HCJDA-38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

F. A. O. No. 68769 of 2017

Javed Ahmad Shafqat

versus

Tariq Ali

JUDGMENT

Date of hearing	22-10-2024
Appellant by:	M/s Hamid Iftikhar Pannu and Saad Hayat Pannu, learned Advocates.
Respondent by:	Mr. Javed Ahmad Malik, learned Advocate.

Sultan Tanvir Ahmad, J:– The present appeal is directed against order dated 10.05.2017, whereby, the learned trial Court has rejected an application seeking to set-aside *ex-parte* decree dated 04.05.2016 and at the same time leave application of the appellant has been dismissed.

2. The relevant facts of the case are that the respondent filed suit dated 18.04.2013 (the '***suit***'), under Order XXXVII of the Code of Civil Procedure-1908 (the '***Code***'), for the recovery of Rs. 4,300,000/- on the basis of cheques No. 18848687, 18848694, 18848693, 18848690, 18848691, 18848692 and

18848689 (the '***cheques***').

3. The appellant was proceeded against *ex-parte* vide order dated 21.06.2013. The *ex-parte* evidence was recorded and thereafter on 23.09.2014 judgment was passed in favour of the respondent for recovery of the amount involved in the *cheques* with costs and the prayer to grant mark-up was turned down.

4. On 12.06.2015 the appellant filed an application seeking to set-aside the *ex-parte* judgment and to grant the leave, which was dismissed vide judgment dated 03.02.2016. Later it was revealed that no decree along with judgment dated 23.09.2014 was prepared upon which an application was instituted by the respondent and as a result thereof the learned trial Court proceeded to prepare ex-parte decree on 04.05.2016. An appeal bearing No. 268-2016 instituted by the appellant against the judgment dated 03.02.2016 was already before this Court. Upon realizing that the decree is prepared on 04.05.2016, the learned counsel for the appellant gave a statement before this Court that a fresh application to set-aside the decree dated 04.05.2016 has been filed. His appeal was disposed of and in view of the submission of the learned counsel for the appellant, the learned trial Court was directed to decide the application afresh, in accordance with law. This second application dated 19.05.2016 as well as the leave accompanying the same was dismissed vide order dated 10.05.2017. Resultantly, the present appeal.

5. Mr. Hamid Iftikhar Pannu, learned counsel for the appellant has relied upon various judgments and he has stated that the impugned order is result of

application of incorrect law and as per mandate of Order XXXVII Rule 4 of the *Code* and Article 164 of the first schedule to the Limitation Act-1908 (the '***Act***') thirty days time period was available to the appellant for filing application to set-aside *ex-parte* decree dated 04.05.2016. He has stated that the learned trial Court has wrongly reached to its conclusion that the appellant has failed to file the leave application within ten days which required rejection of leave application.

6. Mr. Javed Ahmad Malik, learned counsel for the respondent has vehemently opposed this appeal and he has argued that the appellant in any case was obliged to file leave application within ten days after preparation of decree, whereas, the same is filed after fifteen days despite the fact that the appellant was already a participant in the proceedings before the learned trial Court as well as he instituted F.A.O. No. 268 of 2016 and leave is, therefore, correctly rejected as per the law settled in case titled "*Mansoor Ahmad versus Muhammad Iqbal*" **(1994 SCMR 560)**. He has further contended that only a short affidavit is attached with the leave application which is in defiance of Order XXXVII Rule 3(1) of the *Code;* that the said provision of law requires to disclose such facts as would make it incumbent on the holder of negotiable instrument to prove consideration or the other facts that it deemed sufficient to support the application, upon affidavit.

7. I have heard the arguments of the learned counsel for the parties and perused the record with their able assistance.

8. There is no dispute as to the settled proposition that thirty days time period is available to defender from the date of knowledge of *ex-parte* decree. This is when the defender has not participated in the proceedings and it is apparent from record that he never had knowledge of such proceedings. The learned counsel for the appellant is also correct in his argument that Order XXXVII Rule 4 of the *Code* specifically empowers the Court to set-aside the decree, when special circumstances are available. However, the present case has its peculiar facts and circumstances which perhaps can rarely arise. The judgment was passed on 23.09.2014. Both sides never pointed out that no decree was prepared. This remained the position until the respondent had problem in execution who then made an application dated 30.04.2016. Consequently, the learned Court prepared the decree on 04.05.2016. The appellant was aware of the judgment who instituted first application dated 12.06.2015 (hereinafter called as the '***first application***') which was contested on its merits but the *first application* failed. The appellant filed an appeal bearing No. 268 of 2016 wherein the following order was passed:-

> *"As per office report, the notice has been served upon the respondent but no one has entered appearance on behalf of the respondent today, therefore, the respondent is hereby proceeded against ex-parte.*
> *2. Learned counsel for the appellant submits, that the decree sheet has been prepared in this case on 04.05.2016 and the appellant has already filed an application for setting aside the ex-parte decree before the concerned Court and if a direction is given to the learned Trial Court to decide the same strictly in accordance with law, the appellant will be satisfied.*
> *3. In view of the submission made by learned*

> *counsel for the appellant, the Trial Court/Additional District Judge is directed to decide the application of the appellant strictly in accordance with law.*
> *4. This appeal is disposed of accordingly."*

9. Before passing of the above order, the appellant had already filed an application dated 19.05.2016 (hereinafter called as the '***second application***') to set-aside the *ex-parte* decree along with a leave application. In paragraph No. 3 of the *second application* the appellant has set-up the mode of knowledge of the judgment dated 23.09.2014 through one Samar, a clerk of Mr. Shahid Buttar-learned Advocate, alleging that the said learned Advocate was defending the criminal trial of the appellant. The period and grounds of knowledge are prior to the institution of the *first application*. I would like to reproduce paragraph No. 3 of the *second application*:-

> *"3. On 04.02.2015, the respondent/plaintiff instituted petition for the execution of the decree though no decree had been drawn after the judgment dated 23.09.2014. The petitioner was not served in the execution petition as well and he was telephonically informed about the pendency of the Execution petition on 05.05.2015 by an Advocate's Clerk namely Samar who is working in Ferozewala courts. The counsel with whom Samar is working namely Shahid Buttar had remained petitioner's counsel in the criminal trial of the FIR registered by the respondent so the said clerk was aware of the particulars of the matter. The petitioner engaged Shahid Buttar Advocate for proceeding in the matter who submitted power of attorney (Vakalatnama) on his behalf before the Executing Court on 08.05.2015 and the matter was adjourned for 11.06.2015 for the appearance of the petitioner in person."*
>
> (Underlining is added)

10. The appellant had never set-up the above mode of knowledge in the *first application*. It appears that above specific development in mode of knowledge is due to the reason that vide judgment dated 03.02.2016 (i.e. the judgment in the *first application*) the learned trial Court had already observed that the appellant has given the same address that is mentioned in the *suit* and he has admitted that his address in the *suit* is correct where he was served through ordinary mode, courier service and as per the observation of the then learned Judge, proof of the same was available. It is also evident from the record that the appellant in pursuance to the then pending execution, which was initiated on 07.02.2015 under the misconception that decree was also passed, appeared on 08.05.2015 and then kept on seeking adjournment without raising any objection. Facing this situation the appellant has modified his grounds as well as the mode of knowledge, in the *second application*.

11. I am cognizant of the fact that no one should be prejudiced because of mistake of the Court, which has not prepared the decree for a long time period but this does not mean that litigant should be allowed to make developments in his case that too on the crucial points. I am not convinced that the appellant came to know about the case in the manners and on the date as pleaded in the *second application*. Otherwise, he would have taken the above reproduced plea in his *first application*.

12. Much focus has been made in the *second application* as to the law that thirty days period is available to the appellant for seeking to set-aside the *ex-*

parte decree by referring to different cases but this *second application* lacks "special circumstances", which are also essential to be shown for seeking to set-aside the decree and for giving leave to the defender, if it seems reasonable to the Court to do so. In the absence of existence of "special circumstances" the defender of the suit of summary procedure is not entitled to the relief under Order XXXVII Rule 4 of the *Code*.

13. For the reasons recorded above, I am not inclined to accept the present appeal and to grant leave or to set-aside the order assailed. This appeal fails. No order as to costs.

(Sultan Tanvir Ahmad)
Judge

Announced in open Court on 05.11.2024.
Approved for reporting

*Iqbal**

Judge