ORDER SHEET

HIGH COURT OF SINDH, KARACHI

Suit No.B-1630 of 1998

Date

Order with signature of Judge

1. For hearing of CMA No.10226/11
2. For hearing of CMA No.10227/11

Northern Polythene Limited (NPL).....Plaintiff

Versus

National Bank of Pakistan and others.....Defendants

Dates of hearing: 22.11.2012 & 07.12.2012

Mr. Muhammad Anwar Tariq, Advocate for plaintiff

Mr. Yousuf Naseem, Advocate for defendant No.1

Khawaja Shams-ul-Islam, Advocate for defendant No.4

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Muhammad Ali Mazhar, J: This order will dispose of application (CMA No.10226/11) filed by the plaintiff under section 5 of Limitation Act and application (CMA No.10227/11) filed under Order 9 Rule 9 CPC read with section 151 C.P.C.

2. The brief facts of the case are that the plaintiff had filed this suit for Declaration, Permanent & Mandatory Injunction and Recovery of Damages in the year 1998. The suit was fixed for evidence of plaintiff on 06.10.2009 when the plaintiff and his counsel were called absent hence the suit was dismissed for non-prosecution. The suit was dismissed on 06.10.2009 but restoration

application was filed on 03.10.2011 almost after two years and since the restoration application was admittedly time barred, therefore, the plaintiff has also filed application under section 5 of Limitation Act with the prayer that delay in filing application under order 9 rule 9 C.P.C may be condoned.

3. The learned counsel for the plaintiff in support of his application moved under Section 5 of the Limitation Act argued that the plaintiff had no knowledge regarding the dismissal of the suit as the same was ordered to be fixed along with Suit No.B-808/99 and Suit No.B-1222/99. It was further contended that since previous counsel had withdrawn his Vakalatnama, therefore, a direct notice should have been issued to the plaintiff for each and every date but office failed to comply with this requirement. It was further averred that the plaintiff came to know about dismissal of the suit through a letter dated 29th August, 2011 received by Chairman of the plaintiff on 02.09.2011 from National Accountability Bureau Islamabad in which it was inter alia stated that terms of MOU have been turned down and creditor banks have reactivated their suits. On this the plaintiff contacted its new counsel Mr. Abdul Bashir Memon advocate who inquired from Mr. Anwar Tariq advocate when it disclosed that Suit No.B-808/99 and Suit No.B-1222/99 were fixed in court on 13.09.2011 but board was discharged. On further enquiry it was revealed that present suit was dismissed on

06.10.2009. So far as the application moved under Order 9 Rule 9 C.P.C is concerned, learned counsel argued that on 28.8.2001 all three suits were tagged, and Suit No.B-808/99 became leading suit. On 14.10.2008 counsel for the plaintiff Mr. Mansoor-ul-Arifeen filed an application for withdrawal of his vakalatnama which was allowed and order was passed to issue intimation notice directly to the plaintiff for next date of hearing. It was further averred that on 05.11.2008 Intekhab Sayed attorney of the plaintiff appeared and requested for adjournment to engage some other advocate or to pursue Mr. Mansoor-ul-Arifeen to represent the plaintiff in the matter and on his request, matter was adjourned for 23.12.2008. Learned counsel also referred to the order dated 28.05.2009 which shows that on 23.12.2008 matter was fixed but board was discharged. Thereafter matter was again fixed at least three times in court but position was same and plaintiff was not present, however, on 28.05.2009 again this court passed the order as a last opportunity to issue intimation notice to the plaintiff. Learned counsel argued that in view of order notice was required to be issued to the plaintiff at Islamabad address but in the whole record there is no confirmation whether any such notice was received or otherwise acknowledged by the plaintiff or his representative though in the office note it is stated that notice was issued. He also took the plea that due to PCO and induction of new Judges under it, the protest and strikes were being called by Bar Association and the Judges were restored in the year 2009 and in this intervening

period, regular work was not taken up. In support of his arguments, learned counsel relied upon following case-law:-

(1) **1987 SCMR 732 (Muhammad Ismail v. Faiz Bakhsh and others).** It was held that suit dismissed for non-appearance of plaintiff on date fixed for filing of replication. Order was set aside on ground that it was not date of hearing of suit at which either evidence was to be taken or arguments heard, or questions relating to determination of suit considered, but was merely for some interlocutory matter to be decided.

(2) **1995 SCMR 218 (Muhammad Qasim and others v. Moujuddin and others).** Dismissal of appeal for non-prosecution on the date which was given by Reader of the court and not by the Presiding Officer. Order of dismissal of appeal being nullity, Case was remanded for rehearing of appeal on merits.

(3) **2003 CLD (Lahore) 898 (Muhammad Aslam v. Agricultural Development Bank of Pakistan).** Case was fixed for arguments on application for leave to defend the suit, when due to absence of the plaintiff as well as his counsel, the Banking Court dismissed the suit for non-prosecution. If the plaintiff or his counsel was absent on the day, at the best, the Banking Court could have accepted the application for leave to defend the suit but was not competent to dismiss the suit on that date.

(4) **2011 MLD Karachi 266 (Al-Waqar Corporation v. Rice Export Corporation and another).** This is my own judgment in which plaintiff filed application under order IX rule 9 CPC for restoration of suit which was dismissed for non-prosecution. Plaintiff, along with the said application, filed an application for condonation of delay. Plaintiff in his restoration application had taken ground that due to ailment his counsel could not appear to argue the matter and pleaded that he

came to know the factum of dismissal on 25.1.2010 and moved restoration application immediately on 27.1.2010. Evidence was already recorded in the matter. High Court allowed applications of the plaintiff subject to payment of cost of Rs.20,000/- to the defendant and restored suit to its original position.

(5) **SBLR 2012 (Sindh) 1021 (Province of Sindh & another v. Anwar)**. Applications seeking restoration were filed within a period of limitation, whereas no objection in this regard was filed by the respondent. For the purpose of disposal of restoration application it was to be seen as to whether the applicant had shown sufficient reason for non-appearance on the fateful date.

(6) **2012 CLC (Sindh) 229 (M/s. United Bank Ltd. & others v. M/s. Plastic Pack (Pvt) Ltd. & others)**. It was held that Court has inherent powers under Section 151 CPC to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court. Such are enabling provisions and powers thereunder can be exercised by Court to cover ostensibly impossible situations for complete dispensation of justice, for which CPC, 1908, has been designed but despite the best efforts of draftsman to cater for all possible situations, if it is found lacking in meeting some eventualities, the court can act ex delicto justitiae, supply the omission in the procedure, adopt methodology for effectually carrying out the purpose in view.

(7) **2012 CLC (Sindh) 556 (Jangoo v. Fasahatullah Khan & others)**. No substantive step or proceedings in the suit itself was contemplated or required to be undertaken on that date. Court at the most could deal with the interlocutory matters and not the suit itself in its entirety. Unless the suit had been fixed for some substantive hearing or proceedings, it could not have been dismissed for non-prosecution.

(8) **PLD 2012 Sindh 110 (Pehalwan Goth Welfare Council v. District Co-ordination Officer (DCO), Karachi & others).** Plea raised by plaintiff was that when suit was dismissed for non-prosecution, it was fixed for deciding of application and not for issues, evidence or otherwise for hearing of the main case, therefore, it could not be dismissed or non-prosecution. Suit was not fixed either for settlement of issues nor it was fixed for evidence of plaintiff and such suit could not be dismissed for non-prosecution.

4. The learned counsel for the defendant No.1 argued that applications are not supported by proper affidavit as required under Sindh Chief Court Rules. It was further contended that applications are hopelessly time barred. The plaintiff failed to lead evidence and sought number of adjournments on different grounds. In compliance of order dated 14.10.2008 intimation was issued to the plaintiff for 05.11.2008 on which date attorney appeared and sought adjournment to engage counsel. Thereafter the suit was fixed numerous times but no one appeared for the plaintiff nor was any counsel engaged by the plaintiff. Due to withdrawal of vakalatnama by earlier counsel, it was duty of the plaintiff to engage another advocate. Learned counsel denied that there was any disturbance in the court on that particular date due to PCO or induction of Judges. On the contrary he argued that courts were functioning normally. It was further averred that the plaintiff has taken contradictory plea regarding date of knowledge of dismissal of suit. On one hand it was stated that the plaintiff came to know on 01.10.2011 while in Paragraph-2 of application under section 5 of

Limitation Act, it is stated that plaintiff came to know about dismissal of suit through a letter dated 29.08.2011 which was received by Chairman of the plaintiff on 02.09.2011. In support of his arguments he relied upon following case-law:-

PLD 2003 Supreme Court 628 (Sheikh Muhammad Saleem v. Faiz Ahmad). It was held that person seeking condonation of delay must explain delay of each and every day to the satisfaction of the court and should also establish that delay had been caused due to reasons beyond his control. When the delay in filing the appeal was seemingly due to mere negligence and carelessness of the appellant who failed to pursue his case with due diligence, he was not entitled to any indulgence. Door of justice was closed after the prescribed period of limitation had elapsed and no plea of injustice, hardship or ignorance could be of any avail unless the delay of each day was properly explained and accounted for.

5. The learned counsel for the defendant No.4 argued that no power of attorney or board resolution is attached with the applications to show that Intekhab A. Sayed was authorized to file application for restoration of suit on behalf of the plaintiff. The learned counsel also referred to various dates of hearing and argued that earlier counsel withdrawn his vakalatnama and on 05.11.2008 alleged attorney of the plaintiff was present in Court but he failed to engage counsel. Thereafter notices were issued but the plaintiff was called absent and ultimately suit was dismissed for non-prosecution. Learned counsel further argued that the plaintiff has attached copy of letter written by NAB on 29.08.2011 in which

reference of their previous letter dated 13.06.2011 is mentioned which shows that the plaintiff was fully aware in the month of June 2011 regarding dismissal of suit and there was no occasion to wait for further letter or correspondence of NAB if the plaintiff was so keen and interested to file the application for restoration or revival of the suit. He further argued that under Section 27 of Financial Institutions (Recovery of Finances) Ordinance, 2001, suit cannot be restored and proper remedy was to file an appeal under Section 22. Learned counsel also referred to Article 163 of Limitation Act which provides 30 days' time for applying the setting aside the dismissal of suit on default of appearance and time for applying the setting aside the order starts from date of dismissal of the suit. In support of his arguments, he relied upon following case-law:-

(1) **2006 C L D 52 (Kar) (Messrs Makran Fisheries (Pvt.) Limited v. Platinum Co)**. Provision of Section 27, Financial Institutions (Recovery of Finance) Ordinance, 2001 are subject to Section 22 of the Ordnance under which an appeal is provided against final order of the Banking Court. Procedure as laid down in Order IX Rule 9 read with Section 151 CPC is not applicable. Banking Court, in the present case had finally disposed of the suit as dismissed for non-prosecution, as such after passing said order, the suit was no more pending before the Banking Court.

(2) **2006 CLC 163 (Kar.) (Shaikh Kamran Maqbool v. Bolan Bank Limited through Manager & another)**. Procedure to decide suit in the manner provided in Order XVII Rule 3 CPC was available with Banking Court and order passed by Banking Court, could only be attacked by filing an appeal and not otherwise since Section 27 of Financial

Institutions (Recovery of Finances) Ordinance, 2001, had specifically barred Banking Court from revising or reviewing its own order, in particular when order would operate as decision of suit in terms of Order XVII Rule 3 CPC. Impugned order though was passed on account of non-appearance of plaintiff, but such order being clothed with mandatory provisions of Order XVII Rule 3 CPC, it would amount only to considering of merits of impugned order which exercise could only be undertaken in appeal.

(3) **1991 MLD 63 (AJ&K HC) (Abdul Karim and 2 others v. Rehm Ali)**. In order to seek condonation of delay, the plaintiff was under a heavy duty to satisfy the judicial mind of the Court that he was restrained by force of circumstances beyond his control to move the Court within the stipulated period for restoration of his suit.

(4) **PLD 1970 (Lahore) 412 (Mst.Ghulam Sakina & others v. Karim Baikhsh & others)**. Section 151 cannot be invoked to set aside dismissal (obiter). Expression ……..when the suit is called on for hearing. Word "hearing" implies taking down of evidence or hearing arguments or where question relating to the determination of suit considered. Court can dismiss suit under Order IX rule 8 only on date which is fixed for hearing of suit.

(5) **PLD 1989 (Karachi) 1 (Sabzal and others v. Bingo and others).** For restoration of suit Article 163 applies while in case of setting aside decree Article 164 is applicable. Application for restoration of suit, therefore, has to be filed within thirty days from date of its dismissal. Article 181 contemplates a situation where no period of limitation is prescribed in the Schedule of the Limitation Act or Section 48 of CPC and does not apply in case of restoration of suit.

(6) **2009 SCMR 1030 (Mian Muhammad Asif v. Fahad & another)**. Dismissal of suit for non-prosecution. Article 181 of the Limitation Act, 1908 in circumstances, was not attracted and courts correctly applied Article 163 of the Limitation Act, 1908 while considering the application for condonation of delay in moving the application for restoration of the suit. Issue of limitation lost its importance when party failed to show any cause for his absence and that of his counsel on the relevant date. Even otherwise, the court was not bound to restore the suit merely because the restoration application was within time.

(7) **2009 SCMR1435 (Abdul Rashid v. Director General, Post Offices, Islamabad & others)**. It is duty and obligation of aggrieved person to pursue his legal remedy with diligence and to satisfy conscience of Court or Quasi-Judicial Authority for approaching respective forums beyond prescribed limitation. In case aggrieved person does not avail remedy within prescribed period then vested right accrues to other side which could not be taken away lightly even if objections to that effect were not raised by opposite party.

6. Heard the arguments. Learned counsel for the plaintiff Mr.Mohammad Anwar Tariq made much emphasis that this suit was being fixed with Suit No.808/1999 and Suit No.B-1222/1999. In order to verify this fact I called record and proceedings of both the suits to examine this fact. No doubt the instant suit was being fixed along with aforesaid suits. It is also a fact that the present plaintiff is defendant No.1 in both the aforesaid suits and their directors/guarantors have also been impleaded. On 14.10.2008, the earlier counsel for the plaintiff withdrawn his Vakalatnama and it is

also a fact that the suit in hand was dismissed on 6.10.2009 for non-prosecution. The record and proceedings of all three suits clearly demonstrate that this suit along with Suit No.B-808/1999 and Suit No.1222/1999 was being fixed continuously from 14.10.2008 to 6.10.2009. Since in the suit in hand the plaintiff failed to lead evidence or to produce witness, the suit was dismissed for non-prosecution. I also noted that this suit was being fixed for evidence of plaintiff since 7.5.2003, but the plaintiff failed to adduce any evidence till the date of the dismissal of the suit for non-prosecution. This fact is also reflecting from the record that the Suit No.B-808/1999 and Suit No.1222/1999 in which the plaintiff was defendant No.1 though fixed on 6.10.2009, but these two cases were discharged which is transpiring from Reader's diary. It is also a fact that the leave to defend application filed by the plaintiff in Suit No.B-808/1999 was dismissed for non-prosecution on 23.5.2000 which was subsequently, restored on 29.8.2000 by consent and the leave to defend application is still pending and nobody was appearing to represent the plaintiff in that suit also. However, on 13.10.2011 Mr.Mohammad Anwar Tariq, Advocate filed his Vakalatnama for defendant Nos.1 (plaintiff) and defendant Nos.2 and 3.

7. Now I would like to take up the Suit No.B-1222/1999, in this case also the Vakalatnama was withdrawn on 14.10.2008 and as I observed earlier this suit was also being fixed together and even on

6.9.2009 when the suit in hand was dismissed, this suit was fixed but it was discharged. In this case also the present plaintiff is defendant No.1 and leave to defend application (CMA No.9606/1999) was dismissed vide order dated 25.8.2004 and the plaintiff was directed to file statement of account showing the liabilities of defendants within two weeks. In this case also after discharging the Vakalatnama of Mr.Mansoor-ul-Arfin, Advocate vide order dated 14.10.2008, Mr.Anwar Tariq, Advocate has filed Vakalatnama for defendant Nos.1 (plaintiff) defendant No.2 on 13.10.2011. After analyzing the Order Sheet/Reader's diary etc. there is no germane or nexus to show that since the present suit was being fixed along with two other suits in which the present plaintiff was defendant, the present suit could not have been dismissed for non-prosecution, when it is clear that on 6.10.2009 all suits were fixed in court and out of which two were fixed for hearing but the board was discharged and the suit in hand in which the plaintiff was to lead evidence was dismissed for non-prosecution. This is not the case of the plaintiff that on the date of dismissal his advocate was present in two other suits but in all three suits there was no appearance for and behalf of the plaintiff or in the capacity of defendant in two other suits.

8. At this juncture, I would like to point out that CMA No.7273/1999 was filed by the plaintiff for consolidation of this suit with Suit No.808/1999, which application was dismissed. Though the order sheet does not transpire any date when this order was

passed, however, the Reader diary shows that this order was passed on 8.5.2002, therefore, this argument of the learned counsel is also misconceived that the Suit No.808/1999 was being treated as leading suit. On the contrary there was no consolidation order passed by this court.

9. So far as the other allegations that there was a heavy rain or there was some disturbance in the judiciary on account of PCO on that particular date i.e. 6.10.2009 the plaintiff has failed to point out any disability which prevented him not to appear and or lead evidence. The case of the plaintiff is that after withdrawal of Vakalatnama by the earlier counsel no notice was issued to the plaintiff to cause appearance of plaintiff. It is evident from the order dated 5.11.2008 when one Intekhab Sayed attorney of the plaintiff appeared in court in person and requested for adjournment to engage some other advocate or to pursue Mr.Mansoor-url-Arfin to proceed the matter and in his presence fixed date was given to him. However, on 23.12.2008 the board was discharged. Again on 28.5.2009 order was passed to issue intimation notice to the plaintiff. Again intimation was issued for 18.8.2009 on which date the matter was discharged for want of time. The crux of the arguments of the learned counsel for the plaintiff is that for each and every date notice should have been issued to the plaintiff is a misconceived argument. If the plaintiff was so serious to pursue and prosecute the case then it was their sole responsibility and

obligation and or duty to engage counsel so that their case may be decided on merits. No burden can be shifted upon the court to send notice for each and every date, when the specific date and reasonable time was given to their attorney either to engage counsel or to pursue their earlier counsel to proceed the case.

10. It was the responsibility of the plaintiff to vigilantly pursue the case and not to act recklessly which has been done in this case. Though the suit was dismissed on 6.10.2009 but the restoration application was filed on 3.10.2011, which is admittedly time barred. Article 163 of the Limitation Act provide 30 days' time for setting aside the order dismissing the suit in default of non-appearance and right to apply accrues from the date of dismissal. In order to seek condonation of delay the plaintiff has also filed the application under Section 5 of the Limitation Act and pleaded the knowledge of dismissal of the suit from the letter dated 29.8.2011, which was written by NAB to the Chairman of plaintiff. In the letter of NAB violation of a MOU was attributed to the plaintiff with the direction to pay balance amount by 15.9.2011 failing which NAB will reinitiate investigation proceedings against the plaintiff. Along with this letter a letter of NBP dated 29.7.2011 is also attached to show that Executive Vice President of NBP informed the NAB that the plaintiff failed to fulfill the terms of MOU and the creditor Bank have also re-activated their recovery suits. The NAB letter does not refer any suit, but it is merely relate to re-initiation of investigation

against the plaintiff. While in the NBP's letter also no particular suit number is mentioned, but it is mentioned that on account of non-fulfillment of MOU the creditor Banks have decided to reactivate the recovery suit. On plaintiff's own showing Suit No.808/1999 and Suit No.1222/1999 are being fixed in court regularly out of which in one suit the leave to defend application of the plaintiff is pending and in another suit the leave to defend application was dismissed, so the question of reactivation of suits does not arise when they are already activated.

11. So far as the condonation of delay is concerned, the plaintiff on its own pleaded that on came into knowledge of dismissal of this suit, through letter dated 29.8.2011, which was allegedly received to them on 2.9.2011 and the condonation application along with restoration application both were filed on 3.10.2011. It is quite strange to note that the suit was dismissed on 6.10.2009 and the plaintiff came to know the dismissal on 29.8.2011, but in the intervening period no efforts were made by the plaintiff to watch or to take care of their suit. Almost two years lapsed but the plaintiff was so reckless and careless to find out the fate of the suit and their conduct shows that in these two years period they never bothered to pursue or verify the status of their own suit. This cannot be treated a sufficient cause that a party who is himself a plaintiff has to wait for the information of dismissal of their suit through different source and only the letter of NAB they awakened which is otherwise not at all relevant to the dismissal rather its

parameters are merely confined to the alleged MOU and it is non-fulfillment on the part of the plaintiff.

12. There is no strait-jacket formula for determining what 'sufficient cause' is. The expression sufficient cause so as to grant relief under Order 9 Rule 9 CPC has been left to the wisdom, good sense and discretion of the court. The word 'sufficient cause' for restoration of suit is not susceptible of any exact definition and no hard and fast rule can be laid down. As to what is 'sufficient cause' depends on the facts and circumstances of each case. Parameter of each case would primarily be its own facts, it would have to be taken into consideration for determining as to whether 'sufficient cause' was shown or not. The court is to be satisfied as to the sufficiency of good cause and it has to be subjective satisfaction. Where suit is dismissed for default it is the duty of that party or counsel to show sufficient cause as to why case was not prosecuted on the relevant date. It is well settled that mere engagement of counsel does not absolve the party of his responsibility as it was as much his duty as that of counsel engaged by him to see whether the case was properly and diligently prosecuted or not and if counsel was lacking in his sense of responsibility it is the party who engaged him should suffer and not the other side. In this case the earlier counsel withdrawn his Vakalatnama and on subsequent date attorney of the plaintiff appeared and sought time to engage counsel and thereafter, became out of scene and at least for two years did not

take any pain to watch out or find out the stage or status of the suit and now after considerable time when valid right accrued in favour of the defendant, applied restoration with application for condonation of delay. There are two different aspects involved in this case for the purposes of restoration of suit and condonation of delay, the plaintiff has to demonstrate the sufficient cause whereby he was prevented not to diligently pursue the suit while for the purposes of condonation of delay under Section (5) of the Limitation Act, delay of each and every day has to be explained. If condonation is allowed even then it does not mean that restoration of suit will also be achieved, but this remedy is subject to the proof of sufficient cause, which plaintiff has failed to establish.

13. Learned counsel for the plaintiff relied upon various case law which are distinguishable to the facts and circumstances of the present case. In the case of Mohammad Ismail, the matter was fixed for filing replication and for deciding interlocutory application, but the whole suit was dismissed. In the case of Mohammad Qasim & others the appeal was dismissed for non-prosecution on the date which was given by the Reader. In another case of Mohammad Aslam the matter was fixed for hearing of leave to defend application but due to absence of plaintiff the suit was dismissed. In my own judgment in case of Al-Waqar Corporation the evidence was already recorded and the matter was fixed for arguments only but the suit was dismissed for non-prosecution on 18.2.2009, as

the plaintiff failed to adduce evidence, but the restoration application was filed with short delay on 27.01.2010 and not after two years. In the case of Province of Sindh (supra) the court held that for the purposes of disposal of restoration application it was to be seen as to whether the applicant had shown sufficient reason for non-appearance on the fateful date and such application has been filed within a period of limitation. In the case in hand no sufficient cause has been shown except that after two years the plaintiff came to know the dismissal through NAB letter and admittedly the application is barred by time. In the case of United Bank Ltd., the court held that the inherent powers under Section 151 CPC may be exercised to meet the ends of justice and to prevent abuse of process of court. In the case of Jangoo, the court held that when the suit was dismissed the matter was fixed for interlocutory nature and the suit was not fixed for some substantive hearing of proceedings and lastly in the case of Pehalwan Goth Welfare Council it was held that when the suit was dismissed for non-prosecution it was fixed for deciding the application and not for issues, evidence or otherwise. In all aforesaid cases it was never held that when plaintiff failed to lead evidence repeatedly the suit cannot be dismissed for non-prosecution rather most of the cases in which restoration application was allowed were fixed for hearing of interlocutory application and not for settlement of issues or evidence/arguments.

14. The case of Shaikh Mohammad Saleem relied upon by the counsel for the defendant No.1, the hon'ble Supreme Court expounded the guideline that person seeking condonation of delay must explain delay of each and every day to the satisfaction of the court and should also establish that delay had been caused due to reasons beyond his control, which the plaintiff has failed to make out in the case in hand.

15. Learned counsel for defendant No.4 referred to the cases of Abdul Karim, Mst.Ghulam Sakina, Sabzal, Mian Mohammad Asif and Abdul Rashid (supra), in which the court held that while seeking condonation, the plaintiff is under a heavy duty to satisfy the judicial mind that he was restrained by force of circumstances beyond his control. The Word "hearing" implies taking down of evidence or hearing arguments and the Court can dismiss the suit under Order IX rule 8 only on date which is fixed for hearing. It was further held that for restoration of suit Article 163 of the Limitation Act applies and application for restoration should have been filed within thirty days from the date of its dismissal. In one case it was held that it is the duty and obligation of aggrieved person to pursue this remedy with diligence and to satisfy conscience of court for approaching respective forums beyond prescribed limitation. In case aggrieved person does not avail remedy within prescribed period then vested right accrues to other side which could not be

taken away lightly even if objections to that effect were not raised by opposite party.

16. Learned counsel for the defendant No.4 further referred to two more case law reported in 2006 CLD 52 and 2006 CLC 163 (supra) in both case law learned Single Judges of this court held that provision of Section 27 of Financial Institutions (Recovery of Finances) Ordinance, 2001 are subject to Section 22 of the Ordinance under which an appeal is provided against final order of the Banking Court. Hence, procedure laid down under Order IX Rule 9 CPC read with Section 151 CPC is not applicable. The ratio of both judgments cited above is that the order passed by the Banking Court could only be attacked by filing an appeal as Section 27 of the aforesaid Ordinance has specifically barred the Banking Court from revising or reviewing its own order in particular when order would operate as decision of the suit in terms of Order 17 Rule 3 CPC.

17. In this regard I would like to point out that the present suit was filed under the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997, which was repealed by Financial Institutions (Recovery of Finances) Ordinance, 2001. Under sub-section (6) of Section 7 of the 2001 Ordinance, it is clearly provided that all proceedings pending in any Banking Court under the repealed Ordinance shall stand transferred or to be deemed to be

transferred and heard and disposed of by the Banking Court having jurisdiction under 2001 Ordinance. Under sub-section (2) of 2001 Ordinance it is clearly provided that the Banking Court shall in all matters with respect to which the procedure has not been provided, follow the procedure laid down in the CPC. Section 27 of Financial Institutions (Recovery of Finances) Ordinance, 2001 relates to the finality of order and provides that subject to the provision of Section 22 no court or other authority shall revise or review or call or permit to be called into question any proceeding, judgment, decree, sentence or order of the Banking Court or legality or propriety of anything done or intended to be done by the Banking Court in exercise of jurisdiction under this Ordinance. The provision of appeal against the judgment, decree, sentence or final order passed by Banking Court is provided under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. With great respect in my opinion Section 27 of the Ordinance does not restrict Banking Court itself but it clearly provides that subject to Section 22 no court or other authority shall revise or review or call in question any proceedings, judgment or decree or sentence or order of Banking Court. The dismissal of suit in non-prosecution as done in this case did not decide the rights of parties on merits and even this order cannot be considered a decision under Order 17 Rule 3 CPC, but the suit was only dismissed due to default and or non-adducing the evidence. Under the Article 37 of the Constitution of Pakistan, it is the responsibility of State to ensure inexpensive and expeditious justice. If Section 22 of Financial Institutions

(Recovery of Finances) Ordinance, 2001 is read in a way that after dismissal of suit for non-prosecution a Banking Court cannot restore the suit then this would be very harsh and irrational interpretation which lead to an absurdity that the order dismissing the suit for non-prosecution which is neither a judgment nor decision or decree should be challenged in appeal in which also there would be only probability that the appellate court after hearing the parties at best either would dismiss the appeal or restore the suit on sufficient cause and remand the matter back to the banking court to proceed the case on merits as no conclusive decision/decree and or judgment of the trial court would be before the appellate court to decide the rights of the parties except that the suit was dismissed for non-prosecution without touching merits of the case. In the case in hand I am Banking Court as defined under sub-clause (ii) of clause (b) of Section 2 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and in my humble opinion there is no bar under Section 27 of the said Ordinance that the Banking Court cannot restore the suit dismissed for non-prosecution. Though it is a different aspect that while restoring the suit it is incumbent upon the Banking Court to see whether sufficient cause has been made out or not and in case of application barred by limitation, the Banking Court has also to see whether delay of each and every day has been explained or not to the satisfaction of the court, which in my understanding the plaintiff has failed to make out in this case. Sufficient cause has been given a meaning to embrace all relevant circumstances. The question

would be whether the plaintiff honestly intended to be in court and did his best to get there in time, but for intervention of some inevitable cause he failed to appear which is sufficient cause inviting order for restoration. No sufficient cause has been shown therefore, I am not inclined to restore the suit.

18. As a result of above discussion, both the applications are dismissed.

Karachi:-

Dated 27-02-2013 **Judge**