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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, MULTAN
BENCH, MULTAN.
JUDICIAL DEPARTMENT
Civil Revision No. 977 of 2017.

(Kareem Bakhsh vs. Aslam Khan)

J U D G M E N T

Date of hearing.	01.08.2017.
Petitioner by:	Hafiz Muhammad Riaz, Advocate.
Respondent by:	Nemo.

ABDUL RAHMAN AURANGZEB, J.:- Through this civil revision, the petitioner has challenged the validity of order dated 22.05.2017 whereby the application for setting-aside exparte judgment and decree dated 07.02.2013 was dismissed.

2. Brief facts giving rise to the above revision petition are that Aslam Khan respondent (herein after to be referred as “respondent”) filed a suit under Order XXXVII C.P.C. for recovery of Rs.400,000/- against the petitioner Karim Bakhsh on the basis of promissory note and receipt dated 05.05.2012. The petitioner disappeared during the course of trial and hence exparte proceeding were initiated against the petitioner on 21.01.2013. Later on, the learned trial Court recorded exparte evidence of the respondent and the suit was decreed in favour of respondent on 07.02.2013.

3. The petitioner then filed an application under Order XXXVII Rule 4 C.P.C. for setting-aside the exparte proceeding as well as exparte judgment and decree. This application was dismissed for non-prosecution on 08.02.2016. Thereafter, another application for restoration of application for setting-aside exparte judgment and decree was filed, which was dismissed on 28.04.2016. The aggrieved petitioner filed a

revision petition before this Court bearing CR. No. 822 of 2016. On 01.03.2017 with the concurrence of the parties the above mentioned civil revision was allowed and impugned orders dated 08.02.2016 and 28.04.2016 were set-aside subject to payment of costs of Rs.5000/-. After the acceptance of above said civil revision, the initial application for setting-aside the exparte judgment and decree became alive. The written reply of this application was also filed by the respondent. The learned trial Court after having heard the arguments of the parties dismissed the application for setting-aside exparte judgment and decree vide order dated 22.05.2017. Hence, this civil revision.

4. Learned counsel for the petitioner strenuously contends on the sole ground of limitation that it has not been provided any time limit for filing of application under Order XXXVII Rule 4 C.P.C.; therefore, the matter would be governed under Article 181 of the Limitation Act, 1908 and hence, the application is well within time and the same is liable to be accepted. He placed reliance on “NASEER AHMAD versus MUHAMMAD MUSHTAQ” (2006 MLD 1936 Lahore).

5. I have heard learned counsel for the petitioner and have perused the annexed record.

6. I have considered the respective contention of the petitioner noted above. There is no denial with this fact that the suit is based on Negotiable Instrument Act, 1881 and the petitioner on his second appearance after passing the exparte judgment and decree filed an application for setting-aside the exparte judgment and decree but the application was dismissed for non-prosecution, and later on the application for restoration was also dismissed. The application for setting-aside exparte proceedings has been restored with the concurrence of the parties through Civil Revision No. 822 of 2017. Now the subject matter is the application for setting-aside exparte

judgment and decree dated 07.02.2013 which was examined by the learned trial Court and the learned trial Court after having not satisfied with the assertion of the petitioner dismissed the application on 22.05.2017.

7. I have also anxiously gone through the annexed record of the learned trial Court which reveals that the petitioner after the acceptance of application for leave to appear and defend the suit, filed his surety bond but before filing the written statement he went to Saudi-Arabia in connection with his job affairs. Before going to Saudi Arabia he could not manage any proper representation in the pending suit, therefore, due to non-appearance of the petitioner as well as due to non-representation, the learned trial Court decreed the suit on 07.02.2013.

8. Before proceedings further it would be appropriate to mention the provision of law asserted by the petitioner. Order XXXVII Rule 4 CPC provides as under: -

"Power to set aside decree.---After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit." (emphasis supplied)

9. Perusal of above referred context of the Code reveals that there is mark difference for the procedure of setting-aside exparte judgment and decree for ordinary suit and the suit filed under the provisions of Order XXXVII C.P.C. The decree may be set-aside under Order XXXVII rule 4 C.P.C. upon the application of defendant showing "special circumstances" of his inability to appear and obtain leave within the prescribed period i.e. within 10 days under Article 159 of the Limitation Act, 1908.

10. Interestingly, it is not the case of the petitioner which falls under Order XXXVII Rule 4 C.P.C., as he has

already been appeared and granted permission for leave to appear and defend the suit. Contrarily, it is a case where the petitioner, during the pendency of the suit, had disappeared from the proceedings. The reason put forth by the petitioner that he went to Saudi Arabia in emergency and in this way he could not manage the proper representation in Pakistan for pursuance of his case is not a plausible explanation. His further explanation that from Saudi Arabia, he sent a special power of attorney to his brother on 25.02.2013 is also of no avail as the decree had already passed on 07.02.2013. It is the duty of the petitioner that before proceeding to Saudi-Arabia, appoint his attorney for pursuance of his case but he could not manage his representation at proper time. Nevertheless, it is his own decision as he was fully aware with the continuity of the proceedings in the trial court and in such situation the non-representation could not be dispensed with. Therefore, the exparte proceedings initiated by the learned trial Court, which was later on culminated into exparte judgment and decree, is in accordance with law, hence, there is no illegality committed by the learned trial Court.

11. The contention raised by the learned counsel for the petitioner that limitation have been provided for filing of application under Order XXXVII Rule 4 C.P.C. is correct as laid down in the referred judgment “NASEER AHMAD versus MUHAMMAD MUSHTAQ” (2006 MLD 1936 Lahore). But in the present case, when it is admitted by the petitioner that he was already allowed to defend the suit, therefore, the applicability of Order XXXVII Rule 4 C.P.C. is no more further required. However, the provisions of Order XXXVII Rule 7 C.P.C. are attracted. For ready reference the provision of Order XXXVII Rule 7 C.P.C. is reproduced as under: -

“Procedure in suits.---Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.”

The above provision vividly clear that the procedure in suits instituted under the provision of Order XXXVII C.P.C. shall be the same as the procedure in the suit instituted in ordinary manner. It is the case of willful disappearance of the petitioner during the pendency of the proceedings. When the petitioner was pursuing his case diligently, then it was his responsibility to take all necessary steps and measures for further pursuance. Meaning thereby, that the petitioner was in absolute knowledge, hence, he would face the consequence of his non-appearance. It is nowhere provided in the above referred provision under Order XXXVII Rule 4 C.P.C. that when the petitioner has already been granted leave to appear and defend the suit and was later on disappeared from the proceedings, then he can reapplied on the basis of supra Rule 4. The “special circumstances” as envisaged in the application have not been applicable in the instant matter, as the provision of Article 164 of the Limitation Act, 1908 in terms of Order IX Rule 13 C.P.C. is fully attracted in the case in hand. In this regard, respectful reliance can be placed on the enshrined judgment of Hon’ble Supreme Court titled “SHAHID PERVAIZ alias SHAHID HAMEED versus MUHAMMAD AHMAD AMEEN” (2006 SCMR 631) where almost similar circumstances have been addressed when defendant after filing his written statement disappeared from the trial Court and thus exparte decree was passed against him and the application for setting-aside judgment and decree was dismissed. In the case in hand the petitioner tried to rejoin the proceedings by filing an application on 22.09.2015 after the delay of more than 02 years and 05 months for which no plausible justification put forth by the petitioner. In addition to this negligent act the petitioner also failed to file his written statement and hence, he has more weaker stance then the situation discussed above in the supra Shahid Pervaiz’s case.

12. It is also not out of place to mention here that when the petitioner having conscious knowledge of delay of more than two years and five months then it is also obligatory for him to explain the delay of each and every day, but no application for condonation of delay was ever filed by the petitioner which manifestly shows that he wants to avoid the implementation of the decree. Therefore, in such circumstances the petitioner is not entitled for any discretionary relief against which also a valuable right accrued to the respondent. Learned counsel for the petitioner is unable to controvert the relevancy of supra “Shahid Pervaiz” case wherein it was held that: -

“Article 164 of the Limitation Act provides 30 days time to the petitioner/defendant to file application for setting aside ex parte decree. These 30 days started from the date of the decree in the instant case because petitioner/defendant had participated in the proceedings before the trial Court. 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, C.P.C. 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 excuse 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 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, peculiar 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 Court 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."

The view also followed in "ABDUL WAHEED versus RIASAT ALI" (2008 MLD 1684), and "ABDUL HAMEED versus MUHAMMAD GIYAS SAJID" (2012 MLD 1736).

13. Last but not least regarding the maintainability of this civil revision, it is held in "MUHAMMAD KHALIL AHMAD versus SHABBIR AHMAD" (2013 CLC 1121) that under provision of Order XLIII, Rule 1(d), C.P.C. the proceedings culminated under the provisions of Order IX, Rule 13, C.P.C. are appealable. Any final verdict as have been given under Order XXXVII, Rule 4, C.P.C. primarily is to be considered an order passed within the purview of Order IX, Rule 13, C.P.C. and thus, the revisional jurisdiction against such order would not be available. On this score this revision petition is also lacking maintainability.

14. For what has been discussed above, I see no merit in this civil revision and the same is hereby ***dismissed***.

(Abdul Rahman Aurangzeb)
Judge.

Approved for reporting.

Judge.

*Form No: HCJD/C-128***ORDER SHEET****LAHORE HIGH COURT, MULTAN BENCH, MULTAN.
JUDICIAL DEPARTMENT.***Civil Revision No. 977 of 2017.****Kareem Bakhsh.******Vs. Aslam Khan.***

<i>S. No. of order/ Proceeding</i>	<i>Date of order/ Proceeding</i>	<i>Order with signature of Judge, and that of parties or counsel, where necessary</i>
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*01.08.2017.**Hafiz Mian Muhammad Riaz Advocate for
applicant/petitioner.****C.M. No. 1849-C-2017.***

Learned counsel for the petitioner filed the instant application under Section 151 CPC for issuance of an appropriate order for the grant of stay order and to release the applicant/petitioner.

2. Earlier on the same subject CM No. 1840 of 2017 was filed on behalf of the petitioner, which was dismissed as not pressed and the office was directed to fix the main case. Today, on the same stance this application was again moved by the applicant/petitioner, hence, the office is directed to fix the main case for today. CM stands **disposed of.**

**(Abdul Rahman Aurangzeb)
Judge.**

*A. Razzaq**