JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

R.F.A No.272-P/2014

JUDGMENT

Date of hearing……03.09.2018....……

Appellant: (Mian Muhammad) By Malik Zeb Khan, … Advocate

Respondent: Mr. Abdul Sattar Khan, Advocate, in person.

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QALANDAR ALI KHAN, J.- The instant Regular First Appeal by Mian Muhammad (appellant) is directed against the judgment and decree dated 01.10.2011 of the learned Senior Civil Judge, Peshawar, whereby suit of the respondent/plaintiff , Abdur Sattar Khan, Advocate, was decreed ex-parte to the tune of Rs.500000/- (five lakhs) against the appellant/defendant. The appellant is seeking setting aside of the impugned judgment/decree and order dated 1.10.2011, and direction to the learned lower Court to decide the matter on merits, after hearing both the parties.

2. The facts leading to filing of the instant appeal, as narrated in the appeal, briefly stated, are that the respondent lodged suit for recovery of Rs.50000000/- (5 crore) on account of defamation and Rs.10000000/- (one crore) for mental torture etc, total Rs.60000000/- (six crore) in the Court of Senior Civil Judge, Peshawar, which was decreed in favour of the respondent/plaintiff to the extent of Rs.500000/- (five lakhs) only, vide order dated 01.10.2011. The said decree was impugned by the appellant in the District Court, Peshawar, and while appearing before the learned ADJ-V, Peshawar, in response to the Court notice, the respondent raised objection regarding pecuniary jurisdiction of the District Court, but the objection was not accepted and the appeal was admitted for regular hearing vide order dated 28.02.2012. The said order was impugned by the respondent in Civil Revision No.258-P/2012 in this Court which was accepted vide order dated 30.04.2014, with direction to the learned trial Court/ADJ-IV, Peshawar, to return the memo of appeal to the petitioner for filing the same before the proper legal forum. In pursuance of the aforesaid direction, the learned ADJ-V, Peshawar, returned memo of appeal to the appellant vide order dated 24.06.2014 for presentation before the proper forum;

hence the instant appeal. It may also be added here that the appellant had also filed application for setting aside ex-parte proceedings along with application for condonation of delay, but the application was dismissed by the learned trial Court vide order dated 10.09.2011, and the revision preferred by the appellant to this Court was subsequently withdrawn as not pressed after passing of the impugned decree on 01.10.2011.

3. At the very outset, the respondent, himself a senior advocate, raised preliminary objections with regard to maintainability of the regular first appeal by the appellant on the twin grounds, namely, filing of fresh regular first appeal instead of the appeal returned to the appellant on the direction of this Court for presentation before the proper forum, and also the ground of limitation, as the impugned judgment/decree and order was passed on 01.10.2011, whereas the fresh appeal, as pointed out hereinabove, was preferred on 09.07.2014.

4. Arguments of both the learned counsel for the appellant and respondent heard; and record perused with their valuable assistance.

5. It may be observed, at the very start of discussion on the appeal, in the light of

aforementioned preliminary objections raised to the maintainability of the appeal by the respondent, the learned counsel for the appellant, all-along, focused on merits of the case while stressing that the impugned judgment was void as neither the appellant was provided opportunity of cross examination of witnesses of respondent/plaintiff in the case nor issue wise findings were rendered by the learned trial Court while passing the impugned decree in favour of the respondent. The learned counsel for the appellant was time and again reminded to meet the preliminary objections raised to the maintainability of the appeal by the respondent, and his response on more than one occasions was that he could not deny this fact that this was a fresh/new appeal instead of the appeal returned to the appellant and that no application for condonation of delay was filed along with the instant appeal; but maintained, at the same time, that application for condonation of delay had been moved along with application for setting aside ex-parte proceedings, which was rejected by the learned trial Court, and revision petition against the order of the learned trial Court was withdrawn from this Court in the aftermath of the impugned decree in favour of the respondent against the appellant, and further that the

returned appeal has been attached with the instant appeal. The learned counsel, however, failed to refer to a single legal provision or a precedent case whereby an application for condonation of delay, moved long ago with application for setting aside ex-parte proceedings, which was dismissed by the learned trial Court and revision petition was also later on withdrawn by the appellant, could serve the purpose and could meet the essential legal requirement of moving application for condonation of considerable delay of almost three years in filing a fresh/new appeal on 09.07.2014 against the impugned judgment/decree and order dated 01.10.2011. Likewise, the learned counsel failed to show any legal provision or pronouncement of the superior Courts to the effect that simply attaching the returned appeal with the fresh/new appeal could fulfill the requirement of compliance with the direction of the Court to the appellant for filing the same before the proper legal forum.

6. On the other hand, there is plethora of case law supporting stance/plea of the respondent with regard to maintainability of the fresh appeal instead of filing the returned appeal in the proper forum, and failure on the part of the appellant to move application

for condonation of delay, without application for condonation of delay with (fresh) appeal filed in the Court. It would, indeed, be advantageous to refer to some of the reported judgments of the superior Courts, including this Court, in this regard, cited at the bar by the respondent, including **PLD 2016 Supreme Court 872, 2002 SCMR 677, 1999 SCMR 2353, 1984 SCMR 1508, 2015 MLD 405 (Peshawar), 2000 CLC 1290 (Lahore), PLD 1970 Karachi 367 and 2007 CLC 1664) (Northern Areas Chief Court).**

7. As regards contention of learned counsel for the appellant that the impugned decree was void and not sustainable therefore limitation would not run against such a void decree, on the ground, that neither the appellant was provided opportunity for cross examination of witnesses of the plaintiff/respondent nor the learned trial Court recorded issue wise findings despite having framed issues in the case, suffice it to say that an order made by a Court is void only when the same is without jurisdiction as regards subject matter, pecuniary value or territorial limits **(PLD 1975 Supreme Court 331),** which is not the case here, neither learned counsel for the appellant could show any reason for treating the impugned judgment and decree as void. It may also be added here that after ex-

parte proceedings against the appellant, dismissal of his application for setting aside ex-parte proceedings by the learned trial Court, and also disposal of his revision petition on the ground of having become infructuous, there was no occasion for affording him opportunity of cross examination of the witnesses of the respondent/appellant. Furthermore, needless to say that when appeal is being dismissed for being time barred, then its merits need not be discussed **(2011 SCMR 676).** Even otherwise, the learned trial Court/Senior Civil Judge, Peshawar, properly and thoroughly appreciated evidence available on the record, and also took into consideration financial status of the appellant while passing the impugned judgment dated 01.10.2011 “in the light of available record and facts and circumstances of present case”, and fixed quantum of damages/compensation at Rs.500000/- (Five lakhs) instead of the claimed amount of Rs.60000000/- (six crore) that too, notwithstanding the fact that there was nothing in rebuttal of the evidence of the respondent/plaintiff, as the appellant/defendant was proceeded against ex-parte. In short, there is nothing to treat the impugned judgment and decree as void.

8. In the light of foregoing discussion, there is no merit in the appeal, which is accordingly dismissed with costs.

Announced
03-09-2018

J U D G E

Ayub

Hon'ble Mr. Justice Qalandar Ali Khan.