

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. B-31 of 2023

[Askari Bank Limitedv.....M/s. Executive Aviation Pvt. Ltd. & others]

Plaintiff through : Mr. Aijaz Hussain Sheerazi, Advocate.
Defendants through : M/s. Badar Alam & Kashif Badar, Advocates.
Date of Hearing : 30.08.2024
Date of Decision : 10.09.2024

ORDER

Arbab Ali Hakro, J:- The crux of this determination is CMA No. 15133 of 2023, filed under Section 10(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (“FIO”), read in conjunction with Section 5 of the Limitation Act, 1908, by the defendants.

2. The facts in detail are that the plaintiff bank filed the Suit under the provisions of Section 9 of the FIO for the recovery of the amount due to the defendant's failure to repay the loan borrowed by them. A review of the record and proceedings reveals that various methods of service were employed to secure the attendance of the defendants. Having exhausted the final measure to ensure the attendance of the defendants, namely publication in a daily newspaper, the defendants filed the CMA under consideration, to which the plaintiff also filed a counter affidavit.

3. Mr. Badar Alam, learned counsel, advocated the case of the defendant and asserted that the leave to defend application under consideration is timely, having been filed on 11.09.2023 following the receipt of copies of the plaint and summons from the bailiff on 12.08.2023. He further submits that the note of the learned Additional Registrar (O.S.) calculated the 30 days from the date of publication. However, the answering defendants were without copies of the pleadings, and in order to file the leave to defend application, the copies of the plaintiff's pleadings ought to have been supplied to the defendants, which were not provided through the notice of publication in the newspaper. Concluding his submissions, learned counsel argued that the 30-day period should be computed from the receipt of copies of the pleadings through bailiff summons received on 12.08.2023. In this context, the application under consideration is within time. To support his submissions, learned counsel relied on the precedents reported as **2019 CLD 285, 2010 CLD 293, and 2014 CLD 1548.**

4. In contra, learned counsel for the plaintiff based his argument on the premise that the leave to defend application is not maintainable, being barred by

five days. According to the prescription of Section 10(2) of FIO, the defendant ought to have filed the leave to defend application within thirty days of effective service. However, the same was filed after the statutory period of limitation; therefore, it is not maintainable and is liable to be dismissed. The learned counsel for the plaintiff-bank further submits that the publication was effected in the newspaper on 07.08.2023, and the defendant filed the vakalatnama on 12.08.2023. The period for obtaining a copy is also included in the 30-day statutory period. The final stance of the learned counsel for the plaintiff is that the prescription of limitation is not a mere technicality, and disregard thereof would render the entire law of limitation otiose. To support his contention, learned counsel relied on the precedents reported as **2004 CLD 1555, PLD 1990 S.C. 497, 2004 CLD 658, 2010 CLD 999, and 2009 CLD 171.**

5. I have heard the respective learned counsel and have considered the documentation arrayed before me. The learned counsel for the defendants, during arguments, adopted the view that the learned Additional Registrar (O.S.) failed to follow the procedure for substituted service as laid down in Order V Rule 20 CPC in letter and spirit, while this recourse should have been made when the service of summons could not be effected in the ordinary manner. It was further argued that instead of defeating the course of justice by means of an ex-parte judgment, the principle of administration of justice should have been adhered to, which requires that a fair opportunity of hearing be provided to the contesting parties in terms of Article 10-A of the Constitution.

6. It is a well-settled exposition of law¹ that the Court may order substituted service under Order V Rule 20 CPC, where it is satisfied that there is reason to believe that the other side is keeping out of the way to avoid service or that, for any other reason, the summons cannot be served ordinarily. In such a case the Court shall order for service of summons by (a) affixing a copy of the summons at some conspicuous part of house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain; or (b) any electronic device of communication which may include telegram, telephone, phonogram, telex, fax, radio and television; or (c) urgent mail service or public courier services; or (d) beat of drum in the locality where the defendant resides; or (e) publication in press; or (f) any other manner or mode as it may think fit; Provided that the Court may order the use of all or any of the aforesaid manners and modes of service. The service substituted by order of the Court shall be as effectual as if it had been made on the defendant/other side personally. The legislature, in its judiciousness and astuteness, has conferred wide-ranging freedom of choice and options under Order V Rule 20, CPC, as to how the substituted service is to be effected to ensure service quickly and efficiently if

¹ *Sana Jamil v. Mujeeb Qamar & others* (2023 SCMR 316)

the notice/summons could not be served personally at the given address or at the address which is given or known, but the remedy of substituted service can be resorted to only if the Court is satisfied that there is reason to believe that the other side is keeping out of the way only to avoid service.

7. According to the learned counsel for the defendants, the application under consideration is within the statutory period of 30 days as prescribed under the provisions of Section 10(2) of FIO. Upon receipt of copies of the pleadings through bailiff summons on 12.08.2023, the defendants filed the leave to defend application on 11.09.2023, thereby ensuring its timeliness and compliance with the statutory period. Even if it is assumed that the statutory period of 30 days commences from the day following the publication of summons in the newspaper on 07.08.2023, i.e., 08.08.2023, Section 9(5) of the FIO, permits the defendant to obtain a copy of the plaint from the office. Therefore, the application of the 30-day period from the date of publication of the summons in newspapers cannot be strictly enforced without affording the defendant an opportunity to obtain the necessary documents.

8. It is deemed expedient to review the statutory provisions of Section 9(5) and Section 10(2) of FIO, which are delineated hereunder:-

“Section 9 (5) of Ordinance, 2001:

On a plaint being presented to the Banking Court, in summons in Form No. 4 in Appendix 'B' to the Code of Civil Procedure, 1908 (Act V of 1908) or in such form as may, from time to time, be prescribed by rules, shall be served on the defendant through the bailiff or process-server of the Banking Court, by registered post acknowledgment due, by courier and by publication in one English language and one Urdu language daily newspaper, and service duly effected in any one of the aforesaid modes shall be deemed to be valid service for purpose of this Ordinance,. In the case of service of the summons through the bailiff or process-server, a copy of the plaint shall be attached therewith and in all other cases the defendant shall be entitled to obtain copy of plaint from the office of the Banking Court without making a written application but against due acknowledgment. The Banking Court shall ensure that the publication of summons takes place in newspapers with a wide circulation within its territorial limits. (unquote) (emphasis supplied).

Section 10 (2) of Ordinance, 2001:

The defendant shall file the application for leave to defend within thirty days of the date of first service by any one of the modes laid down in sub-section (5) of Section 9:

Provided that where service has been validly effected only through publication in the newspaper, the Banking Court may extend the time for filing an application for leave to defend if satisfied that the defendant did not have knowledge thereof.

9. Upon meticulous examination of the aforementioned provisions, it is unequivocally established that when a plaint is presented to the Banking Court, the summons must be served on the defendant through various prescribed methods: (i) **Bailiff or Process-Server**: An officer of the Court; (ii) **Registered Post Acknowledgment Due**: Mail that necessitates a signature upon receipt; (iii) **Courier**: A delivery service; (iv) **Publication**: In one English language and one Urdu language daily newspaper. The service of the summons through any of these methods is deemed valid for the purposes of this Ordinance. In instances where the summons is served through the bailiff or process server, a copy of the plaint must be attached. Conversely, in all other cases, the defendant is entitled to obtain a copy of the plaint from the office of the Banking Court without submitting a written application, albeit against due acknowledgement. The Banking Court is mandated to ensure that the summons is published in newspapers with wide circulation within its territorial limits. The defendant is obligated to file an application for leave to defend within thirty days of the date of first service by any one of the methods delineated in Section 9 (5). In circumstances where the service has been validly effected solely through publication in the newspaper, the Banking Court may extend the time for filing an application for leave to defend if it is satisfied that the defendant did not have knowledge thereof. The thirty days for filing an application for leave to defend shall be computed from the date of first service of the summons by any of the methods enumerated in Section 9 (5), including service through publication. However, if the service is exclusively through publication and the defendant lacks knowledge of it, the Banking Court has the discretion to extend the time for filing the application. In summation, the thirty-day period commences from the date of first service, including the date of publication. Should the defendant be unaware of the service through publication, the Banking Court retains the discretion to extend the time for filing the application for leave to defend.

10. The record reveals that the summons were published in the newspaper on 07.08.2023, while the summons, along with a copy of the plaint and annexures, were received by the defendants from the bailiff on 12.08.2023. The application for leave to defend (CMA No.13799/2023) was filed on 11.09.2023. If the service upon the defendant is considered from the date of publication of the summons in the newspaper dated 07.08.2023, starting from the following day, i.e., 08.08.2023, there was a delay of 4 days. However, if we compute the time from 12.08.2023, the day the defendants received the summons along with the copy of the plaint and its annexures from the bailiff, it was within 30 days.

11. Examination of the above-mentioned provisions of law shows that the Court is authorized to extend or condone time upon being satisfied that the

defendant, requesting condonation of delay in filing the application for leave to defend, did not have any knowledge or notice, even by proclamation in the newspaper, about the pendency of proceedings against him in the Banking Court before the date of knowledge disclosed by him in his pleadings. The above-mentioned provisions give powers to the Court to condone the delay and also provide a concession to the defendant. The object and intention of the legislature behind these provisions of law is to provide a concession with respect to limitation, considering the possibility that an aggrieved party might not have knowledge or notice of the proceedings through proclamation in the newspaper. In the present application under Section 10(2) of FIO, the defendants have made a categorical statement, by way of an affidavit of Muhammad Zubair Khan, that they are not subscribers of the newspaper "Daily Jang", nor do they read the said newspaper. They further stated that the copy of the plaint was not available in the D-II Branch of this Court, and they obtained it through their counsel from the bailiff along with the summons on 12.08.2023. In such circumstances, the question of condoning the delay in filing CMA No.13799/2023 does not arise.

11. Notwithstanding, Article 10-A of the Constitution enshrines the fundamental right to a fair trial and due process, ensuring that every individual is entitled to these protections. This provision mandates that all judicial and quasi-judicial proceedings must adhere to the principles of natural justice, which include the right to be heard, the right to a fair and impartial tribunal, and the right to a reasoned decision. The essence of Article 10-A is to guarantee that no person is deprived of their legal rights without adequate notice and an opportunity to present their case. It underscores the importance of transparency, accountability, and fairness in the administration of justice, thereby fostering public confidence in the legal system. By embedding the right to a fair trial and due process within the Constitution, the legislature aims to protect individuals from arbitrary and unjust actions by the state or any other entity, ensuring that justice is not only done but is seen to be done

12. For the foregoing reasons, since the defendants have already filed CMA No.13799/2023, seeking leave to defend the Suit, the application in hand is disposed of with no order as to costs. Let the said CMA (Leave to Defend) be heard and decided on merits in accordance with law.

JUDGE