

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
 Ex. No.05 of 2005

 Date Order with signature(s) of Judge(s)

1. For hearing of CMA No.96/2013.
2. For hearing of CMA No.102/2013.

29.01.2014.

Mr. Muhammad Safdar, advocate for the Decree Holder.
 Mr. Salahuddin Ahmed, advocate for the Judgment Debtor
 No.2 alongwith Mr. Nadeem Ahmed, Advocate.
 Mr. Ch. Mamoon, Advocate for the Objectors.
 Mr. S. Arshad Ali, holding brief for Mr. Shahenshah
 Hussain, advocate for the contemnors.

NAZAR AKBAR-J: 1. This is an application for restoration of the Execution Application, which was dismissed on 07.03.2013, after the power of Mr. Zahid Jamil, Advocate for the Decree Holder was withdrawn on 07.02.2013. The application for withdrawal of the Vakalatnama is available at Page No.931 of the Court File, which shows that Mr. Zahid Jamil, Advocate before withdrawing his Vakalatnama has complied with the requirement of Rule 50 of the Sindh Chief Court Rule, which reads as follows:-

“50. Notice of discharge to a client. An advocate on record in a suit or matter desiring to obtain an order for his discharge, shall first give notice of his intended application for discharge to his client and the fact of such notice having been served shall be stated in the affidavit in support of such application.”

2. Despite compliance of Rule 50 of the Sindh Chief Court Rule, this Court was pleased to order that intimation notice may be issued to the Decree Holder. Learned counsel for the Applicant has contended that intimation notices were not properly served on the Decree Holder, as the

notice was sent to the Attorney of the Decree Holder, whose Power of Attorney had been withdrawn prior to issuance of notice. The earlier Attorney was replaced by one Muhammad Abdullah.

3. Learned counsel for the Applicant has advanced two contentions; one is that the intimation notices were sent to the Attorney, who was not the Attorney and other contention is that unless this application is allowed, the Decree Holder shall be deprived of right to fair trial, and it would be violation of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1979. He has relied upon the following case law:-

- I. Messrs. United Bank Limited vs. Messrs. Plastic Pack (Pvt.) Limited (2012 CLD 239).
- II. United Bank Limited vs. The Chairman, Banking Tribunal-I, Lahore (1999 MLD 3267).
- III. Alamgir vs. The State (1988 SCMR 642).

4. Mr. Salahuddin Ahmed, learned counsel for the Judgment Debtor No.2 has mainly contended that the conduct of the Plaintiff/Decree Holder right from 2005 when this Execution Application was filed has to be examined by the Court to appreciate that whether the Applicant has made out a case for indulgence to allow this restoration application. While showing deliberate negligence of applicant by referring to her conduct he has contended that the execution is arising out of a matrimonial dispute and once the Decree Holder obtained attachment order of valuable properties of Intervener viz. Hotel Metropole owned by Karachi Properties Investment Company Limited, the counsel for the Decree Holder has always sought time and delayed the case to coerce the Intervener to succumb to uncalled for demand of ex-wife of one of the

Directors of the Company. He has shown from the record that whenever the case was taken up for hearing, the learned counsel for the Decree Holder sought adjournments on one ground or the other and on 20.05.2009 Mr. Zahid Jamil, advocate threatened that if the case is proceeded, he will have no option but to withdraw his Vakalatnama. The order is reproduced as follows:-

“This matter was called up at 9.00 a.m, when a request was made for keeping aside on behalf of Mr.Zahid Jamil, as he was stated to be busy before another Bench. In the second round, when the matter was called up at 12.15 pm, Mr. Zahid Jamil effected his appearance and requested for adjournment, which request was vehemently opposed by all the learned counsel for the J/Ds and Interveners, Mr. Zahid Jamil states that if the case is proceeded, he will have no option but to withdraw his Vakalatnama.

In my view request in such a manner specially when the hearing was adjourned by framing the question to be addressed is totally unwarranted. However, in the interest of justice, I adjourn the hearing to 27.05.2009, at 11.00 a.m., with mark of caution that no further adjournment on any ground, whatsoever should be granted.”

Mr. Zahid Jamil, advocate for the Decree Holder from 24.1.2005 to 20.05.2009 when he threatened to withdraw his power never addressed the Court on merit of the case and after consuming 8 years withdrew his Vakalatnama on 07.2.2013.

5. Mr. Salahuddin Ahmed, learned counsel for the Judgment Debtor No.2 has shown various instances of conduct from Court record, which in my view are not proper to be mentioned in this order because many of them are in bad taste and I have quoted just one which is enough.

6. He has further contended that the Attorney of the Decree Holder, who has filed affidavit in support of the Application is a Lawyer by

profession and he was not only personally aware of the notice under Rule 50 of Sindh Chief Court Rules sent to Decree Holder for withdrawal of Vakalatnama from the Office of Mr. Zahid Jamil, Advocate, but even his name is available on the Letter Head. In the affidavit in support of the Application for restoration of the Execution Application, the Attorney has stated on oath that intimation notices were not served on the attorney of the Decree Holder without realizing that his own name appears on the notice under Section 50 Sindh Chief Court Rules for withdrawal of the Vakalatnama of Mr. Zahid Jamil, Advocate. The statement of attorney in para ground (b) of the affidavit “that no notice/summons of any nature whatsoever was issued to serve upon the power of attorney of the Applicant” when read with contents of Notice under Rule 50 of the Sindh Chief Court Rules falsifies the stance of applicant. Whether the intimation notices were wrongly sent or even not sent despite Court orders, in the given facts of this case, shall not be a sufficient cause for the purposes of showing indulgence by the Court. The Deponent has not disclosed that despite being the Attorney of the Decree Holder and associate of Mr. Zahid Jamil, Advocate why he did not act immediately and come forward by engaging some other Counsel. He is the Attorney since 2007 and he has been appearing as an associate of Mr. Zahid Jamil, Advocate in this case and several Order Sheets bear his name. He was not an ordinary Attorney, who was supposed to wait for communication of Court’s orders through his Counsel rather he being Lawyer personally knew whatever was going on in Court in execution application filed by his Principal. Mr. Salahuddin Ahmed, learned counsel for the Judgment Debtor No.2 has relied upon the following case law:-

- I. Bashir Ahmed vs. Settlement of Rehabilitation Commissioner (1982 SCMR 188).
- II. Rafiq Ahmed vs. Abdul Haleem (1982 SCMR 1229).
- III. Muhammad Rahim vs. Mst. Begum Kaniz Fatima Hayat (1986 CLC 178).

7. The case law cited by Mr. Muhammad Safdar, learned counsel for the Decree Holder are not relevant in the facts of the case in hand. In the first case reported in **2012 CLD 239**, the execution was restored as the application was dismissed due to non-appearance of the counsel for the decree holder and in the affidavit sufficient cause has been shown for the non-appearance on 07.4.2008. In the case law reported in **1999 MLD 3267** the execution was restored because it was dismissed on account of non-payment of process fee for the issuance of warrants of attachment as process fee was not deposited by the Decree Holder and the Court held that it was too technical to dismiss the restoration application; and in **PLD 1988 SC 642** the facts of the case were that applicants were declared “exparte” without proper service of notice. In all the three cases the facts and circumstances are different. I do not find anything in these three case laws that the faithful Attorney was personally aware of notice under Rule 50 of Sindh Chief Court Rules for withdrawal of Vakalatnama by the learned counsel and yet Court has condoned the negligence of litigant.

8. On the other hand the case law relied upon by Mr. Salahuddin Ahmed, learned counsel for the J.D No.2 on the point that the litigants are reluctant in pursuing their case squarely covers the case of J.D. In the first case law relied upon by him **1982 SCMR 188**, it has been held

by the Hon'ble Supreme Court that while exercising discretionary powers, the Court has to see the conduct of the petitioner and to appreciate that he/she was diligently pursuing the case before the Court and if the petitioner's conduct is found deficient the discretion could not be exercised in favour of such petitioners, and in **1982 SCMR 1229** while refusing request for restoration the Hon'ble Supreme Court reaffirmed the view of Supreme Court in the case of Zulfiqar Ali ..vs.. Lal Din and others (**1974 SCMR162**) that mere facts that litigants have engaged counsel to appear on their behalf, do not absolved them from the responsibility, and it continues to be the duty of the party to see that the case was properly and diligently prosecuted.

9. In the case in hand the applicant herself was fully aware of the development in her case through her attorney since the attorney who has himself filed an affidavit has not denied service of notice of Mr. Zahid Jamil, advocate under Rule 50 of SCCR on the applicant nor the counsel now representing the applicant has denied the fact that the attorney who has filed the affidavit in support of his restoration application is not a lawyer and had been working with Mr. Zahid Jamil, advocate at the relevant time. It is also not denied that even on the notice from the office of Mr. Zahid Jamil, Advocate the Letterhead carries name of the attorney. The following contents of the notice to the Client/Applicant from her Counsel leave no room for any indulgence:-

“With reference to our previous discussions and for reasons which you are aware, since certain instructions issued may put the firm in an embarrassing position with regard to certain members of the Bench, for which we have the highest respect and regard, the Senior Partners of Jamil & Jamil regrettably have taken the decision that the firm, under these circumstances, will

be unable to provide you with further representation in this matter.”

Best regards

*Sd/-
(Jamil & Jamil)
Barrister-at-law*

In fact, she has compelled her counsel to return her file and now trying to take the refuge behind the grace shown by the Court in issuing intimation notice to her though it was not required.

10. The grievance of the applicant is that the intimation notice was issued to the previous attorney after withdrawal of Vakalatnama. Issuance of notice to the attorney of applicant was not even required after compliance of the notice, under Rule 50 of SCCR and even if the Court had shown grace by issuing notice, in the given facts and circumstances of the case, the Court cannot ignore the deliberate and willful negligence of the applicant herself in pursuing the case. She has failed to show bonafide in prosecuting her case with due diligence.

11. Next contention of the learned counsel for the Decree Holder that his right to fair trial, which is protected under Article 10-A of the Constitution shall be violated in the event of dismissal of this application has no substance. The Article 10-A of the Constitution is reproduced below for convenience to appreciate his contentions.

“10A. Right to fair trial. – For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.”

12. The Article 10-A of the Constitution is not for the prosecutor to claim “fair trial and due process”. The protection of Article 10-A is

available only to defendant and / or accused facing civil or criminal trial as the case may be so that they may not be condemned unheard or treated unfairly in the process of adjudication. The Applicant was to prosecute the case for herself and for her own negligence she cannot claim that she has not been given fair trial. She was in Court for almost 09 years and the record shows that her counsel was not ready to bring the miseries of his own client to an end by getting the case decided on merit. He, on his own or under instruction of his client, dragged the prosecution for full 9 years. He was never found complaining delay in disposal of the execution proceeding. Therefore, this contention has no force. It is rather against the logic.

13. In the above facts and circumstances of the case this Restoration Application is dismissed and all the pending Misc. Applications are also dismissed as infructuous.

JUDGE

MUBASHIR