore, learned appellate Court should have taken a lenient view on account of prevailing confusion with regard to pursuing the remedy by the applicants/defendants before a wrong forum in good faith. Thus, having viewed in this background and in the light of the dictums referred to above, I am convinced that a case for condonation of delay is made out.

12. For the reasons discussed, above, instant Civil Revision No.S-172 of 2010 stands allowed and the impugned judgment dated 28.05.2010, passed by learned appellate Court on the application filed by the applicants/defendants for condonation of delay in filing of the Civil Appeal is set aside. The delay in filing said Civil Appeal before learned appellate Court is condoned and the matter is remanded with direction to learned District Judge, Ghotki to entrust the Civil Appeal No. Nil of 2009 to learned Model Civil Appellate Court, who shall proceed with the Civil Appeal on merits and decide the same in accordance with law after hearing both the parties. The parties are left to bear their own cost.

13. Before parting with this judgment, it is ordered that since the possession of valuable massive government land is involved in this matter and when the respondent/plaintiff obtained judgment and decree dated 17.08.2016 and 27.08.2016 respectively by way of misrepresentation and fraud from this Court at principal seat Karachi in a Suit No.512 of 2015, but the operation of said judgment and decree has been suspended by this Court at principal seat Karachi vide order dated 04.11.2016 on the application filed by the applicants in terms of Section 12(2) CPC, therefore, in order to secure/safeguard the government property in question, the applicants/defendants, especially Director, Sindh Agriculture Farms and Major Crops Development, Sindh, Hyderabad and Additional Director, Agriculture Extension, Ghotki are directed to take over the possession of suit land i.e. Agriculture Farm Adilpur, situated in Deh Changlani, Taluka and district Ghotki, admeasuring 96-00 Acres immediately under compliance report to this Court through Additional Registrar within a period of 15-days. However, the possession of the suit property in question shall be subject to final determination by the Courts of competent jurisdiction. SSP, Ghotki and Wing Commander, Shahbaz Rangers, Ghotki are directed to provide force aid to the Director, Sindh Agriculture Farms and Major Crops Development, Sindh, Hyderabad and Deputy Director, Agriculture Farms and Major Crops, Ghotki at Mirpur Mathelo for taking over the possession of the suit land from the respondent. The Chief Secretary, Government of Sindh shall initiate

enquiry against the delinquent Government officers/officials, who did not pursue the cases either before trial Court, appellate Court as well as this Court diligently and showed their negligence and carelessness. He is also directed to probe into the allegations of illegalities and irregularities committed by the delinquent officers/officials in auction proceedings of the Government land so also receiving remaining balance auctioned amount of 75% from respondent/plaintiff at belated stage by issuing letter dated July, 2010, by the Secretary, Government of Sindh Privatization Commission without fulfilling all the codal formalities and procedure. Such compliance report be submitted to this Court through Additional Registrar within a period of 45-days. Let copy of this order be communicated to the Chief Secretary, Government of Sindh, Director, Sindh Agriculture Farms and Major Crops Development, Sindh, Hyderabad, Additional Director, Agriculture Extension, Ghotki, SSP, Ghotki and Wing Commander Shahbaz Rangers, Ghotki through FAX so also copy of this order be provided to learned AAG for information and compliance.

**JUDGE**

Ahmad