

JUDGMENT SHEET.
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT.

C.R. No.23/2019.

Mashkooor Ahmad Khan Sherwani Vs. Abdul Aziz Khan Niazi.

Petitioner by:

Mr. Fahad Khan Tareen,
Advocate.

Respondent Abdul Aziz Khan Niazi:

In Person.

Date of Decision:

17.12.2019.

MOHSIN AKHTAR KAYANI, J:- Through this civil revision petition, the petitioner has assailed the order dated 12.12.2018, passed by learned Civil Judge 1st Class, Islamabad-West, whereby application under Order IX Rule 7 CPC read with sections 12(2) and 151 CPC for setting aside ex-parte proceedings has been dismissed.

2. Learned counsel for the petitioner contends that the petitioner has been proceeded against ex-parte vide order dated 04.10.2005 and he filed an application for setting aside ex-parte proceedings on 07.09.2018 mainly on the ground that he has not been served in proper manner and ex-parte proceedings were initiated without due observance of law; that the petitioner left Pakistan in the year 2002 and the pendency of the civil suit came into his knowledge on 28.08.2018, when his other cases were heard by different Courts; that the suit for recovery of damages is still pending, therefore, the petitioner cannot be deprived of his legal right to defend his case on the principle of *Audi Alteram Partem* as well as under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, therefore, order dated 12.12.2018 may be set aside.

3. Conversely, the respondent in person contends that his counsel is busy before Apex Court, therefore, he will argue his case himself. The respondent further contends that the petitioner was on watching brief and has filed application for setting aside ex-parte proceeding with delay only to frustrate the proceedings

initiated by him; that he has filed different cases against the petitioner for recovery of his hard earned money as such the decrees have partially been satisfied and the petitioner's ground of knowledge qua the suit is afterthought is not reflected from the record.

4. I have heard the arguments and gone through the record.

5. Perusal of the record reveals that the respondent filed a suit for recovery of damages against the petitioner before this Court numbered as C.S No.33/2005, which was transferred to Civil Court after change of pecuniary jurisdiction. Notice could not be served upon the petitioner and he was proceeded against ex-parte on 04.10.2005, however, suit is still pending before the Trial Court. The petitioner filed application for setting aside ex-parte proceedings in terms of Order IX Rule 7 CPC read with section 12(2) and 151 CPC mainly on the ground that he was not served and he received the information via email issued by the Secretary, Islamabad Stock Exchange to learned counsel for the petitioner on 28.08.2018 that he has been proceeded against ex-parte. The petitioner assailed the ex-parte proceedings on the ground mentioned above, whereas learned Trial Court after hearing the learned counsel for the parties dismissed the application vide impugned order dated 12.12.2018 only on one ground that the application has been filed after 13 years as such the delay has not been explained, whereas, the petitioner is entitled to justify his reasons for non-service as well as discovery of knowledge of the suit on 28.08.2018, which was conveyed to him through email of the Secretary, Islamabad Stock Exchange but these issues have not been addressed by learned Trial Court. The question of knowledge of ex-parte proceedings is question of fact, which can only be determined after recording of pro and contra evidence of the parties and the application cannot be decided directly. Reliance is placed upon 2013 YLR 1584 [Peshawar] (Mehmood Hussain Shah and others vs. Mst. Parvaizi Bibi and others).

6. Similarly, the cause of non-appearance as reflected from the pleadings clearly demonstrates that the petitioner was out of the country due to different issues in Islamabad Stock Exchange and even has been proceeded against by

Islamabad Stock Exchange Authorities, however, cause of non-appearance is to be evaluated by the Court liberally and the parties should be allowed to participate in the proceedings without giving any premium of technicalities. It is settled law that in deciding such application, the Courts should exercise their powers liberally in favour of the defendant. Reliance is placed upon 1970 SCMR 251 (Landhi Industrial Trading Estate Ltd. Vs. Government of Pakistan), wherein it has been held that:-

"The rules of procedure as laid down in C. P. C. are principally intended for advancing justice and not for retarding it on pure technicalities."

7. Even there is no bar to participate in the proceedings, when the suit has not yet been decided. Reliance is placed upon PLD 1973 Lahore 659 (Manzoor Ahmed Bhatti vs. Road Transport Corporation). Similar view has also been rendered by Apex Court in the judgment reported as 1992 SCMR 1009 (Police Department through Deputy Inspector-General of Police and another vs. Javid Israr and 7 others), wherein it has been held that:-

"It is the right of every defendant and also the principle of natural justice, to be given a chance of hearing before any order is passed against his interest. The rules of procedure are meant to advance justice and preserve rights of litigants and they are not to be interpreted in a way as to hamper the administration of justice."

8. While considering last contention of the respondent qua time frame for filing of application for setting aside ex-parte proceedings, the same was required to be filed within the period of 03 years from the date of knowledge in terms of Article 181 of the Limitation Act, 1908. Reliance is placed 2002 MLD 322 [Lahore] Malik Yar Muhammad and 3 others vs. Muhammad Farooq Ahmad Khan and 3 other). Therefore, the application filed by the petitioner from the date of his knowledge is well within time, however, contrary view can only be considered on the basis of factual inquiry, which exercise cannot be made by this Court while dealing with instant civil revision petition U/S 115 CPC.

9. While considering above background, this Court is of the view that impugned order dated 12.12.2018 has been passed without considering legal and

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factual aspects of law as well as jurisdiction exercised by Trial Court was not vested in it. Therefore, instant civil revision petition is allowed subject to payment of costs of Rs.20,000/-, impugned order dated 12.12.2018 is set aside. Learned Trial Court is directed to afford one opportunity (not more than 30 days) to the petitioner for filing of his written statement, failing which, learned Trial Court shall proceed in accordance with law.

10. Before parting with this judgment, it is important to note that the suit pertains to the year 2005, therefore, learned Trial Court seized with the matter is directed to decide the same within a period of 06 months from the date of receipt of copy of this judgment under intimation to this Court.

(MOHSIN AKHTAR KAYANI)
JUDGE

R Anjam