

**JUDGMENT SHEET**

**IN THE PESHAWAR HIGH COURT,  
MINGORA BENCH (DAR-UL-QAZA), SWAT  
(Judicial Department)**

**R.F.A No. 40-M/2016  
With C.M 640-M/2016 (N)**

*Waqar Ahmad.....(appellant)*

VS

*Ahmad Hussain.....(respondent)*

*Present: Mr. Ashfaq Hussain, Advocate for the  
appellant.*

*Mr. Iftikhar Ahmad Nasir, Advocate for the  
respondent.*

**Date of hearing: 15.03.2019**

**JUDGMENT**

**SYED ARSHAD ALI, J.-** Through the instant regular first appeal, the appellant has called into question the order of the learned Trial Court dated 10.06.2016, whereby his application for setting aside ex-parte decree dated 31.01.2015 passed against him in suit bearing No. 10/1 of 2014 was dismissed.

2. Essential facts leading to the institution of the present appeal are that on 19.11.2014, the respondent had filed a suit for recovery of Rs. 600,000/- against the present appellant before the learned District Judge/Zilla Qazi Malakand at Batkhela under Order 37 of the Civil Procedure Code, 1908 (**'The Code'**). It was alleged in the plaint that the present appellant had provided him a

cheque on 20.11.2013 for an amount of Rs. 600,000/-, however the same was dishonored. The said suit was decreed ex-parte against the present appellant on 31.01.2015.

3. On 13.10.2015, the present appellant had filed an application for setting aside the ex-parte decree, wherein he has stated that he got knowledge of the ex-parte decree on the same day as he was appearing before the Court in case titled "*Ahmad Hussain vs Waqar Ahmad*". On being noticed, the respondent had contested the said application. Resultantly, the same was dismissed by the learned Trial Court vide order dated 10.06.2016.

4. Learned counsel appearing on behalf of the respondent has raised a preliminary objection to the maintainability of the present appeal that the order impugned whereby an application of the present appellant for setting aside the ex-parte decree was dismissed is not an appealable order under Order XLIII Rule 1 CPC, therefore appeal against the said order is not maintainable. The said objection of learned counsel appears to be correct because Order XLIII Rule 1 CPC read with section 104 CPC does not provide for an appeal against an order dismissing an application for setting aside the ex-parte decree. However, it is a common practice



and the rule laid down by the superior Courts that one proceeding is interchangeable into another proceeding. In the present case, since this appeal has been filed within the period of limitation, therefore the same is converted into revision petition and the office is directed to enter the same in the relevant register. Reliance is placed on *1991 SCMR 1135* titled **“Shamsul Haq & others vs Mst. Ghoti & 8 others”**.

5. Reverting to the merit of the case. The suit was filed by the respondent on 19.11.2014, wherein it was alleged that a cheque amounting to Rs. 600,000/- was given to him by the appellant. However, along with the plaint neither he filed any deposit slip nor the statement showing that the said cheque was dishonored for want of availability of the required amount in the account of the defendant/appellant. The record is also silent as to whether the appellant has ever received any summon from the learned Trial Court regarding the pendency of the suit. The learned Trial Court has dismissed the application for setting aside the ex-parte decree being time barred. In this regard, the learned Trial Court has relied upon the contents of FIR No. 11 dated 21.03.2015 registered under section 489-F PPC, wherein it is mentioned that a decree dated

31.01.2015 was also passed against the accused who is the present appellant. However, in the said FIR, neither the name of the Court nor the case number has been mentioned which can lead to any inference that the present appellant had the knowledge of the proceedings.

6. Against that it is the claim of the present appellant that he came to know about the ex-parte decree on the same day i.e. 31.10.2015 while appearing in another case titled "*Ahmad Hussain vs Waqar Ahmad*" in the same Court. The contents of the ex-parte decree dated 31.01.2015 also show that the learned Trial Court has not taken enough care regarding the availability of sufficient evidence on record for decreeing the suit and has passed the decree for the only reason that the present appellant did not appear before the Court.

7. Under Order 37 Rule 4 CPC, the decree so passed by the learned Trial Court under Order 37 CPC can be set aside, when there are special circumstances warranting the setting aside of the decree. For ready reference, Order 37 Rule 4 CPC is reproduced as under:-

**"Order XXXVII Rule 4 CPC:-**

*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.”*

8. The word special circumstances has not been defined in the Code, however the same remained subject matter of discourse before the superior Courts. In case titled **“National Bank of Pakistan vs Tradewell (Pakistan) Corporation & 2 others”** reported as *1991 CLC 1243*, it was held that *“however, when an application is made to the Court to set aside an ex-parte decree, the Court ought to seriously apply its mind to the merits of the defence in particular, the stage at which and the time when the defence of the particular nature was taken, by him for the first time and if the Court is satisfied that there is some substance in the defence and the other conditions of the rule are satisfied, then only the Court can set aside the ex-parte decree.”* Whereas, it is held time and again by this Court as well as the august Supreme Court of Pakistan that special circumstances also means that the case of the petitioner/applicant be considered on merit.

9. In the present case, when the record is silent regarding the presentation of the cheque before the Bank concerned and the fact that as to whether

the present appellant had received any notice along with copy of the plaint do constitute a special circumstance as provided by Order 37 Rule 4 CPC to set aside the ex-parte decree enabling the present appellant to present his application for leave to defend. In this regard, reliance is placed on *PLD 1995 Supreme Court 362* titled "Haji Ali Khan & Company, Abbottabad & 8 others vs M/S Allied Bank of Pakistan Limited Abbottabad", *1991 CLC 1243* titled "National Bank of Pakistan vs Tradewell (Pakistan) Corporation & 2 others", *2004 YLR 416* titled "Tahir A. Khan vs Messrs United Air Travels Ltd & others" and *2011 CLC 950* titled "Mst. Tahira Taj vs Hakim Shah".

10. In view of the above, by allowing the instant revision petition the impugned order dated 10.06.2016 is set aside and accordingly the present appellant/petitioner shall file an application before the learned Trial Court for leave to defend within ten (10) days from obtaining copy of this judgment.

Announced  
Dt: 15.03.2019

  
JUDGE

Office  
20/03/2019  
W/R