IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Umar Ata Bandial
Mr. Justice Sajjad Ali Shah
Mr. Justice Mansoor Ali Shah

Civil Petitions No. 3950 & 4047 of 2019.
(Against the judgment dated 13.9.2019 passed by the High Court of Balochistan Quetta in CR No. 106 of 2014)

Muhammad Anwar (decd) through his LRs. etc. ...**Petitioners** (CP 3950/19)

Abdul Hameed and others. ...**Petitioners** (CP 4047/19)

Versus

Essa and others. ...**Respondents** (In both)

For the Petitioner(s) : Mr. Zahoor-ul-Haq Chishti, ASC (CP 3950/19)

For the Petitioner(s) : Mr. Kamran Murtaza, Sr. ASC (CP 4047/19)

For the Respondent(s) : Mr. Mir Aurangzeb, AOR/ASC (In both)

Date of Hearing : 12.11.2021

ORDER

Sajjad Ali Shah, J.-. The petitioners seek leave of this Court against the common judgment of Balochistan High Court at Quetta in Civil Revision No. 106 of 2014 whereby the said Court while setting aside the concurrent findings of the Courts below, on the point of limitation, remanded the case for trial on merits.

2. Briefly, the respondents on 23.4.2001 filed a suit against the petitioners seeking cancellation of their lease, consequent mutation and permanent injunction. In the said suit, the cause of action as asserted in para 23 had initially accrued in 1971-72 and thereafter on 27/28/29.07.2000 and thereafter on various dates. The said suit was dismissed on 25.06.2001 by holding it to be barred by time. The appeal met the same fate. However, on 28.03.2002, the High Court while exercising revisional jurisdiction allowed the respondents to

withdraw the suit and to file afresh. It appears that on 18.6.2002, the respondents filed a suit wherein the cause of action was asserted to have arisen in July, 2000 instead of 1971-72 as was asserted in the first plaint. The plaint of the said suit was returned on 25.10.2005 for want of jurisdiction. The respondents, thereafter instead of presenting the same plaint to the Court of competent jurisdiction, filed a fresh suit on 27.04.2006 from which these proceedings have emanated. Again the Court of first instance on 18.9.2007 dismissed the suit being barred by time. The respondents instead of filing an appeal before the District Judge filed an appeal before the High Court and the High Court on 15.9.2011 returned the appeal to the respondents to present it before the District Judge. It appears that on 30.12.2013 the District Judge also dismissed the appeal after affirming the finding of the trial Court. The respondents thereafter invoked the revisional jurisdiction of the High Court and the High Court to our dismay and surprise dealt with the issue of limitation in a very casual and callous manner by holding that *"when the court arrives to the conclusion that Justice demands condonation of delay in a given case, the formal written application for condonation of delay is not sine qua non for exercising the discretion in this behalf, verbal prayer for condonation of delay may be given effect for safe dispensation of Justice"*. The Court in the same breath further observed that section 5, 12 and 14 of the Limitation Act empowers the Court to enhance the period of limitation which even otherwise against substantial justice was a knock out on mere technicality. The High Court consequently through order impugned, by setting aside concurrent findings, remanded the case to the trial Court with the directions to decide it on merits.

3. Learned counsel for the petitioner has contended that in two rounds of litigations, the suit filed by the respondents was found hopelessly barred by time and the High Court brushed aside such findings by holding the dismissal of suit on the ground of limitation as *"a technicality"*. Per ASC the setting aside of concurrent findings of the Courts below in such casual manner cannot be

sustained. It was next contended that the law of limitation was never considered by this Court as a "*mere technicality*" and is to be considered seriously. Per the counsel, the High Court in its revisional jurisdiction while reversing concurrent findings on the question of limitation without assigning any reason simply directed the trial Court to decide the suit on merits which findings could not be sustained.

4. On the other hand, learned counsel appearing for the respondents could not deny the fact that in the first suit the respondents ~~have~~ in para 23 of their plaint had mentioned the cause of action to have accrued in 1971-72 and thereafter on 27th July, 2000. However, contended that the order of the High Court was well reasoned and has rightly held that in the circumstances the limitation was a technical aspect and was liable to be ignored.

5. We have considered the contentions of learned counsel for the respective parties and have perused the record.

6. It appears that in the first round, the suit filed by the respondents was concurrently dismissed by the two Courts by holding it to be barred by limitation and the High Court without setting aside such findings while exercising its revisional jurisdiction allowed the respondents to withdraw the suit with the permission to file afresh. The High Court by allowing such withdrawal in fact tacitly without assigning any reason had set aside such concurrent findings of the two Courts holding the suit to be barred by law which was not permissible as being against the settled principles of law. Though a suit which has been decided or dismissed being barred by law could be allowed to be withdrawn at any time even in an appeal before this Court but after setting aside the judgment and decree on merits. The question arises where a suit is dismissed under Order VII Rule 11 (d), after having been found barred by law as has happened in the instant case, as to whether a plaintiff could be allowed to withdraw the suit at appellate or revisional stage with the permission to file afresh. Order VII Rule 11 which

envisages and records the following four categories where the Court could reject a plaint and Rule 13 which provides that rejection of plaint does not preclude presentation of fresh plaint, read as follows:-

> *"**Order VII Rule 11:***
>
> *11. Rejection of plaint: The plaint shall be rejected in the following cases:-*
>
> *(a) where it does not disclose a cause of action;*
>
> *(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*
>
> *(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;*
>
> *(d) where the suit appears from the statement in the plaint to be barred by any law".*
>
> ***Order VII Rule 13:***
>
> *13. Where rejection of plaint does not preclude presentation of fresh plaint. The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action".*

7. A perusal of rule 11 reveals that it envisages and records 4 categories where the Court could reject a plaint and the first 3 are where the deficiencies in the plaint could be redressed. For instance, under clause (a) where the plaint is rejected on the ground that it does not disclose a cause of action, subject to law of limitation, a fresh plaint could be presented by overcoming the defect and disclosing the cause of action. Likewise, under clause (b) where the plaint is rejected on failures of plaintiff to correct the valuation, again subject to law of limitation, the defect could be removed and a fresh plaint could be presented. In the same manner, under clause (c) if the plaint is rejected on failure of the plaintiff to supply the requisite stamp paper, subject to law of limitation, such defect could be remedied by supplying the court fees. However, where the plaint under clause (d) of Rule 11 is rejected on the ground that the suit is barred by any law, the filing of fresh plaint is not envisaged unless the findings declaring the suit to be barred

by any law are reversed and, therefore, the withdrawal of the suit could not be allowed with the permission to file a fresh. It would of course be unlawful to revive a dead cause without bringing back the suit to life. For this very reason the Lahore High Court substituted rule 13 as reproduced above to the effect that the rejection of plaint on any of the grounds given in clause (a) to (c) in Order 11 shall not on its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. The exclusion of clause (d) appears to be well considered.

8. In the like manner, Order XXIII Rule 1 CPC, which allows the plaintiff to withdraw his suit or abandon part of his claim, empowers the Court to allow such withdrawal with permission to file a fresh suit. However, such permission is to be granted by the Court after satisfying itself and recording reasons that unless such permission is allowed, the suit would fail by reason of some formal defect. The Court can also allow such withdrawal with permission to file a fresh suit in case where the Court is of the view that there are other sufficient grounds for allowing plaintiff to withdraw his suit with the permission to file a fresh suit. A case law study shows that the suit may be allowed to be withdrawn in a case where the plaintiff fails to implead necessary party or where the suit as framed does not lie or the suit would fail on account of misjoinder of parties or causes of action or where the material document is not stamped or where prayer for necessary relief has been omitted or where the suit has been erroneously valued and cases of like nature. It is always to be kept in mind that where such defect could be remedied by allowing amendments, the Court should liberally exercise such powers but within the parameters prescribed by Order VI Rule 17 CPC. Besides while exercising powers under this provision the Court must identify the defect and record its satisfaction that the defect is formal and does not go to the root of the case. It is also to be kept in mind that such withdrawal would not automatically set-aside the judgment and decree which has come against the

plaintiff unless such judgment and decree is set-aside by the Court after due application of mind. In the instant case, the suit was concurrently dismissed by the Courts after having been found barred by law/time, therefore, the High Court had no power to allow withdrawal of the suit with the permission to file a fresh unless it had reversed the concurrent findings on the question of limitation. Even otherwise, if permission is granted for filing a fresh suit under Order XXIII Rule 1 CPC, then, pursuant to Order XXIII Rule 2, the plaintiff is bound by the law of limitation in the same manner as if the first suit had not been filed, therefore, no fresh cause of action would accrue from the date when such permission was granted by the Court. Reference is made to the cases of *Muhammad Saeed Bacha and another vs. Late Badshah Amir and others* (2011 SCMR 345). In these circumstances, the second suit filed by the plaintiff was barred by the principle of *res-judicata*.

9. Coming to the core issue where the High Court in the second round, while setting aside the concurrent findings of the two Courts holding the suit to be barred by time, declared the law of limitation as a *"mere technicality"* and that the limitation could be condoned on a verbal request, these findings of the Court are in direct conflict with the statutory provisions as well as the case law.

10. It appears that the High Court failed to consider and appreciate that the parameters of discretion in condoning the delay in filing an application, appeal, review or revision etc. are totally different than the powers vested in Court to condone the delay occasioned in filing the suit. To cases falling in the first category; Section 5 of the Limitation Act, 1908 (hereinafter referred to as the "**Act**") is applicable which vests the Court with vast discretion of condoning delay in cases where the Court is satisfied that the application seeking condonation of delay discloses *"sufficient cause"* by accounting for each day of delay occasioned in filing the application, appeal, review or revision. On the other hand, the Courts on the original side while trying a suit as required under Section 3 of the Act are bound to dismiss the suit if it is found to be barred by time notwithstanding that

the limitation has not been set up as defense. The Court has no power to condone the delay in filing the suit but could exclude time the concession whereof is provided in Section 4 to 25 of the Act only in cases where the plaintiff has set up in the plaint one of such grounds available in the Act such as disability, minority, insanity, proceedings *bona fide* before a Court without jurisdiction etc. and not otherwise. In fact, the language used in Section 3 of the Act is mandatory in nature and imposes a duty upon the Court to dismiss the suit instituted after the expiry of period provided, unless the plaintiff seeks exclusion of time by pleading in the plaint one of the grounds provided in Sections 4 to 25 of the Act. Reference can be made to the cases of *Haji Abdul Karim and others vs. Messrs Florida Builders (Pvt.) Limited* (PLD 2012 SC 247) and *Hakim Muhammad Buta and another vs. Habib Ahmad and others* (PLD 1985 SC 153). In cases where limitation is not set up in defense and consequently a waiver is pleaded, the Courts notwithstanding such waiver are bound to decide the question of limitation in accordance with law. Reference can readily be made to the case of *Ahsan Ali and others vs. District Judge and others* (PLD 1969 SC 167). The Court even has no discretion or power to condone the delay in filing the suit on humanitarian grounds or by invoking the principles of equity unless any of the grounds prescribed in the Act is available to the plaintiff and is duly pleaded. The Indian Supreme Court in the case of *P.K. Ramchandran vs. State of Kerala and Others* ((1997) 7 SCC 556) held that the *"law of limitation may harshly effect a particular party but it has to be applied with all its rigour when the statute so prescribes and the Courts have no power to extend the period of limitation on equitable grounds"*.

11. As to the condonation of delay on oral motion, though in the case of *Ghulam Muhammad and another vs. The Bank of Bahawalpur Ltd.* (1971 SCMR 148), a two-Member Bench of this Court had approved the condonation of delay on oral motion allowed by the High Court by holding it to be sufficient compliance of Section 5 of the Act but without deliberating on the issue, whereas, in a number of

cases larger Benches of this Court specifically considered this issue and held that an oral submission for condonation of delay does not make a valid justification for condoning the delay in cases even falling under Section 5 of the Act. Reference can readily be made to the cases of *Mullah Ahmed vs. Assistant Commissioner, Sibi* (1986 SCMR 1624), *Commissioner of Income Tax (Investigation) vs. Miss. Shireen Ayub Khan* (1988 SCMR 304) and *Khan Muhammad vs. Zainab Bibi* (2000 SCMR 1227). This view, of course, has a valid legal justification as the party seeking condonation or exclusion of time in terms of Section 5 or Section 3 of the Act has to explain the delay of each and every day through an affidavit and/or justify exclusion of time. It is to be kept in mind that upon expiry of the period of limitation a claimant loses his right to enforce his claim through the Court of law and consequently a right accrues in favour of respondent by operation of law which cannot be lightly disturbed or brushed aside unless *"sufficient cause"* is shown and accepted by the Court.

12. Perusal of the impugned judgment reflects that contrary to the settled principles, the learned Judge in Chambers without realizing the fact that the Court has no discretion in condoning the delay in filing the suit except on statutory grounds as detailed in the Act and that too when one of such grounds is set up to seek exclusion of time, proceeded to base its judgment by reproducing the word to word commentary annexed to Section 5 of the Act at page 82 of "Limitation Act 1908 by Shoukat Mahmood - 6th Edition" in respect of cases falling under Sections 5, 12 and 14 of the Act. With due respect, the principles laid down in Section 5 of the Act are not at all applicable to the suits, whereas the applicability of Section 12 to suits is only to the extent of excluding the day from which period of limitation is to be reckoned and Section 14 provides for exclusion of time of proceedings *bona fide* conducted in Court without jurisdiction. Again it was not a case of proceedings before Court without jurisdiction but a case where, after concurrent dismissal of suit on the point of limitation, the suit which stated

the cause of action to have accrued in the year 1971-72 was withdrawn and filing of fresh suit on the same subject matter by just changing cause of action from 1971-72 to 27/29.7.2000.

13. The second ground which prevailed with the learned Judge to upset the concurrent findings and to remand the case for trial on merits was that the dismissal of suit on the ground of limitation was a mere technicality. It has been held in numerous judgments by this Court that the Law of Limitation is not a mere technicality and that once the limitation expires, a right accrues in favour of the other side by operation of law which cannot lightly be taken away. Reference can be made to the judgments of this Court in the case of *Asad Ali vs. Bank of Punjab* (PLD 2020 SC 736), *Ghulam Qadir vs. Abdul Wadood* (PLD 2016 SC 712), *Abdul Sattar vs. Federation of Pakistan* (2013 SCMR 911) and *Muhammad Islam vs. Inspector-General of Police* (2011 SCMR 8).

14. In the circumstances, the judgment passed by the High Court cannot be sustained, therefore, is set-aside and the concurrent orders of dismissal by the Courts below are maintained. These petitions are converted into appeal and are allowed in the above terms.

Islamabad
12.11.2021
A. Rehman
Not Approved For Reporting