JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R. No.249 of 2016
Jasti Masih
Versus.
Mubarik Masih and another

Date of Hearing:	13.12.2017
Petitioner by:	Raja Basharat Hussain Abbasi, Advocte.
Respondent by:	Mr. Muhammad Arqam Arshad, Advocate for respondent No.1

MIANGUL HASSAN AURANGZEB, J:- Through this common judgment, I propose to decide civil revision petition No.249/2016 and regular first appeal No.137/2016, as they entail common questions of law and fact.

2. Through civil revision petition No.249/2016, the petitioner, Jasti Masih, impugns the order dated 30.06.2016, passed by the Court of the learned Additional District Judge, Islamabad, whereby the petitioner's application for setting aside the ex-parte proceedings initiated against him on 18.05.2016, was dismissed.

3. Through regular first appeal No.137/2016, the appellant, Jasti Masih, impugns the judgment and decree dated 14.06.2016, passed by the Court of the learned Additional District Judge (West), Islamabad, whereby respondent No.1's suit for recovery of Rs.9,00,000/- under Order XXXVII of the Code of Civil Procedure, 1908 ("C.P.C."), was decreed.

4. Jasti Masih shall hereinafter be referred to as "the appellant".

5. On 28.04.2016, respondent No.1 (Mubarak Masih) filed a suit for recovery of Rs. 9,00,000/- against the appellant before the Court of the learned Additional District Judge, Islamabad, under Order XXXVII C.P.C. In the said suit it was *inter-alia* pleaded that respondent No.1 had paid an amount of Rs.9,00,000/- to the appellant as a loan; that when respondent No.1 demanded the return of the said amount, the appellant gave cheque No.0206326 dated 10.12.2015, for an amount of Rs.7,00,000/- and cheque No.1369189 dated 16.11.2015 for an amount of Rs.2,00,000/- drawn on United Bank Limited, G-8 Markaz, Islamabad; that the said cheques were dishonoured on presentation; that respondent No.1

lodged F.I.Rs No.223 and No.89, dated 04.12.2015 and 15.03.2016, under Section 489-F of the Pakistan Panel Code, 1860, against the appellant at Police Station Karachi Company, Islamabad; that since the appellant did not return the said amount to respondent No.1, it furnished the latter with a cause of action to institute a suit for the recovery of the said amount.

6. After the said suit was instituted by respondent No.1, summons was directed to be issued to the appellant. The Process Server's report dated 16.05.2016, shows that although the appellant refused to receive the summons in the Court premises, a copy of the summons was handed over to him. Vide order dated 18.05.2016, the appellant was proceeded against ex-parte.

7. On 21.05.2016, the appellant filed an application for setting aside the ex-parte proceedings. Vide order dated 03.06.2016, the said application was dismissed by the learned trial Court. The said order dated 03.06.2016, was assailed by the appellant in civil revision petition No.249/2016.

8. After recording of respondent No.1's ex-parte evidence, the learned trial Court, vide ex-parte judgment and decree dated 14.06.2016, decreed the said suit. The said ex-parte judgment and decree has been assailed in R.F.A. No.137/2016.

9. Learned counsel for the appellant submitted that the appellant was never served with the summons issued by the learned trial Court; that the story about the appellant refusing to accept the summons from the Process Server in the Court premises is a complete fabrication; that the appellant came to know about the pendency of the suit on 20.05.2016; that the clerk of Kamran Majid Kayani, Advocate had informed the appellant about the suit on the said date; that after perusing the case file, the appellant came to know that ex-parte proceedings had been initiated against him on 18.05.2016; that on 21.05.2016, the appellant filed an application for setting aside the order, whereby the appellant was proceeded against ex-parte; that vide order dated 03.06.2016, the said application was dismissed by the learned trial Court; that civil revision petition No.249/2016 was filed against the said order dated 03.06.2016; that after recording of ex-parte evidence, the said suit was decreed vide ex-parte judgment and decree dated 14.06.2016;

that the said judgment and decree was passed during the pendency of C.R. No.249/2016.

10. Learned counsel for the appellant further submitted that respondent No.1 was not supposed to present the cheques given to him by the appellant for encashment; that the appellant had borrowed Rs.3,00,000/- from respondent No.1, and had given three blank cheques to respondent No.1 as surety; that the said amount had been returned by the appellant to respondent No.1; that in fact respondent No.1 had borrowed Rs.4,00,000/- from the appellant; that the appellant had filed a suit for recovery of Rs.4,00,000/- against respondent No.1, and for the return of the three blank cheques; that the said suit is still pending adjudication; that the appellant vexed twice i.e. criminal as well as civil proceedings; that respondent No.1 had adopted contradictory positions in the criminal proceedings. Learned counsel for the appellant prayed for the impugned order dated 03.06.2016 as well as the ex-parte judgment and decree dated 14.06.2016, to be set aside.

11. On the other hand, learned counsel for respondent No.1 made his submissions in reiteration of the pleadings in the suit. Furthermore, it was submitted that civil revision petition No.249/2016 was filed on the same very date on which, respondent No.1's suit was decreed ex-parte; that as per the report of the Process Server, the appellant came to know on 16.05.2016, about the institution of the suit against him; that the appellant deliberately absented himself from the Court even after coming to know about the suit pending against him; that the order as well as judgment and decree impugned by the appellant are strictly in accordance with the law and facts of the case. Learned counsel for respondent No.1 prayed for the said civil revision petition as well as the R.F.A. to be dismissed.

12. I have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance. The facts leading to the filing of the instant appeal as well as civil revision petition have been set out in sufficient details in paragraphs No.5 to 8, and need not be recapitulated.

13. The appellant asserts that the Process Server's report dated 16.05.2016, is a concoction. In the said report, it is clearly stated

that the Process Server showed the notice regarding the suit to the appellant, who refused to receive the same, and that a copy of the notice was handed over to the appellant. Since the appellant did not appear before the Court on 18.05.2016, he was proceeded against ex-parte. Now, the appellant claims to have gained knowledge about the suit as well as the ex-parte proceedings against him on 20.05.2016. The appellant, in his application for setting aside the ex-parte proceedings, has pleaded *inter-alia* that "*after perusing the file*" he came to know about the ex-parte proceedings having been initiated against him. If the appellant is to be believed that he had perused the case file on 20.05.2016, then he must also have gained knowledge of the Process Server's report dated 16.05.2016. The appellant did not plead anything in his application for setting aside the ex-parte proceedings about the Process Server's said report. Even in civil revision petition 249/2016, the appellant has not questioned the correctness of the Process Server's said report. In this view of the matter, the learned trial Court was correct in dismissing the appellant's application for setting aside the ex-parte proceedings initiated against him. The learned trial Court had proceeded ex-parte against the appellant on the basis of the Process Server's said report.

14. Respondent No.1 entered the witness box as DW-1 and tendered in evidence the cheques which had been given to him by the appellant, and which had been dishonoured on presentation. The appellant admits that he had borrowed Rs.3,00,000/- from respondent No.1 and had given him three blank cheques as a surety. Section 118 of the Negotiable Act, 1881, provides that until the contrary is proved, presumption would be that the negotiable instrument was drawn for consideration. The appellant in his pleadings did not deny his signature on the cheques in question. The mere fact that the appellant had instituted a civil suit for recovery of Rs.4,00,000/- and the return of the said cheques would not be a plausible ground to interfere with the judgment and decree impugned in the instant appeal.

15. True, the appellant had ten days from the date of the service of the summons to file an application for leave to appear and defend the suit, in the case at hand, the appellant filed such an application

on 26.05.2016. This application was not considered by the learned trial Court because the appellant had already been proceeded against ex-parte. Since it is clear that the appellant had been served on 16.05.2016, there was no reason for him to absent himself from the Court on 18.05.2016, whereon he was proceeded against ex-parte.

16. In view of the above, both the civil revision petition No.249/2016 and the regular first appeal No.137/2016, are dismissed, with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

Sanaullah*

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