

service, filed

ORDER IX

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE

1. Parties to appear on day fixed in summons for defendant to appear and answer.--On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

COMMENTS

Object. Rule 1 of Order XI of C.P.C., provided that interrogatories were to be delivered to opposite party for examination so that those could be answered by it. Word "examination" used in Rule 1, Order XI does not mean "examination of a witness" as is done in examination-in-chief but it means perusal of interrogatories by opposite party which is called upon to answer them and deliver answers in writing to the party seeking interrogatories. [PLJ 2007 Kar. 86].

2. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.--Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed:

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

COMMENTS

Application. Neither the petitioner nor his Counsel opted to submit their own affidavits. Supreme Court would treat the application is not supported by any affidavit.

Election petition dismissed in default can be restored by the Election Tribunal, but that can only be done if the application for restoration of the election petition discloses genuine and sufficient reasons for restoring the same. [PLJ 2010 Lahore 22]

Non-deposit of process fee and talbana form. Law favours adjudication of cases on merits and technicalities should not be allowed to stand in the way of substantive justice. [PLJ 2011 Lahore 382]

3. Where neither party appears, suit to be dismissed. Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

COMMENTS

Non-appearance of plaintiff. If there is material available on record for giving decision on merits dismissal should be avoided to the utmost, in such a case the Court may either adjourn the hearing or decide the suit on merits. [PLD 2009 Kar. 61].

Application for restoration. Court was not bound to restore the suit merely because the restoration application was within time. [PLJ 2009 SC 804]

4. Plaintiff may bring fresh suit or Court may restore suit to file.—(1) Where a suit is dismissed under R. 2 or R. 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the Court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

[(2) The provision of Section 5 of the Limitation Act, 1908 (IX of 1908) shall apply to applications under sub-rule (1)].¹

COMMENTS

Restoration of suit. Question as to the maintainability or otherwise of the main suit can be decided only when application for restoration is decided and suit restored. [PLD 1992 S.C. (AJ&K) 7].

Restoration of revision petition. Revision application dismissed in default can be restored on sufficient cause shown in exercise of inherent powers of Court. [PLD 1992 Lah. 250].

Appeal. Order passed under O. IX, R. 4 of the Code is not appealable under O. XLIII, R. 1 of the Code, such appeal cannot be treated as revision. [1994 MLD 664]

5. Dismissal of suit where plaintiff, after summons returned unserved, fails for three months to apply for fresh summons.²[(1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that--

- (a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or
- (b) such defendant is avoiding service of process, or
- (c) there is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit.]

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

6. Procedure when only plaintiff appears.--(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then--

- (a) **When summons duly served.** if it is proved that the summons was duly served, the Court may proceed ex parte,³[and pass decree without recording evidence];
- (b) **When summons not duly served.** if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;
- (c) **When summons served, but not in due time.** if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

2. Subs. by the C.P.C. (Amndt) Act, 1920, (24 of 1920), S. 2 for the original sub-rule. (1).

3. Inserted by Ordi. XII of 1972.

CIVIL

COMMENTS

Ex parte order. No period of limitation is provided for setting aside *ex parte* order. [PLJ 2003 Pesh. 262].

Ex parte proceedings against defendant. Provisions of O.IX R. 6(1)(a), C.P.C. had empowered the Court to proceed against defendant *ex-parte* and pass a decree without recording evidence, if he did not appear before the Court when the suit was called on for hearing; and if summons had been duly served, O.IX R. 6(1), C.P.C. [2010 CLC 807]

7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.--Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

COMMENTS

Remedy against ex-parte proceedings. Order IX; Rule 7 of CPC provides the remedy against *ex-parte* proceedings as the defendant who has been proceeded against *ex-parte*, no doubt remains a party to the proceedings, as he cannot be relegated to the petition, he would have occupied had been appeared. *Ex-parte* proceeding can be set aside, on nominal costs. [PLJ 2010 Peshawar 1 (DB)]

8. Procedure where defendant only appears.--Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

COMMENTS

Hearing. The expression 'hearing of the suit' in O. IX, R. 8 of the Code refers to determination of question resulting in final determination of suit, filing of written statement, striking of issue, taking evidence, tendering documents and hearing of arguments [PLJ 1988 Lah. 461]. "Hearing" consists of taking of evidence, hearing of arguments or consideration of question relating to suit, which would enable the Court to finally come to an adjudication upon it and not consideration of interlocutory matter. [2009 YLR 228].

Restoration of suit. Court upon satisfaction that sufficient cause is shown for non appearance of plaintiffs when suit called on for hearing, it is empowered to set aside dismissal order. [2004 MLD 1346].

9. Decree against plaintiff by default bars fresh suit.--(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff

shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite-party.

[(3) The provisions of Section 5 of the Limitation Act, 1908 (IX of 1908), shall apply to applications under sub-rule (1).]

High Court Amendments. Lahore. To sub-rule (1), add the following proviso: "Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although former suit may have been dismissed for default."

N.-W.F.P. As added by Peshawar High Court Vide No. 2212-6 dated 12.5.1909. Add the following proviso to sub-rule (1): "Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default."

COMMENTS

Scope. Dismissal of suit in default has no debarring effects upon the plaintiff so as to make his defence on the same grounds as were raised in the previous suit but were not adjudicated upon merits in another suit instituted by other party. [PLD 2009 S. C. 493].

Restoration application. Where an appeal is dismissed under Rule 11(2) or Rule 17 or Rule 18, appellant may apply to appellate Court for re-admission of appeal where it is proved that he was prevented by any sufficient cause from appearing when appeal was called for hearing Court may re-admit appeal on such terms as it thinks fit. [PLJ 2015 Karachi 53]

Restoration of suit. Trial Court in terms of O. IX, R. 9 of the Code is bound to dilate upon the question, whether sufficient cause is shown by the application for default. [1988 MLD 1825]. Assertions in affidavits may shake out a valid ground for restoration of suit. [1989 SCMR 883] Conditional restoration on payment of cost is perfectly a valid order. [PLD 1989 Lah. 301]. Appellant giving a reasonable explanation for his absence suit is to be restore, [1999 SCMR 2824]. party to satisfy the Court under C.P.C. that there was sufficient cause for its non-appearance. [2003 MLD 1836].

Restoration of election petition. Election tribunal is not vested with powers to restore an election petition dismissed for default of appearance of election petition. [PLJ 2015 Tr.C. (Election) 1]

Non-appearance of applicant or its counsel. Appellant asserted that respondents had not shown 'sufficient cause' for their absence as well as absence of their advocate. [2010 CLC 908]

10. Procedure in case of non-attendance of one or more of several plaintiffs.--Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

11. Procedure in case of non-attendance of one or more of several defendants.--Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it think fit with respect to the defendants who do not appear.

12. Consequence of non-attendance without sufficient cause shown of party ordered to appear in person.--Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

SETTING ASIDE DECREE EX PARTE

13. Setting aside decree ex parte against defendant. (1) In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

⁵[Provided further that no decree passed *ex parte* shall be set aside merely on the ground of any irregularity in the service of summons, if the Court is satisfied, for reason to be recorded, that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim.]

6. [(2) The provisions of Section 5 of the Limitation Act, 1908 (IX of 1908), shall apply to applications under sub-rule (1).]

High Court Amendments. N.W.F.P. Add the following further proviso.

"Provided further that no decree passed *ex parte* shall be set aside merely on the ground of an irregularity in the service of summons, if the Court is satisfied for reasons to be recorded that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim."

Sindh. Add the following further proviso:-

"Provided also but a decree passed *ex parte* shall not in the absence of good cause be set aside on the ground merely of irregularity in the service of the summons unless upon the facts proved the Court is satisfied that the defendant did not have notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

COMMENTS

Summons were not served or prevented by sufficient cause to appear before Court. [PLJ 2014 Lahore 821]

Ex-party order setting aside of. Relief can only be extended to a party who has approached the Court for setting aside the *ex parte* decree on available grounds under the law including the one that applicant seeking setting aside *ex parte* decree was not heard are allowed to represent himself before the Court. [PLD 2009 SC 437].

Ex-parte judgment and decree. If party failed without lawful excuse to appear in person on day so appointed, Court might pronounce judgment against him or make such order in relation to suit as it thinks fit. [PLJ 2013 Lahore 224] -

Fraud and misrepresentation was made. Since the appellant was admittedly not served on his address, given in memo. of plaint, but on another address notices were sent where the appellant was not residing and appellant came to know about proceedings when Bank filed application u/O. VII, R. 11 of CPC in other suit whether any fraud and misrepresentation had been made in the matter, can be resolved after recording the evidence. [PLJ 2010 Karachi 1]

Relief can only be extended to a party who had approached the Court for setting aside the *ex-parte* decree on available grounds under the law, including the one that the applicant seeking setting aside *ex-parte* decree was not heard or allowed to represent himself/herself before the Court. [PLJ 2009 SC 1072]

Duplication of proceedings. Once judgment and decree had been passed and was maintained till High Court in writ jurisdiction the same could not be termed as void and it was incumbent upon petitioner to have come to Court within time and with proper care because he had previously approached the Court for setting aside *ex-parte* decree as well as by filing application u/S. 12(2), CPC on different grounds so he was

supposed to be vigilant by that time and by now it was closed chapter. [PLJ 2012 Peshawar 55]

14. No decree be set aside without notice. No decree be set aside without notice to opposite-party.--No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite-party.

▼