

Form No: HCJD/C-121
ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

Writ Petition No. 3708 of 2021

Tausif Ahmed

Versus

Mst. Shaista Malik, etc.

S.No. of order/ proceeding	Date of order/ proceeding	Order with signature of Judge and that of parties or counsel where necessary.
(01)	20.10.2021	M/s Mazhar ul Haq Hashmi & Umar Farooq Malana, Advocates for the petitioner.

The petitioner has filed the instant writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, by assailing the impugned order dated 06.02.2021, passed by learned Civil Judge 1st Class, West-Islamabad, whereby right to file written statement of the petitioner has been closed.

02. Brief facts of the case are that the respondent No.1/plaintiff filed a suit for recovery of Rs. 26,04,663/- on account of different heads i.e. Rent, Bills, Renovation, Legal charges, Damages etc.

03. That the petitioner/defendant was summoned by the learned trial Court; learned counsel for the petitioner/defendant filed *wakalatnama* on 06.02.2020, in the Court of learned Civil Judge 1st Class, West-Islamabad and thereafter, on many occasions the case was adjourned for submission of written statement but the same was not submitted and the right to file written statement of the petitioner / defendant was closed vide impugned order dated 06.02.2021.

04. Learned counsel for the petitioner / defendant, *inter alia*, contends that impugned order is the result of patent illegality; learned trial Court has totally failed to look into the proper provisions of law and observations; order passed by the learned trial Court is quite illegal, arbitrary and against the principle of natural justice, law and equity and has prayed for setting aside of impugned order.

05. Arguments heard, record perused.

06. Certified copy of the order sheet of learned trial Court shows that learned counsel for the petitioner / defendant filed

wakalatnama on 06.02.2020; the case was adjourned for 06.03.2020, for filing of written statement with final opportunity but the same was not submitted. Subsequently, the case was adjourned for about nine (09) dates but written statement was not submitted even on 03.12.2020, last and final opportunity was provided by the learned trial Court for submission of written statement but the same was not submitted and after a period of one year, the right to file written statement of the petitioner / defendant was closed vide impugned order dated 06.02.2021.

07. Statement of respondent No.1/plaintiff was recorded by the learned trial Court on 08.03.2021; learned counsel for the petitioner / defendant cross-examined the PW-1 on 19.07.2021, but did not bother to challenge the impugned order dated 06.02.2021, rather the instant writ petition has been filed on 16.10.2021 i.e. with the delay of more than eight (08) months after passing of the impugned order dated 06.02.2021 and after about 03 months of cross-examining the PW-1/plaintiff's witness.

08. According to the Code of Civil Procedure (Amendment) Act, 2020, Section 26-A in the Code of Civil Procedure, 1908 has been inserted which is reproduced for ready reference:

"26A. Written statement and proposed issues by the defendant.—(1) *The Defendant shall file written statement not later than thirty days from the date of service to the plaintiff:*

Provided that if the defendant fails to file written statement on the date fixed, the court may grant an opportunity to file the same not later than fifteen days subject to payment of adjournment costs:

Provided further that if the defendant fails to file after the opportunity given under the first proviso, a final opportunity may be given by the Court to file the written statement not later than fifteen days subject to payment of adjournment costs after which the defendant shall lose the right of defence and the Court shall close the right to defend the case:

Provided also that the written statement may be allowed to be filed by the Court upon payment of costs to be determined by it, if the defendant through an application supported by an affidavit, satisfies the Court that he had just and sufficient cause and the Court record reasons for it.

(2) -----

(3) -----"

09. Order XIII Rule 10 of Code of Civil Procedure, 1908, provides as under:

"10. Procedure when party fails to present written statement called for by Court. Where any party from whom a written statement is so required fails to present the same within the time fixed by Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit."

10. It is held by the Hon'ble Supreme Court of Pakistan in a case titled as **"Riaz ul Haq and others Vs. Muhammad Asghar and others" (2017 SCMR 1841)**, that:

"Order VIII, Rule 10 of C.P.C. prescribes a timeframe for filing a written statement which cannot ordinarily exceed 30 days. A perusal of the record indicates that the petitioners were granted at least four opportunities spread over a period of about five months to file the written statement. However, despite the time given and indulgence shown by the Court, the petitioners failed to file their written statement without any lawful justification. Where law prescribes a time for doing a certain act, the same should ordinarily be adhered to unless cogent reasons and lawful justification is presented before the Court justifying an extension of such time. No such

justification was pleaded before the trial, appellate or revisional Court. Even before us, other than submitting that one more opportunity may be granted against payment of costs, the learned counsel did not furnish any reason or justification for the petitioners' failure to file their written statement despite repeated adjournments granted by the Court."

Reliance is placed on cases titled as **"National Logistic Cell (N.L.C) Vs. Hazrat Ali and others" (2010 SCMR 1970), "District Coordination Officer, Sukkur and 8 others Vs. Khan Muhammad through General Attorney and 3 others" (2013 MLD 1369), "Mst. Bibi Sundas and others Vs. Mst. Bibi Shahida and others" (2020 CLC 1475).**

11. The August Supreme Court of Pakistan in a case titled as **"Moon Enterpriser CNG Station, Rawalpindi Vs. Suit Northern Gas Pipelines Limited, through General Manager, Rawalpindi and another" (2020 SCMR 300).** while dealing with a similar question of law pertaining to application of Order XVII Rule 3 C.P.C has, in unequivocal terms, held that:

"In our view it is important for the purpose of maintaining the confidence of the litigants in the court systems and the presiding officers that where last opportunity to produce evidence is granted and the party has been warned of the consequences, the court must enforce its order unfailingly and unscrupulously without exception. Such order would in our opinion not only put the system back on track and reaffirm the majesty of the law but also put a check on the trend of seeking multiple adjournments on frivolous grounds to prolong and delay proceedings without any valid or legitimate rhyme or reason. Where the Court has passed an order granting the last opportunity, it has not only passed a judicial order but also made a promise to the parties to the lis that no further adjournments will be granted for any reason. The Court must enforce its order and honour its promise. There is absolutely no room or choice to do anything else. The order to close the right to produce evidence must automatically follow failure to produce evidence despite last

opportunity coupled with a warning. The trend of granting (Akhri Mouqa) then (Qatai Akhri Mouqa) and then (Qatai Qatai Akhri Mouqa) make a mockery of the provisions of law and those responsible to interpret and implement it. Such practices must be discontinued, forthwith". (Emphasis supplied)

Reliance is also placed on a case titled as **"Rana Tanveer Khan Vs. Naseer Ud Din and other" (2015 SCMR 1401).**

12. It is well settled that certiorari is only available to quash a decision for an error of law. It will also be issued for correcting errors of jurisdiction when an inferior Court or a tribunal acts without jurisdiction or in excess of its jurisdiction, or fails to exercise its jurisdiction or where the Court or a tribunal acts illegally in exercise of its undoubted jurisdiction and it decides a matter in violation of the principle of natural justice. The High Court while issuing a writ of certiorari acts in exercise of supervisory and not appellate jurisdiction.

13. In a case titled as **"Amjad Khan Vs. Muhammad Irshad (Deceased) through LRs, (2020 SCMR 2155)"**, it is held by the

Hon'ble Supreme Court that:

"It is by now a settled principle of law that the High Courts must not exercise their constitutional jurisdiction in order to interfere with the discretion exercised by lower courts unless the same suffers from jurisdictional, factual or legal errors. In other words, such interference would be justified in cases where the impugned order has been passed without jurisdiction or is based on misreading or non-reading of evidence, or is not in accordance with the law. If none of these errors is present, the High Courts must not exercise their constitutional jurisdiction to interfere with the findings of lower courts merely because it reached a different conclusion as to the controversy than the latter. In this regard, reference can be made to a collective reading of Mst. Mobin Fatima v. Muhammad Yamin (PLD 2006 SC 214) and Nadira Shahzad v.

Mubashir Ahmad (1995 SCMR 1419)."

14. In a case titled as ***"President All Pakistan Women Association, Peshawar Cantt Vs. Muhammad Akbar Awan and others" (2020 SCMR 260)***, it is held by the Hon'ble Supreme Court that:

"It is settled law that when the Statute does not provide the right of appeal against certain orders, the same cannot be challenged by invoking the constitutional jurisdiction of the High Court in order to gain a similar objective. Where a Statute has expressly barred a remedy which is not available to a party under the Statute, it cannot be sought indirectly by resort to the constitutional jurisdiction of the High Court. The High Courts exercising constitutional jurisdiction must be fully cognizant and conscious of this Rule and strictly adhere to the same in the interest of advancing the policy of law and delivering expeditious justice in accordance with the law and the Constitution. Even otherwise, constitutional jurisdiction is equitable and

discretionary in nature and should not be exercised to defeat or bypass the purpose of a validly enacted statutory provision."

15. It is held by the Hon'ble Supreme Court of Pakistan in a case titled as **"Chief Executive MEPCO and others Vs. Muhammad Fazil and others" (2019 SCMR 919)**, that:

"Where the Court or the Tribunal has jurisdiction and it determines specific question of fact or even of law, unless patent legal defect or material irregularity is pointed out, such determination cannot ordinarily be interfered with by the High Court while exercising jurisdiction under Article 199 of the Constitution."

16. It has been held by the Hon'ble Supreme Court of Pakistan in a case titled as **"Chairman, NAB Vs. Muhammad Usman and others" (PLD 2018 SC 28)**, that:

"The powers of judicial review vested in High Court under Article 199 of the Constitution is no doubt a great weapon in the Judge's hands however, the

same shall not be exercised in a case where discretion is exercised by the subordinate court/Tribunal in a fair and just manner without violating or disregarding statutory provision of law, likely to occasion the failure of justice. Ordinarily such extraordinary jurisdiction shall not be exercised at random and in routine manner. The following case law is reproduced for the guidance of the learned Judges of the High Court for future course of action:

(i) Brig (Rtd.) Imtiaz Ahmed v. Government of Pakistan, through Secretary, Interior Division, Islamabad (1994 SCMR 2142).

(ii) Shahnaz Begum v. The Hon'ble Judges of the High Court of Sindh and Balochistan (PLD 1971 SC 677).

(iii) Malik Shaukat Ali Dogar v. Ghulam Qasim Khan Khakwani (PLD 1994 SC 281).

17. Reference in this regard may also be made to the following case laws / principles laid down by the Hon'ble Supreme Court of Pakistan:

*(i) In a case titled as "**Syed Saghir Ahmad Naqvi Vs.***

Province of Sindh” (1996 SCMR

1165), it has been held as follows:

"The statute excluding a right of appeal from the interim order cannot be passed by bringing under attack such interim orders in Constitutional jurisdiction. The party affected has to wait till it matures into a final order and then to attack it in the proper exclusive forum created for the purpose of examining such orders."

(ii) In a case titled as "**Mumtaz Hussain alias Butta Vs. Chief Administrator of Auqaf, Punjab**" **(1976 SCMR 450)**, it has been held

as follows:-

"As the said Ordinance has taken away the right of petitioner to interim relief, learned counsel submitted that this was a ground which entitled the petitioner to prosecute a writ petitioner despite the pendency of the proceedings on the District Court. The argument is misconceived because the writ jurisdiction of the superior Courts cannot be invoked in aid of injustice and in order to defeat the

express provisions of the statutory law.”

18. Learned counsel for the petitioner has failed to point out as to how the impugned / interim order passed by the learned Civil Judge 1st Class, West-Islamabad was the consequence of an error of law or without jurisdiction or in excess of jurisdiction.

19. In view of the above prospective, the instant writ petition has no merits and the same is **dismissed in limine.**

**(TARIQ MEHMOOD JAHANGIRI)
JUDGE**

Ahmed Sheikh

Approved for Reporting