

Form No: HCJD/C.
JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: Writ Petition No.1407 of 2020

Hameed Ullah
Vs.
Ali Arshad and another

Petitioner by: Mr. Khurram M. Qureshi,
Advocate.

Respondents by: Syed Kazim Raza Naqvi, Advocate.

Date of Decision: 25.08.2021.

AAMER FAROOQ, J.- Respondent No.1 filed a suit for recovery in the sum of Rs.1,200,000/- against the petitioner under Order XXXVII Code of Civil Procedure 1908 (CPC) on the basis of cheque allegedly issued by the petitioner to respondent No.1 drawn on Meezan Bank, I-10 Markaz Branch, Islamabad.

2. The petitioner did not enter appearance in the suit, hence the same was decided *ex parte* vide judgment and decree dated 02.02.2019.

3. Two applications were filed by the petitioner, one to set aside *ex parte* judgment and decree dated 02.02.2019 on 30.05.2019 and the second for leave to appear and defend the suit on the same date i.e. 30.05.2019. Both the applications were dismissed by the learned Trial Court vide order dated 22.01.2020 on the basis that the application for setting aside *ex parte* judgment and decree is barred by limitation.

4. Learned counsel for the petitioner, *inter alia*, contended that since the suit was filed under Order XXXVII CPC, hence application filed for recalling of *ex parte* judgment and decree dated 02.02.2019 was under Order XXXVII Rule 4 CPC for which no specific period of limitation is provided and Article 181 of the Limitation Act, 1908 (the Act) would be applicable. Reliance was placed on the case titled **Shahnawaz v. Adwise Pvt. Limited through Chief Executive** (2003 YLR 2724), **Naseer Ahmad v. Muhammad Mushtaq** (2006 MLD 1936), **Tahir A. Khan v. Messrs United Air Travels Ltd and others** (2004 YLR 416) & **Shahid Pervaiz Alias Shahid Hameed v. Muhammad Ahmad Ameen** (2006 SCMR 631). It was further submitted that the learned Trial Court erroneously applied Article 164 of Schedule-I to the Act which is only applicable where a suit under Order XXXVII CPC is contested after grant of leave to defend and thereafter *ex parte* judgment and decree is passed.

5. Learned counsel for respondent No.1, *inter alia*, contended that the appropriate Article of the Act in the facts and circumstances is Article 164 of Schedule-I to the Act in which period of limitation provided is 30 days from *ex parte* judgment and decree or knowledge of the same. It was contended that the petitioner had not pleaded the knowledge nor filed any application for condonation of delay, hence application was rightly dismissed.

6. Arguments advanced by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

7. The controversy raised in the instant petition is spelt out in the preceding paragraphs, hence need not be reproduced. As noted above, the application for recalling of *ex parte* judgment and decree dated 02.02.2019 was dismissed by the learned Trial Court on the basis that the applicable Article is 164 of Schedule-I to the Act and under the same the limitation period is 30 days from the passing of the judgment and decree or knowledge of the same. It is pertinent to observe that the petitioner did not make any request for condonation of delay. Under Order XXXVII Rule 4 CPC after the decree is passed the Court under special circumstances can set aside the same and also stay or set aside the execution if it seems reasonable to the Court to do so provided there are special circumstances showed to the satisfaction of the Court; in parallel *ex parte* judgment and decree may also be recalled or set aside under Order IX Rule 13 CPC. In a normal course of event a suit which is under Order XXXVII CPC under the referred provision of law a judgment and decree is to be set aside where the applicant shows to the satisfaction of the Court that summons were not duly served or that he was prevented by any sufficient cause from appearing when the suit was called for hearing. It is settled law that an application filed under

Order IX Rule 13 CPC the applicable Article to govern the limitation under which the application for recalling of the order is made, is Article 164 *ibid* in which the period, as observed hereinabove, is 30 days from the date of the decree or the knowledge of the same. Whereas for application under Order XXXVII Rule 4 CPC no period of limitation is provided under the Act and where such is the case the governing Article is 181 of Schedule-I to the Act which provides that where no specific period for limitation is provided for any application then the same shall apply and the period of limitation shall be three years.

8. In the instant case the moot point is whether an application for setting aside *ex parte* judgment and decree is to be treated as one under Order IX Rule 13 CPC or Order XXXVII Rule 4 CPC. It is trite law that where there is a special provision and general provision for some action to be taken then the special shall prevail over the general. This principal has been qualified in the context of Order XXXVII CPC by the Courts by observing that where application for leave to defend is allowed and the defendant contest the suit but absent himself and the suit proceeds like a normal suit after recording of evidence then the governing provision of law is Order IX Rule 13 CPC; however, if summons are not properly served or any application for leave to defend is made and *ex parte* judgment and decree is passed the applicable

provision is Order XXXVII Rule 4 CPC. Reliance is placed on the case titled **Raees Ahmad Pahalwan v. Nayab Cinema** (1990 ALD 763) and **Shahnawaz v. Adwise Pvt. Limited through Chief Executive** (2003 YLR 2724) in which the Hon'ble Lahore High Court observed that where the application for leave to defend was dismissed for non-prosecution and application for restoration of the leave application and setting aside *ex parte* judgment and decree was made the same shall be governed under Order XXXVII Rule 4 CPC and the period of limitation would be governed under Article 181 of Schedule I to the Act. Similarly in **Naseer Ahmad v. Muhammad Mushtaq** (2006 MLD 1936) it was observed that the period of limitation applicable for an application under Order XXXVII Rule 4 CPC is three years under Article 181 *ibid.* In **Shahid Pervaiz Alias Shahid Hameed v. Muhammad Ahmad Ameen** (2006 SCMR 631) it was held that in the circumstances where the defendant joined proceedings before the learned Trial Court in the suit under Order XXXVII CPC but on his absence afterwards *ex parte* judgment and decree was passed the relevant governing Article for limitation for such application would be 164 of the Act. In **Habib Bank Limited v. Mussarat Ali Khan** (PLD 1987 Karachi 86) the Hon'ble Sindh High Court held that in a summary suit where *ex parte* judgment and decree is passed the provision of Order IX Rule 13 CPC was not applied and

the relevant application for recalling *ex parte* judgment and decree would be Order XXXVII Rule 4 CPC. It was further observed that even where a wrong provision of law has been mentioned in the caption of the application, the same could not be struck down on the basis thereof. The Hon'ble Court further added that the limitation for filing such application is under Article 181 of the Act.

9. In the above circumstances and position of law the learned Trial Court erroneously applied Article 164 of the Act in holding that the application filed by the petitioner was barred by limitation. The application in essence was one under Order XXXVII Rule 4 CPC and the learned Trial Court had to see whether the special circumstances existed for setting aside the *ex parte* judgment and decree; as the limitation period for such application is Article 181 of Schedule-I to the Act. Therefore, the order impugned in the instant petition dated 22.01.2020 is not tenable in the facts and circumstances and the applicable law.

10. For what has been discussed above, the instant petition is allowed and order dated 22.01.2020 is set aside; consequently, the applications filed by the petitioner shall be deemed to be pending and decided in accordance with the law.

(AAMER FAROOQ)
JUDGE

Approved for reporting