THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

R.A. No. 136 of 2010

[Hyderabad Cantonment Board & another versus Noor Muhammad thr: his LRs & others]

Applicants	:	Hyderabad Cantonment Board and another through M/s. Rafiq Ahmed and K.B. Advocates alongwith Naseem-ul-Hassan, Legal Assistant, Cantonment.
Respondent 1	:	Noor Muhammad son of Late Raees Karan Khan Shoro through his Legal Heirs through Mr. Imdad Ali R. Unar, Advocate.
Respondents 2-4	:	Mukhtiarkar, Taluka Hyderabad, ADC-I, Hyderabad and Secretary Revenue Board through Mr. Wali Muhammad Jamari, Assistant Advocate General Sindh.
Date of hearing	:	22-11-2021.

O R D E R

Adnan Iqbal Chaudhry J. - F.C. Suit No. 354/1989, subsequently numbered F.C. Suit No. 01/1989, was filed by the predecessor of the Respondents 1(a) to 1(f) **[plaintiff]** against the Applicants and the Respondents 2 to 4 **[defendants]** before the Senior Civil Judge, Hyderabad when the Additional Deputy Commissioner, Hyderabad cancelled entries in the record of rights in respect of 43-05 acres land in deh Jamshoro, which land, the plaintiff averred, was his ancestral property and not the property of the Federation or of the Hyderabad Cantonment Board.

2. The suit remained pending for the plaintiff's evidence with only a partial examination-in-chief of the plaintiff. It was dismissed for non-prosecution on 10-12-1998 when the plaintiff remained absent. However, on the plaintiff's application the suit was restored on 22-04-1999.

3. On 07-12-2001, the suit was again dismissed in default and for non-prosecution when the defendants were present but the plaintiff did not appear for further examination-in-chief.

4. It was on 20-09-2004 that the plaintiff moved an application under Order IX Rule 9 CPC read with section 12(2) CPC for restoring the suit. There was no application under section 5 of the Limitation Act, 1908 for condoning the delay, rather it was urged that the Attorney appointed by the plaintiff to follow-up the suit had colluded with the other side and did not inform the plaintiff of the date fixed for evidence and of its subsequent dismissal. The trial court restored the suit *vide* order dated 23-11-2005 treating the restoration application as one under section 12(2) CPC. Against such order the Applicants (defendants 4 and 5) moved Civil Revision No. 17/2006 before the Additional District Judge.

5. While Civil Revision No. 17/2006 was pending against the restoration order dated 23-11-2005, the suit was once again dismissed by the trial court for non-prosecution on 07-12-2006 but again restored by order dated 17-02-2007.

6. On 24-09-2007, Civil Revision No. 17/2006 that was pending before the Additional District Judge, was allowed, whereby the earlier order dated 23-11-2005 for restoring the suit was set-aside, and the trial court was directed to decide the restoration application afresh by a speaking order, with the effect that the suit-dismissal order dated 07-12-2001 was revived. The learned Additional District Judge was of the view that the trial court did not discuss whether section 12(2) CPC was even attracted in the circumstances to restore the suit.

7. After the remand order above, the application for restoration of the suit moved under Order IX Rule 9 read with section 12(2) CPC was dismissed by the trial court *vide* order dated 10-11-2007 holding that section 12(2) CPC was not attracted in the circumstances, and

that, as per Article 163 of the Limitation Act, the restoration application was hopelessly time-barred.

8. The order dated 10-11-2007 dismissing the restoration application was appealed by the plaintiff in Civil Misc. Appeal No. 2/2008. Though the learned Additional District Judge agreed with the trial court that section 12(2) CPC was not attracted, nonetheless he allowed the appeal and the restoration application *vide* order dated 13-12-2010 **[the impugned order]**. He was of the view that in the intervening period an order dated 17-02-2007 passed by the trial court had come in the field whereby it had again restored the suit, and where after the plaintiff's evidence had progressed, and thus the suit should be decided on the merits instead of technicalities. The instant revision application by the Applicants (defendants 4 and 5) is against such order.

9. By order dated 23-08-2011 in this revision, this Court had observed that while the trial court may proceed further with the evidence, it shall not pass final judgment in the suit. Therefore, the recording of evidence continued. The suit is presently at the stage of final arguments *albeit* adjourned *sine die* pending this revision application.

10. Heard the learned counsel and perused the record.

11. As narrated above, Civil Revision No. 17/2006 against the restoration order dated 23-11-2005 was still pending before the Additional District Judge when the suit was again dismissed for non-prosecution on 07-12-2006 and then again restored on 17-02-2007. That Civil Revision was subsequently allowed on 24-09-2007 whereby the restoration order dated 23-11-2005 was set-aside and the trial court was directed to decide the restoration application afresh, which it did when it dismissed the same as time-barred. Against that, the Additional District Judge took the view (the impugned order) that the trial court could not have dismissed the ***revived*** restoration

application when it had already granted a subsequent restoration application on 17-02-2007. That, in my view, is an error in applying the law. It amounts to annulling the previous order passed by the Additional District Judge in Civil Revision No. 17/2006. The restoration of the suit by order dated 23-11-2005 and further proceedings in the suit remained subject to orders in Civil Revision No. 17/2006.[1] Once that restoration order was set-aside, the suit-dismissal order dated 07-12-2001 was revived, and then, the proceedings that had ensued in the suit in the meantime, including another dismissal and then restoration of the suit by order dated 17-02-2007, and further evidence recorded in the suit, all stood reversed under the doctrine of restitution which entails that the parties be put in the position there were in prior to order varied/reversed by the court.[2]

12. In the same vein as above, the evidence that was recorded by the trial court while the instant revision application was pending, is also subject to the outcome of this revision. That is why the order dated 23-08-2011 passed herein at the outset had restrained the trial court from passing final judgment. Therefore, I am not swayed by the submission of learned counsel for the Respondent No.1/plaintiff that in the meantime the suit has progressed to the stage of final arguments.

13. The order dated 07-12-2001 dismissing the suit in default was passed when the case was fixed for the plaintiff's evidence[3] but the plaintiff was called absent whereas the defense was present. It was

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[1] "If pursuant to an order of remand the subordinate court decides the case, an appeal against the remand order does not become infructuous, which has to be decided on its own merits. The post remand decision will be subject to the final decision in the pre-remand proceedings." - *Habib Ullah v. Azmat Ullah* (PLD 2007 SC 271).

[2] *Naeema Begum v. Iqbal Ali Khan* (1999 CLC 1432); *Sultan Bibi v. Gul Baran* (PLD 1999 Quetta 56); *Barkat Ali v. Additional District Judge, Faisalabad* (2001 MLD 1044).

[3] It has been observed in *Qaim Ali Khan v. Muhammad Siddique* (1987 SCMR 733) and *Habibullah v. Rent Controller, Peshawar* (1998 SCMR 2656) that a date fixed for evidence is a 'date of hearing' within the meaning of Order IX Rule 8 CPC.

thus an order under Order IX Rule 8 CPC against which the remedy of restoration provided in Order IX Rule 9 CPC was availed.

14. The restoration application moved by the plaintiff on 20-09-2004 was after more than 2 years and 9 months of the dismissal order dated 07-12-2001. It was averred by the plaintiff that since his Attorney had colluded with the other side, he did not inform the plaintiff of the date fixed for evidence and then also suppressed from him that the suit had been dismissed in default. It was thus contended by the plaintiff that section 12(2) was attracted for restoring the suit, the limitation for which was three years under Article 181 of the Limitation Act. Here, I may note that it was not the plaintiff's Attorney in the witness box, but the plaintiff himself. The finding that section 12(2) CPC was not attracted is not only by the trial court but also by of the Additional District Judge who passed the impugned order, and rightly so, inasmuch as if any fraud was committed upon the plaintiff by his Attorney/agent, that was not fraud with the Court so as to attract section 12(2) CPC.[4]

15. With section 12(2) CPC not attracted, the restoration application under Order IX Rule 9 CPC was time-barred by more than 2 years and 9 months as against the limitation of 30 days provided in Article 163 of the Limitation Act. No application was moved to condone the delay under section 5 of the Limitation Act. As a result, section 3 of the Limitation Act, 1908 imposed an obligation on the court to dismiss such a time-barred application. Here, two submissions are advanced by learned counsel for the plaintiff. First, that the suit-dismissal order dated 07-12-2001 was a void order against which no limitation runs; and second, that the suit should be decided on the merits instead of technicalities.

[4] See *Shazia Ashraf v. Municipal Committee, Sahiwal* (2006 CLC 1018) and *Water & Power Development Authority v. Sea Gold Traders* (2002 MLD 19) for the distinction between fraud in legal proceedings and fraud upon a party out of court.

16. Regards the first submission, the suit-dismissal order dated 07-12-2001 was not a void order. As already observed, it was a lawful order passed under Order IX Rule 8 CPC when the plaintiff failed to appear for evidence. In any case, the argument that no limitation runs against a void has been held to be misconceived in *Begum Syeda Azra Masood v. Begum Noshaba Moeen* (2007 SCMR 914) as follows:

> "13. As far as the submission of the learned counsel that limitation does not run against a void order is concerned, it has not impressed us. As held above, the judgment and decree of the trial Court could not be said to be void. We may add that a void order is only a type of an illegal order and if it has created certain consequences, an aggrieved person must get rid of it. If the argument of learned counsel for the petitioner is accepted, then there may not be any limitation at all to challenge an illegal order by describing it as a void order after any period say 5 years, 10 years, 20 years and so on. One of the objects of the legal system, particularly to prescribe limitation, is to settle the rights of the parties and provide certainty in human affairs and if the argument which is being put forth is accepted, it will have the effect of unsettling rights and may affect the transactions which may have taken place meanwhile and, thus, prejudice a third party."

17. Regards the second submission that limitation is a mere technicality at the discretion of the Court, that too has been laid to rest by the Supreme Court. The object of the law of limitation and the duty of the Court to apply the same were discussed in *Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad* (PLD 2015 SC 212). It was observed that the law of limitation was vital for an orderly and organized society; that failure to apply such law would adversely affect the disciplined and structured judicial process; that it should be strictly construed and applied in letter and spirit; that it is not merely a technicality, rather as mandated by section 3 of the Limitation Act, it is obligatory upon the court to dismiss a cause/lis which is barred by time even though limitation has not been set out as a defence; that a person must approach the Court for recourse with due diligence, without dilatoriness or negligence and within the time prescribed; and that if a person is permitted to act to the contrary, it will result in misuse of the judicial process and exploitation of the legal system.

In *Khushi Muhammad v. Fazal Bibi* (PLD 2016 SC 872) it was further held that :

> "4(ii) The hurdles of limitation cannot be crossed under the guise of any hardships or imagined inherent discretionary jurisdiction of the court. Ignorance, negligence, mistake or hardship does not save limitation, nor does poverty of the parties;
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> ………..
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> (iv) There is absolutely no room for the exercise of any imagined judicial discretion vis-a-vis interpretation of a provision, whatever hardship may result from following strictly the statutory provision. There is no scope for any equity. The court cannot claim any special inherent equity jurisdiction;
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> (v) A statute of limitation instead of being viewed in an unfavourable light, as an unjust and discreditable defence, should have received such support from courts of justice as would have made it what it was intended emphatically to be, a statute of repose. It can be rightly stated that the plea of limitation cannot be deemed as an unjust or discreditable defence. There is nothing morally wrong and there is no disparagement to the party pleading it. It is not a mere technical plea as it is based on sound public policy and no one should be deprived of the right he has gained by the law. It is indeed often a righteous defence. The court has to only see if the defence is good in law and not if it is moral or conscientious;….."

18. In view of the judicial pronouncements discussed above, and since no application had been made under section 5 of the Limitation Act, the learned Additional District Judge did not have any discretion to condone the delay in the making of the restoration application and to prejudice a valid defense of limitation that had come to vest in the Applicants due the plaintiff's own doing. The impugned order therefore cannot be sustained. Consequently, the revision application is allowed. The order dated 13-12-2010 passed by the V-Additional District Judge, Hyderabad in Civil Misc. Appeal No. 02/2008 is set-aside, and the order dated 10-11-2007 passed by the III-Senior Civil Judge, Hyderabad is restored, with the result that F.C. Suit No. 01/1989 (old F.C. Suit No. 354/1989) remains dismissed.

JUDGE