

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.754 of 2008

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ORDER WITH SIGNATURE OF JUDGE

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For hearing of CMA No.569 of 2012

Date of hearing 27.08.2012

Mr. Mahmood Hussain Advocate present for plaintiff

Mr. Mohammad Ali Jan Advocate present for defendant.

ABDUL RASOOL MEMON J.- Through this order I intend to dispose of an application under Section 151 CPC read with Order 9 Rule 9 and Order 9 Rule 7 CPC being CMA No.569 of 2012 moved on behalf of the Defendant praying therein to recall the orders dated 09.02.2011 and 28.04.2011 whereby vide first order dated 09.02.2011 the application under Section 151 CPC being CMA No.5563 of 2010 moved by the defendant for recalling the order dated 29.03.2010, was dismissed for non-prosecution and defence of the defendant was struck off and by second order dated 28.04.2011 the suit against the defendant was ordered to proceed ex parte.

2. The plaintiff had filed the instant suit for specific performance, permanent injunction and damages in the sum of Rs.50,00,000/- against the defendant. The notices were served upon the defendant vide diary dated 02.11.2010 but he remained absent. However, four week time was allowed to the defendant to file the written statement, but he failed to file the same. On 11.01.2011 two weeks further time was extended as last chance, but even though no written statement was filed by the defendant. Accordingly on 11.02.2011 the defendant was debarred from filing written statement and the matter was placed before the Court for final disposal. Per record one Mr. Sartaj Mulghani Advocate had filed his power on behalf of the defendant on 26.01.2010.

3. Record further reveals that vide order dated 22.09.2008 interim order was passed whereby the parties were directed to maintain status quo and thereafter the plaintiff moved an application being CMA No.11019 of 2009 alleging that the defendant has violated the status quo order passed on 22.09.2008. On 29.03.2010, bailable warrants in the sum of Rs.10,000/- were issued against the defendant. Against the said order dated 29.03.2010, the defendant moved an application being CMA No.5563 of 2010 under Section 151 CPC praying therein for recalling the order dated 29.03.2010 on the ground that the said order was obtained by showing wrong address of the defendant. The said application of the defendant had come up for hearing before the Court on 09.02.2011 when nobody had appeared on behalf of the defendant while counsel for the plaintiff was present. Accordingly, the said CMA No.5563 of 2010 was dismissed for non-prosecution and further the defence of the defendant was struck off. Thereafter on 25.03.2011 the defendant moved CMA No.4002 of 2001 under Section 151 for recalling the order dated 29.03.2010 which was also dismissed for non-prosecution vide order dated 28.04.2011 and the suit was ordered to proceed ex parte against the defendant and the plaintiff was directed to file

affidavit in ex parte proof. Thereafter, the plaintiff filed his affidavit in ex parte proof on 13.05.2011 and so also affidavit of P.W. Rasheed Ahmed on 01.06.2011 and the matter was fixed for final disposal/arguments.

4. Being aggrieved the defendant filed the instant application under Section 151 CPC read with Order 9 Rule 9 CPC and Order 9 Rule 7 CPC being CMA No.569 of 2012 praying therein to recall the orders dated 09.02.2011 and 28.04.2011 and to allow him to contest the suit.

6. The defendant has filed affidavit in support of his application stating therein that the plaintiff has deliberately shown his wrong address in the memo of the plaint, therefore, the summons were not served upon him. The defendant further stated that the plaintiff tried to obtain ex parte judgment and decree by suppressing the real facts. It is further stated in the affidavit that by taking advantage of non-service of summons the plaintiff filed application under Sections 3 and 4 of Contempt of Court Act by making false allegations whereupon notices were issued and he came to know about these proceedings and engaged Mr. Sartaj Mulghani Advocate who filed his power on behalf of the defendant on 26.01.2010, who had assured him to pursue the matter and that he would attend the Court as and when required. The defendant believed his words and the said advocate moved the Application under Section 151 CPC (CMA 5563 of 2010) praying therein for recalling the order dated 29.03.2010 but after filing the said application the said Advocate did not apprise him about the progress of the case. It is further stated that he is suffering from mental disorder and other ailments (Bipolar Affective Disorder) of which fact the said advocate was aware. Subsequently, when he came to know that the said application under Section 151 CPC has been dismissed for non-prosecution he tried to contact the said advocate

but in vain and then another Advocate Mr. Nawab Mirza was engaged by him who moved another application (CMA No.4002 of 2011) but he also could not pursue the same diligently and the said application was also dismissed. The defendant further stated that due to suffering from mental disorder he was unable to attend his business and mostly remained confined to bed therefore he could not pursue his case diligently. In support of his contentions he has placed on record copies of certificates issued by the doctors showing that he was a patient of “Bipolar Affective Disorder”.

7. The plaintiff has not filed objections/counter-affidavit to rebut the contentions of the defendant pleaded in his affidavit filed in support of his application.

8. Learned counsel for the defendant in support of his contentions has argued that the absence of the defendant was neither wilful nor deliberate but was due to mental disorder and his remaining on bed. According to him same ground was taken by the defendant in the application CMA No.4002 of 2011 and he also annexed copies of medical tests and doctors prescriptions etc. with the said application. It is urged by him that the plaintiff has not filed any counter affidavit to rebut the contention of the defendant which he has pleaded on oath in his affidavit in support of his application, therefore, the facts deposed in the affidavit not rebutted by filing any counter affidavit shall be deemed to have been admitted.

9. He further contended that the suit was proceeded ex parte against the defendant hence he can apply for setting aside the order of ex parte proceedings under Order 9 Rule 7 CPC and it can

be moved prior to the passing of the ex parte decree, therefore, Article 181 of the Limitation Act, which provides three years period for limitation, would be attracted in the circumstances of this case as ex parte decree has not yet been passed against the defendant. In support of his contentions he has placed reliance on the following cases.

1. MOHAMMAD ASLAM VS. MOHAMMAD SHARIF (1994 CLC 2310)
2. MOHAMMAD HAYAT KHAN and 3 others Vs. ALI AKBAR KHAN (1998 CLC 209)
3. PROVINCE OF PUNJAB VS. Ch. PERVAIZ AHMAD and others (1993 CLC 660)
4. MANZOOR AHMAD BHATTI, ADVOCATE VS. ROAD TRANSPORT CORPORATION, WEST, PAKISTAN THROUGH SECRETARY OF THE CORPORATION AND ANOTHER (PLD 1973 Lahore 659)

10. On the other hand counsel for the plaintiff in rebuttal has argued that the application filed by the present defendant is hopelessly time barred and no sufficient cause has been shown for non-appearance of the defendant on the date of hearing when the matter was called and so also no explanation has been furnished by the defendant in respect of negligence on the part of his advocates. He further contended that this is a case of gross negligence on the part of the defendant, therefore, the defendant is not entitled for any indulgence by this Court and the application merits no consideration and be dismissed accordingly. In support of his contentions he placed reliance on the following cases.

1. JOINT SECRETARY, MINISTRY OF RELIGIOUS AND MINORITY AFFAIRS and 2 others (1985 CLC 231)
2. Mst. HAIDERI BEGUM and others vs. MOHAMMAD ASLAM SULTAN (1992 CLC 1255)

11. I have considered the arguments advanced by the counsel for both the parties and perused the record so also gone through the case law cited by the counsel for the parties.

12. On perusal of orders dated 09.02.2011 and 28.04.2011 it appears that vide order dated 09.02.2011 defence of the defendant was struck off while by order dated 28.04.2011 the suit was ordered to proceed ex parte against the defendant and the plaintiff was directed to file affidavit in ex parte proof. It is also a matter of record that the suit has not yet been disposed of and is fixed for final disposal/arguments. Therefore, in the circumstances the case of the defendant may involve provisions of Order 9 Rule 7 CPC which empowers the Court on the defendant's appearing and showing good cause for his previous non-appearance, to hear the defendant in answer to the suit as if he had appeared on the date of the first hearing, while for setting aside an ex parte decree under Order 9 Rule 13 the defendant has to show sufficient cause for his non-appearance on the relevant date of hearing. Provisions of Order 9 Rule 7 CPC would indicate that unless and until it is shown that the conduct of the defendant was grossly negligent, strict construction of Order 9 Rule 7 CPC should be avoided. This dicta is laid down in the case of Mohammad Hayat Khan and 3 others (*supra*).

13. The defendant in his affidavit in support of his application has clearly stated that he was suffering from mental disorder and was lying on bed and in support of his contentions he has placed on record copies of medical test reports and certificates of doctors and medical prescriptions wherein it is stated that the defendant was a patient of "Bipolar Affective Disorder". Such contention of the defendant has not been controverted by filing any counter affidavit by the plaintiff.

14. So far as to establishing of good cause is concerned the defendant has been able to show a good cause for his previous non-appearance and I am fortified with the view that while deciding applications under Order 9 Rule 7 the court should liberally exercise his powers in favour of defendant because the rules of procedure as laid down in CPC are principally intended for advancing justice and not for retarding it on pure technicalities and the object of the code is to give the parties to litigation full opportunity of being heard. In the instant case the suit is still pending and the application under Order 9 Rule 7 CPC for setting aside the ex parte proceedings could be filed at any time prior to the passing of the ex parte decree and such application need not be moved on the next date of hearing when ex parte proceedings were ordered. For limitation purpose, the applications under Order 9 Rule 7 for setting aside ex parte proceedings would be governed by Article 181 of the Limitation Act, 1908 which provides three years period. In this respect I am fortified by the case of Mohammad Aslam (supra), therefore, instant application being CMA No.569 of 2012 under Order 9 Rule 7 CPC moved for recalling and setting aside the orders dated 09.02.2011 and 28.04.2011 is not barred by limitation.

15. So far non-appearance of the advocates of the defendant Mr. Sartaj Mulghani and Mr. Nawab Mirza is concerned the defendant in his affidavit has stated that due to mental disorder he was unable to contact his advocates, but nothing has been brought on record as to why the advocates did not appear before this Court while the suit was called for hearing and there is no explanation of any sort from the advocates themselves.

16. In the instant suit for specific performance and damages, technical knockout may not be permitted and it should be decided after giving an opportunity of being heard to both the parties.

As valuable rights of the parties are to be determined and the plaintiff has also prayed for the damages to the tune of Rs.50,00,000/- and the defendant has shown a good cause for his absence on the relevant date of hearings, therefore, I am of the view that a fair opportunity should be given to the parties to establish their claim. The case law relied upon by the counsel for the plaintiff during his arguments have no application to the circumstances of this case as in the instant application under Order 9 Rule 7 the defendant has prayed for setting aside order of ex parte proceedings while the two cases cited by the plaintiff are in respect of setting aside ex parte judgment and decree under Order 9 Rule 13 which has no application at all with the circumstances of this case.

17. In view of the above discussion I allow CMA No.569 of 2012, however, subject to payment of costs of Rs.20,000/- (rupees twenty thousand only) to be paid by the defendant to the plaintiff. The defendant is allowed fifteen days' time to file his written statement.

J U D G E

Farooq PS/\*