

Judgment Sheet
**IN THE PESHAWAR HIGH COURT, ABBOTTABAD
BENCH
JUDICIAL DEPARTMENT**

R.F.A. No. 160-A/2023

JUDGMENT

Date of hearing.....26.11.2025.....

Appellants (Mst. Saira Bibi and others) By Mr. Mujadhid Khan,
Advocate.

Respondents (Mst. Sughra Bibi and others)
Respondents By Mr. Muhammad Liaqat, Advocate.

AURANGZEB, J.- Through this appeal, the appellants have assailed the order dated 05.05.2023 passed by the learned Additional District Judge-I, Abbottabad vide which the application for restoration of appeal filed by the appellants was dismissed.

2. In essence, on 08.02.2020 the appellants filed an appeal before the learned Additional District Judge-I, Abbottabad against the judgment and decree dated 04.01.2020 passed by the learned Civil Judge-II, Abbottabad, whereby the learned trial court decreed the suit in favour of respondent No.1 (plaintiff) against the present appellants and others. Thereafter, the appellants did appear before the learned appellate court and their appeal was dismissed vide order 06.07.2022 for non-compliance of the order of appellate court.

Not contented with the same, the present appellants filed an application for restoration of appeal, which was also dismissed vide order dated 05.05.2023, hence, the instant appeal.

3. Arguments heard and record perused.

4. The record shows that the learned trial court passed its judgment and decree on 15.03.2023, whereby the suit instituted by the respondents was decreed. Feeling aggrieved by this judgment, the appellants filed a statutory appeal before the learned Additional District Judge-I, Abbottabad, on 12.04.2023, challenging the findings and decree of the trial court. After admission of the appeal, the appellate court on 20.04.2023 directed the appellants to deposit the requisite process fee and complete all necessary procedural steps for issuance of notice to the respondents in accordance with Order XLI Rules 14 and 15 of the Code of Civil Procedure, 1908. Despite these directions, the appellants failed to comply. Thereafter, on 10.05.2023, the appellate court granted yet another opportunity to comply with the requisite process and documentation. However, the appellants again failed to deposit the process

fee and furnish the necessary documents for service of notice. Consequently, on 22.06.2023, the appellate court dismissed the appeal on the ground of non-compliance with its order.

5. The statutory framework governing the dismissal of an appeal and its subsequent restoration is contained in Order XLI CPC, specifically Rules 17, 18, and 19, which provide as follows:

Rule 17 – Dismissal of appeal for appellant's default:

“(1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(2) Hearing appeal ex-parte. Where the appellant appears and the respondent does not appear, the appeal shall be heard ex-parte.”

Rule 18 – Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs:

“Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed:

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.”

Rule 19 – Readmission of appeal dismissed for default:

“(1) Where an appeal is dismissed under rule 11, sub-rule (2) or rule 17 or rule 18, the appellant may apply to the Appellate Court for the readmission of the appeal; and where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

(2) The provisions of section 5 of the Limitation Act 1908 (IX of 1908) shall apply to an application for re-admission of an appeal dismissed under sub-rule (2) of rule 17 or sub-rule (1) of this rule.”

These rules collectively establish the legal framework for dismissal of an appeal due to non-compliance with the court’s order and its subsequent restoration. Rule 17 empowers the appellate court to dismiss the appeal if the appellant fails to appear or comply with the court’s directions. Rule 18 permits the court to dismiss an appeal where notice has not been served due to the appellant’s failure to deposit the required costs, while also allowing the appeal to proceed if the respondent appears. Rule 19

provides a statutory right to restore the appeal if the appellant can demonstrate sufficient cause for non-compliance and mandates the court to re-admit the appeal on such terms as it deems fit.

6. The duties of the parties and the court under these provisions are dual and complementary. The appellants are obliged to comply with all procedural directions, deposit process fees promptly, and provide the necessary documents to facilitate the service of notice. The appellate court, on its part, must ensure that any dismissal of the appeal is procedurally proper, by recording the facts of non-compliance, ensuring the appeal is called in open court, giving the appellant an opportunity to explain their non-compliance, and exercising its powers in accordance with Rules 14 to 20 of Order XLI CPC. Failure to observe these requirements renders the dismissal order procedurally defective and legally infirm.

7. It is a fundamental principle of civil justice that disputes should be adjudicated on merits, rather than being decided or terminated on mere technicalities. The dismissal of an appeal, without proper

examination of the reasons for non-compliance, deprives the party of its statutory right to have the case decided substantively. In the present matter, the dismissal order dated 22.06.2023, and the subsequent dismissal of the restoration application, prevent adjudication on merits, contrary to the underlying objectives of the civil justice system. In this regard reliance is placed on the judgment of Lahore Court rendered in case titled **Mst. Kaniz Maryam versus Ziabun Nissa and 2 others (PLD 1998 Lahore 342)**, wherein it was held that:-

“Therefore, the Court has to pass a specific order requiring a party to pay the process fee within the fixed time. In the absence of such an order, no penal action can be taken against the defaulting party. In this connection, an analogy may be drawn from the provisions regarding payment of court-fee. It is primarily the duty of a party to pay proper court-fee on the plaint or a memorandum of appeal but before a plaint or memorandum of appeal can be rejected for non-payment of court-fee, the party has to be required by an express order to pay the specified amount of court-fee. If no such opportunity is provided to a party, the penal consequences cannot ensue. So far as a revision petition is concerned, it is not strictly governed by the provisions of Order XLI of the C.P.C. which is applicable to appeals from original decrees, except rule 38. The said rule has been made applicable to revisions by

virtue of Order LII which reads as under:-

"Applicability of Rule 38 of Order 41 to proceedings under section 115. Rule 38 of Order 41 shall apply, so far as may be, to proceedings under section 115 of the Code. "

Rule 38 is reproduced below for ready reference:-

"38.(1). An address for service filed under Order 7, rule 19, Order 8, rule 11 or subsequently altered under Order 7, rule 24 of Order 8, rule 12 shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rules 21 and 22, of Order 7 shall apply so far as may be, to appellate? proceedings."

Rules 21 and 22 of Order 7 relate to consequences of failure to file address and the procedure when party not found at the place of the address given for his service. Obviously, the other rules under Order XLI have not been made applicable to revision petitions. Therefore, a revision petition cannot be dismissed under the provisions of Order XLI, Rule 18 of the C.P.C. for nonpayment of the process-fee. Even in the case of an appeal, the penal consequences cannot ensue unless the Court has passed an express order specifying the amount to defray expenses for service of notice and the period within which it has to be paid. In the present case, this was never

done under any order of the Court. Hence, the order dismissing the revision simply for the petitioner's failure to pay the process-fee was wholly without lawful authority and of no legal effect.”

Further reliance on the judgment of High Court Sindh delivered in case titled Mst..Zaira Khatoon versus Mst. Kishwar Jamal (2009 MLD 67 Karachi), wherein it was held that:-

“Heard Mr. Shehanshah Hussain learned counsel for the appellant, who states that appeal can be dismissed for default only under Order XLI Rule 11 sub-clause (2) or Rule 17-18, C.P.C. and when matter was already admitted for regular hearing, same was not to be dismissed for non-prosecution. According to him even matter was not fixed for hearing and at the most stay application was to be disposed of and not a main appeal. He further states that dismissal order, dated 19-5-2008 is without jurisdiction and nullity in the eye of law, as such question of limitation does not arise and pray for re-admission of the appeal with a request that matter may be remanded to the appellate Court for rewrite of judgment on merits by providing an opportunity of hearing to both the parties.

On perusal of record, it appears that on 3-6-2006 matter was admitted for a regular hearing, whereas, appeal has been dismissed for non-prosecution on 15-9-2007, as no one was in attendance on behalf of the appellant in Court at the time of call. The grounds urged by the appellant in her affidavit

accompanying with application moved under Order XLI Rule 19, C.P.C. prima facie seems to be genuine and carrying weight, as at the first instance Dr. M.R. Zia Rana was engaged by her, who unfortunately died during pendency of the appeal. She engaged Mr. Farhat; who proceeded to Khairpur according to her, due to the death of his father without intimating her and she remained under impression that her counsel Mr. Farhat will appear and proceed with the matter, but appeal was dismissed for non-prosecution. So far non-appearance of the learned counsel, so also of the appellant at the time of call on a particular date and time seems to be not mala fide, as one of his counsel expired during pendency of appeal whereas, Mr. Farhat proceeded to Khairpur due to the death of his father, and under such a circumstance it was not possible for learned counsel for the appellant to intimate his clients including the appellant, and that be the reason that she remained absent on a particular date and time and matter dismissed for non-prosecution and she being house hold lady without knowledge and information that father of Mr. Farhat has expired and his counsel will not be available on a particular date and further that matter has been dismissed, all was not possible and was beyond her control.”

Reliance is also placed on the judgment of this court delivered in case titled **Ghulam Muhammad Badal versus Islam Gul and 09 others (2015 YLR 788 Peshawar)**, wherein it was held that:-

“5.No doubt, the appeal of the petitioner was dismissed by the learned appellate court on account of the absence of the appellant and his counsel. However, the learned appellate court seriously erred while discussing the merits of the case in the impugned order. Order XLI, Rule 17, C.P.C. duly caters to a situation where the appellant or for that matter his counsel fail to turn up on the date of hearing. The same reads as under:--

17. Dismissal of appeal for appellant's default.---(1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(2)

Even otherwise, it is supposed to be the most cherished goal of all courts to decide the cases on merits by affording adequate opportunity to the parties to put across their viewpoints rather than resorting to quick fix arrangement of disposal of cases through dismissal.”

8. Furthermore, the constitutional guarantee under Article 10-A ensures the right to a fair trial, which includes the right of every litigant to a meaningful opportunity to present their case. Dismissing an appeal or a restoration application without considering the reasons provided by the appellants constitutes a violation of this fundamental right. Procedural lapses, unless deliberate or

contumacious, cannot deprive a party of its right to have a civil dispute determined on its merits.

9. In light of the legal principles discussed hereinabove, reference to Order IX Rule 2 and Rule 4 CPC becomes equally relevant, as the jurisprudential foundation underlying restoration of suits under Order IX is directly applicable to the restoration of appeals under Order XLI Rules 17, 18, and 19 CPC. Order IX Rule 2 contemplates dismissal of a suit where service of summons is not effected owing to the plaintiff's failure to pay process fee, postal charges, or to provide requisite copies. Such failure is procedural in nature and does not reflect upon the merits of the claim. Order IX Rule 4, on the other hand, embodies a clear remedial and restorative philosophy by empowering the court to restore the suit upon the plaintiff showing sufficient cause. The use of the expression "shall make an order" within Rule 4 is significant, as it imposes a statutory obligation upon the court to restore the lis once sufficient cause is established and thereby prevents procedural lapses from defeating substantive rights.

This restorative scheme under Order IX CPC reflects the broader legislative and constitutional policy that adjudication of disputes should ordinarily be on merits rather than on technicalities. Superior courts, in a consistent line of authority, have held that where a dismissal arises from a procedural omission—whether in a suit under Order IX or in an appeal under Order XLI—the courts must adopt a liberal, equitable, and justice-oriented approach. Restoration should not be denied unless the conduct of the litigant is wilfully negligent, contumacious, or mala fide. The same remedial spirit that animates Order IX Rule 2 and Rule 4 therefore must guide the exercise of jurisdiction under Order XLI Rules 17 and 19 CPC, which deal with dismissal and readmission of appeals. When the appellants' appeal was dismissed for non-compliance with procedural directions dated 20.04.2023 and 10.05.2023, the appellate court was duty-bound to examine whether sufficient cause existed for the earlier non-compliance. The failure to apply the settled legal standards flowing from the combined reading of Order IX and Order XLI renders the impugned orders legally unsustainable.

10. In the instant case, although the appellants did not deposit the process fee or furnish the required documents as directed, the dismissal order dated 22.06.2023 fails to record whether the appellants were prevented by sufficient cause. It does not show that the case was called in open court, nor does it demonstrate that the appellate court considered the requirements of Rules 14, 15, 16, 17, and 18 before passing the dismissal order. Therefore, the order is cryptic, procedurally defective, and inconsistent with the principle of adjudication on merits.

11. The appellants subsequently filed an application for restoration of the appeal on 05.07.2023 under Rule 19 CPC, asserting that their non-compliance was not deliberate and that they were prevented by circumstances beyond their control from complying earlier. Rule 19 mandates that the appellate court must examine whether the appellants were prevented by sufficient cause before refusing restoration. However, the appellate court dismissed the restoration application without applying its mind to this mandatory requirement, constituting a failure

to exercise jurisdiction in accordance with law.

12. Learned counsel for the respondents contended that the dismissal of the appeal was based on Order XVII Rule 3 CPC. This contention is misplaced, as that rule applies exclusively to trial courts for recording of evidence and not to appellate proceedings. At the appellate stage, the powers and duties of the court are governed exclusively by Order XLI CPC, including Rules 14 to 20, which guide proper issuance of notice, compliance with directions, and restoration of dismissed appeals.

13. It is therefore evident that the dismissal order dated 22.06.2023 and the dismissal of the restoration application dated 05.07.2023 were not passed in accordance with law. The statutory safeguards under Order XLI Rules 14, 15, 16, 17, 18, and 19 CPC were completely overlooked, resulting in a failure by the appellate court to discharge its statutory duties. Both orders are legally infirm and inconsistent with the principles of fair trial, procedural justice, and adjudication on merits.

14. In the circumstances, the appeal clearly merits restoration. The appellants

must be afforded a full and fair opportunity to prosecute their appeal in accordance with Order XLI CPC, ensuring proper issuance of notice, calling the appeal in open court, and hearing both parties on all issues. The aim is to have the dispute resolved on merits, rather than being terminated due to procedural technicalities.

15. Accordingly, the instant appeal is allowed and the impugned orders dated 22.06.2023 and the dismissal of the restoration application dated 05.07.2023 are set aside. The appeal filed by the appellants shall stand restored to its original number before the learned Additional District Judge-I, Abbottabad. The learned appellate court is directed to proceed with the appeal strictly in accordance with Order XLI Rules 14 to 20 CPC, ensuring full compliance with procedural safeguards and opportunity of hearing to both parties. The matter shall be expeditiously decided, preferably within three months. The parties are directed to appear before the learned appellate court on 06.12.2025.

Announced:
26.11.2025.
Aftab PS/*

JUDGE