

Form No: HCJD/C
JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

Writ Petition No.2836 of 2020

Khalid Mehmood

Versus

Learned Additional District Judge, West Islamabad and 2 others

Petitioner's by : Kashif Ali Malik, Advocate for the petitioner.

Respondent's by : Muhammad Ali Raja, Advocate for respondent No.2.

Ch. Zaki Rizwan, Advocate for respondent No.3.

Mr. Awais Haider Malik, State Counsel.

Muhammad Yousaf, Inspector, ICT Police.

Ch. Muhammad Akram, Inspector (ETO).

Date of Decision : 10.11.2020.

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AAMER FAROOQ, J. -

The petitioner filed a suit for recovery of Rs.350,000,00/- against respondent No.2 under Order XXXVII Code of Civil Procedure (CPC) apparently on the basis of cheque tendered by respondent No.2 to the petitioner; alongwith suit the petitioner filed an application for attachment before judgment with respect to vehicle owned by respondent No.2. Notices/summons were issued to respondent No.2 and the application for attachment before judgment was allowed and the referred vehicle was attached. Application was filed by respondent No.2 for release of the vehicle. The referred application was allowed by respondent No.1 vide order dated 08.08.2020, hence the petition.

2. Learned counsel for the petitioner, *inter-alia*, contended that admittedly the leave to defend the suit has not been granted to respondent No.2 yet and it is trite law that till such time the same is done, no application is maintainable on behalf of such defendant. In this behalf, it was contended that the impugned order is without jurisdiction. Learned counsel in support of his contentions placed reliance on cases reported as "Messers United Distributors Pakistan Limited Vs. Ahmad Zarie Services and another" (1997 MLD 1835), "Farooque Ahmed Vs. Raza Muhammad (PLD 2007 Karachi 182) and "Syed Itrart Hussain Rizvi Vs. Messrs Tameer MICRO Finance Bank Limited through Attorney and another (2018 CLD 116).

3. Learned counsel for respondent No.2 submitted that the application was filed in continuation of the proceedings for attachment under Order XXXVIII Rule 9 CPC and as such the same was maintainable and the order does not suffer from any illegality.

4. Arguments advanced by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

5. As noted above, the petitioner is aggrieved of the impugned order dated 08.08.2020, whereby the application on behalf of respondent No.2 was entertained by the learned Trial Court, despite the fact that the leave to appear and defend has not yet been granted to him. In this behalf, the case law relied upon by the learned counsel for the petitioner is instructive. In "Syed Itrart Hussain Rizvi Vs. Messrs Tameer MICRO Finance Bank Limited through Attorney and another (2018 CLD 116), the Hon'ble Sindh High Court held *as follows:*

"It is now a well settled that in a summary suit under Order XXXVII of C.P.C., in which summons have been issued in Form No.4 Appendix B, the defendant is not entitled to appear or defend the suit as a matter of course unless he obtains leave from the Court so to appear and defend. In default of his obtaining such leave for his appearance and defence in pursuance thereof the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree. Till such time as leave to defend is granted the defendants cannot even file interlocutory application in order to agitate the point of jurisdiction or to question the transactions between the parties or to challenge validity, and legal effect of the promissory note and crossed cheque issued by them in favour of the plaintiffs. In this regard, reliance can be placed on the case of Messrs United Distributors Pakistan Limited v. Ahmad Zarie Services and another (1997 MLD 1835) wherein this Court has held as under:

"5. At the outset it may be observed that in a suit based upon negotiable instrument in which summons have been issued in Form No.4 Appendix B, the defendant is not entitled to appear or defend the suit as a matter of course unless he obtains leave from the Court so to appear and defend. In default of his obtaining such leave for his appearance and defence in pursuance thereof the allegations in the plaint shall be deemed to be admitted and the plaintiffs shall be entitled to a decree. The advantage in adopting the procedure prescribed by Order XXXVII, C.P.C. is that the defendant is not, as a matter of right, entitled to appear or to defend, but if he deserves to be heard he must apply to the Court for permission to appear and defend within 10 days of service of summons as envisaged by Article 159 of the Limitation Act. Till such time as leave to defend is granted the defendants cannot even file interlocutory application in order to agitate the point of jurisdiction or to question the transactions between the parties or to challenge validity, and legal effect of the promissory note and crossed cheque issued by them in favour of the plaintiffs. In my view these issues can be decided at the trial after recording evidence after leave to defend is granted to the defendants on disclosing a sufficient cause."

8. In the present case since the appellant failed to file leave to appear and defend the case in the suit, therefore, the learned trial court [respondent No.2] had rightly dismissed the application under Order VII, rule 10, C.P.C. filed by the appellant/defendant for return of plaint and subsequently after recording evidence of Respondent No.1/plaintiff decreed the suit".

Similar view was taken by the Hon'ble Sindh High Court in case reported as "Farooque Ahmed Vs. Raza Muhammad (PLD 2007 Karachi 182)" wherein, it was held that till such time a leave to defend was granted, defendants could not even file interlocutory application in order to agitate the point of jurisdiction nor to question transactions between the parties. In this behalf, reliance was also placed on "Messrs United Distributors Pakistan Limited Vs. Ahmad Zarie Services and another" (1997 MLD 1835).

6. In view of the above mentioned case law, it is clear that no application on behalf of the defendant who has not obtained leave to appear and defend the suit is maintainable; even, if such application is an interlocutory or with respect to ancillary matter.

7. Admittedly, respondent No.2 has not yet been granted leave to appear and defend the suit by the learned Trial Court and in view of the above case law, the application filed for release of the attached property was not maintainable. The impugned order hence is not tenable in the facts and circumstances as being patently illegal and without jurisdiction.

8. For what has been stated above, the instant petition is allowed and the impugned order dated 08.08.2020 is set-aside, consequently the application filed by respondent No.2 stands dismissed as not maintainable at this stage. Needless to observe that if and when respondent No.2 is granted leave to appear and defend, he may move an appropriate application questioning the attachment of his vehicle, if he so desires.

(AAMER FAROOQ)
JUDGE

*Niqab M *

Approved for Reporting