ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Civil Revision Application No.S-43 of 2011

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE

1. For orders on Office Objection
2. For Order on CMA 97/2012
3. For Orders on CMA 163/2013
4. For hearing of CMA No.122/2013
5. For hearing of main case.

Applicants : **Divisional Forest Officer Afforestation, Larkana & Others.**

Respondents : **Haji Karim Khan Through L.Rs and others.**

Mr. Abdul Hameed Burghuri Additional Advocate General along with Aijaz Ahmed Bhatti Advocate for applicants.
Mr. Habibullah Ghouri Advocate for respondents.

Date of hearing : 15.09.2017.
Date of Order : 25.09.2017.

O R D E R.

This is a Civil Revision in which the applicants have challenged order dated 31.01.2011, whereby, the application filed under order 9 Rule 9 CPC for restoration of the appeal has been dismissed. Such appeal was filed against judgment and decree dated 23.12.2003 passed in F.C. Suit No.157 of 2000 by 1st Senior Civil Judge, Larkana, through which the suit filed by the respondents was decreed.

2. This revision has been filed by the Forest Department of Government of Sindh and a private counsel has been engaged by them; however he has shown his reluctance to proceed with this revision and has requested the Additional Advocate General to assist and argue the matter. Finally both have assisted the Court. Learned AAG has contended that the Appellate Court has failed to appreciate the facts of the case as the controversy in hand already stands decided by the Honorable Supreme Court on Merits in the case of some other

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claimants of the land in the same vicinity vide order dated 27.10.2008 in Civil Petition No.172-K of 2006. He has submitted that the land in question belongs to the Forest Department, whereas, the respondents who are encroachers on the basis of a forged decree have filed the suit without having any judgment on record and on the basis of the same, the suit was decreed in their favor. He has further submitted that per settled law the cases are supposed to be decided on merits and not on technicalities. Therefore he has prayed to remand the case to the Appellate Court for deciding the same on merits and after considering the judgment passed by the Honorable Supreme Court.

3. On the other hand learned Counsel for respondents has contended that the applicants had failed to proceed with the appeal, and therefore, the Appellate Court had no choice but to dismiss the appeal. He further submits that after dismissal of the appeal the applicants filed application for restoration but again they did not proceeded with the matter and accordingly the restoration application was also dismissed by the Appellate Court. He has prayed for dismissal of instant revision application as according to him no ground for indulgence is made out.

4. I have heard all present before the Court and perused the record. By consent of all this Revision Application is being decided at the stage of hearing of main case without admitting it. It appears that the respondents filed a Civil Suit bearing F.C.No. 157 of 2000 before the 1st Senior Civil Judge, at Larkana, and the Court after recording evidence passed the judgment and decree as above in favor of the respondents. The applicants then filed appeal against such judgment bearing Civil Appeal 13 of 2004 and the said appeal was dismissed by the Appellate Court vide order dated 29.01.2010 in Non-prosecution. Thereafter the applicants filed restoration application under Order 9

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Rule 9 CPC, and the same was also dismissed through impugned order dated 31.01.2011.

5. In fact a very short controversy is involved in this matter that whether the Appellate Court was justified, firstly in dismissing the appeal, and secondly in dismissing the restoration application also in Non-prosecution. Though ordinarily, if a party is not vigilant in pursuing its case, the Court is not left with any other choice but to dismiss the lis for default on the part of applicant. Similarly, in entertaining the restoration application again it is entirely up to the Court to see as to whether any ground for indulgence to exercise the discretion is made out or not on the basis of peculiar facts of each case. There is no universal rule in this regard and is entirely dependent on the facts before the Court. In this matter it appears to be an admitted position that the matter was being continuously fixed before the Appellate Court before dismissal of appeal for service upon respondents and all respondents were still to be served. In that case in the given circumstances it was incumbent upon the Court to take a lenient view in case of non-appearance of the Counsel for the applicant. It further appears that the Counsel for the applicant had filed his personal affidavit to the effect that he was engaged recently and on the fateful day when the appeal was dismissed for Non-prosecution on 29.01.2010; he was in Karachi and was out of station. On the restoration application no order was passed and it was in the process of service again, when the impugned order was passed.

6. It is by now a settled proposition of law that the provision of Order 9 Rule 9 CPC is not to be interpreted with a strict view and the facts prevailing before the Court must be looked into with leniency and every possible effort is to be made to decide the case on merits instead of default. The expression *"sufficient cause"* used in this provision is

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not susceptible to an exact definition and there is no hard and fast rule which could be settled down to cover all sorts of possible situations. It lies with the discretion of the Court to examine and consider the facts and circumstances of each case and such discretion must also be exercised keeping in mind the judicial principles. The Honorable Supreme Court in the case of ***Mst. Marim Bai and another v. Mst. Mehrunnisa Begum*** (**1985 SCMR 2064**) has been pleased to hold as under;

> However, there is an aspect of the matter, which seems to have escaped the notice of the learned Judge in the High Court. As a broad proposition of law, it may be stated that the expression "sufficient cause" as used in Order XLI, rule 19 of the Code of Civil Procedure is not susceptible of an exact definition and no hard and fast rule can be laid down to cover all possible cases. The question must of necessity depend on the facts and circumstances of each case and lies within the discretion of the Court. But this discretion must be exercised on judicial principles. The main consideration, which weighs with the Court is to find whether the non-appearance was intentional or the result of negligence, so that where such non-appearance is not intentional or negligent and the counsel or his client has made genuine efforts to be present at the hearing, a very strict view should not be taken. See Muhammad Haleem and others v. H.H. Muhammad Naim and others PLD 1969 S C 270.

7. In the case of ***Salamat Bib & Others v. Settlement and Rehabilitation Commissioner, Multan*** (**PLD 1966 SC 467**) the Hon'ble Supreme Court has been pleased to settle the following guidelines while dealing with cases of restoration.

> Order XLI, rule 19 of the Code of Civil Procedure gives the requisite power to the appellate Court to re-admit an appeal dismissed for default, "where it is proved that he (the appellant) B was prevented by sufficient cause from appearing when the) appeal was called on for hearing'". As to what is or is not sufficient cause for the purposes of this rule must necessarily depend upon the facts and circumstances of each case, for, a explained by the Federal Court in the case of Malik Mumtaz Ahmad and others v. Umtul Habib and others(1) P L D 1955 F C 178 these words are "not susceptible of an exact definition and no hard and fast rule can be laid down to cover all possible cases. Each case must be judged upon its merits and its peculiar circumstances. While it cannot be tolerated that the counsel should be remiss in the discharge of their duties and leave the

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> Court waiting for them, it is equally desirable, and even necessary, that the case should be heard and decided on merits, and where the nonappearance was not intentional and the counsel or his client had made genuine efforts in taking reasonable precautions to be present at the hearing, a very strict view as to `sufficient cause' should not put him out of the Court."

8. In the case of ***Anwar Khan v. Fazal Manan*** (**2010 SCMR 973**), the Hon'ble Supreme Court has been pleased to observe as under;

> 4. We have given our anxious consideration to the contentions of learned counsel for the parties and perused the record. It is well-settled principle that the most important duty of the Courts of law is to do justice between the parties and in the absence of any express power, normally on technical grounds, they should not hesitate to give proper relief. It must also be mentioned that civil Courts are Courts of both law and equity and in the absence of special reasons they should also be inclined to do substantial justice and matters of controversy should also be disposed of on merits and not on technical consideration. This is always more important in cases where there is apprehension that the party concerned shall be seriously prejudiced if the application or suit is not restored. It is also a settled proposition of law that the principal object of legal formalities and procedural provisions is to safeguard the interest of justice and the procedural provisions unless insurmountable should not be allowed to defeat the ends of justice. In the case in hand, the petitioner seems to be sufficiently vigilant and was making inquiries about the proceedings from all the relevant quarters as evident from the contents of the application. His non-appearance has also been explained. According to the contents of the application, misunderstanding was created due to the fact that file had been misplaced, as informed by the official of the Court. The duty of the Court is to do justice between the parties. The procedure prescribed is always for the purpose of doing justice between them and should not come in the way of doing substantial justice. It is pertinent to mention here that to make a mistake about the date is not lapse of category, which can outrightly be excluded from the scope of bona fide mistake. Such mistake occurred by mis-apprehension of the party and some time by unintentional wrong communication by the clerk of the Court. In this case, the mistake was bona fide coupled with the fact that this assertion was duly supported by the affidavit and the respondent could not be rebutted expressly in the reply of the application which was denied in general terms. If being so, the possibility of noting down a wrong date could not be ruled out. Under the circumstances, the Courts below should have exercised discretion in favour of the petitioner on the well-known maxim that law favours adjudication on merits and this principle is to be followed unless there are practical difficulties which cannot be surmounted.

9. The aforesaid observations are relevant and pertinent to decide the present case as it is not in dispute that the controversy regarding the same land which is claimed by the Forest Department on the basis of a Gazette Notification already stands decided by the Hon'ble Supreme Court vide its order dated 27.10.2008 passed in the case of *Muhammad Waris & Others v. Chief Conservator of Forest Sindh & Others,* wherein the land was being claimed by the plaintiffs/appellants on the basis of sanads issued in favor of their predecessors in interest on 18.01.1933 and their Suit was decreed which in appeal was also upheld by the Appellate Court. However, in Civil Revision filed by the Forest Department the High Court overturned the orders of the Courts below which was maintained by the Hon'ble Supreme Court. The learned trial Court in that case had attached great importance to the documents of plaintiffs on the ground that they were more than 30 years old and the presumption of genuineness could be attached to them under Section 90 of the Evidence Act, 1872 (Now Article 100 of Qanoon-e-Shahadat Order, 1984) and such ground was also upheld in appeal. However, the High Court while relying upon the case of *Hameeda Begum v. Mst. Murad Begum (PLD 1975 SC 624)* came to the conclusion that no presumption could be attached to such documents in terms of Section 90 of the Evidence Act, 1872 which otherwise appear to be forged and the orders of the Courts below were overturned and thereafter the Hon'ble Supreme Court upheld the same. This issue was never brought to the notice of the Trial Court nor before the Appellate Court and in view of such circumstances and peculiar facts of this case it would be in the interest of justice and equity that the case in hand is decided on merits by the Appellate Court instead of dismissing the same in default or Non-prosecution.

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9. In view of hereinabove facts and circumstances of this case, I am of the view that a case for indulgence is made out by the applicants as the Court below has failed to exercise proper jurisdiction, and therefore, this Civil Revision application is allowed by setting aside the impugned order(s) dated 31.01.2011 & 29.01.2010, whereby the restoration application and the appeal, both were dismissed for Non-prosecution in the terms that the Civil Appeal bearing No.13 of 2004 shall be deemed to be pending before the Court of IV-Additional District & Sessions Judge, Larkana, who shall decide the same on merits after due notice to the parties and their Counsel preferably within a period of 3 months from the date of this Order as this is already an old matter.

10. Instant Civil Revision application is allowed in the aforesaid terms.

Dated: 25.09.2017

JUDGE
25.9.17