ORDER SHEET

IN THE HIGH COURT OF SINDH,

II APPEAL No. 92 of 2011

Date of Hearing : 27.04.2016

Date of Announcement : 12.05.2016

Appellant t : NIB Bank Ltd. Through
Mr. Kashif Hanif, Advocate

VERSUS

Respondent : A.R.Y Traders (Pvt.) Ltd.
Through Mr. Kashif Paracha, Advocate

O R D E R

MUHAMMAD IQBAL KALHORO, J: This judgment shall dispose of instant appeal in the terms as discussed herein below.

2. Controversy concerning this appeal is concise and brief. It relates to the question whether or not the appeal filed by the appellant against the judgment dated 16.03.2010 and decree 24.03.2010 rendered in the suit filed by the respondent for recovery of money was within time. Appellant's claim is that the appeal was within time but the appellate court dismissed it as time-barred. Learned counsel for the respondent, however, does not agree to it. Both the learned counsel in the course of hearing of this appeal stuck to their respective positions and referred to the relevant dates endorsed on certified true copies of the judgment and decree of the trial court to support their respective contentions. They also relied upon several decisions to vouch for their case. Appellant's counsel's reliance was on case laws reported in P L D 2005 Supreme Court 311, 2008 Y L R 1865, 1983 C L C 1235, 2005 C L C 680, 1981 C L C 797, 1980 C L C 1972, 2012 C L C 1293 and 2003 S C M R 176. Whereas the respondent's counsel relied upon decisions reported in P L D 2008 SC 577, 2003 S C M R 1560, 1997, 1997 S C M R 919, 1997 S C

M R 1974 S C M R and 2014 C L C 160. And from which I have with respect taken guidance.

3. Appellant is the bank and the respondent, a private limited company, is its customer. It filed a civil suit for recovery of Rs.1929100/- against the appellant on the ground that it had allowed withdrawal of the said amount through 5 cheques, which contained alterations and forged signatures, without observing and following necessary and required caution and vigilance expected from the bank in the usual course of transaction. This claim was denied by the appellant in the written statement. Record reflects that initially the suit was dismissed for failure of the respondent to lead evidence. In appeal, however, the matter was remanded back to the trial court to decide it on merits. But the appellant could not appear in the trial court and the suit was finally decreed. The appeal against which was dismissed vide impugned judgment.

4. The decree was drawn on 24.03.2010; the endorsement of the copying branch available on the certified copies indicates that application for copies was moved on 16.04.2010 after 22 days, cost of the copies was estimated by the branch on 2.07.2010, it was paid on 03.07.2010 and copies got ready on 10.7.2010. Stamps were supplied by the appellant on 13.07.2010 and on the same day the copies were certified, but the appellant received the same on 19.07.2010, and on the same day it filed the appeal. Respondent's counsel argued that the appeal on the face of it was barred by one day. After 22 days of the decree, the application for certified copies was moved and although the copies were ready for delivery on 10.07.2010 but the appellant received the same on 19.07.2010 after 09 days. And a sum total of these days would become 31 days, which was one day beyond the prescribed limit of 30 days. I have considered his contention. In my estimation, it does not appear to be the case. An examination of relevant copy demonstrates that it was ready on 10.07.2010. However, it would not mean and in any case would not be read or construed as if the copy was ready for delivery on that date as urged by leaned counsel, because unless a copy is stamped and certified by the copying branch, it cannot be considered ready for delivery. In the present case the copy was certified on 13.07.2010, therefore, understandably it was ready for delivery only on that date. The period thus would be computed from that day and not from the day when the copy just got ready for further action (10.07.2010). And this

calculation indicates clearly that it was 28th day when the appeal was filed; 22 days were consumed before making application for certified true copies and when the copies were ready for delivery (13.07.2010) 6 days more were used up in collecting them from office of the copyist. This simple computation is made even without considering requirement under section 12 (5) of Limitation Act, 1908 whereby it was mandatory for the copyist branch to issue a notice of intimation to the appellant to collect the copy after it got ready for delivery. And it also does not need to be urged here that in absence of such notice time requisite for obtaining copy would extend to the date of delivery. The appeal filed by the appellant, therefore, was not time-barred. The appellate court erred in holding so. Learned counsel for the respondent had also stressed in his arguments that due to failure of the appellant to vigilantly pursue the matter for getting estimation of cost done at the earliest, as it was done only on 02.07.2010 after two and half months of the application, the appellant would be held responsible for such inordinate delay and that would reflecte adversely against it. I do not agree with him on this analogy either, for the reasons that the appellant could not be saddled with the responsibility of getting cost of the copy estimated from the copying branch. In law it is the duty of the said branch and its non-performance would not expose the applicant to any penal action. Appellant admittedly had no control over the working of the branch and time consumed thus in estimating the cost cannot be attributed to the appellant.

5. Learned counsel for the respondent had also questioned the maintainability of this appeal on the ground of failure of the appellant to pay court fee within time. A perusal of record in this regard indicates that this appeal came up before this court on 07.10.2011 for kacha peshi and orders on office objections, *inter alia,* in regard to payment of proper court fee. Notice to other party was ordered to be issued and the operation of the impugned judgments was suspended, however the order on office objection was deferred. And thereafter this objection was not attended to until it was raised by learned counsel for the respondent in his arguments, and thereafter on the request of the appellant, he was allowed to provide court fee at its own risk and consequences during course of the day on 01.11.2012. Record reflects that on the same day requisite court fee was provided and along with it an application requesting the court to take the court fee on record and condone the

delay was also filed. I have considered the case of the appellant on this point in this backdrop. No doubt the applicant was required to file appeal alongwith court fee, and in case of its failure to do so, it was required to make good of deficiency within time stipulated by law, but at the same time it cannot be ignored that this court while dealing with the office objection on 07.10.2011 had deferred to pass any order on it, and thereafter neither any observation in this regard was ever made nor at any point of time the appellant was put to make good of deficiency. It is obvious that this court blissfully omitted to take note of such deficiency until 01.11.2012, when it was pointed out to by learned counsel for the respondent, and never required the appellant to make good of deficiency. In such situation a Latin maxim (albeit it may not be strictly applicable in the given situation), ***actus curiæ neminem gravabit,*** designed to ensure that neither party is prejudiced by some accidental or unavoidable action or omission of the court, comes in mind. And in the prevailing facts and circumstances, in my humble estimation, extending its benefit to the appellant would not be illogical and against the interest of justice.

6. Accordingly, the delay in providing the court fee is condoned and the appeal is allowed in the terms whereby the matter is remanded back to the appellate court to decide the appeal on merits after hearing both the parties within 4 months and submit such compliance report through MIT.

The appeal is disposed of accordingly alongwith pending applications.

JUDGE