

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No. 828/2009

[Raja Rehmat Khan Vs. Muhammed Aamir Tastee & Ors]

Date	Order with signature of Judge
1.	<u>FOR ORDERS ON CMA No. 2794/13.</u>
2.	<u>FOR ORDERS ON CMA No. 1288/13.</u>
3.	<u>FOR HEARING OF CMA No. 10609/11</u>
4.	<u>FOR FINAL DISPOSAL.</u>

17.04.2013

Mr. Badrul Alam, Advocate for the plaintiff.
Mr. K. B. Bhutto, Advocate for the defendants.

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1&2). Through these applications the applicant prays for treating the above case on `Fast Track` in view of circular No.GAZ/XII.Z.14(HC)(i) dated 16.10.2012 on the ground that the applicant is a senior citizen aged above 65 years and thus entitled for treating his case on `Fast Track`. The circular is reproduced as under :

“The Hon’ble Chief Justice has been pleased to order that preference be given to the cases of Senior citizens i.e. persons aged above 65 years, widows who have not re-married and orphans whose both parents have expired. In case they opt for fast track, they should move an application which would be heard in Court and decided accordingly. Once the priority is given to a particular case, the Roster shall fix such case on weekly basis. The file cover of the cases, to which priority has been allocated, should be given different colour preferably `RED` to attract the attention of the Hon’ble Judges.”

To the grant of these applications, learned counsel for defendant No.3 also extended his no objection. Consequently, the applications are granted with direction to the office/roster to treat the above case on `Fast Track` in accordance with directions contained in the aforesaid circular. Applications stand disposed off.

3). Through this application under Rule 158 SCCR (O.S.), defendant No.3 seeks re-call of order dated 17.08.2010, passed by

Additional Registrar (O.S.) whereby the defendant No.3 was debarred from filing of written-statement.

The reasons for non-filing of the written statement have been given in the `affidavit` in support of the application [CMA No.10609/2011]. In para 2, it has been specifically averred that in July, 2010, the defendant No.3 had gone to Vinder, Baluchistan in connection with family dispute where he was held up and also fell sick. Due to grave insecurity prevailed in Vinder, Baluchistan the defendant No.3 could not come back to Karachi in time.

In the `counter-affidavit` in response to CMA No.10609/2011 such assertions made by the defendant No.3 have been denied by the plaintiff. The defendant No.3 by way of filing the `affidavit-in-rejoinder` has not only specifically denied the contents of the `counter-affidavit` filed by the plaintiff but has also reiterated/reaffirmed contents of the affidavit in support of the application being CMA No.10609/2011.

I have heard learned counsel for the parties and also perused the record. Per learned counsel for the defendant No.3 court has complete discretion in extending time for filing of written statement which might exceed `30 days`. According to the learned counsel the rules and procedure laid down in CPC and inter-alia under Rule 156 to 159 Sindh Chief Court Rules (O.S.) are basically meant for advancing the `cause of justice` and not to thwart it. Mr. K. B. Bhutto Advocate, further argued that dispute between the parties in any event deserves to be decided on merits. Exparte judgment/decree per learned counsel on technical grounds must and ought to be avoided.

Learned counsel for defendant No.3 further urged that under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 a `fair trial` and `due process` is fundamental right and one cannot be deprived of it on technical grounds much-less under circumstances of the case in hand.

Conversely, Mr. Badrul Alam, learned counsel for the plaintiff contended that delay in filing of written statement by defendant No.3 is deliberate and without any plausible explanation. Per learned counsel no proofs regarding his absence from Karachi and/or his sickness at Vinder, Baluchistan has been placed on record. Under circumstances, per learned counsel, the application bearing CMA No.10609/2011 is liable to be dismissed and the plaintiff's suit be proceeded *ex parte*.

I have heard the learned counsel for the parties and also perused the record available before me, it would be appropriate to reproduce herein Order VIII Rules 1, 9 and 10 CPC which read as follows :-

“1. *Written Statement.*--*The defendant may, and if so required by the court, 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]

9. *Subsequent pleadings.*--*No pleading subsequent to the written statement of the defendant other than by way of defence to set off shall be presented except by the leave of the court and upon such terms as the court thinks fit but the court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.*

10. *Procedure when party fails to present written statement called for by court.*--*Where any party from whom a written statement is so required fails to present the same within the time fixed by court, the court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.”*

Evidently, the use of words `**required**` and `**ordinarily**` in Order VIII Rule 1 CPC are not without significance. The word `**required**` in my view does not include any routine order passed without application of mind. Prior making a written statement subject of penal rule 10 CPC, there should be a proof on record that the court had required it by application of mind and indeed through a `**speaking order**`. Of course, innocent parties otherwise, without

fulfilling such requirements would be trapped in a technical situation without fully realizing the implications.

In the instant case, it is clear from the record that defendant No.3 was never `required` by `court` what to say by a `speaking order` regarding filing of written statement by him. Thus, penal consequences of Rule 10 CPC in my view are not attracted to the situation in hand particularly under the facts of the present case. Besides word `ordinarily` convey that the period of `30 days` cannot be adhered to in all situations. The word `ordinarily` vests a discretion in court to extend this period of `30 days` whenever it advance the `cause of justice`. The word `ordinarily` used in proviso to Order VIII Rule 1 CPC, renders at directory and not mandatory.

Further after incorporation of Article 10-A in the Constitution of Islamic Republic of Pakistan, 1973, now significantly the situation has changed. Article 10-A mandates that `civil rights` and `obligations` be adjudicated upon besides a `fair trial` through a `due process` of law. Now `fair trial` and `due process` is a fundamental right covering both substantive and procedural due process. For easy reference 10-A of the Constitution of Islamic Republic of Pakistan, 1973 is reproduced herein:

“10-A, Right to fair trial---For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.”

Further, in the case of **SHABIR AHMED vs. KIRAN KHURSHEED & Others (2012 CLC 1236)**, it was observed on page 1252 as under:

“Article 10-A, morphs Article 4 into a more robust fundamental right, covering both substantive and procedural due process. While substantive due process provides a check on legislation and ensures the protection of freedoms guaranteed to a person under the Constitution, procedural due process, which concerns me here, provides that `each person shall be accorded certain `process` if they are deprived of life, liberty or property---The question then focuses on the nature of the `process` that is `due`. The government always has the obligation of providing a neutral decision maker one who is not inherently biased against the individual or who has personal interest in the outcome”. Due

process is now available to every person as a fundamental right and underscores procedural fairness and propriety in determining his civil or criminal rights. The procedure adopted in determining the rights of the parties must at every step pass the test of fairness and procedural propriety and at all times must honour the law and the settled legal principles. Article 10-A is not limited to a judicial trial in its strict sense but requires fairness from any forum which determines the rights of a person.”

What is `due process of law` the Hon`ble Supreme Court of Pakistan while dilating upon the terms `due process of law` in *the case of New Jubilee Insurance Company Limited, Karachi v. National Bank of Pakistan, Karachi (PLD 1999 SC 1126)*, summarizing the term `due process of law` while placing reliance on the judgment in the case of **Aftab Shahban Mirani v. President of Pakistan (1998 SCMR,1863)**, held as under: --

“(1) A person shall have notice of proceedings which affect his rights.

(2) He shall be given reasonable opportunity to defend.

(3) That the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of his honesty and impartiality, and

(4) That it is a Court of competent jurisdiction. Above are the basic requirements of the doctrine “due process of law” which is enshrined, inter alia, in Article 4 of the Constitution. It is intrinsically linked with the right to have access to justice which is fundamental right. This right, inter alia, includes the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. A person cannot be said to have been given a fair and proper trial unless he is provided a reasonable opportunity to defend the allegation made against him.”

In the event, any order passed or proceedings held in violation of `fair trial` and `due process` indeed, would be null and void. In this regard reliance can be placed on the case of **Babar Hussain Shah & another vs. Mujeeb Ahmed Khan & another [Reported in 2012 SCMR 1235 (1241)]**. The relevant extract therefrom is reproduced as under :

*“11.....Although from the very inception the concept of fair trial and due process has always been the golden principles of administration of justice but after incorporation of Article 10-A in the Constitution of the Islamic Republic of Pakistan, 1973 vide 18th Amendment, it has become more important that due process should be adopted for conducting a fair trial and order passed in violation of due process may be considered to be void. In a very old judgment of this Court reported as **Collector, Sahiwal and 2 others vs. Muhammad Akhtar (1971 SCMR 681)**, this Court went on to hold as under :--*

‘This Court has gone to the extent of pointing out that the mere absence of a provision in a statute as to notice cannot override the principle of natural justice that an order affecting the rights of a party cannot be passed without an opportunity of hearing and also held that where the giving of a notice is a necessary condition for the proper exercise of jurisdiction then failure to comply with this requirement renders the order void and the entire proceedings which follow also become illegal.’”

Apart from the above it is necessary to bear in mind that principle object behind all legal formalities is to safeguard the paramount interest of justice. Things under the principles of jurisprudence are required to be done, of course, strictly in accordance with law. Rules and procedure are meant for the purposes of advancing the cause of justice. Law always leans towards adjudication of cases on merits. Rules and procedure, with a view to safeguard the rights of parties litigating, not to be interpreted in a manner as to hamper the administration of justice.

Result of above discussion is that order dated 17.08.2010 passed by Additional Registrar (O.S.) is recalled/set aside and defendant No.3 is allowed to file his written statement within two weeks however, subject to cost of Rs.10,000/- [Rupees Ten Thousand only] because of passive conduct of defendant No.3 and to some extent causing delay by him in swift disposal of the suit on merits. Application stands allowed.

4). Deferred.

Karachi;
Dated:17.04.2013

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