

***Stereo.HCJDA 38.***  
***JUDGMENT SHEET.***

***LAHORE HIGH COURT***  
***RAWALPINDI BENCH RAWALPINDI.***  
***JUDICIAL DEPARTMENT***

***W.P.No.2998 of 2018***

***FAZAL HUSSAIN***

***Versus.***

***RAZIA BEGUM, ETC.***

***JUDGMENT.***

*Date of hearing:*     ***23.11.2023***

*Petitioner by:*       ***Mr. Abdul Masood Awan, Advocate***

*Respondent No.1*   ***Mr. Muhammad Adeel Arshad, Advocate.***  
*by:*

***Mirza Viqas Rauf, J.*** *This constitutional petition emanates from a suit for recovery of maintenance instituted by respondent No.1 (hereinafter referred to as “respondent”). Suit was decreed ex-parte vide judgment dated 17<sup>th</sup> March, 2016. The petitioner moved an application for setting aside ex-parte decree but it was dismissed vide order dated 3<sup>rd</sup> February, 2018, being barred by time. Feeling dissatisfied, the petitioner though filed an appeal before the learned Additional District Judge, Chakwal but remained unsuccessful as the appeal was dismissed through judgment dated 30<sup>th</sup> July, 2018.*

***2.***       *Learned counsel for the petitioner contended that the petitioner was never served with the process of the Court. He added that on attaining the knowledge about the ex-parte decree, the petitioner immediately moved an application seeking setting aside of the same but it was dismissed being barred by time. Learned counsel submitted that the petitioner feeling aggrieved though preferred an appeal but appeal was also dismissed in a mechanical manner. It is emphatically contended that both the Courts while dismissing the application have erred in law.*

3. *Conversely, learned counsel for the “respondent” defended the impugned judgment as well as order and submitted that the petitioner remained indolent and intentionally avoided his appearance. Learned counsel added that the application for setting aside ex-parte decree was rightly dismissed.*

4. *Heard. Record perused.*

5. *Suit for recovery of maintenance was instituted by the “respondent” before the learned Judge Family Court, Chakwal, who proceeded to issue process against the petitioner. On account of non-appearance, the petitioner was initially proceeded against ex-parte vide order dated 24<sup>th</sup> November, 2015 and finally suit was decreed as such by way of judgment dated 17<sup>th</sup> March, 2016. It is claim of the petitioner that he was not aware about the passing of the ex-parte decree and on attaining the knowledge, he immediately moved an application, which was well within time but it is dismissed being barred by time in an illegal and unlawful manner.*

6. *For the expeditious settlement and disposal of disputes relating to the marriage and family affairs and for matters connected therewith, Family Courts were established under the Family Courts (Act XXXV of 1964) (hereinafter referred to as “Act, 1964”). Section 7 of the “Act, 1964” prescribes the manner of institution of suits before the Family Court whereas section 8 deals with the procedure of intimation to defendant on presentation of plaint before the Family Court. Section 9 deals with the written statement and sub-section 5 of section 9 postulates that if the defendant fails to appear on the date fixed by the Family Court for his appearance, and it is proved that summons or notice was duly served on the defendant, the Family Court may proceed ex-parte. Since the suit was decreed ex-parte, so sub-sections 6 and 7 of section 9 of the “Act, 1964” would be quite relevant for the resolution of matter in issue, which are reproduced below for reference and convenience: -*

**9. (1) Written statement.— .....**

(2) ... ..

(3) ... ..

(4) ... ..

(5) ... ..

(6) *In any case in which a decree is passed ex parte against a defendant under this Act, he may apply within thirty days of the service of notice under sub-section (7) of the passing of the decree to the Family Court by which the decree was passed for an order to set it aside, and if he satisfies the Family Court that he was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was heard or called for hearing, the Family Court shall, after service of notice on the plaintiff, and on such terms as to costs as it deems fit, make an order for setting aside the decree as against him, and shall appoint a day for proceeding with the suit; provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside against all or any of the other defendants also.*

*(7) The notice of passing of the ex-parte decree referred to in sub-section (6) shall be sent to the defendant by the Family Court together with a certified copy of the decree within three days of the passing of the decree, through process server or by registered post, acknowledgement due, or through courier service or any other mode or manner as it may deem fit.*

(8) ... ..

(underlining supplied for emphasis)

7. *It is manifestly clear from the bare perusal of above referred provisions of law that in case a suit is decreed ex-parte, a defendant may apply within 30 days of the service of notice under sub-section 7 of section 9 of the “Act, 1964” of the passing of the decree to the Family Court by which the decree was passed for an order to set it aside. Sub-section 7 of section 9 of the “Act, 1964” commands the Family Court to send a notice of passing of ex-parte decree to the defendant together with a certified copy of the decree within three days of the passing of such decree through process server or by registered post, acknowledgement due or through courier service or any other mode or manner as it may deem fit. Admittedly, due compliance to sub-section 7 was not made at all by the Family Court.*

8. *So far contention of learned counsel for the “respondent” that this ground has not been taken in the petition, suffice to observe that*

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*sending of notice of passing of ex-parte decree in the manner provided in sub-section 7 of section 9 of the “Act, 1964” is the mandate of law. Nobody can be penalized on account of fault of the Court. Reference to this effect can be made to Syed AGHA HUSAIN SHAH and another v. Mst. DEENA BIBI and others (2017 CLC Note 69).*

9. *It is an oft repeated principle that when law provides a specific manner for performing an act, then it should be performed in such manner but in no other way. Needless to mention that limitation of 30 days for filing an application for setting aside ex-parte decree would start from the service of notice under sub-section 7 as added by the Ordinance LV of 2002. It would not be out of context to mention here that prior to insertion of sub-section 7, sub-section 6 ordained that in any case in which a decree is passed ex parte against a defendant under the Act, he may apply within reasonable time of the passing thereof to the Family Court by which the decree was passed for an order to set it aside. The word “reasonable time” was, however, substituted through the Amending Ordinance LV of 2002 dated 1<sup>st</sup> October, 2002 as “30 days” of the service of notice under sub-section 7 of the passing of the decree. In addition thereto, sub-sections 7 and 8 were also added therein.*

10. *Though Rule 13 of the Family Court Rules, 1965 postulates that an ex-parte decree or proceeding may for sufficient cause shown be set aside by the Court on application made to it within 30 days of the passing of the decree or decision but this rule is apparently showing scorn and derogative of the basic provision of “Act ,1964”. It is trite law that whenever there is an inconsistency between the rule and the basic provision of statute, the latter will prevail. Guidance in this respect can be sought from NATIONAL ELECTRIC POWER REGULATORY AUTHORITY versus FAISALABAD ELECTRIC SUPPLY COMPANY LIMITED (2016 SCMR 550). The relevant extract from the same is reproduced below: -*

*“11. NEPRA Rules, 1998 are framed by the Authority under section 46 of the Act, 1997 with the approval of the Federal Government. Rules and or Regulations are the progeny or off spring of a Statute and are to be strictly in conformity with the provisions of the Statute where under same are framed. It is settled proposition of law that the rules framed under a Statute are to remain within the precinct of the Statute itself and cannot transgress the limits and parameters of the parent Statute itself. All efforts are to be made to interpret the rules so as to bring it in conformity and without injuring the intent and spirit of the Statute, where it is not possible then the rules in as much as it is injuring the very intent and spirit which must yield to the Statute. This view finds support from a case reported as Ziauddin v. Punjab Local Government (1985 SCMR 365 @ 368), wherein it was held as under:-*

*"Rules framed under the statute could not go beyond and over reach the statute itself. To make implementation of statutory provision consistent harmonious directory effect must be given to requirement of Rule".*

*12. In another case reported as Pakistan v. Aryan Petro Chemical Industries (Pvt.) Ltd. (2003 SCMR 370) in paragraph 11 of the judgment, it was held that "This is a settled principle that a statutory rule cannot enlarge the scope of the section under which it is framed and if a rule goes beyond what the section completes, the rule must yield to the statute. The authority of executive to make rules and regulations in order to effectuate the intention and policy of the Legislature, must be exercised within the limits of mandate given to the rule making authority and the rules framed under an enactment must be consistent with the provisions of said enactment. The rules framed under a statute if are inconsistent with the provisions of the statute and defeat the intention of Legislature expressed in the main statute, same shall be invalid".*

*Reference to this effect can also be made to SUO MOTU CASE NO.13 OF 2009 (PLD 2011 Supreme Court 619) and Civil Appeals Nos.2296 to 2412 of 2001 "FEDERATION OF PAKISTAN through Secretary, Ministry of Finance and others versus Haji MUHAMMAD SADIQ and others" (PLD 2007 Supreme Court 133).*

*11. The nutshell of above discussion is that the Courts below have committed patent illegality while dismissing the application for setting aside ex-parte decree, being barred by time. Resultantly this petition is **allowed**. The impugned judgment as well as order dated 30<sup>th</sup> July, 2018 and 3<sup>rd</sup> February, 2018 are **set aside** being illegal and unlawful. As a sequel, the application for setting aside ex-parte decree shall be deemed to be pending before the learned Senior Civil Judge (Family Division),*

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*Chakwal, who shall decide the same afresh on its own merits strictly in accordance with law. No order as to costs.*

**12.** *Parties are directed to appear before the learned Senior Civil Judge (Family Division), Chakwal on 14.12.2023.*

**(MIRZA VIQAS RAUF)**  
**JUDGE**

**Approved for reporting.**

**JUDGE**

*Zeeshan*