

**2019 M L D 1082**

**[Peshawar (Abbottabad Bench)]**

**Before Syed Muhammad Attique Shah, J**

**FAZAL KARIM and 4 others---Petitioners**

**Versus**

**HUSSAN DIN and 8 others---Respondents**

Writ Petition No.93-A of 2012, decided on 13th September, 2017.

**(a) Civil Procedure Code (V of 1908)---**

---O. IX, R. 13---Limitation Act (IX of 1908), Art. 164 & S. 5---Suit for declaration and permanent injunction---Ex parte decree, setting aside of---Limitation---Condonation of delay---Provisions of Art.164, Limitation Act, 1908---Applicability---Scope---Defendants submitted their written statement but thereafter absented themselves from the Court and ex parte decree was passed---Application for setting aside of ex parte decree was accepted by the Trial Court but Revisional Court dismissed the same---Validity---Once defendant appeared before the Court, joined the proceedings and thereafter disappeared in consequence thereof an ex parte decree was passed against him then provisions of Art. 164 of Limitation Act, 1908 would be applicable---Ex parte decree was passed on 15-06-2010 whereas application for setting aside of the same was moved on 15.11.2010---Application for setting aside of ex parte decree was barred by five months in circumstances---Petitioners had not submitted any application for condonation of delay under S. 5 of Limitation Act, 1908---Period of limitation for setting aside of ex parte decree was thirty days---Petition for setting aside of an ex parte decree was time barred which was rightly dismissed by the Revisional Court---High Court declined to interfere in the findings rendered by the Revisional Court in its discretionary and equitable jurisdiction under Art. 199 of the Constitution---Constitutional petition was dismissed in circumstances.

Messrs Rehman Weaving Factory (REGD), Bahawalangar v. Industrial Development Bank of Pakistan PLD 1981 SC 21 distinguished.

Honda Atlas Cars (Pvt.) Limited v. Honda Sarhad (Pvt.) Limited and others 2005 SCMR 609; Shahzad Pervez alias Shahzad Hameed v. Muhammad Ahmad Ameen 2006 SCMR 631 and Secretary Education Department Government of NWFP, Peshawar v. Asfandar Yar Khan 2008 SCMR 287 rel.

**(b) Limitation Act (IX of 1908)---**

---Art. 164---Ex parte decree, setting aside of---Limitation---Period of limitation for setting aside of ex parte decree was thirty days.

Khalid Rehman Qureshi for Petitioners.

Haq Nawaz Khan for Respondents.

Date of hearing: 13th September, 2017.

**JUDGMENT**

**SYED MUHAMMAD ATTIQUE SHAH, J---**The petitioners through instant petition has challenged the judgment and decree dated 12.12.2011 passed by learned District Judge, Haripur, in Civil Revision No.13/12 of 2011, whereby, the revision petition of the respondents was accepted and order dated 18.05.2011 of Civil Judge-II, Haripur, was set aside, with the following prayer:-

"It is respectfully prayed that on acceptance of instant writ petition the impugned judgment of District Judge, Haripur dated 12.12.2011 be set aside and the order of Civil Judge, Haripur dated 18.05.2011 be restored with costs throughout."

2. Brief facts of the instant writ petition are, that the respondents instituted a suit for declaration, perpetual injunction and possession through partition against the petitioners in respect of constructed property measuring 18 marlas, situated in Mouza Talokar, Tehsil and District Haripur, who contested the said suit by submitting their written statement, however, later, the petitioners absented themselves from Court proceedings, consequently they were proceeded against ex parte vide order dated 19.05.2010 and after recording ex parte evidence, the suit was decreed in favour of the respondents vide order dated 15.06.2010. Subsequently, the petitioners challenged the validity of ex parte decree dated 15.06.2010 by filing petition under section 12(2), C.P.C. dated 15.11.2010, on the grounds of fraud and misrepresentation. The learned trial Court after hearing the parties, converted the said petition into an application for setting aside ex parte decree and subsequently after hearing both the parties, set aside the ex parte decree on payment of cost of Rs.3,000/- vide order dated 18.05.2011.

3. Being aggrieved of order dated 18.05.2011, the respondents filed Revision Petition No.13/12 of 2011 on 15.06.2011 before the learned District Judge, Haripur, who accepted the said revision petition vide its judgment and order dated 12.12.2011, while setting aside the impugned order dated 18.05.2011 of the learned trial Court and dismissed the application for setting aside ex parte decree and restored the judgment and decree dated 15.06.2010 of the learned trial Court.

4. The petitioners being dissatisfied with the impugned judgment and order of the learned revisional Court dated 12.12.2011 have now impugned the same before this Court through instant writ petition.

5. Arguments of the learned counsel for the parties heard and record perused with their able assistance.

6. Perusal of record reveals, that the respondents instituted a suit for declaration, perpetual injunction and possession through partition against the petitioners, wherein they appeared and submitted their written statement, however, subsequently, they absented themselves from Court proceedings and thus were proceeded against ex parte. After recording ex parte evidence of the respondents, an ex parte decree was passed by the learned trial Court against the petitioners on 15.06.2010. Later, the present petitioners challenged the said ex parte decree through a petition under section 12(2), C.P.C. before the learned trial Court. However, the said petition was converted by the learned trial Court into one under Order IX, Rule 13, C.P.C. and after hearing arguments of the parties the same was allowed vide its order dated 18.05.2011. Being aggrieved from the said order of learned trial Court, respondents impugned the same before the learned Revisional Court, later, after hearing the parties, the said Revision Petition was allowed by the learned Revisional Court vide judgment and order dated 12.12.2011. Now through the instant petition under Article 199 of the Constitution, the petitioners have challenged the said findings of the learned Revisional Court before this Court.

7. The record of the case transpires that the application of the petitioners for setting aside ex parte decree was barred by five months, as the said decree was passed by the learned trial Court on 15.06.2010, whereas the application for its setting aside was filed on 15.11.2010. Moreover, the petitioners had not submitted any application for condonation of delay under section 5 of the Limitation Act, 1908. It is noteworthy to mention here, that period of limitation provided for setting aside an ex parte decree is 30 days under Article 164 of the Limitation Act, 1908. Hence, the said application was hopelessly time barred, which was rightly dismissed by the learned Revisional Court. Moreover, the conduct of the petitioners was also discernible from the fact that they appeared before the learned trial Court, submitted their written statement, participated in the proceedings and thereafter disappeared. Therefore, in these circumstances, petitioners are not entitled for any discretionary relief in constitutional jurisdiction of this Court under Article 199 of Constitution. When learned counsel for petitioners was confronted with above situation, he could not controvert the same, however, he strongly urged, that in view of peculiar facts and circumstances of the present case, provisions of Article 164 of the Limitation Act, 1908 were not applicable to the application for setting aside ex parte decree, rather the provisions of Article 181 of the Limitation Act, 1908 were applicable to the said application and placed reliance on case titled Messrs Rehman Weaving Factory (REGD), Bahawalangar v. Industrial Development Bank of Pakistan reported in (PLD 1981 SC 21). However, this Court is of the view that judgment (supra) is not applicable to the peculiar facts and circumstances of the present case, as the same has subsequently been distinguished by the august Apex Court in its judgment reported in case titled 'Honda Atlas Cars (Pvt.) Limited v. Honda Sarhad (Pvt.) Limited and others' (2005 SCMR 609), wherein it has been held, that once defendant(s) appears before the Court, joins the proceedings and then disappears from the Court, as a consequence thereof, an ex parte decree passed against him/them, then provisions of Article 164 of the Limitation Act, 1908 would be applicable. In this respect, relevant extract from the said judgment is reproduced below:

"7. It is important to note that learned High Court interfered with both the orders of the trial Court mainly in view of the judgment in the case of Messrs Rehman Weaving Factory (ibid). According to learned counsel for appellant, this judgment is not applicable to the facts of the case in hand. Besides it, subsequently, this judgment has been considered and distinguished in different cases by various learned High Courts. He made reference to the cases of Gulzar v. Hata 1988 MLD 1518, State Life Insurance Corporation of Pakistan v. Shakar Khatoon 1998 CLC 283, China Petroleum Engineering Construction Corporation (CPECC) v. Messrs R.J. Engineering and Management Consultants 1999 CLC 117 Mst. Durdana Akbar v. Government of Sindh 1999 CLC 1846 and Government of N.-W.F.P. v. Surryia Begum PLD 1995 Pesh. 53. He also referred to the judgment reported in the case of Atta-ur-Rehman Baig v. Barey Khan PLD 1998 Pesh. 83, wherein it has been held that for setting aside ex parte decree, Article 164 of the Limitation Act will be applicable and not Article 181 of the Limitation Act.

8. A careful perusal of the judgment in Messrs Rehman Weaving Factory (ibid) indicates that this case was remanded by the learned High Court to the learned trial Court after dismissal of revision filed by the appellant along with record of the case. Learned trial Court on recommencing trial recommenced trial and issued notices for 23rd May, 1972 to the defendants. On this date the plaintiff was represented but no one was present on behalf of the defendants who were allegedly served, therefore, they were proceeded against ex parte and eventually an ex parte decree was passed against them on 27th May, 1972. The defendants on an assertion that notice was not served and that the knowledge about the decree was gained by them on 31st July, 1972, filed an application on the next day for setting aside ex parte decree. A similar application was filed by defendant No.2 on 6th

October, 1972. These applications were dismissed on 8th May, 1974, being barred by time. Then the defendants filed separate appeals in the High Court, which were accepted on 21st February, 1977 for the reasons that service was not proper, therefore, the defendants could not be deemed to have been duly served, as such the applications, filed within a period of 30 days from the date of knowledge were within time. Thus, on setting aside ex parte decree, case was sent back to the trial Court for determination on merits in accordance with law."

Similar view has also been taken by the august Apex Court in case titled 'Shahzad Pervez alias Shahzad Hameed v. Muhammad Ahmad Ameen' (2006 SCMR 631), and case titled 'Secretary Education Department Government of NWFP, Peshawar v. Asfandar Yar Khan' (2008 SCMR 287).

8. Thus, in view of the above discussions, this Court reached to the conclusion, that the learned Revisional Court has properly appreciated the entire facts and circumstances of the case in hand, while deciding the respondent's Revision Petition. Therefore, this Court would not interfere in the findings rendered by the learned Revisional Court in its discretionary and equitable jurisdiction under Article 199 of the Constitution. Hence, the present writ petition being bereft of merits is hereby dismissed.

ZC/25/P

Petition dismissed.