

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Arshad Hussain Khan

Mr. Justice Amjad Ali Sahito

First Appeal No.131 of 2024

Appellant : Syed Adnan Hussain S/o Syed Ashhad Hussain through Syed Kashif Hussain Shah, Advocate

Respondent : M/s. M.B.I. Ltd.
Nemo.

Date of Hearing : 01.10.2026

Date of Order : 01.10.2026

J U D G M E N T

Amjad Ali Sahito, J.- Through this appeal, the appellant has called in question the Judgment and Decree dated 19.08.2022 passed by learned Addl. District Judge-V (MCAC), Karachi West and subsequent Order dated 21.09.2024 passed by the learned 5th A.D.J. Karachi (West) in Summary Suit No.26 of 2020; whereby the suit of the plaintiff was decreed ex-parte as prayed and subsequently the application filed by the Defendant/present appellant under Section 5 of Limitation was also dismissed.

2. Briefly stated, the facts giving rise to present appeal are that the respondent/plaintiff instituted a Summary Suit No.26 of 2020 under Order XXXVII Rules 1 & 2 CPC for recovery of Rs.13,51,554/- against the appellant. The case of the respondent was that M/s Society Paint House, through the appellant as its proprietor, had availed credit facility from the respondent and obtained material against the said facility. According to the respondent, despite repeated demands, the outstanding amount remained unpaid and, towards the liability, the appellant issued Cheque No.10496088 dated 23.01.2020 drawn on Bank Al-Habib Limited, Military Road Branch, Sukkur, for an amount of Rs.13,51,554/-. On presentation, the said cheque was

dishonoured. The respondent also relied upon the relevant account documents, invoices, confirmation of balance, correspondence and legal notice in support of its claim.

3. The record shows that summons were issued to the defendant through all modes of service, but he failed to appear and contest the proceedings. Consequently, his defence was struck off and the matter was proceeded with ex-parte. The respondent thereafter recorded its evidence and produced, inter alia, the authority letter, account opening and credit documents, invoices, confirmation of balance, the disputed cheque, dishonour memo, correspondence and legal notice. After considering the documentary evidence, the learned Trial Court found that the claim of the respondent was supported by the record and accordingly decreed the suit on 19.08.2022 for the amount claimed.

4. Subsequently, execution proceedings were initiated. During which, the appellant claims to have acquired knowledge of the decree. He then filed an application under Order XXXVII Rule 4 CPC seeking setting aside of the ex-parte judgment and decree, along with an application under Section 5 of the Limitation Act. In the application under Order XXXVII Rule 4 CPC, the appellant mainly pleaded that the summons had not been properly served upon him; that he was unaware of the proceedings; that the cheque in question had not been issued or signed by him and that the decree was without lawful authority. He also raised an objection regarding presentation of the cheque after the period of six months. The appellant further asserted that an opportunity ought to be afforded to him to contest the suit on merits.

5. The learned trial Court, after hearing the learned counsel, dismissed the application under Order XXXVII Rule 4 CPC through the impugned order dated 21.09.2024. The learned trial Court observed that the objection regarding presentation of the cheque after six months could not be raised at that stage when the defendant had failed to appear before the Court during the proceedings. The application under Section 5 of the Limitation Act was also dismissed.

6. Learned counsel for the appellant has contended that the impugned order is not sustainable in law as the appellant was never properly served in the summary suit and remained unaware of its pendency. He submits that the ex-parte judgment and decree were obtained without providing the appellant an opportunity of hearing and that the appellant came to know about the decree only when execution proceedings were initiated. Learned counsel further contends that the appellant never issued or signed the cheque relied upon by the respondent and that the cheque had allegedly been presented after six months, rendering the summary proceedings not maintainable. He further submits that the appellant had promptly approached the learned Trial Court after acquiring knowledge of the decree and had filed the application under Order XXXVII Rule 4 CPC, but the same was dismissed without affording a proper opportunity to the appellant. According to learned counsel, the matter ought to have been decided on merits after allowing the appellant an opportunity to defend the suit, particularly in view of his right to a fair trial.

7. No one is appearing on behalf of the respondent despite notice. Since this is an older matter of 2024, therefore, we have decided to proceed with the appeal on the basis of material available on the record.

8. We have heard the learned counsel for the appellant and have carefully examined the material available on record.

9. The principal question arising for determination in the instant appeal is whether the Appellant has succeeded in establishing the existence of such special circumstances as would justify setting aside of the ex-parte judgment and decree in exercise of jurisdiction under Order XXXVII Rule 4 CPC and, consequentially, whether he is entitled to an opportunity to defend the summary suit. For determination of this question, it is necessary to examine not only the explanation furnished by the Appellant for his failure to appear and contest the proceedings before the learned trial Court, but also the manner in which the suit proceeded and the circumstances in which the Appellant

claims to have acquired knowledge of the decree during execution proceedings.

10. Order XXXVII Rule 4 CPC confers a discretionary jurisdiction upon the Court to set aside an ex-parte decree where special circumstances are shown. The provision, however, does not contemplate reopening of a summary decree merely upon the defendant subsequently expressing a desire to contest the claim or putting forward a defence which could have been raised during the pendency of the proceedings. The expression “special circumstances” requires the defendant to place before the Court circumstances of such nature as satisfactorily explain his failure to appear and contest the suit and justify restoration of the opportunity to defend after the decree has already been passed. The jurisdiction is, therefore, to be exercised upon a judicial assessment of the circumstances which resulted in the defendant’s failure to participate in the proceedings, viewed in the backdrop of the proceedings as a whole.

11. In this regard, it is material that the Appellant’s case is that he had no knowledge of the pendency of the summary suit and that he came to know about the ex-parte judgment and decree only during the execution proceedings. The record of the judgment dated 19.08.2022, however, shows that summons were issued to the defendant through all modes of service and, despite the same, he failed to appear and contest the matter, whereafter the proceedings were taken up ex-parte and the respondent was permitted to lead its evidence. The Appellant, therefore, cannot succeed merely by asserting that he subsequently acquired knowledge of the decree during execution proceedings; rather, he was required to demonstrate that the circumstances attending the service of summons and his failure to appear before the learned trial Court constituted special circumstances within the meaning of Order XXXVII Rule 4 CPC. The question, therefore, is whether the explanation furnished by the Appellant is sufficient to displace the proceedings which culminated in the ex-parte decree and to warrant restoration of the opportunity to defend the summary suit.

12. Tested on the above principle, the Appellant has failed to establish any circumstance which could be regarded as special within the meaning of Rule 4. His principal plea is that he had no knowledge of the summary suit and that summons were not served upon him. However, the judgment dated 19.08.2022 records that summons were issued through all modes of service and that, despite such process, the defendant failed to appear and contest the matter. The Appellant has not placed any material before us to demonstrate that the service effected in the proceedings was insufficient or that any circumstance beyond his control prevented him from appearing before the learned trial Court. A mere assertion of want of knowledge, therefore, cannot constitute a special circumstance warranting setting aside of the decree.

13. The fact that the appellant subsequently appeared in the execution proceedings also does not assist him. Rather, the record demonstrates that he approached the Court after the decree had already been passed and execution proceedings had commenced. The remedy under Order XXXVII Rule 4 CPC is not intended to provide a defendant, who remained absent during the summary proceedings, an unrestricted opportunity to reopen the matter merely by raising a defence after the decree. The defendant must first cross the statutory threshold of establishing special circumstances warranting exercise of the Court's discretion. The appellant has not been able to cross that threshold.

14. The plea that the cheque was neither issued nor signed by the Appellant also does not, in the circumstances of the present case, constitute a special circumstance warranting exercise of jurisdiction under Order XXXVII Rule 4 CPC. Such plea essentially relates to the merits of the respondent's claim and does not, by itself, explain the Appellant's failure to appear and contest the proceedings before the learned trial Court. The Appellant was required to establish circumstances which prevented him from participating in the proceedings and which, therefore, justified setting aside the decree already passed

against him. In the absence of any such explanation, a defence on merits, raised after the decree, cannot furnish a ground for setting aside the same.

15. Likewise, the objection concerning presentation of the cheque after six months does not provide a valid ground for interference with the impugned order. The appellant seeks to raise this objection after the decree had already been passed, whereas the record shows that he did not appear before the trial Court to raise any such objection or seek leave to defend. The learned trial Court was, therefore, justified in observing that such an objection could not be permitted to revive the proceedings at that stage. In any event, the mere raising of a legal objection after the decree does not dispense with the statutory requirement of demonstrating special circumstances under Order XXXVII Rule 4 CPC.

16. We have also examined the application under Section 5 of the Limitation Act. The Appellant sought condonation of delay principally on the plea that he remained unaware of the summary suit and came to know about the judgment and decree during the execution proceedings. However, the learned trial Court had considered this explanation and dismissed the application. In the circumstances discussed above, we find no sufficient cause warranting condonation of the delay. The appellant has, therefore, failed to make out any ground for interference with the order passed on his application under Section 5 of the Limitation Act.

17. It is also significant that the decree was not passed merely on the basis of an unsubstantiated assertion of the respondent. The learned trial Court recorded the respondent's ex-parte evidence and considered the documentary material produced in support of the claim, including the cheque and dishonour memo, account documents, invoices, confirmation of balance and correspondence. The trial Court thereafter recorded its satisfaction that the plaintiff's version was supported by documentary evidence and decreed the suit accordingly. The appellant has not demonstrated any error in that process which

could, at this stage, justify exercise of the jurisdiction under Order XXXVII Rule 4 CPC.

18. The contention that every matter should be decided on merits cannot be applied in disregard of the special procedure prescribed under Order XXXVII CPC. While the procedure does provide an opportunity to the defendant to contest the claim in accordance with law, a defendant seeking to reopen a decree already passed must satisfy the specific requirement of establishing special circumstances under Rule 4. In the present case, that requirement has not been met.

19. For the foregoing discussion, we are of the considered view that the appellant has failed to establish any special circumstance warranting setting aside of the ex-parte judgment and decree dated 19.08.2022. The learned trial Court committed no illegality or material irregularity in dismissing the application under Order XXXVII Rule 4 CPC and the application under Section 5 of the Limitation Act. The impugned order dated 21.09.2024, therefore, calls for no interference.

20. Consequently, the instant appeal is **dismissed**. The impugned order dated 21.09.2024 passed by the learned Vth Additional District & Sessions Judge, Karachi West is **maintained**. The ex-parte judgment and decree dated 19.08.2022 passed in Summary Suit No.26 of 2020 shall remain **intact**.

JUDGE

JUDGE

KAMRAN/PS