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JUDGMENT SHEET

LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

W. P. No. 7834 / 2023

Muhammad Sufyan Qasim (deceased) through Legal Heirs

Versus

Manzoor Ahmad & two others

JUDGMENT

Date of Hearing:	18.10.2023
Petitioners By:	Mr. Muhammad Asif Bhatti, Advocate
Respondent By:	Ch. Maghfoor Hussain Wahga, Advocate

ABID HUSSAIN CHATTHA, J: This constitutional Petition brings a challenge to the impugned Order dated 18.10.2022 and Judgment dated 23.12.2022 passed by the Courts below.

2. Briefly, Respondent No. 1 (the “**Respondent**”) on 15.12.2016 instituted a suit for specific performance to recover Rs. 18,500,000/- in relation to an agreement to sell dated 06.05.2013 against the husband of Petitioner No. 1 and father of Petitioners No. 2 to 4, namely, Muhammad Sufyan Qasim who was proceeded *ex-parte* on 28.10.2017 and the suit was *ex-parte* decreed by the Civil Court vide Judgment and Decree dated 21.01.2019. Initially, the application for setting aside *ex-parte* Judgment and Decree dated 21.01.2019 filed by the Petitioners was accepted by the Trial Court vide order dated 07.03.2020 but later, the Appellate Court while accepting appeal of the Respondent vide Judgment dated 10.10.2020 remanded the matter to the Trial Court with a direction to decide application of the Petitioners afresh after settlement of issue as to the legal

competency of the Petitioners to apply for setting aside the *ex-parte* Judgment and Decree dated 21.01.2019 by providing an opportunity of hearing to the parties on the said issue. Thereafter, the application of the Petitioners for setting aside the referred *ex-parte* Judgment and Decree was concurrently dismissed by the Courts below vide impugned Order and Judgment. Hence, this Petition.

3. The case of the Petitioners set-up in their application dated 16.09.2019 for setting aside *ex-parte* proceedings and *ex-parte* Judgment and Decree against the said Muhammad Sufyan Qasim is that he went missing on 23.12.2013 regarding which an F.I.R No. 1028 / 2013 under Section 365 of the Pakistan Penal Code, 1860 at Police Station, Civil Lines, Gujrat was got registered on 28.12.2013 and till date the said Muhammad Sufyan Qasim has not been recovered and still his status is as that of a missing person. Therefore, he is liable to be presumed as a dead person in terms of Articles 123 and 124 of the Qanun-e-Shahadat Order, 1984 (the “QSO”) and henceforth, the Petitioners as his legal heirs ought to be given the right to defend the suit for specific performance instituted against him. After remand of the case by the Appellate Court vide Order dated 10.10.2020, the Trial Court framed an issue with regard to competency of the Petitioners to file Application for setting aside *ex-parte* Judgment and Decree dated 21.01.2019, whereafter, the parties recorded their respective evidence and the Courts below concurrently came to the conclusion that the Petitioners were not legally competent to file the said application for setting aside *ex-parte* Judgment and Decree.

4. Arguments heard. Record perused.

5. At the outset, it would be pertinent to reproduce Articles 123 & 124 of the QSO which read as under:-

“123. Burden of proving death of person known to have been alive within thirty years. Subject to Art. 124, when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

124. Burden of proving that person is alive who has not been heard of for seven years.--When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is shifted to the person who affirms it.

6. Petitioner No. 1 herself appeared in the witness box as AW-1 and reiterated averments of the application on Oath. In documentary evidence, the Petitioners produced certified copies of agreement to sell as Ex.A-1, certified copy of Petition titled, “Sufiyan Qasim v. DPO, Gujranwala etc.” alongwith order dated 03.10.2013 as Ex.A-2, photocopy of F.I.R. dated 28.12.2013 as Mark-A and Notice in the name of Muhammad Sufiyan Qasim as Mark-B. Conversely, the Respondent appeared as RW-1 and produced photocopy of F.I.R No. 465 / 2013 as Mark-A, photocopy of proclamation 87 / 88 as Mark-B, photocopy of F.I.R No. 814 / 2013 as Mark-C and photocopy of F.I.R No. 263 / 2010 as Mark-D. Petitioner No. 1 during evidence deposed that she did not know whether her husband is alive or dead as he is missing since 23.12.2013. As such, the Petitioners had produced evidence to the effect that Muhammad Sufyan Qasim had not been heard for seven years by those who definitely and naturally would have heard of him if he had been alive as Petitioner No. 1 was cross-examined on 11.11.2021. Thereafter, burden to prove that Muhammad Sufyan Qasim is alive shifted to the Respondent but the fact of his misplacement could not be controverted in the evidence produced by the Respondent.

7. The Supreme Court of Pakistan under similar circumstances has held in case titled, “Col. (Retd.) Mansoor Akbar v. Fazal-e-Rab Pirzada and others” (2012 SCMR 540) that when one of the legal representative of a person pleaded before the Trial Court that he went missing prior to passing of *ex-parte* decree against him, the right to challenge the same in appeal would accrue to the legal representative. The relevant paragraph No. 17 thereof is reproduced as under:-

“The petitioner, till date, has not placed any material either before the trial Court or before the appellate Court to

establish that the respondent No.1 never went missing nor has he disputed the plea of respondents Nos. 2 to 5 that respondent No. 1 had not been heard of since August 2004 by them. The provisions of Article 123 of the Qanun-e- Shahadat Order 1984, speak about the burden of proof of the fact about a person known to have been alive, which Article is subject to the Article 124 of the said Order, in which it has been provided that when the question arises as to whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him, the burden of proving that such person is alive is shifted to the person who affirms it. The Article 124 clearly shifts the burden on the petitioner to establish that (a) the respondent No.1 is alive and (b) he intentionally has avoided to contest and or participate in the suit proceedings. No material has been brought on record by the petitioner to controvert that the plea taken by the respondents Nos. 2 to 5 that the respondent No.1 went missing since 11-8-2004. The provisions of C.P.C. does not provide the procedure to secure the interest of a missing person. In such like circumstances, where one of the legal representative has pleaded before the trial Court that the respondent No. 1 went missing prior to the passing of ex parte order by the trial Court against him, the right to challenge ex parte decree by the respondents Nos. 2 to 5, would accrue to them. Any finding by the trial Court on an application under Order I, Rule 10, C.P.C. of the respondents Nos.2 to 5, would, in no way, debar them from challenging ex parte decree.”

8. In the instant case, the Respondent instituted his suit on 15.12.2016, whereas, the F.I.R regarding abduction of Muhammad Sufyan Qasim was dated 28.12.2013 i.e. much prior to the date of institution of the suit. In the given circumstances, the Petitioners had a legitimate right to contest the suit as the purpose for passing *ex-parte* decree is to penalize a party which deliberately avoids appearance, either in person or through his counsel, with the ulterior object to defeat, delay or frustrate the litigation or is grossly negligent or fails to appear without sufficient cause, but such principle of law would not extend to cover an eventuality of the nature where the person is proved to have gone missing prior to the institution of the suit.

9. In view of the above, this Petition is **allowed**; the impugned Order dated 18.10.2022 and Judgment dated 23.12.2022 passed by the

Courts below are set aside; and the order dated 07.03.2020 passed by the Trial Court accepting the application of the Petitioners for setting aside *ex-parte* proceedings dated 28.10.2017 and *ex-parte* Judgment and Decree dated 21.01.2019 is upheld. The Trial Court is directed to proceed with the pending suit in accordance with law. The parties are directed to appear before the Trial Court on 01.11.2023 alongwith certified copy of this Judgment.

(ABID HUSSAIN CHATTHA)
Judge

Approved for reporting.

Judge

Waqar