

*Form No: HCJD/C-121.*  
JUDGEMENT SHEET  
IN THE ISLAMABAD HIGH COURT, ISLAMABAD  
JUDICIAL DEPARTMENT

**WRIT PETITION NO. 467 OF 2021**

Abid Naeem

Vs

Learned Civil Judge, (West) Islamabad and others

PETITIONER BY: Dr. G.M Chaudhry, Advocate.

RESPONDENTS BY: Raja Saif-ur-Rehman, Advocate for  
respondent No.2.  
Ms. Neeli Khan, Advocate for respondent  
No.3.

DATE OF DECISION: 14.12.2021.

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**BABAR SATTAR, J.-** The petitioner is aggrieved by order dated 11.01.2021, pursuant to which the civil suit dismissed by order dated 28.05.2019, was restored.

2. Learned counsel for the petitioner stated that the restoration application, in relation to which the impugned order was passed, was filed on 03.12.2019 after a period of 155 days beyond the limitation period prescribed under Article 163 of the Limitation Act, 1908 ("**Act**"). Learned counsel further stated that the impugned order was passed in breach of Section 3 of the Act, which is a mandatory provision and further that no application for condonation of delay was filed under Section 5 of the Act. Learned counsel further stated that the reasoning for the unexplained delay in filing of the restoration application was that the counsel could not find the case on the cause list for the period

of 155 days and stated that it is settled law that mistake of a counsel is not an excuse where it comes to mandatory provision of the Act. Learned counsel for the petitioner relied on **Khawaja Umar Joo Vs. Muhammad Hussain and others (PLD 1963 Azad J&K 44)**, **Asad Ali Vs. The Bank of Punjab and others (PLD 2020 SC 736)** and **Government of N.W.F.P and others Vs. Akbar Shah and others (2010 SCMR 1408)**.

3. The learned counsel for the respondent No.2 submitted that by order dated 02.04.2019 the learned Civil Court had fixed the application filed under Order XXXIX Rule 1 and 2 of CPC for arguments on 28.05.2019 and due to the absence of the respondent on the said date not only the application under Order XXXIX Rule 1 and 2 CPC but the entire suit was dismissed for non-prosecution. He submitted that when the suit was not fixed for hearing on the said date, it could not be dismissed on such date as such dismissal would be without cause. He relied on **Najeeb Mehmood Vs. Capital Development Authority (2021 YLR 631)**, **Qazi Muhammad Tariq Vs. Hasin Jahan and 3 others (1993 SCMR 1949)**, and **National Bank of Pakistan Vs. Haji Muhammad Shafique and another (2005 MLD 1483)**. He contended that when the suit was not fixed for hearing on a certain date, its dismissal on such date for non-prosecution would not attract provisions of Article 163 of the Act but provisions of Article 181 of the Act would attract and in such view of the matter, the application for restoration was within time. He relied on **Messrs Transglobe Shipping Service Vs. Wapda and another (2016 SCMR 2023)**, **Sabir Hussian Vs.**

**Azra Begum (2017 YLR Note 410), Manager Jammu and Kashmir State Property in Pakistan Vs. Khuda Yar and another (PLD 1975 SC 678) and Mst. Gohar Taja Vs Sajid And others (2003 YLR 1994).** He further submitted that as the dismissal of the main suit was without cause, it would deem to be a void order and no limitation would run against a void order. For this submission he relied on **Manager Jammu and Kashmir State Property in Pakistan Vs. Khuda Yar and another (PLD 1975 SC 678).** He submitted that on the date of hearing the only order that the court could pass due to the absence of the respondent was dismissal of stay application but not of the main suit. He relied on **Mst. Suraya Parveen Vs. Mst. Rukhsana Hanif (2012 SCMR 656), Muhammad Qasim Vs Moujuddin (1995 SCMR 218) and Najeeb Mehmood Vs. Capital Development Authority (2021 YLR 631).** He further contended that the respondent had shown sufficient cause to the learned civil court for restoration of the suit by producing material before the court to establish that the counsel had inadvertently noted wrong date for fixation of application under Order XXXIX Rule 1 and 2 in his diary and as soon as he became aware of the dismissal order, the application for restoration was filed. To support his argument that unintentional mistake with regard to the date of hearing being a sufficient cause for restoration, he relied on **Standard Chartered Bank (Pakistan) Limited Versus Arshad Ali (2014 CLD 191).** He finally contended that the petitioner had received cost pursuant to order dated 11.01.2021, which has been impugned in the instant petition pursuant to which the suit of the respondent was

restored and after having received the cost, the petitioner was estopped from challenging the said order. He relied on Government of **N.W.F.P. Vs Akbar Shah (2010 SCMR 1408)**, **Syed Muhammad Zuhair Shah Banori Vs. Syed Muhammad Zahid Shah Banori (2012 CLC 629)**, **ALI HUSSAIN Versus ALI ABMAD KHAN WARSI (1982 CLC 2616)** and **Qamar Zaman Vs. Musammir Shah (2000 SCMR 1730)**.

4. In rebuttal, the learned counsel for the petitioner submitted that the respondent had raised none of these pleas before the learned Civil Court and it is settled law that no new plea could be raised before the appellate court, which had not been raised before the learned trial court. He relied on **Fazal Rahman Vs Amir Haider (1986 SCMR 1814)** and **Citi Bank N.A., A Banking Company Vs Riaz Ahmed (2000 CLC 847)**. He further contended that imposition of costs for restoration of the suit and its payment to the petitioner could not prevent the petitioner from seeking any relief against an order which had been passed without lawful authority. He relied on **Khawaja Umar Joo Vs. Muhammad Hussain and others (1963 PLD Azad J&K 44)** and **Qamar Zaman Vs. Musammir Shah (2000 SCMR 1730)**.

5. It is an admitted fact that what was fixed for hearing on 28.05.2019 before the learned Civil Court was the application under order XXXIX Rule 1 and 2 and not the main suit, which is evident from the perusal of the order passed by the learned Civil Court on 28.05.2019. Consequently, order dated 28.05.2019 to

the extent that it dismissed the suit of the respondent was not a lawful order. It has been held by the august Supreme Court that a court cannot dismiss a suit on a date on which it is not fixed for hearing. It was held by the august Supreme Court in **Muhammad Tariq Vs. Hasin Jahan (1993 SCMR 1949)** that:

*"A perusal of the record indicates that the suit of the appellant was dismissed on a day which was not fixed for its hearing; it was a day appointed for hearing arguments on the application for temporary injunction filed by the appellant. In the absence of the appellant all that the learned trial Judge could do was to dismiss the application for temporary injunction. It could not proceed beyond that and dismiss the suit as well. Quite clearly its order in this regard was without jurisdiction and void. This aspect of the case was noticed neither by the learned Additional District Judge nor by the High Court. The order of dismissal being void all that the appellant was required to do was to call upon the learned trial Court to treat his suit as still pending. We would therefore accept this appeal, set aside the orders of the three Courts below and direct that the suit of the appellant should be treated as still pending and disposed of in accordance with law."*

6. Similarly, the learned Sindh High Court in **National Bank of Pakistan Vs. Haji Muhammad Shafiq [2005 MLD 1483]** held that:

*"It appears that an application for setting aside ex-parte judgment and decree was filed on 17-6-2003 and a learned Single Judge of this Court by an order dated 22-12-2003 recalled the ex-parte judgment and decree and ordered that suit should proceed in accordance with law. In all fairness thereafter the defendants should have filed their written statement and contested the suit but the record shows that no such written statement has been filed and when the suit was fixed on 20-2-2004 for orders on Official Assignee's reference dated 27-10-2003 and arguments on some*

*interlocutory application, it was dismissed apparently for non-prosecution though there was no occasion for dismissal of the suit and at the most the application fixed for arguments could be dismissed.”*

7. While relying on these judgments as well as the judgment rendered by the learned Lahore High Court in **Altaf Hussain Qamar Vs. Imran Rasool (2011 CLC 1891)**, this Court in **Najeeb Mehmood Vs. Capital Development Authority (2021 YLR 631)** had reiterated that a suit could not be dismissed for non-prosecution on a day on which it was not fixed for hearing. The law settled on this issue does not need further elaboration. A suit dismissed on a date when it is not fixed for hearing would obviously amount to dismissal without notice to the party who is seeking the enforcement of its rights before the court, such order would be in breach of Article 10A of the Constitution.

8. In view of the aforementioned law and facts of the instant matter, order dated 28.05.2019 was not backed by lawful authority and had been passed in breach of the right of the respondent guaranteed under Article 10A of the Constitution as well as under the principles of natural justice. Consequently, such order could not be allowed to stand. It has further been held by the august Supreme Court that in the event that a case is not fixed for hearing on a certain date, it could not be regarded as having been fixed for hearing for purposes of Order IX Rule 8 of CPC and in the event that it is dismissed on such date, Article 163 of the Act would not be attracted and for purposes of limitation the residuary Article 181 of the Act would be attracted.

Reliance is placed on **Mst. Gohar Taja Vs. Sajid and others (2003 YLR 1994)**, **Abdul Latif Vs. Aqeel Ahmed (2006 SCMR 789)**, **Messrs Transglobe Shipping Service vs. Wapda and another (2016 SCMR 2023)** and **Sabir Hussain Vs. Azra Begum (2017 YLR Note 410)**.

9. It is also settled law that a void order cannot be allowed to stand and no limitation runs against a void order. It is the obligation of the court to pass a reasoned order in adjudicating rights of parties after affording the parties an opportunity to be heard in accordance with law. This principle was reiterated by the august Supreme Court in **Mollah Ejahar Ali vs. Government of East Pakistan and others (PLD 1970 SC 173)**. The case law relied on by the learned counsel for the petitioner with regard to raising new pleas before an appellate court is not applicable in the instant case as it is the petitioner who brought before this Court an order of the learned Civil Court pursuant to which a suit dismissed for non-prosecution was restored through the impugned order. The reasoning of the learned Civil Court does not reflect that it took into account the fact that it ought not have dismissed the suit by order dated 28.05.2019, when the suit was not fixed for hearing and the only application under Order XXXIX Rule 1 and 2 was fixed for hearing. The learned Civil Court has merely recorded its reasons for why there was sufficient basis for restoration of the application. Even in the event that this court does not find the reasoning for restoration as recorded by the learned civil court persuasive, it is not inclined to interfere with the impugned order as the effect of the impugned order is to set

aside an order that had been passed in breach of the provision of the law and the Constitution, and was consequently a void order. It is settled law that this court exercises its constitutional jurisdiction to right wrongs and not to use its equitable jurisdiction in a manner that might perpetuate illegality. The order dated 28.05.2019 was a void order and has been recalled by through the impugned order and consequently there is no occasion for this Court to interfere with the impugned order.

9. For the above reasons, the petition is **dismissed** for being without merit.

(BABAR SATTAR)  
JUDGE

Announced in the open Court on 23.12.2021.

JUDGE

Saeed.