

SUPREME COURT OF AZAD JAMMU & KASHMIR

[Appellate Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, CJ.
Raja Saeed Akram Khan, J.

Civil Appeal No.227 of 2018
(PLA filed on 18.10.2018)

1. Muhammad Rais,
2. Muhammad Zahoor,
3. Karamat Hussain,
4. Abdur Rehman,
5. Muhammad Nasir,
6. Yasir Arfat, sons of Muhammad Hussain, caste Sudhan, r/o Numb Peprian, Tehsil & District Sudhentu, Pallandri.

..... APPELLANTS

v e r s u s

1. Muhammad Sarfraz,
2. Muhammad Ishfaq,
3. Muhammad Afaq, sons of Sakhi Muhammad,
4. Sakhi Muhammad s/o Lal Khan, caste Gakhar,
5. Muhammad Nisar Khan, son,
6. Zaibun-Nisa, d/o Muhammad Shafee, caste Sudhan, r/o Numb Peprian, Tehsil & District Sudhentu/Pallandri.

.....RESPONDENTS

7. Tahir Tariq,
8. Ramzan,
9. Noman Tariq, sons of Muhammad Tariq, caste Sudhan, r/o Numb Peprian, Tehsil & District Sudhentu/Pallandri.

..... PROFORMA RESPONDENTS

[On appeal from the order of the High Court,
Dated 24.7.2018, in Misc. Application No.8/2018]

FOR THE APPELLANTS: Mr. Muhammad Jameel
Chaudhary, advocate.

FOR THE RESPONDENTS: Sardar Nisar Ahmed
Khan, advocate.

Date of hearing: 22.4.2019

JUDGMENT:

Raja Saeed Akram Khan, J.—The titled appeal, by leave of the Court, has been filed against the order passed by the High Court on 24.7.2018, whereby an application for restoration of the appeal titled *Muhammad Raees & others vs. Muhammad Sarfraz & others*, dismissed for non-prosecution, has been rejected.

2. The facts of the case, shortly stated, are that during pendency of an appeal filed by the appellants, herein, before the High Court, the mother of the appellants died. On 6.12.2017 the appeal was fixed for hearing, but the appellants could not appear before the Court and the appeal was dismissed for non-prosecution. It is the claim of the appellants that they attained the knowledge of the fate of appeal on

7.6.2018 and filed the application for restoration of the same, on 24.7.2018, which has been dismissed through the impugned order, hence this appeal by leave.

3. Mr. Muhammad Jameel Chaudhdary, advocate, counsel for the appellants, submitted that the impugned order is based on misconception of law and the facts of the case, as the learned High Court failed to appreciate the real controversy involved in the matter. He added that the learned High Court fell in error of law and the facts while not taking into consideration that due to illness and death of the mother of the appellants, they could not appear before the Court, therefore, the default was not intentional, as the circumstances were beyond their control. The learned counsel added that the written arguments were already filed by the appellants on 30.5.2017 and the arguments were sought by the Court from the other side. The appellants were under the impression that as the written arguments had come on the record, the case shall be decided on merits after seeking the arguments from the other side. He further submitted that the appellants were fully vigilant, that's why they had filed the written arguments on the order of the

court, which are available on the record and in this scenario, it was enjoined upon the learned High Court to decide the case on merits, instead of dismissing the appeal for non-prosecution.

4. On the other hand, Sardar Nisar Ahmed Khan, advocate, counsel for the respondents, submitted that the proper course has been adopted by the learned High Court while dismissing the appeal for non-prosecution. He submitted that although the written arguments had been filed on behalf of the appellants but this does not dispense them from appearing before the Court. The learned counsel added that even the ground, which has been made basis for restoration of appeal, is against the record, as no proof of illness or death of the mother of the appellants has been brought on the record. Moreover, after the death of their mother, they approached the Court after the lapse of a considerable time. He added that in such situation, no other option was left for the High Court except to dismiss the case for non-prosecution and the law always supports the vigilant and not the indolent.

5. We have heard the learned counsel for the parties and gone through the impugned order along with the other record made available, with utmost care.

6. A scrutiny of the record reveals that the appellants filed the written arguments before the High Court on 30.5.2017, which are part of the record as annexure 'PE'. This fact is in consonance with the interim order of the learned High Court dated 30.5.2017, at page 12 of the file of the High Court, which reads as under:-

"Appellant filed written arguments in support of his version. Learned counsel for the respondents seeks adjournment for arguments. Adjournment is allowed. To come up for the purpose on 20.6.2017."

While keeping the above mentioned facts in juxtaposition, we are of the view that after filing the written arguments, the appellants have rightly presumed that the case shall be decided on merits, after seeking arguments from the other side. In this state of affairs, when the whole version of the appellants was before the Court, there was no justification to dismiss the appeal for non-prosecution, instead of deciding the same on merits. Such dismissal

order is not supported by law, therefore, the same is set aside. Resultantly this appeal is accepted and the appeal filed by the appellants before the High Court is restored to its original number. The learned High Court is directed to decide the same on merits, after taking into account the written arguments already filed by the appellants and after hearing the arguments of the respondents along with the other material brought on the record. No order as to costs.

JUDGE

CHIEF JUSTICE

Mirpur
23.4.2019