

IN THE HIGH COURT OF SINDH AT KARACHI

Revision Application No.150 of 2017

(*Aaloo Mal v. Mukhtiarkar (Revenue) Thatta & Others*)

Before:

Sana Akram Minhas J

Applicant	Aaloo Mal Through, Mr. Tariq Hussain, Advocate
Official Respondents No.1 to 9	Through, Ms. Nusrat Sultana, AAG
Respondent No.10	Bakhsh Ali Through, Mr. Aizaz Hussain Shah, Advocate
<u>Date of Hearing:</u>	19-10-2026
<u>Date of Decision:</u>	19-10-2026

JUDGMENT

1. **Sana Akram Minhas, J:** Through the present Revision Application, filed under Section 115 of the *Code of Civil Procedure, 1908* (“**CPC**”), the Applicant has assailed the concurrent decisions of the two Courts below, namely:
- i) The Order dated 28.3.2017 (“**Impugned Order**”), passed by the learned Trial Court, dismissing the Applicant’s application under Order 9 Rule 9 CPC for restoration (“**Restoration Application**”) of his First Class Suit No.141/2010 (*Allo Mal v. The Mukhtiarkar (Revenue) Thatta & Others*) (“**FC Suit**”), on the grounds that:
- (a) the Applicant (Plaintiff in FC Suit) had failed to establish sufficient cause; and
- (b) the Restoration Application, presented on 28.11.2016, was time-barred (the FC Suit having been dismissed for non-prosecution on 20.10.2016).
- ii) The Judgment dated 15.9.2017, passed by the learned First Appellate Court (namely, the 1st Additional District Judge, Thatta),

dismissing the Applicant's Civil Miscellaneous Appeal No.3/2017 (*Allo Mal v. The Mukhtiarkar (Revenue), Thatta & Others*)(**"Civil Misc. Appeal"**), and upholding the Impugned Order.

The FC Suit

2. The FC Suit was instituted, inter alia, seeking a declaration of ownership and a permanent injunction in respect of a residential plot measuring 3500 square yards, situated in Deh Makli, Taluka and District Thatta.

The First Dismissal Of The FC Suit And Its Subsequent Restoration

3. The FC Suit was initially dismissed for non-prosecution on 29.9.2014. Upon an application filed by the Applicant, the Trial Court restored the FC Suit vide Order dated 9.1.2015, on payment of costs of Rs.5,000/- (*Rupees Five Thousand*). While considering the application, the Trial Court noted that the adjournment application had attributed the Applicant's absence to "*ailment or some other problem*", whereas the restoration application attributed it to his daughter's illness, without specifying the nature of the illness or producing any medical prescription or certificate. Although the Trial Court observed that the Applicant had failed to establish "*sufficient cause for his failure to attend the court*", it nevertheless ordered the restoration of the FC Suit, subject to costs.

Dismissal For Non-Prosecution – The Second Occasion

4. Following restoration, the Applicant was granted time on 26.2.2015 and 6.3.2015 to file his Affidavit-in-Evidence, which he eventually did on 9.3.2015. Between 25.3.2015 (when a caution of last chance was issued), and 14.7.2016, the matter was fixed for cross-examination/evidence of the Applicant but was adjourned for various reasons, including the absence of the Applicant or his Counsel on certain dates. On 6.8.2016, the matter was adjourned on account of the Applicant's absence, with an express caution that the next opportunity to produce evidence would be the "*final chance*". The Applicant was thereafter called absent on 11.8.2016, 27.8.2016, 3.9.2016, 26.9.2016 and 10.10.2016. Significantly, on 10.10.2016, the penultimate date of hearing, the Trial Court expressly recorded that the Applicant "*has been granted many dates of hearing but he has avoid [sic] to led evidence*". The application filed by the Applicant's Counsel seeking

condonation of the Applicant's absence was allowed subject to costs of Rs. 5,000/- (*Rupees Five Thousand*), and the matter was adjourned to 20.10.2016. On the latter date, both the Applicant and his Counsel remained absent, whereupon the FC Suit was once again dismissed for non-prosecution vide the Impugned Order.

Respective Submissions

5. Learned Counsel for the Applicant submitted that, prior to the dismissal of the FC Suit on 20.10.2016, the Applicant had remained absent on only one occasion, namely, 10.10.2016; that since the Applicant's Affidavit-in-Evidence was already on record, the Trial Court ought to have proceeded under Order 17 Rule 3 CPC instead of dismissing the FC Suit under Order 17 Rule 2 CPC, which, according to Counsel, was inapplicable in the circumstances. In support of his submissions, Counsel cited 1985 CLC 231 (*Joint Secretary v. Mobina Begum*) and an unreported order dated 31.10.2016 passed in Revision Application No.195/2009 (*Haji Muhammad Hashim v. Samuel Charles*).
6. Conversely, learned Counsel for Respondent No.10 submitted that the dismissal of the FC Suit on 20.10.2016 could not be viewed in isolation, as the Suit had previously been dismissed for non-prosecution on 29.9.2014 and restored on 9.1.2015, subject to costs; that between the first dismissal (on 29.9.2014) and the second dismissal (on 20.10.2016), no progress had been made in the proceedings, and the matter remained at precisely the same stage as it had been at the time of the first dismissal; that the Restoration Application was barred by limitation as the Applicant's application under Section 5 of the *Limitation Act, 1908*, seeking condonation of delay ("**Delay Condonation Application**"), had been dismissed vide a separate Order dated 28.3.2017 ("**Separate Order**"), passed on the same day as the Impugned Order dismissing the Restoration Application; and that, although the Applicant had challenged the Impugned Order, he had not assailed the Separate Order (dismissing the Delay Condonation Application), which therefore remained operative and, according to Counsel, precluded the Applicant from successfully challenging the dismissal of his Restoration Application.
7. The matter has been heard and the available record has been perused.

Decision

8. Although the Trial Court's order dated 20.10.2016 does not expressly state that the FC Suit is being dismissed for non-prosecution under Order 17 Rule 2 read with Order 9 Rule 8 CPC, it is apparent from the circumstances and effect of the Order that the Trial Court proceeded under the said provisions.
9. The present Revision Application raises questions concerning the applicability of Order 17 Rules 2 and 3 CPC, the relevance of the Applicant's previous conduct in assessing the sufficiency of the cause shown for his non-appearance on 20.10.2016, and the effect of the Separate Order dismissing the Applicant's Delay Condonation Application, which remains unchallenged. When specifically invited to address these aspects, Counsel for the Applicant contended that following restoration of the FC Suit on 9.1.2015, its earlier dismissal and the Applicant's preceding conduct had become a "*past and closed transaction*". Counsel further argued that Order 17 Rule 2 CPC applied only where a matter was fixed at the stage of summons and was inapplicable once the suit had reached the stage of recording evidence. These submissions, together with the effect of the unchallenged Separate Order, dismissing the Delay Condonation Application, are considered below.

Applicability Of Order 17 Rule 2 CPC At The Evidence Stage

10. The contention that Order 17 Rule 2 CPC is inapplicable once a suit reaches the stage of evidence is misconceived. In **Qamar Sultana v. Abdul Hussain (PLD 1982 Kar 355)**, Saleem Akhtar J held that a prerequisite for the exercise of jurisdiction under Order 17 Rule 2 CPC is that the case must have been fixed for hearing and it is adjourned to another date. The term "*hearing*" encompasses the recording of evidence, the hearing of arguments, or the consideration of questions relating to the suit that enable the Court to arrive at a final adjudication, but does not extend to the consideration of interlocutory matters.
11. The same principle finds support in **Khurshed Ali Khan v. Muhammad Ayub (PLD 2025 SC 718)**, which bears a close factual resemblance to the present case. There, the issues had been framed, the suit was fixed for evidence, and the plaintiff's failure to appear resulted in its dismissal for non-prosecution. The Supreme Court rejected the contention that the suit could not have been dismissed while other applications remained pending, holding that, once issues have been framed, the suit becomes ripe for hearing and the trial court is competent, in the exercise of its discretion, to dismiss it for non-prosecution. The Court also distinguished a date fixed for hearing of the suit from one fixed for the appearance of parties before settlement of issues.

12. The decision in **Khurshed Ali Khan** (supra) is directly relevant here, as the FC Suit (in the instant Revision Application) had likewise proceeded to the stage of evidence before its dismissal for non-prosecution. Thus, the fact that the Applicant's Affidavit-in-Evidence had already been filed did not, by itself, preclude the Trial Court from proceeding under Order 17 Rule 2 CPC. Applicant's objection to its applicability is, therefore, devoid of merit.
13. Moreover, the distinction between Order 17 Rules 2 and 3 CPC, has been explained in **Muhammad Asif v. Fahad** (2009 SCMR 1030), **Ahlian Moori Payeen v. Ghulam Muhammad** (2010 CLC 902), and, more recently, by the Supreme Court in **Irfan Rasheed v. Zawar Muhammad Afzal** (2026 SCMR 1613). While Rule 2 of Order 17 empowers the Court to proceed in accordance with Order 9 CPC where a party fails to appear on the date fixed for hearing, Rule 3, on the other hand, enables the Court to proceed to decide the case on the merits where the parties are present but a party, despite having been afforded sufficient opportunities, fails to produce evidence or perform an act necessary for the progress of the case. The applicability of either provision depends upon the circumstances of the default. In the present case, both the Applicant and his Counsel remained absent on 20.10.2016. The mere fact that the Applicant's Affidavit-in-Evidence had previously been filed did not, by itself, render Rule 2 inapplicable or oblige the Trial Court to proceed under Rule 3. The Trial Court was, therefore, competent to proceed under Order 17 Rule 2, read with the applicable provisions of Order 9 CPC.
14. In view of the foregoing discussion, and the principles laid down in the above-cited authorities, the two judgments relied upon by the Applicant's Counsel are distinguishable on facts and do not advance the Applicant's case.

Previous Conduct And Independent Assessment Of Sufficient Cause

15. As regards the Applicant's contention that the restoration of the FC Suit on 9.1.2015 rendered his previous conduct irrelevant to the subsequent proceedings, the same is untenable. The earlier restoration did not confer upon the Applicant an unconditional entitlement to further indulgence, nor did it dispense with his obligation to diligently pursue the FC Suit. The record, as noticed above, reflects that the FC Suit had previously been dismissed for non-prosecution and was restored subject to costs, despite the Trial Court's observation that sufficient cause for the earlier default had not been established. Thereafter, despite repeated opportunities to produce evidence and express warnings that the opportunity granted on the respective dates

was the last or final chance, the Applicant appeared intermittently on some dates but remained absent on others, despite such warnings, and failed to pursue the proceedings diligently. Even on 10.10.2016, only his Counsel was present, while the Applicant himself remained absent, and the matter was adjourned to 20.10.2016. On the latter date, both the Applicant and his Counsel were absent, resulting in the dismissal of the FC Suit for non-prosecution.

16. However, the relevance of the Applicant's previous conduct must be distinguished from the question whether sufficient cause has been established for his non-appearance on the date in question. While past conduct may be considered in assessing a party's diligence and may warrant the imposition of costs or a warning, it cannot, by itself, justify dismissal of an application for restoration where sufficient cause for non-appearance on the relevant date is otherwise established. The controlling consideration under Order 9 Rule 9 CPC is whether sufficient cause has been shown for the Applicant's failure to appear when the FC Suit was dismissed. Accordingly, although the Applicant's previous conduct forms part of the procedural history, the sufficiency of the explanation for his non-appearance on 20.10.2016 must be assessed on its own merits, in the context of the record as a whole. In this regard, the principles laid down by the Supreme Court in **Faryal Arif Latif v. Arif Latif (2025 SCMR 395)** are instructive.
17. Turning to the explanation advanced for the Applicant's non-appearance on 20.10.2016, the explanation furnished in the Restoration Application does not establish sufficient cause for the Applicant's non-appearance on that date. The Application attributes the absence to the illness of the Applicant's wife and relies upon certain medical documents annexed thereto. However, an examination of the available medical documents (**at Court File Pg. 115–119**) reveals that they pertain to October 2015, while those **at Court File Pg. 121–137** relate to the period from January to May 2016. These documents, being several months prior to the date on which the FC Suit was dismissed, do not establish that the Applicant's wife was suffering from an illness on 20.10.2016 that reasonably accounted for the Applicant's absence from Court.
18. The documents appearing **at Court File Pg. 139–155** pertain to November 2016 and comprise laboratory-test reports and radiology reports. These documents, too, do not establish any medical circumstance contemporaneous with 20.10.2016 that prevented the Applicant from attending Court on that date. No sufficient explanation has been furnished connecting the medical material relied upon with the Applicant's non-appearance on the date in question. Consequently, the medical documents,

whether considered individually or collectively, fail to substantiate the cause advanced in the Restoration Application. The mere production of medical reports, without establishing their temporal and factual connection with the relevant default, cannot be regarded as sufficient cause within the meaning of Order 9 Rule 9 CPC.

Unchallenged Separate Order Dismissing The Delay Condonation Application

19. A further difficulty arises from the Applicant's failure to challenge the Separate Order dated 28.3.2017, whereby his Delay Condonation Application was dismissed. Article 163 of the *Limitation Act, 1908* prescribes a limitation period of thirty (30) days from the date of dismissal for an application by a plaintiff to set aside the dismissal of a suit for default of appearance (see **Muhammad Asif** (supra); **Honda Atlas Cars v. Honda Sarhad (Pvt) Ltd**(2005 SCMR 609); and **Sabzal v. Bingo** (1989 CLC 656)). The Applicant filed the Restoration Application on 28.11.2016, i.e. thirty-nine (39) days after the FC Suit was dismissed on 20.10.2016, thereby exceeding the prescribed period by nine (9) days.
20. The Trial Court dismissed the Restoration Application as time-barred and, by the Separate Order dated 28.3.2017, dismissed the Delay Condonation Application. Although the Applicant challenged the Impugned Order dismissing the Restoration Application, he did not challenge the Separate Order refusing to condone the delay, which has consequently remained unchallenged. In the absence of a challenge to the Separate Order, the Applicant cannot, through proceedings directed solely against the Impugned Order, circumvent the subsisting Separate Order refusing to condone the delay. The Separate Order, therefore, remains undisturbed.

Conclusion

21. In view of the foregoing, the decisions of the two Courts below disclose no ground warranting interference in the exercise of revisional jurisdiction under Section 115 CPC. Accordingly, the Revision Application is **dismissed**, with no order as to costs.

JUDGE