

## ORDER SHEET

### IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Ist Civil Appeal No. 13 of 2010

1. For Katcha Peshi.
2. For hearing of CMA No. 517/2010

Mr. Muhammad Imran Shamsi Advocate for the appellant  
along with the appellant

### J U D G M E N T

**Nadeem Akhtar, J.** : Through this First Appeal, the appellant has impugned the judgment delivered on 31.05.2010 and decree prepared on 16.06.2010 by the learned District Judge Khairpur, whereby Summary Suit No. 24 of 2009 filed by the respondent under Order XXXVII Rules 1 and 2 CPC for recovery of Rs.140,000.00 was decreed ex-parte against the appellant. By a short order announced by me on 04.09.2012, this appeal was dismissed. Following are the reasons for dismissal of this appeal :

1. The respondent filed the above mentioned Suit against the appellant under the Summary Chapter of CPC. It was the case of the respondent before the learned trial court that the appellant had taken a loan of Rs.140,000.00 from him, and in order to return the said loan to him, the appellant issued in his favour a cheque bearing No.E-537519 on 02.05.2007 for the same amount. The said cheque was issued by the appellant from account No.1946-8 maintained by her with National Bank of Pakistan, Khairpur. According to the respondent when he presented the said cheque on 04.05.2007, it was dishonoured and was returned to him by appellant's bank along with a memo with the remarks that the account of the appellant had insufficient funds. Thereafter the respondent approached the appellant who promised to repay the loan amount, but she did not honour her promise. Consequently, the respondent served upon the appellant two legal notices dated 07.07.2008 and 17.10.2008 through his counsel calling upon her to settle her outstanding liability. The appellant did not acknowledge any of the said notices nor did she settle her liability and as such the respondent was constrained to file the Suit.

2. Summons issued in the Suit to appellant were duly served upon her through bailiff on 20.01.2010, whereafter she engaged a counsel who filed power on her behalf and sought adjournment through an application. After twenty eight (28) days of service of summons on the appellant when the Suit came up before the learned trial court on 17.02.2010, there was no application on record by or on behalf of the appellant for leave to appear and defend the Suit. Accordingly, the learned trial court ordered on 17.02.2010 ex-parte proceedings against the appellant and directed the respondent to produce his witnesses. On 25.02.2010, the appellant filed three applications before the learned trial court, one for setting aside the ex-parte order, the second seeking leave to appear and defend the Suit, and the third for condonation of delay in filing the application for leave to appear and defend the Suit. On the same day, notice of all the above applications was ordered to be issued to the respondent who filed objections in reply to the application for condonation of delay filed by the appellant. All the above applications filed by the appellant were fixed for hearing before the learned trial court on 27.04.2010 when she and her counsel remained absent although the matter was called thrice. Ultimately all the said three applications were dismissed for non-prosecution by the learned trial court on 27.04.2010 at 02:00 PM and the matter was adjourned for respondent's ex-parte proof.

3. The respondent filed his affidavit in ex-parte proof on 24.05.2010 wherein he reiterated his claim against the appellant and he also produced relevant evidence in support of his claim, which remained un-rebutted. After hearing the respondent and after examining the evidence produced by him, the learned trial court decreed his Suit by the impugned judgment and decree.

4. It was contended by the learned counsel for the appellant that the ex-parte order ought to have been recalled, delay by the appellant in filing application for leave to appear and defend the Suit ought to have been condoned, and the appellant ought to have been granted opportunity to defend the Suit by the learned trial court. It was submitted by him that the reason for delay was due to the illness of the appellant ;

that the appellant was condemned unheard ; that the claim of the respondent was false ; and that the appellant was not liable to pay any amount to him. On my query the learned counsel admitted in the presence of the appellant, who was present with him in Court, that the cheque in question was not only executed by the appellant, but also that the same was handed over by her to the respondent. He also admitted that it was not the case of the appellant that the cheque was blank at the time of its execution, or that same was taken over by the respondent from the appellant without her consent. No other ground was urged in support of this appeal.

5. The record shows that the appellant was duly served on 20.01.2010 through bailiff, however, she had stated in the affidavits filed by her in support of the applications before the learned trial court that she received the summons on 04.02.2010. The record also reveals that after service of summons on 20.01.2010, the appellant engaged a counsel who filed his power and an application for adjournment on her behalf before the learned trial court. The above referred three applications were filed by the appellant on 25.02.2010 through the same counsel. The appellant never alleged either before the learned trial court or before this Court in this appeal that the power and application for adjournment, which were filed on her behalf immediately after service of summons, were unauthorizedly filed by the said counsel. As such, appellant's version does not appear to be correct, and therefore, the learned trial court was right in computing the period of limitation with effect from 20.01.2010 for filing application by the appellant for leave to appear and defend the Suit. If it is assumed that the appellant was served on 04.02.2010, as claimed by her, even then she was bound to file her application for leave to appear and defend the Suit on or before 14.02.2010. However, she filed such application on 25.02.2010.

6. In view of service of summons on the appellant on 20.01.2010, the prescribed period of limitation of ten days for filing application for leave to appear and defend the Suit commenced with effect from 21.01.2010.

Law on this point is now well settled that service effected through any one mode has to be considered good service as laid down by the Hon'ble Supreme Court in the leading case of M/S Ahmed Autos & another V/S Allied Bank of Pakistan Ltd, reported as **PLD 1990 SC 497**. This authority of the Hon'ble Supreme Court is fully applicable in the present case, and in view thereof, the appellant was duly served on 20.01.2010. Resultantly, the period of limitation of ten days for filing application for leave to appear and defend the Suit prescribed in Article 159 of the Limitation Act, 1908, and in Form No.4 of Appendix 'B' referred to in Rule 2 of Order XXXVII CPC expired on 30.01.2010. As a matter of indulgence, if the period of limitation is computed from 04.02.2010, when the appellant claims to have been served, even then ten days' time for filing application for leave to appear and defend the Suit expired on 14.02.2010. The appellant did not file application either on 30.01.2010 or on 14.02.2010, but filed the same on 25.02.2010 much after expiration of the prescribed period of limitation. Thus, appellant's application for leave to appear and defend the Suit was barred by time.

7. As far as the application for condonation of delay filed by the appellant before the learned trial court is concerned, I have noticed that it was based on a very vague statement by the appellant that she had an operation due to which she was unable to move and that she was advised complete rest. The specific date of the operation, specific dates / period during which she was confined to bed, and the specific date when she recovered from such disability, were not disclosed by the appellant in her said application. Not only this, delay of each and every day was not explained by her in the said application, which ought to have been explained by her according to the settled principle of law. The above relevant information and explanation have not been pleaded in this appeal also. In support of the view expressed by me, I would like to refer to two authorities of the Hon'ble Supreme Court on the points of filing of application within the prescribed period of limitation and condonation of delay. In the case reported as **1999 SCMR 2353** (Messers Qureshi Salt & Spices Industries, Khushab and another V/S Muslim Commercial Bank Limited, through President, and 3 others), it was held by the Hon'ble Supreme Court that delay under Section 5 of the Limitation Act cannot be condoned without application as the delay of each day is to be

explained before a Court can condone the delay, and therefore, the same cannot be done unless an application stating sufficient reason for condonation is made. In another authority reported as **2006 SCMR 631** (Shahid Pervaiz alias Shahid Hameed V/S Muhammad Ahmad Ameen), it was held by the Hon'ble Supreme Court that it is a settled principle of law that valuable right accrues to the other side by lapse of time and each day's delay has to be satisfactorily explained.

8. It is also a settled principle of law that when a defendant fails to appear or fails to obtain leave to defend in response to a summon served in Form No.4 provided in Appendix 'B' to CPC, or where the Court refuses to grant leave, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree. In such an event, the Court shall pass a decree in favour of the plaintiff against the defendant. This view is fortified by the authorities of the Hon'ble Supreme Court, namely, **PLD 1995 Supreme Court 362** (Haji Ali Khan & Company, Abbottabad and 8 others V/S M/s. Allied Bank of Pakistan Limited, Abbottabad) ; **1996 SCMR 1530** (Naeem Iqbal V/S Mst. Zarina) ; and **1999 SCMR 2832** (Col. (Retd.) Ashfaq Ahmed and others V/S Sh. Muhammad Wasim).

9. In this case, the application filed by the appellant for leave to appear and defend the Suit was admittedly barred by time, and her application for condonation of delay did not disclose sufficient or satisfactory grounds nor the delay of each and every day was explained therein by her. Moreover, when both her above mentioned applications along with her application for setting aside the ex-parte order were fixed for hearing on 27.04.2010 before the learned trial court, all the three applications were dismissed for non-prosecution at 2:00 PM after three calls as the appellant and her counsel remained absent on every call. Thereafter, no application was filed by the appellant for restoration of any of the said three applications. It means that when the Suit came up for final disposal before the learned trial court, none of the applications filed by the appellant was pending.

In view of the above discussion and the authorities of the Hon'ble Supreme Court referred to above, I am of the firm opinion that there is no illegality or infirmity in the impugned judgment and decree, and that the same do not require any interference by this this Court. The appeal is therefore dismissed along with the listed application with no order as to costs.

J U D G E