

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD. **JUDICIAL DEPARTMENT.**

W.P. No. 1108/2013.

Aftab Khan

Versus

Muslim Commercial Bank Limited, etc.

Petitioner by: Dr. Zubair Sarfraz and Mr. Ashiq Hussain
Tarar, Advocates.

Respondent No.1 by: Ms. Moona Hussain, Advocate.

Date of Decision: 29.11.2019.

MOHSIN AKHTAR KAYANI, J: Through this Writ Petition, the petitioner has assailed the order dated 30.01.2013, passed by learned Judge, Banking Court, Rawalpindi, whereby application filed by petitioner to set aside the *ex-parte* proceeding was dismissed.

2. Learned counsel for the petitioner contends that suit titled **MCB Vs. Aftab Khan** was filed before learned Judge, Banking Court, whereby *ex-parte* proceedings were initiated on 02.03.2012, the petitioner filed an application against the said *ex-parte* proceedings to set aside the same but the learned trial Court dismissed the same without considering the law on the subject; that petitioner was not given due opportunity of hearing which is the fundamental right of the petitioner.

3. Conversely, learned counsel for respondent No.1/MCB contends that petitioner was served through publication in Urdu and English newspaper and even after publication petitioner has failed to appear before the Court which resulted into initiation of *ex-parte* proceedings, however, his application was dismissed due to his conduct as well as due to non-submission of application for leave to appear and defend the suit; that learned trial Court has passed the impugned order within four corners of law.

4. Arguments heard, record perused.

5. Perusal of record reveals that suit was filed by MCB/respondent No.1 against the petitioner for recovery of Rs.550,093.60 under the Financial Institutions (Recovery of Finance) Ordinance, 2001, whereas petitioner was proceeded against *ex-parte* on 02.03.2012 and he filed application for setting aside of *ex-parte* proceedings on 19.03.2012, which was contested by respondent's side and the same was dismissed through impugned order.

6. The record further reflects that the petitioner's appearance has been marked on 02.03.2012 as he has submitted the power of attorney on the said date but surprisingly the said order was subsequently amended, wherein the reference of submission of power of attorney was incorporated later on, which is not the part of original order in Urdu. The original order is reproduced as under:-

"2-3-2012 منجانب مدعی کوئی حاضر نہ ہے۔
منجانب مدعا علیہ کوئی حاضر نہ ہے۔
معیاد گزر چکی ہے۔ مدعا علیہ کے خلاف کاروائی یکطرفہ عمل میں لائی جاتی ہے۔ برائے بحث یکطرفہ
بتقرر 2012-5-9 پیش ہووے۔ سنایا گیا۔"

Later on following line was added:-

"مکرر بعد از پیشی وکالت نامہ منجانب چوہدری زبیر سرفراز داخل شد۔"

7. The said order reflects two separate stances, wherein the limitation period for leave to appear and defend the suit had already been expired, as a result whereof *ex-parte* proceedings were initiated. As per Section 10 of the Financial Institutions (Recovery of Finance) Ordinance, 2001 the defendant shall not be entitled "to defend the suit until he obtains leave from the banking court to defend the same", whereas in this case petitioner has not submitted any application for leave to appear and defend the suit as prescribed in Section 10(2) of the Financial Institutions (Recovery of Finance) Ordinance, 2001 within period of 30 days and this aspect has specifically been referred in the impugned order in

which learned trial Court has referred "میعاد کزر چکی ہے" There is no cavil to the proposition that service of notice upon petitioner has to be seen from the last order, whereby publication in Daily Jurat (in Urdu) and Daily The Nation (in English) was directed to be published vide order dated 04.11.2011 and when publications were placed before the Court, the Court has no other procedure except to proceed against the petitioner, who has not opted to appear before the Court on the given date i.e. 02.03.2012.

8. It is trite law that starting point for the period of limitation in such type of suit has to be calculated by the Court from first date of publication for the purpose of leave to appear and defend the suit. Reliance is placed upon 1999 SCMR 2353 (Qureshi Salt and Spices Industries, Khushab Vs. Muslim Commercial Bank Limited, Karachi), 2000 CLC 896 (National Bank of Pakistan Vs. Pakistan Tanks Terminal (Pvt.) Ltd.), whereas in this case notices have been published in the newspaper on 02.12.2011, whereas the petitioner was served through Bailiff on 04.01.2012 but despite service of notice, petitioner has not opted to file application for leave to appear and defend the suit in terms of Section 10(2) of the Financial Institution (Recovery of Finance) Ordinance, 2001, therefore, *ex-parte* proceedings have rightly been initiated against the petitioner. The petitioner has failed to demonstrate from record as to how his rights have been effected.

9. Besides the above referred background, it has further been observed that petitioner has filed instant writ petition against interlocutory order, when confronted, learned counsel for the petitioner contends that order impugned is not an appealable order in terms of Section 22 of the Financial Institution (Recovery of Finance) Ordinance, 2001, whereby the aggrieved person can only assail the judgment, decree, final order passed by the Banking Court within period of 30 days and even no appeal, review or revision shall lie against the order passed in application for leave to appear and defend or any interlocutory

order of banking Court which does not dispose of the entire case before the Banking Court in terms of Section 22(6) of the Financial Institutions (Recovery of Finance) Ordinance, 2001.

10. In view of the argument rendered by learned counsel for the petitioner the bar provided U/S 22(6) of the Financial Institutions (Recovery of Finance) Ordinance, 2001, could not be circumvented by filing any appeal, revision or constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 with a plea that no such remedy was available. Reliance is placed upon 2013 CLD 2033 (Bank of Punjab through Authorized Attorney Vs. AMZ Ventures Limited). Similarly, it is also settled that interim order in absence of right of appeal, review or revision could be challenged in an appeal from final judgment/decreed by the plaintiffs or defendants as the case may be. Reliance is placed upon 2013 CLD 854 (Crescent Leasing Corporation Limited Vs. Sarhad Goods Transport Company). When Legislature had specifically prohibited the filing of an appeal against the interlocutory order, no exception could be drawn from such legislative intent, which otherwise would amount to defeating the clear intention of the legislature. Reliance is placed upon 2013 CLD 805 (Nadeem Akhtar Vs. Dubai Islamic Bank (Pakistan) Ltd.).

11. In view of above background, the constitutional petition filed by the petitioner would amount to negate the provision of the statute and bypassing legislative intent of the statute, constitutional jurisdiction of High Court could not be invoked. Reliance is placed upon 2015 CLD 257 (Sheikh Muhammad Usman Vs. Judge Banking Court No.1), therefore, instant writ petition is not maintainable under law as well on merits and the same is hereby dismissed.

(MOHSIN AKHTAR KAYANI)
JUDGE