

(Appellate Jurisdiction)

Justice Yahya Afridi, CJ  
Justice Shahid Bilal Hassan

(Against the order dated 27.05.2024 of the Lahore High Court, Lahore passed in C.R.No.31785 of 2024)

... *Petitioner(s)*

Versus

... Respondent(s)

Mr. Muhammad Tariq Zafar, ASC  
(via video-link from Lahore)

N.R.

19.11.2024.

## ORDER

**SHAHID BILAL HASSAN, J.** This petition has been brought against the order dated 27.05.2024 of the Lahore High Court, Lahore, passed in C.R.No.31785 of 2024.

2. Succinctly, the respondent instituted a suit under Order XXXVII, Rules 1 & 2, Code of Civil Procedure, 1908 for recovery of Rs.10,912,024/- on the basis of various cheques, wherein the petitioner was proceeded against ex parte on 18.02.2022 by the learned trial Court and after recording ex parte evidence, the suit was decreed ex parte on 09.06.2022. After about 19 months of the passing the ex parte decree, the petitioner filed an application seeking setting aside of ex parte decree on the ground that he did not receive any summons or notice. The said application was resisted by the respondent. The learned trial Court vide order dated 01.03.2024 dismissed the above said application. The petitioner being dissatisfied

and aggrieved filed revision petition *ibid* but the same was dismissed by the Lahore High Court, Lahore; hence, the instant petition.

3. We have given patience hearing to the learned counsel for the petitioner and have also gone through the record, made available. It is observed that all available modes of service were adhered to by the learned trial Court that the petitioner should join the proceedings and after failure in ordinary means of service, the learned trial Court resorted to publication of Court notice in newspaper but even then the petitioner did not bother to join the proceedings, therefore, he was proceeded against ex parte on 18.02.2022. Even the order dated 09.06.2022 goes to divulge that after closure of ex parte evidence, the learned trial Court kept the file of the case in wait but none on behalf of the petitioner joined the proceedings and ultimately the learned trial Court proceeded to pass the ex parte judgment and decree dated 09.06.2022. After lapse of about 19 months, the petitioner filed application seeking setting aside of ex parte judgment and decree dated 09.06.2022 and not the order dated 18.02.2022 when he was proceeded against ex parte, that too, without filing an application for leave to appear and defend the suit, which otherwise ought to have been filed along-with the application for setting aside ex-parte proceedings, judgment and decree, because proceedings under Order XXXVII, Code of Civil Procedure, 1908 are of summary nature and special procedure has been provided for the same. It would be appropriate to reproduce Rule 4 of Order XXXVII, Code of Civil Procedure, 1908, for ease of reference:

**"4. Power to set aside decree.** After decree the Court may under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may 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."

Rule 4 of Order XXXVII, Code of Civil Procedure, 1908 confers power on the court to set aside the decree under 'special circumstances' and give leave to the defendant to appear and defend the suit. Rule 4 of referred Order deals where the defendant fails to appear and files application for leave to defend; however, in the instant case, no application for leave to appear and defend was filed by the petitioner and only application seeking setting aside of ex-parte judgment and

decree, not the order for initiating ex parte proceedings, was filed. This Court in **Haji Ali Khan** case<sup>1</sup> held:

*"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."*

Under Rule 4 of Order XXXVII, Code of Civil Procedure, 1908, "under special circumstances" the court can set aside the decree. Rule 4 of the referred Order is subject to the condition there must be 'special circumstances' to support any application for setting aside decree. The plain reading of the above said Rule makes it diaphanous that it excludes 'ordinary circumstance' or 'circumstances which may happen every day'. Meaning thereby, heavy burden lies on the defendant (petitioner here) to show the circumstances due to which he was unable to appear during proceedings of the suit. The 'special circumstances' are different from 'ordinary circumstance' and 'circumstance which may happen every day', rather the same are rare, exceptional and beyond the control of the human being. The same can be categorized as: 1). Serious illness or accident preventing defendant's appearance; 2). Death or sudden incapacitation of defendant's counsel; 3). Natural calamity or unforeseen events; 4). Mistake or error apparent on the face of the record. 5). Failure of justice due to non-service or inadequate service. However, in the instant case, as noted above, every possible and provided mode of service was adopted by the learned trial Court and thereafter substituted mode of service was resorted to but even then the petitioner did not bother to join the proceedings and even application seeking setting aside ex parte judgment and decree, no 'special circumstance' was given rather only the following ground was taken up:-

- یہ کہ دعویٰ عنوان بالا میں سائل/مدعا علیہ کی کسی بھی طریقے سے تعیل نہ ہوئی ہے۔

Such ground cannot be considered especially when the address of the petitioner, given in the suit, and mentioned by him in his application are same.

4. In addition to the above, a party cannot lead or take a different stance as has been pleaded by him in his application or plaint and written statement/written reply; therefore, the submission made by

---

<sup>1</sup> Haji Ali Khan and Company v. Allied Bank of Pakistan (PLD 1995 SC 362)

the petitioner's counsel that the petitioner was abroad, when the said plea was not taken up in his application, cannot be considered.<sup>2</sup>

5. The crux of the discussion is that no case for grant of leave is made out, consequent whereof leave is refused and the petition in hand stands dismissed.

Chief Justice

Judge

Islamabad:

19.11.2024

'Approved for reporting'

(M.A.Hassan)

---

<sup>2</sup> Sh. Fateh Muhammad v. Muhammad Adil and others (PLD 2008 SC 82) and Hyder Ali Bhimji v. Additional District Judge Karachi South and another (PLD 2012 SC 279).