

ORDER SHEET.
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT.

Civil Revision No. 32/2014

Capital Development Authority
Versus

Khawajgan Co-operative Housing Society, Ltd.

<u>S.No. of order/ proceedings</u>	<u>Date of order/ proceedings</u>	<u>Order with signature of Judge and that of parties or counsel where necessary.</u>
(5)	09-09-2020	Mr. Ghulam Shabbir Akbar, Advocate for Petitioner.

The petitioner has called in question the order dated 01-10-2013, whereby, learned Additional District & Sessions Judge has dismissed the application for restoration of Regular First Appeal. The petitioner has also assailed the order dated 07-09-2010, whereby, the Regular First Appeal was dismissed for non-prosecution.

02. Learned counsel for the petitioner contends that learned Appellate Court has not considered the record in its true perspective, whereby, the Regular First Appeal has been dismissed for non prosecution on 07-09-2010. Earlier, on the said date the presiding officer of the Court was out of country and as such the date i.e. 07-09-2010 was fixed by Reader of court which could not be considered as an actual date. It has further been contended that Article 181 of the Limitation Act, 1908, is applicable in such type of proceeding, whereas, the Appellate Court has allowed the appeal while considering Article 168 of the Limitation Act, 1908 and dismissed the application for restoration being time barred which is contrary to the principles of law.

03. The notices have been issued to the respondent but no one has put appearance despite of the fact that substitute

mode of services was adopted through publication in Daily Pakistan, whereby, the notices were published for summoning of Respondent/Khawajgan Co-operative Housing Society, Ltd. through Daily Pakistan on dated 08-09-2020, hence, the respondent has been proceeded ex-parte.

04. Arguments heard record perused.

05. Perusal of record reveals that instant Civil Revision has been filed against the order dated 01-10-2013, whereby, the application for restoration for Regular First Appeal filed by the petitioner has been dismissed. It has been observed from the record that application filed by petitioner (Capital Development Authority) for restoration of Regular First Appeal was filed after one (01) month and seven (07) days of the original order of dismissal of appeal for non-prosecution and as such the appellate court while hearing application of restoration has relied upon Article 168 of the Limitation Act, 1908 provided under the first schedule, whereby, thirty (30) days time has been referred for the purposes of re-admission of the appeal from the date of dismissal but such eventuality can only be justified if on the previous date of hearing i.e. 04-08-2010, the presiding officer was on duty whereas in the instant matter the case was adjourn to 07-09-2010 by Reader of court and as such the said order was not considered by the learned appellate court as the date so fixed by Reader of the court is not to be considered as date of hearing in appeal, as there is no specific order passed by the court itself to that effect that if the petitioner fails to appear, the matter shall be decided otherwise.

06. I have considered the provision of Order XLI Rule 17(1) CPC which deals with the dismissal of appeal in default, the same has to be qualified with the terms, where appellant does not appear when appeal is called on for hearing, the court may make an order that appeal be dismissed. This aspect does not reveal clearly, as to what matter was fixed for hearing before court on 07-09-2010 which was dismissed for non-prosecution, hence, the initial order of dismissal of appeal for non-prosecution reveals that appeal was not fixed by the order of the court rather by the Reader, therefore, the expression **"called on for hearing"** as used in Order XLI Rule 17, CPC is obviously presume the completion of all earlier steps as envisaged by Rule 11 to 16 of order XLI CPC. Even otherwise it is settled that once the appeal crosses the hurdle of preliminary hearing under Rule 11, then under Rule 14 & 15 of Order XLI, CPC the appeal cannot be heard and decided without the presence of the parties and if the appellant does not appear on the date fixed for argument, the court may make the order for dismissal in default, both such procedural aspects are discretionary power of the court.

07. The above mentioned facts, if seen in the light of Article 168 of Limitation Act 1908, it becomes clear that the time frame referred is applicable in said cases where parties have been notified with the fixed date by the court itself otherwise Article 181 of the Limitation Act, 1908 comes in the play which provide the time limitation for filing of application for restoration of an appeal within three years. Reliance is placed upon **2016 SCMR 2009 titled as "Tehsil Municipal Administrator, Faisalabad**

versus Muhammad Saleem and others” & 1995 SCMR
218 titled as “Muhammad Qasim and others versus
Moujuddin and others.

08. In view of above reasons and the law laid down by the apex Court, it is observed that Court of learned Additional District Judge has not considered the position under the law and exercised the jurisdiction not vested in it, in terms of section 115 CPC, therefore, instant civil revision is **allowed** and impugned orders dated 07-09-2010 as well as 01-10-2013 are set aside. The matter is remanded to the appellate court to decide appeal in accordance with law after hearing the parties.

09. Before parting with the order, it has been observed that instant matter is pending since long, therefore, it is expected from the learned Appellate Court seized with the matter to decide the same within next six (06) months under intimation to this Court.

(MOHŠİN ĀKHTĀR KĀYANĪ)
JUDGE