

ORDER SHEET
THE HIGH COURT OF SINDH AT KARACHI
M.A No. 76 of 2021

Date: Order with signature of the Judge

1. For orders on office objection.
2. For hearing of Main Case.

03.05.2023

M/s. Mukesh Kumar G. Karara & Nabi Bux Laghari, Advocates for the Appellant.

Mr. Adnan Ahmed, Advocate for Respondent No.2.

Salahuddin Panhwar, J:- Admittedly, respondent No.1 was declared ex-parte before the trial Court. Learned counsel for the appellant has emphasized to page-27 which is the impugned judgment. According to learned counsel for the appellant, learned trial Court has dismissed the suit on two accounts; one is that suit is time barred and another is that trial Court lacks jurisdiction. He has further contended that with regard to time barred suit, which is a mixed question of law and facts. The defendants were declared ex-parte and the plaintiff was not provided an opportunity to lead the evidence, he has also emphasized over section 20 of the Gas (Theft Control & Recovery) Act, 2016. According to learned counsel, this is a special law, therefore, Limitation Act would not be applied here. Whereas, learned counsel for respondent No.2 contents that the impugned judgment is in accordance with law and the suit was time-barred.

2. This Court is in agreement with the arguments raised by the learned counsel for the appellant that issue of limitation was a mixed question of law and facts; hence, the trial Court was required to permit the parties to lead their evidence though defendants were ordered to be proceeded *exparte*. It has been held by this Court as well as apex Court time and again that the cases of the parties should be decided on merits. If a party upon evidence brought on record has established his case on merits, then he should not be knocked out on technical grounds. Rules and procedures are framed to foster the cause of justice and should sparingly come into the way for dispensation of the same on merits. In Case of S.D.O./A.M., Hasht Nagri Sub-Division, PESCO, Peshawar and others v. Khawazan Zad (PLD 2023 Supreme Court 174), it was held by the Apex Court that: *"The courts, thus, always lean in favour of*

adjudicating the matters on merits rather than stifling the proceedings on procedural formalities. The rules of procedure are meant to facilitate the court proceedings for enforcing the rights of litigants, not to trap them in procedural technicalities for frustrating their rights. They are the tools to advance the cause of justice and cannot be used to cause the miscarriage of justice. The ultimate object of securing the ends of justice, therefore, outweighs the insistence on strict adherence to such rules”.

3. Section 3, of the Limitation Act, 1908 provides that: *“Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by the First Schedule shall be dismissed although limitation has not been set up as a defence”.* However, as per provisions of Section 29, of the Limitation Act, 1908, *“nothing in the Limitation Act shall affect section 25 of the Contract Act, 1872: (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the First Schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that Schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law; (a) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and (b) the remaining provisions of the Act shall not apply”.*

4. It is also well-settled that Order VII, Rule 6, of the Code of Civil Procedure, 1908 mandates that the plaint should show the ground upon which the exemption from the law of limitation is claimed. The learned trial Court is under obligation to consider the pleadings of the parties and evidence so recorded on the point of limitation in the context of the relevant laws. In Case of **Haji Abdul Sattar and others v. Farooq Inayat and others (2013 SCMR 1493)**, it was held by the apex Court that: *“Consequently we are of the opinion that the issue of limitation in the matter is a mixed question of law and fact and, without being evidence recorded the same cannot be determined”.* Under these circumstances, impugned judgment is hereby set-aside. The case is remanded back with directions to the trial Court to frame the issue of limitation as well as jurisdiction or any other issue, if any, arising out of the material propositions of law or fact on which the parties are at variance. The learned trial Court is also directed to allow the parties to lead evidence on the issues so framed and decide the *Lis* on merits. Order of the ex-parte proceedings against

respondent No.2 is also set-aside. However, the Respondent No.2 would be at liberty to file an application for leave to defend in accordance with the provisions of Section 7, of the Gas (Theft Control & Recovery) Act, 2016, which shall be decided in accordance with the relevant provisions of law. In case the learned trial Court is of the view that the sufficient cause is not shown by the Respondent No.2 in the application for leave to defend the Suit to grant leave to defend, even then the Appellant shall be permitted to lead evidence on the point of limitation but still the same does not mean that the Respondents should be completely debarred from taking any part in the further proceedings of the Suit. The Respondents can still cross-examine the Appellant and his witnesses and also take part in the arguments as of right. In Case of *Police Department through Deputy Inspector-General of Police and another v. Javid Israr and 7 others* (1992 SCMR 1009), it was held by the Honourable Supreme Court of Pakistan that: *“Even if he has not filed written statement, he may be in a position to secure the dismissal of the suit by raising an objection, orally, to the jurisdiction of the Court, limitation etc. In the absence of any clear provisions in the Code of Civil Procedure prohibiting the appearance and taking part in the proceedings by the Defendant, proceeded ex parte there can be no legal bar to allow him to defend his rights. It is the right of every Defendant and also the principle of natural justice, to be given a chance of hearing before any order is passed against his interest. The rules of procedure are meant to advance justice and preserve rights of litigants and they are not to be interpreted in a way as to hamper the administration of justice. As such, in the absence of any clear prohibition in the scheme of civil procedure denying the Defendant of his right to take part at any stage of the proceedings after the order of ex parte proceedings, he can appear and defend the suit if somehow his application for setting aside the ex parte proceedings does not succeed on account of his failure to show good cause for his previous non-appearance. **It is, therefore, held that the Defendant who had been proceeded against ex parte can take part in the subsequent proceedings as of right**”*. The underlining is supplied. Reference may be made to the dictum laid down by this Court in Case of *Mst. Bushra Bang Shirani and another v. Muhammad Hassan and another* (1992 MLD 1116).

This Misc. Appeal stands disposed of in the above terms.

JUDGE