

2023 S C M R 1118

[Supreme Court of Pakistan]

Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Shahid Waheed, JJ

FEDERATION OF PAKISTAN through Secretary, Ministry of Defence Rawalpindi and another---Petitioners

Versus

Messrs FARRUKH INTERNATIONAL (PVT.) LTD. through Proprietor---Respondent

Civil Petition No. 3185 of 2020, decided on 6th February, 2023.

(Against the order of the Lahore High Court, Rawalpindi Bench, Rawalpindi dated 07.09.2020 passed in C.R. No. 1294-D of 2016)

(a) Civil Procedure Code (V of 1908)---

---O. IX, R. 6---Defendant proceeded ex parte---Despite non-appearance of the defendant, the Court should not act mechanically, rather ought to consider the legal and factual aspects of the case, on the basis of the material available before it.

Where on the date of hearing, only the plaintiff appears and the defendant despite being duly served does not appear, the Court by exercising powers under Order IX, Rule 6 of the Code of Civil Procedure ("C.P.C.") may proceed against the defendant ex parte and pass a decree without recording evidence. As per section 2(2) of the C.P.C., a "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint as well. The Court after proceeding with the defendant ex parte, may determine the rights of the parties either without recording evidence or may call the plaintiff to produce evidence, in order to satisfy itself on arriving at a proper conclusion of the matter presented before it, for the safe administration of justice. Thus, despite non-appearance of the defendant, the Court should not act mechanically, rather ought to consider the legal and factual aspects of the case, on the basis of the material available before it.

Ghulam Ali Shah and others v. Muhammad Khalid and others 2017 SCMR 1849 ref.

(b) Qanun-e-Shahadat (10 of 1984)---

---Arts. 17(2)(a) & 79---Civil Procedure Code (V of 1908), O. IX, R. 6---Document pertaining to financial and future obligations---Execution and attestation---Two marginal witnesses---If the question of execution and attestation of any such document is put in issue by the Court, the party relying upon such document is required to produce its two marginal witnesses in order to prove its

execution in accordance with the law---Said principle is applicable also to cases where the defendant is proceeded against ex parte.

A document which pertains to financial and future obligations is required to be attested by at least two witnesses, as provided by Article 17(2)(a) of the Qanun-e-Shahadat, 1984 ("Order, 1984"). Article 79 of the Order, 1984 mandates that any such document required by law to be attested by two witnesses shall not be used as evidence, save for two attesting witnesses appear before the Court to prove its execution, unless the same is admitted by the contesting parties, as stipulated by Article 81 of the Order, 1984. If the question of execution and attestation of any such document is put in issue by the Court, the party relying upon such document is required to produce its two marginal witnesses in order to prove its execution in accordance with the law. This principle is applicable to all such documents executed between private and/or public parties as well as in cases where the defendant is proceeded against ex parte.

Sheikh Muhammad Muneer v. Mst. Feezan PLD 2021

SC 538 ref.

(c) Qanun-e-Shahadat (10 of 1984)---

---Art. 79--- Civil Procedure Code (V of 1908), O. XXXVII, Rr. 1 & 2---Suit for recovery on account of breach of contract---Contract---Proof---Petitioners/plaintiffs had relied upon a contract which admittedly pertained to financial and future obligations---Initial burden of proving the case and the documents was on the petitioners/plaintiffs---Despite the fact that the defendant was proceeded against ex parte, the Trial Court in order to satisfy itself with regard to the execution of the document, exercised its discretion by asking the petitioners/plaintiffs to produce evidence in support thereof---Law had provided a procedure for production of documents through the person concerned along with its original record---If the procedure for production of the document was not followed in the manner prescribed by law, the same could not be taken into consideration---Petitioners produced the document through their representative, who neither prepared nor attested the same---Even the original record of these documents were not produced in the Trial Court for comparison---Besides, production of the marginal witnesses of the documents in the Court was a condition precedent under Article 79 of the Qanun-e-Shahadat, 1984, but the needful was not done---Petitioners had failed to prove the execution of the documents relied upon, as such, did not confirm the contents of the plaint --- Petitioners had abused the process of law by filing vexatious and frivolous claims, wasting the precious time of the Courts---Petition for leave to appeal was dismissed with costs of Rs. 100,000, and leave was refused.

Manzoor Hussain v. Misri Khan PLD 2020 SC 749 and Federation of Pakistan and another v. Jaffar Khan and another PLD 2010 SC 604 ref.

Javed Iqbal Wains, Additional A.G.P. for Petitioners.

Nemo for Respondent.

Date of hearing: 6th February, 2023.

ORDER

JAMAL KHAN MANDOKHAIL, J.---The Petitioners filed a suit for recovery of an amount of Rs.912,801.60/- against the Respondent on account of breach of a contract awarded to him for supply of certain food items. The Respondent did not contest the suit, therefore, was proceeded against ex parte and asked the Petitioners to produce evidence. Subsequently, the Civil Judge, 1st Class, Rawalpindi ("Trial Court") vide judgment and decree dated 22.02.2014 dismissed the suit, holding that the Petitioners had failed to prove their claim. The appeal filed against the judgment and decree of the Trial Court was dismissed by the Additional District Judge, Rawalpindi through judgment dated 25.02.2016. Thereafter, the Petitioners filed a Civil Revision before the Lahore High Court, Rawalpindi Bench, Rawalpindi which too was dismissed through the impugned judgment dated 07.09.2020, hence, this petition for leave to appeal.

2. Arguments heard and have perused the record. Where on the date of hearing, only the plaintiff appears and the defendant despite being duly served does not appear, the Court by exercising powers under Order IX, Rule 6 of the Code of Civil Procedure ("C.P.C.") may proceed against the defendant ex parte and pass a decree without recording evidence. As per section 2(2) of the C.P.C., a "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint as well. The Court after proceeding with the defendant ex parte, may determine the rights of the parties either without recording evidence or may call the plaintiff to produce evidence, in order to satisfy itself on arriving at a proper conclusion of the matter presented before it, for the safe administration of justice. Thus, despite non- appearance of the defendant, the Court should not act mechanically,¹ rather ought to consider the legal and factual aspects of the case, on the basis of the material available before it.

3. A document which pertains to financial and future obligations is required to be attested by at least two witnesses, as provided by Article 17(2)(a) of the Qanun-e-Shahadat Order, 1984 ("Order, 1984"). Article 79 of the Order, 1984 mandates that any such document required by law to be attested by two witnesses shall not be used as evidence, save for two attesting witnesses appear before the Court to prove its execution,² unless the same is admitted by the contesting parties, as stipulated by Article 81 of the Order, 1984. If the question of execution and attestation of any such document is put in issue by the Court, the party relying upon such document is required to produce its two marginal witnesses in order to prove its execution in accordance with the law. This principle is applicable to all such documents executed between private and/or public parties as well as in cases where the defendant is proceeded against ex parte.

4. The Petitioners/Plaintiffs have relied upon a contract which admittedly pertains to financial and future obligations. The initial burden of proving the case and the documents was on the Petitioners/Plaintiffs. Despite the fact that the defendant was proceeded against ex parte, the Trial Court in order to satisfy itself

with regard to the execution of the document, exercised its discretion by asking the Petitioners/Plaintiffs to produce evidence in support thereof. The law has provided a procedure for production of documents through the person concerned along with its original record. If the procedure for production of the document is not followed in the manner prescribed by law, the same cannot be taken into consideration.³ The Petitioners produced the document through their representative, who neither prepared nor attested the same. Even the original record of these documents were not produced in the Trial Court for comparison. Besides, production of the marginal witnesses of the documents in the Court is a condition precedent under Article 79 of the Order, 1984, but the needful was not done. The Petitioners have failed to prove the execution of the documents relied upon, as such, did not confirm the contents of the plaint. The Courts below after proper adjudication of the matter have concurrently refused to grant relief to the Petitioners and dismissed the suit. The learned counsel for the Petitioners has not been able to point out any substantial question of law, illegality, procedural irregularity or jurisdictional defect in the concurrent findings of fact of the Courts below, warranting interference.

Thus in view of the above, leave is refused and the petition is dismissed. The Petitioners have abused the process of law by filing vexatious and frivolous claims, wasting the precious time of the Courts. Consequently, costs of Rs.100,000/- are imposed upon the Petitioners. Since the Respondent did not participate in the proceedings right from the beginning, therefore, the costs shall be deposited by the Petitioners in a charitable organization of their choice within one month from receipt of a copy of this order and acknowledgment thereof be submitted to the Registrar for our perusal in Chambers.

MWA/F-11/SC Petition dismissed.