

Stereo. H C J D A 38.
JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.1415/2017

Chiragh Din

Versus

Bashindgan Mohallah Doburji Kakke-Zayyan etc.

J U D G M E N T

Date of Hearing:	03.03.2026
Petitioners by:	Mr. Liaquat Ali Sial, Advocate.
Respondents No.1 to 4 by:	Mr. Faseeh-uz-Zaman, Advocate.
Respondents No.5 to 19 by:	Mr. Muhammad Habib, Advocate.

Anwaar Hussain, J. The petitioner, along with *proforma* respondents No.5 to 19, were defendants before the Trial Court in representative suit instituted by respondents No.1 to 4 (“**the respondents**”), *i.e.*, *Bashindgan Mohallah Doburji Kakke-Zayyan*, with the prayer that a part of the land reserved for graveyard has been purchased by the petitioner, which is against the law and hence, liable to be cancelled. The suit was consigned to record on 05.12.2006 and when application under Order IX Rule 9 read with Section 151 of Code of Civil Procedure, 1908 (“**CPC**”) was filed for its restoration, the same was dismissed by the Trial Court through order dated 23.11.2015 on the ground that it was badly barred by time, however, when the appeal was preferred, through impugned judgment dated 21.03.2017, order dated 23.11.2015 was set aside by the Appellate Court below and the matter was remanded to the Trial Court for decision afresh.

2. Learned counsel for the petitioner contends that the record has not been appreciated by the Appellate Court below inasmuch as against order dated 05.12.2006, the respondents initially filed application under Section 12(2), CPC, which was dismissed on 28.03.2012; whereafter the respondents filed application for restoration, which was time barred and rightly dismissed through order dated 23.11.2015, hence, well-reasoned order of the Trial Court has been erroneously upended by the Appellate Court below.

3. Conversely, learned counsel for the respondents supports the impugned judgment dated 21.03.2017 and contends that order dated 05.12.2006 was *void ab initio* as the main suit was not fixed for hearing and erroneously consigned to record, hence, no limitation lies, more so when the suit property is reserved for public purpose (graveyard) and cannot be alienated to a private person.

4. Arguments heard. Record perused.

5. Admittedly, the suit was filed in representative capacity by the respondents who are residents of *Mohallah Doburji Kakke-Zayyan* with the averments that the property forming subject matter of the impugned sale was given as *waqf* and was transferred in the name of the petitioner only because the *waqf* could not be effectuated and incorporated in the relevant revenue record. The factual matrix of the case regarding filing of the suit and the same having been consigned to record followed by application for its restoration is not disputed. In the light of the arguments of the learned counsel for the parties before this Court, primary question involved in this case is whether application under Order IX Rule 9, CPC could be filed and allowed by the Appellate Court below after lapse of more than seven years. Learned counsel for the petitioner contends that in absence of any specific provision governing limitation in such matter, residuary provision, *i.e.*, Article 181 of the Limitation Act, 1908 was applicable,

which provided three years period of limitation, therefore, the impugned judgment passed by the Appellate Court below is unsustainable in the eye of law. Whereas learned counsel for the respondents contends that no limitation runs against a void order.

6. However, interesting feature of the case has not been kept in sight by both sides inasmuch as through order dated 05.12.2006, the case was not dismissed for non-prosecution but was merely consigned to record. Order dated 05.12.2006 reads as under:

کو نسل مد عالیہ حاضر۔
منجانب مدعی کوئی حاضر نہ ہے۔
لہذا مثل ہذا داخل دفتر کی جاتی ہے۔ بعد از ترتیب و تکمیل داخل دفتر ہوئے۔

The expression ‘dismissed for non-prosecution’ and ‘consigned to record’ are two different legal connotations. Often when the case is dismissed for non-prosecution by the Court, it is followed by direction to the Office to ‘consign the case file to record’, however, merely directing the Office to ‘consign the case file to record’ for the reason that no one tendered appearance on behalf of the plaintiff does not have the same effect. Dismissal of the suit for non-prosecution and directing the file to be consigned to record amounts to a judicial determination under Order IX of CPC, whereby the suit stands terminated for default of appearance. The subsequent direction to consign the file to the record room is merely administrative in nature, reflecting that the proceedings have concluded and the file is to be archived. In such a situation, the *lis* comes to an end unless restoration is sought and allowed in accordance with law.

7. On the contrary, where a file is consigned to the record without a formal order dismissing the case for non-prosecution or otherwise finally deciding it, as happened in the present case, the legal effect is materially different. Consigning a file to the record room often denotes an administrative action or an adjournment *sine*

die (indefinitely) rather than a final adjudication on the merits, whereas dismissal for non-prosecution (or default) is a specific, penal, judicial order resulting from a failure of a party to appear or prosecute. Consignment of the case by itself does not constitute adjudication. It is neither a decree nor an order of dismissal within the meaning of the CPC. In the absence of an express order terminating the proceedings, the matter cannot be treated as finally disposed of; rather, it remains undecided, though administratively shelved. Therefore, if the record reveals that the suit was merely consigned without a preceding judicial order dismissing it for non-prosecution, it would indicate that the Court did not consciously exercise jurisdiction to terminate the *lis*. In such circumstances, restoration may not strictly fall within the ambit of Order IX, CPC because there was no formal dismissal to be set aside. Instead, the proper course may be to seek revival or recall of the consignment order, as the substantive proceedings were never conclusively adjudicated.

8. Having observed hereinabove, the record depicts that instead of appreciating this factual aspect, the respondents/plaintiffs misdirected themselves by first filing application under Section 12(2), CPC followed by application under order IX Rule 9, CPC. Learned counsel for the petitioner could not deny that after filing of the suit, it was transferred to the Court of Mr. Khalid Saleem and was fixed on 20.04.2006 for filing of objection on report of local commission and to achieve this purpose (objection on report of local commission), multiple opportunities were granted to the parties but no one appeared on behalf of the respondents/plaintiffs and on 28.11.2006, the case was adjourned for 'further proceedings' on which date notice *pervi* was issued for 05.12.2006, when the file was consigned to record. In this manner, the impugned order dated 05.12.2006 if taken as order of dismissal on account of non-prosecution, cannot sustain as case was not fixed for hearing. Case reported as Tehsil Municipal

Administrator, Faisalabad v. Muhammad Saleem and others (2016 SCMR 2009) is referred. Therefore, the Appellate Court below was fully justified in its finding through impugned judgment on the ground that when the case was adjourned by the Trial Court prior to consigning to record, on all prior dates, there was no specific order for proceedings in the main suit and hence, the respondents/plaintiffs were non-suited on technical ground. Operative part of the impugned judgment reads as under:

“5. On all these dates there is no specific order regarding the specific proceedings in the main suit. The appellant assailed the order dated 05.12.2006 which reproduced as under:

’کونسل مدعا علیہ حاضر .
منجانب مدعی کوئی حاضر نہ ہے۔
لہذا مثل ہذا داخل دفتر کی جاتی ہے ۔ بعد از ترتیب و تکمیل داخل دفتر
ہوئے۔‘

6. The learned trial court while rejecting the application under section 151 red (sic) with O.9 rule 9 mentioned in para No.6 of the order dated 23.11.2015 that on 28.11.2006 counsel of defendant appeared and notice pervi was issued to the plaintiff for appearance on 05.12.2006 and on 05.12.2016 learned counsel for defendant appeared and no one appeared on behalf of petitioner, learned predecessor dismissed the suit due to non-prosecution.

7. The record clearly indicates that after transfer of the suit, the suit was repeatedly fixed for proper proceedings. There is no concept in civil law for further proper proceedings. **The order dated 05.12.2006 is passed without examining the record. There is no order of learned predecessor regarding dismissal of the suit due to non prosecution but the mere forum (sic) order in a casual manner to consign the file to record room is available.** Such like order against the facts and record have no force in the eye of law. The appellant has also submitted an application under section 5 of the limitation

act. The impugned order of learned trial court dated 05.12.2006 was void ab- initio. In such like situation application of the applicant for restoration of suit was not time barred.”

(Emphasis supplied)

The Appellate Court below was justified in holding that a case ‘consigned to record’ is not inherently dismissed for non-prosecution. Suffice to observe that the Court retains the inherent power to revive it, particularly in the interest of deciding cases on their merits rather than technical and administrative grounds. The Court has the discretion to revive the matter if it believes that ‘substantial justice’ requires the case to be decided on merits. In the present case, the dispute involves determining whether suit property is a *waqf* graveyard—and thus sacred, inalienable property belonging to the community or the Allah Almighty—the case cannot be brushed aside or consigned to the record without recording evidence and appraising the same.

9. In view of the above discussion, the present petition is devoid of any merits and hence, **dismissed**. No order as to costs.

(ANWAAR HUSSAIN)

Judge

Approved for reporting

Akram

Judge