

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.121 of 2017

Khan Afsar

Versus

Muhammad Akhtar

Date of Hearing: 25.09.2017
Petitioner by: Mian Muhammad Omar Riaz, Advocate,
Respondent by: . Malik Akhtar Abbas, Advocate.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, Khan Afsar, impugns the order dated 09.12.2016, passed by the Court of the learned Additional District Judge, Islamabad, whereby the petitioner's application for leave to appear and defend the civil suit filed by the respondent (Muhammad Akhtar) under Order XXXVII of the Code of Civil Procedure, 1908 ("C.P.C."), for the recovery of Rs.35,00,000/-, was dismissed.

2. The record shows that on 23.06.2016, the respondent filed a suit under Order XXXVII C.P.C. for the recovery of Rs.35,00,000/- along with profit against the petitioner before the Court of the learned Additional District Judge, Islamabad. The respondent's case was that was Manager (Administration) of Al-Karim Flour & General Mills Rawat, Islamabad; that the respondent was In-charge of supplying flours to the said Mills' customers and was responsible for maintaining records of the supplies; that the petitioner was one of the respondent's customers, and had purchased flour etc., from the said Mill; that the petitioner paid Rs.35,00,000/- through cheque bearing No. 2501464, dated 02.01.2015 as consideration for the flour supplied to the petitioner drawn on Habib Bank Limited, Sabzi Mandi Branch, Mansehra; that the said cheque was dishonoured due to insufficient funds in the petitioner's account. On 23.06.2016, the respondent instituted a suit under Order XXXVII C.P.C. against the petitioner before the Court of the learned Additional District Judge, Islamabad.

3. Apparently, the petitioner was in prison when the said suit was instituted. Vide order dated 15.07.2016, the learned trial Court directed summons to be issued to the petitioner through Superintendent Central Jail, Adiyala, Rawalpindi. On 29.07.2016, the petitioner was produced before the learned trial Court in custody. As per the order dated 29.07.2016, the defendant refused to receive a copy of the plaint. The petitioner stated that he would receive a copy of the plaint on the next date after engaging the services of a counsel. The case was adjourned to 09.09.2016.

4. On 01.09.2016, the petitioner filed an application for leave to appear and defend the suit. In the said application, it was pleaded that the petitioner appeared before the Court on 29.07.2016; that the cheque in question was signed and issued by the petitioner as a result of coercion and undue influence; and that the petitioner was arrested in a criminal case and was sent behind bars at the respondent's instance. On 07.10.2016, the respondent filed a reply to the said application, and refuted the stand taken by the petitioner.

5. Vide order dated 09.12.2016, the learned trial Court dismissed the petitioner's application for leave to defend the suit. The grounds on which the said application was dismissed, were that the said application was barred by time; that the petitioner had not filed an application for condonation of delay; and that the affidavit filed along with the application for leave to defend the suit had not been attested by an Oath Commissioner. The said order dated 09.12.2016, has been impugned by the petitioner in the instant civil revision petition.

6. Learned counsel for the petitioner submitted that the petitioner got knowledge of the suit on 29.07.2016, when he was produced before the learned trial Court; that after 29.07.2016, the petitioner engaged the services of a counsel and filed an application for leave to defend the suit on 01.09.2016; that the learned trial Court erred by dismissing the petitioner's said application on 09.12.2016; that the petitioner could not file an application for leave to defend the suit between 01.08.2016 to

31.08.2016, because the Courts were closed due to summer vacations; that the learned trial Court ought to have extended the benefit of Section 4 of the Limitation Act, 1908, to the petitioner; that the cheque in question was issued due to undue influence and coercion exerted on the petitioner; that although the affidavit filed along with the application for leave to defend the suit was not attested by an Oath Commissioner, the same was a curable defect, and the learned trial Court should have given an opportunity to the petitioner to rectify this defect. Learned counsel for the petitioner prayed for the instant civil revision petition to be allowed, and for the impugned order dated 09.12.2016, to be set aside.

7. On the other hand, learned counsel for the respondent submitted that the impugned order dated 09.12.2016, is strictly in accordance with the law; that the petitioner admittedly got knowledge of the suit on 29.07.2016; that the petitioner should have filed an application for leave to defend the suit within a period of ten days from the said date; that the mere fact that the Courts were closed due to summer vacations did not prevent the petitioner from filing the application for leave to defend the suit before a duty Judge; that the petitioner filed the application for leave to appear and defend the suit on 01.09.2016, which is way beyond the prescribed limitation period; that the petitioner did not file an application for condonation of delay along with the said application; and that the affidavit filed along with the said application, had not been attested in accordance with the law. Learned counsel for the respondent prayed for the instant civil revision petition, to be dismissed.

8. I have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance. Facts leading to the filing of the instant civil revision petition, are set out in sufficient detail in paragraphs 2 to 5 above, and need not be recapitulated.

9. The petitioner had been served with summons through the Superintendent Adiyala Jail, where he had been incarcerated in a criminal case registered under Section 489-F of the Pakistan

Penal Code, 1860. On 29.07.2016, the petitioner was produced in custody before the learned trial Court. The petitioner refused to receive a copy of the plaint and sought time to engage the services of a counsel. If the ten-day limitation period for filing an application for leave to defend the suit is to be reckoned from 29.07.2016, the same expired on 08.08.2016. The lower Courts were closed from 01.08.2016 to 31.08.2016 due to summer vacations. The petitioner filed the application for leave to defend the suit on 01.09.2016. The petitioner did not file an application for condonation of delay along with the said application. The affidavit filed along with the petitioner's application for leave to defend the suit had not been attested by an Oath Commissioner. All these are admitted facts.

10. Order XXXVII C.P.C. provides for a summary procedure in respect of certain suits. The essence of the summary suit is that the defendant is not, as in an ordinary suit, entitled as of right to defend the suit. He must apply for leave to defend the suit within ten days from the date of service of summons upon him and such leave can be granted only if the affidavit filed by the defendant discloses such facts which will make it incumbent upon the plaintiff to prove consideration or such other facts as the Court may deem sufficient, for granting leave to the defendant to defend the suit. If no leave to defend is granted, the plaintiff is entitled to a decree. The Court may, however, require the plaintiff to prove his case.

11. The pivotal question that needs to be answered is whether the benefit of Section 4 of the Limitation Act, 1908, can be extended to the petitioner. Section of the Limitation Act, 1908, is reproduced herein below:-

"4. Where Court is closed when period expires. Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens. "

12. Learned counsel for petitioner had submitted that since the lower Courts were closed on account of summer vacations from 01.08.2016 to 31.08.2016, and since the limitation for filing an

application for leave to defend the suit expired during the vacations, therefore, the suit was filed on the re-opening of the Courts on 01.09.2016. Section 4 of the Limitation Act, 1908, in effect provides that if the limitation expires during the period when the Court is closed, limitation prescribed under the law gets extended till the date of re-opening. The usual cases where the doctrine of extended period comes into operation are cases where the limitation expires during the period when the civil Courts are closed for vacations and suits are allowed to be filed on the day of reopening of the Court.

13. Undisputedly, the last date for filing an application for leave to defend the suit was 08.08.2016. The lower Courts were closed from 01.08.2016 to 31.08.2016 for summer vacations. The application for leave to defend the suit was filed on 01.09.2016 i.e. the opening day after summer vacations. Therefore, in my view, it cannot be said that the said application was barred by time. It is well settled that the period during which the Court remains closed on account of vacations, has to be excluded for the computation of limitation. In holding that the petitioner's application for leave to defend filed on 01.09.2016, was not barred by time, I am guided by the law laid down in the following cases:-

- (i) In the case of Province of Punjab Vs. Muhammad Saleem (PLD 2014 SC 783), The Hon'ble Supreme Court has copiously interpreted Section 4 of the Limitation Act, 1908, in the following terms:-

"From the unambiguous language of section 4 of the Limitation Act, 1908, there can be no doubt that a statutory right has been conferred upon a litigant, to the effect that if the period prescribed for a suit, an appeal, or an application expires on a date/day which falls during the period or the day when the court is closed, the said case/matter may be instituted/preferred by the concerned litigant on the day when the court re-opens. It may be emphasized here that the aforementioned right by stretch of any legal interpretation of the law cannot be construed as a grace in any manner whatsoever; rather it is a right conferred by law and thus for all intents and purposes is a 'vested right' as is known to our jurisprudence. It is settled law that such vested right should in letter and spirit be enforced at all cost, except where it is

unenforceable on account of any specific legal bar or it stands obliterated or taken away by or under the law.”

- (ii) In the case of Muhammad Yar Vs. Muhammad (2003 SCMR 1772), it has been held *inter-alia* as follows:-

“...In the case in hand the provisions as contained in section 4 of the Limitation Act, 1908 which revolves around two maxims i.e. “Lex non cogit a dispossibilia” (the law does not compel a man to do that which he cannot possible perform) and “Actus Curiae neminem gravabit” (an act of the Court shall prejudice no man) can safely be made applicable as no fault could be attributed to the respondent. We are conscious of the fact that provisions as contained in section 4 of the Limitation Act, 1908 has no concern whatsoever with computing the prescribed period but where it expires on a day when the Court was closed the complaints/petitions/applications may be preferred on the day when the Court re-opens. The period of limitation is not amended/modified/alterd or changed by the provisions of section 4 of the Limitation Act, 1908...”

- (iii) In the case of Nooruddin Vs. Pakistan through the Secretary, Ministry of Communications (2000 SCMR 354), The Hon'ble Supreme Court has interpreted Section 4 of the Limitation Act, 1908, in the following terms:-

“...That section enables a suitor, appellant or applicant, in cases where the period of limitation for his suit, appeal or application expires on a day when the Court is closed, to institute, prefer or make such suit, appeal or application, as the case may be, on the day the Court re-opens. Consistent authority on the point is that where the Limitation Act provides an extension in the period of limitation, such as under the bulk of sections 6 to 24, the person concerned may add such period to that in contemplation of the First Schedule to the Limitation Act, and if the combined period so arrived at expires when the Court is closed, including when it is closed for vacation, the relevant suit, appeal or application, taking benefit from section 4 of the Limitation Act, may be instituted, preferred or made on the date of the relevant Court reopens. Inter alia the rule has been recognized in Naganna v. Krishnamurthi, AIR 1932 Madras 139, Nur Muhammad v. Sachul, PLD 1957 Karachi 843, Rasul Bakhsh V. Ghulam Qadir, PLD 1960 Karachi 741, Fazal Karim v. Ghulam Jilani, 1975 SCMR 452. Inshallah Begum v. Shamin Akhtar , 1983 CLC 2583, Ikramullah v. Said Jamal, 1980 SCMR 375, Port Muhammad Bin Qasim v. NIC, Karachi, 1983 CLC 3126. ”

- (iv) In the case of Muhammad Ramzan Vs. Ahmed Bux (1991 SCMR 716), it has *inter-alia* been held as follows:-

“... it would be against the law to deprive him of the benefit of section 4 in case the ordinary period of

limitation expires on a holiday, to prefer the appeal on the reopening of the Court. To hold otherwise and to put a condition for availing the benefit of section 4 upon the making of an application for copy within the ordinary limitation period, would be reading something into the provisions of section 4 which is not prescribed by the legislature. ”

- (v) In the case of Fazal Karim Vs. Ghulam Jilani (1975 SCMR 452), a notification had been issued to the effect that the during the period of vacations, petitions will be received daily from such persons as may choose to present them except on Sunday and public holiday. The question that needs to be determined as to whether an appeal which was to become time barred during the Court vacations could be filed during such vacations on the strength of the said notification. The Hon'ble Supreme Court held that an appeal which was filed after the reopening of the Courts could not be held to be time barred. Furthermore, it was held as follows:-

“From the plain reading of section 4 of the Limitation Act, it becomes abundantly clear that the period during which the Court remains closed on account of vacations, has to be excluded for the computation of limitation and the notification cannot take precedence over the statutory provision. Even otherwise, we [find] that there is no conflict between the notification and the provision contained in section 4 of the Limitation Act. According to the notification, the Office was to remain open for receipt of petitions from persons who might choose to file. Surely, the word “ Office” as used in the notification is not synonymous with “Court” as used in section 4 of the Limitation Act. The Court may be closed and yet the Office might still be open. Even otherwise, the notification merely gives the petitioners an option to file petitions. Such an option cannot be construed so as to take away a statutory right.”

- (vi) In the case of Silk Bank Limited Vs. Al-Khan Constructions Company (Pvt.) Ltd. (2017 CLD 496), a suit was filed under Section 9 of the Financial Institutions (Recovery of Finance) Ordinance, 2001. When the time for the filing of the application for leave to defend the suit expired, the Courts were closed due to summer vacations. The Hon'ble Lahore High Court spurned the plaintiffs objections to the effect that the defendant's application for leave to defend the suit.

In this regard, paragraph 7 of the said report is reproduced herein below:-

07. "The allegation that the application for leave to defend filed by the defendants is time barred has no substance. It is clear that summer vacations had commenced when the time for filing the application for leave to defend lapsed. The application for leave to defend was filed immediately after opening of the Court on 03.09.2012. It, therefore, cannot be said that the application for leave to defend was time barred. "

14. The mere fact that the petitioner's application for leave to defend was not accompanied with an application for condonation of delay in filing the same under Section 5 of the Limitation Act, 1908, would not render the said application incompetent. This is because the petitioner had filed the application for leave to defend on 01.09.2016 (i.e. when the Court reopened after summer vacations) in exercise of his right granted under Section 4 of the Limitation Act, 1908. Since it was a matter of the petitioner's right to have filed the application for leave to defend the suit when the Courts reopened, there was no need for him to have filed an application under Section 5 of the Limitation Act, 1908, for condonation of delay in filing the application for leave to defend the suit.

15. Now as regards the issue that the affidavit filed by the petitioner along with his application for leave to defend the suit, was not attested by the Oath Commissioner, I am of the view that the learned trial Court should have given an opportunity to the petitioner to have the affidavit attested. In the case of Sardar Abdur Rehman Vs. Fida Hussain (1996 CLC 1571), a suit under Order XXXVII C.P.C. was decreed by the Court of the learned District Judge only on the ground that the affidavit along with the defendant's application for leave to defend the suit, had not been attested. The Hon'ble Peshawar High Court set aside the decree and remanded the matter to the Court of the learned District Judge with the direction to afford an opportunity to the defendant to get his affidavit attested and thereafter to consider the application for leave to defend the suit on merits. Paragraph 4 of the said report is reproduced herein below:-

“4. While rejecting the petition for leave to defend the learned District Judge became unmindful of the fact that the defendant could be asked there and then to get the affidavit attested or could extend reasonable time for such attestation, under his powers defined by section 148, C.P.C. No doubt, a justice delayed is a justice denied but hastily imparted justice denying a substantial right to a party, is equally a justice denied.”

16. Furthermore, in the case of Emirates Bank International Vs. United Exports Limited (PLD 1993 Karachi 661), it has been held *inter-alia* as follows:-

“A bare reading of Order 37, Rule 3(l), C.P.C. would reveal that when a defendant files an application for leave to defend the suit he is also required to support the application by an affidavit. A summon under Order 37, C.P.C. in Form 4 of Appendix B also speaks of "obtaining leave on an application to the Court supported by affidavit or declaration Where there is a failure on the part of the defendant to file affidavit or declaration no doubt there is also non compliance of Rule 74(1)(c) of Sindh Chief Court Rules and Forms on the original side as pointed out by Mr. Sajid Zahid. But it is always in the discretion of the Court under Order 148, C.P.C. to accept a belated affidavit filed by a defendant. The discretion must be liberally granted in favour of the defendant in a summary suit and he should not be debarred from setting up his defence under Order 37, Rule 3, C.P.C. unless the Court is satisfied that he has no other object but to delay or defeat the proceedings in the suit or harass the plaintiff.”

17. In view of the above, the instant civil revision petition is allowed. The impugned order dated 09.12.2016, passed by the learned trial Court is set aside. The matter is remanded to the learned trial Court with the direction to decide the petitioner's application for leave to appear and defend the suit, afresh after taking into consideration the observations contained herein. The parties are directed to appear before the learned trial Court on 11.10.2017 for further proceedings. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE)

Sanauallah*

APPROVED FOR REPORTING

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