

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD **JUDICIAL DEPARTMENT**

W.P.No.152 of 2016

Mst. Basan Bi & two others

VERSUS

The Additional District Judge-V, East, Islamabad & others

Date of Hearing: 17.02.2016

Petitioners by: Mr. Zulfiqar Ali Abbasi, learned ASC

Respondents by: Sheikh Khizar-ur-Rasheed, Advocate for
respondent No.2,
Mr. Muhammad Faisal Chaudhry, Advocate
for respondents No.3 to 8 and 12,

MIANGUL HASSAN AURANGZEB, J:- Through the instant Writ Petition, the petitioners, Mst. Basan Bi etc., have impugned the order dated 23.11.2015, passed by the Court of learned Additional District Judge-V, Islamabad, whereby, the Civil Revision Petition No.69/2015 filed by respondent No.2 against the order dated 25.06.2015 passed by the Court of learned Civil Judge 1st Class, Islamabad, was allowed. Vide the said order dated 25.06.2015, the learned Civil Court allowed the petitioners' application for restoration of the suit to the extent of respondents No.3 to 13 (hereinafter referred to as "defendants No.2 to 12") which had been dismissed under Order IX, Rule 2 of the Code of Civil Procedure, 1908 ("C.P.C.").

2. The facts relevant for the disposal of this petition are that on 29.08.2005, the petitioners (Mst. Basan Bi & two others) filed a suit for declaration and permanent injunction against respondent No.2 (Muhammad Yamin) before the learned Civil Court. Through this suit, the petitioners sought a declaration to effect that they are owners in possession of land measuring 2 Kanals, 17 Marlas, being 57/237 share out of the total land measuring 11 Kanals, 17 Marlas in Khasra No.1925/2, situated in village Pind Begwal, District Islamabad. The petitioners also prayed for a decree for permanent injunction restraining the defendant in the suit from transferring the suit land to any other

person(s). The respondent No.2 contested the suit by filing a written statement, wherein it was revealed that portions of the suit land had been transferred in favour of third party purchasers. This revelation prompted the petitioners to file an application under Order I, Rule 10 and Orders VI, Rule 17 read with section 151 C.P.C., praying for the suit to be amended and to implead the third party purchasers as parties to the suit.

3. Vide order dated 10.06.2009 passed by the learned Civil Court, the said application was allowed and the petitioners were permitted to amend the plaint. After availing several opportunities, the petitioners filed the amended plaint on 06.01.2010, in which the third party purchasers were impleaded as defendants (i.e. defendants No.2 to 12). On the same very day, the learned Civil Court ordered notices to be issued to the newly impleaded defendants in the suit for their appearance before the Court on 28.01.2010. As the said defendants did not appear, the learned Civil Court, vide order dated 25.01.2011 again directed notices to be issued to the said defendants. The petitioners were also directed to submit/deposit the process fee for summoning the said defendants. On 02.02.2011, the learned Civil Court was constrained to pass the following order:-

“1. Suit was filed in the year 2005 and still it is pending for the summoning of defendants No.1 to 12 for which process fee has not been submitted by the plaintiffs.

2. Brief facts are that the stay petition was dismissed by the court vide order dated 14.12.2006 and the case was fixed for framing of issues but the plaintiff lingered on the matter through filing different applications and in this exercise five years have been elapsed. Only defendant No.1 is appearing in the court and process fee has not been deposited for the summoning of defendants No.2 to 12 hence further adjournments is not justified for the same and suit in hand is hereby dismissed to the extent of defendants No.2 to 12 due to non deposit of process fee. Now the suit is pending only to the extent of defendant No.1.”

4. The learned Civil Court, on 02.02.2011, also framed the issues. Thereafter the evidence of the contesting parties was recorded. The petitioners waited for almost four years and then on 27.02.2015, filed an application for the restoration of the suit which had been dismissed to the extent of defendants No. 2 to

12. Along with this application, the petitioners also filed an application for the condonation of delay in filing the said application for the restoration of the suit. In this application, the petitioners pleaded that the factum as to the dismissal of the suit was not in the knowledge of the petitioners, and that they gained this knowledge on 25.02.2015, when they got copies of the judicial record and the order sheet.

5. The learned Civil Court, vide order dated 25.06.2015, allowed the petitioners' applications for condonation of delay and restoration of the suit to the extent of the defendants No.2 to 12. The reason, which prevailed over the learned Civil Court in allowing the said applications, was that there had been no note of the *ahlmad* (Assistant Record Keeper/Administrative staff) recording the non-submission of the process fee. In holding so, the learned Civil Court gave credence to the position taken by the petitioners that they had no knowledge of any order directing them to deposit the process fee.

6. Against the said order dated 25.06.2015, respondent No.2 preferred a Civil Revision Petition before the learned Additional District Judge-V, Islamabad, who, vide impugned order dated 23.11.2015, allowed the petition and set aside the said order passed by the learned Civil Court.

7. Learned counsel for the petitioners submitted that Courts are sanctuaries of justice not to be persuaded by technicalities. In submitting that justice should not be denied at the altar of technicalities, he placed reliance on the cases of Thal Engg. Industries Ltd. Vs. Bank of Bahawalpur Ltd & another reported as PLJ 1979 SC 363, Zahoor Ahmad Vs. Mehra through legal heirs and others reported as 1999 SCMR 105, Government of NWFP and others Vs. Fazal Maula and others reported PLD 1993 Peshawar 192, and Ahmad Zaman Khan, Barrister Vs. Government of Punjab through Collector, Multan and two others reported as 1993 CLC 1327". He further submitted that as the learned Civil Court never issued notice to the petitioners to deposit the process fee, it was an act of the Court which had caused prejudice to the petitioners, in this regard he placed

reliance on the case of Malik Nasrullah Vs. Mst. Mumlikat Begum reported as 2003 CLC 235 and Muhammad Ilyas and 4 others Vs. Munshi Khan reported as 2003 CLC 1815. Learned counsel for the petitioner further submitted that the petitioners' application for restoration of the suit was within time because the petitioners gained knowledge about the order dated 02.02.2011, on 25.06.2015, whereafter, the application for the restoration of the suit was filed without any delay. He submitted that the limitation period for filing such application for restoration of the suit was three years under Article 181 of the Limitation Act, 1908. In making this submission, the learned counsel for the petitioners placed reliance on the cases of Muhammad Qasim Vs. Moujuddin etc, reported as 1995 SCMR 218, and Habiba Begum Vs. Haji Iqbal-ud-Din, reported as PLJ 2012 Peshawar 209.

8. On the other hand, the learned counsel for the contesting respondents submitted that law assists those who are vigilant about their rights and not those who sleep over them. He submitted that the petitioners were most negligent in pursuing their cause before the learned Civil Court, because the order dated 02.02.2011 was well within their knowledge and they let limitation period for filing an application for re-calling the said order lapse. He drew the attention of the Court to the cross-examination of the PW-1 (who was the attorney of the petitioners) recorded on 01.03.2013. He read out that portion of PW-1's testimony where he was specifically asked whether it was in his knowledge that on 02.02.2011 the suit had been dismissed to the extent of defendants No.2 to 12. PW-1 had expressed his lack of knowledge as to the said dismissal. Learned counsel for the contesting respondents defended the impugned judgment by submitting that at least since 01.03.2013, the respondents had knowledge about the dismissal of the suit. He further submitted that the petitioners' stance about not knowing about the order dated 02.02.2011 is unbelievable because the learned Civil Court had framed the issues vide the same order. The petitioners had led the

evidence on the basis of the issues framed by the Learned Civil Court. As the order whereby, the suit was dismissed to the extent of defendants No.2 to 12 is on the same page on which the issues were framed, it is out of the question that the petitioners or their counsel did not read the same. He concluded his arguments with the prayer that petition be dismissed and directions be issued to the learned Civil Court to expeditiously decide the suit.

9. I have heard the arguments advanced by the learned counsel for the contesting parties and perused the record with their able assistance.

10. I have already narrated the essential facts in Paragraphs 2 & 3 hereinabove which need not be recapitulated. As mentioned above, on 06.01.2010, the learned Civil Court ordered notices to be issued to the newly impleaded defendants (i.e. defendants Nos. 2 to 12) in the suit for their appearance before the Court on 28.01.2010. These defendants had been impleaded in the suit on the application of the petitioner and were arrayed as defendants Nos.2 to 12 in the amended plaint. As the said defendants did not appear, the learned Civil Court, vide order dated 25.01.2011 again directed notices to be issued to the said defendants. The petitioners were also directed to submit/deposit the process fee for summoning the said defendants and the matter was adjourned to 02.02.2011. The law also required the process to be served at the expense of the petitioners. In this regard, it is pertinent to reproduce herein below the provisions of Order XLVIII, Rule 1, C.P.C:-

"1. Process to be served at expense of party issuing.--(1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

Costs of service.--(2) The court fee chargeable for such service shall be paid within a time to be fixed before the process is issued."

11. Since the Learned Civil Court had adjourned the matter to 02.02.2011 for the appearance of defendants No.2 to 12, it goes

without saying that the petitioner was required to deposit the process fee well before the said date. As the order dated 25-01.01.2011 had not been complied with by the petitioners, the learned Civil Court, vide order dated 02.02.2011, dismissed the suit to the extent of defendants No.2 to 12, due to non-deposit of process fee by the petitioners. The learned Civil Court passed the said order under the provisions of Order IX, Rule 2 C.P.C. which is reproduced herein below:-

“2. Dismissal of suit where summons not served in consequence of plaintiff’s failure to pay costs.-- Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed.”

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.”

12. Order IX C.P.C. provides different modes in which the Court may deal with the situation of absence of either parties. Order IX, Rule 2 C.P.C. provides for a case where the defendant's absence is caused by non-service of summons in consequence of the plaintiff's failure to pay the court-fee or postal charges. A suit can be dismissed under Order IX, Rule 2 C.P.C., where on the date fixed it is found that the summons had not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges for such service. It will appear from a reading of Order IX, Rule 2 C.P.C. that the power is discretionary. The court is not bound to dismiss the suit. In the case of Tanveer Akhtar Vs. National Bank of Pakistan, Shakargarh, reported as 2002 CLD 264, the Hon'ble Lahore High Court has held that the provisions of Order IX, Rule 2 were not of an imperative nature, thus, rigid application thereof was not warranted. It was also held that discretion under Order IX, Rule 2 C.P.C. should be sparingly exercised and only in cases of grave negligence and not in routine. The Hon'ble High Court cautioned that an order to dismiss a suit cannot be passed under Order IX, Rule 2 C.P.C.

when the defendant appears before the Court in person or through an agent. This view has also been taken in the cases of Hoechst Pakistan Ltd., Karachi Vs. Chaudhry Agriculture Traders, reported as 1993 CLC 1892, Rehmat Ali Vs. Fazal Hussain, reported as 1990 CLC 761.

13. In the case of Abdul Ghani Vs. Settlement Commissioner, Lahore Division, reported as PLD 1971 SC 59, the Hon'ble Supreme Court of Pakistan termed Order IX, Rule 2 as one of the "penal provisions of the Code". It was explained that Order IX, Rule 2 C.P.C., empowers the Court to make an order dismissing the suit where it is found that the summons had not been served on the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service. Furthermore, with reference to the penal provisions contained in C.P.C., including Order IX, Rule 2 thereof, it was held in Paragraph 8 of the judgment as follows:-

"8. It will be noticed that in the statutory provisions of the Code cited above a default or delay in the performance of certain acts and in the taking of certain steps is attended with penal consequences, which tend to foreclose the right of the defaulting party to prosecute or to defend that action as the case may be. The object of incorporating the above penal provisions is fairly obvious. These provisions, it would seem, are primarily designed to ensure that all steps essential for a speedy disposal of a case and effective dispensation of justice are promptly taken with due diligence and dispatch. One means of ensuring this result is to visit levity in respect thereto with penal consequences. It is, however, true that any law embodying punitive provisions must be clear in its application to attract the penalties. ..."

14. The consequence of dismissal of the suit under Order IX, Rule 2 C.P.C. is provided for by Order IX, Rule 4 C.P.C. Where a suit is dismissed under Order IX, Rule 2 C.P.C., the plaintiff has an option to bring a fresh suit or apply for an order to set aside the dismissal, in which case he must satisfy the Court that there was sufficient cause for his failure to serve the summons. So when a suit is dismissed under Order IX, Rule 2 C.P.C., an application for restoration can be filed under Order IX, Rule 4, which is reproduced herein below:

"4. Plaintiff may bring fresh suit or court, may restore suit to file.-- Where a suit is dismissed under rule 2 or rule 3, the

plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit."

15. Now under Order IX, Rule 4 C.P.C., the court can recall the order and can set the dismissal aside on sufficient cause. It is, thus, clear that the existence of sufficient cause is the *sine qua non* for exercise of the powers under Order IX, Rule 4 C.P.C. The prayer for recall should be backed by a cause considered sufficient. Absent this, the answer is bound to be a curt "no".

16. The limitation period for filing an application under Order IX, Rule 4 C.P.C., to set aside a dismissal for failure to pay costs or service of process, is 30 days under Article 163 of the Schedule to the Limitation Act, 1908. The limitation under the said Article is to run from the date of the dismissal. As mentioned above, the petitioners' application for the restoration of the suit to the extent of defendants No.2 to 12 was barred by almost four years. The application under Order IX, Rule 4 C.P.C. may be admitted after the period of limitation prescribed by Article 163 of the Limitation Act, 1908, if the applicant satisfies the Court that there was sufficient cause for not making it within the prescribed period of 30 days. In order to seek a condonation of delay, the petitioners were under a heavy duty to satisfy the judicial mind of the Court that they were restrained by force of circumstances beyond their control to move the Court within the 30 day limitation period for the restoration of the suit to the extent of defendants No.2 to 12. The grounds taken in the petitioners' application for condonation of delay under Section 5 of the Limitation Act, 1908, does not inspire confidence.

17. For the petitioner to assert that they had no knowledge about the order dated 25.01.2011 of the learned Civil Court directing them to submit/deposit the process fee for summoning

the said defendants on 02.02.2011, is not tenable. It is pertinent to bear in mind that it was on the petitioners' application that the learned Civil Court had impleaded defendants No.2 to 12 as parties to the suit. It does not appeal to reason that for almost four years, the newly impleaded defendants did not appear in the court and the petitioners did not notice this. The absence of such defendants ought to have been a cause for concern for the petitioners who kept mum on this matter and let the trial proceed. Now that the trial was at its tail end and the matter was fixed for arguments, the petitioners want to have the dismissal order set aside so that they can go back on their footsteps and do well what they had done ill. For remaining indolent for all this while, the petitioners have only their own selves to thank for the unsavory consequences that befall them.

18. Even if it is assumed that the petitioners did not know that the suit was dismissed on 02.02.2011 to the extent of defendants No.2 to 12, it is not fathomable that the petitioners continued to remain under this impression beyond 01.03.2013, when, during the cross-examination of PW-1, he was asked whether he knew that the suit had been dismissed to the extent of defendants No.2 to 12. The petitioners cannot, by any stretch of imagination, claim ignorance regarding the contents of the order sheet and the testimony of their own witness. A party to a *lis* is presumed to be aware of the contents of the order sheet as well as the evidence recorded. Additionally, as mentioned above, the contesting parties led evidence on the basis of the issues framed by the learned Civil Court on 02.02.2011. The order of the learned Civil Court whereby the suit was dismissed to the extent of defendants No2 to 12 is on the same very page as the one on which the issues were framed. Hence, the stance of the petitioner that they were not aware of the said dismissal order does not inspire confidence.

19. There is no cavil with the proposition relied upon by the learned counsel for the petitioners that law favours adjudication on merits rather than technicalities and that an act of court should prejudice no one. In the instant case, no act of the

learned Civil Court prejudiced the petitioners. On 02.02.2011, when the case was called out for hearing, the learned Civil Court noticed that the petitioners had not paid the process fee, as a result of which the summons could not be issued to defendants No.2 to 12. The Court therefore proceeded to dismiss the suit under Order IX, Rule 2 C.P.C. to the extent of defendants No. 2 to 12. The learned Civil Court in doing so acted strictly in accordance with the law.

20. As regards the reliance placed by the learned counsel for the petitioners on the cases of Muhammad Qasim Vs. Moujuddin etc., reported as 1995 SCMR 218, and Habiba Begum Vs. Haji Iqbal-ud-Din reported as PLJ 2012 Peshawar 209, suffice it to say that the law laid down in the said cases does not come to the aid of the petitioners. In the former case, the question for determination was whether on a specified date, which was a date given by the Reader of the Court and not by the Presiding Officer, an appeal could have been dismissed for non-prosecution. It was held by the Hon'ble Supreme Court of Pakistan that dismissal of an appeal for non-prosecution on the date which was given by the Reader of the Court, was a nullity and the limitation period for challenging the same was governed by Article 181 of the Schedule to the Limitation Act, 1908. The latter case also laid down the same law. The record reveals that in the instant case the order dated 25.01.2011 directing the petitioners to submit/deposit the process fee for summoning defendants No.2 to 12 was passed by the Judge and not by the Reader. Hence, the said precedents do not extend any help to the petitioners due to having distinct facts and circumstances.

21. In view of the aforesaid position, I am satisfied that no sufficient cause was made out for recalling the order dated 02.02.2011 and setting aside the dismissal of the suit to the extent of defendants No.2 to 12. The petitioners' application for the restoration of the suit to the extent of defendants No.2 to 12 was barred by Article 163 of the Limitation Act, 1908, and was, therefore, liable to be dismissed simply on the ground that it

was made beyond the limitation. I know that such prayers should be considered liberally, but the peculiar facts of this case, especially the four-year delay in making the application for restoration, did not justify the revival of the case against defendants No.2 to 12.

22. In the result, there is no merit in this petition and it is, accordingly, dismissed, but in the circumstances of the case, there will be no order as to costs. The parties are directed to appear before the learned Civil Court on 01.03.2016 for further proceedings in the suit.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

Announced in an Open Court on _____/2016

(JUDGE)

APPROVED FOR REPORTING

(JUDGE)

Qamar Khan*

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