

Form No.: HCJD/C
JUDGEMENT SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

FAO No. 41 of 2020

Muhammad Tashheez Ul Azhan Khawaja.

VERSUS

Muhammad Zeeshan, etc

For the Appellant: Mr. Saad Ahmad Rajpoot,
Advocate.

For Respondents: Respondent No. 1 in person.
Mr. Bilal Anwar Sadat Awan,
Advocate.

Date of hearing: 19.08.2020.

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LUBNA SALEEM PERVEZ. J : Instant first appeal has been filed u/s 104 read with Order XLIII Rule I CPC against order dated 10.02.2020, passed by learned Civil Judge 1st Class, (West) Islamabad, whereby, the right of present appellant along with three other defendants to file written statement in the suit have been struck off.

2. Brief facts of the case are that a suit for separate possession through partition has been filed before the Senior Civil Judge Islamabad, by Respondent No. 1 in the present appeal on 11.10.2018, and the present appellant failed to file written statement despite availing several opportunities in this regard, thus, his right to file written statement under Order VIII have been struck off by the learned Trial Court, vide impugned order dated 10.02.2020. The learned Judge, however, framed the issues and adjourned the case for 20.02.2020, for recording of evidence.

3. Learned counsel for the appellant submitted that on 10.02.2020, he appeared before the learned Court in the first half and made a request to keep the case in waiting as he was to attend cases before another Hon'ble Court; that when he reached the Court on 03:30 he found the door of the Court closed; that the written statement was also ready, however, due to

closure of the Court he could not file the same on the given date and his right to file written statement was illegally struck off. He further submitted that the learned Trial Court instead of passing harsh order of striking the right of filing written statement, while using its discretionary powers could have imposed penalty and granted permission to file written statement. The denial to furnish written statement would adversely affect the case of the appellant (defendant No. 1 in the suit). However, he also submitted that the suit filed by the present Respondent No. 1 is a suit for partition and ultimately will be decreed by determining the shares of the parties.

4. Respondent No. 1 appeared in person and furnished written arguments, wherein, it is stated that present appeal is not maintainable as the present appellant intentionally and fraudulently did not appear before the Court just to linger on the proceedings of the suit; that earlier also the appellant refused to receive notices issued by learned Civil Court wherein the suit for partition has been filed. He prayed that the appeal may be dismissed as not maintainable.

5. Arguments heard. Record perused.

6. The appellant has assailed the impugned order dated 10.02.2020, whereby, the learned Trial Court has struck off the right of appellant for filing written statement, however, on the said date after framing of issues, the case was adjourned for 20.02.2020, for evidence, thus no final judgment against the appellant was passed. Perusal of the record reveals that ample opportunities for filing of written statement were granted to the appellant and vide order dated 14.01.2020, last opportunity was granted to the appellant and defendant Nos. 2 to 4 (present appellant is defendant No. 1 in the suit) by issuing notice under Order VIII Rule 10 CPC, for 10.02.2020. On the said date the learned Court granted the request for keeping the case in waiting, however, when no one turned till the rising of the Court, to file written statement in response of notice u/o VIII Rule 10 CPC, the learned Court had no option but to pass the order at 03:35 pm. The stance of the learned counsel for the appellant that he reached the Court at 03:30 pm is not convincing as neither any affidavit controverting

the factual contention of passing order at 03:35 pm was submitted nor any substantial reason has been put forth for his arriving the Court exactly on the time of closure of the Court. The sanctity and presumption of truth is attached to the judicial orders of the Court which cannot be challenged on non-substantive assertions.

7. The order sheets, according to which the time was allowed to the appellant to file written statement, as well as the impugned order have been carefully examined which show that due to the adjournments sought by the appellant for filing written statement on one pretext or another the proceedings of trial were lingered on unnecessarily. The argument that on 10.02.2020, the counsel arrived in the Court at 03:30 pm, for filing of written statement, even if accepted to be true, same also reveals the conduct of deliberate and intentional avoidance of filing written statement on the part of the appellant as it is not mandatory that the written statement is to be filed by the learned counsel for the appellant when the appellant himself could submit the same to the learned Trial Court.

8. Examination of the impugned order dated 10.02.2020, further shows that though notice u/s VIII Rule 10 CPC have been issued to the appellant, however, no final judgment has been passed against him and the lenient view has been taken by adjourning the case to next date. Thus the impugned order being not the final judgment/decreed cannot be challenged before this Court through FAO under the provisions of section 104 read with Order XLIII Rule 1 (b) CPC. Provision of Rule 10 of Order VIII CPC is also reproduced below:-

“ORDER VIII

WRITTEN STATEMENT AND SET-OFF

1. The defendant may, and, if so required by the Court, shall at or before the first hearing or within such time as the Court may permit, present a written statement of his defence:

Provided that the period allowed for filing the written statement shall not ordinarily exceed thirty days.

10. Where any party from whom a written statement is so required fails to present the same within the time fixed by Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.”.

9. The issue of passing order instead of pronouncing judgment under Rule 10 of Order VIII CPC remained under consideration of the courts and the principle which has been settled is that only final order of pronouncement of judgment is appealable under section 104 read with Order XLVIII Rule 1(b) CPC but the order passed during the proceedings of the suit for striking off the right of the defendant to file written statement is not appealable. This Court, vide judgment passed in the case titled as ***Kiran Arif Mian v. Kinza Khalid (PLD 2008 Islamabad 11)*** has categorically held that only the final judgment pronounced against the party is appealable under Order XLIII Rule 1(b) CPC. The relevant extract is also reproduced as under:-

“Under Order VIII, rule 10 of the CPC, if a party fails to present the written statement within the time fixed by the Court, the Court can pronounce judgment against him or make such order in relation to the suit as it thinks fit. Under Order XLIII, Rule 1(b), the order is appealable only if the judgment is pronounced against a party failing to file the written statement. In this case, learned trial Judge, after striking off defence of the petitioner, fixed the case for ex parte evidence of the plaintiff/respondent. Since the judgment was not pronounced against the petitioner, the appeal is not competent. The petitioner, therefore, rightly filed the revision petition.”.

10. Similar case has also been dealt with by the Hon’ble Lahore High Court, vide judgment passed in case titled as ***Secretary Agriculture, Government of The Punjab, Lahore vs. Messrs Muhammad Abbas & Sons (2006 CLC 1473)***, whereby, the learned Judge has held as under:-

“4. Confronted with the provisions of rule 1 of Order XLIII, C.P.C. regarding the maintainability of the appeal against order, dated 3-6-2000, the learned counsel for the petitioners admitted that no judgment was pronounced by the learned trial Judge under rule, 10 of Order VIII, C.P.C. and instead the suit was adjourned.

5. The provisions of rule 1(b) of Order XLIII, C.P.C. provide that an appeal lies only against "an order under rule 10 of Order VIII, C.P.C. pronouncing judgment against a party". In absence of a judgment against the petitioners, their appeal against order, dated 3-6-2000 was obviously incompetent. The learned Additional District Judge also proceeded with the matter as if the appeal was competent but dismissed the same being barred by time.

6. Be that as it may, the appeal as filed by the petitioners was obviously not allowed by the law wherefor even if the appeal come have been treated as a civil revision, the petitioners would be barred to file a second civil revision before this Court.

7. At this stage, the learned counsel for the petitioners requested this Court for conversion of this civil revision into a constitutional petition. In view of the fact that the petitioners filed an incompetent appeal and then a civil revision, the circumstances of the case do not justify conversion of the present civil revision into a constitutional petition under Article 199 of

the Constitution of Islamic Republic of Pakistan, 1973. The present civil revision admittedly arises out of an incompetent appeal filed by the petitioners. This civil revision is thus, dismissed.”.

11. Respectfully taking guidance from the above noted case law, I am of the considered view that the appeal against the provisional orders, passed during the course of trial proceedings, are not appealable under section 104 read with Order XLIII Rule 1(b) CPC. The present FAO is accordingly **dismissed**, being not maintainable.

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in the open Court on 25-08-2020

JUDGE

M. Junaid Usman