

IN THE HIGH COURT OF SINDH, KARACHI

Ist Civil Appeal No.107 of 2021
[Muhammad Saeed Vs. Shahid Ali]

Date	Order with signature of Judge(s)
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PRESENT:

Mr. Justice Irfan Saadat Khan
Mr. Justice Arshad Hussain Khan

Appellant Through Mr. Liaquat Ali Khan, Advocate

Respondent Through Mr.Naveed Ali Advocate

Date of Hearing: 14.02.2023

Date of Decision 20.02.2023

JUDGMENT

ARSHAD HUSSAIN KHAN, J: The appellant through this appeal has called in question the order dated 24.11.2021, passed by the learned Additional District & Sessions Judge-VII [MCAC] Karachi-[South] in Summary Suit bearing No.113/2021 whereby while dismissing the application for leave to appear and defend, the suit was decreed to the extent of Rs.22,00,000/- [Rupees Twenty-Two Lacs Only].

2. Briefly the facts leading to filing of this Appeal are that the respondent / plaintiff filed a summary chapter suit bearing No.113/2021 before learned Additional District and Sessions Judge-VII, Karachi, against the present appellant/defendant for recovery of the amount Rs. 1,00,50,000/- in respect of the cheques issued by the appellant/defendant for settlement of some outstanding amount of the respondent/plaintiff, however, the said cheques were bounced upon deposit of the same before the concerned bank.

3. Before the trial court, Notices and summons were issued repeatedly and on 09.10.2021, notice was received by the appellant / defendant himself. However, the appellant / defendant filed application for leave to appear and defend on 23.10.2021 after a lapse of approximately 04 days for which no reason was given and further no limitation application was filed for condonation of such delay. Keeping

in view the said position, the application for leave to appear and defend was dismissed and the suit was decreed only to the extent of Rs.22,00,000/- by the learned trial court through the impugned order.

4. Learned counsel for the appellant / defendant, during the course of arguments, has contended that the impugned order is not sustainable as the same is bad on facts and law both as the learned trial judge while dismissing the leave to appear and defend application has failed to apply her judicious mind as the delay of 04 days is no delay and the court has every power to condone such a delay. He has further contended that the respondent / plaintiff has no legal character, right and interest to file the aforesaid suit. It is also contended that the suit was filed with malafide intention and with unclean hands, as such the suit was liable to be dismissed instead decreed. Lastly, he has argued that the impugned order is totally against the provisions of law and the same is liable to be set aside.

5. On the contrary, learned counsel appearing on behalf of respondent / plaintiff, during the course of arguments, while supporting the impugned order submits that the appellant / defendant despite having received the notice of the case did not file leave to appear and defend application within the prescribed time and further he has also failed to file any application for condonation of delay in filing of application for leave to appear and defend. He has contended that the impugned order is well within the four corners of law and equity, hence does not warrant any interference by this Court in the present appeal.

6. Heard the arguments and perused the material available on the record.

Indeed the proceedings under Order XXXVII rule 2 and 3 C.P.C. are summary in nature and where the defendant does not submit an application for leave to appear and defend within the statutory period of 10 days, as envisaged by Article 159 of the Limitation Act from the date of service, the allegations in the plaint shall be deemed to have been admitted and the suit so instituted shall be decreed. We are also aware of the fact that at the same time the court ceased of the matter is not relieved of the responsibility to see and ensure before decreeing the suit that the person proceeded against was not only served but was also made

to understand the nature of the proceedings. It was preeminently in this context that the Legislature in its wisdom prescribed a form for the plaint and a form for the summons to be served on the defendant of such proceedings.

7. From perusal of the record, it appears that before the trial court the summons were issued on prescribed Form-IV of Appendix B of the CPC, which, per bailiff's report dated 24.09.2021, was received by the son of the appellant, however, none appeared before the court, thereafter upon the request of the respondent / plaintiff, the summons were repeated through the court of learned Vth Juridical Magistrate, Karachi [South], where the criminal case of bouncing of cheques against the appellant/defendant was pending, which was personally received by the appellant/defendant on 09.10.2021. The appellant/defendant despite having received the notice did not file his application for leave to appear and defend within the time, but filed the same on 23.10.2021, after expiration of the prescribed period of limitation. Thus, defendant's application for leave to appear and defend was miserably barred by time. Moreover, appellant/defendant did not file any application for condonation of delay in filing of application for leave to appear and defend and without an application for condonation of delay, appellant's time barred application for leave to appear and defend could not be entertained in any case. The Hon'ble Supreme Court in the case of Messers Qureshi Salt & Spices Industries, Khushab and another v. Muslim Commercial Bank Limited, through President, and 3 others, [1999 SCMR 2353], while dealing with the issue of non-filing of application within the prescribed period of limitation and condonation of delay, inter alia, held that the delay under Section 5 of the Limitation Act cannot be condoned without an application as the delay of each day is to be explained before a court, which can condone the delay, and therefore, the same cannot be done unless an application stating a sufficient reason for condonation is made. In another case of Shahid Pervaiz alias Shahid Hameed v. Muhammad Ahmad Ameen [2006 SCMR 631], 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 now also well settled law that when a defendant fails to appear or fails to obtain a leave to appear and defend in response to a summon served through Form No.IV 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. Reliance in this regard can be placed on the cases of *Haji Ali Khan & Company, Abbottabad and 8 others v. M/s. Allied Bank of Pakistan Limited, Abbottabad*, [PLD 1995 SC 362], *Naeem Iqbal v. Mst. Zarina* [1996 SCMR 1530] and *Col. (Retd.) Ashfaq Ahmed and others v. Sh. Muhammad Wasim* [1999 SCMR 2832].

9. In view of the above facts and circumstances, we do not find any merit in the present appeal as such the impugned order does not call for any interference by this Court; hence the appeal is dismissed in limine.

JUDGE

JUDGE

*Jamil**