Form No: HCJD/C-121

ORDER SHEET
IN THE LAHORE HIGH COURT, MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

Writ Petition No. 15231 of 2024

Muhammad Ramzan
vs
Addl. District Judge, Shujabad etc

S.No. of Order/ Proceeding	Date of order/ proceeding	Order with signature of Judge and that of parties or counsel where necessary

14.11.2024. Mr. Atta ul Manan Malik, Advocate.

Through this constitution petition, the legal heirs of Muhammad Ramzan son of Noor Muhammad, cited in the memorandum of parties as petitioner and *pro forma* respondents (hereinafter mentioned as '**petitioner**'/ '**petitioners**'), have challenged the order dated 11.03.2024 passed by the learned Civil Judge Shujabad, District Multan, whereby the application filed by respondent No. 3/Kousar Mai ("***respondent***") to set aside ex parte proceedings initiated against her vide order dated 04.10.2013 and subsequent ex parte decree dated 11.07.2015 was accepted with the result that by setting the same aside suit filed by the petitioner against her was revived and petitioner has also challenged the order dated 25.10.2024 passed by the Learned Additional District Judge, Shujabad, District Multan, who has dismissed their revision petition to up hold the decision of the learned trial court.

2. Learned counsel for the petitioner states that respondent No.3 filed an application for setting-aside ex parte decree on 29.06.2022 by mentioning therein that she had attained knowledge regarding passing of ex parte judgment and decree dated 11.07.2015 on 22.02.2022,

which was beyond limitation and the said application has been allowed without attending to her application under Section 5 of the Limitation Act, 1908 ("**Act**") for condonation of delay, which was not decided and hence *prejudice* has been caused to the legal heirs of the petitioner, therefore, prays for setting aside the impugned orders.

3. The deceased predecessor-in-interest of the petitioner namely Muhammad Ramzan son of Noor Muhammad filed suit for cancellation of mutation No.1596 dated 21.03.2000 regarding 04-Kanals land transferred to the respondent out of total 18-Kanals land situated in Khata no. 422, mauza Chak R.S Shujabad, District Multan and recovery of gold ornaments against the respondent on the ground that after receiving the said benefits his wife, the respondent, who was married to him on 28.03.2000, had deserted him and became '*ghairabad*', without any reason and despite receiving maintenance allowance obtained ex parte decree for divorce on 02.11.2011, hence was not entitled to retain the said property and gold ornaments. In the suit filed by the petitioner ex parte proceedings were initiated against the respondent on 04.10.2014 and ex parte decree was passed on 11.07.2015. The stance of the respondent in her petition to set aside ex parte proceedings and decree was that she got knowledge of the same on 22.02.2022 and thereafter moved application on 29.06.2022. The main contention of the respondent in her petition was that her incomplete/wrong address i.e. Mouza Khuja, Tehsil Shujabad, District Multan was mentioned by the predecessor-in-interest of the petitioners instead of whole address which was 'Chah Addi Wala, Mouza Khuja, Tehsil Shujabad, District Multan' and therefore, her

service could not be effected by any way, so ex parte decree was obtained by concealment of facts. Many documents brought on record during the proceedings before the learned Trial Court showed the address of the said respondent as "*Chah Khapri Wala, Mauza Sikandarabad*" and impugned orders passed by both the courts below mention that even the predecessor-in-interest of the petitioners himself filed an application to set aside proceedings against him wherein he mentioned the above mentioned address of the respondent. It was also noted that the deceased predecessor-in-interest of the petitioners also filed an appeal against the judgment and decree dated 21.09.2021; where he himself again mentioned the address of the respondent as "*Chah Khapri Wala, Mauza Sikandarabad*". It has also been noted by the courts below that even process server had reported that no female of the name of the respondent was present at the address given in the plaint. Relying upon the available material and record, the learned Trial Court has passed the impugned order dated 11.03.2024, whereby the ex parte proceedings and decree passed against her have been set-aside. The learned Additional District Judge did not find any wrong application of facts and law in the said order and up held the same.

4. It is not the case of the petitioners that application of condonation of delay had not been filed or that the court was unaware that the said application had been filed and in that scenario due to mis-reading or non-reading of record the court was not justified to allow the application for setting aside ex parte proceeding and decree. Had the case been so this court may have considered to remand the matter to be decided afresh while also considering afore-referred aspect of the matter

but the position is otherwise and not so. Rather, the grievance raised by the counsel for the petitioners is that the application for condonation of delay had been filed which despite being referred to in the impugned orders had not been decided therefore, the impugned order and judgment are not sustainable and are liable to be set aside for the reason that an application going to the root of the matter has remained undecided and hence the matter is liable to be remanded for decision afresh. It is pertinent to mention here that this court in its constitutional jurisdiction is not required to interfere in each and every case, where the court or forum below has proceeded with some irregularity while deciding the matter. It was held in *Raunaq Ali etc. vs. Chief Settlement Commissioner and others* (**PLD 1973 SC 236**) that "*an order in the nature of a writ of certiorari or mandamus is a discretionary order. Its object is to foster justice and right a wrong. Therefore, before a person can be permitted to invoke this discretionary power of a Court, it must be shown that the order sought to be set aside had occasioned some injustice to the parties. If it does not work any injustice to any party, rather it cures a manifest illegality, then the extra ordinary jurisdiction ought not to be allowed to be invoked*."

5. Although it is general practice of procedural law that where an application going to the root of the matter remains undecided usually the courts remand the matter for decision of the same afresh, while also keeping in view the contents of the said application, but the same is not an absolute rule of law and the courts may refuse to set aside the decision *inter alia* for the reasons that prejudice has not been caused to the rights of the parties or by the said decision justice has been done and to set

aside the said decision would result in prejudice to the right(s) of any of the parties.

6. The question that arises is that whether in the present case through the impugned order and judgment justice has been done or *prejudice* has been caused to the parties and further that whether balance for preventing *prejudice* to parties is in favour of upholding the said decision or setting aside the same and could it be held that the limitation had impliedly been condoned by both the aforementioned courts while allowing the application to set aside ex parte proceedings and decree to revive the suit filed by the predecessor of interest of the petitioners against respondent.

7. Similar situation came up before the Supreme Court of Pakistan in case titled ***Ashiq Hussain Shah vs. Province of Punjab through Collector District, Attock and 6 others*** (2003 SCMR 1840), wherein the decision of case without decision of application for condonation of delay was under consideration and it was treated as under:-

> "4. The perusal of the averments of the plaint would show that prior to the filing of suit, a criminal case under section 447, P.P.C. was registered against the petitioner for illegal occupation of above land. In the suit the petitioner claimed that the Patwarkhana was situated adjacent to the land in dispute and in the written statement, the stand of the respondents was that the suit-land was owned by the Province of Punjab and was in possession of Patwarkhana as per demarcation held on 4-12-1989 and that the new building of Patwarkhana was being constructed on the land owned by the Government. It was stated in the application for setting aside the ex parte decree that the official who was deputed to pursue the suit, neither appeared before the Court nor informed the concerned authorities that the suit was decreed ex parte. We having gone through the judgment in appeal find that the question of limitation was not dealt with as such and respondent also did not offer sufficient explanation for non-appearance in the Court but we cannot permit the taking away of the Government property for the negligence of subordinate officials. The manner in which the matter was pursued by the subordinate officials would show that they did not properly watch the

> Government interest and the possibility of their being in league with the petitioner being not ruled out, we are not in favour of non-suiting the respondents on technical grounds and would prefer that the rights of parties should be determined in the property on merits, therefore, notwithstanding the disposal of appeal on merits without dealing with the question of limitation in express words, it would be deemed that there was implied condonation of delay."

8. In another case this court in case titled ***Muhammad Sadiq vs. Administrator, Residual Properties, Multan Division, Multan/Additional Commissioner (Revenue), Multan Division, Multan and another*** (1985 CLC 369 (Lahore)), has addressed a similar situation as under:-

> "6. As regards the first contention raised by the learned counsel for the petitioner, there is no doubt that the revision petition was filed by respondent No.2 after the expiry of limitation period prescribed, therefor, the learned Administrator, Residual Properties, respondent No.2 accepted the revision petition without giving any specific decision on the question of limitation raised before him. Impugned order, however, shows that the learned Administrator was quite conscious of the question of limitation and in fact, he took note of the objection raised in this behalf and yet he proceeded to deal with the revision petition on merits and remanded the case to the Deputy Administrator for fresh decision of the crucial issue viz. whether or not the property in dispute was evacuee and available for transfer. In these circumstances, learned Administrator can be taken to have impliedly condoned the delay. Even otherwise, question of limitation was relatable to the question of the evacuee or non-evacuee nature of the property in dispute for the determination of which the case was remanded by the Administrator. If the property in dispute is ultimately found to be non-evacuee, it was quite evidently not available for transfer to the petitioner and in that event, order of the Deputy Administrator challenged in the revision petition before the Administrator would be coram non judice and consequently question of limitation would not arise. In this view of the matter, precedents relied upon by the learned counsel for the petitioner are of no avail to him. Moreover, I find that in the cases relied upon by the petitioner, the Settlement Authorities were not even conscious that any question of limitation arose in the matters before them. In the instant case, the learned Administrator as shown above was quite conscious of the question of limitation and he remanded the case for fresh decision of what he described as 'basic fact in issue' viz, whether or not the area in dispute was evacuee and available for transfer. This disposal, in my opinion,

> indicates that the learned Administrator impliedly condoned the delay. Judgments relied upon by the petitioner, therefore, are not strictly applicable to the present case. Even otherwise, order of the Deputy Administrator transferring the area in dispute to the petitioner having admittedly been passed in the absence of the respondent No.2 and without notice to him, question of limitation did not arise. Resultantly, order of the learned Administrator disposing of the revision petition on merits does not suffer from any legal infirmity by reason of the delay not having been expressly condoned."

9. In the present case, the mutation of tamleek of property in favour of respondent was cancelled through ex parte decree passed in favour of predecessor in interest of the petitioner, which decree has been set-aside by courts below on the ground that service of the respondent had not been effected, and the suit has been restored to enable the parties to contest the same for reaching a just conclusion on its own merits. It is settled law that no one should be condemned unheard and parties should not be knocked out on the basis of technicalities. Moreover where substantial justice has been done, it is not necessary for this Court to interfere in Constitutional jurisdiction on the basis of technicalities alone for the reason that Constitutional jurisdiction is discretionary in character and where courts below have given concurrent conclusions, Superior Courts generally do not interfere in the conclusions arrived at by courts and Tribunals below. Reliance is placed on ***Tehsil Nazim TMA, Okara vs. Abbas Ali and 2 others*** (2010 SCMR 1437). In the present case, if the said decree was allowed to remain in the field the same would cause *prejudice* to the rights of the respondent to get the matter decided on merits. By revival of the suit, petitioners still have a right to pursue the remedy available to them under the law, hence no serious *prejudice* would be caused to them if the said decision is upheld and in this scenario keeping position

of both the parties in juxtaposition it is concluded that balance to avoid *prejudice* to the rights of the parties tilts in favour of maintaining the decision of setting aside the ex parte proceedings and decree and revival of suit for its decision on its own merits. In view of the foregoing, even if application filed under Section 5 of the Act was not decided, as proprietary rights of the parties are involved, hence it was appropriate to condone the delay in filing application for setting-aside ex parte decree and consequently order passed by both the courts below are interpreted in the manner that as while setting aside ex parte decree the courts below were conscious of pendency of the application for condonation of delay, hence the delay in filing the application for setting aside ex parte proceedings and decree although not dealt with in express terms had been impliedly condoned which is permissible in view of the principles laid down in the aforementioned judgments and the said orders in the interest of justice are deemed to be modified to the extent that delay in filing application for setting-aside ex parte decree is condoned and by allowing said application, the ex parte proceedings and decree are set-aside and the suit filed by the petitioners is revived, which shall be decided afresh on its own merits in accordance with law.

10. For what has been discussed above, this petition being devoid of any merit is ***dismissed***.

(*MUZAMIL AKHTAR SHABIR*)
JUDGE

*Naveed **

Approved for reporting.