JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A.No.73/2009
Chairman, National Highway Authority and another
Versus
M/S Moon Traders and another

Date of Hearing: 05.12.2019 & 16.04.2020
Appellants by: Mr. Muhammad Atif Khokhar, Advocate
Respondents by: M/s Saadia Abbassi and Mr. Muhammad Islam Sandhu, Advocates for respondent No.1.

MIANGUL HASSAN AURANGZEB, J:- Through the instant Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (**"C.P.C."**), the appellants impugn the *ex-parte* judgment and decree dated 21.09.2002 passed by the Court of learned Senior Civil Judge, Islamabad, whereby respondent No.1's suit was decreed to the extent of recovery of Rs.2,500,000/- with costs and damages amounting to Rs.300,000/-.

2. The facts essential for disposal of this appeal are that on 11.09.1999, respondent No.1 instituted a suit for recovery of Rs.2,500,000 with mark up at the rate of 20% from the date of deposit of earnest money, *mesne* profit and damages amounting to Rs.300,000/-. In the said suit it was pleaded *inter alia* that in February, 1998 the appellants auctioned a 'Steel Structure Bridge' at Km 1599 on N-5 *Harro Nullah*; that respondent No.1 submitted a bid and paid earnest money amounting to Rs.2,500,000/-; that respondent No.1's bid being the highest was accepted vide letter dated 14.02.1998; that thereafter respondent No.1's reservation/request for removal of the army communication cables hanging over the bridge was not addressed causing respondent No.1 to demand refund of earnest money, but the appellants re-advertised the auction; that respondent No.1 issued a legal notice and having not received any response, the suit was filed.

3. The learned Civil Court summoned the appellants who initially appeared, but later absented themselves and failed to submit a written statement due to which the suit was decreed *ex-parte* vide judgment and decree dated 29.07.2000. On the appellants' application, the

learned Civil Court set-aside the said *ex-parte* judgment and decree vide order dated 27.11.2000. Thereafter on 09.12.2000, the appellants submitted a written statement. In the said written statement, the appellants contested the suit by pleading that respondent No.1 did not abide by the terms and conditions of tender by not depositing a sum equal to 1/4th of the bid amount along with a Bank Guarantee for the remaining 3/4th of the bid amount within the stipulated period. It was also pleaded that as the auction was on an "as is where is basis," therefore the removal of the cables was respondent No.1's responsibility. The appellants denied respondent No.1's assertion that reservations had been raised regarding the overhead cables or that the appellants had given an assurance for their removal.

4. The learned trial Court framed issues from the divergent pleadings of the parties. The appellants once again committed default in appearing before the learned Civil Court. Consequently, they were again proceeded against *ex-parte* vide order dated 08.11.2001. The proceedings culminated in the passing of the impugned *ex-parte* judgment and decree dated 21.09.2002 whereby respondent No.1's suit was decreed for an amount of Rs.2,500,000/- along with damages to the tune of Rs.3,00,000/- as well as the costs.

5. The said judgment and decree dated 21.09.2002 has been assailed in this appeal. This appeal was filed on 18.11.2002 before the Hon'ble Lahore High Court, Rawalpindi Bench. Subsequently, as a consequence of the judgment dated 03.06.2005 passed by the Hon'ble Lahore High Court in R.F.A.No.47 of 1996 the present appeal, along with several other appeals, was sent to the Court of the learned District Judge, Islamabad. The learned Additional District Judge, on 29.11.2008, made a reference to the learned District Judge, Islamabad stating therein that the value of the appeal exceeds the pecuniary jurisdiction of the District Court. The said reference was answered in the affirmative, hence the appeal was sent to this Court on 05.12.2008.

6. It may be mentioned that after filing the present appeal on 18.11.2002, the appellants/defendants also filed an application on 26.11.2002 before the learned Civil Court for setting aside *ex-parte* judgment and decree. On 20.05.2003, respondent No.1/plaintiff filed a reply to the said application wherein it was pleaded *inter alia* that the

application was filed beyond the limitation period provided in Article 164 of the Limitation Act, 1908. The learned Civil Court vide order dated 31.03.2004 framed the issues. It appears that no further proceedings on the said application were taken as an endorsement dated 21.04.2004, appearing in the margin of the order sheet of the learned Civil Court, shows that the record was thereafter transmitted to the Hon'ble Lahore High Court, Rawalpindi Bench.

7. Learned counsel for the appellants submitted that the representative of the appellants was present before the learned Civil Court throughout up to 29.05.2002 but his attendance could not be marked; that on 29.05.2002, the learned Presiding Officer was transferred and the representative of the appellants was under a wrong *bonafide* impression that a fresh notice would be issued; and that in fact the appellants never defaulted in appearing before the learned Civil Court.

8. Learned counsel for the appellants further submitted that the impugned judgment suffers from legal and factual infirmities; that the learned Civil Court could not have accepted the affidavit of respondent No.1 without his presence and recording specific permission; that the impugned judgment does not take into account the contents of the written statement and the material on record; that no evidence has been discussed in the impugned judgment while granting the decree for the refund of earnest money and award of damages; and that the non-application of judicial mind by the learned Civil Court is floating on the surface of the decree because against the claim of Rs.2.5 million, the learned Civil Court decreed the suit for 25 million rupees. Learned counsel prayed that the impugned judgment and decree be set aside and the suit be remanded to the learned trial Court for decision afresh on merits.

9. On the other hand, learned counsel for respondent No.1 opposed the appeal by submitting that the appellants habitually absented themselves from the proceedings before the learned Civil Court; that the requirement of a fresh notice after transfer of the learned Presiding Officer is neither envisaged under the law nor is there any such practice; that after *ex-parte* proceedings were initiated against the appellants on 08.11.2001, the suit was adjourned many

times but the appellants did not appear even once; and that the application for setting aside the *ex-parte* decree filed by the appellants is time barred.

10. Furthermore, it was submitted that after acceptance of respondent No.1's bid, the appellants created hurdles and did not respond to its letters; that the appellants had declared the bridge as a national heritage site but then re-auctioned it to a third party; that respondent No.1's claim was virtually admitted by the appellants in all material respects; that respondent No.1's evidence had gone unrebutted; and that the impugned judgment is in accordance with the facts and the law. Learned counsel prayed for the appeal to be dismissed.

11. We have heard the contentions of the learned counsel for the parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 6 above, and need not be recapitulated.

12. The record shows that on 08.11.2001, the learned Civil Court passed an order to proceed *ex-parte* against the appellants. The *ex-parte* proceedings culminated in the *ex-parte* decree dated 21.09.2002. On 18.11.2002, the appellants filed the instant appeal under Section 96 C.P.C. Subsequently, on 26.11.2002, the appellants filed an application under Order IX, Rule 13 C.P.C. for the setting aside of the said *ex-parte* decree.

13. Where an *ex-parte* decree is passed against a defendant in a suit, he has the remedy of filing an application under Order IX, Rule 13 C.P.C. before the trial Court or to file an appeal under Section 96 C.P.C. before the appellate Court. The scope of the inquiry under Order IX, Rule 13 C.P.C. and Section 96 C.P.C is entirely different. If he files an application under Order IX, Rule 13 C.P.C., the trial Court has to be satisfied that the summons were not duly served on him or that if the summons were served, he was prevented by any sufficient cause from appearing before the trial Court when the suit was called for hearing and he was proceeded against *ex-parte*. If he files an appeal under Section 96 C.P.C. against the *ex-parte* decree, the appellate Court has wide jurisdiction to go into the merits of the decree and see

whether or not the decree is in accordance with the law or supportable on the basis of the material brought on record. An error, defect or irregularity which has affected the decision of the case may be challenged in appeal against the decree whether *ex-parte* or otherwise. In an appeal besides merits of the *ex-parte* decree, the appellate Court can also examine all the interlocutory orders including those orders whereby *ex-parte* proceedings were initiated against the appellant. The right to file an appeal, being a statutory right, cannot be curtailed unless the statute expressly or by necessary implication says so.

14. Generally, once a party has chosen to avail one of the two remedies, the principle of election would come into play and the other remedies against an *ex-parte* decree cannot remain available simultaneously. In holding so, reliance is placed on the judgment in the case of Trading Corporation of Pakistan Vs. Devan Sugar Mills Limited (PLD 2018 SC 828) wherein the Hon'ble Supreme Court held as follows:-

> "***In a situation where an application under Order IX, rule 13, C.P.C. and also an application under section 12(2), C.P.C. seeking setting aside of an ex-parte judgment before the same Court and so also an appeal is filed against an ex-parte judgment before higher forum, all aimed at seeking substantially similar if not identical relief of annulment or setting aside of ex-parte order/judgment, Court generally gives such suitor choice to elect one of the many remedies concurrently invoked against one and same ex-parte order/judgment, as multiple and simultaneous proceedings may be hit by principle of res-subjudice (section 10, C.P.C.) and or where one of the proceeding is taken to its logical conclusion then other pending proceeding for the similar relief may be hit by principles of res-judicata. Giving choice to elect remedy from amongst several coexistent and or concurrent remedies does not frustrate or deny right of a person to choose any remedy, which best suits under the given circumstances but to prevent recourse to multiple or successive redressal of a singular wrong or impugned action before the competent forum/court of original and or appellate jurisdiction, such rule of prudence has been evolved by courts of law to curb multiplicity of proceedings. As long as a party does not avail of the remedy before a Court of competent jurisdiction all such remedies remain open to be invoked. Once the election is made then the party generally, cannot be allowed to hop over and shop for one after another coexistent remedies."***

15. As mentioned above, the remedy under Order IX, Rule 13 C.P.C. is limited in scope and is confined to the extent of examination as to whether sufficient cause for absence of the applicant/defendant is available or is there non-service of summons on the

applicant/defendant. While deciding an application under Order IX, Rule 13 C.P.C., the trial Court cannot go into the merits of the decree and see whether or not the decree is in accordance with the law or supportable on the basis of the material brought on record. Therefore, if a party files an application under Order IX, Rule 13 C.P.C. as well as an appeal against an *ex-parte* decree, the dismissal of the application would not preclude the appellate Court from deciding the appeal on merits (other than the legality of the order of the trial Court to proceed *ex-parte* against the appellant). However, the dismissal of the application under Order IX, Rule 13 C.P.C. would preclude the appellate Court from deciding the legality of the order of the trial Court to proceed *ex-parte* against the appellant but not the question that the *ex-parte* decree is in accordance with the law and evidence on the record. Since the trial Court while deciding an application under Order IX, Rule 13 C.P.C. cannot, like an appellate Court, conduct a reappraisal of the evidence in order to determine whether the *ex-parte* decree is in accordance with the law and evidence on the record, the election of the forum by the defendant against whom an *ex-parte* decree is passed is to be for the decision on the legality of the order to proceed *ex-parte* against him or the *ex-parte* proceedings and none other. Where an application under Order IX, Rule 13 C.P.C. is dismissed, the matter regarding the order to proceed *ex-parte* against the defendant would become *res judicata* and cannot be re-agitated in an appeal against the *ex-parte* decree.

16. Where an application under Order IX, Rule 13 C.P.C. is allowed, an appeal filed against the *ex-parte* decree would be rendered infructuous since the *ex-parte* decree would no longer be in the field. On the other hand, the dismissal of an appeal against the *ex-parte* decree would render the application under Order IX, Rule 13 C.P.C. non-proceedable and infructuous. In the case of Zafar Vs. Ghulam Muhammad (2005 CLC 525), the Hon'ble Lahore High Court held as follows:-

> ***"According to law a defendant against whom an ex parte decree is passed is provided with two remedies; one by way of filing an application under Order IX, rule 13, C.P.C. and the other by way of challenging such a decree through an appeal under section 96, C.P.C. The limitation of the Court attending an application under Order IX, rule 13, C.P.C. is that such ex parte decree can only be set aside on***

showing sufficient cause for non-appearance or on account of non-service of summons and no further material is to be looked into for setting aside such a decree but if a defendant chooses to file an appeal under section 96, C.P.C. against such a decree then the entire case reopens in appeal, even all the interim orders including the one passed under Order IX, rule 6, C.P.C. could also be challenged and examined under section 105, C.P.C. and the merits of the ex parte judgment could also be examined by the appellate Court."
(Emphasis supplied)

17. In the present case, the appellants first filed the appeal against the *ex-parte* decree dated 21.09.2002 before the appellate Court, and thereafter filed an application for setting aside the same decree before the trial Court. In paragraphs 9, 10 and 11 of the memo of the appeal, the appellants have also questioned the legality of the learned Civil Courts' order to proceed *ex-parte* and the *ex-parte* proceedings against the appellants. Now, the appellants did not apply for keeping the instant appeal pending until their application for setting aside the *ex-parte* decree was decided by the learned Civil Court. Admittedly, the instant appeal was filed prior in time to the application for the setting aside of the *ex-parte* decree. Therefore, this Court proceeded to decide the appeal on merits, including the question as to whether the learned Civil Court's order to proceed *ex-parte* suffered from any legal infirmity.

18. It is an admitted fact that the appellants joined the proceedings before the learned trial Court and had submitted a written statement. The order for initiation of *ex-parte* proceedings against the appellants was passed on 08.11.2001. During the pendency of the suit, no application for setting aside the *ex-parte* proceedings was filed. The sole ground agitated by the appellants in the memo of the appeal is that after the learned Presiding Officer was transferred and another one replaced him, a fresh notice should have been issued to the appellants. There is no requirement in the law for such a notice to be issued when a Presiding Officer is transferred and another one replaces him. A litigant ought to be vigilant and note the next date even when the Court is vacant due to the transfer of the Presiding Officer. No explanation sustainable in law was provided by the appellants for letting the suit proceed *ex-parte* against them even though they had appeared earlier and filed a written statement. Negligence on the part of the appellants is quiet apparent since they

were earlier also proceeded against *ex-parte*. After the earlier order to proceed *ex-parte* was recalled, the appellants should have been vigilant and not absented themselves from the Court, resulting in the second *ex-parte* order. We have not been convinced by the learned counsel for the appellants that the learned Civil Court committed an illegality by proceeding *ex-parte* against the appellants.

19. In the memo of the appeal, it is pleaded that after the order to proceed *ex-parte* was passed against the appellants, the representative of the appellants had been appearing before the learned trial Court. A party who joins the proceedings and is subsequently proceeded against *ex-parte* can rejoin the proceedings. Reference in this regard may be made to the following case law:-

(i) In the case of Azizullah Khan Vs. Arshad Hussain (PLD 1975 Lahore 879), the Hon'ble Lahore High Court has held as follows:-

> ***"According to law the ex parte order against the defendants did not mean that they could not participate in the further proceedings of the case. They could not be considered to be dead in relation to the future proceedings. A party cannot be stopped from participating in the proceedings simply because of its non-appearance on the first or some adjourned hearings. A party proceeded against ex parte may apply under rule 7 of Order IX, for setting aside the ex parte order and if the learned trial Court is satisfied that good cause has been shown then the ex parte order may be set aside. Even if no such application is made and no good cause is shown for setting aside the ex parte order that does not mean that the defendant proceeded against ex parte is debarred from appearing and participating in the further proceedings. All that the provision as contained in rule 7 of Order IX, requires is that in case of good cause having been shown the ex parte order may be set aside but there is no provision whereby an absentee defendant cannot appear and participate in the adjourned proceedings. The whole scheme of the Code provides for substantial justice to be done after giving full opportunity to the parties to the suit."***

(ii) In the case of Col. (Retd.) Nadeem Shafique Raja Vs. Jamshed Khan Barki (2017 CLC 1512), I had the occasion to hold as follows:-

> ***"13. Even though, the petitioner had been proceeded against ex parte by the learned Civil Court, he nonetheless had a right to participate in the proceedings at a subsequent stage. Where an ex parte order had been passed by the trial Court against the defendant he could not ask for the reopening of proceedings unless he showed sufficient cause, but he could join at any time from the stage which had already been reached. The purpose to be achieved by the said principle was that decisions should be on merits. In the case of Police Department through Deputy Inspector General of Police v. JavidIsrar (1992 SCMR 1009), it has been held that a defendant who is proceeded against ex parte, and does not get the ex parte order set-aside, was not debarred from appearing and participating in the proceedings at a subsequent***

stage. Additionally, in the cases of Sabir Ali v. KhalidaParveen 2006 YLR 638 and Muhammad Mussain v. Dana Begum (PLD 2004 SC AJ&K 20), it has been held that where proceedings had been ordered ex parte against a defendant, he could join the proceedings at any subsequent stage, if he did not want the setting aside of the proceedings taken in his absence. The provisions of Order IX, Rule 7, C.P.C. were attracted only, where the defendant wanted the setting aside of the ex parte proceeding. In the case at hand, the petitioner has, at no material stage, applied for the setting aside of the ex parte proceedings."

20. The appellants, after being proceeded against *ex-parte,* could have rejoined the proceedings and cross-examined respondent No.1's witness and could have produced their own evidence. It was most negligent on the appellants' part not to have done so after rejoining the proceedings. This is an added reason why the *ex-parte* decree should not be interfered with.

21. Every court in dealing with an *ex-parte* case should take good care to see that the plaintiff's case is at least *prima facie* proved. Mere absence of the defendant does not justify the presumption that the whole of the plaintiff's case is true. The fact that the defendant is absent and has not joined any issue with the plaintiff does not in any way lessen the plaintiff's burden for proving his case. He must adduce all such evidence which, under any circumstance, should satisfy the court that his claim is genuine and deserves to be decreed. The plaintiff is bound to prove his case to the satisfaction of the court and his burden is not lightened merely because the defendant is absent. Where the plaintiff fails to make out a *prima facie case,* the defendant is entitled *ex debito justitiae* to have a decree set aside. In this regard reference may be made to the following case law:-

(i) In the case of Farzand Raza Naqvi Vs. Muhammad Din (2004 SCMR 400), the Hon'ble Supreme Court held that *"despite of non-representation of defendants in the suit, the trial Court was under legal obligation to attend the important question relating to the maintainability of the suit and the genuineness of the claim of plaintiff arising out of the pleadings of the parties, and decide the suit on merits to avoid any injustice to any party in his absence."*

(ii) In the case of East and West Steamship Co. Vs. Queensland Insurance Co. (PLD 1963 SC 663), it was held that *"[t]here can*

be no doubt of the duty of the Court to ensure, even when proceeding ex parte, that its decision is in accordance with the facts which should be ascertained with as much care as is possible in the absence of any contesting party."

(iii) **In the case of Akhtar Nawaz Vs. Mrs. Sanjeeda Khatoon (2003 MLD 61), the Hon'ble High Court of Sindh held that *"Courts while passing any ex parte judgment or decree against the absenting party are expected to exercise great caution, as it is not very uncommon in this morally deteriorating society to obtain orders by misrepresentation and suppression."***

(iv) **In the case of BASF Pakistan (Pvt.) Ltd. Vs. Tanocraft Limited (PLD 2003 Karachi 598), the Hon'ble High Court of Sindh held as follows:-**

> *"This is an ex parte case and as such while deciding the same heavy burden lies on advocate appearing for plaintiff and on Court to see, that no injustice be done to unrepresented party. The provisions of Order VIII, rule 10, C.P.C. are not mandatory in the sense giving no option to the Court except to pass a judgment in favour of the plaintiff. If a written statement is not filed, rule 10 of Order VIII, C.P.C. does not postulate a judgment to be pronounced and decree be passed automatically or mechanically. The judgment pronounced under rule 10, Order VIII, C.P.C. should indicate that the Court has applied its mind to the merits of the case before decreeing the suit. It is for the plaintiff to prove his case. It is the duty of the Court to see as to whether the suit is filed within time or not."*

22. The record further shows that on 07.09.2002, a statement of Syed Shujat Ali Shah (PW-1) was recorded by the learned Civil Court to the effect that he had produced his affidavit-in-evidence. Therefore, the appellants cannot assert that the affidavit was filed in absence of the witness. The material fact which was required to be proved by respondent No.1/plaintiff was his stance that during the course of bidding an observation regarding the presence of overhead Army communication/telephone lines passing through the bridge was raised, and thereupon the appellants had assured respondent No.1 that he would be satisfied. Now, this fact was reiterated in the affidavit produced in evidence by PW-1. No evidence to disprove this was produced by the appellants. They even failed to cross-examine the witness. A positive fact in absence of evidence to the contrary cannot be presumed to have been disproved merely on the basis of bald

averments in the written statement. It is also on the record that the appellants did not respond to the letters and legal notices sent by respondent No.1 and that several years had elapsed since the deposit of the bid bond/earnest money and as such the amount of damages awarded by the learned Civil Court are commensurate with the loss that respondent No.1 suffered on account of being deprived of the earnest money by the appellants.

23. The appellants could not forfeit the earnest money deposited by respondent No.1 in absence of a specific term in the bidding conditions entitling the appellants to forfeit the earnest money in the event respondent No.1, after the acceptance of its bid, failed to deposit the balance amount. Additionally, the appellants could not show that they had suffered a loss due to the non-deposit of the remaining bid amount by respondent No.1. It was admitted that the bridge in question was subsequently put to auction. It is not the appellants' case that in the subsequent auction they were not able to obtain a bid as high as that of respondent No.1 and the forfeiture of the amount deposited by respondent No.1 was necessitated to make good the loss suffered by respondent No.1.

24. In view of the above, we do not find any legal infirmity in the impugned judgment and decree. Consequently, this appeal is dismissed with no order as to costs. It is clarified that suit was decreed for Rs.2,500,000/- (not Rs.25 Million) plus damages amounting to Rs.300,000/-. No order as to costs.

(CHIEF JUSTICE) **(MIANGUL HASSAN AURANGZEB)**
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(CHIEF JUSTICE) **(JUDGE)**

APPROVED FOR REPORTING

*Qamar Khan**