

**JUDGMENT SHEET**  
**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**(JUDICIAL DEPARTMENT)**

**C.R. No.244/2014**

Dr. Muhammad Shafi through LRs & 3 others

*versus*

Margallah Education Trust

Petitioners by: Syed Zafar Ali Shah, Advocate.

Respondent by: Mr. Abdul Rashid Awan, Advocate.

Date of Hearing: 31.12.2019.

**MOHSIN AKHTAR KAYANI, J:** Through the civil revision petition, the petitioners have assailed the order dated 02.06.2014, whereby the application submitted by the petitioners for restoration of Arbitration Application under Section 20 of the Arbitration Act, 1940 was dismissed by the learned Civil Judge 1<sup>st</sup> Class, (West), Islamabad.

2. Learned counsel for petitioners contended that the petitioners had filed application under Section 20 of the Arbitration Act, 1940 on 23.01.2003 against the Margallah Education Trust/respondent before the learned Civil Court, Islamabad, which was later on transferred to the Hon'ble Islamabad High Court and was numbered as C.S. No.1710/2008, whereby an Arbitrator was appointed vide order dated 17.06.2009 with the direction to complete the arbitration proceedings, however due to change of law, the matter was referred back to the learned Civil Court, and the petitioners were directed to submitted process fee for summoning of respondent and due to non compliance of said order, their application under Section 20 of the Arbitration Act, 1940 was dismissed on 14.11.2011. The petitioners thereafter filed application for restoration of arbitration application, however the same was dismissed vide order dated 02.06.2014. Learned counsel for petitioner further contended that the petitioners were not given due right of hearing despite the fact that the matter in issue relates to arbitration proceedings and as such, an Arbitrator was appointed by the Hon'ble Islamabad High Court while dealing with matter in shape of C.S. No.1710/2008, though due to change of law the matter was referred back to the learned Civil Court for adjudication; that the presence of parties was recorded by the

Hon'ble Islamabad High Court on 17.06.2009, whereby Chief Justice (R) Sh. Riaz Ahmad was appointed as an Arbitrator, therefore, once an Arbitrator was appointed, the arbitration petition could not be dismissed without completion of arbitration proceedings; that the petitioners have filed an application for restoration of their suit, which was rejected being time barred without considering the issue in hand as technicalities could not be placed in deciding the matter on merits.

3. Conversely, learned counsel for respondent contended that arbitration proceedings were not carried out due to lack of interest on the part of petitioners, who had not submitted process fee for summoning of respondent, due to which their application was dismissed and as such, the application for restoration of the suit was time barred and the delay could not be condoned on the part of petitioners.

4. Arguments heard, record perused.

5. Perusal of record reveals that the petitioners have filed an application under Section 20 of the Arbitration Act, 1940 against the respondent on 22.01.2003 before the learned Civil Court, however during pendency of the matter the pecuniary jurisdiction was changed and the matter was referred to the Hon'ble Islamabad High Court having being numbered as C.S. No.1710/2008 (Dr. Muhammad Shafi, etc. vs. Margalla Education Trust), whereafter Mr. Justice (R) Khizar Hayat Sh. was appointed as an Arbitrator on behalf of the petitioners, while Chief Justice (R) Abdul Karim Kundi was appointed as an Arbitrator on behalf of the respondent, but subsequently, the latter refused to perform and act as an Arbitrator, therefore, Retired Chief Justice of Pakistan Sh. Riaz Ahmad was appointed as an Arbitrator by this Court vide order dated 17.06.2009 in presence of learned counsel for both the parties.

6. During the said proceedings, the law was changed and the matter was again referred to the learned Civil Court, whereby notice pervi was issued to the petitioners as well as to respondent, whereupon the petitioners put appearance before the Court on 18.06.2011, whereby they were directed vide order dated 18.06.2011 to submit process fee for summoning of respondent, but the said order was not complied with despite the matter being heard on 23.07.2011 and 15.10.2011, therefore, last opportunity was granted to the petitioners, but no interest was shown and finally the suit was dismissed vide impugned order dated 14.11.2011 due to non deposit of process fee.

7. The petitioners again approached the learned Civil Court by filing an application for restoration of their civil suit on 21.12.2011 together with an affidavit with the request to restore the civil suit, which was dismissed due to non submission of process fee. The said application was contested by the respondent mainly on the ground that the reasons for restoration are neither plausible nor sufficient, though no counter affidavit was placed on record. In such eventuality, the guidance has been obtained from the case reported as 2012 SCMR 123 (Fareed Ahmad Janjua v. Punjab Small Industries Corporation) and 1985 SCMR 2064 (Mst. Mariam Bai & another v. Mst. Mehrunnisa Begum), wherein it was held that ordinarily affidavit of a counsel in absence of counter affidavit was to be taken on its face value and accepted.

8. The learned Trial Court after considering the request of the petitioners passed the impugned judgment 02.06.2014 only on one ground that the application for restoration was filed with delay, although the limitation provided for restoration of suit, which was dismissed due to non-deposit of process fee, has to be considered in the light of Order IX Rule 2 CPC and the limitation for such purpose has to be considered as 30 days in terms of Article 163 of the Limitation Act, 1908. Reliance is placed upon 1995 CLC 461 Sindh (Ciba-Geigy Pak Ltd. vs. Muhammad Safdar).

9. I have attended the reasons submitted in the application for restoration of the suit, which was supported by an affidavit, whereby the petitioners side contend that:

"یہ کہ سائل مقدمہ عنوان تاریخ کی غلط فہمی کی وجہ سے خارج ہوا۔"

10. This aspect was not attended to by the learned Trial Court despite the fact that the matter was already culminated into appointment of Arbitrators in presence of both the parties before the Hon'ble Islamabad High Court.

11. The dismissal of application for restoration as a penal action should be sparingly retaken in the given circumstances. Reliance is placed upon PLD 1992 Peshawar 18 (Shah Behram vs. Akbar Khan). Poles apart, the reasons rendered by the petitioners side have to be given weightage as the respondent has not filed counter affidavit, even otherwise, the delay of 8 days is to be condoned.

12. This Court is equipped with the powers enunciated under Section 115 CPC and while considering the background of the case, the role of the Court is limited where

Arbitrators were appointed for adjudication of a matter, the dismissal of suit was not warranted under the law as the learned Trial Court has not exercised the jurisdiction vested in it for adjudication of the matter on merits, rather decided the same on technical grounds.

13. In view of above reasons, the instant Civil Revision is ALLOWED. The impugned order dated 02.06.2014 is hereby SET ASIDE with direction to the learned Trial Court seized with the matter to proceed with the case on day-to-day basis. Both the parties are directed to appear before the court of learned Senior Civil Judge (West), Islamabad on 17.01.2020.

(MOHSIN AKHTAR KAYANI)  
JUDGE

Announced in open Court on: 10.01.2020.

JUDGE

Khalid Z.