

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

R.A. No. 174 of 2009

DATE **ORDER WITH SIGNATURE OF JUDGE**

27.08.2013

Mr. Faraz Ahmed Chandio advocate for applicants
Mr. Bilawal Ghunio advocate for respondents

This impugned order is arising out of Summary Suit No. 07 of 2008 in terms whereof the application under Order XXXVII CPC for grant of leave to defend the suit was dismissed vide order dated 9.10.2009 as being barred by time.

Brief facts of the case are that Summary Suit No. 07 of 2008 was filed by the Sindh Small Industries Corporation and the summons were served on 4.8.2008. On 11.08.2008 after service of summons under the required rules, the defendant No.1 who is husband of defendant No.2 appeared and submitted an application to grant time to file an application for leave to defend and to engage an advocate on the ground that the copy of memo of plaint is not served with the summons. Learned counsel for the applicant however admitted that he received copy of the same on 11.08.2008 in court and on the same day, application for filing leave to defend application was granted which according to him was to be filed on 1st September 2008. Learned counsel submits that since the application was dismissed on the point of limitation, therefore, the trial court has not considered the merits of the case. He further argued that the suit was not maintainable as it was filed against the individual / partners and not against the firm. He further argued that the demand promissory note at page 83 does not fulfill the requirement and hence cannot be considered as demand promissory note as no date is mentioned. On query he admits the contents of promissory note except the amount of Rs. 9,15,000/- which was not disbursed and instead amount of Rs. 6,86,250/- was disbursed, rest of the contents are correct and no forgery was found. Learned counsel has relied upon the case reported in PLD 1984 Karachi 252, 2013 MLD 1012 and 2012 CLC 899 and submitted that since the trial court itself extended time for filing leave to defend application, therefore, his belated application should not have been considered as time barred. Learned counsel submits that the suit should have been filed as ordinary suit and not as a summary suit. Besides, learned counsel submits that the suit itself was time barred and the alleged notices said to have been issued on 13.08.2005 are fabricated.

On the other hand, learned counsel for respondent has supported the order impugned and submitted that under no stretch of imagination the time could alleged to have been extended at the whims and desires of learned trial court. Learned counsel submits that on 11.08.2008 the defendant himself filed an application enabling him to file an application for leave to defend and engage a counsel which reflects that he was aware of the summary suit as he requested the trial court to grant time and enable him to file an application to defend the suit and he cannot seek such relaxation that the time was extended by the trial court to file leave to defend application. Learned counsel also submitted that since the application was dismissed as being time barred, therefore, merit is not required to be considered. He without prejudice to above argued that no forgery to promissory note was established which is claimed in the application. He argued that in a suit a sum of Rs.6,86,250/- was claimed as principal and not Rs.9,15,000/-.

I have heard the learned counsel and perused the record.

To begin with I propose to consider the arguments of appellant that the suit was time barred. The cause of action is reflected in terms of para-7 which is 13.08.2005 and there is no categorical denial of the fact in the affidavit in support of his leave to defend application that the notices dated 13.08.2005 were neither issued nor served. Learned counsel has also failed to point out as to when for the last time the defendant refused the repayment of the demand promissory note whatever amount it may be. Again reverting to the question as to whether suit could be instituted against the partners of the firm, this ground was again not agitated in leave to defend application. It may however, clarified that the defendant has neither placed on record any copy of the registered firm nor he has pleaded such in his application for leave to defend. Learned counsels argument that since the demand promissory note provide for recovery of the markup / profit to the amount disbursed, therefore, it cannot be said as demand promissory note in terms of Section 4 and 118 of Negotiable Instruments. Such could hardly be a ground to be considered as in the event of the recovery of the amount the landing company under the law is entitled to recover the profit / markup on account of the failure.

Coming to the main point of limitation, it is admitted position that he has received copy of the plaint on 11.08.2008 and he filed an application for leave to defend on 01.09.2008 on the self understanding that the trial court has extended time for filing leave to defend application by 01.09.2008. The Sindh Civil Court Rules and Civil Procedure Code provides a date of hearing and not the date of filing application, therefore, under no stretch of imagination such adjournment that was granted on 11.08.2008 when the matter was put off to 1.9.2008 could be considered as a date for filing an application. Certainly that application if at all desired by the appellant required to be filed within time provided under the law to be considered on 1.9.2008 when the matter was adjourned and the

adjournment of the case to 1.9.2008 would not constitute enlargement of time. The diary dated 11.8.2008 is reproduced as under:-

“Representative of plaintiff and Mr. Javed Bukhari Advocate for the plaintiff are present. Defendant No.1 is present in person and submitted an application for grant of time to file application for leave to defend and engage an advocate on the ground that copy of memo of plaint and its enclosures are not supplied to him. Allowed vide Ex. No.06. Copies are supplied to him. The defendant No.2 is his wife and she will also be represented by him. Put off to 1.9.2008, for filing of application for leave to defend, if desires.”

Perusal of the diary dated 11.08.2008 shows that the matter was put off to 01.09.2008, for filing an application for leave to defend, if desired. This hardly subscribe to the contention of the learned counsel that the time was extended by the trial court for filing leave to defend application. Neither the trial court nor the other forum having jurisdiction or prerogative to extend time to file application for leave to defend as prescribed by the statute itself. Only the time taken by the party to file an application could be condoned if at all it is delayed by any cogent reason. They have not even bothered to file application for condonation of delay. Accordingly the application was rightly rejected being time barred. We find no substance in this revision application which is accordingly dismissed.

Lastly I appreciate the efforts made by the learned counsel for the applicant in this case. He shall continue to make such hard work in other cases and the court will always appreciate the efforts made by the young counsel

Sd/- Muhammad Sharif Siddiqui
Judge.