

Judgment Sheet

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision Application No. S – 80 of 2017

Applicant : Abdul Qadir Memon, through Mr. Abdul Qadir Shaikh, Advocate.

Respondent : Shahid Umar, through Mr. Yousuf Ali Advocate.

Date of hearing : 18.12.2017.

J U D G M E N T

NADEEM AKHTAR, J. :This Civil Revision Application is directed against the order passed on 16.09.2017 by the learned 1st Additional District Judge in the respondent's Summary Suit No.03/2016 whereby application filed by the applicant for recalling the ex-parte order passed against him on 22.12.2016 was dismissed. The main questions involved in the present matter are whether a notice can be issued instead of summons in a Summary Suit to the defendant to answer the claim of the plaintiff, whether summons in a Summary Suit under Order XXXVII CPC can be issued in a form other than the form specifically prescribed in Rule 2 of Order XXXVII CPC, and whether an ex-parte order against the defendant can be passed by the trial Court after issuance of only a notice and without issuing summons in the prescribed form.

2. Relevant facts of the case are that Summary Suit No.03/2016 was filed by the respondent against the applicant under Order XXXVII CPC for recovery of Rs.6,500,000.00. Vide order dated 07.12.2016, service upon the applicant was held good by the trial Court and it was ordered that the Suit shall proceed against him ex-parte. On 04.05.2017, the applicant filed two applications, one for recalling the aforesaid ex-parte order and the other under Order XXXVII Rule 3 CPC seeking leave to appear and defend the Suit. Vide impugned order dated 16.09.2017, the application filed by the applicant for recalling the ex-parte order was dismissed. It is stated that the application filed by the applicant for leave to appear and defend the Suit is still pending before the learned trial Court.

3. Mr. Abdul Qadir Shaikh, learned counsel for the applicant, contended that the applicant was never served in a proper manner through summons in the prescribed Form No.4 of Appendix B of the Code of Civil Procedure, 1908.

In addition to this, it was contended by him that the notice published in the newspaper was in respect of a Family Suit and not the subject Summary Suit. It was urged by him that since the notice was defective and service upon the applicant was not effected in a proper manner in accordance with law, the ex-parte order as well as the impugned order refusing to set aside the ex-parte order are bad in law. It was further urged by him that the impugned order is liable to be set aside and the application filed by the applicant seeking leave to appear and defend the Suit, which application is still pending before the trial Court, should be decided by the learned trial Court on merits.

4. On the other hand, Mr. Yousuf Ali, learned counsel for the respondent, contended that the applicant, despite being fully aware of the proceedings, deliberately avoided to appear before the trial Court within the prescribed period of limitation. Regarding the mistake in the publication of notice in newspaper, he submitted that such defect is liable to be ignored as there was no such mistake in the notices issued through other modes. He prayed for dismissal of this revision application.

5. Vide order dated 27.11.2017 passed in the present proceedings, R&P of the above mentioned Suit was called from the learned trial Court. I have heard learned counsel for the applicant and respondent at length and have examined the material available on record, particularly R&P of the Suit, with their assistance. Record reveals that vide order dated 22.08.2016, learned trial Court admitted the Suit with direction to register the same and to issue "notice" to the defendant (present applicant) ; since notice issued through the bailiff had returned unserved, notice was ordered to be repeated on 08.09.2016 ; on 30.09.2016, notice was once again ordered to be repeated, but this time through registered post A/D as well ; on 20.10.2016, application for substituted service filed by the plaintiff / respondent under Order V Rule 20 CPC was allowed by the learned trial Court by ordering publication of notice in the newspaper ; on 16.11.2016, publication was once again ordered ; service upon the defendant / applicant was held good on 25.11.2016 in view of publication of notice in newspaper ; and, vide order dated 07.12.2016, the applicant was declared ex-parte.

6. Order V of CPC deals with the requirements and procedure for issuance and service of summons. Under Rule 1 of Order V CPC, when a Suit is duly instituted summons are to be issued to the defendant to appear and answer the claim on the day specified therein, but summons are not issued when the defendant appears at the presentation of the plaint and admits the claim of the

plaintiff ; and under Rule 2 of Order V CPC, every summons must be accompanied by a copy of the plaint. Rules 3, 5, 6, 7 and 8 of Order V CPC deal, respectively, with issuance of summons for personal appearance of the defendant on the day specified therein, for settlement of issues or for final disposal, for fixing the day for the appearance of the defendant, for requiring the defendant to produce all documents in his possession and power upon which he intends to rely in support of his case, and to produce his witnesses for final disposal of the Suit. The forms in which summons are issued at different stages of the Suit are prescribed in Appendix B of CPC.

7. The procedure of institution and trial of Suits is prescribed in and is governed only by the Code of Civil Procedure, 1908, (**'the Code'**), and as observed in the preceding paragraph, the Code provides that when a Suit is duly instituted summons are to be issued to the defendant to appear and answer the claim on the day specified therein. Thus, under the Code, summons is the only mode and source through which the defendant becomes aware inter alia about the nature of the Suit filed against him, the allegations and claim made therein against him, details of the person (plaintiff) who has made such allegations and claim against him, details of the court where the Suit is instituted, and the date on which he is required to appear before the court in order to defend himself ; and, once the defendant acquires knowledge of all the above, only then is he able to defend the Suit in a proper manner as prescribed in the Code. It must be kept in mind that there is no concept of issuing notice to the defendant in a Suit to answer the claim of the plaintiff, and for this purpose only summons are issued in the form prescribed in the Code itself. Upon institution of a Suit, the Court is duty-bound to issue summons to the defendant calling upon him to answer, on the date specified in the summons, the claim made by the plaintiff in his Suit. However, it may be observed that notice can be issued to the defendant at any subsequent stage of the Suit and for the purpose specified therein or in respect of applications filed by the plaintiff or other defendants in a pending Suit, but not upon institution of the Suit to answer the claim of the plaintiff.

8. Coming back to the present case, perusal of its R&P shows that upon admission of the Suit instead of passing an order for issuance of summons, an order was passed by the learned trial Court on 22.08.2016 for issuance of notice to the defendant (present applicant), and in pursuance of such order, notice was issued to the applicant in the following terms :

“To the above named respondent.

Whereas, the advocate for plaintiff has filed summary Suit for recovery of an amount of Rs.65,00,000/- (sixty five lacs) under Order 37 rule 6 and Order 38 rule 5 read with Section 151 CPC-1908 before this Court and same is fixed for hearing on 08.09.2016 at 08:00 A.M.

***You are hereby given notice** to appear in person or through an advocate or agent duly authorized before this Court on 08.09.2016 at 08:00 A.M., and **to file your objection** if any. In case of your failure without sufficient cause the above matter will be heard and decided in your absence according to law. (Copy attached herewith).*

Given under my hand and seal of this Court this 24th day of August, 2016.

Order

*Reader,
Additional District Judge (Hudood)
Sukkur”*

(Emphasis added)

9. It is evident from the above notice that although it was mentioned therein that a summary Suit had been filed against the applicant / defendant, but he was called upon to file objections instead of an application for leave to appear and defend the Suit as specifically provided for in Rule 2(2) of Order XXXVII of the Code. Since the Suit in the present case was filed under Order XXXVII of the Code, summons therein were to be issued only in Form No.4 of Appendix B as specifically provided for in Rule 2 of Order XXXVII CPC, which reads as under :

“2. Institution of summary suits upon bills of exchange, etc.

(1) All Suits upon bills of exchange, hundis or promissory notes, may, in case the plaintiff desires to proceed thereunder, be instituted by presenting a plaint in the form prescribed ; but the summons shall be in Form No.4 in Appendix B or in such other form as may be from time to time prescribed.

(2) In any case in which the plaint and summons are in such forms respectively the defendant shall not appear or defend the Suit unless he obtains leave from a judge as hereinafter provided so to appear and defend ; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree.....”

10. A bare reading of Rule 2(1) of Order XXXVII of the Code shows that the requirement of issuance of summons in a Suit under Order XXXVII of the Code in Form No.4 of Appendix-B is mandatory because of the word “shall” used in the said Rule. Moreover, non-filing of application for leave to appear and defend by the defendant within the statutory period of ten days stipulated in the

summons entails an adverse consequence against him. The contents and language of the said Form No.4 are of extreme importance, therefore, the same is reproduced below for convenience and ready reference :

*“ No.4. SUMMONS IN SUMMARY SUIT
ON NEGOTIABLE INSTRUMENT (O.37, r.2)*

(Title)

To

[Name, description and place of residence]

*WHEREAS has instituted a Suit against you under Order XXXVII of the Code of Civil Procedure, 1908, for Rs....., balance of principal and interest due to him as the of a of which a copy is hereto annexed, **you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the Suit, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree** for any sum not exceeding the sum of Rs..... and the sum of Rs..... for costs together with such interest, if any, from the date of the institution of the Suit as the Court may order.*

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the Suit on the merits, or that it is reasonable that you should be allowed to appear in the Suit.

GIVEN under my hand and the seal of the Court, this Day of19....

Judge”

(Emphasis added)

11. Through the summons in the above-quoted Form No.4 prescribed in Appendix-B of the Code specifically for Suits filed under Order XXXVII of the Code, the defendant in such Suit is “summoned” to cause appearance in order to obtain leave from the Court within ten days from service to appear and defend the Suit by means of an application supported by an affidavit and showing that there is a defence to the Suit on merits ; and, the defendant is also put on notice that in case of his default / failure, the plaintiff will become entitled to a decree. In case summons are not issued in the said prescribed form or are not issued at all, the defendant will be totally unaware about the claim made against him by the plaintiff, the mode in and the time within which he has to defend himself and the consequences of not defending the Suit in the prescribed manner and within the prescribed limitation. Any such omission in issuing the summons or deficiency therein shall cause extreme prejudice and hardship to the defendant, and any adverse order or decree against him in such circumstances, will be bad in law.

12. We have seen in the present matter that summons were not issued at all, let alone summons in prescribed Form No.4 of Appendix-B in terms of Rule 2(1) of Order XXXVII of the Code. Thus, the entire proceedings and the impugned ex-parte order passed therein were illegal and are liable to be set aside. In addition to the above, record shows that contention of learned counsel for the applicant that publication in newspaper was in respect of a Family Suit and not for the subject Summary Suit, is also correct. It is surprising and disappointing to note that the above blunder of not issuing summons in the form specifically prescribed for Summary Suits was committed by an Additional District Judge who is a senior Judge of the District Judiciary.

13. In view of the above discussion, the impugned ex-parte order is set aside. The learned District Judge Sukkur is directed to transfer Summary Suit No.03/2016 (Shahid Umar V/S Abdul Qadir) from the Court of learned 1st Additional Judge Sukkur to his own Court, and to proceed with the said Suit from inception strictly in accordance with law by issuing summons in the prescribed form and manner.

14. Foregoing are the reasons of the short order announced by me on 18.12.2017 whereby the impugned order was set aside and this Civil Revision Application and CMA No.1082/2017 pending therein were allowed with no order as to costs.

Office is directed to return R&P of the above mentioned Suit forthwith to learned trial Court for compliance.

JUDGE