

**IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT, HYDERABAD**

**1<sup>st</sup> Appeal No. 36 of 2021**

Muhammad Umair	-----	Appellant
	<b><i>Versus</i></b>	
Zulfiqar Ali Shaikh and another	-----	Respondent

Miss. Samina Ajmeri, advocate for appellant  
None present for respondent, though served.  
Mr. Allah Bachayo Soomro, Addl.A.G.

Date of hearing :  
& judgment : **29.08.2022**

**J U D G M E N T**

**ADNAN-UL-KARIM MEMON, J.** Through this 1<sup>st</sup> Appeal, Appellant is asking for setting aside the Judgment dated 31.5.2021 passed by learned Vth Additional District Judge, Hyderabad dismissing Applications moved under Order XXXVII Rule 3 CPC for leave to defend the suit and Application under Section 5 of the Limitation Act in Summary Suit No. 92 of 2020 (Re- Zulfiqar Ali Sheikh v. Muhammad Umair) and decreed the suit of respondent No.1, hence the instant 1<sup>st</sup> Appeal.

2. Brief facts of the case are that respondent filed Summary Suit for recovery of Rs. 1,67,48,000/- against the appellant contending that defendant was doing business of Tiles and he being in a good relationship with him requested to invest his amount of Rs. 1,01,00,000/- and he paid the said amount through pay order. The defendant was paying the profit but when he stopped payment of profit amount the respondent demanded his invested amount including profit amount i.e. total amount of Rs. 1, 67, 48,000/- for which he issued him cheques which on presentation before the concerned banks were returned with the memo of insufficient funds. The plaintiff/respondent lodged FIRs under Section 489-F and also filed the above summary suit with the following prayers:-

- a) To pass Judgment and Decree in favor of the plaintiff against the defendant for the total amount of Rs.1,67,48,000/- (One Corer Sixty Seven Lac & Forty-Eight Thousands Rupees).
- b) To direct the defendant to pay the principal amount of Rs.1,67,48,000/- (One Corer Sixty Seven Lac & Forty-Eight Thousands Rupees) along with mense profits equivalent to Bank Interest at the rate of 20% from the date of filing this suit, till the realization of the decretal amount of Rs.1,67,48,000/- (One Corer Sixty Seven Lac & Forty-Eight Thousand Rupees).

- c) In case of failure this Honorable Court may be pleased to sell moveable and immovable properties of the defendant if any found for the satisfaction of the Decree.

3. After service of summons, the appellant/defendant filed applications under Order XXXVII Rule 3 CPC for leave to defend the suit and also an application under Section 5 of the Limitation Act. Learned trial court after hearing the parties dismissed both the above applications and decreed the suit; hence the instant 1<sup>st</sup> Appeal.

4. Ms. Samina Ajmery learned counsel for the appellant, has argued that the impugned Judgment dated 31.5.2012 of the learned trial court is opposed to facts and law; that the learned trial court failed to take into consideration that the respondent failed to produce any proof of payment of the loan to the appellant; that the respondent is a government employee working in Excise Department, his monthly salary is about one lac rupees; then how he gave the subject amount of Rs. 1,01,00,000/- to the appellant without any written agreement; that criminal case lodged by the respondent against the appellant is going to be compromised as the respondent has extended no objection for acquittal of the appellant. She prayed for allowing the instant 1<sup>st</sup> Appeal and to remand the matter to the trial court for proceeding on merit after granting leave to defend the suit. She further argued that the right of a party to defend himself before a Court of law and not to be prejudiced on account of his imprisonment.

5. I have noticed that the respondent has been served, however, he has chosen to remain absent without intimation, such factum has already been disclosed in the order sheet, compelling this court to hear the counsel representing the appellant with the assistance of learned AAG and other material placed on record.

6. The short question arising for determination in this appeal is whether the appellant who was the defendant in summary suit under Order XXXVII, C.P.C. filed by the respondent/plaintiff, could be proceeded ex-parte by the trial Court when he was confined in jail and no order for his production in Court had been made to defend the suit proceedings in time.

7. It appears from the record that service of the summons was held good upon the appellant when he was in Special Prison Nara Hyderabad, subsequently he engaged his counsel to defend the case by preferring an application under Order 37 Rule 3 read with section 151 CPC for leave to defend the suit which was dismissed by the trial court on the analogy that the appellant could have moved an application under Order 37 Rule 3 CPC from Prison but he did not do so. Thus, he was held not entitled to defend the suit.

8. The learned trial Court despite the knowledge about the detention of the appellant in prison did not direct the Jail authorities to produce him in Court on the date of hearing to defend the suit proceedings, as his absence was not willful as such ex-parte proceedings ought not to have been initiated against him. The rules of natural justice provide a reasonable opportunity to defend, which is inherent to the fundamental right of access to justice recognized by the Hon'ble Supreme Court in Mehram Ali and others v. Federation of Pakistan and others **PLD 1998 SC 1445**. The opportunity to defend necessitates that a party should be provided an opportunity to answer the case against him.

9. In the light of the foregoing principle, the ex-parte order passed by the trial court is held to be harsh and not sustainable under the law and is liable to be reversed. Primarily the trial court had exercised the jurisdiction in proceeding ex-parte illegally and against the provisions of law. The impugned Judgment dated 31.5.2021 passed by learned Vth Additional District Judge, Hyderabad is suffering from material irregularity in the appreciation and application of the relevant law. It is therefore set aside.

10. The parties shall be provided an opportunity to defend their respective claim on the subject issues by adducing the evidence and the matter shall be decided on merits. The trial Court shall endeavor to decide the suit pending before it within one month positively. The appeal is allowed in the above terms.

**JUDGE**