2012 CLD 1754

[Lahore]

BeforeNasir Saeed Sheikh,J

Rana MUHAMMAD IKRAM—Petitioner

versus

MEHRAN FERTILIZERS (REGD.), FAISALABAD

through Ms. Rashida Tallat—Respondent

Civil Revision No. 1019 of 2012, decided 26th March, 2012.

Negotiable Instruments Act (XXVIof 1881)

***—S.* 4—Civil *Procedure Code (V Of 1908), O.XXXVII, Rr. 1, 2 & 4—Recovery of money--- Negotiable instrument— "Promissory note"—"Iqrarnama"—Suit filed by plaintiff* under *OXXXVII, rule 1,* C P C- *for recovery of Rs.15,00,000warn decreed ex parte in favour of plaintiff and Trial Court declined to set aside the Judgment—Plea raised by defendant was that plaintiff relied upon "Iqrarnama", which warn not a "promissory note"— Validity-in Iqrarnama an unconditional undertaking and* assurance *was incorporated that an amount of Rs. 15,00,000 warn payable by defendant and would be paid to plaintiff in two specific dates—Contents of the document were in negotiable Instruments act, 1881-- note" as defined in Negotiable Instruments Act, 1881— Trial Court rightly took cognizance and entire proceedings had been conducted in accordance with relevant law—Trial Court rightly passed ex part Judgment and decree against defendant and dismissed application under 0, XXXVII, R. 4, C. P.C. for valid and lawful reasons— High Court in exercise of provisional Jurisdiction declined to interfere in Judgment and decree passed by Trial Court— Revision warn dismissed in circumstances, [pp.1761,* 1762] A & B

Pak Law Publication
Office # 05, Ground Floor, Arshad Mansion, Near Chowk A.G Office, Nabha Road Lahore.Ph. 042-37350473 Cell # 0300-8848226

Pir Saber Shah v. Shad Muhammad Khan, Member Provisional Assembly N.W.F.P. and another PLD 1995 SC 66 **distinguished.**

Shahid Pervaiz alias Shahid Hameed v. Muhammad Ahmad Ameen 2006 SCMR 631 and 1984 SCMR 568 **ref.**

Khalid Jamil for Petitioner.

ORDER

NASIR SAEED SHEIKH, J. —A suit for the recovery of Ra. 15,00.000 under Order XXXVII, Rule 2, of C.P.C. on the basis of a pro note dated 11-7-2003 was instituted by the respondent against the petitioner before the learned District Judge, Faisalabad which was entrusted to a learned Additional District Judge, Faisalabad. The petitioner was proceeded ex parte on 24-9-2008 after effecting of service upon him through daily "Jang" as prescribed by law on 19-11-2008, Mian Ehsan Ullah Danish Advocate filed memo of appearance on behalf of the petitioner/defendant before the learned Additional District Judge, Faisalabad and sought adjournment for filing an application for leave to appear and defend the suit. On 21-11-2008 an application under Order XXXVII, Rule 3. C.P.C. was moved before the learned Additional District Judge. This application was under consideration and was fixed for arguments when on 14-7-2009, the petitioner/defendant again absented himself and ex parte proceedings were again directed against him. The learned Additional District Judge recorded ex parte evidence and vide judgment and decree, dated 11-11-2009, an ex parte decree was passed against the petitioner for the recovery of Rs. 15,00,000.

2. On 20-1-2012 the petitioner filed a petition under Order XXXVII. Rule 4, of C.P.C. for setting aside of the ex parte Judgment and decree dated 11-11-2009. Along with

Pak Law Publication
Office # 05, Ground Floor, Arshad Mansion, Near Chowk A.G Office,
Nabha Road Lahore.Ph. 042-37350473 Cell # 0300-8848226

this petition the petitioner moved an application under section 5 of the limitation Act for condo nation, of delay.

3. This petition was contested by the respondent. The learned Additional District Judge through the impugned order dated 8-3-2012 dismissed the petition moved by the petitioner. Through the instant civil revision, the order dated 8-3-2012 has been assailed by the petitioner.

4. It is contended by the learned counsel for the petitioner that the document dated 11-7-2003 forming basis of the instant suit was an "Iqrarnama" which does not constitute a promissory note as defined in the Negotiable Instruments Act XXVI of 1881. The learned counsel contends that although this question has not been specifically raised before the learned Additional District Judge but the petition moved by the petitioner does speak of the objection raised about the non-maintainability of the suit on the ground that mixed questions of law and facts are involved in this case and that it would be most appropriate if the suit be heard and decided on merits. The learned counsel has developed an argument that on the basis of these grounds mentioned by the petitioner In the application moved under Order XXXVII, Rule 4 of C.P.C., the question of non-maintainability of the suit on the ground that it is not based on a promissory note, can be argued by the petitioner before this Court. The learned counsel further contends that the learned Additional District Judge had no jurisdiction to entertain the Instant suit. Relying upon case-law reported as **Pir Saber Shah**v.***Shad Muhammad Khan, Member Provisional Assembly N. W. F. P. and another***(PLD 1995 SC 66), the learned counsel argued that there is no estoppal against the petitioner to raise this question of law before tills Court. The learned counsel further argues, that since judgment and decree dated 11-11-2009 is the result of lack of Jurisdiction by the learned Additional District Judge, therefore, no period of limitation runs against this void judgment and decree and the application under Order XXXVII, Rule 4 of C.P.C. has been illegally dismissed by the learned Additional District Judge through the Impugned order

Pak Law Publication
Office # 05, Ground Floor, Arshad Mansion, Near Chowk A.G Office,
Nabha Road Lahore.Ph. 042-37350473 Cell # 0300-8848226

dated 8-3-2012. It is thus prayed that the Impugned order dated 8-3-2012 be set aside and the application moved by the petitioner under Order XXXVII, **Rule** 4 of C.P.C. for setting aside of the ex parte Judgment and decree dated 11-11-2009 be accepted.

5. **I have considered the arguments of the learned counsel for the petitioner.**

6. The petitioner was the defendant in the suit which was instituted under Order XXXVII, Rule 2 of C.P.C. against him by the respondent for the recovery of Rs, 15,00,000. The petitioner was served through the publication of notice against him in the dally "Jang" and ex parte proceedings were directed against him vide order dated 24-9-2008. The petitioner did not seek setting aside of the ex parte proceedings order dated 24-9-2008. However he joined the ' proceedings by submitting memo of appearance through his counsel Mian Ehsan Ullah Danish Advocate which fact is recorded In the Interim order dated 19-11-2008. The petitioner moved an application dated 21-11-2008 under Order XXXVII, Rule 3, C.P.C. for leave to appear and defend the suit. Paragraphs .Nos.5 and 6 of this petition under Order XXXVII, Rule 3 of C.P.C. moved by the petitioner are relevant and are reproduced as under:--

> *"(5) That the respondent deals in with the plaintiff and in this context a transaction of money happened inter parties which has now been completed amicably and nothing against defendant. Hence this suit is false frivolous* **liable** *to be dismissed. Documents relevant are attached herewith.*
>
> *(6) That the plaintiff* **manipulated, concealed** *and changed the original shape of Iqrarnama dated 11-7-2003 and while making foul play tried to converted into negotiable instrument ~~th~~herefo~~re~~ the suit has* **been** *filed with un-clean hands and Just to extort money from the petitioner~~/defendant~~, the petitioner/defendant reserves the rights to initiated criminal proceedings as well as other legal course of action against the plaintiff."*

7. The perusal of the above paragraphs reflects that the petitioner did not-specifically question or deny .the execution 0f the* document dated 11-7-2003 in the petition moved by him under Order XXXVII, Rule 3 of C.P.C. The petitioner for the reasons beat known to him

Pak Law Publication
Office # 05, Ground Floor, Arshad Mansion, Near Chowk A.G Office,
Nabha Road Lahore.Ph. 042-37350473 Cell # 0300-8848226

absented himself from the Court proceedings from 14-7-2009 onwards and did not bother to find out the progress of the case and the fate of the suit instituted against him. The learned Additional District Judge Faisalabad ultimately decreed the suit in favour of the respondent on 11-11-2009 after recording the evidence of the respondent. The petitioner re-appears on the scene at his choice and moved a petition dated 18-1-2012 before the learned Additional District Judge on 20-1-2012 under Order XXXVII, Rule 4 of C.P.C. for setting aside of the judgment and decree. The contents of the petition have been gone through and it is noted that the petitioner shifted the responsibility of his absence from the Court proceedings upon the shoulders of his Advocate who assured the petitioner that he would apprise him of the date of hearing when the personal presence of the petitioner .would be required. In paragraph No.2 of the petition the petitioner contended that Mian Ehsftn Ullah Danish Advocate passed away and he remained unaware of the proceedings pending against him. The petitioner did not disclose the source through which he came to know of the death of his learned counsel nor of the source through which he came to know of the passing of the Judgment and decree, dated 11-11-2009 against him. All that the petitioner stated in the paragraph No. 6 of the application is that he came to know of the judgment and decree dated 11-11-2009 on 16-1-2012 through the execution proceedings initiated against him. The petitioner also moved an application under section 5 of the Limitation Act, 1908 for condonation of delay but did not say anything explaining the delay of each and every day from .14-7-2009^ when the petitioner all 6f a. sudden disappeared from the scene and ex" parte proceedings were directed against him till 16-1-2012 when the petitioner claimed to have got the knowledge of execution proceedings. The learned Additional District Judge in paragraph No. 4 of the Impugned order recorded the following reasons and observations about this conduct of the petitioner:--

> ***"The petitioner has not stated, the date of death of him counsel. However, the learned counsel for the respondent has stated that the date of death of the counsel of the petitioner was 2-8-2010. It is evident from, the very version of, the petitioner that he even remained unaware about the fact of death of him counsel till 16-1-***

Pak Law Publication
Office # 05, Ground Floor, Arshad Mansion, Near Chowk A.G Office,
Nabha Road Lahore.Ph. 042-37350473 Cell # 0300-8848226

> ***2012. It clearly means that after giving wakalatnama to his counsel he never bothered to have contact with his counsel and about the suit. When the petitioner seems to have himself chosen not to bother about the pendency of the suit, then it does not lie in his mouth-to stats that the law has always favored the adjudication of the suit on its merits, and that his absence in the suit was not deliberate one. The circumstances explained by the petitioner to justify his absence, are unreasonable and they do not furnish any valid ground for setting aside*** **the** ***ex parte decree*** **Since** ***by not bothering about the pendency of the mutt the petitioner himself took the risk of the decision*** **likely** ***to be ensued in that suit and he went in slumber, so.His contention that he has come to know about the passing of impugned ex parte decree against him only on 16-1-2012, cannot be given any consideration and waitage. In short, the petitioner has completely failed to assign any good cause for his absence and for setting aside the ex parte decree.***

It is also noted that the learned Additional District Judge took note of the date of death of the counsel *for* the petitioner to be 2nd of August; 2010. The above mentioned facts and circumstances clearly point out that the petitioner is guilty of sheer and gross negligence in pursuing the matter. The Hon'ble Supreme Court of Pakistan in the Judgment reported **as** ***Shdhid Pervaiz alias Shahid Hameed*****v.** ***Muhammad Ahmad Ameen*** (2006 SCMR 631) disapproved such a conduct of the defendant of suit under Order XXXVII, Rules 1 and 2 of G.P.C. It is to be noted that in the reported judgment an application was moved by the defendant of the suit after four months of passing of the ex parte decree against him. The Hon'ble Supreme Court of Pakistan also laid down the law that Article 164 of the Limitation Act, 1908 governs the period of limitation for filing an application for setting aside Of the ex parte decree under Order XXXVII, Rule 4 of C.P.C. The Hon'ble Supreme Court of Pakistan after relying upon an earlier judgment reported as 1984 SCMR 568 held as follows:--

Pak Law Publication
Office # 05, Ground Floor, Arshad Mansion, Near Chowk A.G Office,
Nabha Road Lahore.Ph. 042-37350473 Cell # 0300-8848226

"This Court has interpreted Order XXXVII, Rule 3 of C.P.C.in Abdul Karim Jaffarani's case 1984 SCMR 568. The relevant observation isas follow:--

"In view of the legislative history of these provisions, the overall object envisaged by the Legislature was to provide for expeditious disposal of litigation involving commercial transactions of a particular nature by a summitry procedure so that the defendant does not have the means open to exploitation in the ordinary procedure for trial of suits to prolong the litigation and prevent the plaintiff from obtaining an earlier decision by raising untenable and frivolous defenses."

"The Order XXXVII is a special provision having special procedure prescribed under Order XXXVII, rule 4 C.P.C provides a remedy to the petitioner/defendant to file an application for setting aside ex parte decree. The Legislature in its wisdom used the word special circumstances in Order XXXVII, rule 4, C.P.C. *is higher in decree than the words sufficient cause and good cause shown under the various rules of Order IX, C.P.C. The exercise shown by* the, *petitioner's/ defendant's counsel in his affidavit that he was* unable *to appear before the Court in order to see his ailing relation could not be considered as* a 'special circumstance' *whereupon an application under Order XXXVII, rule 4, C.P.C. could be allowed. Term 'special' in Webster's New International Dictionary (2nd Edition) is defined as distinguished by some unusual quality, uncommon, noteworthy, extraordinary, as a special occasion, especially distinguished by superior excellence, importance, power, or .the like. In the shorter Oxford English Dictionary an historical principles term 'special' is defined as of such* a *kind as to exceed or* excel *in some way that* which *is* usual *or common, exceptional in character quality or decree. The Concise Oxford English Dictionary says that 'special' means of a*

Pak Law Publication
Office # 05, Ground Floor, Arshad Mansion, Near Chowk A.G Office,
Nabha Road Lahore.Ph. 042-37350473 Cell # 0300-8848226

particular kind, particular in general. Therefore, under rule 4, C.P.C. the petitioner/defendant is obliged to explain **the** ***'special circumstances'*** **which prevented** ***him from appearing in the Court to seek leave to appear and defend the suit within time or other 'special circumstances' which may authorize the Courts to set aside the decree' already passed by it. Rule*** **4, C.P.C. is** ***intended to prevent injustice, tin*** **the** ***present case, no special circumstances*** **have been** ***shown for entitling the petitioner/defendant to claim benefit of ruts 4,*** **CJP.C.** ***Facts In the' case depict Warn a clear case of sheer negligence in the conduct of the defence."***

8. In Paragraph No.7 of the reported Judgment the Hon'ble Supreme Court of Pakistan further held as follows:--

"It is a settled principle of law that valuable right accrues to the other side by lapse of time and each day's delay has to be satisfactorily explained. It was argued that a valuable right of the petitioner is involved but this does not furnish a proper ground for condonation of delay in civil matters."

In the light of the above authoritative pronouncement of law, the order passed by the learned Additional District Judge seems to be unexceptional and needs no interference on this score.

9. The contention of the learned counsel for the petitioner that the document forming basis of the suit Instituted by the respondent is not a promissory note as it is described as "Iqrarnama" hasno substance in the eye of law. The term "Iqrarnama" means the document in which there is an assurance or an undertaking to pay a specified amount at a specific time to the lender. The definition of promissory note as given in section 4 of the Negotiable Instruments Act XXVI of 1881 is very important. Section 4 of the Act of 1881 is reproduced as below:--

Pak Law Publication
Office # 05, Ground Floor, Arshad Mansion, Near Chowk A.G Office,
Nabha Road Lahore.Ph. 042-37350473 Cell # 0300-8848226

> **"A** ***"Promissory note".A "promissory note" is an instrument in writing (not being a bank-note or a currency-note containing an unconditional undertaking, signed by the maker, to pay on demand or at a fixed or determinable future time a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instruments."***

The term "Iqrarnama" Is exactly the vernacular translation of the term "promissory note" as it refers to an unconditional assurance or undertaking to pay a specified amount at a fixed or determinable future time to the other side. A copy of the document dated 11-7-2003 has been placed on the record of the Instant petition in which an unconditional undertaking and assurance is Incorporated that an amount of Rs. 15,00,000 is payable by the petitioner and shall be paid to the respondent on two specific dates i.e. Rs.5,00,000 shall be paid till 31-12-2003, remaining Rs. 10.00,000 shall be paid till 30-6-2004 and the entire amount shall be paid till 31-12-2004. The contents of the document dated 11-7-2003are fully covered by the definition of promissory note asdefined in the Negotiable Instruments Act XXVI of 1881, The I case-law reported as ***Pir Saber Shah v. Shad Muhammad Khan, Member Provisional Assembly N.-W.F.P. another***(PLD 1995 SC 66), relied upon by the learned counsel for the petitioner does not help the case of the petitioner. It Is observed that the document dated 11-7-2003 is a promissory note, the cognizance of the suit bailed upon which has been rightly taken by- the learned Additional District Judge, Faisalabad and the entire proceedings have been conducted by the learned Additional District Judge in accordance with the relevant law The learned Additional District Judge, has rightly passed ex parte Judgment and $_B$ decree dated 11-11-2009 against the present petitioner. It is also observed that the learned Additional District Judge for valid .and lawful reasons dismissed the application of the petitioner under Order XXXVII, Rule 4 of C.P.C. In exercise of my revisional Jurisdiction under section 145 of G.P.C., I am not persuaded to interfere in the matter. The instant civil revision being devoid of any legal substance is accordingly***dismissed in limine.***

MH/M-119/L Revision dismissed.

Pak Law Publication
Office # 05, Ground Floor, Arshad Mansion, Near Chowk A.G Office,
Nabha Road Lahore.Ph. 042-37350473 Cell # 0300-8848226