JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

F.A.O. NO. 105 OF 2024

MISBAH UD DIN.

VS

FATEH UR REHMAN.

Appellant by : Ms. Naheed Akhtar, Advocate.

Respondent by : Mr. Mujtaba Zamani, Advocate.

Date of hearing : 19.03.2025

MUHAMMAD AZAM KHAN, J.

1. Through the instant Appeal, the Appellant [Misbah ud Din] has assailed the Order dated 11.03.2024 **("Impugned Order")** passed by the learned Additional District Judge, East-Islamabad **("Trial Court")** whereby the Appellant's Application for setting aside ex-parte Judgment and Decree dated 11.12.2023 **("Ex-parte Judgment and Decree")**, has been dismissed.

2. The brief facts of the case in hand are that the Respondent/Plaintiff filed a Suit for Recovery under Order XXXVII, Code of Civil Procedure, 1908 **("CPC")** against the Appellant/Defendant before the learned Trial Court on 05.10.2023. Notices were issued to the Appellant to procure his attendance through registered post AD, TCS/Courier service, and proclamation in the newspaper 'Daily Mashriq' but none appeared on behalf of the Appellant/Defendant, therefore, ex-parte proceedings were initiated by the learned Trial Court vide Order dated 18.11.2023. After recording ex-parte evidence of the Respondent/Plaintiff, the learned Trial Court decreed the Respondent/Plaintiff's Suit vide ex-parte Judgment and Decree. On 23.01.2024, the Appellant/Defendant filed an application before the learned Trial Court for setting aside ex-parte Judgment and Decree which was dismissed vide the Impugned Order. Being aggrieved of the Impugned Order, the Appellant has filed the instant Appeal.

3. The learned counsel for the Appellant/Defendant argued that the Impugned Order is based on extraneous considerations beyond the material available on record; that the suit was based on an agreement in which the guarantee cheque

worth Rs.1,850,000/- was issued and in the agreement, it is stated that this cheque will be encashed after expiry of one year on the non-payment of the original amount i.e. 250,000/- but the Respondent/Plaintiff went against the terms and conditions of the agreement and bounced the cheque maliciously; that it is pertinent to mention that amount of profit was not fixed in the agreement and the Respondent/Plaintiff malafidely fixed the amount or profit as Rs. 1,850,000/-; that the Impugned Order undeniably gives impression of hasty decision, not only deficient in its contents but also incorrect in its result; that no proper notice has been served upon the Appellant/Defendant on his personal address as the Appellant/Plaintiff was residing in UAE since last 11 months prior the date of filing of case i.e. 20.05.2023 but the Respondent/Plaintiff willfully concealed this fact from the learned Trial Court and there is nothing on record to show proper service/notice on his personal address or advertisement in international circulation newspaper to the Appellant/Defendant, due to which he was unaware of the suit filed against him; that the Appellant/Defendant also has sufficient cause for non-appearance because he was engaged by an agreement with the mobile & Laptop repairing company for two years, therefore, even if he had been properly served he would not have been able to appear before the learned Trial Court; that no opportunity of hearing has been provided to the Appellant/Defendant and the learned Trial Court has passed the Impugned Order in a haphazard manner; that when the Appellant/Defendant came to know about the decree against him, the Appellant/Defendant promptly applied for making Power of Attorney document which is a time consuming process; that the Appellant/Defendant requested the Court to extend the time under Section 148, CPC, but the learned Trial Court rejected the request; that equity, justice & law demands that opportunity of producing evidence be given to the Appellant/Defendant; that the Ex-parte Judgment and Decree is in violation of the spirit, hence, the same may kindly be set aside by allowing leave to defend to the Appellant/Defendant; and that the findings of the learned Trial Court that the Respondent/Plaintiff is entitled to the recovery of Rs. 1,850,000/- from the Appellant/Defendant on the basis of an agreement, are misconceived, incorrect, based on a wrong assumption, hence, interference of this Court has become inevitable. Finally, the learned counsel requested that the present appeal be allowed, the impugned order be set aside, and the Appellant/Defendant be granted an opportunity to seek leave to defend the suit, submit an attested copy of the Power of Attorney, and contest the suit accordingly.

4. On the other hand, the learned counsel on behalf of the Respondent argued that the learned Trial Court has passed a well-reasoned order; that to procure the attendance of the Appellant/Defendant, the learned Trial Court issued notice as well as proclamation in the newspaper but the Appellant/Defendant failed to appear before the learned Trial Court. Finally, the learned counsel prayed for dismissal of the instant Appeal.

5. I have heard the learned counsel for the parties and have also perused the record with their able assistance.

6. The Appellant/Defendant filed Application for setting aside Ex-parte Judgment and Decree before the learned Trial Court without annexing the Application for Leave to Appear and Defend the Suit to disclose that he has a plausible defense and there exist special circumstances which preclude him from attending the said Court. In this regard, reliance is placed on a recent judgment of the august Supreme Court of Pakistan cited in *Muhammad Mansab versus Muhammad Hanif,* 2025 SCMR 60, the relevant portion of which is reproduced as under:-

> *"Summary suit for recovery based on cheques---Ex parte decree---Application for setting aside ex parte decree dismissed---Validity---All available modes of service were adhered to by the Trial Court so that the petitioner (defendant) should join the proceedings and after failure in ordinary means of service, the Trial Court resorted to publication of Court notice in newspaper but even then the petitioner did not bother to join the proceedings, therefore, he was proceeded against ex parte on 18.02.2022---Even the order dated 09.06.2022 goes to divulge that after closure of ex parte evidence, the Trial Court kept the file of the case in wait but none on behalf of the petitioner joined the proceedings and ultimately the Trial Court proceeded to pass the ex parte judgment and decree dated 09.06.2022---After lapse of about 19 months, the petitioner filed application seeking setting aside of ex parte judgment and decree dated 09.06.2022 and not the order dated 18.02.2022 when he was proceeded against ex parte, that too, without filing an application for leave to appear and defend the suit, which otherwise ought to have been filed along-with the application for setting aside ex-parte proceedings, judgment and decree, because proceedings under Order XXXVII of Code of Civil Procedure, 1908 ('C.P.C.') are of summary nature and 4special procedure has been provided for the same---Rule 4 of O. XXXVII, C.P.C. deals with the situation where the defendant fails to appear and files application for leave to defend; however, in the instant case, no application for leave to appear and defend was filed by the petitioner and only application seeking setting aside of ex parte judgment and decree, but not the order for initiating ex parte proceedings, was filed".*

7. The suits filed under Order XXVII, CPC are summary trials conducted under a special procedure. In this case, the Appellant/Defendant was served through substituted service; however, despite this, he failed to appear before the learned Trial Court. Furthermore, the Respondent/Plaintiff filed an application to set aside the Ex-parte Judgment and Decree after expiry of the limitation period and that too without attaching an Application for Leave to Appear and Defend the Suit. The Application to set aside the Ex-Parte Judgment and Decree was filed under Order XXXVII, Rule 4, CPC. This rule grants the Court the authority to set aside a judgment and decree in special circumstances, which are rare and exceptional, rather than ordinary situations that may occur regularly. If ordinary circumstances were to be considered, it would undermine the very purpose of a summary trial, as intended by the legislature.

8. For what has been discussed above and by keeping reliance on the Judgement of the apex Court cited above the Appellant/Defendant has failed to present a valid case for setting aside the Ex-parte Judgment and Decree. Resultantly, the instant Appeal is **dismissed**.

(MUHAMMAD AZAM KHAN)
JUDGE

Sajid/--