

FORM NO.HCJD/C
JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

JUDICIAL DEPARTMENT
CASE NO.F.A.O. No.85 of 2007

Liaqat Ali

Versus Zarafat Ali etc

Date of hearing: **28.10.2008**

Appellant by: **Mr. Muhammad Asad Rajpoot, Advocate.**

Respondents by:- **M/s Shehzad Shaukat, Advocate & Mian**
Ishtiaq Hussain, Advocate.

Muhammad Munir Paracha, J. :- The respondents filed a suit against the petitioner, Capital Development Authority and Director, Estate Management, Capital Development Authority for declaration, cancellation of documents, possession, recovery of mense profit and permanent injunction in the court of Civil Judge, Islamabad. After service of summons, defendants for the first time appeared before the Trial Court on 19.10.2006. Mr. Muhammad Asad Rajpoot, Advocate filed his power of attorney on behalf of the petitioner. Learned Trail Judge adjourned the case for 27.11.2007, for filing the written statement by the defendants. On 27.11.2007, the Presiding Officer of the Court was on leave and the case was adjourned by the Reader of the Court to 16.01.2007. On 16.01.2007, the learned Trial Judge adjourned the case for 17.02.2007 with a warning that it would be the last opportunity for filing the written statement. On 17.02.2007, an application under Order 7 Rule 11 CPC for rejection of the plaint was filed by the petitioner. The case was adjourned to 28.03.2007 for filing reply to the application. The order dated 28.03.2007 shows that CDA

filed written statement and written reply to the injunction application. The plaintiff filed an application under Order 1 Rule 10 CPC. The case was adjourned to 09.05.2007 for filing replies to applications under Order 1 Rule 10 CPC and Order 7 Rule 11 CPC. The order dated 09.05.2007 shows that the reply to application under Order 7 Rule 11 CPC was filed by the plaintiff. Some time was sought by the petitioner for filing written statement. Learned Trial Judge adjourned the case for 05.06.2007 with a warning that it would be the last opportunity. On 05.06.2007, the case was adjourned to 24.07.2007 for filing the written statement and arguments on the application. On 24.07.2007, the petitioner requested for some more time for filing the written statement, however, the learned Trial Judge declined the request, struck off defence under order 8 rule 10 CPC and fixed the case for 02.10.2007 for arguments on application under Order 7 Rule 11 CPC. The petitioner challenged the said order dated 24.07.2007 through present FAO.

2. I have heard learned counsel for the petitioner as well as Mr. Shehzad Shaukat, Advocate who represented the respondents/plaintiffs.

3. Learned counsel for the respondents raised a preliminary objection that the appeal is not competent, as no judgment was pronounced against the petitioner. I have held in case reported as **"Kiran Arif Mian Vs. Kinza Khalid" PLD-2008/11 Islamabad;**

"Under Order XLIII, Rule 1(b), the order is appealable only if the judgment is pronounced against a party failing to file the written statement. In this case, learned trial judge, after striking off defence of the petitioner, fixed the case for ex parte evidence of the plaintiff/respondent. Since the judgment was not pronounced against the petitioner, the appeal is not competent. The

petitioner, therefore, rightly filed the revision petition."

I agree with learned counsel for the respondents that the appeal could not have been filed. However, I will treat present FAO as Civil Revision.

4. Learned Counsel for the petitioner submits that Order VIII Rule 10 CPC could not have been invoked by the trial court because the court never required the petitioner to file written statement in terms of Order VIII Rule 9 CPC, relies on *Sardar Sakhawatuddin & 3 others Vs. Muhammad Iqbal & 4 others* (**1987 SCMR 1365**), *Muhammad Younas Vs. Muhammad Iqbal & 11 others* (**2004 CLC 1198**), *The Secretary, Board of Revenue Punjab, Lahore & another Vs. Khalid Ahmed Khan* (**1991 SCMR 2527**), *WAK Orient Power and Light Ltd. Vs. Westinghouse Electric Corporation & others* (**2002 SCMR 1954**) and *Mst. Najma Yasmin and another Vs. Mst. Firdous Khalid and 2 others* (**2002 CLC 1085**).

5. On the other hand it is submitted by the learned counsel for the respondents that learned Trial Judge required the petitioner to file written statement within the meaning of Order VIII Rule 9 CPC when a number of adjournments were granted by the Court for the said purpose, relies on *Muhammad Waris Vs. Addl. District Judge & 2 others* (**2008 CLC 580**), *Wak Orient Power and Light Limited Vs. Westinghouse Electric Corporation & others* (**2002 SCMR 1954**), *Col.(Retd.) Ayub Ali Rana Vs. Dr. Carlites Pune & another* (**PLD 2002 SC 630**), *M/s Allied Group Ventures Ltd. Vs. Quality Vision (Pvt.) Limited & others* (**PLD 2002 Lahore 274**), *Manager, Forest Operation (Malakand Circle) Vs. Muhammad Zaman and others* (**PLD 1992 Peshawar 173**), *Azad Hussain Vs. Haji Muhammad Hussain* (**PLD 1994 SC 874**), *Mst. Hakumat Bibi Vs. Imam Din & others* (**PLD 1987**

SC 22), Muhammad Munshi Vs. Shahamand (**PLJ 1981 Lahore 511**), Addl. Chief Engineer (Army), Okara Cantt. Vs. M/s Nasim Co. (Pvt.) Ltd. (**1991 CLC 1476**), Azad Hussain Vs. Haji Muhammad Hussain (**1994 CLC 1817**), Muhammad Salim Vs. Abdul Shakoor (**1994 CLC 1911**), Muhammad Fayyaz Butt Vs. Metropolitan Corporation Ltd., Lahore (**1997 CLC 55**) and Lahore Development Authority Vs. Haji Abdul Qadoos (**2004 MLD 923**).

6. After the Punjab amendment, Order VIII Rule 1 CPC reads as under:-

“Written Statement.

The defendant shall, at or before the first hearing or within such time as the court may permit, present a written statement of his defence;

Provided that the period allowed for filing the written statement shall not ordinarily exceed thirty days.

Provided further that no more than two adjournments shall be granted for presenting the written statement”.

7. After the amendment, the defendant is under legal obligation to file written statement of his defence at or before first hearing or within such time as the court may permit. The court can require the defendant to file the written statement under Order VIII Rule 9 CPC. However, Order VIII Rule 10 CPC can only be invoked, if the defendant has failed to file the written statement required by the Court in terms of Order VIII Rule 9 CPC. In the present case, the Trial Court never required the plaintiff to file the written statement. The adjournments were being granted by the Trial Court for filing written statement but it were for the written statement required to be filed under Order VIII Rule 1 CPC. The phrase, “**so required**” necessarily refers to Order VIII

Rule 9 CPC. It was held by the Hon'ble Supreme Court in the case reported as 1987 SCMR 1370 which reads as under:-

"There is another very important aspect of the matter. All the three types of written statement mentioned earlier do not entail penal consequences. Therefore, it should always be absolutely clear from the proceedings that the written statement on account of which penalty is sought to be imposed was "required", by the Court. It was neither as of right (Rule 1) nor as result of permission (Rule 9). The use of word "required" is not without significance. It does not permit a routine order without application of mind to the "requirement" and/or the need. Therefore, it is essential that whenever a written statement is to be made subject of the penal rule 10, there should be proof on record that the Court had "required" it by application of mind to the need and that too in a speaking order. Without the same, many innocent parties would be trapped in a technicality without fully realizing the implications".

8. No speaking order having been passed by the Trial Court after application of mind requiring the defendant to file written statement in terms of Order VIII Rule 9 CPC, an order under Order VIII Rule 10 CPC could not have been passed. The order dated 24.07.2007 passed by the trial court is, therefore, set aside.

9. However, the matter does not end here. Order VIII Rule 1 CPC provides that no more than two adjournments shall be granted for presenting the written statement. In this case, the defendant failed to present the written statement although he was granted 4/5 opportunities. He, therefore, cannot now be permitted to file the written statement.

10. Let me now examine the effect of non-filing of the written statement. Non-filing of the written statement does not amount to ~~the~~ admission

of facts contained in the plaint. Order VIII Rule 2 CPC provides as under:-

“New fact must be specifically pleaded:- The defendant must raise by his pleading all matters, which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing the illegality.

11. Similarly Order VIII Rule 6 reads as under:-

Particulars of set-off to be given in written statement.

(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiffs demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

Effect of set-off.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

12. In the absence of the written statement, the defendant/petitioner will have no right to lead evidence to prove facts not arising out of the

plaint. Similarly, the defendant cannot lead evidence to claim set-off against the plaintiff. However, he has a right to cross-examine the witnesses produced by the plaintiff and he can also lead evidence to disprove the facts stated in the plaint. The FAO (it was treated as Civil Revision) stands disposed of in the above terms.

(Muhammad Munir Peracha)
Judge

Altaf Malik

Announced in the open Court on: / 3 ,11.2008.

Judge

Approved for reporting.

Judge

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