

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

WRIT PETITION NO. 573 OF 2021

Jammu & Kashmir Cooperative Housing Society Islamabad

Vs

Muhammad Ashraf Khan, etc.

PETITIONER BY: Sheikh Muhammad Suleman, Advocate.

RESPONDENTS BY: Mr. Abdul Kamran Butt, Advocate for
respondent No.1.
Mr. Sajid Mehmood Chaudhry, Advocate
for respondent No.3.

DATE OF HEARING: 26.04.2021

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BABAR SATTAR, J.- Through this petition the petitioner has impugned (i) the order passed by the learned Civil Judge dated 06.02.2020 whereby in exercise of powers under Order XVII Rule 3 of the Code of Civil Procedure, 1908 ("**CPC**") the right of the petitioner to cross-examine plaintiff's witnesses (PWs) was closed, and (ii) the order dated 19.01.2021, through which the application for review of order dated 06.02.2020 was dismissed.

2. Learned counsel for the petitioner stated that there are five defendants in the suit titled "Muhammad Ashraf Khan v. Malik Masood Ahmed, etc" in which the impugned order has been passed and the said order noted that, "*no one turned up on behalf of defendant for cross-examination on PWs, therefore, by invoking power u/o XVII Rule 3 CPC right of defendant is*

closed." The learned counsel submitted that use of word defendant instead of defendants or any particular defendant is an error floating on the surface of the said order as there are five defendants in the suit and the order created genuine confusion as to which defendant's right to cross-examination had been closed. The learned counsel for the petitioner further submitted that in the impugned order dated 19.01.2021, the submission of petitioner regarding the error as aforesaid has not been addressed in a reasoned manner as in para 7 of the impugned order dated 19.01.2021, the learned Civil Court has observed the following:

"As far as objection of the learned counsel for defendant No.5/petitioner that word defendant has been written in the impugned order while there are different set of defendants in the present case. It is a matter of record that only defendant No.5 is contesting party, therefore court wrote the word defendant in the impugned order."

The Learned counsel for the petitioner submitted that all five defendants are represented by independent counsels and all the five defendants have filed written statements contesting the suit and that the learned Civil Court has never passed an order to proceed ex-parte against any of the defendants and consequently the reasoning of the learned Civil Court that only contesting defendant was defendant No.5, implying thereby that it can be inferred from the impugned order that the said order has been passed in relation to defendant No.5, suffers from irrationality and illegality. The learned counsel for the petitioner further submitted that the clerk of petitioner's counsel noted the date for cross-examination incorrectly which was the cause of

non-appearance before the learned Civil Court on 06.02.2020. And that as the learned Civil Court has not yet passed judgment and decree disposing of the suit and as it is a settled proposition endorsed by the jurisprudence produced by the superior courts that adjudicating matters on merits has to be preferred as opposed to decide them on the basis of technicalities, it would have been in the interest of justice to allow the petitioner a final opportunity to cross-examine the PWs. He further relied on Article 10A of the Constitution to argue that right to cross-examination is a valuable right and a part of due process rights of a party before the court and such right ought to be suspended with much reluctance. He relied on Mst. Bilquis Fatima and 3 others v. Nasim Ahsan and 2 others (1996 SCMR 1057), Muhammad Javed and another v. The State and another (2006 PCr.LJ 1170), Oil and Gas Development Company Limited v. Muhammad Ilyas Mian (2018 CLC 1666), Ali Shan and 3 others v. The State through Advocate General, Mirpur (2020 MLD 594), Muhammad Tariq and 6 others v. The State and another (2020 PCr.LJ 1315) and Mst. Motia Masood v. Muhammad Yasir and another (2020 CLC 1910). The learned counsel for the petitioner concluded by saying that there is an error floating on the surface of order dated 06.02.2020 and as the same has not been recognized by the learned Civil Court in its order dated 19.01.2021, both the impugned orders are liable to be set aside and the petitioner be given one final opportunity to cross-examine the PWs.

3. Learned counsel for respondent No.1 submitted that the application that was dismissed by the impugned order, dated

19.01.2021, was barred by time as the right to cross-examine PWs was closed on 06.02.2020 and review application was filed on 23.09.2020 after the delay of 07 months and 17 days. He further submitted that mistake of counsel's clerk in noting the date of hearing in diary is not sufficient cause to condone non-appearance of the counsel on the date fixed for hearing and further that it is settled proposition of law that a party cannot take the benefit of its counsel's mistake. Learned counsel further stated that even according to the diary produced before the court the date purportedly recorded by the clerk of petitioner's counsel for cross-examination was 27.02.2021 and, therefore, the petitioner and his counsel had knowledge of the order dated 06.02.2020 at least from such date and despite that the review application was not filed up until 23.09.2020 and that no condonation application was filed along with the review application and no date of knowledge was stated therein. The learned counsel for respondent No.1 submitted that the record shows the petitioner's delinquency in proceeding with the trial as the case was fixed for cross-examination on PWs on seven dates (i.e. 13.11.2019, 17.11.2019, 10.12.2019, 17.12.2019, 04.01.2020, 25.01.2020, 01.02.2020) and that at least twice in its orders the learned Civil Court recorded that a final opportunity was provided to the petitioner to cross-examine PWs together with a warning that penal consequences would follow if the petitioner failed to avail such opportunity. That in view of the conduct of the petitioner, it is not entitled to any equitable relief and the impugned orders dated 06.02.2020 and 19.01.2021 do not suffer from any legal infirmity.

4. Learned counsel for respondent No.3 submitted that it would be in the interest of justice to grant the petitioner another opportunity to cross-examine PWs as it is preferable to decide the disputes on the basis of merits instead of technicalities.

5. In rebuttal, the learned counsel for the petitioner stated that the objection regarding petitioner's application being barred by time was taken up by respondent No.1 before the learned Civil Court and the argument was dismissed and the application was held to be maintainable in view of the fact that courts did not conduct routine proceedings during the year 2020 amid the situation that has arisen due to Covid-19.

6. The reasoning given by the learned Civil Court in finding that the application was maintainable and that not barred by limitation is reproduced below:

"First of all coming to the objection of the plaintiff's counsel regarding the application of defendant No.5 being time barred. Admittedly, the present application has been filed beyond the stipulated period. It is a matter of fact that after 06.02.2020, there was pandemic situation of Covid-19 and Honorable Islamabad High Court, Islamabad vide its letter dated 24.03.2020, period of limitation prescribed by law in filing appeal, review petition etc in civil and district courts was condoned."

7. It is now settled that provisions of the Limitation Act, 1908 are of a mandatory nature as provided in section 3 of the said Act and it is obligatory for the court to look into the question of limitation even without there being any objection raised by the parties to the proceedings. It was held by the august Supreme Court in Dilmir v. Ghulam Muhammad and 2

others (PLD 2002 SC 403) that consideration of disposing matters on merit is not sufficient to presume that the delay is to be condoned in the absence of another sufficient cause. Covid-19 has indeed created an extraordinary situation giving some parties a legitimate basis to explain the delay in pursuing their claims, while also giving others an opportunity to use Covid-19 as an excuse. In the instant matter the learned Civil Court in view of the fact and circumstances of the case and working of district courts has exercised its discretion to conclude that the petitioner had a legitimate basis to explain the delay in filing the application that led to the impugned order dated 19.01.2021 and consequently the application was found to be maintainable and the objection regarding limitation was dismissed. The reasoning of the learned Civil Court on the question of maintainability of the application has not been challenged before this Court in the instant petition and consequently there is no reason for this Court to interfere with exercise of discretion by the learned Civil Court on the question of limitation determined as a factual matter and backed by valid reasoning.

8. The learned counsel for respondent No.1 has been unable to point out any order passed by the learned Civil Court whereby it was ordered that the proceedings in the suit in relation to defendants No. 1 to 4 would proceed ex-parte or that they had not appeared before the Court or contested the claim of the plaintiff or any order that closed their right to cross-examine PWS.

9. In view of the record, the reasoning of the learned Civil Court that only defendant No.5 remains a contesting party in the suit is not borne out. Perusal of the record reflects that defendants No. 1 to 4 have filed written statements and are contesting parties who are represented through counsels and the order sheet also reflects the presence of their counsels before the learned Civil Court at various hearings.

10. In this view of the matter, it appears that order dated 06.02.2020 was infact ambiguous and it did not identify the defendant who was subjected to the penal consequences of Order XVII Rule 3 of CPC. The exercise of powers by the learned Civil Court under Order XVII Rule 3 of CPC to close the right of defendants to cross-examine PWs after their failure to do so on multiple dates fixed for such purpose might have been in accordance with law. But the order itself was ambiguous as it cannot be inferred from the plain language of such order as to which defendant is at the receiving end of the penalty imposed and thus an error did float on the surface of the impugned order dated 06.02.2020 rendering it liable to be corrected in review.

11. It must, however, be pointed out that fundamental rights under Article 10A of the Constitution to fair trial and due process are to be afforded to all parties to any adjudication. It was held by the august Supreme Court that in Mrs. Shagufta Shaheen and others v. The State through D.G, NAB and another (2019 SCMR 1106) that, *"long delays in deciding matters did not sit well with the right to fair trial and due process guaranteed as a Fundamental Right under Article 10A of the Constitution."*

12. The propensity within our judicial system to delay the adjudication of matters by seeking adjournments, refusing to proceed with the various stages of trial with all due dispatch, forcing courts to issue warrants and pass strictures and providing repeat opportunities to the parties to proceed with the matters pending adjudication, is to be deprecated. The conduct of a party seeking to deliberately delay adjudication of a matter for collateral purposes is infact a breach of the contesting party's Article 10A rights, and the court is duty bound to take cognizance of such conduct as well as take penal action to ensure that no one party is able to hold expeditious adjudication of judicial proceedings hostage. The argument that one final opportunity be granted in the interest of justice to uphold Article 10A rights of a party which has been delinquent in pursuing his case expeditiously is not a sufficient reason in itself to remand such matter back to the trial court. The question before the court remains as to how best to balance competing rights of the parties before a court all of whom have been guaranteed the right to fair trial and due process under Article 10A of the Constitution.

13. It is in view of the error floating on the surface of the order dated 06.02.2020 and reasoning of the learned Civil Court in relation to such error in its order dated 19.01.2021 that is not borne out by the record, the impugned orders are being set aside. However, as the petitioners have invoked the discretionary constitutional jurisdiction of this Court and the conduct of the petitioner and its delinquency cross-examining

the PWs despite repeated reminders and warnings cannot go unnoticed. The learned Civil Court is therefore, directed to provide one final opportunity to the petitioner to cross-examine PWs, subject to payment of Rs.50,000/- as cost to respondent No.1. The instant petition is **disposed of** in the above terms.

(BABAR SATTAR)
JUDGE

Saeed.