JUDGEMENT SHEET
IN THE PESHAWAR HIGH COURT, D.I.KHAN BENCH
(Judicial Department)

W.P No. 35-D/2022 with
Interim Relief

Muhammad Jalil
Vs
Mst. Nagina Bibi
and others

For petitioner	Muhammad Mohsin Ali, Advocate
For respondents	Mr. Shakil Ahmad Katikhel, Advocate Muhammad Kamran Baloch, Advocate
Date of hearing	22.9.2022

JUDGMENT

MUHAMMAD FAHEEM WALI, J.- Through the instant petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner Muhammad Jalil has called in question the judgment dated 28.2.2022 rendered by learned District Judge-II, D.I.Khan, whereby his appeal against the order dated 25.11.2021 of learned Civil Judge-I/Judge Family Court-I, D.I.Khan was dismissed being time barred.

2. Precise summary of the case is that the respondent No.1 filed a suit for recovery for dissolution of marriage, dower, maintenance, dowry and gold ornaments etc against the present petitioner before learned Civil Judge-IX/Judge Family Court, D.I.Khan. When put on notice by the Court, the petitioner/defendant appeared and contested the suit by filing his written statement but later on remained absent before the Court, thus was placed and proceeded exparte. After recording exparte

evidence of plaintiff/respondent, partial exparte decree was passed in favour of respondent No.1 vide order dated 24.4.2019. Not contended with the same, the petitioner filed an application for setting aside ex-parte decree, which was dismissed by the learned trial Court on 25.11.2021. Feeling disgruntled from the said order, the petitioner preferred an appeal before learned appeal Court, which was also dismissed vide judgment dated 28.02.2022, hence the instant writ petition.

3. I have considered the arguments of learned counsel for the parties and perused the record with their valuable assistance.

4. Perusal of the record manifestly shows that impugned judgment and decree was passed on 24.4.2019 by learned trial court while the application for setting aside exparte decree was filed on 31.5.2019 with a delay of more than 09 days. The main claim of the petitioner is that his application for setting aside exparte decree is within time for the good reason that he received notice of the exparte decree on 30.5.2019 and on the same day he applied for obtaining attested copies of the order while on next day i.e 31.5.2019, he filed the subject application. Admittedly, the petitioner had participated in trial before the learned Family Court and thereafter due to his absence, he was placed exparte which culminated into exparte decree in favour of the respondent No. 1. In the instant case, the attitude and conduct of the petitioner is not a question but this Court has to consider the law point involved in it i.e

whether the time limitation for filing application was to be reckoned from the date of exparte proceedings so initiated or from the date of receipt of notice of exparte decree?

5. After delving into the record, it is manifestly clear that petitioner has established his plea that he got knowledge when he received notice of exparte decree i.e on 30.5.2019. In legal parlance, Article 164 of the Limitation Act, 1908 is applicable to an application by a defendant for an order to set aside a decree passed exparte and the prescribed period of limitation of 30 days starts running from the date of the decree, where the summons is not duly served, when the applicant has knowledge of the decree. The record reveals after getting knowledge of exparte decree, the application filed by the petitioner is well within time. The apex Court, while placing reliance on case ***Shahid Pervaiz alias Shahid Hameed v. Muhammad Ahmad Ameen (2006 SCMR 631),*** has also held a similar view in case ***Secretary Education Department, Government of N.W.F.P., Peshawar and others v. Asfandyar Khan (2008 SCMR 287)*** as:--

> "Article 164 of Limitation Act provides 30 days to file application for setting aside ex parte decree because petitioner/defendant had participated in the proceeding before the trial"

6. This Court, in case of ***Khayal Badshah v. Afzal Khan and 4 others (PLD 2015 Peshawar 59)*** has held the same view that if summons were served upon the defendant, period to set

aside ex parte decree would be governed under Article 164 of the Limitation Act which would be reckoned from the date of decree and if the summons was not served, the period for moving the application under Order IX Rule 13 C.P.C. would be reckoned from the date of acquiring knowledge of the ex parte decree, in both the cases, it would be thirty (30) days as prescribed under Article 164 of the Limitation Act.

7. Learned counsel for the respondent No. 1 has not been able to show any law to rebut the contention of petitioner regarding getting knowledge of exparte decree from the date of receipt of notice despite being given an opportunity to produce dictums of the Hon'ble Supreme Court of Pakistan in relation to section 9(7) of Family Courts Act, 1964. For ready reference, the sections 9(6) and 9(7) of Family Courts Act, 1964 are reproduced as under:-

Sections 9 (6) and 9(7) of Family Courts Act 1964

(6) In any case in which a decree is passed *ex parte* against a defendant under this Act, he may apply within [32][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. It is worth mentioning that it is imperative upon the Family Court to send notice to the defendant regarding the grant of an exparte decree passed against him through process server or by registered post, acknowledgment due or through courier service or any other mode or manner as it deems fit. In the instant case, it is apparent from the perusal of the exparte order dated 24.4.2019, wherein it is mentioned that *certified copy of this order/judgment alongwith certified copy of decree sheet be sent to the defendant and concerned Union Council within three days positively through registered posts upon the expenses of plaintiff.* In this respect, the petitioner stated that copy of exparte decree has been delivered to him on 30.5.2019 in view of section 9(7) of Family Courts Act, 1964, thus, onus was shifted to the petitioner/defendant to prove that copy of exparte decree has been sent to him that, in turn, he has proved through producing sufficient record. In holding this view, I am also fortified by the judgment laid down by this Court in the case titled ***Syed Agha Hussain Shah and others vs. Mst. Deena Bibi and others*** (***PLJ 2017 Peshawar 1, D.I.Khan Bench***). Therefore, it is held that the application for setting aside the *ex parte* decree was filed within a reasonable time. Even otherwise it has been observed in the numerous authorities

laid down by the superior Courts that *lis* should not be knocked out on technical grounds but endeavour of the Courts should be to decide the matters, involving valuable rights of the parties, on merits and party to the litigation should not be non-suited on mere technical grounds.

9. Relying upon the dictum laid down by the apex Court as well as section 9(7) of the Family Courts Act, 1964, I am of the considered view that the learned Additional District Judge-II, D.I.Khan was wrong in in his findings through the judgment impugned herein. Therefore, this writ petition is accepted, the impugned order dated 24.4.2019 and judgment dated 28.2.2022 are set aside and the application of the petitioner for setting aside the judgment and decree dated 24.4.2019 is allowed. The case is remanded to the learned Judge Family Court-I, D.I.Khan with the direction to decide the suit filed by respondent No. 1 Mst. Nageena Bibi on merits within a period of four months expeditiously.

Announced
September 22, 2022
*Hasnain/**

JUDGE

(S.B)
Hon'ble Mr. Justice Muhammad Faheem Wali