JUDMENT SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P.No.360 of 2016
Muhammad Saleem Khan & others
Versus.
M/s Kalim Associates through its Managing Partner & others

Date of Hearing: 21.04.2016
Petitioners by: Syed Sibtain Raza Bukhari, Advocate,
Respondents by: Mr. Asad Hussain Ghalib & Raja Javaid Iqbal, learned Advocates for respondent No.1,
Mr. Tariq Mehmood Jahangiri, learned ASC for respondent No.5 (The Director Building Control Section CDA, Islamabad)

MIANGUL HASSAN AURANGZEB, J:- Through this common judgment, I propose to dispose of Writ Petition Nos. 360 & 361 of 2016, as they arise out of the same proceedings before the learned Civil Court, and raised common questions of law and fact.

2. The record shows that on 31.08.2010, respondent No.1 (M/s. Kalim Associates), instituted a suit for declaration, permanent injunction & recovery of damages amounting to Rs.19,10,000/- against *inter-alia* the petitioners. Respondent No.1 is said to be the owner of the first floor measuring 5376 Sq. ft. of the building constructed over plot No.1055 (old plot No.79-E), Fazal-ul-Haq Road, Blue Area, F-7 / G-7, Islamabad. Respondent No.1's claim in the said suit was that during 2010, the defendants in the suit, carried out repair works on the 2nd and 3rd floor of the said building, and during this process damaged the water and sewerage lines and other ancillary installations; that this damage was not repaired, which caused a grave loss to respondent No.1 in the form of loss of rental as well as the expenses incurred on carrying out necessary repairs. Vide order dated 31.08.2010, the learned Civil Court passed an ad interim order restraining the defendants in the Suit from carrying out works on the second and third floors of the suit property until the water and sewerage lines and other allied installations are repaired.

3. The order sheet of the said suit reveals that on 06.09.2010, petitioner No.1 in Writ Petition No.361 of 2016

(Muhammad Naeem Khan, who was defendant No.1 in the said suit), tendered appearance through his counsel before the learned civil court. Notices were directed to be issued to the rest of the defendants in the suit through TCS/UMS. On 13.10.2010, again appearance was tendered on behalf of said defendant No.1 only. On 16.11.2010, the learned Civil Court ordered summons to be issued to the rest of the defendants through proclamation in the daily "Kahkashan". On 15.12.2010, respondent No.1/plaintiff deleted defendant No.5 (Ch. Zulfiqar Ali) from the array of defendants. By then summons to the rest of the defendants through publication had been issued. The order sheet between 15.12.2010 and 14.02.2011 has gone missing. The order dated 14.02.2011, passed by the learned Civil Court reads as follows:-

> *"Written statement has not been filed by the defendants despite of availing of sufficient opportunities. No plausible justification has been given for non submission of written statements in present prescribed time. In this situation, the right of submission of written statements of the defendants is closed U/O 8 Rule 10 C.P.C. To come up affirmative evidence on 22.03.2011."*

4. The record shows that Muhammad Saleem Khan (who was defendant No.2 in the suit) died on 21.11.2011. As late as 17.05.2014, the legal heirs of Muhammad Saleem Khan filed an application before the learned Civil Court to be impleaded as parties in the Civil.

5. Vide order dated 24.06.2014, the learned Civil Court dismissed the application for the legal heirs of Saleem to be impleaded as parties in the suit. The reason for dismissing the said application was that since the learned Civil Court had earlier struck off the defendant's right to file a written statement, the acceptance of the application would have amounted to giving the legal heirs of Muhammad Saleem Khan to file a written statement.

6. The legal heirs of Muhammad Saleem Khan preferred Civil Revision Petition No.78/2014 before the Court of the learned Additional District Judge, Islamabad, against the said Order dated 24.06.2014, passed by the learned Civil Court.

7. Vide Order dated 25.06.2015, the learned revisional Court allowed the said Civil Revision Petition to the extent of permitting the legal heirs of Muhammad Saleem Khan to be brought on record. However, the legal heirs of Muhammad Saleem Khan were not given the right to file their defence / written statement. It may be mentioned that the learned counsel for the respondents in the said Civil Revision Petition expressed his no-objection to the legal heirs of Muhammad Saleem Khan being brought on record. The learned revisional Court was of the view that as the order dated 14.02.2011, striking off Muhammad Saleem Khan's right to file a written statement, was passed before his death (i.e. on 21.12.2011), the legal heirs of Muhammad Saleem Khan could not assert an independent right to file a written statement.

8. The legal heirs of Muhammad Saleem Khan have filed Writ Petition No.360/2016 impugning the order dated 24.06.2014 passed by the learned Civil Court, and the revisional order dated 25.06.2015. The petitioners seek the right to file a written statement before the learned Civil Court.

9. On 21.12.2013, Muhammad Naeem Khan (defendant No.1 in the Suit), filed an application under Section 151 C.P.C. for permission to join the proceedings and file a written statement. In this application, it was also prayed that the order whereby the applicant's right to file a written statement was closed, be reviewed and set aside in exercise of the inherent powers of the Court. Mrs. Shamsa Khanum (defendant No.3 in the Suit) had also filed an application for the setting aside ex-parte proceedings.

10. The learned Civil Court, vide order dated 16.04.2014, held that no order for ex-parte proceedings against the defendants in the Suit, was available on the file; that vide order dated 14.02.2011, the defendant's right to file a written statement was struck off; that the plaintiff's evidence had already been recorded; and that the defendants were allowed to make their appearance in the Suit and to cross-examine the evidence of the plaintiff.

11. Against the said order dated 16.04.2014, the present petitioners preferred Civil Revision Petition No.29/2014 before the Court of learned Additional District Judge, Islamabad. Vide Order dated 25.06.2015, the said Civil Revision Petition was dismissed by the learned revisional Court. Paragraph 9 of the said revisional order is reproduced herein below:-

> ***"The order dated 14.2.2011 was against all the applicants/defendants and as such their right of filing the written statement(s) was debarred by that order which order was revisable under section 115 CPC as no judgment was announced. But despite having knowledge of said order and pendency of suit proceedings, no revision application was filed. The applicant No.1 was in attendance since 6.9.2010 and against other applicants they had been served via publication and service had been held good on 15.12.2010. Thus, passing the orders of debarring them from filing written statement on 14.2.2011 was a legal exercise and I do not found any distinction could have been drawn by learned trial court against any of the applicants on any ground taken in the revision application."***

12. The petitioners, (i.e. Muhammad Naeem Khan, defendant No.1 in the Suit), the legal heirs of Muhammad Saleem Khan, who was defendant No.2 in the Suit, and Mst. Shamsa Khanum (defendant No.3 in the Suit), have assailed the said revisional Order dated 25.06.2015, through Writ petition No.361/2016.

13. Learned counsel for the petitioners in both the writ petitions submitted that since the order sheet between 15.12.2010 and 14.02.2011 was missing, there was no way of knowing whether there had been any direction given by the learned civil court to the petitioners to file their written statements; that there was also no way of knowing whether any of the petitioners had appeared before the learned civil court prior to the passing of the order dated 14.02.2011, whereby the defendants' right to file written statement was struck off; that in fact Muhammad Saleem Khan and Mst. Shamsa Khanum had not tendered appearance before the learned Civil Court prior to the passing of the said order dated 14.02.2011; that since the learned revisional court had permitted the legal heirs of Muhammad Saleem Khan to be brought on record, it should also have permitted them to file a written statement and to defend the suit; that bringing the legal heirs of Muhammad Saleem Khan on the record is not of

any use unless they were permitted to file a written statement; and that law favours adjudication on merits rather than technicalities.

14. Furthermore, the stance of the learned counsel for the petitioners in Writ Petition No.360 of 2016 is that their predecessor, Muhammad Saleem Khan, had not appeared before the learned Civil Court, and on account of his non-appearance, he could have been proceeded against ex-parte. However, his right to file a written statement could not have been closed by the learned Civil Court on account of his non-appearance. He further submitted that findings of the learned appellate Court that service on defendants No.2 to 4 was held good on 15.12.2010, is totally against the record. He further submitted that on the said date, defendant No.5 was deleted from the array of the defendants, and the record is silent as to whether defendants No. 2, 3, 4, 6 & 7 had appeared in the court in response to the proclamation. He submitted that learned Civil Court had erred by closing the right of all the defendants in the suit to file a written statement.

15. On the other hand, learned counsel for respondent No.1 defended the orders impugned in the instant writ petitions. He submitted that the conduct of the petitioners before the learned trial court was most negligent and they deserve no indulgence from this court; that respondent No.1/plaintiff's evidence had been recorded and arguments are to take place before the learned trial court; that it shall not be in the interests of justice, if the evidence recorded on behalf of the petitioners is discarded at this belated stage.

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

17. The facts are set out in sufficient detail in paragraphs 2 to 11 above and need not be recapitulated. Now it is not the fault of the petitioners that the order sheet between 15.12.2010 and 14.02.2011 has gone missing. It is the primary obligation of the court to ensure the safety of the record. Since a portion of the order sheet is missing, it cannot be

ascertained whether Muhammad Saleem Khan and Mst. Shamsa Khanum had tendered appearance in the suit in response to the proclamation, and whether they were called upon to file a written statement. Their right to file written statement could have been struck off only had they appeared before the learned civil court and had been called upon to file a written statement. Had the above named petitioners not tendered appearance in the learned civil court in response to a notice/proclamation, they were liable to be proceeded against ex-parte.

18. As the contention of the learned counsel for the petitioners is that Muhammad Saleem Khan and Mst. Shamsa Khanum had not appeared before the learned civil court, that is why they made an application for the recall of the order dated 14.02.2011, and did not file a revision petition against the said order.

19. Had the order sheet between 15.12.2010 and 14.02.2011 not gone missing, the present controversy would not have arisen. The learned revisional court was not wrong in holding that service on the defendants in the suit had been held good on account of the publication, but the vital question that needs to be answered is whether in response to the publication, the petitioners tendered appearance before the learned civil court or not. This cannot be determined due to the missing portion of the order sheet. I feel that the petitioners ought not to be penalized for a portion of the order sheet going missing. Consequently, W.P.No.361/2016 is allowed by setting aside the Order dated 25.06.2015, passed in C.R.No.29/2014, and the Order dated 16.04.2014 passed by the learned Civil Court. W.P.No.360/2016 is partially allowed by setting aside the Order dated 25.06.2015, passed in C.R.No.78/2014 only to the extent of not allowing the legal heirs of Muhammad Saleem Khan to file their written statements. The evidence already recorded by the learned Trial Court shall not be discarded or obliterated but the petitioners shall have the right to cross-examine the plaintiffs' witnesses, and to file their written statements and to produce their evidence. On account of the

delay in filing an application for impleadment of legal heirs, costs to the tune of Rs.25,000/- are being imposed on the legal heirs of Muhammad Saleem Khan. Furthermore, costs to the tune of Rs.30,000/- are being imposed on Mst. Shamsa Khanam for not diligently pursuing her remedy for setting aside the order dated 14.02.2011, whereby their right to file a written statement was struck off. As Muhammad Naeem Khan had appeared before the learned Civil Court when his right to file a written statement was struck off, costs to the tune of Rs.30,000/- are being imposed on him. The petitioners' participation in the proceedings before the learned Trial Court shall be subject to the payment of the said costs to the plaintiffs in the court on the next date of hearing.

20. The writ petitions are disposed of in the above terms.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

Qamar Khan*

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