ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

SECOND APPEAL NO.21/2019

Date	Order with signature of Judge

1. For hearing of CMA No.875/2019.
2. For hearing of main case.

02.03.2021

Choudhri Abdur-Resheed advocate for appellant.
Mr. Muhammad Tariq advocate for respondent.

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Salahuddin Panhwar, J:- Heard learned counsel for respective pasties.

2. Precisely relevant facts are that defendant filed suit for declaration, possession and mesne profit; summons were issued; defendant appeared but he failed to file written statement within time. Accordingly leaned trial judge while exercising powers under order VIII rule 10 CPC, decreed the suit.

3. Learned counsel for respondent has relied upon 1981 SCMR 590 which says that order VIII rule 10 CPC is not a decree and second appeal is not competent, only revision is to be filed.

4. As regard plea of revision petition and not of second appeal, it would suffice to refer the case of *Muhammad Yusuf v. Kharian Bibi* 1995 SCMR 784 wherein it is held as:-

> "The learned counsel half-heartedly raised objection to the conversion of the second appeal to revision petition. Suffice it to observe that the High Court is competent to convert the appeal into revision petition even on a verbal prayer made by the party concerned."

5. I would further add that the learned counsel for the respondent has not claimed any point of *limitation* involved as for **second appeal** and **'revision'** the period of *limitation* is prescribed differently. On this count, too, such plea is of no help for the

respondent. The reference is made to the case of *Abdul Khaliq v. Rehmat Ali* 2012 SCMR 508 wherein it is held as:-

> "13. .... But, in the instant case perusal of case record reveals that against the impugned judgment dated 12.7.2000, civil petition for leave to appeal was filed on 24.7.2000 i.e within 12 days, therefore, due to grant of permission for its conversion into civil appeal in terms of order dated 30.8.2004, it was deemed to have been so instituted from the same date, thus, no prejudice was caused to the respondent No.1 nor any question of limitation could legitimately be raised as regards filing of such civil appeal."

6. Since, in the instant matter the provision of Order VIII rule 10 of the *Code* is involved therefore it would be conducive to *first* refer the same which reads as:-

> "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."

Prima facie, the *first* part of referred provision has ***'penal'*** consequences therefore, at all material times, the Court(s) must keep in mind that a ***'penal'*** action, normally, should not be taken unless the party (against whom action is to be taken) is *first* warned in clear words of penal consequences if he fails to perform a ***required*** act else the purpose of *second* coercive action, available to Court(s), in shape of ***"make such order in relation to the suit as it thinks fit"*** shall stood fail. In absence thereof, a ***penal action*** which, too, in shape of a *binding decree* without burdening the plaintiff to prove his case, shall always qualify the term ***'harsh'***. Reference can be made to the case of *Muhammad Anwar Khan v. Riaz Ahmed* PLD 2002 SC 491 wherein it is held as:-

> "……. We are sorry to hold that this sort of approach to determine the lis is not appreciated. The duty of the Court is to do substantial justice and in this case the petitioners have been made to suffer simply on a technical ground. The learned trial Court could have passed an order asking them to sign the

> written statement when they were represented by a lawyer. Even otherwise, we have noticed that there was only a routine order for filing of written statement and for such a routine order consequences as envisaged under Order 8, rule 10 C.P.C, are not attracted. **It has repeatedly held that penal consequences of this provision should only be applied in respect of cases where the written statement was required by the Court through a speaking order. ...**

7. It is settled principles of law under the rule of prudence that the Court(s) should always be cautious while recording **judgment against him** on failure of the defendant because the *failure* in filing the written statement alone shall never allow a **'judgment'** which, *normally,* has the binding effects upon all concerned. If the '**judgment'** requires determination of disputed questions, having wider effects and consequences then the Court(s) must demand *proof* before recording such like **'judgment'.** Needless to add that penal consequence, *too,* allows a **judgment only against failing party *alone*** which the Court while proceeding must keep in view**.** Guidance is taken from the case of *C.N. Ramappa Godwa v. C.C. Chandergowda & Ors* (2013 SCMR 137) wherein it is held as:-

> 'As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a written statement has not been filed the court should be a little cautious in proceeding under Order VIII, Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, **it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy**. Such a case would be covered by the expression " the court may, in its discretion, require any such fact to be proved' used in sub-rule (2) of Rule 5 of Order 8,

> or the expression "may make such order in relation to the suit as it thinks fit' used in Rule 10 of Order VII".

While keeping the above settled principles, it is the time to have direct referral to the *impugned* order which reads as:-

> "In view of above reasons, since there is no rebuttal to the case of the plaintiff and defendant, despite being time given by the court, has failed to file the written statement, the adjournment application is hereby rejected, as result whereof the defence of the defendant Professor Rao Nisar struck off under order VIII rule 10 of the Code of Civil Procedure, 1908; and **the instant suit is decreed as prayed for against the defendant**. Parties are left to bear their own costs. Let a decree be prepared accordingly for knowledge of parties and execution."

8. The perusal of the above clearly shows that because of non-filing the written statement, the learned trial Court not only **struck off** the defence of the defendant but also **decreed** the suit against the defendant. I am *little* surprised that when the provision itself allows only one **penal consequence** i.e **judgment against him** or **'**such order in relation to the suit as it thinks fit**'** then the learned trial Court was not legally justified to decree the suit when it (learned trial court) *first* had passed an order of **'striking off defence'.** Be that as it may, the impugned order, nowhere, shows that the defendant was *earlier* warned in categorical terms (speaking order) that failure in filing the written statement on *next-date* shall bring the **penal consequences,** as provided by Order VIII R 10 CPC, hence in absence thereof the *impugned* order, *legally,* can't sustain. Accordingly impugned judgments recorded by both courts below are against the law hence set aside being void. Case is remanded back with the liberty to appellant to file written statement within fifteen days and trial court shall decide the *lis* on merits.

J U D G E

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