

Stereo.HCJDA 38.
Judgment Sheet
LAHORE HIGH COURT
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

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F.A.O No.107 of 2019

Muhammad Amir

Versus

Muhammad Asghar

JUDGMENT

Dates of hearing: **27.11.2025 & 03.12.2025**

Appellant by: Khawaja Nadeem Mushtaq, Advocate.

Respondent by: Mirza Asif Abbas, Advocate.

MIRZA VIQAS RAUF, J. This single judgment shall govern the titled appeal as well as C.R.No.901 of 2017 on account of involvement of similar question of law. Before proceeding further, it would be advantageous to have the factual resume of both these matters.

BACKGROUND OF F.A.O No.107 of 2019.

2. This appeal in terms of Order XLIII Rule 1 of the Code of Civil Procedure (V of 1908) (hereinafter referred to as “CPC”) is arising out of a suit instituted by the respondent under Order XXXVII of **CPC** wherein the appellant was arrayed as defendant. During the proceedings, the appellant was proceeded against ex-parte and ultimately suit was decreed as such by way of judgement dated 12th September, 2014. An application was moved by the appellant seeking setting aside of ex-parte decree, which was dismissed on the sole ground that application was not accompanying an application for leave to appear and defend the suit vide order dated 18th June, 2019 handed down by the learned Additional District Judge, Pind Dadan Khan, District Jhelum.

BACKGROUND OF C.R No.901 of 2017.

3. In this revision application, the matter is arising of a suit instituted by the respondent in a summary character wherein the applicant being defendant was proceeded against ex-parte on 16th February, 2017. The applicant though moved an application seeking setting aside of ex-parte proceeding order but it was also dismissed solely on the ground that it was not accompanying an application for leave to appear and defend the suit through order dated 8th September, 2017 passed by the learned Additional District Judge, Rawalpindi.

4. In the above backdrop, the subject appeal was admitted for regular hearing by way of order dated 13th September, 2019 whereas revision application was admitted on 28th September, 2021 and Mr. Imran Hassan Ali, Advocate was appointed amicus curiae to assist the court. Both the matters were taken up on various dates separately and ultimately on 3rd December, 2024, while dealing with the subject appeal, office was directed to place the matter before the Hon'ble Chief Justice for constitution of larger bench with the following observations: -

“This appeal in terms of Order XLIII Rule 1 of Code of Civil Procedure (V of 1908) stems from order dated 18th of June, 2019, whereby learned Additional District Judge, Pind Dadan Khan proceeded to dismiss application seeking setting aside of the ex-parte judgment and decree dated 12th of September, 2014 passed in a suit under Order XXXVII of the Code ibid instituted by the respondent, on the ground that application for setting aside ex-parte decree was not accompanying application for leave to appear and defend the suit.

2. Before me learned counsel for the appellant while making reference to the cases *Ghulam Muhammad v. Abdul Ghaffar* (2008 MLD 109) and *Zulfiqar Ali v. Muhammad Iqbal* (2018 MLD 1547) submits that for defendant in a suit under Order XXXVII of C.P.C. decreed ex-parte, it is not necessary that he should move an application for leave to contest alongwith the application for setting aside ex-parte decree. Contrary to this, learned counsel for respondent places reliance on case *Mirza Irfan v. Muhammad Yaqoob* (2011 MLD 1024) and submits that in view thereof it was necessary for the appellant to move an application seeking leave to appear and defend the suit while moving an application for setting aside ex-parte decree. Apparently, there is disparity in the views of this Court in the above noted judgments.

3. In order to remove the issue of conflicting views, office to place this matter before the Hon'ble Chief Justice for constitution of larger Bench.”

Similarly, when civil revision came up for hearing on 10th December, 2024, it was observed as under: -

“It appears that with regard to a similar question, in F.A.O No.107 of 2019, matter has been referred to be placed before the Hon’ble Chief Justice for constitution of larger bench.

2. Office in view thereof, to proceed accordingly.”

5. We are, thus, now seized with the matter in furtherance thereof. The moot point, which requires our determination, is as to whether while moving an application for setting aside ex-parte proceeding order or decree in a suit under order XXXVII of **CPC**, it is obligatory for the defendant to also move an application for leave to appear and defend the suit simultaneously?

6. On the above noted core issue, we have heard learned counsel for the parties as well as learned amicus curiae and perused the record.

7. We are cognizant of the fact that suit in a summary character is to be proceeded in terms of Order XXXVII of **CPC**. Rule 2 provides the manner of institution of summary suit upon bill of exchange etc. and it reads as under: -

“2. Institution of summary suits upon bills of exchange, etc.-- (1) All suits upon bills of exchange, hundies or promissory notes, may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No.4 in Appendix B or in such other form as may be from time to time prescribed.

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a judge as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree--

(a) for the principal sum due on the instrument and for interest calculated in accordance with the provisions of section 79 or section 80, as the case may be of the Negotiable Instruments Act, 1881 up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit; and

b) for such subsequent interest, if any as the Court may order under section 34 of this Code; and

c) for such sum for costs as may be prescribed:

Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way.

(3) A decree passed under this rule may be executed forthwith.”

(Underlining supplied for emphasis)

From the perusal of the above, it clearly manifests that a suit in a summary character founded on bill of exchange, hundies or promissory notes can be instituted by a plaintiff as per his desire to proceed in terms thereof by presenting a plaint in the prescribed form. In such a suit, the service of the defendant shall be effected through summons as prescribed in Form No.4 in Appendix B or in such other form as may be from time to time prescribed. Sub-rule (2) postulates that in any case in which the plaint or summons are in such forms, respectively, the defendant is precluded to appear or defend the suit unless he obtains leave from the Court, so as to appear and defend. It also provides the consequences for the default in obtaining leave or appearance which is in the form of a decree in favour of the plaintiff. Rule 3 prescribes the mode for grant of leave to defend. Rule 4 empowers the Court to set aside a decree under special circumstances and to 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.

8. Article 159 of the Limitation Act, 1908 (hereinafter referred to as “**Act, 1908**”) prescribes the period of limitation for presenting an application for leave to appear and defend the suit in terms of Rule-3 of Order XXXVII of **CPC** as ten days from the date of service of summons. From the joint reading of above noted provisions of law, we can safely observe that order XXXVII of **CPC** provides a special summary procedure with regard to suit instituted on negotiable instruments. Needless to mention that for invoking the rigors for the grant of leave to appear or defend the suit against defendant, it is necessary that the plaint should be in prescribed form and summons are also served upon the defendant in the form prescribed in Sub-Rule (1) of Rule-2 of Order XXXVII **CPC**. We feel no hesitation to observe that the limitation provided in Article 159 of the **Act, 1908** for leave to appear and defend the suit would come into play when the summons are duly served as required under the law.

9. Before us, various pronouncements have been cited from both the sides. We shall take them one by one, so as to properly address the proposition canvassed before us. First of all, we would like to take into account the case law referred by the respondents. In the case of MIRZA IRFAN v. MUHAMMAD YAQOOB (2011 MLD 1024) learned single Bench of this Court held that the application for setting aside ex-parte decree without an application for leave to appear and defend was not entertainable. Second of the series is case of MUHAMMAD MANSAB v. MUHAMMAD HANIF (2025 SCMR 60). In the latter case, a suit in a summary character was instituted wherein the defendant in the suit was proceeded against ex-parte and suit was ultimately decreed as such on 9th June, 2022. The defendant in the suit, after about 19 months of passing of the ex-parte decree, moved an application seeking setting aside of ex-parte decree on the ground that he did not receive any summons or notice. In this background, it was observed by the Supreme Court of Pakistan that in terms of Rule 4 of Order XXXVII of **CPC**, the defendant has to show special circumstances persuading the Court to set aside the decree, which, to our mind, was in fact the ratio decidendi. Though as a passing reference, it was also observed that the application for setting aside ex-parte decree was not accompanying an application for leave to appear and defend the suit, which otherwise ought to have been filed alongwith application for setting aside ex-parte proceedings but with all reverence at our command, it can be termed as *obiter dicta*.

10. To the above effect, guidance can be sought from the case of Haji ALI KHAN & COMPANY, ABBOTTABAD and 8 others v. M/s. ALLIED BANK OF PAKISTAN LIMITED, ABBOTTABAD (PLD 1995 Supreme Court 362) wherein the full Bench of the Supreme Court of Pakistan observed as under: -

“A perusal of the above-quoted Rule 1 indicates that the above Order is applicable to the High Court, to the District Court and to any other Civil Court notified in this behalf by the High Court.

It may further be noticed that under sub-rule (1) of Rule 2, it has been laid down that all suits upon bills of exchange, Hundies or promissory notes, may, in case the plaintiff so desires, be instituted by presenting a plaint in the

form prescribed, but the summons shall be in Form No.4 in Appendix B or any such other form as may be from time to time prescribed,

It may also be noticed that sub-rule (2) of Rule 2 of the above Order envisages that if a suit is filed in terms of sub-rule (1), the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend. It further contemplates that in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree in terms of sub-clauses (a), (b) and (c) provided in aforesaid sub-rule (2). Whereas, sub-rule (3) thereof lays down that a decree passed under the above rule may be executed forthwith.

It may be pointed out that Rule 3 deals with a case in which a defendant after receipt of the summons in Form No. 4 as provided in Appendix B to the C.P.C. appears in Court within the prescribed time, namely, 10 days specified in the above Form and applies for leave to defend by disclosing upon an affidavit such facts as would make it incumbent on the holder i.e. the holder of the documents referred to in sub-rule (1) of Rule 2, namely, bills of exchange, Hundies or promissory notes, to prove consideration or such other facts as the Court may deem sufficient to support the application. Whereas sub-rule (2) of Rule 3 lays down that leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court may think fit. It may further be noticed that sub-rule (3) thereof, which was incorporated by Ordinance No.X of 1980, makes the provisions of section 5 of the Limitation Act, 1908, applicable to application under sub-rule (1) of Rule 3.

It may also be mentioned that Rule 4 of the above Order deals with the situation when a decree is already passed by the Court. It confers power on the Court to set aside decree under special circumstances and if necessary stay or set aside execution. It further empowers a Court to give leave to the defendant to appear to the summons and to defend the suit if it seems reasonable so to do and on such terms as it thinks fit.

6. It will not be out of context to observe that generally above Rule 4 will cover a case in which a defendant for sufficient cause has failed to appear and to file an application for leave to defend within the prescribed period.”

We feel no cavil to observe that in the light of above noted principles, the judgment in the case of MIRZA IRFAN *supra* is not declaring good law.

11. In somewhat similar facts and circumstances, in the case of GHULAM MUHAMMAD v. ABDUL GHAFAR (2008 MLD 109), it was observed as under: -

“4. I have thoroughly examined the proclamation made in the newspaper and find that the summonses were not published as required under Order XXXVII, Rule 2(1), C.P.C. as they are not in Form-4, Appendix-B to the Code of Civil Procedure, 1908. The said publication was made under the provisions of Order V, Rule 20 and not under Order XXXVII, Rule 2(1), C.P.C. It is pertinent to note here that in the said summons, it was neither indicated that summary suit

has been filed by the respondent nor the appellant was called upon to file the application for leave to appear and defend the suit within a period of ten days as prescribed under the law. In view whereof, to my mind, the summons was not published in the newspaper as prescribed in Form-4, Appendix-B to the Code of Civil Procedure, 1908 and therefore all the ensuing proceedings based on the said publication are of little consequence. It cannot be held on the basis of the proclamation in the newspaper that either the summonses were validly published as per the requirement of law or the appellant was legally served. The learned Additional District Judge on 29-4-2004, while proceeding ex parte against the appellant, did not advert to this crucial aspect of the case and failed to take notice that the summonses were not published as required under the law. It appears that the learned Court, after finding that the publication was made, proceeded to pass ex parte order in routine and without application of judicial mind. The appellant could not have been proceeded ex parte on the basis of the publication in the newspaper neither any decree could be passed against him. It may be noted that even when the appellant filed the application for setting aside ex parte decree, the learned Additional District Judge ignored to consider this legal proposition and hasten to dismiss appellant's application only on the ground that "despite substituted service by way of proclamation in the newspaper the petitioner/defendant/judgment-debtor did not bother to give appearance in the Court". He was oblivious of the fact that the summons was neither duly published nor served and thus he failed to apply judicial mind.

5. It has been held above that the summons was not legally published in the newspaper and the appellant was not properly served, therefore, all the subsequent proceedings have no value, as the superstructure made on a void order falls to the ground. I find support from the principle of law laid down in the case of *Yousaf Ali v. Muhammad Aslam Zia and 2 others* (PLD 1958 SC 104) that:--

"And if on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities, the whole series of such orders, together with the superstructure of rights and obligations built upon them, must, unless some statute or principle of law recognizing as legal the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they are founded."

6. In the above perspective, I have examined the impugned order, dated 18-12-2004 and find that the same is not sustainable in law. The learned Additional District Judge, in the first instance, should not have passed the ex parte decree on account of aforementioned grave legal infirmity and if he had passed the decree, then, on being filing the application for setting aside ex parte decree, he ought to have acceded to the request of the appellant, as it was legal and justified.

12. To our considered opinion, the judgment in the case of *ZULFIQAR ALI v. MUHAMMAD IQBAL* (2018 MLD 1547) is more relevant wherein the learned Single Bench of this Court held as under:-

7. Admittedly, the appellant on 03.05.2014 filed an application for leave to appear and defend the suit which was 9th day of the order of setting aside ex-parte judgment and decree. It is to be examined whether the application was within time or barred by limitation. The perusal of order sheet of the learned trial Court shows that the Court vide order dated 11.02.2010 issued process for

service of defendant through ordinary mode and by publication in the newspaper. The notice was published on 19.02.2010 and the appellant on account of his non-appearance on the following date was proceeded against ex-parte on 01.03.2010.

8. The learned trial Court while deciding the application for setting aside *ex-parte* judgment and decree did not consider publication in the newspaper as due service. In the order dated 24.04.2014 it was observed as under:

"No notice or summons is attached with the file showing that the same was delivered to the present appellant or he was served or even he refused to receive that. Although the publication Exh.R3 is attached with the file but in ipso facto, it was not a conclusive proof that the same was delivered and received by the present appellant/ defendant, therefore, contention of the present appellant / defendant is correct that he received no summons at all regarding institution of the suit."

(underlined to provide emphasis)

Admittedly, the appellant was not personally served in the case. The limitation under Article 159 of the Act starts when summons is served on the defendant. On account of non-service of the appellant, naturally the copy of the plaint was also not delivered to him as required under Rule 3 of Order XXXVII, C.P.C. Hence, in the absence of anything to the contrary, the appellant would be considered to have been served on 24.04.2014 in terms of Article 159 of the Act, the date when the suit revived.

9. In the case of Aqeel Ahmed v. Muhammad Akram (2006 YLR 320) while dealing with a similar situation it was held as under:-

" 7. There is no denying of the fact, rather it is admitted by the learned trial Court itself in its order, dated 9.8.2004 while setting aside the ex-parte decree that appellant was never served with summons as mandated by Order XXXVII, Rule 2(3), C.P.C. and despite showing its dissatisfaction over the report of Process Serving Agency with regard to service of summons for 28.4.2000, the learned trial Court proceeded to seek service of the appellant by way of citation in the newspaper for 6.5.2004 which in other words is substituted service and not due service as contemplated in Order XXXVII rule 2(2), C.P.C. or Order V, rule 20(1), C.P.C., which requires that the Court before issuing the substituted service must be satisfied that the defendant is keeping out of the way for the purpose of avoiding service or for any other reasons service cannot be effected in ordinary course, it is only then that the Court shall direct substituted service by any of the modes prescribed in the said Rule including publication in the press. It was held in "Mst. Afzal Begum and others v. Y.M.C.A. through its General Secretary Lahore" (PLD 1979 SC 18) and "Muhammad Aslam v. Additional District Judge, Rawalpindi and others" (1979 SCMR 85) that substituted service does not amount to due service: Hence it is held that at no stage of proceedings conducted by the learned trial Court in the suit, the appellant was ever served as required by Order XXXVII or Order V, C.P.C. whereas the limitation under Article 159 of the Limitation Act only runs from the date of service. So far as the question, whether application moved by the appellant on 15.9.2004 for leave to appear and defend was within time, is concerned suffice it to say that as till 10.9.2004 even the file of original suit was not before the learned trial

Court hence to say that limitation for this purpose started from the date of setting aside ex-parte decree and as such application moved by the appellant on 15.9.2004 was barred by time, is not correct legal position."

10. The interim order passed on 24.04.2014 shows that the suit was adjourned after its revival for 15.05.2014, without any reference to the filing of application for leave to appear and defend the suit. The order dated 24.04.2014 reads as under:-

"Vide my detailed order of even recorded separately on the application of defendant for setting aside the ex parte judgment and decree dated 23.4.2010, the impugned judgment and decree has been set-aside and the suit has been restored. Consequently, it be registered. Now to come up on 15.5.2014."

Similarly, in the detailed order of the even date, nothing was mentioned about the application for leave to appear and defend the suit. Now, the limitation of 10 days for filing an application for leave to appear and defend the suit commences when summonses are served as provided in Article 159 of the Act, which reads as follows:-

<i>159. For leave to appear and defend a suit under summary procedure referred to in section 128 (2)(f) or under Order XXXVII of the Code of Civil Procedure, 1908.</i>	<i>Ten days</i>	<i>When the summons is served.</i>
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The defendant, having not been served in the case, filed an application within 10 days of the above mentioned order, therefore, his application cannot be termed as barred by time. While dealing with somewhat similar situation in the case of Habib Bank Limited v. Muskrat Ali Khan (PLD 1987 Karachi 86) it was held as under:

"It is noticeable that the said order merely sets aside the ex-parte decree passed on 16.2.1984. It does neither fixes a day for hearing of the suit as provided under Order IX, Rule 13, C.P.C. nor says any things about leave to the defendant to appear and defend the suit. As a consequence of the said order the defendant will be taken to be not served with the summons. Taking the point to its logical conclusion one may argue that the 10 days period of limitation was to start only after the defendant is shown to be served with the summons. However, the defendant's making the above application, for leave to appear and defend the suit within 10 days of passing the said order can hardly be said to be beyond time as provided under Article 159 of the Limitation Act, 1908."

11. The impugned order, dismissing the application for leave to defend the suit as time barred is not sustainable, consequently the order dated 31.10.2014 and the judgment and decree dated 13.11.2014 are set-aside. The case is remanded to the learned trial Court to decide the application afresh on its merits which shall be deemed to be pending before the learned trial Court. The parties are directed to appear before the learned District Judge, Multan on 12.10.2017, who shall decide the matter either himself or shall entrust the same to any other Court of competent jurisdiction. The learned trial Court is expected to proceed with the matter expeditiously and shall decide the suit within a period of three

months from today.

13. The above survey of law though made the proposition a bit simple for us but we would like to ponder upon the issue a bit deep to unearth the true analogy of order XXXVII of **CPC**. It would not be out of context to mention here that unlike an ordinary suit, in a suit instituted under Order XXXVII of **CPC**, a defendant cannot appear or defend the suit unless he obtains leave from the Court in the manner provided therein but for the said purpose, certain pre-conditions are also laid down, which are to be fulfilled before penalizing the defendant in the suit. In a suit instituted under Order XXXVII of **CPC** in the ordinary course, a defendant has to submit leave to appear and defend the suit within ten days from the date of service of summons upon him/her but Order XXXVII does not specifically and unequivocally cater the situation involved in the present cases. A decree passed by the Court in a suit for summary character can be set aside by the said court under Rule-4 of Order XXXVII of **CPC**, if the defendant is able to show some special circumstances for the said purpose. We feel no hesitation to observe that Order XXXVII of **CPC** nowhere requires a defendant to move an application seeking leave to appear and defend the suit alongwith an application for setting aside ex-parte decree. It is an oft repeated principle of law that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other way. Reliance in this respect can be placed on MUHAMMAD AKRAM v. Mst. ZAINAB BIBI (2007 SCMR 1086).

14. Rule 7 of Order XXXVII of **CPC** ordains that 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. Leaving aside the implications of Rule 7 in the present scenario, we have noticed that similar provisions are embodied in the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as “**Ordinance**”) and the Punjab Rented Premises Act, 2009 (hereinafter referred to as “**Act, 2009**”). In the former, section 10 deals with the leave to defend, which is almost pari materia to order XXXVII of **CPC**. Section 12 of the **Ordinance** was, however,

independently inserted in the **Ordinance**, which deals with the power of the Court to set aside decree. For ready reference and convenience, same is reproduced below: -

12. POWER TO SET ASIDE DECREE. – In any case in which a decree is passed against a defendant under sub-section (1) of Section 10 he may, within twenty-one days of the date of the decree, or where the summons was not duly served when he has knowledge of the decree, apply to the Banking Court for an order to set it aside, and if he satisfies the Banking Court that he was prevented by sufficient cause from making an application under Section 10, or that the summons was not duly served nor published in newspapers, the Court shall make an order setting aside the decree against him upon such terms as to costs, deposit in cash or furnishing of security which shall not be less than one third of the amount of the decree and allow him to make the application within ten days of the order.

(Underlining supplied for emphasis)

By virtue of above provision, a defendant in the suit instituted under the **Ordinance**, if confronted with an ex-parte decree, can move an application for setting aside such decree and if his application is allowed, he is permitted to make an application for leave to contest within ten days of the such order.

15. Contrary to this, in the **Act, 2009**, a respondent, in the proceedings under the Act, has also to seek leave to contest in terms of section 22 and if he/she is proceeded against ex-parte, section 21(4) deals with the situation, which reads as under: -

21. Appearance of parties and consequences of non-appearance.– (1) If an application under this Act other than application for deposit of rent is filed, the Rent Tribunal shall issue notice to the respondent in the form prescribed in the Schedule, for appearance of the respondent on a date not later than ten days through process server, registered post acknowledgement due and courier service.

(2) A notice under sub-section (1) shall be accompanied by copies of the application and the documents annexed with the application.

(3) If the respondent fails to appear and the Rent Tribunal is satisfied that:

(a) the notice has not been served on the respondent or the respondent is willfully avoiding the service of the notice, the Rent Tribunal may direct service of the notice by:

(i) affixing a copy of the notice at some conspicuous part of the rented premises or residence of the respondent; or

(ii) publication in the press, electronic media or any other mode; and

(b) the notice has been served, the Rent Tribunal may proceed *ex-parte* and pass the final order.

(4) If an *ex-parte* order is passed against a respondent, the respondent may, within ten days from the date of knowledge, apply to the Rent Tribunal for setting aside the *ex-parte* order along with an application for leave to contest.

(5) If the respondent shows a sufficient cause for his non appearance, the Rent Tribunal may set aside the *ex-parte* order on such terms as it may deem fit.

(6) The parties may appear in person or through a recognized agent in the Rent Tribunal.

(7) If on a date fixed, the applicant fails to appear, the Rent Tribunal may dismiss the application.

(8) If an application has been dismissed in default of the appearance of an applicant and an application for restoration of the same is made within thirty days of the dismissal order, the Rent Tribunal may restore the application on such terms as it may deem appropriate.

(underlining supplied for emphasis)

From the glimpse of the above noted provision, it is clearly evident that in case of *ex-parte* proceeding order against the respondent, he/she may move an application for setting it aside before the Rent Tribunal but such application has to accompany an application for leave to contest as well.

16. In view of punitive nature of the provisions contained in Order XXXVII of **CPC**, we are constrained to observe that it should be interpreted as it actually exists and nothing can be imported or borrowed for any interpretation, which is alien to the plenary meaning. We may observe here that a defendant in a suit, has to seek leave to appear and defend such suit but after passing of the *ex-parte* decree, the existence of suit itself would become mystery. In other words, suit will only revive if once the application for setting aside *ex-parte* decree is allowed.

17. The nutshell of above noted threadbare discussion is that in case a suit under Order XXXVII of **CPC** is decreed *ex-parte*, it is not obligatory for the defendant to move an application for leave to contest alongwith application for setting aside *ex-parte* decree. Such application would only

come into play after acceptance of latter application and in case of acceptance of application for setting aside ex-parte decree, the defendant would be obliged to move an application for leave to appear and defend the suit within ten days from the passing of such order or judgment.

18. For what has been discussed above, we **allow** this appeal and **set aside** the order dated 18th June, 2019 passed by the learned Additional District Judge, Pind Dadan Khan. As a sequel, the application seeking setting aside of the ex-parte judgment and decree dated 12th September, 2014 shall be deemed pending before the learned Additional District Judge, Pind Dadan Khan, which shall be decided on its own merits strictly in accordance with law.

19. So far case of revision applicant is concerned, he was proceeded against ex-parte, for setting aside of which, he moved an application but it has been dismissed on the ground that it is not accompanying an application for leave to appear and defend the suit. To that effect, we are inclined to observe that in ordinary course, when due compliance is made to Rule 2 of Order XXXVII **CPC** relating to prescribed form of plaint and service of summons in Form No.4 in Appendix B, the defendant who is proceeded against ex-parte is obliged to move an application for leave to appear and defend the suit alongwith his application for setting aside ex-parte proceeding order. We have also noticed that nothing is available on record that plaint was in the prescribed manner and summonses were ever served in the prescribed form, so question of limitation would not arise ever unless due compliance is made to the mandatory provisions of law. Needless to observe that in case of ex-parte proceeding order, if defendant opts to move an application for its setting aside, such an application is to be treated in terms of Order IX Rule 7 of **CPC**. Since in the present case, summons were not served in the prescribed manner, so by not moving an application for leave to appear and defend the suit alongwith his application for setting aside ex-parte proceeding order, the applicant has not committed a major sin but a small peccadillo. An application for setting aside ex-parte proceeding order should accompany an application for leave to appear and defend the suit as is required in terms of

Rule 2 of Order XXXVII **CPC** but limitation for such an application would only start running if plaint is in prescribed form and summonses were also served in the prescribed manner.

20. For the foregoing reasons, the connected civil revision application No.901 of 2017 is, thus, also **allowed**. Resultantly, order dated 8th September, 2017 passed by the learned Additional District Judge, Rawalpindi is **set aside**. As a sequel, the application seeking setting aside of ex-parte proceeding order dated 16th February, 2017 shall be deemed pending before the trial Court, which shall be decided afresh on its own merits, strictly in accordance with law. The applicant, however, would be at liberty to move an application for leave to appear and defend the suit within ten days from today. No order as to costs.

(Sadaqat Ali Khan)
Judge

(Mirza Viqas Rauf)
Judge

(Jawad Hassan)
Judge

Approved for reporting

Judge

Judge

Judge