

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Civil Revision No. 191/2017

Najeeb Mehmood
Versus
Capital Development Authority through its Chairman

Date of Hearing : 27.10.2020.
Petitioner by : Mr. Manzoor Hussain, Advocate.
Respondent by : Malik Javid Iqbal Wains, Advocate.

FIAZ AHMAD ANJUM JANDRAN, J.- Through the instant Civil Revision Petition, petitioner impugns orders dated 25.11.2016 and 24.01.2017, passed by the learned Senior Civil Judge, Islamabad (East), and learned Additional District Judge, Islamabad (East), respectively. Vide order dated 25.11.2016, his application for restoration of suit, dismissed for non-prosecution, was dismissed. Appellate Court maintained the said order.

2. Precisely, facts relevant for the disposal of instant civil revision petition are that on 13.08.2012, petitioner filed a suit for declaration, specific performance, perpetual and mandatory injunction against the respondent/C.D.A assailing cancellation of lease of a plot in favour of his predecessor. The respondent contested the suit by filing written statement and the suit was at the stage of arguments on application for temporary injunction when no one appeared on behalf of the petitioner and suit was dismissed for non-prosecution vide order dated 29.09.2015. The petitioner then filed an application for its restoration on 27.05.2016 which was dismissed by the learned Trial Court vide order dated 25.11.2016. The petitioner's appeal against the said order was also dismissed by the learned Additional District Judge vide

order dated 24.01.2017, hence the instant civil revision petition.

3. Learned counsel for the petitioner contends that the impugned order of dismissal of suit for want of prosecution is not only harsh but also contrary to the ground situation, whereby the mischief on the part of respondent is on higher pedestal than the petitioner; that on various occasions, the learned Presiding Officer had been on leave while on few, there was joint request for adjournment; that after hearing arguments on stay application, the matter was fixed for announcement of order for six consecutive dates; that most of the adjournments were on the part of the respondents and due to non-availability of the Court, cumulatively lend to draw an inference that the penal action of dismissal of suit was too harsh; that at the order in original was a void order, therefore, in such an eventuality there arises no question of limitation. Learned counsel placed reliance upon case laws reported as **1993 SCMR 1949, 2012 SCMR 656, 2005 MLD 1483, 2015 CLC 316, and PLD 2008 Karachi 103.**

4. Conversely, learned counsel for the respondent argued that the conduct demonstrated by the petitioner/plaintiff during the proceedings deserves no leniency; that before resorting penal action, the petitioner was afforded two consecutive opportunities; that the petitioner remained silent for about ten months and thereafter filed application for restoration of the suit with evasive and vague ground and that too without separate application for condonation of delay, therefore, the

concurrent observation of the two learned Courts are not open to any exceptions.

5. Heard the learned counsels for the parties and perused the record with their able assistance.

6. Record reveals that the suit was filed on 13.08.2012 and till passing of the crucial order on 29.09.2015, it was adjourned for 47 times. The order sheets further reveals that the suit was at the stage of arguments on application for temporary injunction. Before the date of 29.09.2015, on the date 17.09.2015, petitioner was afforded absolute last opportunity for arguments on the application for temporary injunction and the case was fixed for 29.09.2015. It is thus obvious that the suit was at the stage of arguments on application for temporary injunction when the main suit was dismissed for non-prosecution

7. The question before the Court is that "whether the Court can decide the suit, when the date is not fixed for its decision rather for hearing/decision upon an application for temporary injunction?"

8. The proceedings so far conducted during the trial unambiguously show that the parties were granted specific date in respect of particular subject i.e. arguments on application for temporary injunction. Law on the subject is that **the parties are mindful that on the next date, the court will proceed with the matter as per order announced on the previous date. The parties used to prepare their brief as per business fixed by the Court. It is difficult to borrow/purchase the contention that the order regarding a business could be passed, which was not fixed before the Court. The Court has to proceed**

strictly in accordance with law and not otherwise, because law requires that when a thing is required to be done in a particular manner, it should be done in that particular manner alone and not otherwise.

9. The Hon'ble Apex Court in the case of "***Qazi Muhammad Tariq v. Hasin Jahan and 3 others***" (1993 SCMR 1949) having identical facts, has graciously held as under:-

*"A perusal of order indicate that the suit of the appellant was dismissed on a day which was not fixed for its hearing; it was a day appointed for hearing arguments on the application for temporary injunction filed by the appellant. **In the absence of the appellant all that the learned Trial Judge could do so was to dismiss the application for temporary injunction. It could not proceed beyond that and dismiss the suit as well.** Quiet clearly its order in this regard was without jurisdiction and void. This aspect of the case was noticed neither by the learned Additional District Judge nor by the High Court. The order of dismissal being void all that the appellant was required to do was to call upon the learned Trial Court to treat his suit as still pending. We would therefore accept the appeal, set aside the order of the three courts below and direct that the suit of the appellant be treated as still pending and disposed of in accordance with law." (Emphasis added)*

10. The Hon'ble Sindh High Court followed the same course while deciding case of "***National Bank of Pakistan v. Haji Muhammad Shafique and another***" (2005 MLD 1483). It was observed that:-

"It appears that an application for setting aside ex-parte judgment and decree was filed on 17.06.2003 and the learned Single Judge of this Court by an order dated 22.12.2003 recalled the ex-parte judgment and decree and order that suit should proceed in accordance with law. In all fairness thereafter the defendant should have filed their written statement and contested the suit but

the record shows that no such written statement has been filed and when the suit was fixed on 20.02.2004 for order on official assignee's reference dated 27.10.2003 and arguments on some interlocutory application, it was dismissed apparently for non-prosecution though there was no occasion for dismissal of the suit and at the most application fixed for arguments could be dismissed.

11. Subsequently, the Hon'ble Lahore High Court by following the case of Qazi Muhammad Tariq (Supra), in the case of **"Altaf Hussain Qamar and 2 others v. Imran Rasool and 5 others"** (2011 CLC 1891) observed that *"the business before the learned Trial Court on the date of passing of impugned order dated 03.10.2006 was to consider passing judgment on application under Order XXXIX Rules 1 & 2 C.P.C and the main suit was not fixed for the said date as such, the court could not take up the question of dismissal of the suit. If the learned Courts below are allowed to proceed to pass order without or in excess of jurisdiction taking the parties by surprise, this would play havoc with the scheme of the C.P.C."*

12. The principal *ibid* if applied to the facts of the instant case, it emerges that suit was at the stage of arguments/decision upon application for temporary injunction when it was dismissed for non-prosecution which, as a matter of course, could not have been dismissed being beyond the mandate of the proceedings fixed for that particular date i.e. decision upon application for temporary injunction.

13. When court adjourned the matter for the next date with specific caution, "that last and final opportunity for arguments on application for temporary injunction is

granted. On said date again matter was adjourned till 12:30 pm for arguments but instead of passing of an order upon said application, decided the main suit by announcing the order "suit dismissed for non-prosecution". This amounts to a surprise order because as per law when an application was fixed then any other order except an order upon said application amounts to a surprise order, which is not warranted by law.

14. Adverting to the ground qua delayed filing of application for restoration, suffice it to observe that in the case of Qazi Muhammad Tariq (*Supra*) it was graciously held that such type of order was without jurisdiction and void, therefore, in such an eventuality, the question of limitation does not arise and is repelled.

15. In view of the above, the instant civil revision petition is **allowed**. Impugned orders dated 25.11.2016 and 24.01.2017 are set aside. As a result, application of the petitioner for restoration of suit is accepted, order dated 29.09.2015 regarding dismissal of suit for non-prosecution is also set aside and consequently, the suit of the petitioner is restored. The learned Trial Court shall proceed with the same from the stage where it had been on the date fixed i.e. 29.09.2015. The parties are left to bear their own costs.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

A.R.Ansari

Announced in the open court on 18.11.2020.

Judge.

Approved for reporting

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