

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui, C.J
Mr. Justice Jawad Akbar Sarwana.

High Court Appeal No.203 of 2016

Saleh Muhammad
Versus
Faqir Muhammad and others
.-.-.-.-.-.

Date of hearing: 21.01.2025
Date of short order: 21.01.2025
Date of Reasons: 22.01.2025

None present for the Appellant.

Mr. M. Jamshed Malik, Advocate for Respondents.
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J U D G M E N T

Muhammad Shafi Siddiqui, C.J.- This appeal is arising out of impugned orders dated 14.10.2014 and 25.04.2016 whereby a suit fixed for final arguments was dismissed for non-prosecution followed by dismissal of a review/restoration application along with an application for condonation of delay.

2. Brief facts of the case are that a suit for specific performance was filed by the appellant and per counsel for the Respondents Mr. Jamshed Malik, after framing of issues the evidence was recorded and the matter was taken to its final hearing in the shape of final arguments when it was found convenient to dismiss the suit for non-prosecution.

3. We have heard learned counsel for Respondents and perused the material available on record.

4. It seems that on the crucial date i.e, 14.10.2014 when the suit was dismissed for non-prosecution, it was fixed for final arguments. The reason prevailed for the dismissal of the suit for

non-prosecution was an earlier order dated 10.10.2014 when the counsel, who was not in attendance, was purportedly informed, (by way of passing order) about the possible dismissal of the suit for non-prosecution, if the counsel failed to appear. The matter came up on 14.10.2014 and consequently dismissed for non-prosecution.

5. It seems that an application for review of the order was filed along with an application for condonation of delay and that too was dismissed by assigning reasons that the counsel was not regular and punctual in appearance, in fact some additional reasons were assigned as to why the suit was liable to be dismissed for non-prosecution, which was not required as being a *coram non judice*.

6. There is no cavil that the Judge/trial court was under the obligation to see as to whether on a particular date when the matter is likely to be dismissed for non-prosecution or was dismissed for non-prosecution, there were sufficient grounds of his (counsel) non-appearance, notwithstanding the previous defaults, if recorded.

7. Nonetheless, a review application which was then filed could have been considered as an application for the restoration of the suit which was fixed for final arguments along with an application for condonation of delay but no reason whatsoever was assigned as to why the application, which was titled as review application, cannot be considered as a restoration application along with an application for condonation of delay. The order of 25.04.2016 is also silent about the reasons for the condonation of delay as not being considered. There is nothing to suggest that the reasons assigned for the condonation of delay were not lawful.

8. The important fact of the matter was that the parties took pain for the disposal of the suit on merit as they, since 2006, were pursuing the matter and per learned counsel for Respondents Mr. Jamshed Malik, recorded the evidence in the matter. Why then an attempt was not made for the disposal of the suit on merit since every material was available on record for merit based disposal. The matter was then came up for final arguments.

9. At times it is convenient for a Judge to dismiss the suit for non-prosecution, however, a Judge is under the obligation to make an attempt to dispose of a case on merit and more importantly when after recording of evidence it has reached to a stage of final arguments, endeavors should be made for merit disposal when it has reached such stage.

10. Mr. Jamshed Malik, learned counsel for Respondents has not expressed his views if any counter affidavit to the condonation application or a review application, which could have been considered as a restoration application, was filed, as there is nothing on record of this appeal as well.

11. We therefore, are of the view that in the first instance all attempts for the disposal of the suit, which is ripe for final arguments, be made and only then an alternate recourse such as the one exercised by the learned single Judge should have been adopted and exhausted.

12. We set aside the impugned orders, allow the application bearing CMA No.18652/2015 by treating it as a restoration application along with an application bearing CMA No.8201/2015 for the condonation of delay as being without any rebuttal or

counter affidavit. The counsels in the suit are required to appear before the learned Single Judge as assistance as required by learned Judge, disposal of the suit on merit, be provided.

13. The appeal in view of the above reasoning was allowed by a short order dated 21.01.2025, which is reproduced as under:-

For the reasons to follow the impugned orders dated 14.10.2014 and 25.04.2016 (Annexures "A" & "B" to the Appeal) are set-aside and case is remanded to the learned Single Judge for deciding the Suit, fixed for arguments, on merit preferably within six (6) weeks. A cost of Rs.20,000 is being imposed upon the appellant to be deposited with the High Court Clinic within a week.

Dated: - 22.01.2025

CHIEF JUSTICE

JUDGE

Ayaz Gul