

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI  
Suit No.1525 of 2005

Date	Order with Signature(s) of Judge(s)
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For hearing of CMA No. 7673/2020.  
(Statement dated 19.10.2020 filed as flagged).

08.02.2021

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Mr. Amel Khan Kasi, Advocate for plaintiff.  
Mr. Raj Ali Wahid Kunwar, Advocate for defendant No. 1.  
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This is an application (C.M.A. No. 7673 of 2020) filed on behalf of the plaintiff with accompanying affidavit of his attorney, seeking recalling of the order dated 25<sup>th</sup> August, 2020 and restoring of the suit to its position as it was on the said date.

The defendant No. 1 has filed counter affidavit to the said application and plaintiff, through his Attorney, has filed affidavit-in-rejoinder to the counter affidavit of the defendant No.1 to the said application.

Learned counsel for the plaintiff contends that a number of litigations were/are pending adjudication in relation to the subject matter of this suit including Suit No. 380 of 2006 and J.M. No. 13 of 2015; hence, the present suit was tagged alongwith said two matters by the Court vide orders dated 16<sup>th</sup> December, 2014 and 11<sup>th</sup> April, 2019, respectively; however, upon disposing of Suit No. 380 of 2006, this suit was de-tagged from J.M. No. 13 of 2015, as the evidence of the parties in the present suit was recorded and the same was fixed for final arguments by this Court vide order dated 21<sup>st</sup> November, 2019. He further contends that as his firm i.e. M/s. Mohsin Tayebaly & Co. was appearing in other mattes tagged with the aforesaid suit/J.M. earlier, they were under the bona fide mistake that they have already filed their power in this case and thus they were under the impression that whenever this matter will be fixed for final hearing they will come to know about such fixing through cause list; however, on

25<sup>th</sup> August, 2020 when the matter was dismissed for non-prosecution the name of their firm did not appear in the cause list; hence, on the alleged date they were unaware of fixing of the matter; however, on the day of filing this application i.e. 3<sup>rd</sup> September, 2020 it came into their knowledge that their firm infact had not filed power on behalf of the plaintiff; as such, they filed the same alongwith this application. He further contends that it transpired from the order sheets that earlier they were pursuing the matter diligently when the same was tagged with other two matters. He also adds that even before dismissing of the present suit for non-prosecution, the office was directed to issue notice to the plaintiff on 18<sup>th</sup> August, 2020 and the same was issued but it was not served upon the plaintiff as he had already shifted from the given address; hence, absence of the plaintiff on the date when the suit was dismissed for non-prosecution was neither willful nor intentional but due to bona fide mistake of the counsel for the plaintiff as stated above. Learned counsel further contends that it is a settled principle of law that where entire evidence has been recorded and the suit is fixed for arguments, the matter may be decided on merits and on the basis of material presented at hand and the dismissal for non-prosecution should not be made at that stage and the lis be deiced on merits rather than technicalities. He adds that unless the application in hand is allowed the plaintiff shall suffer irreparable loss. In support of his contentions, learned counsel relies upon the cases of *Syed Abdul Wahid and another v. Syed Sirajuddin (1998 SCMR 2296)*, *Muhammad Haleem and others v. H. H. Muhammad Naim and others (PLD 1969 Supreme Court 270)* and *First Dawood Investment Bank Limited v. Bank Islami Pakistan Limited (2020 CLD 49)*.

On the other hand, learned counsel for defendant No. 1 while opposing the application in hand maintains that the basic requirement of order IX, rule 9, C.P.C. is that the party applying for an order to set aside a dismissal order has to

satisfy the Court that there was sufficient cause for non-appearance of the parties before the Court when the lis was fixed before it and in absence of sufficient cause, as it is in this case, the application is liable to be dismissed. He further maintains that even the instant application itself is not maintainable as the same has been signed by a person on behalf of the plaintiff, who is not duly authorized to do so, as the alleged Power of Attorney produced subsequently by the counsel for the plaintiff through a statement does not authorize the Attorney to file such application. He further maintains that the conduct of the plaintiff shows from the record that neither he was careful nor vigilant to pursue the suit since long and the plea of the counsel for the plaintiff that his firm's name was not mentioned in the cause list is also unjustified as it is evident from the record that his firm did not file power on behalf of the plaintiff in the instant suit till 25<sup>th</sup> August, 2020. He adds that even the Court issued notice to the plaintiff at his address given in the title of the suit; however, the same received back unserved with the endorsement of process server that the plaintiff is not residing at the given address at least for last 10 years and if the plaintiff had shifted from the given address, it was his burden to provide his fresh address for service; hence, the Court before dismissing the suit for non-prosecution took all efforts to ensure appearance of the plaintiff before this Court and then on account of deliberate and willful absence of the plaintiff the instant suit was dismissed for non-prosecution by this Court; therefore, the instant application merits dismissal with costs. In support of his contentions, learned counsel relies upon the cases of *Mst. Khadija Begum and 2 others v. Mst. Yasmeen and 4 others* (PLD 2001 Supreme Court 355), *Northern Polythene Ltd. (NPL) through Director (Finance) v. National Bank of Pakistan and others* (2013 MLD 782), *Pakistan National Shipping Corporation through Secretary v. Messrs Seaward Surveyors* (2015 MLD 24), *Akhtar Alam and 3 others v. Shabbir and 5 others* (1994 MLD 201),

*Ghulam Mohiddin Warsi through Attorney v. Qutibuddin and others (2019 CLC Note 54)* and *Black's Law Dictionary, Ninth Edition*.

I have heard learned counsel for the parties and perused the material available on record.

An objection has been raised by the learned counsel for defendant No. 1 with regard to authority of the Attorney of the plaintiff, namely, Naveed Usmani, who has also filed accompanying affidavit, claiming to be the Attorney of the plaintiff. Learned counsel for the plaintiff vide statement dated 19<sup>th</sup> October, 2020 has filed copy of Special Power of Attorney allegedly executed by the plaintiff in favour of said Attorney on 16<sup>th</sup> April, 2014. It reflects from perusal of the same that the said attorney is authorized to do all or any of the acts, deeds and things in respect of Suits No. 1525 of 2005, 1009 of 2006 and 380 of 2006 filed before this Court and clause "1" thereof authorizes the Attorney to engage counsel; sign and file pleadings, present cross objections, interlocutory or miscellaneous applications, petitions and affidavits, give evidence, file any appeal for him in his name and on his behalf in the above matter, and for the purpose and in connection therewith to file in or take out documents and papers. The restoration application is a miscellaneous application in the suit for that the said Attorney of the plaintiff is duly authorized; hence, I find no weight in the contention of learned counsel for defendant No. 1 that the instant application has been filed by an unauthorized person on behalf of the plaintiff.

It is an admitted position that earlier this suit was tagged with Suit No. 380 of 2006 and J.M. No. 13 of 2015; however, vide order dated 21<sup>st</sup> November, 2019 this Court de-tagged J.M. No. 13 of 2005 from this suit and the said order was passed in presence of Mr. Amel Khan Kasi referring him as advocate for the plaintiff and Mr. Raj Ali Wahid Kunwar as Advocate for defendant No. 1.

Thereafter, the matter was fixed on 4<sup>th</sup> March, 2020 when while recording absence from plaintiff's side, this Court adjourned the matter with a note of caution that in the event if none appears for the plaintiff on the next date of hearing, the matter will be heard and decided with assistance of counsel present on that date. Subsequently, matter was fixed on 18<sup>th</sup> August, 2020 when again none was present for the plaintiff and matter was adjourned to 25<sup>th</sup> August, 2020 with direction to office to issue notice to plaintiff for the next date of hearing and then on 25<sup>th</sup> August, 2020 the matter was dismissed for non-prosecution when it was fixed for final arguments. There is no denial to the fact that the learned counsel for the plaintiff was under bona fide impression that their firm has filed their power on behalf of the plaintiff in this matter. As stated earlier, in this matter presence of Mr. Amel Khan Kasi Advocate was recorded on several dates as counsel for the plaintiff, even then no intimation notice was issued by this Court to him especially when his name was not appearing in the cause list despite marking his presence in this case as counsel for the plaintiff.

So far sufficient cause for restoration of this suit is concerned, I am of the view that in the circumstances of the case in hand when the attendance of the counsel for the plaintiff has been marked by this Court on several dates as advocate for plaintiff, he appears to be under bonafide belief that when the matter will be fixed he will come to know about such fact through cause list as he has filed power on behalf of the plaintiff in the suit also, which infact was not filed earlier by him; hence, sufficient cause has been shown for the restoration of the suit.

It must also be kept in mind that the High Court when exercises its original civil jurisdiction, it is Court of both law and equity. The Courts in absence of special reasons to the contrary have always leaned in favour of substantial justice. This is because law favour adjudication of disputes on merit.

Therefore, unless there is a definite finding of negligence on the part of a party or its counsel, the Court should not reject an application for restoration of a suit dismissed for default.

The matter is ripe for the decision on merits in the light of evidence of the parties available on record after hearing learned counsel for the parties. At this stage if an opportunity of being heard is given to learned counsel for the parties by allowing this application and restoring the suit on its position as it was on the date of its dismissal for non-prosecution, it would be highly in the interest of justice. Hence, I allow this application; however, subject to payment of cost of Rs.20,000/- to be deposited by the plaintiff with the Nazir of this Court for its onward transmission to High Court Clinic for the purchase of medicines. Consequently, order dated 25<sup>th</sup> August, 2020 is recalled and suit stands restored to its original position, subject to compliance of the above condition.

2. The statement is taken on record.

Athar Zai

JUDGE