

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, ACJ.

Civil PLA No.338 of 2019

(Filed on 29.11.2019)

Waqar-ul-Hassan s/o Muhammad Razzaq, Caste Jaat r/o Sairi Bandala Samahni, presently Bhimber Rajjani, Tehsil and District Bhimber.

.....PETITIONER

VERSUS

1. Abdul Aziz s/o Bagh Ali,
2. Muhammad Jamil s/o Jan Muhammad through Attorney Muhammad Razzaq s/o Khushi Muahhad, Caste Jatt, r/o Bandala Samahni, presently Bhimber Rajjani, Tehsil and District Bhimber.
3. Muhammad Sajid s/o Nazir Ahmed r/o Kahawdian, Tehsil Samahni, presently Bhota Sayyal, Tehsil and District Bhimber.

....RESPONDENTS

[On appeal from the judgment of the High Court dated 30.09.2019 in Civil Misc. No.56/2018]

FOR THE PETITIONER:

Mr. Muhammad Younas
Arvi, Advocate.

FOR THE RESPONDENTS: Ch. Muhammad Bashir
Tabassum, Advocate.

Date of hearing: 19.05.2020

JUDGMENT

Raja Saeed Akram Khan, ACJ– The appeal No.08/2018 titled *Waqar-ul-Hassan vs. Abdul Aziz* pending before the High Court was dismissed in default vide order dated 09.10.2018. The petitioner, herein, filed an application for restoration of the appeal on 30.09.2019. After necessary proceedings, the learned High Court dismissed the application through the impugned order dated 30.09.2019, hence, this petition for leave to appeal.

2. Mr. Muhammad Younas Arvi, Advocate, the learned counsel for the petitioner submitted that the impugned order of the High Court is against law and the facts. He contended that in fact, on the date fixed for hearing when the case was called the petitioner's counsel was busy before the other bench of the same Court, hence, the absence was not intentional. He further submitted

that the case was at the stage of final arguments. Valuable rights of the petitioner are involved, hence, grant of leave is justified.

3. Conversely, Mr. Muhammad Bashir Tabassum, Advocate, the learned counsel appearing on behalf of the respondents submitted that the petitioner remained negligent in pursuing the case. No sufficient cause has been shown for restoration of the appeal. The order passed by the High Court is reasonable and not open for any interference. Therefore, this petition is liable to be dismissed.

4. I have heard the learned counsel for the parties and gone through the record. The only ground taken by the petitioner for restoration of the appeal is that at the time of calling of the case he was busy before the other bench of the same Court. In support of this contention, he has not brought on record the counsel's diary or the daily cause list, whereas, it was incumbent upon him to prove sufficient cause for non-appearance. In the case reported as *Mst. Lal Jan & others vs. Muhammad Younas Khan & others* [2009 SCR 14] almost

identical plea for restoration of the case was taken.

This Court has held that:-

".....It was the basic responsibility of the appellants to prove that there was sufficient cause for non- appearance before the High Court. Although the application of the appellants is within time, but despite this, they have to prove sufficient cause. The assertion of the learned counsel for the appellants was that he could not appear before the High Court due to engagement before the Supreme Court. He did not produce copy of his case diary. Moreover he did not mention in the application that in which case he was busy before the Supreme Court on the aforesaid date. It would also not be out of place to mention here that the appellants did not intimate the High Court about the engagement of their counsel before the Supreme Court. There is nothing on the record on the basis of which it could be ascertained that the learned counsel for the appellants was actually busy before the Supreme Court. He neither produced any record regarding his engagement before the Supreme Court nor himself appeared as a witness before the Court. If at all he was busy in the Supreme Court, then he should have appeared as a witness in the application before the High Court and proved the aforesaid fact. It is also pertinent to note that the appeal was dismissed by the High Court on 12.10.2004 and the application was moved on 13.12.2004 after about two months and one day. This delay itself reveals that the grounds taken in the application are not correct. If it would have been as such, then the appellants would have filed application on the next

day. It is also pertinent to note that an application for restoration has to be decided on the basis of evidence and a party has to substantiate the grounds taken in the application by evidence. This view finds support from a case reported as *Mst. Allah Bachai & others v. D. C. Badin & others* [1985 CLC 1985]. It was the basic duty of the appellants to produce evidence before the High Court for proving the facts listed in the application, but they did not produce any evidence in support of their application. There is nothing on the record in support of their application on the basis of which it could be held that there was sufficient cause for non-appearance of the appellants. It was the basic responsibility of the appellants to prove sufficient cause for non-appearance through cogent and solid evidence, but they failed to prove as such. Same like proposition was resolved in a case reported as *Muhammad Ghazanfar v. Ali Haider* [1979 CLC 84].”

In support of the contents of the application the petitioner has produced no record i.e. case diary, cause list or any other document, which could have been produced. Although the petitioner has filed an affidavit in support of the contents of the application for restoration of the appeal, however, the same is normally acceptable regarding the question of the fact which otherwise cannot be established from record or other

evidence¹, whereas, the assertion made by the petitioner could have been proved through counsel's diary or daily cause list, which has not been done in this case.

5. Even after dismissal of the appeal in default the petitioner kept mum for almost a month and thereafter filed an application for restoration without assigning any reasonable ground which is also speaking proof of his negligence and indolence. In view of the reason mentioned in the application, he should have moved the application on the very next day. The impugned order of the High Court is well reasoned, calling for no interference.

Therefore, finding no force this petition for leave to appeal is dismissed with no order as to costs.

ACTING CHIEF JUSTICE

Mirpur,
19.05.2020

¹ 2013 SCR 1026