

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Muhammad Ali Mazhar
Mrs. Justice Ayesha A. Malik

Civil Petition No.609 of 2020

(Against the Order dated 03.02.2020
passed by the High Court of Sindh,
Karachi in Second Appeal No.26/2018)

Meeru Khan

...Petitioner

Versus

Mst. Naheed Aziz Siddiqui & others

...Respondents

For the Petitioner:

Barrister Gohar Ali Khan, ASC
Syed Rifaqat Hussain Shah, AOR

For Respondents 1 & 2:

Ex-parte

Date of Hearing:

13.09.2023

Judgment

Muhammad Ali Mazhar, J. By means of this Civil Petition for leave to appeal the petitioner has impugned the Order dated 03.02.2020 rendered by the learned High Court of Sindh ("**High Court**") in Second Appeal No.26/2018, which was considered to be time barred and dismissed along with pending applications.

2. The barebones of the case are that the petitioner entered into an agreement to sell with respondent No.2 on 19.07.2006 for buying out Shop No.B-36/3 constructed on Plot No.FL-1/A, Sector-5K, North Karachi Township, Karachi, and paid Rs.110,000/- on 19.07.2006 as earnest money, while the balance sale consideration of Rs.700,000/- was to be paid by or before 18.08.2006. Upon payment of the balance amount of Rs.700,000/- through Pay Order and taking over possession of the shop, the respondents filed a suit for declaration cancellation, injunction and damages which was decreed on 27.02.2012. Consequently the petitioner filed an appeal before the learned Additional District Judge, Central, Karachi which was dismissed. Being aggrieved, the petitioner filed a Second Civil Appeal in the High Court but could not deposit the requisite court fee due to time constraint; hence he filed an application (C.M.A. No.1868/2018) on 08.02.2018 under Section 149 of the Code of Civil Procedure, 1908 ("**CPC**") seeking permission to deposit the court fee. On 02.10.2019 the

abovementioned application was taken up for hearing, which was not opposed by the counsel for respondent No.1; hence, the application was allowed by the High Court on 02.10.2019 with the directions to pay the requisite court fee of Rs.15,000/- within 15 days, which the petitioner deposited on 04.10.2019, however, despite that, the second appeal was dismissed by the High Court as being barred by time.

3. The learned counsel for the petitioner argued that the High Court, while dismissing the appeal, ignored the order dated 02.10.2019 whereby time was allowed to deposit the court fee with the consent of respondents, thereby resolving the issue of court fee as, after payment of the requisite court fee, the appeal was deemed to be validly filed from the date of filing in the first instance. In fact, on 03.02.2020 the case was taken up and decided in the absence of the advocate for the petitioner. It was further contended that the learned High Court did not consider the precedents cited to explicate Section 149, CPC whereby, pursuant to the time accorded by the Court for making the deficiency good, and on its compliance, the question of limitation could not arise. He invited our attention to the impugned order and argued that, despite the learned Judge himself observing that the court fee had already been paid, the appeal was dismissed being barred by time. In support of his contention, the learned counsel referred to the cases of Siddiq Khan v. Abdul Shakoor (PLD 1984 SC 289), Mst. Zainab v. Naeem Khan (1987 SCMR 1883), Nazir Ahmad v. Abdul Karim (PLD 1990 SC 42), Muhammad Maht v. Chaman Lal (1994 SCMR 222), Assistant Commissioner v. Abdul Shakor (1997 SCMR 919), and Jindo Mai v. Muhammad Bukhsh (2010 SCMR 48).

4. The record of this Court unveils that the respondent No.1 was already proceeded ex-parte *vide* order dated 11.06.2020 but, despite notice to the legal heirs of respondent No.2, nobody appeared. Thus, as a last resort, *vide* order dated 18.05.2023, this Court ordered substituted service through publication of notices in the newspaper Daily Jang, Karachi. The Court Associate informed us that the said publication had already been effected on 30.08.2023, but still nobody is present to represent the respondents, therefore we have no other alternative but to proceed with the matter *ex-parte*.

5. Heard the arguments. As the entire controversy revolves around the niceties of Section 149, CPC, therefore for the ease of convenience it

would be expedient and worthwhile to reproduce the aforesaid Section as under:-

"149. Power to make up deficiency of court-fees: Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

6. It is discernible from Section 149, CPC that it expounds an exception to the set of guidelines and rules encompassed under Sections 4 and 6 of the Court Fees Act, 1870. The power of the Court conferred under Section 149 is somewhat transient in nature and enunciates an interim measure only; it does not, however, invest any power to exempt the payment of the requisite court fee altogether. The exercise of this discretion by the Court at any stage is, as a general rule, expected to be exercised in favour of the litigant on presenting plausible reasons which may include *bona fide* mistake in the calculation of the court fee; unavailability of the court fee stamps; or any other good cause or circumstances beyond control, for allowing time to make up the deficiency of court fee stamps on a case to case basis. The discretion can only be exercised where the Court is satisfied that sufficient grounds are made out for non-payment of the court fee in the first instance. It is worth reiterating that this power is always subject to the discretion of the Court in appropriate and fit cases and the litigant cannot claim the exercise of this discretion as of right or privilege in every case. A generous or easygoing view cannot be taken to cover up a premeditated strive or endeavor to avoid the payment of requisite court fee perfunctorily. The expression "at any stage" alluded to in Section 149 accentuates that the deficiency, if any, on account of court fee can be ordered to be made good by the Appellate Court at any stage of proceedings in appeal. The provision delineated under Order VII, Rule 11 and Section 149, CPC have to be read collectively and in unison. In case of deficiency in the court fee, the Court cannot dismiss the suit or appeal without pinpointing the inadequacy of court fee and then fixing a timeline for payment. After compliance of the order within the stipulated timeframe, it shall have the same force and effect as if the court fee had been paid in the first instance. On the face of it, Section 149 relates to the sanction of time for the payment of court fee in the beginning, while Section 148 is

germane to the enlargement of time where any period is fixed or granted by the Court for any act prescribed or allowed by the CPC, and allows the Court to, in its discretion, from time to time, enlarge such period even where the period originally fixed or granted may have expired.

7. It goes without saying that when time is allowed or extended by the Court for the payment of the requisite court fee, such order cannot be recalled unless it formally reviewed. The policy of the law with the gateway of a beneficial provision is not intended to penalize or victimize the litigant on account of a deficiency in court fees. By no stretch of imagination have the laws *vis-à-vis* court fees and valuation of suits been envisioned to make available an apparatus to the parties under litigation to circumvent the decisiveness of the *lis* on merits or to elongate the life of the *lis* by raising objections as to court fees and valuation of the suit; therefore it is also an obligation of the Court simultaneously that, while admitting or registering the plaint or appeal, it should check whether the requisite court fee has been paid or not and, in case of deficiency or filing application under Section 149 CPC, pass necessary orders for compliance without keeping the application pending for an unlimited period of time. In the case in hand, the application under Section 149 CPC remained pending unnecessarily, without any order, until 02.10.2019 when the Court granted 15 days' time for payment of the court fee and, on 04.10.2019, the court fee was paid, which fact is also reflected from the impugned order, hence there was no lawful justification for considering the appeal barred by time and this finding of the High Court is erroneous. After making up the deficiency of court fee within the time allowed by the Court, the second appeal should have been heard on merits rather than technicalities. In the case of Mst. Zainab and another v. Naeem Ahmad and another (1987 SCMR 1883), this Court observed that the petitioners had initially failed to pay the proper amount of court fees as they were misled by the erroneous entry in the decree sheet. The Court held that in any case they were entitled to an opportunity for making up the deficiency as laid down in Siddique Khan v. Abdul Shakoor Khan (PLD 1984 SC 289) and as they had made up the deficiency within the time granted to them, the Court erred in law in making an order which had the effect of dismissing their appeal. Whereas in the case of Siddique Khan and 2 others v. Abdul Shakur Khan and another (PLD 1984 SC 289), this Court while relying on

different dictums held that (a) It would indeed be anomalous if limitation is not saved in cases where the law requires the Court to allow the plaintiff to correct the valuation of the relief claimed in the suit which must necessarily entail making up any deficiency in the stamp paper affixed on the plaint; (b) Time should automatically be enlarged in cases in which the Court has the discretion to grant time to pay the whole or part of the court fee prescribed; and (c) Consequently, where the plaintiff is required to correct the valuation of the relief claimed in the suit, he shall further be required to supply the requisite stamp paper and on compliance it shall have the same force and effect as if such fee had been paid in the first instance. In the foregoing background, it was further held with regard to the interpretation of Order VII, Rule 11 (b) and (c), CPC that it was obligatory to allow time for making up the deficiency in court fees before rejecting the plaint and, regarding refusal of discretion under Section 149, CPC, this could only be on grounds of contumacious and positive *mala fide* conduct. In the case of Muhammad Mahibullah and another v. Seth Chaman Lal thr. L.Rs. and others (1994 SCMR 222), it was held that when the learned Additional District Judge came to hold that the memorandum of appeal had not been sufficiently stamped, instead of outright dismissing the memorandum of appeal, an opportunity should have been given and the appellant should have been called upon to make good the deficiency. Under the provisions of Order VII, CPC which applies to suits, when the plaint does not bear the appropriate court fees this is the requirement of the law. Further, Section 107(2), CPC provides that the Appellate Court shall have the same powers and shall perform, as nearly as may be, the same duties as are conferred and imposed by the CPC on Courts of original jurisdiction in respect of suits instituted therein. While in the case of Assistant Commissioner and Land Acquisition Collector, Badin v. Haji Abdul Shakoor and others (1997 SCMR 919), this Court held that if an appellant files an appeal with the deficit court fee, the Appellate Court under Section 149, CPC can extend the time and, if time is so extended, the question of limitation will not arise, but if the Appellate Court finds that the appellant is guilty of contumacy or he acts in a positive *mala fide* manner with regard to the deficient court fee, it may decline to exercise discretion on that ground in favour of the appellant. In the case of Ch. Nazir Ahmed v. Abdul Karim and another (PLD 1990 SC 42), this Court held that the Court is bound to ascertain the deficiency in the court fee affixed on the plaint and then give time to

the plaintiff to make up the deficiency and, if the plaintiff complies with the order within the time granted, the defect in the plaint is deemed to have been removed from the date it had been originally filed in Court.

8. The function of the Court is to do substantial justice between the parties after providing an ample opportunity of hearing which is one of the most significant components and elements of a fair trial. The procedure is mere machinery and its object is to facilitate, not obstruct, the administration of justice. The CPC should, therefore, be considered liberally and should not be allowed to undermine substantial justice. A statute or any enacting provision therein must be so construed as to make it effective and operative. The distinction between substantive law and the law of procedure is a very fine one, but for the purposes of jurisprudence a distinction is made particularly from the point of view of administration of justice. This Court in the case of Imtiaz Ahmad v. Ghulam Ali and others (**PLD 1963 SC 382**) held that the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. The English system of administration of justice on which our own is based may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his.

9. Statute law can be either substantive or procedural: the substantive law defines the rights while the procedural law deals mainly with the procedure or remedies. It would be worthwhile to cite a passage from *Corpus Juris Secundum*, Volume 21, page 136 that "while a Court may be expressly granted the incidental powers necessary to effectuate its jurisdiction, a grant of jurisdiction, in the absence of prohibitive legislation, implies the necessary and usual incidental powers essential to effectuate it, and subject to existing laws and constitutional provisions, every regularly constituted Court has power to do all things that are reasonably necessary for the administration of justice within the scope of jurisdiction and for the enforcement of its judgments and mandates." While according to Salmond, the law of procedure may be defined as that branch of the law which governs the

process of litigation. It is the law of actions "*jus quod ad actiones pertinet*" which includes all legal proceedings civil or criminal. Salmond has drawn the following distinctions between substantive law and procedural law: (i) Substantive law determines the conduct and relations of the parties *inter se* in respect of the matter litigated, whereas the procedural law regulates the conduct and relations of Courts and litigants in respect of the litigation; (ii) Substantive law deals with the ends which the administration of justice contemplates while the procedural law deals with the means and instruments by which the ends of administration of justice are to be attained; (iii) The question as to what facts constitute a wrong is determined by the substantive law, while what facts constitute proof of a wrong is a question of procedure; (iv) Substantive law defines the rights whereas the law of procedure defines the modes and conditions of the application of one to the other; and (v) Substantive law relates to the matter outside the Courts, whereas the procedural law regulates affairs inside the Courts [Ref: *Introduction to Jurisprudence*, Third Edition Reprint (2011) by Dr. Avtar Singh & Dr. Harpreet Kaur].

10. As a result of the above discussion, this Civil Petition is converted into an appeal and allowed. The impugned order of the High Court is set aside and the matter is remanded to the High Court to decide Second Appeal No.26/2018 on merits after due notice to the parties.

Judge

Judge

ISLAMABAD
13th September, 2023
Mudassar
Approved for reporting