ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

(JUDICIAL DEPARTMENT)

Writ Petition no. 801 of 2022

Zaheer Abbas

versus

Additional District Judge, Islamabad-West and another

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	07.03.2022	Mr. Muhammad Mustafa Khattak, Advocate for the petitioner.

This writ petition prays to set aside the impugned order dated 08.02.2022 of the learned Additional District Judge-West, dismissing the appeal against the consolidated judgment and decree dated 21.01.2020 of the family Court on the ground of limitation.

2 The petitioner appealed from the judgment and decree dated 21.01.2020 before the learned Additional District Judge-East, and then the Covid shutdown ensued. Much later on 25.01.2022, the learned ADJ-East returned the appeal for filing before the learned ADJ-West. The appellate court of the learned ADJ-West disbelieved the plea that the appeal was filed in time before ADJ-East because the order sheets of that appeal were not appended, the application for condonation was not filed either and, above all, the ADJ-West did not find any pleas in the memo of appeal or otherwise to demonstrate good faith and due diligence, and relied on *State Bank of Pakistan through Governor versus Imtiaz Ali* (2012 SCMR 280) to dismiss the appeal.

3 The order sheets appended with the writ petition do show that the appeal was filed with the Court of learned ADJ-East on 14.02.2020, that is, within 24 days of the judgment in the first instance, and notices were issued for 21.02.2020, and after a few hearings at which the respondent did not show up, the appeal kept getting adjourned due to Corona pandemic until 03.09.2020, and the appellant remained represented on all such

adjourned dates. The order sheets show that thereafter, on 25.01.2022, the Court of learned ADJ-East, *while deciding the appellant's application for early hearing*, ruled for the first time that the appeal should have been filed before the Court of learned ADJ-West, and returned the appeal to the appellant with the words "…*to file the same before the learned concerned court*", i.e., before the Court of learned ADJ-West. In the meantime, the execution proceedings before the executing Court in parallel led to the appellant's salary being attached vide order dated 11.01.2022.

4 On closer examination, this was not a case of pursuing a *wrong remedy* before the wrong forum; the appellant pursued the *right remedy*. Nor can it be said *stricto senso* that the appellant went before the wrong forum; he went before the correct appellate Court, namely, the Court of learned ADJ, except that he ended up East instead of West. The record shows that the tests of good faith and due diligence per section 14 of the Limitation Act 1908, which are relevant considerations for the purposes of condonation under section 5 per *Khushi Muhammad through L.Rs. and others versus Mst. Fazal Bibi and others* (PLD 2016 Supreme Court 872) are met in this case. The Court of ADJ-East wasn't progressing with the appeal until the appellant filed his application for early hearing. Both Covid pandemic and the lax approach of the Court contributed to the appellant's misfortune.

5 In so far as the absence of an application for condonation of delay is concerned, it wasn't fatal on the facts of this case. The appellant genuinely believed his appeal never to have been time-barred; for him it was simply a case of his appeal being transferred from ADJ-East to ADJ-West, and he can't be entirely faulted for believing so given the words in the order for return of appeal reproduced above. Further, it was within the powers of the learned ADJ-West to call for filing of a condonation application on the peculiar facts of this case.

Although *Khushi Mohammad* requires the filing of a condonation application, it does not lay down the inflexible rule that the Court is precluded for good from calling upon the appellant to file an application under section 5 for condonation of delay in appropriate cases where the appellant believes *bona fide* for objectively demonstrable good reason that there was no delay. While rejecting the principle *actus curiae neminem gravabit* generally by a majority, *Khushi Mohammad* did keep open the door for exceptional cases by stating that the term 'sufficient cause' had to be given the widest possible amplitude and in so doing the conditions and principles of section 14 of the Limitation Act 1908 could not be left out. *Khushi Mohammad* held that:

> For the purposes of determining whether in a given case sufficient cause had been made out for condonation of delay when an appeal had been filed before a wrong forum, no hard and fast rule could be laid down; there could not and should not be a simple test for determining the same. The establishing of sufficient cause was not amenable to mathematical formulae. Courts were called upon in individual cases to apply their judicial faculties to the facts placed before them and weigh the same in order to decide whether that ephemeral threshold had been crossed which meant that the appellant had convincingly established sufficient cause for condonation of delay. It would be unwise and unadvisable to state for all times to come that what may or may not constitute a sufficient cause; each case ought to be decided on its own merits vis-a-vis the plea of sufficient cause.

6 On the peculiar facts of this case, I find that the test of 'sufficient cause' is met and accordingly set aside the impugned order. The appellant's appeal will be deemed pending before the learned appellate Court for decision on merits.

(Sardar Ejaz Ishaq Khan)
Judge

Imran