SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Shariat Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, CJ.

Raza Ali Khan, J.

Civil Appeal No.148 of 2020

(PLA filed on 25.06.2020)

Muhammad Siyam s/o Muhammad Zaman caste Bhatti Hameedabad Colony p/o Chakswari, Tehsil & District Mirpur.

……..APPELLANT

v e r s u s

1. Sulma Bibi daughter of Muhammad Shafi caste Bhatti r/o Jogalapal Tehsil Khoiratta, District Kotli.

…RESPONDENT

[On appeal from the judgment of the Shariat Appellate Bench of the High Court dated 18.05.2020 in civil misc. No. 56 of 2020]

FOR THE APPELLANT: Mr. M. Ramzan Dutt, Advocate.

FOR THE RESPONDENT: Ch. M. Ajaib, Advocate.

Date of hearing: 23.06.2020

JUDGMENT:

Raza Ali Khan, J.—The titled appeal, by leave of the Court, has arisen out of the judgment passed by the Shariat Appellate Bench of the High Court of Azad Jammu & Kashmir (hereinafter to be referred as High Court), dated 18.05.2020, in Civil Misc. No. 56 of 2020.

2. The relevant facts giving rise to the captioned appeal are that the appellant, herein, filed an appeal before the High Court of Azad Jammu & Kashmir against the order passed by the Judge Family Court on 29.11.2019, whereby, the application filed by him for setting aside the ex-parte decree was dismissed. On 10.02.2020, the appeal of the appellant, herein, before the High Court was fixed for hearing, but nobody appeared before the Court on behalf of the appellant,

therefore, the learned High Cout dismissed the same for want of prosecution. The appellant, herein, moved an application for restoration of the appeal which has also been dismissed through the impugned judgment dated 18.05.2020.

3. Mr. Muhammad Ramzan Dutt, advocate, the learned counsel for the appellant argued with vehemence that the impugned judgment of the learned High Court is against law, facts and the record of the case. He argued that the learned High Court has not considered the valuable rights of the appellant and has dismissed the application for restoration of appeal. He further argued that the case of the appellant should have been decided on merits rather, than knocking out/ throwing out on technical grounds. He contended that the appellant has furnished satisfactory reason before the High Court for non-appearance of his counsel, but the

learned High Court has dismissed the application without taking into consideration this aspect of the case. On merit, he submitted that the judgment and decrees of trial Court are not maintainable. The service of summons cannot be ordered through substituted service by way of publication in newspaper unless the direct attempt of the same is not made through ordinary mode of service. He further argued that the trial Court has also failed to award an opportunity to cross-examine the plaintiff and her witnesses as it is the settled law that in ex-parte proceedings, the defendant has no right to plead his defence but has right to cross examine and argue the case in accordance with the available record. He prayed that the impugned judgment/ order of the learned High Court is not maintainable, therefore, this appeal may be accepted.

4. Conversely, Ch. Muhammad Ajaib, advocate, the learned counsel for the respondent strongly controverted the arguments advanced by the learned counsel for the appellant and submitted that the impugned judgment is in accordance with law and interference by this Court is not required. He further argued that the appellant has no interest in the case and is playing delaying tactics just to linger on the matter. He further argued that for restoration of the appeal, sufficient cause has to be shown but the appellant has failed to substantiate any sufficient cause before the High Court for his absence, therefore, the learned High Court has rightly dismissed the application. He further argued that the application for restoration of appeal can only be accepted when the non-appearance of the party or his counsel was beyond his control but the reason mentioned in the application does not fall

within the preview of sufficient cause. Therefore, this appeal is not maintainable which is liable to be dismissed.

5. We have heard the learned advocates for the parties and have gone through the record of the case made available. As per record of the case, the appeal of the appellant before the High Court was dismissed for non-prosecution. He filed an application for restoration of the same on the ground that the case was fixed on 10.02.2020 for arguments and on that date when the case was called for hearing, the applicant remained in impression that the learned counsel engaged by him will appear before the Court but unfortunately, on account of his personal engagements, he could not attend the Court and his absence was not deliberate nor intentional. It was further stated that the valuable rights of the appellant are involved in the

case, hence, the original case may be restored and decided on merits. The learned High Court has dismissed the application of the appellant, herein, while observing that no sufficient cause has been shown by the appellant.

6. In our view, when 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. If the circumstances were beyond the control of the party or his counsel, then the same has always been considered to be a sufficient cause for the restoration of the suit or appeal, as the case may be. In the instant case the sufficient cause shown by the learned counsel for the appellant is that on the date fixed for hearing the appellant was under the impression that the learned counsel engaged by him will appear before the Court but he

could not appear due to personal engagement, thus, non-appearance on the part of appellant or his counsel was not intentional. Mere engagement of counsel does not absolve the litigant of all his responsibilities. Both, the party as well as the counsel are bound to ensure that the appeal is being prosecuted properly and diligently. Like that a counsel is duty bound to attend the case in the Court or in case of any emergency, to make an alternative arrangement; non-appearance in the Court without 'sufficient cause' cannot be excused. Such absence is not only unfair to the client of the counsel but also unfair and discourteous to the Court.

7. As it has been stated above, it is necessary for the concerned party to satisfy the Court that there was any sufficient cause for his absence on the relevant date, but in the instant case no 'cause'

whatsoever, much less a 'sufficient cause' was mentioned in the application for restoration of the appeal. Our view is also fortified from the judgment titled *"Khwaja Ghulam Qadir and another vs. Muhammad Sharif & others [PLJ 2000 SC (AJK) 359],* wherein, it was observed as follows.

> *"The question of 'sufficient cause is a question of fact which is to be decided taking into consideration the circumstances and the nature of the cause which prevented a party or his counsel from appearing in the Court. Thus, where no cause has been mentioned specifically and a general averment of 'compulsion' has been made, as is in the present case, it cannot be said that there existed any 'sufficient cause' for the absence of plaintiff or his counsel".*

Same view has been taken in the cases reported as *AJ&K Government and others vs. Abdul Rashid and others [2002 SCR 100] and M. Kabir Khan vs. Mst. Anees Begum [2005 SCR 23].*

8. Similarly, the other contention of the learned counsel for the appellant that the appeal should have been decided on merits as valuable rights of the appellant are involved in the case, is concerned, the same cannot be taken as a sufficient cause for the restoration of appeal which is dismissed in default for non-appearance. It was duty of the appellant to inform his counsel of the fact that which date was fixed for hearing the appeal and he cannot be absolved of his responsibility to contact his counsel to appear and argue the appeal on the date fixed. It is a celebrated principle that law helps those who are vigilant and careful enough to look after their interests and does not help those who sleep over their rights and are indolent to seek the redressal of their grievance. In this regard, reliance can be placed on a reported judgment of

this Court titled *"AJ&K University vs. Mir Alam & others" [2002 SCR 292].*

In our considered view, the appellant has not come out with a genuine and bonafide sufficient /good cause for restoration of appeal which was dismissed in default for non-appearance of the appellant and his counsel. The impugned judgment of the learned High Court is well reasoned, therefore, this appeal, having no merits, stands dismissed.

CHIEF JUSTICE JUDGE

Mirpur