

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

R.A. No.79 of 2011.

DATE	ORDER WITH SIGNATURE OF JUDGE
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For hearing of main case.

12-10-2020

Mr. Hakim Ali Siddiqui advocate for the applicant.
Mr. Arbab Ali Hakro advocate for respondent No.1.

This revision application is arising out of judgment passed in Civil Appeal No.60 of 2010 whereby the Appellate Court dismissed the appeal being hopelessly barred by law.

Brief facts of the case are that the applicant filed a suit bearing No.399 of 2008 for specific performance of the agreement. He claimed that in suit for specific performance time would run only when the performance was denied. The Trial Court while exercising jurisdiction under the law dealing with the case of specific performance being discretionary in nature dismissed the suit on 02.11.2009 after considering the pleadings of the applicant. He ultimately also reached the conclusion that the suit was barred by time in terms of Article 113 of the Limitation Act, 1908. Appeal however was preferred belatedly and was dismissed as being barred by time. It is the case of applicant that since the law of limitation (Article 113) was not appreciated by trial Court therefore, the appellate Court should have ignored the limitation act's applicability in filing an appeal and should have heard the appeal on merit, irrespective of it being barred by time.

I have heard learned counsel and perused the record. The Trial Court pleased to dismiss the suit on 07.11.2009 and decree was prepared on 09.11.2009, the application to obtain a certified copy was also filed on 09.11.2009 and the copy was received, as stated by learned counsel for the

applicant in the Court, on 08.12.2009, whereas the appeal was preferred on 05.03.2010. Counsel submits that alongwith the memo of appeal the applicant also moved an application for condonation of delay alongwith medical certificates however no such copy is available on record despite requirement of Section 115 CPC. The Appellate Court however considered the medical certificates and dismissed the appeal being barred by time. The record shows that the appeal was filed on 05.03.2010 whereas the copy was received on 08.12.2009. The requisite time for filling an appeal is 30 days and even if the winter vacations of about 09 days i.e. from 26.12.2009 to 03.01.2010 is excluded it should have been filed on or around 30.01.2010, which the learned counsel for the applicant agreed. He however, submits that in view of the order of trial Court which erroneously dismissed suit being barred by time, it was the duty and obligation of the Appellate Court to have condoned the delay.

I am not satisfied with the statement of the applicant's counsel that a lis/appeal being barred by time should have been heard on merit also. Specific performance is a discretionary relief and valuable rights have been accrued on account of applicability of the Limitation Act at the appellate stage. The cited judgment of PLD 2002 Supreme Court 84 would come into consideration if discretion was not exercised in accordance with law. The Appellate Court could have condoned the delay had it been satisfied with the reasoning assigned in the affidavit. The Appellate Court while dismissing the appeal being barred by time exercised the discretion available to him under the law. Appellate Court assigned plausible reason while dismissing appeal. The relevant part is reproduced as under:-

"5. It is a normal rule that in case an application, appeal is filed beyond the prescribed period of limitation, each and every day is to be explained satisfactorily to make out a plausible ground for condoning the delay.

6. As regards the ailment is concerned and certificate is produced, which has been mentioned above, I am not satisfied that the nature of ailment was such as to render appellant

completely helpless to establish contact with her counsel, particularly when she was able to move and certificate issued by the doctor and produced before this Court also lacks the requirement necessary for certificate issued by the doctors.

7. *The question here involved is that of limitation which goes to the competency of the appeal. It is not a matter of mere technicality but of compliance with substantive provision of law. A party which has been delinquent in pursuing his remedy at law can not turn around and complaint to the court that miscarriage of justice has been taken place specially when the results achieved are based on act of omission and commission of the party itself. In this connection I rely upon the cases reported in P.L.D. 2001 Karachi 396, 2000 AC 21 and 119, 1976 SCMR 296 and 1983 C.L.C. 1928.*

8. *In view of the facts and circumstances mentioned above, I have reached to the conclusion that the appeal is hopelessly time barred and same is dismissed with no order as to costs.”*

It cannot be said that the discretion was not lawfully exercised by the appellate Court and hence the facts and circumstances of the referred case are different than the one in hand.

Similarly in PLD 2004 Supreme Court 62, the equity would come into play for both the parties and not for one person. Limitation Act is not mere technicality. Valuable rights would accrue on account of the applicability of Limitation Act and hence, person who remain indolent cannot be benefited in treating the Limitation Act as being mere technicality. In the said judgment Honorable Supreme Court while hearing a lis arising out of merit held that in a suit for specific performance of agreement, limitation would run from date of denial or refusal, in case no date for performance is set or if time was not the essence of agreement. In the instant case it is a matter of appeal being preferred beyond limitation and not suit.

Insofar as reported judgment 1987 SCMR 1543 is concerned, the same is not applicable according to the facts and circumstances of the case. We cannot declare any order as nullity or void to avoid application of Limitation Act. Trial Court had the jurisdiction to decide question and a wrong decision cannot be named as nullity or void to suit or accommodate applicant's desire.

The Medical Certificate available at page 87 (Annexure E-1) is of 25.02.2010 i.e. by that time the appeal had already been barred by time by almost 25 days and the period remain unexplained. There is no satisfactory explanation about the earlier period. The medical certificate of 10.11.2009 is only a prescription of some medicine without any reasoning and explanation for applicant. The applicant was neither prescribed bed rest nor any condition disclosed by the Doctor that the applicant was unable to perform the statutory and legal obligation.

I thus do not see any error in the order of appellate Court whereby the appeal was dismissed as being barred by time. The merit of the case would open only once the hurdle of the limitation is crossed. Specific performance is a discretionary relief and not a right of a party. No doubt equity plays a vital role while considering the case of specific performance but then the appellant took it negligently and conceded to the facts when the suit was dismissed as being barred by time as well as he did not prefer appeal within time and it cannot be considered as a void order against which the limitation would not run.

In view of above, I do not see any reason to interfere in the order of the appellate Court and the revision application is accordingly dismissed.

JUDGE