IN THE HIGH COURT OF SINDH BENCH AT SUKKUR
Civil Rev.Application No.S-174 of 2022

Applicant	:	Shah Muhammad, through Mr. Soomar Das. R.Parmani, Advocate
Respondent No.1	:	Deen Muhammad through Mr. Jam M. Jamshed Akhtar, Advocate
Respondents No.2 to 4	:	Nemo
Date of hearing	:	19.02.2024
Date of Decision	:	29.03.2024

JUDGMENT

ARBAB ALI HAKRO, J.- Through this civil revision filed under Section 115 of the Code of Civil Procedure, 1908 (**"the Code"**), the applicant has impugned the Order dated 30.8.2022, passed by the II-Additional District Judge, Ghotki ("**appellate Court**"), in which an application under Order XLI Rule 19 of the Code for re-admission of appeal was dismissed.

2. However, this Order is appealable under Order XLIII Rule 1(t) of the Code, and the appeal shall lie under the provisions of section 104 of the Code, which specifically provides the right to appeal from specific orders. Rule 1(t) expressly permits an appeal from an order of refusal under Rule 19 of Order XLI to re-admit or under Rule 21 of Order XLI to re-hear an appeal. The record reflects that at the time of filing the present Revision Application, neither the office of this Court nor the other side raised any objections at any stage. Given the circumstances of the case and in the interest of justice, it is appropriate to convert this challenge into an appeal. The law provides for such a conversion to ensure that the parties' rights are not prejudiced and that justice is served. Therefore, in light of the provisions of the Code and the facts of the case, I am inclined to convert this challenge into an appeal. It is accordingly ordered.

3. The respondent No.1/plaintiff filed a suit for possession through pre-emption against the applicant/defendant No.1 and respondents No.2 to 4, in respect of suitland measuring 1-6 ½ Acres as detailed in the plaint. The plaintiff/respondent No.1 claimed a superior right of pre-emption as Shafi-i-Sharik, Shafi-i-Khalit, and Shafi-i-Jar, in addition to other rights, while the applicant was alleged to be a stranger. It was further pleaded that respondent No.1 has fulfilled all the requirements of the Talbs, as envisaged under the law. Upon the applicant's refusal to receive the sale consideration amount of Rs.70,000/- and transfer the Khata to respondent No.1, respondent No.1 has filed the suit. The applicant and respondents No.2 to 4 contested the suit by filing a written statement. After recording evidence from both parties, the trial Court decreed the suit vide Judgment dated 16.12.2014 and Decree dated 18.12.2014. Feeling aggrieved, the applicant preferred an appeal under Section 96 of the Code and then moved an application under Order XLI Rule 27 of the Code for the production of additional evidence. The appellate Court dismissed the application after inviting/receiving objection vide Order dated 12.01.2016. Therefore, the applicant assailed the said Order before this Court by filing Civil Revision Application No.22 of 2016.

4. On 11.01.2022, the applicant's appeal was dismissed due to non-prosecution. Subsequently, on 25.01.2022, the applicant filed an application under Order XLI Rule 19 of the Code to re-admit the appeal before the appellate Court. The applicant explained that on 11.01.2022, his counsel and his junior partner were present before the appellate Court. They requested an adjournment to obtain a stay order from this Court in R.A No.22 of 2016, which the applicant filed against the Order passed on an application under Order XLI Rule 27 of the Code. The application was supported by an affidavit of the applicant. However, it was opposed by the learned counsel for respondent No.1. However, the appellate Court dismissed the application vide impugned Order dated 30.8.2022, with the following observation: -

> *"Above mentioned order is showing that learned advocate for appellant/applicant specifically refused to proceed and argue the matter before my learned predecessor, though ample opportunity was given to him. In such circumstances, my learned predecessor was left with no option but to dismiss the appeal. Court has to decide the matter, in either way, when any party is not willing to proceed the matter. Court cannot be a mere spectator in proceedings and let the matter linger-on on wish of any party. Court cannot be expected to remain mum, when one party is specifically refusing to proceed before it. If such practice would be allowed, then matters will not be decided, even in centuries. Convincing reason for not proceeding the matter was not shown in application or accompanying affidavit, therefore, I see no reason for showing extra ordinary leniency of allowing application, particularly when applicant side is not giving any undertaking for proceeding appeal before decision of revision application by High Court."*

5. At the outset, the learned counsel for the applicant argued that the appellate Court dismissed the applicant's appeal on the grounds that the applicant's counsel refused to argue the appeal until the decision of the Revision Application, which was pending before this Court. However, this does not imply that the applicant's counsel refused to argue the appeal. According to him, the counsel for the applicant requested that the matter be adjourned until the decision of the Revision Application, which was pending before this Court, filed by the applicant whereby his application for the production of the *Foti Khata Badal* entry as additional evidence, was dismissed. He argued that the *Foti Khata Badal* entry was a public record and the backbone of the case, enabling the appellate Court to pronounce Judgment. He also contended that the appellate Court passed the impugned Order on incorrect premises of law and facts, causing a serious miscarriage of justice, which is untenable and liable to set aside.

6. Conversely, the learned counsel for respondent No.1 refuted the arguments of the applicant, supported the impugned Order of the Appellate Court, and contended that the applicant failed to provide any valid reason for the re-admission of his appeal. In his application, the counsel pointed out that the applicant prayed for the restoration of the suit instead of the re-admission of the appeal as envisaged under Order XLI Rule 19 of the Code. Therefore, the appellate Court rightly dismissed the

applicant's application for the restoration of the appeal in accordance with the law through the impugned Order, which does not warrant any interference by this Court.

7. I have heard learned counsel for the parties at length and perused the record with their assistance.

8. The record and the impugned Order reveal that the primary reason for the appeal not being pursued before the appellate Court was the applicant's submission of an application under Order XLI Rule 27 of the Code. This application was for the production of the *Foti Khata* entry as additional evidence before the appellate Court. However, this application was dismissed by an Order dated 12.01.2016. Subsequently, the applicant challenged the Order in this Court through Revision Application No.S-22 of 2016. This Revision Application was heard concurrently with the present Revision Application. Upon evaluating the merits, this Court has allowed the aforementioned R.A No.22 of 2016.Here, it would be appropriate to reproduce the reasons for allowing the Revision Application as follows: -

> *"The pivotal question at hand is the necessity of the document, specifically the Foti Khata entry,that the applicant wishes to introduce. This document is deemed crucial to a certain degree in order to dispel any doubts regarding the applicant's status as a co-sharer following his father's demise. This status forms the basis of his claim to the preferential right of pre-emption as Shafi-i-Sharik. The appellate Court disallowed the applicant's application on the grounds that the applicant did not seize the opportunity to present evidence in the trial court. Therefore, the applicant is not permitted to enhance or rectify any deficiencies or omissions at the appellate stage. However, the appellate court failed to consider the trial court's ruling that "The contesting defendant No.1 (applicant herein) has not denied the claim of plaintiff regarding ownership of plaintiff over suit land to the extent of his share in in it,* ***excepting that his father is also co-sharer in the suit survey number which does not mean that the defendant himself is co-sharer in the suit survey number****." Through his application, the applicant merely seeks to record the certified copy of the Foti Khata Badal entry, a public document, which is inherently admissible. This document could potentially clarify the ambiguity surrounding the applicant's status as a co-sharer. Even otherwise, under the Mohammadan Law, the legal position is that the right to inheritance is established immediately upon the death of an ancestor. This principle signifies that the heirs' entitlement to the deceased's property is instant and automatic, occurring at the exact moment of the ancestor's death. It is not contingent on any subsequent administrative or legal*

> *procedures. The sanction of mutation, on the other hand, is an administrative procedure that records the transfer of title in the revenue records. While this is an important step, it is merely an executive action that gives effect to the law of inheritance. It does not create or confer the right to inheritance but merely acknowledges and records the transfer of property rights that has already occurred by virtue of the law of inheritance. Therefore, while mutation sanction is a crucial step for administrative and record-keeping purposes, it does not influence the immediate opening of inheritance under the Mohammadan Law. The heirs' legal rights to the property are established by the law itself and are not dependent on the sanction of mutation"*
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> *[Emphasis is supplied]*

9. Considering the aforementioned circumstances, the applicant was justified in not proceeding with the appeal. The applicant's action was in accordance with his legal right, as he sought to ensure a thorough review of the evidence through the application under Order XLI Rule 27 of the Code. Despite dismissing that application by the appellate Court, the applicant persisted in his pursuit of justice by challenging that decision in a Revision Application. Therefore, the applicant's decision not to proceed with the appeal, in this case, was within his legal right and in line with the principles of due process.

10. There is no dispute over the proposition that Rule 19 of Order XLI of the Code allows an applicant to apply for the re-admission of an appeal. If it is demonstrated that a sufficient cause prevented the applicant from proceeding with the appeal, the Court is obliged to re-admit the appeal on terms it deems appropriate. In this case, the applicant filed an application for the restoration of the suit, erroneously typing 'suit' instead of 'appeal' rather than seeking its re-admission. However, the essence of his request was to seek an opportunity for a hearing, which is his fundamental right in the administration of justice. The mere use of the term 'restoration of suit' instead of 're-admission of appeal' neither alters the substance of the request nor prevents the Court from exercising its jurisdiction under the relevant provision of law. It is a well-established principle of justice administration that courts should not deny appropriate relief to a party on merely technical grounds, especially when there is a risk that the party in question will be seriously prejudiced if the lis is not restored. It goes

without saying that procedural provisions are intended to protect the interests of justice rather than to defeat them. Unless insurmountable, procedural provisions should not obstruct the pursuit of justice. The law always favours adjudication on the merits over technical considerations, and this maxim should be followed unless there is an insurmountable practical difficulty. Reference can be made to the case of Anwar Khan v. Fazal Manan (2010 SCMR 973). In this case, the appellant's bona fide and vigilant effort to seek the restoration of the appeal provides sufficient cause for the re-admission of the appeal. In my considered view, the appellate Court, in declining the re-admission of the appeal, failed to exercise its jurisdiction to meet the ends of justice in accordance with the law, given the facts and circumstances of this case.

11. For the foregoing reasons, this Revision Application is allowed, impugned Order dated 30.8.2022, passed by the appellate Court is set aside, and the case is remanded to the appellate Court where the appeal against the Judgment and Decree shall be deemed pending. The appellate Court shall decide the appeal afresh after affording reasonable opportunity of hearing to the parties. This should preferably be done within one month from receipt of this Order, with intimation to this Court. However, it is needless to mention here that the appellate Court shall, of course, decide the appeal in accordance with the law without being influenced by the observation made by this Court hereinabove.

JUDG E

Suleman Khan/PA