JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A. No.142 of 2016

Farrukh Nisar
Versus
Israr Ahmed

Date of Hearing:	21.06.2017
Appellant by:	Sheikh Muhammad Sulaman, Advocate
Respondent by:	Mr. Waqar Hanif Abbasi, Advocate.

MIANGUL HASSAN AURANGZEB J:- Through this judgment, I propose to decide civil revision petition No.280/2016 and regular first appeal No.142/2016, as these matters are between the same parties, and involve common questions of law and fact.

2. Through civil revision petition No.280/2016, the petitioner, Farrukh Nisar, impugns the order dated 15.06.2016, whereby the Court of the learned Additional District Judge, Islamabad, dismissed the petitioner's application for leave to appear and defend the suit for recovery of Rs.13,00,000/- instituted by the respondent under Order XXXVII of the Code of Civil Procedure, 1908 ("C.P.C.").

3. Through regular first appeal No.142/2016, the appellant, Farrukh Nisar, impugns the judgment and decree dated 12.07.2016, passed by the Court of the learned Additional District Judge, Islamabad, whereby the said suit instituted by the respondent under Order XXXVII C.P.C. for recovery of Rs.13,00,000/-, was decreed.

4. Farrukh Nisar shall be referred to as the "appellant". The record shows that on 28.09.2013, the respondent (Israr Ahmed) instituted a suit for recovery of Rs.13,00,000/- under Order XXXVII C.P.C. against the appellant before the Court of the learned Additional District Judge, Islamabad. In the said suit, it is *inter-alia* pleaded that on 15.03.2013, the respondent had invested an amount of Rs.1 Million with the appellant, who had promised that he would pay Rs.3,00,000/- as profit on the said invested amount within a period of two months. In this regard,

cheque No.10043178, dated 20.06.2013, for an amount of Rs.1.3 Million drawn on Bank Al-Habib, Aabpara Market, Islamabad, was given by the appellant to the respondent. On 20.06.2013, the said cheque was dishonoured when presented for encashment. On 27.06.2013, the respondent again presented the said cheque for encashment, but the same was dishonoured again. Consequently, FIR No.429/13, dated 20.08.2013 under Section 489-F PPC was registered at Police Station Sabzi Mandi, Islamabad, against the appellant.

5. Vide order dated 31.05.2014, the learned trial Court directed summons to be issued to the appellant through *inter-alia* proclamation in the Daily "Khabrain". Perusal of the order dated 22.10.2014 shows that the proclamation was published in the Daily "Al-Akhbar" instead of the Daily "Khabrain". Vide the said order dated 22.10.2014, the petitioner was proceeded against *ex-parte*.

6. On 05.06.2015, the appellant filed an application for setting aside the said ex-parte order dated 22.10.2014. The position taken by the appellant in the said application was that he had changed his residence in the month of July 2013, and that the respondent had mentioned the appellant's incorrect address in the suit. Furthermore, it was pleaded that the appellant on 02.06.2015, came to know about the suit instituted by the respondent. Vide order dated 02.12.2015, the learned trial Court accepted the appellant's application for setting aside the ex-parte proceedings subject to the payment of costs to the tune of Rs.1,000/-.

7. On 15.06.2015, the petitioner filed an application for leave to defend the civil suit. In the said application, it was pleaded that the petitioner came to know on 03.06.2015 about the pendency of the civil suit. He also claims to have obtained copies of the plaint on 06.06.2015. The learned trial Court held that the limitation period of ten days under Article 159 of the Limitation Act, 1908, for the filing of an application for leave to defend commenced from the date on which a defendant gains knowledge of the civil suit. Computing the limitation period from

03.06.2015, the learned trial Court held that the petitioner's application for leave to defend was barred by two days. Furthermore, it was held that Article 159 *ibid* does not provide for the said limitation period to commence from the date when a defendant obtained copies of the suit. Since the petitioner had not filed an application for condonation of delay along with the application for leave to defend the suit, the learned Civil Court dismissed the said application, and adjourned the matter for the respondent's *ex-parte* evidence to 20.06.2016.

8. The said order dated 15.06.2016, was impugned by the petitioner in civil revision petition No.280/2016, before this Court. Vide order dated 04.07.2016 passed by this Court, the proceedings before the learned trial Court were stayed.

9. Perhaps the said order dated 04.07.2016 passed by this Court, was not intimated to the learned trial Court. On 12.07.2016, the learned trial Court dismissed the petitioner's application to cross-examine the respondent's witnesses. On the same very day, the learned trial Court decreed the suit instituted by the respondent. The judgment and decree dated 12.07.2016 has been impugned by the petitioner in regular first appeal No.142/2016.

10. Learned counsel for the appellant submitted that the learned trial Court erred by not appreciating that the appellant had filed the application for leave to defend the suit within the limitation period prescribed by law; that the process server's report dated 31.05.2014 shows that the appellant was not served; that summons had not been served on the appellant because he had changed his address; that the proclamation was published by the respondent in the wrong newspaper; that the limitation period for filing an application for leave to defend the suit starts from the day when the defendant is served with the summons as well as the copy of the plaint; that since summons were not served on the appellant, the limitation period for filing an application for leave to defend the suit commenced when the appellant got knowledge of the suit and obtained a copy of the plaint; that the appellant obtained copies of the plaint on

06.06.2015; that without reading the plaint, the appellant was in no position to file an application for leave to defend the suit; that since 14.06.2015 was a Sunday, the application for leave to defend the suit was filed on 15.06.2015, which is within the limitation period prescribed by law; that even though the appellant, on 05.06.2015, filed an application for the setting aside of the order to proceed ex-parte against the appellant, the limitation period for filing the application for leave to defend would commence from the date the appellant obtained copies of the plaint i.e. 06.06.2015; and that the learned trial Court erred by dismissing the appellant's application for leave to defend on the ground of limitation.

11. Furthermore, learned counsel for the appellant submitted that after this Court had stayed the proceedings before the learned trial Court, the learned trial Court should not have proceeded with the suit in the presence of a stay order; and that this Court, vide order dated 04.07.2016, stayed the proceedings before the learned trial Court, whereas the learned trial Court, in disregard of the stay order, decreed the suit on 12.07.2016. Learned counsel for the appellant prayed for the civil revision petition No.280/2016 and the regular first appeal No.142/2016, to be allowed, and for the matter to be remanded to the learned trial Court.

12. On the other hand, learned counsel for the respondent submitted that the order dated 15.06.2016 and the decree dated 12.07.2016, passed by the learned trial Court is strictly in accordance with the law and facts of the case. He further submitted that the appellant has admitted that he got knowledge of the suit on 02.06.2015; that limitation period for filing an application for leave to defend the suit would commence from the date of appellant's knowledge about the suit; that in the application for setting aside the ex-parte proceedings, the appellant had pleaded that he got knowledge of the suit on 02.06.2015, whereas in the application for leave to defend, the appellant pleaded that he got knowledge of the suit on 03.06.2015; that the appellant filed the application for leave to

defend the suit on 15.06.2015, which was beyond the limitation period of 10 days prescribed by law; and that the appellant had not filed an application for condonation of delay along with the application for leave to defend the suit. Learned counsel for the respondent prayed for the appellant's revision petition and appeal to be dismissed.

13. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the revision petition and appeal under disposal have been set out in sufficient detail in paragraphs 2 to 9 above, and need not be recapitulated.

14. Summons in a suit under Order XXXVII C.P.C. are required to be in Form No.4 in Appendix – B to the C.P.C. Order XXXVI, Rule 2 (2) read with the Form No.4 in Appendix – B require the plaint to be accompanied by the summons. In the case of Binyameen Khalil Vs. Riaz Ahmed Rahi (2014 CLC 105), it has been held that where a copy of the plaint was not served on the defendant at the time of affecting service of summons, it could not be held that the defendant was properly served, and period of limitation under Article 159 of the Limitation Act, 1908, for filing an application for leave to appear and defend the suit could not be computed from the date of service of summons without a copy of the plaint. In the case of Khushi Muhammad Vs. Muzammal Khatoon (2014 YLR 1779), it has been held *inter alia* as follows:-

> ***"In a suit under Order XXXVII, Rule 2, C.P.C. the summons is to be issued on Form IV of Appendix-B. It is imperative that the copy of the plaint with annexures should be sent under Order XXXVII, Rule 2(1), C.P.C. along with the summons. Unless this legal requirement is fulfilled, the service is not complete and the period of limitation does not start. For the sole reason that the copy of the plaint does not appear to have been sent along with the summons, the period of ten days prescribed for submission of the application under Article 159 of the schedule of the Limitation Act, 1908 did not start at all."***

15. Law to the said effect has also been laid down in the cases of Ameer Ali Vs. Khuda Bux (2016 MLD 206), Shafaqat Mehmood Vs. Muhammad Nazir (2014 CLC 1222), and Junaid Iqbal Butt Vs. Muhammad Babar Shahzad (2012 YLR 1694).

16. Under Article 159 of the First Schedule to the Limitation Act, 1908, the limitation period of ten days for filing an application for leave to appear and defend a suit under Order XXXVII, C.P.C. commences when summons are served on the defendant. In the case at hand, the appellant/defendant was not served with summons. This has been expressly observed by the learned trial Court in its order dated 20.06.2016. The learned trial Court had resorted to substituted service, but admittedly the summons were not published in the newspaper in which they were supposed to be published. The vital question that needs to be answered is whether the limitation period of ten days would commence from the date when the appellant gained knowledge of the suit or the date when he obtained a copy of the plaint.

17. The purpose of issuing summons to the defendant is that defendant should gain knowledge of the pendency of a suit/proceedings against him; tender appearance before the Court; and to defend the proceedings against him. Once the defendant gains knowledge of the suit against him, he ought to take steps to obtain a copy of the plaint etc. In paragraph 6 of the application for setting aside order dated 22.10.2014, the appellant has pleaded that he gained knowledge of the pendency of the suit against him on 02.06.2015. The said application was filed on 05.06.2015. In the said application, the appellant has made reference to the contents of the plaint by pleading that the respondent had mentioned the appellant's wrong address in the suit/plaint. For all intents and purposes, the appellant was aware of the contents of the plaint when the said application dated 05.06.2015 was filed. Therefore, learned counsel for the appellant's contention that the appellant obtained copies of the plaint does not inspire confidence.

18. Now, the appellant filed the application for leave to defend the suit on 15.06.2015. Other than the appellant's pleading in his application for leave to defend the suit, the appellant did not bring any material on record to show that the appellant was provided with a copy of the plaint on 06.06.2015. Although the learned counsel for the appellant is correct in his submission

that the appellant had not been served with the summons, and that summons were not published in the daily Khabrain, as ordered by the learned trial Court, the fact remains that the appellant admittedly got knowledge of the suit on 02.06.2015. If the appellant could file an application for setting aside the ex-parte proceedings on 05.06.2015, what prevented him from filing an application for leave to defend the suit on or prior to 13.06.2015. This, the learned counsel for the appellant could not explain. In view of the above, I have no reason to fault the order dated 15.06.2016, passed by the learned trial Court, whereby the appellant's application for leave to defend the suit was dismissed as time barred.

19. Now vide interim order dated 04.07.2016, this Court had stayed the proceedings before the learned Trial Court. A stay of proceedings was an order which put and stop to the further conduct of proceedings in the court or a tribunal at the stage then reached, the object being to prevent the hearing or trial taking place. It is by now well settled that stay order operates from the very day it is issued. To make a stay order effective, it is not necessary that such an order should be served on the concerned Court or a tribunal. Its communication is not a precondition for its operation. If the proceedings before a Court or a tribunal have been stayed by a higher forum, an order passed by such a Court or a tribunal during the subsistence of the stay order is *coram-non-judice*, without jurisdiction and thus void. Reference in this regard may be made to the following case law:-

(i) In the case of Muhammad Anwar Vs. Muhammad Akbar (PLD 2000 SC 52), it has been held as follows:-

> ***"6. ...It is a settled preposition of law that stay order operates from the time when such order is made and not from the time it is communicated. Din Muhammad and two others v. Abdul Rehman Khan 1992 SCMR 127 may be cited, wherein it was observed that ignorance would not permit lower Court to render order of superior Court ineffective or nullity, and such action would not be clothed with legality when legal order to proceed had been stopped or stayed."***

(ii) In the case of Din Muhammad and two others Vs. Abdul Rehman Khan (1992 SCMR 127), the Hon'ble Supreme Court held that the proceedings taken by trial Court after its proceedings were stayed by a higher forum were a nullity. The trial Court was directed to proceed to determine the suit afresh. Furthermore, it was held as follows:-

> ***"4. In the case in hand, order of this Court was communicated to the High Court who further forwarded it to the trial Court, though the communication is not on the file of the trial Court. such a contingency was envisaged in the Full Bench case of the Lahore High Court in "Karam Ali v. Raja" (P L D 1949 Lah, 100 at 114) where it was observed that "the order may, by collusion between the party interested and the ministerial officer of the appellate Court or the executing Court, be suppressed". Nevertheless it was held that a stay order will "operate from the time that such order is made and not from the time it is communicated to the executing Court". Besides the reasons in the precedent cases it has also to be kept in view that just as law operates the moment it is enacted and ignorance of it is no defence, so an order made by a superior Court operates when it is made and non-knowledge or ignorance will not permit the lower Court to render the order of the superior Court ineffective or nullity. It is the other way round. No doubt, non-knowledge will not entail liability for any action taken but action will not be clothed with legality when legal authority to proceed had been stopped or stayed."***

(iii) In the case of Aamir Khurshid Mirza Vs. The State (2006 CLD 568 = 2005 YLR 3059), it has been held as follows:-

> ***"8. ... It is now well-settled that just as law operates from the moment it is enacted and ignorance is no defence, a stay granted by a Superior Court operates from the time the order is made and non-knowledge or ignorance of the order will not permit a lower Court to render A the order of a Superior Court ineffective or a nullity. We have no doubt in our mind and we are supported by authority that any or all proceedings taken by the trial Court after our order staying the proceedings before it, are a nullity and this totally without jurisdiction and, therefore, the case would be deemed to have never been transferred from the Special Court in respect of offences in Banks at Lahore. Reference may profitably be made to the cases reported as Din Muhammad Khan v. Abdul Rehman Khan 1992 SCMR 127 and Akhtar Hussain and 4 others v. The State 1993 SCMR 1523. There is no question or need of having assailed the transfer order, which as stated by us earlier was a nullity."***

(iv) In the case of Nand Kishore Vs. Shadi Ram (AIR 1926 Allahabad 457), it has been held as follows:-

> ***"An order to stay passed by an appellate Court is an order to a Subordinate Court to stay its hand, and in that sense it bears no analogy to an injunction, which is an order to a party to refrain***

> ***from doing a certain act. The former takes effect from the time of its pronouncement, and its communication is only needed to make it known to the Court which is directed to carry it out. Its force is not suspended till it is formally communicated to the Court concerned. An injunction is, however, binding on the party to whom it is issued from the time it is communicated, for there can be no attempt unless the party concerned knows what he is required to do, or to abstain from doing, and a Court cannot punish a man for doing what he did not know he was forbidden to do."***

20. Law to the above effect has also been laid down in the cases of Karam Ali Vs. Raja (PLD 1949 Lahore 100), Syed Nazir Ahmad Vs. Syed Muhammad Saeed (PLD 1955 Lahore 34), Mst. Ramzan Bibi Vs. Mst. Amina Bibi (PLD 1970 L 371), Abdur Rashid Khan Vs. Nasim Akhtar (1974 SCMR 509), Haji Abdul Jalil Vs. Javed Ahmad (1983 SCMR 869), Popalzai Vs. District and Sessions Judge, Karachi (1984 CLC 630), The State Vs. Sajjad Hussain (1993 SCMR 1523), Mst. Iqbal Begum Vs. Additional Commissioner (General) (2002 MLD 975).

21. Since the impugned judgment and decree dated 12.07.2016 was passed by the learned trial Court after this Court had, vide order dated 04.07.2016, had stayed the proceedings before the learned trial Court, the said judgment and decree is liable to be set aside.

22. The appellant had filed an application before the learned trial Court for permission to cross-examine the respondent. Since the appellant's application for leave to defend the suit had been dismissed on 15.06.2016, the learned trial Court, vide order dated 12.07.2016, dismissed the appellant's application to cross-examine the respondent. In a summary suit, where leave to defend is refused or is not applied for, the contents of the plaint are deemed to be admitted and plaintiff becomes entitled to a decree and, therefore, the defendant would have no right to cross-examine the plaintiff's witness. The order passed by the Court below rejecting the appellant's application to seek cross-examination of the respondent cannot be said to suffer from any legal infirmity.

23. In view of the above, civil revision petition No.280/2016 is dismissed, whereas regular first appeal No.142/2016 is allowed.

The matter is remanded to the learned trial Court for a decision afresh. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE)

APPROVED FOR REPORTING

Sultan*