

*HCJD/C-121*  
**JUDGMENT SHEET**  
**IN THE SLAMABAD HIGH COURT, ISLAMABAD**

**CIVIL REVISION No.388 of 2019**

**Khurram Manzoor and another**  
***Versus***  
**Suriya Begum (late) through her legal heirs & others**

**Petitioners by** : **Raja Inam Amin Minhas, Adv.**

**Respondents by** : **Mr. Tahir Mehmood, Advocate.**  
**Mr. Arshad Mehmood,**  
**Advocate for CDA.**

**Date of Decision** : **04.06.2021**

**Babar Sattar, J:-** Through this petition, the petitioners have impugned orders dated 27.02.2019 and 05.04.2019, passed by the learned Civil Court. Vide order dated 27.02.2019, the learned Civil Court ordered initiation of ex-parte proceedings against the petitioners due to their non-appearance. The application of the petitioners seeking the setting aside of order dated 27.02.2019 was then dismissed by the learned Civil Court vide order dated 05.04.2019.

**2.** Learned counsel for the petitioners stated that the subject matter of the suit relates to a dispute between the parties regarding ownership of plot No.6-B, F-7 Markaz, Islamabad. He took the Court through facts of the case which are not germane to the question of legality of the impugned orders and need not be reproduced here. The basic contention of the learned counsel for the petitioners was that vide order dated 15.12.2018, the learned Civil Court had fixed applications for interim injunction and appointment of receiver for arguments on 12.01.2019. On

the next two dates of hearing i.e. 12.01.2019 and 26.01.2019, there were no proceedings in the Court due to a strike called by lawyers and the security situation in the Court compound, respectively. On 09.02.2019, the counsel for the petitioners sought an adjournment and the applications for interim injunction and appointment of receiver were fixed for arguments on 27.02.2019. On the said date, the counsel for the petitioners could not appear before the Court inadvertently and the learned Civil Court passed the impugned orders dated 27.02.2019, whereby it initiated ex-parte proceedings in the suit against the petitioners. An application for setting aside these ex-parte proceedings was dismissed vide order dated 05.04.2019 on the basis that the application was supported by an affidavit which had been executed by the clerk of the learned counsel for the petitioners and not by the petitioners themselves. Learned counsel for the petitioners submitted that the impugned order dated 27.02.2019 suffers from illegality as on the said date the matter was fixed for hearing on the applications (i.e. for interim injunction and appointment of receiver) and not the main suit. Consequently, by exercising his powers under Order IX read together with Order XVII of CPC, the learned Civil Court would have been within its right to pass any orders in relation to the said applications. But that it ought not have initiated ex-parte proceedings against the petitioners in the main suit given that the main suit was not fixed for hearing on the said date. He also submitted that once this infirmity was brought to the attention of the learned Civil Court through an application filed by the petitioners, even if such application was not duly authorized, the

Court ought to have exercised its jurisdiction under Section 151 of the CPC to correct the error floating on the face of the order as opposed to dismissing the petitioners' application for lack of authorization as was done by order dated 05.04.2019. He contended that the petition ought to be accepted and the impugned orders are liable to be set aside.

**3.** Learned counsel for respondents 1 and 2 also preferred detailed arguments on the merits of the suit. But as aforesaid, the merit of the suit is not a question before this Court in the instant proceedings and reproducing such arguments would serve no purpose and could in fact run the risk of causing prejudice to the proceedings pending before the learned trial Court. In relation to the legality of the impugned orders the contention of the learned counsel for respondents 1 and 2 was that the suit had been pending since 2011 and it was fixed for recording of evidence in 2014 and had still not been decided in 2021. He submitted that the adjudication of the suit has been delayed due to dilatory tactics employed by the petitioners and the order passed by the learned Civil Court to proceed ex-parte against the petitioners suffers from no illegality.

**4.** Learned counsel for respondent No.3 supported the impugned orders and reemphasized the observations of the learned trial Court noting that the attitude of the petitioners in the trial proceedings had been lethargic. He submitted that the petitioners had been provided an opportunity to argue his case and in the event of the petitioners' failure to avail such

opportunity, the petitioners must bear the consequences. He contended that the petition is liable to be dismissed.

**5.** Perusal of the order sheet reflects that there is merit in the submission made by the learned counsel for the petitioners that what was fixed for adjudication on 27.02.2019, when the order to proceed ex-parte against the petitioners was passed by the learned Civil Court, were two miscellaneous applications for interim injunction and appointment of receiver. The learned Civil Court, therefore, had ample power under Order IX read together Order XVII to pass appropriate orders in relation to the said applications. However, as the learned Civil Court had itself ordered that the hearing on the said date would be in relation to the two applications and not the main suit, it cannot be inferred that the petitioners would have automatically assumed that the main suit was also fixed for adjudication on the said date. Thus notwithstanding the absence of the petitioners on the said date and the reasons for such absence, what was fixed for hearing were two miscellaneous applications and the orders passed by the learned Civil Court on such date ought to have been limited to such applications. Had the learned Civil Court not passed explicit repeat orders stating that the next order of business of the Court would be the adjudication of the two applications, and a hearing date has been fixed in the main suit along with miscellaneous applications, the learned Civil Court would have been justified in passing the impugned order and ordering ex-parte proceedings in the event of absence of the petitioners.

**6.** In the instant case, however, when the petitioners was put on notice that the Court would hear the two applications identified in the order of the learned Civil Court, passing an order in the main suit would be deemed to be without notice and would consequently fall foul of the Article 10-A rights of the petitioners to due process and fair trial guaranteed by the Constitution.

**7.** In view of above, the impugned order dated 27.02.2019 suffers from material illegality and is liable to be set aside.

**8.** The reasoning of the learned trial Court in its order dated 05.04.2019 through which it dismissed the application filed by the petitioners for not being duly authorized does not suffer from any infirmity. There is no concept within the CPC of a clerk appearing on behalf of a party and a Civil Court recording such appearance as the appearance of a party to the proceedings. Unless such clerk is a duly authorized special attorney of the party.

**9.** The term pleader as defined in Section 2 (15) of CPC as:-

***"any person entitled to appear and plead for another in Court, and includes as advocate, a vakil and an attorney of a High Court."***

Rule 1 Order III of Code of Civil Procedure 1908 provides the following:-

***"Appearances, etc., may be in person, by recognized agent or by pleader"*** Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a

*pleader appearing, applying or acting, as the case may be, on his behalf:*

*Provided that any such appearance shall, if the Court so directs, be made by the party in person.*

Rule 2 Order III of Code of Civil Procedure 1908 provides the following:-

***"Recognized agents"***

*The recognized agents of parties by whom such appearances, applications and acts may be made or done are-*

- (a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;*
- (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.*

**10.** From the above, it is obvious that it is either a party itself or a duly authorized attorney or pleader who is entitled to appear before a Court on a date fixed for the hearing of a case. The current practice of clerks appearing before Civil Courts and their presence being recorded and deemed as the presence of the party whom they purport to represent has no backing of law and needs to be deprecated. It is a settled principle of law that a thing that requires to be done in a certain way must be done in that way or not at all. A clerk of a counsel has no right of appearance or audience or advocacy before the Civil Court and has no authority to sign any pleadings. Appearance of clerks in place of parties and their counsel disables the Court from

undertaking effective case management, as a clerk has no skin in the game: he neither has an interest to protect such as the party itself, nor is he bound by professional ethics prescribed for lawyer under the Legal Practitioners and Bar Councils Act, 1973. Thus care must be employed by the learned Civil Court not to allow appearance of a clerk of a counsel in the stead of parties or their counsel or mark their presence on order sheets, which unsanctioned and retrograde practice has culminated into the current sorry state of affairs where clerks are now executing pleadings, as in the instant case.

**11.** But notwithstanding that the reasoning of the learned Civil Court in its order dated 05.04.2019 is cogent on a standalone basis, once an error that was floating on the surface on the order of the learned Civil Court dated 27.02.2019 was brought to its attention, the learned Civil Court ought to have used its powers under Section 151 of the CPC to pass an appropriate order to correct the said error. Now that this Court has determined that an order directing initiation of ex-parte proceedings in the suit could not be passed against the petitioners on 27.02.2019 as the suit in relation to which such order was passed was not fixed for hearing on such date, the impugned order of learned Civil Court dated 27.02.2019 cannot be allowed to stand merely because the application for correction of such error was not duly authorized.

**12.** The learned Civil Court has observed in its orders that the petitioners have conducted the proceedings in the suit in a manner that has caused delay. The learned Civil Court has ample powers under the Costs of Litigation Act, 2017 read together with

the CPC as amended through the Civil Procedure Amendment Act, 2020, to take penal action against any party that causes delay in the adjudication of matters pending before it. Provisions of the Costs of Litigation Act, 2017 are mandatory in nature and the Courts are under an obligation to give effect to them in order to ensure speedy adjudication of grievances. Pursuant to Section 35-A of CPC, introduced through the Costs of Litigation Act, 2017, a Civil Court is under an obligation to impose a minimum adjournment cost of Rs.5000/- per adjournment, unless the Court is convinced that the adjournment has been sought "on account of unavoidable reasons", and such reasons are then recorded by the Court in its order to explain the lack of imposition of adjournment costs. The legislative intent behind the promulgation of the Cost of Litigation Act, 2017, is to deter delaying tactics on behalf of parties who abuse the process of the Court to delay and preempt timely adjudication of cases. Imposition of adjournment cost also puts a party on notice that the Court will exercise its discretionary penal powers under the CPC to discharge its obligation to adjudicate the case before it on merits in a timely fashion.

**13.** For the afore said reasons, the petition is ***allowed***, the impugned orders dated 27.02.2019 and 05.04.2019 are set aside and the parties are directed to appear before the learned Civil Court on 23.06.2021 when the suit as well as all miscellaneous applications will be fixed for hearing before the learned Civil Court. As the suit has been pending for almost a decade, this Court expects that the learned Civil Court will adjudicate the matter in an expeditious manner and enforce the penal



provisions of the Costs of Litigation Act, 2017 and the CPC, as amended, in the event that any party seeks to delay the adjudication of the suit any further.

**14.** The office is directed to share a copy of this judgment with the learned Member Inspection Team (MIT) so that steps can be taken on the administrative side to ensure that (i) the practice to affording the right of audience and appearance to clerks before Civil Courts can be brought to an end, and (ii) the mandatory provisions of the Costs of Litigation Act, 2017, are given effect by the learned judges of the District Courts.

**(BABAR SATTAR)**  
**JUDGE**

**Approved for reporting.**

\*M.A. Raza\*