SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Mohammad Azam Khan, C. J.
Raja Saeed Akram Khan, J.

Civil Appeal No.180 of 2015
(PLA filed on 19.5.2015)

Syed Rehman Shah s/o Nooran Shah, r/o village Larri, Tehsil Patika, District Muzaffarabad.

….APPELLANT

VERSUS

1. Additional District Judge, Muzaffarabad,
2. Civil Judge, Muzaffarabad, Court No. 1, Muzaffarabad.
3. Khaleel-ur-Rehman Shah,
4. Habib-ur-Rehman Shah, sons,
5. Mst. Bibi,
6. Mst. Anti, widows,
7. Mst. Atia,
8. Mst. Afia, (daughters under puberty) sons of Abdul Rehman Shah,
9. Ghulam Mustafa Shah, caste Syed, r/o village Larri, Tehsil Patika, District Muzaffarabad.

….RESPONDENTS

(On appeal from the judgment of the High Court dated 14.4.2015 in writ petition No.1070 of 2012)

FOR THE APPELLANT: Mr. Farooq Hussain Kashmiri, Advocate.

FOR RESPONDENT NO.5: Raja Ajmad Ali Khan, Advocate.

Date of hearing: 10.1.2017.

JUDGMENT:

Raja Saeed Akram Khan, J.— The above titled appeal by leave of the Court has been directed against the judgment passed by the High Court on 14.4.2015, whereby the writ petition filed by the appellant, herein, has been dismissed in limine.

2. The facts briefly stated are that the appellant, herein, filed a suit for possession in the Court of Civil Judge, Muzaffarabad on 17.9.2003, in respect of land comprising khewat No. 24, 32 measuring 10 kanal, 1 marla, situate in village Larri, Tehsil & District Muzaffarabad. The trial Court dismissed the suit for non-prosecution on 23.8.2004. The appellant filed an application for restoration of the suit, which

was dismissed vide order dated 13.4.2005. The appellant filed a revision petition in the Court of District Judge, Muzaffarabad which was entrusted to the Additional District Judge, Muzaffarabad. After hearing the parties, the learned Additional District Judge, Muzaffarabad, dismissed the revision petition on 6.5.2005. The appellant filed a writ petition in the High Court, which was accepted and the case was remanded to the trial Court with the direction for decision of the case on merit after framing of issues and recording of evidence of the parties. The trial Court after framing the issues recorded the respective evidence of the parties and dismissed the application for restoration of the suit on 24.6.2010. Feeling dissatisfied, the appellant filed a revision petition before the District Judge, Muzaffarabad which was entrusted to the Additional District Judge, Muzaffarabad for disposal under law. After hearing the parties, the learned District Judge, Muzaffarabad

dismissed the revision petition on 17.4.2012. Feeling dissatisfied, the appellant filed a writ petition in the High Court, which was dismissed in limine vide impugned judgment dated 14.4.2015. Hence, this appeal by leave of the Court.

3. Mr. Farooq Hussain Kashmiri, Advocate, the learned counsel for the appellant, argued that the learned High Court has passed the impugned judgment without adhering to the relevant provisions of law, which is not sustainable in the eye of law. The learned High Court has not taken into consideration that after framing of issues, when a case is fixed for evidence of a party then the provisions of Order IX, CPC are not applicable rather the provisions of Order XVII, CPC are applicable. He further argued that if a party fails to appear before the Court then under Rule 2, Order XVII, CPC, the suit may be dismissed for non-prosecution or

the Court has power to decide the suit under Rule 3, Order XVII, CPC. He contended that Order IX, CPC, was not applicable in the case in hand, whereas, the suit should have been decided under Order XVII, CPC but the learned High Court while delivering the impugned judgment has not taken into account this important aspect of the case.

4. On the other hand, Raja Amjad Ali Khan, Advocate, the learned counsel for respondent No.5, while controverting the arguments addressed by the learned counsel for the appellant, submitted that the judgment passed by the learned High Court is perfect and legal which is not open for interference by this Court. He argued that all the controversial questions on the strength of the case law enunciated by this Court have comprehensively been resolved by the learned High Court while assigning cogent reasons. He contended that

apart from the legal proposition; whether, Order IX, CPC or Order XVII, CPC, is applicable in the case in the hand, the learned High Court has considered the contents of application filed by the respondents and drew the conclusion that the appellant failed to furnish any sufficient cause for restoration of the suit. In this way, the learned High Court has not committed any illegality while passing the impugned judgment.

5. We have heard the arguments of the learned counsel for the parties at some length and gone through the impugned judgment along with the record made available. The controversy involved in the matter is that the suit of the appellant was dismissed by the trial Court for non-prosecution. The appellant filed an application for restoration of the suit. The trial Court dismissed the application and the revision petition before the District Judge also failed. The appellant filed writ petition before the High

Court which was accepted and the case was remanded to the trial Court to decide the same after framing issues and recording evidence. The trial Court as per direction of the learned High Court framed issues and after recording evidence and hearing the parties again dismissed the application for restoration of the suit and the District Judge as well as the learned High Court concurred with the findings recorded by the trial Court. The sole point agitated by the learned counsel for the appellant before this Court is that the learned High Court dismissed the writ petition only on the ground that the order passed by the trial Court under Order IX Rule 8, CPC, was appealable and revision petition before the District Judge was not competent. Whereas, the learned High Court failed to adhere to the fact that after framing of issues, when a case is fixed for evidence of a party then the provisions of Order IX, CPC are not attracted rather the provisions of Order

XVII, CPC are attracted and the order passed under Order XVII, CPC is not appealable, therefore, the revision petition before the District Judge was competent. The perusal of the impugned judgment shows that the learned High Court in paragraph 13 of the impugned judgment has also discussed the merits of the case. As the learned counsel for the appellant during the course of arguments also stated that under Rule 2 of Order XVII, CPC the suit may be dismissed for non-prosecution; and it is well settled law that if a case is dismissed for default of appearance of a party or his counsel, it is the duty of that party or counsel to show 'sufficient cause' as to why the case was not prosecuted on the relevant date, therefore, at first we deem it proper to consider the point whether the cause shown by the appellant for non-appearance was sufficient or not. Before proceedings further it is pertinent to mention here that the term 'sufficient cause' has been

interpreted by all the superior Courts as; it is such a cause which is beyond the control of a party. The perusal of the record reveals that the suit of the appellant was dismissed for non-prosecution on 23.08.2004, and he filed an application for restoration of the same on 15.02.2005, after a period of more than six months. It will be useful to reproduce here the relevant contents of the application filed by the appellant for restoration of the suit which read as under:-

"2۔ یہ کہ سائل/مدعی کراچی میں محنت مزدوری کے لئے چلا گیا۔ جاتے ہی سائل/مدعی کے بیٹے تصدق حسین شاہ کی ٹانگ ٹوٹ گئی جسکی تیمارداری میں مصروف رہا جس وجہ سے سائل مدعی عدالت گرامی میں بروقت حاضر نہ ہو سکا جس بناء پر سائل/مدعی کا مقدمہ خارج ہو گیا۔

3۔ یہ کہ سائل/مدعی بیٹے سے بے پناہ محبت کرتا ہے۔ سائل کا جوان بیٹا ٹانگ ٹوٹ جانے کی وجہ سے مکمل طور پر معذور ہو چکا ہے۔ سائل کو اس دوران مقدمہ کی طوالت کا بھی شدت سے احساس تھا بوجہ مجبوری سائل اپنے کونسل سے رابطہ نہ کر سکا۔ اب یہاں مظفر آباد آنے پر معلوم ہوا کہ مورخہ 04۔08۔23 کو مقدمہ خارج ہو چکا ہے۔"

After going through the application for restoration of the suit, it appears that the cause

shown by the appellant for non-appearance was that he remained busy in looking-after of his son at Karachi, whose leg was got fractured in an accident. It is spelt out from the record that full opportunity was provided to the appellant to substantiate his version by producing evidence that the circumstance were beyond his control but despite the fact that the respondents while filing objections taken a specific stance that neither the appellant went to Karachi nor leg of his son was got fractured, the appellant has not produced any solid evidence in support of his version. On the date when the suit was dismissed for non-prosecution, the case was fixed for evidence of the plaintiff-appellant but instead of producing evidence the appellant absented himself and after a considerable time approached the Court for restoration of the suit. It is very astonishing that during the intervening period, i.e. 23.08.2004 to 15.02.2005, the appellant even did not bother to contact his

counsel to inquire about the proceedings of the case. The appellant filed application for restoration of the suit beyond prescribed period of limitation and under law he was bound to explain the delay of each and every day but he failed to offer any such explanation. In such state of affairs, the trial Court was fully justified to dismiss the application on the ground of non-existence of sufficient cause and on the point of limitation as it is settled law that Courts cannot give any premium to a party which is found negligent, uninterested and careless. Reliance may be placed on a case reported as *Muhammad Habib Khan v. Nasiri Khatoon & 11 other* [2006 SCR 22], wherein, while dealing with the proposition it has been held that:-

> "The term 'sufficient cause' is such a cause which is beyond the control of a party, therefore, the Courts have not given any premium to a party which is found negligent, indifferent and careless."

As it is evident from the record that the appellant failed to substantiate that the circumstances were beyond his control due to which he failed to appear before the Court on the date fixed for hearing and also failed to furnish any explanation regarding the delay in filing of application for restoration of the suit, therefore, there is no need to record findings on the point whether the order of the trial Court was appealable or revisable, as the same would be mere an academic discussion. Keeping in view the circumstance of the case if the version of the learned counsel for the appellant is accepted that the revision petition was competently filed even then the end result will be the same. The trial Court after evaluating the evidence brought on record has passed the well reasoned judgment and the District Judge upheld the same. Under section 44 of the Interim Constitution Act, 1974, the writ petition lies on the violation of law. The appellant failed

to point out any violation of law. The order passed by the trial Court as well as the District Judge was in accordance with law applicable; therefore, the writ petition was not maintainable which has rightly been dismissed by the High Court.

Resultantly, this appeal having no substance is hereby dismissed with no order as to costs.

Muzaffarabad,
.02.2017 **JUDGE** **CHIEF JUSTICE**

Date of Announcement: 17/02/2017