FORM NO.HCJD/C

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

CASE NO. : CIVIL REVISION NO.31/2012

Muhammad Aslam Dar
Vs.
Fazal-ur-Rehman Khan Niazi & Another

Date of hearing : 03.05.2012

Petitioners by : M. Bashir Khan, Advocate

Respondent by : Raja Muqsit Nawaz Khan, Advocate

NOOR-UL-HAQ N. QURESHI J.- Ex-parte judgment and decree dated 03.11.2010 and order dated 15.11.2010 passed by learned Civil Judge, Islamabad and impugned judgment and decree dated 21.3.2012 passed by learned Additional District Judge, Islamabad have been impugned through the instant C.R.

2. Leading facts of the case as contended in the C.R whereby respondent No.1 filed a suit for recovery of Rs.245,000/- against the petitioner and respondent No.2. the petitioner appeared, filed his written statement also issues were framed on 02.2.2007 when for three dates of hearing, matter was fixed for evidence of plaintiff/respondent No.1 who was found absent.

3. The ex-parte proceedings were initiated against the petitioner on 25.7.2007 when no evidence of plaintiff was available therefore, on moving an application, exparte proceedings were set aside vide order dated 08.12.2007.

4. Again the case was fixed for evidence of plaintiff but for 16 dates of hearing, evidence by plaintiff side was not produced which dates commencing from 16.2.2008 to 03.2.2009 a period spread over about one year.

5. Allegedly, the plaintiff/respondent No.1 assured the petitioner that he will withdraw the suit. The petitioner with such satisfaction proceeded abroad on furnishing assurance but the suit was decreed on 03.11.2010 which infact as a result of fraudulent conduct of plaintiff/respondent No.1. The petitioner acquiring knowledge about a week prior to 21.6.2011 that ex-parte decree has been passed on 03.11.2010 when notices for execution were issued to the petitioner at his address in Islamabad. The petitioner at relevant time was in Canada. The petitioner through his attorney filed an application on 21.6.2011 for setting aside ex-parte judgment and decree dated 03.11.2010, mentioning therein that the petitioner upon knowledge about week ago, moved the same.

6. Reply to the said application was also filed but the learned Civil Judge, Islamabad without considering such materiality set forth in the application, dismissed the same vide order dated 15.11.2011.

7. Challenging the said order, petitioner filed appeal on 23.12.2011 before learned District judge, Islamabad which was transmitted to learned Additional District Judge who vide judgment and decree dated 21.3.2012 has been pleased to dismissed the appeal, therefore, instant C.R preferred.

8. On receiving notice, respondent appeared through counsel.

9. Learned counsel for the petitioner argued that case diary dated 12.7.2007 shows a compromise was going to be presented before the court on 23.7.2007. he referred the judgment dated 03.11.2010 whereby it was observed that defendant No.2 did not appear despite service of summon, therefore, proceeded ex-parte. He also pointed out para-6 of the judgment which provides that after framing of issues no one turned up, therefore, proceeded ex-parte vide order dated 24.6.2010 and therefore, ex-parte evidence was summoned. He referred page 28, his application moved on behalf of petitioner by his counsel whereby at para-3 he informed that petitioner had no knowledge about ex-parte decree as he proceeded abroad. He also referred page 36 which is an order passed on 15.11.2011 in its para-4 it is apparent that Aslam Dar himself appeared in the court on 12.1.2007, written statement was filed, issues were framed but despite the matter fixed for evidence no one turned up, therefore, exparte proceedings were initiated. Thus it was fixed for ex-parte evidence. He argued that under such circumstances, Article 164 of Limitation Act would not apply instead whereof Article 181 would apply. He argued that order 9 Rule 6 CPC having crucialty in this entire case in view thereof applicability of relevant Article could be ascertained. Article 164 provides 30 days time for preferring application to get ex-parte decree set aside whereas Article 181 provides when right to apply occurs. He argued that case of petitioner does not cover by article 164 but it is covered by article 181, therefore, both the courts below have erred in deciding the application by trial court and appeal by appellate court as both the courts have not applied their mind judicially. The concurrent findings by both the courts below suffer from illegality without application of proper article of limitation act and there are strong reasons available before the court to interfere within such findings. In support of his contentions, he referred order 9 Rule 6 CPC which is reproduced here under:-

> ***"Procedure when only plaintiff appears*** *--(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then*
>
> *a)* ***When summons duly served*** *--(a) if it is proved that the summons was duly served, the Court, the Court may proceed exparte and pass decree without recording evidence;*
>
> *b)* ***When summons not duly served****, if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;*

*c) **When summons served, but not in due time**, if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.*

(2) When it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement"

10. He also referred order 9 Rule 13, where the relevant provision of law to seek setting aside decree ex-parte against defendant.

11. For the convenience Article 164 and 181 of limitation Act are also reproduced here under:

Description of Suit		*Period of Limitation*	*Time from which period begins to run*
164.	*By a defendant, for an order to set aside a decree passed exparte*	*Thirty days*	*The date of the decree or where the summons was not duly served, when the applicant has knowledge of the decree*
181	*Application for which no period of Limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908.*	*Three years*	*When the right to apply accrues*

He relied upon following case law in support of his contentions:

a) PLD 1981 SC 21
b) PLD 1986 Peshawar 81
c) 2007 MLD 985
d) 2001 CLC 1976
e) PLD 2002 Supreme Court 491
f) PLD 2002 Supreme Court 495

12. On the other side, learned counsel for the respondent argued that the petitioner himself remained absent despite knowledge of the pendency of suit. He filed written statement in his defence but subsequently caused his disappearance which was neither within the knowledge of court nor anybody. The plea raised of compromise between the parties is an old issue pertaining to the order 12.7.2007 having no connection with the subsequent developments. The said compromise as apparent from the diary referred was to be submitted on 23.7.2007 which positively leading towards an aspect that it was merely an attempt but could not attained finality that is why subsequent to that event parties were contesting their rights through their counsel but suddenly petitioner disappeared without information furnished to the court.

13. After lapse of sufficient time, he without appearing before the court moved an application through his counsel who sworn his own affidavit which is contrary to the averment of the petitioner raised in the instant civil revision. No any documentary evidence in support of contentions raised either before the trial court, appellate court or

even before this court is produced. A vague plea since taken by petitioner which has not be believed by both the court below that is why with sufficient reasons, learned courts below have passed the respective orders and judgments.

14. He argued that revision requires very strong base to interfere when concurrent findings have been delivered by the both court below and there is no such legal plea raised as to how the decision of both the courts below suffered from legal and factual infirmity. He also emphasized that by wrong proposition of law, petitioner is trying to re-alive his claim which as a result of final decision has no any base to stand. He emphasized that only article 161 of limitation act would apply which in clear terms provides the remedy and time limit. Like-wise order 9 Rule 6 is very much clear and in case if the petitioner has not been served with the summons, issued by trial court, such benefit he could have claimed but when he himself was contesting the suit even, he filed written statement when such a vague plea he can not now claim of his ignorance. He however relied upon following case law in support of his contentions:

a) *2005 SCMR 346*
b) *1984 SCMR 504*
c) *2008 SCMR 1417*
d) *2008 SCMR 287*
e) *2006 SCMR 631*
f) *PLD 1998 Peshawar 43*
g) *1999 CLC 117*
h) *1997 CLC 841*
i) *PLD 1979 SC (AJ & K) 120*

15. Arguments heard, record perused, relevant case law has also been taken into consideration.

16. From the record it appears that there is no plausible explanation furnished by petitioner to substantiate his such plea of remaining outside the Pakistan or proceeded abroad.

17. Merely by filing an application through attorney does not mean that he proceeded abroad nor his such plea of compromise is proved through any other independent or corroborative piece of evidence, no document in support thereof has also been furnished either before the trial court, the appellate court as well as before this Court. Moreover, the case law presented in support of contentions raised by learned counsel for petitioner is not appears to be helpful to him as heavy burden is casting upon the petitioner to prove his such plea.

18. Otherwise, basic principle is vigilance not indolence and when the party has no right towards his own interest, the court can not be instrumented to rescue them for their continuous indolence for a sufficient period despite the fact on record that he after filing written statement cause his disappearance when exparte decision initiated by trial court.

19. The case law presented by learned counsel for respondent is sufficiently supporting his strong plea. The order and judgment passed by trial court dated 03.11.2010 and order dated 15.11.2010 passed by learned Civil Judge, Islamabad and impugned judgment and decree dated 21.3.2012 passed by learned Additional District Judge, Islamabad respectively are well speaking and covering all the aspects factual as well as legal, therefore, I find no any legal infirmity in both the orders which require interference through instant C.R. Otherwise for the Civil Revision, there requires very strong base on legal side and the burden casting upon the shoulder of petitioner to prove the illegality in both the decision of courts below which in my humble view is entirely lacking. Hence, instant Civil Revision merits no consideration and same is hereby dismissed.

(NOOR-UL-HAQ N/QURESHI)
JUDGE

Announced in Open Court on 09-05-2012

JUDGE