Form No.HC.JD/C-121

ORDER SHEET
IN THE LAHORE HIGH COURT, RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

R.F.A. No. 51 of 2023

Ayaz Mehmood **Versus** Musadaq Riaz & 2 Others

Sr. No. of Order/ Proceeding	Date of Order/ Proceeding	Order with Signature of Judge, and that of parties or counsel, where necessary
	13.02.2023	Mr. Muhammad Asghar Gondal, Advocate for the applicant / appellant.

C.M.No.1-C of 2023

The subject appeal, filed under section 96 of the Code of Civil Procedure, 1908 (the '***Code***'), is directed against the *ex-parte* judgment and decree dated 21.12.2021 passed by learned Civil Judge 1st Class, Rawalpindi, whereby, the suit for specific performance and injunction, instituted by the appellant, has been dismissed. The appeal is accompanied by the instant application dated 08.02.2023 (the '***application***') seeking to exclude the period for pursuing the remedy before forum without jurisdiction i.e. the learned District Court, Rawalpindi.

2. Mr. Muhammad Asghar Gondal, learned counsel for the applicant / appellant, during the arguments, has reiterated the contents of the *application* and relevant part of the same is as follows: -

> *"2. That the applicant / appellant filed an appeal before the Learned District Judge*

Rawalpindi as per the appellant is proper forum of the Learned District Judge Rawalpindi but lateron the Learned Addl. District Judge asked the appellant that the appeal was not maintainable due to the proper jurisdiction of the District Judge Rawalpindi, hence the case was return to the appellant to file for the proper forum before this honorable Court.

3. That the decision of case on merits is always to be encouraged instead of non suiting the litigants for technical reasons including on limitation."

3. There is no cavil to the settled proposition of law that where the plaint is returned under Order VII, Rule 10 of the *Code* for its representation before the Court of competent jurisdiction, for all intent and purposes, it is treated as a fresh institution. The suit for specific performance of agreement dated 18.04.2017 involving consideration of Rs.61,200,000/- was dismissed by the learned Civil Court vide impugned judgment and decree dated 21.12.2021. Instead of filing appeal before this Court, an appeal was instituted before the learned District Court, Rawalpindi which remained pending for about one year and finally the appeal was returned under Order VII, Rule 10 of the *Code* vide order dated 08.02.2023 passed by the learned District Court, Rawalpindi.

4. The *application*, for excluding the period of pursing the remedy before the learned Court lacking jurisdiction, is instituted under section 5 of the Limitation Act, 1908 (the '***Act***') which

requires a litigant to satisfy the Court that he has sufficient cause for not preferring the appeal or making the application within the stipulated time period. In order to establish 'sufficient cause', there is no mathematical formula or hard and fast rule that can be followed, however, it is equally an established principle that although section 14 of the *Act* has no direct application to the appeals but the principles enumerated therein can be taken into the consideration by the Court while ascertaining the availability of 'sufficient cause' for condonation of delay. Reference can be made to the case titled "*Khushi Muhammad through L.Rs. and Others Versus Mst. Fazal Bibi and Others"* (**PLD 2016 Supreme Court 872**). It will be beneficial to reproduce the relevant extract from the said judgment of the Honourable Supreme Court of Pakistan, which reads as follows:-

> *"37. The purpose of the laws of limitation is to establish certainty in the affairs of men, to bring repose and to bring an end to litigation after a certain time period has expired from accrual of an actionable right. Both Sections 5 and 14 of the Act are exceptions to the laws of limitation. A person claiming under the aforesaid exceptions must establish that he or she is not disentitled to the discretionary relief which may be awarded by the Court. Therefore a claimant seeking condonation of delay must explain the delay of each and every day to the satisfaction of the Court, establish that the delay was caused by reasons beyond the person's (or counsel's) control and that he was not indolent, negligent or careless in initiating and pursuing the actionable*

right which had accrued in his favour. The "borrowed" applicability of the provisions of Section 14, where its principles are taken into account to set the standard for ***sufficient cause****, proceeds on the conditions precedent of* ***due diligence*** *and* ***good faith*** *which must be present before the court grants condonation of delay on the basis of time spent before wrong fora; even if such principles are not taken into consideration the court is not supposed to exercise its discretion in any arbitrary, whimsical and fanciful manner but has to see if a case was made out by the appellant which prevented and precluded him from approaching the right forum of appeal. The overwhelming case law cited in the earlier part of this opinion concludes that the institution and the pendency of an appeal before a wrong forum on counsel's wrong advice i.e. one having no jurisdiction does not constitute a sufficient cause for condonation of delay in terms of Section 5 of the Act, but there is considerable case law that supports the contrary view. In my opinion, the gulf betwixt the divergent views must be bridged by employing proportionality and balancing. It can neither be held that condonation is absolutely ruled out in such a situation nor that the appellant shall be entitled to condonation as a matter of course and right, rather the Court must look into the facts and circumstances of each as to whether sufficient cause has been made out. Because any exercise of discretionary jurisdiction in favour of a person seeking relaxation of the application of the laws of limitation as of right etc. would be prejudicial to the interests of the respondent. A valuable vested right accrues in favour of the respondent the moment a relevant period of limitation expires in that the respondent is then free from the hanging sword of an actionable claim. In order to wrest away this valuable right from a respondent the*

person seeking condonation of delay must establish ***sufficient cause****. However, sufficient cause is a term wide enough to encompass within it the principles enshrined in Section 14 of the Act or indeed independent thereto. Time spent pursuing an appeal before a wrong forum, in good faith and with due diligence ought in our view to constitute sufficient cause for condonation of delay. But the act of approaching a wrong forum must be accounted for: It should be established that due to some honest, bona fide and genuine ambiguity in the law or in fact, a party or his counsel was led astray in terms of approaching a wrong forum. Mere incompetence of the counsel, inadvertence, negligence or ignorance of law attributable to him and / or overlooking of the record by the counsel cannot constitute sufficient cause ipso facto, but the factor (s) which misled the legal counsel, including any ambiguity in the law, causing him to file the appeal before the wrong forum must be indicated. Mere wrong advice of counsel is not an adequate ground per se to constitute sufficient cause because if this rule is accepted, the centuries tested rule that ignorance of law is no excuse would stand violated. Besides, the above factors which caused ambiguity and misled the appellant (or his counsel as the case may be) have to be stated with clarity and precision in the application for condonation of delay and proved on the record."*

(Underlining is added)

5. Here it will be appropriate to reproduce section 14 of the *Act*, which reads as follows: -

"*Exclusion of time of proceeding bona fide in Court without jurisdiction.*

(1) In computing the period of limitation prescribed for any suit the time

> *during which the plaintiff has been prosecuting **with due diligence** another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and **is prosecuted in good faith** in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.*
>
> *(2). In computing the period of limitation prescribed for any application the time during which the application has been prosecuting **with due diligence** another civil proceeding whether in a Court of first instance or in a Court of appeal, against the same party for the same relief shall be excluded, where such proceeding is **prosecuted in good faith** in a Court which, from defect of jurisdiction, or other cause of a like nature is unable to entertain it."*
>
> *(Emphasis Supplied)*

6. Reading of above clearly reflects that it is incumbent upon the litigant, seeking exclusion of time period for pursuing remedy in forum without jurisdiction, to plead the facts to justify the grant of relief and by reasonably demonstrating due diligence and good faith in pursuing the matter before the learned Court having no jurisdiction to adjudicate.

7. The initial burden, to show the above elements for seeking to exclude the period consumed in prosecuting case before learned forum without jurisdiction, is on the applicant pleading such relief. Reliance in this regard can be placed on the law settled by the Honourable Supreme Court as well as this Court in cases titled "*Khushi*

Muhammad through L.Rs. and Others" (***supra***), "*Monazah Parveen Versus Bashir Ahmad and 6 Others"* (**2003 SCMR 1300**) and "*Abdul Ghani Versus Mst. Mussarat Rehana"* (**1985 CLC 2529**).

8. Reverting to the facts of the case, the applicant / appellant miserably failed to plead the elements of section 14 of the *Act.* No plea as to the *bonafide* on the part of the applicant / appellant or any due diligence on his part has been taken in the *application* or during the arguments. The learned counsel for the applicant / appellant besides reiterating the contents of the *application*, which are already reproduced above, failed to give any justification or to argue as to due diligence adopted by the appellant for about one year of pursuing the remedy in wrong forum.

9. The circumstances of the case did not involve or present any difficulty in ascertaining correct forum having jurisdiction to hear the appeal. The error of filing the appeal before the learned District Court, Rawalpindi is fairly obvious and it could have been avoided by exercising even little diligence or adopting some care. A learned Division Bench of this Court, somewhat in similar circumstances of the present, in "*Abdul Ghani" case* (***supra***) has observed that in such circumstances even the wrong advice of a counsel cannot be foundation for enlargement of time consumed in pursuing remedy before wrong forum. The relevant part of the said judgment is as under: -

> "*We are of the view, that the error in filing the appeal in the District Court is so patent, that it could have been avoided by exercising due care.* ***The wrong advice of a counsel does not furnish a foundation for enlargement of time****. A reference in this connection may be made to Abdul Ghani v. Ghulam Sarwar PLD 1977 SC 102, which is on all fours on the case in hand."*
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> (Emphasis supplied)

10. The conduct of the applicant / appellant depicts carelessness, lack of required diligence and callous approach on the basis of which condonation of delay under section 5 of the *Act* is sought, without even discharging the initial burden or even pleading necessary ingredients. Further reference can be made to the cases titled "*Sarmukh Singh Vs Channan Singh and Ors* (**AIR 1960 PH 512**) and "*Munshi v. Punna Ram"* (**AIR 1974 Punjab and Haryana 229**).

11. As far as the contention of learned counsel for the applicant / appellant that the cases should be decided on the basis of merits rather than technicalities is concerned, it is suffice to observe that availing the remedy within the period provided by law is not merely a technicality. Section 5 or section 14 of the *Act* are not intended to add premium to the carelessness or to validate lack of vigilance and required caution by a litigant.

12. In the wake of above discussion, we are of the considered opinion that the *application*, for enlargement of time by excluding the time

period of about one year for pursuing remedy before wrong forum, has no substance, therefore, the same is *dismissed.*

Main Appeal

13. For the foregoing reason the present appeal is ***dismissed in limine,*** being barred by time. No order as to costs.

(MIRZA VIQAS RAUF) JUDGE **(SULTAN TANVIR AHMAD) JUDGE**

Approved for reporting

*J.A.Hashmi/** **JUDGE** **JUDGE**