C.R.No.1019/2012

Rana Muhammad Ikram **Mehrban Fertilizers**

26.3.2012 **Mr. Khalid Jamil Advocate, for the petitioner.**

A suit for the recovery of Rs.15,00,000/- under Order XXXVII Rule 2 of CPC on the basis of a pronote dated 11.7.2003 was instituted by the respondent against the petitioner before the learned District Judge, Faisalabad which was entrusted to a learned Addl:District Judge, Faisalabad. The petitioner was proceeded ex-parte on 24.9.2008 after effecting of service upon him through daily "Jang" as prescribed by law. On 19.11.2008, Mian Ehsan Ullah Danish Advocate filed memo of appearance on behalf of the petitioner/defendant before the learned Addl.District Judge, Faisalabad and sought adjournment for filing an application for leave to appear and defend the suit. On 21.11.2008, an application under Order XXXVII Rule 3 CPC was moved before the learned Addl.District Judge. This application was under consideration and was fixed for arguments when on 14.7.2009, the petitioner/defendant again absented himself and ex-parte proceedings were again directed against him. The learned Addl. District Judge recorded ex-parte

evidence and vide judgment and decree dated 11.11.2009, an ex-parte decree was passed against the petitioner for the recovery of Rs.15,00,000/-.

2. On 20.1.2012, the petitioner filed a petition under Order XXXVII Rule 4 of CPC for setting aside of the ex-parte judgment and decree dated 11.11.2009. Alongwith this petition, the petitioner moved an application under Section 5 of the Limitation Act for condonation of delay.

3. This petition was contested by the respondent. The learned Addl.District Judge through the impugned order dated 8.3.2012 dismissed the petition moved by the petitioner. Through the instant civil revision, the order dated 8.3.2012 has been assailed by the petitioner.

4. It is contended by the learned counsel for the petitioner that the document dated 11.7.2003 forming basis of the instant suit was an "Iqrarnama" which does not constitute a promissory note as defined in the Negotiable Instruments Act XXVI of 1881. The learned counsel contends that although this question has not been specifically raised before the learned Addl. District Judge but the petition moved by the petitioner does speak of the objection raised about the non- maintainability of the suit on the ground that mixed questions of law and facts are involved in this case and that it would be most appropriate if the suit be heard and decided on

merits. The learned counsel has developed an argument that on the basis of these grounds mentioned by the petitioner in the application moved under Order XXXVII Rule 4 of CPC, the question of non-maintainability of the suit on the ground that it is not based on a promissory note, can be argued by the petitioner before this Court. The learned counsel further contends that the learned Addl.District Judge had no jurisdiction to entertain the instant suit. Relying upon case law reported as ***Pir Saber Shah*** Versus. ***Shad Muhammad Khan, Member Provisional Assembly N.W.F.P. and another*** (PLD 1995 S.C. 66)**,** the learned counsel argued that there is no estoppal against the petitioner to raise this question of law before this Court. The learned counsel further argues that since judgment and decree dated 11.11.2009 is the result of lack of jurisdiction by the learned Addl.District Judge, therefore, no period of limitation runs against this void judgment and decree and the application under Order XXXVII Rule 4 of CPC has been illegally dismissed by the learned Addl. District Judge through the impugned order dated 8.3.2012. It is thus prayed that the impugned order dated 8.3.2012 be set-aside and the application moved by the petitioner under Order XXXVII Rule 4 of CPC for setting aside of the ex-parte judgment and decree dated 11.11.2009 be accepted.

5. I have considered the arguments of the learned counsel for the petitioner.

6. The petitioner was the defendant in the suit which was instituted under Order XXXVII Rule 2 of CPC against him by the respondent for the recovery of Rs.15,00,000/-. The petitioner was served through the publication of notice against him in the daily "Jang" and ex-parte proceedings were directed against him vide order dated 24.9.2008. The petitioner did not seek setting aside of the ex-parte proceedings order dated 24.9.2008. However he joined the proceedings by submitting memo of appearance through his counsel Mian Ehsan Ullah Danish Advocate which fact is recorded in the interim order dated 19.11.2008. The petitioner moved an application dated 21.11.2008 under Order XXXVII Rule 3 CPC for leave to appear and defend the suit. Paragraphs No.5 and 6 of this petition under Order XXXVII Rule 3 of CPC moved by the petitioner are relevant and are reproduced as under:-

> ***"5. That the respondent deals in with the plaintiff and in this context a transaction of money happened inter parties which has now been completed amicably and nothing against defendant. Hence this suit is false frivolous liable to be dismissed. Documents relevant are attached herewith.***
>
> ***6. That the plaintiff manipulated, concealed and changed the original shape of Iqrarnama dated 11.07.03 and while***

making foul play tried to converted into negotiable instrument therefore the suit has been filed with un-clean hands and just to extort money from the petitioner/defendant,thepetitioner/defend-ant reserves the rights to initiated criminal proceedings as well as other legal course of action against the plaintiff."

7. The perusal of the above paragraphs reflects that the petitioner did not specifically question or deny the execution of the document dated 11.7.2003 in the petition moved by him under Order XXXVII Rule 3 of CPC. The petitioner for the reasons best known to him absented himself from the Court proceedings from 14.7.2009 onwards and did not bother to find out the progress of the case and the fate of the suit instituted against him. The learned Addl.District Judge Faisalabad ultimately decreed the suit in favour of the respondent on 11.11.2009 after recording the evidence of the respondent. The petitioner re-appears on the scene at his choice and moved a petition dated 18.1.2012 before the learned Addl.District Judge on 20.1.2012 under Order XXXVII Rule 4 of CPC for setting aside of the judgment and decree. The contents of the petition have been gone through and it is noted that the petitioner shifted the responsibility of his absence from the Court proceedings upon the shoulders of his Advocate who assured the petitioner that he

would apprise him of the date of hearing when the personal presence of the petitioner would be required. In paragraph No.2 of the petition the petitioner contended that Mian Ehsan Ullah Danish Advocate passed away and he remained unaware of the proceedings pending against him. The petitioner did not disclose the source through which he came to know of the death of his learned counsel nor of the source through which he came to know of the passing of the judgment and decree dated 11.11.2009 against him. All that the petitioner stated in the paragraph No.6 of the application is that he came to know of the judgment and decree dated 11.11.2009 on 16.1.2012 through the execution proceedings initiated against him. The petitioner also moved an application under Section 5 of the Limitation Act, 1908 for condonation of delay but did not say anything explaining the delay of each and every day from 14.7.2009 when the petitioner all of a sudden disappeared from the scene and ex-parte proceedings were directed against him till 16.1.2012 when the petitioner claimed to have got the knowledge of execution proceedings. The learned Addl.District Judge in paragraph No.4 of the impugned order recorded the following reasons and observations about this conduct of the petitioner:-

> ***"The petitioner has not stated the date of death of his counsel. However, the learned counsel for the respondent has stated that***

> ***the date of death of the counsel of the petitioner was 2.8.2010. It is evident from the very version of the petitioner that he even remained unaware about the fact of death of his counsel till 16.1.2012. It clearly means that after giving wakalatnma to his counsel he never bothered to have contact with his counsel and about the suit. When the petitioner seems to have himself chosen not to bother about the pendency of the suit, then it does not lie in his mouth to state that the law has always favored the adjudication of the suit on its merits, and that his absence in the suit was not deliberate one. The circumstances explained by the petitioner to justify his absence, are unreasonable and they do not furnish any valid ground for setting aside the ex-parte decree. Since by not bothering about the pendency of the suit the petitioner himself took the risk of the decision likely to be ensued in that suit and he went in slumber, so, his contention that he has come to know about the passing of impugned ex-parte decree against him only on 16.1.2012, cannot be given any consideration and waitage. In short, the petitioner has completely failed to assign any good cause for his absence and for setting aside the ex-parte decree.***

It is also noted that the learned Addl.District Judge took note of the date of death of the counsel for the petitioner to be 2nd of August, 2010. The above mentioned facts and circumstances clearly point out that the petitioner is guilty of sheer and gross negligence in pursuing the matter. The Hon'ble Supreme Court of Pakistan in the judgment reported as ***Shahid Pervaiz alias Shahid Hameed*** Versus ***Muhammad Ahmad Ameen*** (2006 SCMR 631)

disapproved such a conduct of the defendant of suit under Order XXXVII Rule 1 and 2 of CPC. It is to be noted that in the reported judgment an application was moved by the defendant of the suit after four months of passing of the ex-parte decree against him. The Hon'ble Supreme Court of Pakistan also laid down the law that Article 164 of the Limitation Act, 1908 governs the period of limitation for filing an application for setting aside of the ex-parte decree under Order XXXVII Rule 4 of CPC. The Hon'ble Supreme Court of Pakistan after relying upon an earlier judgment reported as 1984 SCMR 568 held as follows:-

> ***"This Court has interpreted Order XXXVII, Rule 3 of C.P.C. in Abdul Karim Jaffarani's case 1984 SCMR 568. The relevant observation is as follows:-***
> ***"In view of the legislative history of these provisions, the overall object envisaged by the Legislature was to provide for expeditious disposal of litigation involving commercial transactions of a particular nature by a summary procedure so that the defendant does not have the means open to exploitation in the ordinary procedure for trial of suits to prolong the litigation and prevent the plaintiff from obtaining an earlier decision by raising untenable and frivolous defences."***
> ***"The Order XXXVII is a special provision having special procedure prescribed under Order XXXVII, rule 4 C.P.C. provides a remedy to the petitioner/defendant to file an application for setting aside ex parte decree. The Legislature in its wisdom used the word special circumstances in Order XXXVII, rule 4, C.P.C. is higher in decree than the***

words 'sufficient cause' and 'good cause' shown under the various rules of Order IX, C.P.C. The exercise shown by the petitioner's/defendant's counsel in his affidavit that he was unable to appear before the Court in order to see his ailing relation could not be considered as a 'special circumstance' whereupon an application under Order XXXVII, rule 4, C.P.C. could be allowed. Term 'special' in Webster's New International Dictionary (2nd Edition) is defined as distinguished by some unusual quality, uncommon, noteworthy, extraordinary, as a special occasion, especially distinguished by superior excellence, importance, power, or the like. In the shorter Oxford English Dictionary on historical principles term 'special' is defined as of such a kind as to exceed or excel in some way that which is usual or common, exceptional in character quality or decree. The Concise Oxford English Dictionary says that 'special' means of a particular kind, particular in general. Therefore, under rule 4, C.P.C. the petitioner/defendant is obliged to explain the 'special circumstances' which prevented him from appearing in the Court to seek leave to appear and defend the suit within time or other 'special circumstances' which may authorize the Courts to set aside the decree already passed by it. Rule 4, C.P.C. is intended to prevent injustice. In the present case, no special circumstances have been shown for entitling the petitioner/defendant to claim benefit of rule 4, C.P.C. Facts in the case depict it as a clear case of sheer negligence in the conduct of the defence."

8. In paragraph No.7 of the reported judgment the Hon'ble Supreme Court of Pakistan further held as follows:-

> "***It is a settled principle of law that valuable right accrues to the other side by lapse of time and each day's delay has to be satisfactorily explained. It was argued that valuable rights of the petitioner is involved but this does not furnish a proper ground for condonation of delay in civil matters."***

In the light of the above authoritative pronouncement of law, the order passed by the learned Addl.District Judge seems to be unexceptional and needs no interference on this score.

9. The contention of the learned counsel for the petitioner that the document forming basis of the suit instituted by the respondent is not a promissory note as it is described as "Iqrarnama**"** has no substance in the eye of law. The term "Iqrarnama" means the document in which there is an assurance or an undertaking to pay a specified amount at a specific time to the lender. The definition of promissory note as given in Section 4 of the Negotiable Instruments Act XXVI of 1881 is very imprtant. Section 4 of the Act of 1881 is reproduced as below:-

> ***"A "Promissory note". A "promissory note" is an instrument in writing (not being a bank-note or a currency-note containing an unconditional undertaking, signed by the maker, to pay on demand or at a fixed or determinable future time a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."***

The term "Iqrarnama" is exactly the vernacular translation of the term "promissory note" as it refers to an unconditional assurance or undertaking to pay a specified amount at a fixed or determinable future time to the other side. A copy of the document dated 11.7.2003 has been placed on the record of the instant petition in which an unconditional undertaking and assurance is incorporated that an amount of Rs.15,00,000/- is payable by the petitioner and shall be paid to the respondent on two specific dates i.e. Rs.5,00,000/- shall be paid till 31.12.2003, remaining Rs.10,00,000/- shall be paid till 30.6.2004 and the entire amount shall be paid till 31.12.2004. The contents of the document dated 11.7.2003 are fully covered by the definition of promissory note as defined in the Negotiable Instruments Act XXVI of 1881. The case law reported as ***Pir Saber Shah*** Versus. ***Shad Muhammad Khan, Member Provisional Assembly N.W.F.P. and another*** (PLD 1995 S.C. 66)**,** relied upon by the learned counsel for the petitioner does not help the case of the petitioner. It is observed that the document dated 11.7.2003 is a promissory note, the cognizance of the suit based upon which has been rightly taken by the learned Addl.District Judge, Faisalabad and the entire proceedings have been conducted by the learned Addl. District Judge in accordance with the relevant law. The learned

Addl.District Judge has rightly passed ex-parte judgment and decree dated 11.11.2009 against the present petitioner. It is also observed that the learned Addl.District Judge for valid and lawful reasons dismissed the application of the petitioner under Order XXXVII Rule 4 of CPC. In exercise of my revisional jurisdiction under Section 115 of CPC, I am not persuaded to interfere in the matter. The instant civil revision being devoid of any legal substance is accordingly ***dismissed in limine.***

(NASIR SAEED SHEIKH)
JUDGE

*M.Younas.

Approved for reporting.