

JUDGMENT SHEET.
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT.

Civil Revision No.362/2019.

Mian Muhammad Yasin

Vs.

Bashir Ahmed Nadeem

Petitioner by:

Mr. Muhammad Shahid Kamal Khan,
Advocate.

Respondent by:

Ex-Parte.

Date of Decision:

22.07.2020.

MOHSIN AKHTAR KAYANI, J:- Through this civil revision petition, the petitioner has assailed the order dated 12.09.2019, whereby learned Additional District Judge (West) Islamabad has closed right of the petitioner to cross-examine D.W.1.

2. Brief facts as referred in the instant case are that the petitioner filed suit for recovery of amount in terms of order XXXVII CPC on the basis of negotiable instrument against the respondent, whereby leave was granted and after submission of written statement, issues were framed on 14.05.2014, where-after the matter was fixed for recording of evidence and evidence of the petitioner being plaintiff has been concluded, however, when the matter was fixed for cross-examination of the respondent side/defendant, the petitioner failed to cross-examine the defendant/D.W.1, even he was burdened with costs of Rs.3,000/- with last opportunity but he failed and the impugned order was passed.

3. Learned counsel for the petitioner contends that he was on general adjournment w.e.f. 08.07.2019 to 09.09.2019 for performance of Hajj and the matter was immediately fixed on first working day i.e. 12.09.2019 after his general adjournment but he was not well on the said date, resultantly impugned order was passed although he has partially cross-examined D.W.1 and the remaining evidence was to be concluded at that date as such it is not willful default on his part or the petitioner, who is eager to conclude the matter; that if the petitioner is not allowed to cross-examine D.W.1, it would amount to negation of right of fair trial and it would cause irreparable loss to the petitioner.

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4. This Court after entertaining C.R on 27.09.2019 issued notices to the respondent on 24.10.2019, where-after the respondent side put appearance through counsel Mr. Ikram ul Haq Chaudhry, even the respondent put appearance on 29.05.2020 and 19.06.2020 but later on no one put appearance, however, on 29.05.2020 this Court passed direction to the Trial Court for early conclusion of the trial within period of 30 days but the petitioner filed C.M No.515/2020 for recalling of the order. The said application was dismissed vide order dated 13.07.2020 and the matter was fixed for today i.e. 22.07.2020 after issuance notice to the parties but despite that no one has put appearance on behalf of the respondent, even name of learned counsel for the respondent is reflected in the cause list, which proves that the respondent is not interested in early conclusion of the trial, therefore, he is proceeded against ex-parte.

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

6. Perusal of the record reveals that the petitioner filed suit for recovery in terms of order XXXVII CPC and the matter was contested by the respondent after grant of leave by the Court. Issues were framed and evidence of the petitioner/plaintiff was concluded. The respondent put his appearance and recorded his evidence on 22.11.2018, who was cross-examined on 07.03.2019 but the said cross-examination was not concluded and remaining cross-examination was reserved as reflected from the order sheet i.e. *بقیہ جرح محفوظ شد*. The matter was adjourned to 25.04.2019, whereby the case was transferred to the Court of Mr. Muhammad Ali Waraich, learned Additional District Judge (West) Islamabad, who adjourned the matter for 27.04.2019 when last and final opportunity was granted on the application under order XIII Rule 2 CPC. The matter was adjourned to 20.05.2019 for arguments on the said application and the same was adjourned to 28.05.2019 due to non-availability of counsel, who was busy before Apex Court. The matter was fixed for 03.07.2019, whereupon the respondent alongwith his counsel put his appearance but no one put appearance on behalf of the petitioner side and in the later half of the day proxy counsel on behalf of the petitioner appeared and submitted the general adjournment of the petitioner's counsel w.e.f. 08.07.2019 to 09.09.2019 and the learned Trial Court extended one last opportunity

for cross-examination of D.W.1 and fixed the matter for 12.09.2019, however, on the said date proxy counsel put appearance before the Court on behalf of the petitioner/plaintiff and the impugned order was passed due to non-availability of the counsel.

7. This entire scenario if read in juxta position with the impugned order, it reveals that learned Trial Court has referred previous history of the case in which delay was caused due to many reasons although D.W.1 was cross-examined partially. The matter has to be considered for the conduct of the petitioner's counsel or the petitioner w.e.f. 07.03.2019 till 12.09.2019 in which the petitioner's counsel remained on general adjournment in connection with Hajj but learned Trial Court has referred previous reasons, which are not relevant to the position referred in the impugned order dated 12.09.2019. Last opportunity was the only opportunity granted to the petitioner as such learned Trial Court was under influence of the date of filing of the suit, which is pending since 2013 and the impugned order has been passed under the said inference.

8. It is trite law that matter should be decided on merits rather than on technicalities, even in this case financial rights of the petitioner are at stake, which can only be settled if cross-examination is completed upon D.W.1 although there is some negligence on part of the petitioner in previous period prior to cross-examination on D.W.1 but the same could not be considered as ground to deprive him from cross-examination when he has partially cross-examined the said witness on 17.06.2019, which fact was not considered by Trial Court nor referred in the impugned order. The Trial Court is equipped with the jurisdiction vested in it and should grant one opportunity to achieve the perspective of fair trial but the same was not exercised as such this Court is fully competent to settle this matter in terms of section 115 CPC through supervisory jurisdiction.

9. In view of above discussion, the instant civil revision is allowed subject to payment of costs of Rs.10,000/- to be paid by the petitioner to the respondent. The impugned order dated 12.09.2019 is hereby set aside. The cost shall be paid before the Trial Court on the date fixed and only one opportunity shall be granted to the petitioner side for cross-examination on D.W.1. It is expected that learned Trial

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Court shall conclude the trial within period of three (03) months from the date of passing of this judgment under intimation to this Court.

(MOHSIN AKHTAR KAYANI)
JUDGE

R.Anjam

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