

ORDER SHEETLAHORE HIGH COURT, BAHAWALPUR BENCH, BAHAWALPUR
JUDICIAL DEPARTMENT

Civil Revision No. 442 of 2011.

Muhammad Nawaz. **Versus** Muhammad Akram.

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26.11.2012. Mr. Munawar Iqbal Theham, Advocate for the petitioner.
Mr. Nazeer Ahmad Larr, Advocate for the respondent.

On the strength of this civil revision the petitioner has challenged order dated 4.7.2011 passed by the learned Additional District Judge, Rahim Yar Khan.

2. Tersely, the facts as gleaned out from the instant petition are that the respondent filed a suit under Order XXXVII rule 1 & 2 CPC for recovery of Rs.9,00,000/- on the basis of cheque. The petitioner joined the proceedings and submitted an application for leave to defend the suit which was allowed subject to furnishing of surety equal to the amount claimed in the said suit. As the petitioner neither appeared nor submitted surety, as directed by the learned trial Court while accepting his application for leave to appear and defend, he was proceeded against *ex-parte* and finally vide *ex-parte* judgment & decree dated 31.8.2010 the suit filed by

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the respondent was decreed. After having come to know about the said *ex-parte* judgment & decree the petitioner moved an application under section 12(2) CPC for setting aside thereof, on 25.6.2011, which was dismissed by the learned Additional District Judge, vide order dated 4.7.2011; hence this petition.

3. The arguments advanced by learned counsel for the petitioner can be summarized in the words that the suit was decreed to the tune of Rs.9,00,000/- in an illegal manner as the original claim of respondent No.3 was to the extent of Rs.6,00,000/- only whereas Rs.3,00,000/- was claimed by him on account of profit; that the petitioner did not furnish requisite surety as the matter was compromised between the parties out of court but the respondent who undertook to withdraw the suit succeeded to get a decree against the petitioner in a clandestine manner; that the suit was to be filed in Dunyapur whereas the same was illegally filed at Rahim Yar Khan; that the order passed by the learned Additional District Judge is not sustainable for the reason that to decide the application filed by the petitioner under section 12(2) CPC framing of formal issues and then

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recording of evidence was *sine qua non* and that the learned Additional District Judge was not obliged to dismiss the application filed by the petitioner under section 12(2) CPC on the ground of lack of jurisdiction and at the most he could return the same. In addition to his oral submissions, learned counsel has referred the case reported as Javed Iqbal v. Abdul Aziz and another (PLD 2006 SC 66).

4. Conversely, learned counsel appearing on behalf of respondent while opening his arguments submits that after acceptance of his application for leave to appear and defend the suit the petitioner did not furnish requisite surety despite availing number of opportunities, therefore, the matter was heard *ex-parte*; that even after dismissal of his application for leave to appear and defend the suit on 9.4.2010 the petitioner did not bother to move the court concerned for setting aside thereof rather he awaited for the moments when respondent filed execution petition against him; that conduct of the petitioner is uncalled for inasmuch as during the proceedings on the execution petition filed by the respondent the petitioner appeared before the court on 21.7.2011 and got recorded his statement to the effect that a

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compromise has been effected between the parties according to which he shall pay Rs.3,00,000/- to the decree holder before the Court on 30.7.2011 whereas the remaining amount of Rs.6,00,000/- shall be paid in 20 equal installments; that the petitioner further covenanted that he has no objection if a direction is issued to the Manager Z.T.B.L. Depalpur to deduct Rs.30,000/- from his monthly salary to satisfy the claim of the decree-holder; that after passing of the *ex-parte* decree in favour of the respondent valuable rights have accrued in his favour and that in case the impugned order is set aside the petitioner would succeed to further prolong fate of the case for an indefinite period.

5. I have heard learned counsel for the parties at considerable length and have also gone through the documents appended with this petition in addition to the case-law cited at the bar.

6. A perusal of the file shows that application for leave to appear and defend the suit, filed by the petitioner, was accepted by the learned Additional District Judge, vide order dated 9.2.2010, and the matter was adjourned to 25.2.2010 for furnishing of

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requisite surety. On the said date the petitioner did not submit the requisite surety and on his request the case was adjourned to 2.3.2010. Even on the said date the petitioner failed to furnish the surety and while entertaining his request the case was adjourned to 9.3.2010 on which date too the petitioner failed to submit surety and the case was adjourned to 17.3.2010 on his request. On the said date the petitioner re-iterated his inability to furnish the requisite surety and on his request the case was adjourned to 9.4.2010 when again he failed to comply with the order of the trial Court to furnish surety, therefore, his application for leave to appear and defend the suit was dismissed and the case was fixed for recording of *ex-parte* evidence. This entire scenario shows utter lack of interest on the part of the petitioner to pursue the matter. Thus, learned Additional District Judge had committed no illegality while dismissing his application for leave to appear and defend the suit as if a party fails to abide by any order of the court he has no right for the relief which was granted to him on fulfillment of the said condition. Reliance in this regard is placed on the cases reported as Col. (Retd.) Ashfaq Ahmed

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And Others v. Sh. Muhammad Wasim (1999 S C M

R 2832) wherein the apex court of the country has

held as under: -

“It may be observed that in the instant case petitioners had failed to fulfil conditions specified in conditional order dated 9-10-1994 passed by trial Court regarding leave to defend. Besides, the material on record coupled with an evasive expressions made by the petitioners were taken into consideration while passing final decree. Additionally, entire record was adequately scrutinized by the High Court while rejecting appeal through impugned judgment.”

Further in the case reported as Haji Ali Khan &

Company, Abbottabad And 8 Others v. M/S. Allied

Bank Of Pakistan Limited, Abbottabad (PLD 1995

SC 362) the aforesaid point has further been

elaborated in the following words: -

“when the leave is granted conditionally or subject to terms, but the defendant fails to perform the condition or fulfil the terms to which the leave is subject, then it becomes a case as if no leave to defend had been given. (See "Ramkarandas Radhavallabh v. Bhagwandas Dwarkadas" AIR 1965 SC 1144, 1146)”.

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6. It is also important to note over here that after 9.4.2010 when the application filed by the petitioner for leave to appear and defend the suit was dismissed, the case remained pending till 31.8.2010 when the final *ex-parte* judgment and decree was passed by the learned Additional District Judge but the petitioner kept himself aloof from the proceedings and now he cannot claim that prior to passing of the *ex-parte* judgment & decree he was not provided an opportunity of hearing.

7. Another important question involved in the instant matter is the point of limitation for an application for setting aside of the *ex-parte* judgment & decree. According to Article 164 of the Limitation Act, 1908, the period provided for setting aside of *ex-parte* judgment & decree for a party who disappears after joining the proceedings is 30 days but the petitioner has not explained delay in filing of application for setting aside of the *ex-parte* judgment & decree. Further, stance of the petitioner qua compromise between the parties during pendency of the suit cannot be taken as a gospel truth as there is nothing on record to substantiate the said fact.

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8. Insofar as plea of the petitioner that infact the petitioner had to pay Rs.6,00,000/-, as is evident from the recitals of the plaint, and Rs.3,00,000/- has illegally been added by the trial Court is concerned, I am constrained to hold that in view of the statement made by the petitioner before the Executing Court this stance does not hold any water.

9. For what has been discussed above, I have no hesitation in my mind to hold that the petitioner has failed to show sufficient cause for his non-appearance in the proceedings before the learned Additional District Judge after having joined the same. The order passed by the leaned Additional District Judge does not suffer from any legal flaw. Consequently, this petition is **dismissed** with no order as to costs.

(SHUJAAT ALI KHAN)
JUDGE

Approved for Reporting.

JUDGE