ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.2737/2019
Raja Naseem Akhtar Abbasi
Versus
Learned Additional District Judge-I and Others

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	30.07.2019	**Malik Tanveer-ul-Hassan, Advocate for the petitioner** **Mr. Qaiser Nazir Sipra, Advocate for respondents No.3 to 7**

Through the instant writ petition, the petitioner, Raja Naseem Akhtar Abbasi, impugns the order dated 16.07.2019, passed by the Court of the learned Additional District Judge, Islamabad, whereby respondents No.3 to 7's revision petition against the order dated 18.04.2019, passed by the Court of the learned Civil Judge, Islamabad, was allowed. Vide the said order dated 18.04.2019, the learned Civil Court had accepted the petitioner's application under Order IX, Rule 13 read with Section 12(2) of the Civil Procedure Code, 1908 ("C.P.C.") for setting aside the *ex-parte* judgment and decree dated 10.09.2018. Vide the said *ex-parte* judgment and decree, the learned Civil Court had decreed respondents No.3 to 7's suit for declaration and mandatory injunction.

2. The facts essential for the disposal of the instant writ petition are that on 07.11.2012, respondents No.3 to 7 filed a suit for declaration and mandatory injunction against the petitioner. Vide *ex-parte* judgment and decree dated 09.04.2013, the said suit was decreed. Subsequently, the petitioner filed an application under Section 12(2) C.P.C., for the setting-aside of the said *ex-parte* judgment and decree. Vide

order dated 10.11.2017, the said application was allowed and the *ex-parte* judgment and decree dated 09.04.2013, was set-aside.

3. It is an admitted position that after the setting-aside of the said *ex-parte* judgment and dated 09.04.2013, the petitioner had participated in the proceedings before the learned Civil Court. However, on 23.07.2018, the petitioner was proceeded against *ex-parte*. Vide *ex-parte* judgment and decree dated 10.09.2018, the said suit was decreed once again. On 14.03.2019, the petitioner filed an application under Order IX, Rule 13 read with Section 12(2) C.P.C. for setting aside the *ex-parte* judgment and decree dated 10.09.2018. Vide order dated 18.04.2019, the said application was allowed by the learned Civil Court, and the *ex-parte* judgment and decree dated 10.09.2018, was set-aside.

4. Aggrieved by the said order dated 18.04.2019, respondents No.3 to 7 preferred a revision petition before the Court of the learned Additional District Judge, Islamabad. Vide order dated 16.07.2019, the said revision petition was allowed and the order dated 18.04.2019, passed by the learned Civil Court was set-aside. Consequently, the petitioner's application under Order IX, Rule 13 read with Section 12 (2) C.P.C. was dismissed. The said order dated 16.07.2019 has been assailed through the instant writ petition.

5. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that the orders/judgments passed by the learned Courts below are at variance; that the absence of the petitioner from the Court on the date on which he was proceeded against *ex-parte* was not

deliberately, because he has not been issued a notice or summon after his counsel had withdrawn his *vakalatnama*; that the address of the petitioner given by respondents No.3 to 7 in the suit was wrong; that law favours adjudication on merits rather than technicalities; and that the *ex-parte* judgment and decree dated 10.09.2018 had been passed in violation of the principles of natural justice. Learned counsel for the petitioner prayed for the petition to be allowed in terms of the relief sought therein.

6. On the other hand, learned counsel for respondents No.3 to 7 submitted that the impugned order dated 16.07.2019 did not suffer from any legal or jurisdictional infirmity so as to warrant interference in the Constitutional jurisdiction of this Court; that since the earlier *ex-parte* judgment and decree dated 09.04.2013 had been set-aside, the petitioner should have been vigilant and not absented himself from the Court on 23.07.2018, when he was proceeded against *ex-parte*; that the petitioner was proceeded against *ex-parte* on 23.07.2018, after the learned Civil Court had issued notice "*parvi*" to him; that the application for the setting aside of the *ex-parte* judgment and decree was filed beyond the limitation period provided by law; and that since the petitioner had not particularized in his pleadings the fraud on the basis of which the *ex-parte* judgment and decree dated 09.04.2013 was obtained, the said application was not worthy of consideration. Learned counsel for respondents No.3 to 7 prayed for the writ petition to be dismissed.

7. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

8. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 4 above and need not be recapitulated.

9. The *ex-parte* judgment and decree was passed by the learned Civil Court on 10.09.2018 whereas the application to set-aside the said *ex-parte* judgment and decree was filed by the petitioner on 14.03.2019.

10. Article 164 of the Schedule to the Limitation Act, 1908 provides a limitation period of thirty days for an application by a defendant for an order to set-aside a decree passed *ex-parte*. The said thirty-day limitation period is to commence from the date of the decree, but where summons were not served on the defendant, the limitation period is to commence when the applicant/defendant gains knowledge of the decree.

11. In the case at hand, since the petitioner had been appearing in the suit rather it was on his application that the earlier *ex-parte* judgment and decree dated 09.04.2013 was set-aside, therefore, the thirty-day limitation period for the filing of an application for the setting aside of the *ex-parte* judgment and decree dated 10.09.2018 commenced from the date of the said decree.

12. This made the petitioner's application dated 14.03.2019 grossly time-barred, and therefore, liable to be dismissed. In holding so, I derive guidance from the law laid down in the following cases:-

(i) In the case of Shahid Pervaiz Vs. Mohammad Ahmad Ameen (2006 SCMR 613), it has been held *inter-alia* that after the defendant had joined the proceedings before the learned Trial Court and filed a

written statement, an *ex-parte* decree was passed against him. Four months after the passing of the *ex-parte* decree, the defendant filed an application for the setting aside of the *ex-parte* judgment and decree. It was held that since the defendant had participated in the proceedings before the learned Trial Court, the limitation period for filing an application for the setting aside of the *ex-parte* decree was thirty days starting from the date of the decree as provided in Article 164 of the Schedule to the Limitation Act, 1908. The order of the learned Trial Court dismissing the defendant's time barred application for the setting aside of the *ex-parte* judgment and decree was maintained up to the Hon'ble Supreme Court.

(ii) In the case of <u>Secretary Education Department, Government of N.-W.F.P. Vs. Asfandiar Khan (2008 SCMR 287)</u>, the learned Trial Court had dismissed the defendant's application for the setting aside of the *ex-parte* judgment and decree as it was filed fifteen months after the decree. Since the defendant had participated in the proceedings before the learned Trial Court before the suit was decreed *ex-parte*, the defendant's contention that the limitation period for filing an application for the setting aside of an *ex-parte* decree was three years and not thirty days, was spurned concurrently up to the Hon'ble Supreme Court. In paragraph 05 of the said report, it was held *inter-alia* as follows:-

> ***"5. ... Since it was well within the knowledge of petitioners that suit was pending against them and were declared***

> ***ex parte as such Article 164 of Limitation Act would be applicable in their case whereby period to move application for condonation of delay is 30 days. In the similar circumstances, it was held by this Court in the case of Shahid Pervaiz alias Shahid Hameed v. Muhammad Ahmad Ameen 2006 SCMR 631 that defendant joined proceedings before the trial Court and afterwards on his absence an ex parte decree was passed. Defendant after four months filed application for setting aside ex parte decree which application was dismissed being time-barred. Article 164 of Limitation Act provides 30 days to file application for setting aside ex parte decree because petitioner/defendant had participated in the proceedings before the trial Court."***

Law to the said effect has also been laid down in the cases of Honda Atlas Cars (Pakistan) Ltd. Vs. Honda Sarhad (Pvt.) Ltd. (2005 SCMR 609), Government of N.-W.F.P. through Secretary, C&W Department Vs. KhaniZaman (1995 CLC 516), Akram Rashid Vs. Hamid Ali Khan (2015 CLC 1290), KhayalBadshah Vs. Afzal Khan (PLD 2015 Peshawar 59), and several other judgments.

13. The petitioner cannot seek to circumvent the thirty-day limitation period provided in Article 164 of the Schedule to the Limitation Act, 1908 for setting aside the *ex-parte* judgment and decree by contending that his application was also under Section 12(2) C.P.C. for which the limitation period is three years under Article 181 of the Schedule to the Limitation Act, 1908.

14. I have gone through the petitioner's application for setting aside the *ex-parte* judgment and decree dated 10.09.2018 and do not find any pleadings where fraud had been pleaded with particularity. It is essential that in a case where fraud, undue influence, or coercion is put at the forefront, the complainant party should set out the facts in full and give essential particulars instead of making general allegations. This is a legal

requirement enshrined in Order VI, Rule 4 of C.P.C and reiterated by the Superior Courts in several cases including Faizum alias Toor Vs. Nander Khan (2006 SCMR 1931), Mst. Sahib Noor Vs. Haji Ahmed (1988 SCMR 1703), and Pakistan Banking Council Vs. Ali Maohtaram Naqvi (1985 SCMR 714). Recently in the case of Lanvin Traders, Karachi Vs. Presiding Officer, Banking Court No.2, Karachi (2013 CLD 1581), the Hon'ble Supreme Court has held that it is an elementary principle of pleadings that where allegations of fraud, misrepresentation, collusion or *malafide* are attributed, necessary particulars and the details in that context are to be unfolded in the pleadings, and that bald or vague statements to that effect are of no legal consequence.

15. The mere fact that the petitioner alleges that his address in the suit was wrong can be no ground on which the *ex-parte* judgment and decree dated 10.09.2018 could be set-aside, because the petitioner had already appeared in the suit and had been defending the same. Furthermore, the mere fact that the petitioner's learned counsel had withdrawn his *vakalatnama* did not absolve the petitioner from appearing before the learned Civil Court.

16. In view of the above, I have no reason to interfere in the impugned order dated 16.07.2019, consequently, the instant writ petition is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

*Qamar Khan**

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