Form No: HCJD/C.

JUDGEMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

F.A.O No.138 of 2016.

Federal Government Employees Housing Foundation through its Director.

Vs.

Bashir Ahmed & others.

F.A.O No.21 of 2017.

Muhammad Ashfaq & seven (07) others.

Vs.

Bashir Ahmed & others.

Appellant's by:	***Altaf Hayat Khan, Advocate in FAO No. 138 of 2016.*** **Ahmed Abdul Rafay, Advocate in FAO No.21 of 2017.**
Respondent's by:	***Syed Javed Akbar Shah, Advocate in FAO No.138 of 2016.*** ***Imtiaz Anwar Cheema, Advocate in FAO No.21 of 2017***
Date of Decision:	***10.10.2018.***

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Aamer Farooq, J.- This judgment shall decide the instant appeal as well as FAO No.21 of 2017 as common questions of law and facts are involved.

02. The facts, in brief, are that respondent No.1 filed a suit against the appellants in the instant appeal as well

as in FAO No. 21 of 2017, alleging therein, that he had entered into agreement to sell with predecessor in interest of respondents No.2-A to 2-H in respect of plot measuring 200 Sq. Yards, Phase-IV situated at Sector G-14/1-3, Islamabad which was allotted to predecessor in interest of respondents No.2-A to 2-H. The suit was duly contested and during the course of same an application under Order VII Rule 11 C.P.C. was filed. Furthermore, the proceedings were adjourned sine die on the statement of respondent No.1. It seems from the record that respondent No.1 got the suit reactivated and no one is appeared on behalf of the appellants and ex-parte judgement and decree was passed against them on 14.12.2015. Applications under Order 9 Rule 13 C.P.C. were filed for setting aside judgment & decree but the same were dismissed.

03. Learned counsel for the Federal Government Employees Housing Foundation, *inter alia,* contended that its application under Order IX Rule 13 C.P.C. has been dismissed on the ground that the same is barred by limitation, whereas, such is not the case. In this behalf, it was contended that an application under Order IX Rule 13 C.P.C. can be filed within period of three (03) years in light of case law reported as ***"Hashim Ali Shah vs. Syed Akhtr Ali Shah" (NLR 1995 Civil 368).*** It was furhter contended that no service of notice was effected at the time of resurrection of the suit.

04. Learned counsel for the appellants in FAO No.21 of 2017 supported the contentions by learned counsel for the appellant in the instant appeal and also contended that no service was effected.

05. Learned counsel for the respondents contended that the application filed by the appellant was barred by limitation as period of 30 days is prescribed under Article 164 of Schedule 1 to the Limitation Act, 1908.

06. Arguments advanced by the learned counsels for the parties have been heard and documents placed on record examined with their able assistance.

07. In so far as, the appellant, in the instant appeal is concerned there is an observation by the learned Trial Court that service was duly effected upon the Housing Foundation. However, learned counsel for the appellants categorically and specifically denies the same, where such is the case, the matter needs to be examined in detail by leading evidence on the disputed facts, which was not done in the instant case.

08. Both the applications were dismissed on the ground of limitation, as well. In this behalf, learned Trial Court observed that the applications are barred by limitation. Admittedly, upon filing of suit by respondent No.1 summons were issued by the learned Trial Court and duly served upon the appellants in the instant appeals. It is only during the course of trial that the case was adjourned sine die and when application for its

reactivation was made the defendants/appellants did not appear. The legal question before the Court, in such facts and circumstances, is whether Article 164 of the Schedule 1 to the Limitation Act is applicable or any other Article. The Hon'ble Supreme Court of Pakistan in case titled as ***"Messrs Rehman Weaving Factory (Regd) vs. Industrial Development Bank of Pakistan"(PLD 1981 SC 21)*** held that in such like facts and circumstances, as are in the instant case, the relevant Article is 181 of Schedule 1 ibid. The august Apex Court in the referred judgment observed as follows:-

> ***"It has been emphasised that rule 13 has dual role: one when it is applied directly in connection with ex paste decree passed under rule 6 of Order IX and the other, by reference, when the ex parte decree is under Order XVII, rule 2. Similar views were expressed by the Supreme Court of India in Sangram Singh v. Election Tribunal A I R 1955 S C 425. When dealing with the adjourned hearing dealt with in Order XVII, it was held that Rule 2 thereof applies to the non-appearance on the day fixed for the adjourned hearing. "In that event, the Court is thrown back to Order IX with the additional power to made `such order as it thinks fit'; when it goes back to Order IX it finds that it is again empowered to proceed ex parte on the adjourned hearing in the same way as it did, or could have done if one or the other parties had not appeared at the first hearing, that is to say, the right to proceed ex parte is a right which accrued from day to day, because at each adjourned hearing the Court is thrown back to Order IX, rule 6. It is not a mortgaging of the future but only applies***

to the particular hearing at which a party was afforded the chance to appear and did not avail himself of it".

If Order IX, rule 13 applies to ex parte decree passed under clause (a) of rule 6(1) thereof and also by reference to similar decree passed under Order XVII Rule 2, and if the language used in Article 164 is relatable to rule 6(1)(a) and first part of Order IX, rule 13, which caters for situation arising out of rule 6(1)(a), i.e. when `summons, was not duly served ; when it would be logical to assume that Article 164 relates to the ex paste decree passed under Rule 6(1)(a) on the first hearing and not to an ex parte decree passed on the adjourned hearing under Order XVII, rule 2. If a `notice' which was required by natural justice or by law to be served on a defendant to afford him an opportunity for appearance on an adjourned bearing and it was not duly served on him; then his case would not be governed by Article 164, because it would not be a case of first hearing for which "summons" was to be issued. This interpretation of Article would also permit a judicious interactions of first and third columns thereof ; in that, it would govern only those applications which seek the setting aside of that ex parte decree which has been passed after the service (or non-service) of the "summons" issued for the first hearing visualised under Order IX, rule 6(1)(a). The word "summons" is not only the key to the interpretation of third column, but it will also govern the entire article. When any cause is shown for non appearance at the first hearing whether non-service of `summons' or any other sufficient cause, e.g. an accident on the way, an act of God or act of State beyond

human control, only Article 164 would apply and limitation would commence from the date of the knowledge of the decree, when the `summons' was not duly served ; otherwise from the date of the decree. And the remaining cases, other than those of first hearing, would not be governed by Article 164.

The next question arises as to what would be the period of limitation for an application for setting aside an ex parte decree, not covered by Article 164. That application may or may not be under section 151. It could still be under the second part of rule 13 of Order IX, though in some cases section 151 might also apply. When defendant makes an application under Order 1X, rule 13 in connection with an ex parte decree, which is not passed under, rule 6 of order IX (on the first hearing), it would not be governed by Article 164. But that would not necessarily mean that there is no period of limitation for such an application. It is not essential here to examine the effect of "null and void order" on the question of limitation; P is simple that where the defendant makes an application for setting aside an ex parte decree, which is not covered by Article 164, it would be governed by Article 164, it would be governed by residuary Article 181 and the period of limitation would be three years from the accrual of the right to apply. Undoubtedly this period of limitation would be more than necessary in some of these applications, but so would be the case in several other applications covered by Article 181. It is for the Legislature to do the exercise of rationalisation, in the light of experience gained during three quarters of a country.

In this case, as both the applications were made within three years of the ex parte decree as also from the date of the knowledge of the decree therefore, they were within limitation on the assumption that the defendant had no `notice' of the date of hearing when the decree was passed-the decree having been passed on a date after the initial service of "summon" and on fresh hearing, after the return of the records from the High Court. In this view of the matter, the impugned judgment does not suffer from any defec regarding question of limitation. Although the course suggested an followed in Muhammad Swaleh's case could also be adopted in this case, in view of the legal position clarified earlier, it is not necessary to do so".

09. In view of the above judgment of Hon'ble Supreme Court of Pakistan the applications filed by the appellants were not barred by limitation. Even otherwise, the learned Trial Court though has held that service was effected upon the appellants in the instant appeal but has not mentioned any proof of the same. Moreover, service through substituted mode is always indirect mode and if a party/person appears before the Court and can show that he had no personal knowledge of the filing of the lis the Court should recall the ex-parte proceedings/order and set it aside accordingly.

10. In view of foregoing reasons, instant appeals are allowed and the impugned order is set aside. Consequently, the applications filed by the appellants shall be deemed to be pending and shall be decided on

merits after satisfaction, whether at the time of reactivation of the case, notices were served upon the appellants. Since the matter is pending since long, therefore, the applications shall be decided expeditiously preferably within a period of 45 days from this order.

(AAMER FAROOQ)
JUDGE

Shakeel Afzal

Approved For Reporting