

IN THE HIGH COURT OF SINDH AT KARACHI

R.A. No. 36 of 2025

Muhammad Faizan Samad Applicant

Versus

Ghazanfar Ali Fadool & others Respondents

Date of Hearing : 20.05.2025

Date of Order : 26.05.2025

Petitioner through M/s. Muhammad Jibran Nasir and
Daniyal Muhammad Hussain, Advocates.

Respondent through : Mr. Arjumand Khan, Advocate.

JUDGEMENT

Muhammad Jaffer Raza, J: -The Instant Civil Revision Application has been preferred impugning order dated 27.01.2022, passed by the learned trial Court in Summary Suit No.155 of 2022, wherein, the Applicant's application under Order XXXVII Rule 4 CPC was dismissed.

2. Brief facts of the case are that the above noted Summary Suit was preferred by the Respondents against the Applicant and his wife. Subsequently, the said Suit, after deletion of the Applicant's wife from the array of Defendants, was decreed in favour of the Respondents, vide Judgment and Decree dated 18.10.2023 and 23.10.2023 respectively. Thereafter, the Respondents filed Summary Execution No.12 of 2023, which is pending adjudication. Meanwhile, the Applicant preferred Application under Section XXXVII Rule 4 CPC for setting aside the *Exparte* Judgment and Decree dated 18.10.2023 and 23.10.2023, respectively.

3. Learned counsel for the Applicant has stated that he could not affect appearance in the Summary Suit due to circumstances which were beyond his control. He has augmented his arguments by inviting my attention to the Applicant's incarceration in

various FIRs. He has argued that he did not have the opportunity to appear before the learned trial Court and file his Leave to Defend Application within the stipulated time under Order XXXVII Rule 4 CPC. He further contended that earlier, on 22.11.2022 appearance was affected on his behalf by his mother who was his duly constituted Attorney. However, soon after the said appearance, she was involved in an accident and was immobilized, due to which, no subsequent appearance could be made by her. He has further averred that the learned trial Court was notified about the unforeseen accident through an application preferred on 01.12.2022 only eight [08] days after his mother first affected appearance in the noted Summary Suit. He has further shown from the record that the medical record of the Applicant's mother was presented on 12.12.2022 before the learned trial Court, and despite the same the Applicant was declared *ex-parte* vide Order dated 13.12.2022. Subsequently, the said Order declaring the Applicant as *ex-parte* was impugned before this Court in Revision Application No.175 of 2022 and the same was dismissed with the observation that the Applicant shall be at liberty to prefer an Application under Order XXXVII Rule 4 CPC. Relevant Paragraph of the said Order is reproduced as under:

"21.The Applicant has elected to file this Application under Section 115 of the Code of Civil Procedure, 1908 asking this court to revise the Impugned Order and pleads that the Impugned Order was passed illegally and has in this regard pressed into service the provisions of Order XXXVII Rule 4 of the Code of Civil Procedure, 1908. He contends that factual circumstances, disclosed constitute special circumstances to "set aside the decree". The Applicants argument to this extent is misplaced. From the record it apparent that the proceedings in Summary Suit No.155 of 2022 before the XIth Additional District & Sessions Judge Karachi (South) were suspended by this Court on 21 March 2023 and which order subsists to date. There being no decree that has as yet been passed in Summary Suit No.155 of 2022 by the XIth Additional District & Sessions Judge Karachi (South), the provision of Order XXXVII Rule 4 of the Code of Civil Procedure, 1908 cannot be pressed by the Applicant at this stage. Needless to say, the Applicant would be at liberty to maintain such an application in Summary Suit No.155 of 2022 by the XIth Additional District & Sessions Judge Karachi (South) on the grounds that he has raised in this Application once the decree is passed in Summary Suit No.155 of 2022 by the XIth Additional District & Sessions Judge Karachi (South), if he so desires."

4. It is subsequently contended by the learned counsel for the Applicant that on 21.06.2024 his incarceration came to an end and within two weeks of the same he filed the Application under Order XXXVII Rule on 08.07.2024, which was dismissed vide Impugned Order. He has further averred that the Application was preferred well within the three year limitation period as prescribed under Article 181 of the Limitation Act, 1908. He has lastly argued that his contentions were not properly recorded or appreciated by the learned trial Court and he only wishes that that his Leave Application [which has already been filed before the learned trial Court] may be heard and decided on merits, after setting aside the *Ex-parte* Judgment and Decree.

5. Conversely, learned counsel for the Respondent has assisted me in perusing through the record and in particular the case diary of the learned Trial Court. She has stated that the Applicant was aware of the Proceedings pending against him, therefore, the Application under Order XXXVII Rule 4 CPC was correctly dismissed by the learned trial Court as no “*special circumstances*” have been cited by the Applicant for the said Application to be allowed. Learned counsel has further contended that the Summary Suit has been pending for a significant period of time. The entire wisdom of Summary proceedings is being defeated due to the conduct of the Applicant. She has further averred that the Applicant used to regularly appear in the Criminal Proceedings pending against him, and therefore, there was no impediment in him appearing before the learned trial Court. She has lastly argued, that no case has been made out by the Applicant for the grant of the relief sought.

6. In rebuttal, learned counsel for the Applicant has argued that his appearance before the Criminal Court was mandatory as the same is in accordance with the procedure in criminal cases where the presence of the Accused is not dispensable. He has lastly stated that “*special circumstances*” have been made out and the matter may be decided on merits.

7. I have heard both the learned counsels and perused the record. Prior to delineating on the facts presented, it will be expedient to reproduce Order XXXVII Rule 4 CPC.

“4. 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.” (Emphasis added)

8. The primary question therefore is whether the circumstances exemplified by the Applicant can fall within the classification of “*special circumstances*”. The distinction between “*special circumstances*” and “*ordinary circumstances*” was expounded in a recent judgment of the Hon’ble Supreme Court in the case of **Muhammad Mansab Versus Muhammad Hanif**¹ wherein it was held as under: -

“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.”

9. The incarceration of the Applicant cannot be classified as an “*ordinary circumstance*” as it is not a circumstance which “*may happen every day*”. Therefore, I agree with the contention of learned counsel for the Applicant that the circumstances presented by him i.e. his incarceration are sufficient for the Application to be allowed by the learned trial Court. It is held that the same can safely be classified as “*special circumstances*”. Whilst it is correct that incarceration has not been classified as “*special circumstances*” in the case of **Muhammad Mansab**

¹ 2025 SCMR 60

(supra). However, perusal of the said judgment indicates that the said list is not exhaustive and can include additional circumstances.

10. Similar circumstances were present in the case of **Muhammad Nadeem Amin Versus Ch. Farasat Ullah**² wherein incarceration was held to be a special circumstance, in the following words: -

“The physical confinement of the petitioner in jail is certainly not a case of willful abstention by the petitioner not is it an occurrence of a routine nature. It is indeed a special circumstance that prevented the petitioner from attending the Court in answer to its summon and constituted a good ground to explain the petitioner's non-appearance. To promote' the interest of justice, it was necessary for the petitioner in this case to have been granted a substantive opportunity to defend himself. The impugned order accordingly suffers from material irregularity in the appreciation and application of the relevant law. It is therefore set aside.”

11. Moreover, the involvement of the Applicant's mother and attorney in an accident squarely falls within the classification above.

12. In light of what has been held above the instant Revision Application is allowed. As a consequence, Judgment 18.10.2023 and Decree dated 23.10.2023 is set aside with the directions to the learned trial Court to hear the Leave to Defend Application [already filed by the Applicant] and decide the same within 30 days from today.

JUDGE

Jamil

² PLD 2006 Lahore 32