JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

WRIT PETITION No. 822 of 2021

Muhammad Khalid Munir

Versus

Nazar Sadiq & another

Petitioner By : Mr. Abid Hussain Ranjha, Advocate

Respondent By : Mr. Muhammad Sadiq Khan, Advocate.

Date of hearing : 22.09.2021

BABAR SATTAR, J. - The petitioner is aggrieved by order dated 27.01.2021 passed by the learned Civil Judge (West), Islamabad, restoring the suit of respondent No.1.

2. Brief facts of the case are that a suit for specific performance filed by respondent No.1 was dismissed for non-prosecution under Order IX Rule 8 of CPC on 05.07.2018. Respondent No.1 filed an application for restoration, which was also dismissed for non-prosecution on 07.11.2018. He then filed another application for restoration, which was dismissed for non-deposit of process fee on 11.02.2019 and a subsequent application was filed by respondent No.1 for restoration of the application for restoration of the suit, which was allowed and the application for restoration of suit was restored on 18.02.2019. Pursuant to the said application the suit was then restored on 27.01.2021, which is the cause of grievance for the petitioner.

3. The learned counsel for the petitioner stated that there was no cause stated in the application for restoration of the suit and the application was also not supported by an affidavit. He further stated that the impugned order also does not state that a sufficient cause has been made out for the purpose of Order IX Rule 9 of CPC and consequently the impugned order suffers from material illegality as it is based on reasoning that is perverse.

4. Learned counsel for respondent No.1 stated that in view of order IX Rules 2 and 3 of CPC the law provided the respondent an opportunity to file a fresh suit subject to limitation and consequently no useful purpose would be served if the instant suit is dismissed and new suit is filed. He submitted that under section 151 of CPC, the learned Civil Court had discretion and in exercise of such discretion the order of restoration of the application of the respondent had been passed. He submitted that it is settled law that claims of parties ought to be decided on merits and not on technicalities. He relied on ***Muhammad Yaqub Vs. Kala Khan and 7 others*** ***(1995 MLD 1161) and Mst. Hussain Jan and 8 others Vs. Muhammad Suleman through Legal Heirs and 16 others*** ***(PLD 1994 Peshawar 95)***. He submitted that in the event the respondent had made one mistake period of over eight years during which the suit had been pending he ought not be penalized.

5. In rebuttal, the learned counsel for the petitioner stated that the impugned order had not been passed under Order IX Rules 2 and 3 of CPC and the question of refiling of suit did not arise. That the relevant provisions of the CPC were Order IX Rules 8 and 9 pursuant to which it was mandatory for an applicant to establish sufficient cause in

order for the Court to restore the petition under Order IX rule 9, which the respondent did not do. He submitted that the order sheet reflected that the respondent in his capacity as plaintiff in the suit had availed at least seven opportunities before the suit was dismissed under Order IX Rule 8, which dates were as follows: 28.07.2018, 15.01.2019, 11.02.2019, 14.06.2019, 14.09.2019, 08.12.2020 and 25.01.2021. He submitted that the sole ground for restoration of the application dismissed for non-prosecution as stated by the respondent was that the respondent's counsel was busy before another court. That this was not sufficient cause as the case had been called multiple times throughout the day, but the respondent's counsel did not appear before the court and no explanation has been provided as to why the respondent himself failed to appear before the Court if his counsel was not available. That the sole reason provided for restoration of the application in the impugned order was that the matter ought to be decided on merits was not accordance with law, which reasoning suffered from infirmity for not being supported by the language of Order IX Rule 9.

6. The august Supreme Court in ***Abdul Rashid Vs. Director-General, Post Offices, Islamabad and others*** ***(2009 SCMR 1435)*** held that: *"it is the duty and obligation of the aggrieved person to pursue his legal remedy with diligence and to satisfy conscience of the Court for approaching respective forums beyond prescribed limitation. If the aggrieved person does not avail remedy within the prescribed time, then the vested right accrues to the other side which could not be taken away lightly even if objection to that effect is not raised by the other side."* The same rational applies in cases of dismissal for non-

prosecution and subsequent restoration as well. Whether a party has been delinquent in pursuing his legal remedy resulting in dismissal of the suit, a right accrues in favour of the contesting party, which cannot then be taken away unless a delinquent party satisfies the conscience of the court that it has sufficient cause for not being able to pursue his claim on the date when the matter was fixed by the court for adjudication.

7. The learned Sindh High Court in ***Northern Polythene Limited (NPL) through Director Vs. National Bank of Pakistan and 3 others (2013 CLD 1053)*** held the following:

> *"The expression sufficient cause so as to grant relief under Order IX, Rule 9, C.P.C. has been left to the wisdom, good sense and discretion of the court…The court is to be satisfied as to the sufficiency of good cause and it has to be subjective satisfaction. Where suit is dismissed for default, it is the duty of that party or counsel to show sufficient cause as to why case was not prosecuted on the relevant date. It is well settled that mere engagement of counsel does not absolve the party of his responsibility as it was as much his duty as that of counsel engaged by him to see whether the case was properly and diligently prosecuted or not and if counsel was lacking in his sense of responsibility it is the party who engaged him should suffer and not the other side."*

8. The matter of non-appearance of the petitioner and his counsel came before the august Supreme Court in ***Rai Muhammad Riaz (decd) through L.Rs. and others Vs. Ejaz Ahmed and others (PLD 2021 SC 761)*** wherein the following was held:

> *7. …Nobody appeared for the petitioners on 5 dates of hearing, only the Clerk of the learned counsel appeared on 8 different dates (which also constitutes non-appearance) and multiple "last and final opportunities" were granted by the Court to the petitioners to file replies to applications and other pleadings from*

time to time. We may note that the practice of granting multiple "last and final opportunities" has strongly been deprecated by this Court on repeated occasions. Reference may be made to Moon Enterpriser CNG Station v. Sui Northern Gas Pipelines Limited (2020 SCMR 300). This practice must stop forthwith and the trial Courts must implement judgments of this Court in letter and spirit as the same are binding on them in terms of Article 189 of the Constitution and failure to comply can entail serious penal consequences for judicial officers failing or refusing to follow and implement clear and categorical judgments and orders of this Court.

11. …Although the term sufficient cause has not been defined in the Code of Civil Procedure nor can a specific yardstick be put in place for determining what constitutes sufficient cause and what does not, it always depends upon the facts and circumstances of each case and it has to be left to the judicial conscience of the Court to make an informed assessment as to whether the cause disclosed by the petitioners was a reason good enough to satisfy the Court that it was beyond the reasonable control of the party concerned to appear before the Court on the date fixed for hearing.

12. In the case of Ata Ullah Malik v. Custodian Evacuee Property (PLD 1964 SC 236) this Court examined, discussed and elaborated the term, "sufficient cause" which effectively explained the meaning and scope of the said term in the context of Order IX, Rule 9, C.P.C. as follows:

"Under section 5 of the Limitation Act there has to be a finding of sufficient cause. In pre-Partition India sufficient cause had been defined as circumstances beyond the control of the party and I do not know of any case wherein this definition of sufficient case had been rejected. However, at least in determining sufficient cause while dealing with the same expression in Order IX, Rule 8, C.P.C. and Order IX, Rule 3, C.P.C. the Courts had been lenient and had been condoning some negligence i.e. negligence to the extent to which it is regarded as human though they never condoned gross negligence. At the same time the Courts had always been strict in demanding proof of sufficient cause for every day which had expired after the ordinary period of limitation."

> *Many years later in the case of Khadija Begum v. Yasmeen (PLD 2001 SC 355) this Court again reiterated the same principle which by now is accepted settled law.*
>
> *13. …Although, ideally speaking the policy of the law is that matters should be decided on merits instead of knocking out parties on the basis of technicalities, the provisions of Order IX, Rule 9, C.P.C. cannot lightly be brushed aside or rendered nugatory and inconsequential. A party claiming its benefit must establish sufficient cause, bona fides and due diligence all of which factors are conspicuous by their absence in the instant case.*

9. In view of the law laid down by the august Supreme Court the term "sufficient cause" as used in Order IX Rule 9 has not been given a precise definition. It has been left to the discretion and subjective satisfaction of the court to determine whether the reasons for non-appearance of the party constitute circumstances beyond the control of the party and thus sufficient cause for purposes of Order IX Rule 9 of CPC. The relevant test for the court is whether or not the cause for non-appearance constitutes sufficient reason beyond the control of the party to appear before the court on the date fixed. In relevant circumstances a mistake might amount to sufficient cause beyond the control of the party. It is for both the party itself and its counsel to establish sufficient cause for their failure to appear despite their honest intent to do so, while exercising reasonable care and due diligence. Such test is to be subjectively applied to an honest mistake in noting the date or time of appearance, but does not cover pure negligence or nonchalance. As the plaintiff is under an obligation to ensure representation before the court on the date of hearing, in the event that his counsel fails to appear it is the plaintiff who must assume the burden of such failure and not the contesting party. Therefore in the event that a plaintiff does appear

before the court on the date fixed and assumes that the counsel appointed by him would appear on such date, and the counsel fails to appear for any reason, the burden of such failure falls on the plaintiff and not on the defendant.

10. The court is under an obligation to dispense justice in accordance with law and every party has a right to be treated in accordance with law as required by Article 4 of the Constitution. Order IX Rule 9 of CPC requires that a delinquent plaintiff establish sufficient cause for non-appearance in order to have the dismissal of his suit for non-appearance set-aside. The court is therefore under a statutory obligation to focus its mind on the cause for non appearance furnished by the plaintiff as opposed to absolving the delinquent plaintiff of his obligation to establish sufficient cause. The application of such plaintiff to establish sufficient cause for non-appearance before the court, in order to have the order of dismissal recalled is a statutory obligation that cannot be rendered nugatory by the court.

11. While determining whether or not the cause for non-appearance supplied by the plaintiff amounts to sufficient cause has been left to the conscience of the Court. The court is not vested with unbridled discretion while satisfying its conscience as to the cause of non-appearance given that it is under an obligation to dispense justice in accordance with law. The discretion vested in the court is therefore limited to determining whether or not the explanation for lack of appearance amounts to sufficient cause for purposes of Order IX Rule 9 of CPC and such discretion does not extend to excusing the obligation of the plaintiff to establish sufficient cause for non-appearance.

12. In the context of Order IX Rule 9 of CPC, the focus of courts on the need to dispense justice on merits and not on the basis of technicalities is some time misconceived. The question of decisions on merits came before the august Supreme Court in the context of Order XVII Rule 3 of CPC in ***Federation of Pakistan through Secretary Ministry of Petroleum and Natural Resources Vs. Durrani Ceramics and others*** **(2014 SCMR 637)** wherein it held the following:

> *"… [W]e are of the candid view that provisions of Order XVII, Rule 3, C.P.C. are penal in nature and as per the settled law such provisions should be strictly construed and applied, therefore once the case of a delinquent litigant squarely falls within the purview and mischief of the law (ibid) then neither any concession should be shown to such litigant nor a lenient view favouring him should be resorted to; this should not even be permissibly done on the touchstone of exercise of discretionary power of the court and/or on the approach that technicalities of procedure should not be allowed to impede the interest of justice, and/or that the litigants should not be knocked out on technical grounds, and that adversarial lis should be settled on merits. If such approach is liberally followed and resorted to there shall be no discipline in the adjudication of the civil litigation and the delinquent whose case though is squarely hit and covered by the penal provisions of Order XVII, Rule 3, C.P.C. would be given a chance to his advantage and to the disadvantage of his opposing side. This is not the spirit of the law at all. It may not be out of place to mention here that to apply and to adhere to law is not a mere technicality, rather it is duty cast upon the court as per Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 to do so. Thus where Order XVII, Rule 3, C.P.C. is duly attracted, the court has no option except to take action in accord therewith."*

13. The courts in our legal system are courts of law as well as courts of equity. The exercise of discretion while adjudicating a claim, even within equitable jurisdiction, cannot be arbitrary. In our adversarial system of justice if a court fails to consider competing interests of

litigating parties by absolving the party who is delinquent from its obligation to show sufficient cause for non-appearance before the court, the court could inadvertently end up facilitating the abuse of the process of the court by enabling a party to delay the adjudication of the claims before it. While exercising jurisdiction under Order IX Rule 9 of CPC the following must be borne in mind:

(i) Article 10-A right to fair trial does not mean unqualified entitlement to have claims adjudicated at the whims of one party to the dispute. Claims have to be adjudicated according to law with a focus on the rights of both the claimant and the defendant.

(ii) In the realm of laws, statues prescribe limitation periods that determine the outer limit of the time period within which a claim under the law can be enforced. It is now settled law that limitation provisions are of a mandatory nature and are not to be treated as technicalities.

(iii) In realm of equity, the doctrine of latches is rooted in the wisdom that equity does not help the indolent. The same principle is applicable where a plaintiff fails to pursue his claim assiduously by not appearing before the court on the date fixed for proceedings in the matter.

(iv) Within CPC time frames are provided to regulate the cycle of a dispute that enters the adjudicatory process. If these time frames are not abided by, the cost inflicted on public interest is debilitating. CPC confers penal powers on the court to enforce prescribed time lines to move along the adjudication of the suit in order to conclude the proceedings within a reasonable period of time. The entire scheme is meant to ensure that justice is delivered according to law within time lines prescribed by law.

(v) Courts are vested with no unguided discretion to ignore statutory intent and while administering and regulating a

trial its failure to exercise the authority to adjudicate a claim in the manner and within time frames conceived by CPC would prejudice the interest of the party contesting the claim. That the right of such contesting party to fair trial under Article 10A and to be treated in accordance with law under Article 4 must also borne in mind by the court.

(vi) The exercise of discretion by a court arbitrarily in a manner that excuses a delinquent party thereby enabling it to delay adjudicatory process puts at stake public faith in the justice system to dispense justice in a timely manner, clutters court dockets, consumes public resources by adding to the cost of litigation and puts into question the ability of the justice system to act as a neutral arbiter of the law.

14. In the instant matter the impugned order absolved the respondent of his obligation to establish sufficient cause as required under Order IX Rule 9 of CPC. The learned Civil Court has simply not brought into consideration the question of whether or not the respondent had sufficient cause for his non-appearance while allowing the application of the respondent. Consequently, the learned Civil Court has acted in excess of its jurisdiction under the law. The learned Civil Court was under an obligation to apply the test of sufficient cause, as explained above, and document its reasons as to why its conscience was satisfied that the non-appearance of the respondent before the court on the date fixed was excusable in accordance with law. The impugned order is therefore not sustainable and is set-aside. The instant petition is **allowed**. The matter is remanded back to the learned Civil Court where the application of the respondent for restoration of the application seeking restoration of the suit dismissed for non-prosecution will be deemed pending. The parties are directed to appear before the learned

Civil Court on **14.10.2021**, when the learned Civil Court will decide the said application in accordance with law after providing the parties an opportunity to be heard.

(BABAR SATTAR)
JUDGE

Approved for reporting.

Saeed.