

JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

RFA No. 6825 of 2020
(*Muhammad Ali Khalid v. Muhammad Talha*)

JUDGMENT

Date of hearing: 12.05.2023

Appellant by: Mr. Zahoor-ul-Hassan, Advocate.

Respondent by: Rana Muhammad Ishaque, Advocate.

Faisal Zaman Khan, J. Through this Regular First Appeal, order and decree dated 14.01.2020 passed by the Additional District Judge, Samundari has been assailed, by virtue of which while rejecting an application for leave to appear and defend the suit filed by the appellant, a suit for recovery of Rs.2,000,000/- under Order XXXVII CPC filed by the respondent against the appellant has been decreed.

2. The facts giving rise to the present appeal are that on the strength of a cheque dated 08.08.2019 issued by the appellant in favour of the respondent, a suit under Order XXXVII CPC for recovery of Rs.2,000,000/- was filed by the respondent against the appellant, in which an application for leave to appear and defend the suit was filed by the appellant which was dismissed being barred by time and thereupon the suit was decreed through the impugned order and decree, hence this appeal.

3. Learned counsel for the appellant submits that appellant was never served and as and when he came to know about the pendency of the suit, an application for leave to appear and defend the suit was filed,

which was within time therefore the trial court erred in law in dismissing the same being barred by time and decreed the suit.

4. Replying to the above, learned counsel for the respondent supports the impugned order and decree.

5. Arguments heard. Record perused.

6. Order XXXVII CPC is a special dispensation. Under this Order and unlike in a regular civil suit, procedure has been provided to file and proceed with the suit filed on the basis of negotiable instruments, as contemplated in the Negotiable Instruments Act 1881. In a suit filed under this Order, which is summary in nature, under Rule 3 of the said Order, a defendant who has been served, within stipulated time has to seek leave to appear and defend the suit and once the leave is granted, the suit shall be converted into a regular civil suit and will be decided in accordance with the general procedure prescribed in CPC.

7. Unlike the regular civil suit where summons for service of the defendant are issued under Order V Rules 1 & 5 CPC, the format of which is given in Form No. II Appendix-B CPC in a suit filed under Order XXXVII CPC, under Rule 2 of the said Order, a defendant has to be issued summons in the specific format as given in **Form No. 4 Appendix-B CPC**.

8. In order to differentiate between the nature of these summonses, the text as given in **Form Nos. 2 and 4, Appendix-B CPC** are reproduced:

<p>NO. 2. SUMMONS FOR SETTLEMENT OF ISSUES, (O. 5, rr. 1, 5)</p> <p>(Title) [Name, description and place of residence]</p> <p>WHEREAS</p> <p>has instituted a suit against you for you are hereby <u>summoned to appear in this Court in person, or by a pleader duly</u></p>	<p>NO. 4. SUMMON IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT (O. 37, r. 2)</p> <p>(Title) [Name, description and place of residence]</p> <p>WHEREAS has</p> <p>instituted a suit against you under Order XXXVII of the Code of Civil Procedure, 1908, for Rs. ,balance of</p>
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<p><u>instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions</u>, on the day of 19 ,at o' clock in the noon, to answer the claim; and <u>you are directed to produce on that day all the documents upon which you intend to rely in support of your defence</u>; 1 [and to file on or before that date your written statement]. Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.</p> <p>GIVEN under my hand and the seal of the Court, this day of 19</p> <p>Judge.</p> <p>NOTICE---1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.</p> <p>2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.</p>	<p>principal and interest due to him as the of a <u>of which a copy is hereto annexed</u>, you are hereby summoned <u>to obtain leave from the Court within ten days from the service hereof</u> 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].</p> <p><u>Leave to appear may be obtained on an application to the Court supported by affidavit</u> 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.</p> <p>GIVEN under my hand and the seal of the Court, this day of 19</p> <p>Judge</p>
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(Emphasis supplied)

9. A cumulative reading of the above summonses would show that unlike a regular civil suit, where defendant is called to appear in the court, either himself or through a representative, in a suit filed under

Order XXXVII CPC defendant can only contest the suit subject to grant of leave to appear and defend the suit, that too on an application filed by him within 10 days of his service of summons (see Order XXXVII Rule 3 CPC), issued in the format given in **Form 4, Appendix-B CPC** (see Order XXXVII Rule 2 CPC). The text of the said summons would show that unlike summons issued in Form 2, Appendix-B CPC, the defendant is cautioned about the time line in which he has to file such an application and it is a *sine qua non* that the summons is to be accompanied by a copy of plaint.

10. The above provision (Order XXXVII Rule 2 CPC) has been interpreted in judgments reported as *Ahmad Shah and another v. Israr-ud-Din* [2016 CLC 1100], *Shafqat Mehmood v. Muhammad Nazir* [2014 CLC 1222], *Binyameen Khalil v. Riaz Ahmad Rahi* [2014 CLC 105] and *Muhammad Naeem Choudhry v. Aziz-ur-Rehman and another* [2013 CLC 1042], a cumulative reading of which would show that where the summons is not issued to a defendant in **Form No. 4, Appendix-B CPC**, it will be presumed that he has not been served and his limitation for filing the application for leave to appear and defend the suit would start from the date when he appeared before the court and filed such application.

11. In the above backdrop, a perusal of the record would show that the suit was filed by the respondent against the appellant on 28.10.2019 whereupon an order was passed on the same day that summons in the **prescribed form** be issued to the appellant with registered envelope A/D and the case was adjourned to 11.11.2019. On the given date, the process was returned with the report that appellant has avoided and concealed himself from service, in view of which summonses were again ordered to be issued to him through registered post A/D and the case was fixed for 16.11.2019. On the said date, again an order was passed by the trial court for issuance of summons to the appellant through registered post A/D and the case was adjourned for 23.11.2019. On the given date, the trial court ordered that despite service

none has entered appearance on behalf of the appellant therefore a publication in daily Aaj Kal may be issued and the case was adjourned for 05.12.2019 and on the said date, learned counsel for the appellant filed his power of attorney alongwith his application for leave to appear and defend the suit.

12. Keeping in view the above provisions of law, a perusal of the record would further show that the **initial 02 summonses** issued to the appellant for 11.11.2019 and 16.11.2019 **were not in the prescribed manner and form** as contemplated in Order XXXVII Rule 2 and **Form 4, Appendix-B CPC** as the said summonses were ordinary summonses which were issued under Order V Rules 1 & 5 and Form No. 2, Appendix-B CPC. A further perusal of the record would show that for service of the appellant, keeping in view order dated 16.11.2019, for the first time, summons in the format given in **Form No. 4, Appendix-B CPC (correct format)** was issued, which was required as per Order XXXVII Rule 2 CPC however on 22.11.2019 the Process Server reported at the back of the summons that he has received the summons (for service) today thus the time for service may be extended.

13. In the above factual matrix, a perusal of the order-sheet would show that despite the fact that Process Server never served the appellant for 23.11.2019 or through summons issued in accordance with **Form 4 Appendix-B CPC** the trial court passed an order that since service of the appellant has been affected (factually incorrect) and none has entered appearance on his behalf therefore he may be served through substituted service.

14. Be that as it may, since the appellant was never served through the prescribed summons as contemplated in Order XXXVII Rule 2 and **Form 4, Appendix-B CPC** thus the publication in the newspaper could not be issued, hence, this cannot be said that he was ever served, therefore, as and when he appeared before the trial court with his application for leave to appear and defend the suit, his limitation for

filing such an application would start from the day he enters appearance therefore the trial court erred in law in dismissing the application for leave to appear and defend the suit being barred by time and decreed the suit.

15. For what has been discussed above, this appeal is **allowed**, as a sequel to which the impugned order and decree is **set aside**, resultantly, the suit filed by the respondent shall be deemed to be pending before the trial court, who shall decide the application for leave to appear and defend the suit filed by the appellant on merits and thereupon proceed with the suit.

(Faisal Zaman Khan)
Judge

Approved for reporting

JUDGE

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