ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

I. A. Nos.76 & 77 of 2018

Date **Order with signature of Judge**

Present
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Agha Faisal

I.A. No.76 of 2018
[Muhammad Ahmed Siddiqui & another vs. Abdul Abid Advocate & another]

I.A. No.77 of 2018
[Abdul Abid Advocate vs. Muhammad Ahmad Siddiqui & others]

Date of Hearing: 20.08.2019 & 16.03.2020.

Mr.Muhammad Shahid Shah, Advocate for the Appellants in I.A.No.76/2018 & for Respondents Nos.1 & 2 in I.A. No.77/2018.

Abdul Abid Advocate Appellant in person in I.A. No.77/2018 & Respondent No.1 in I.A. No.76/2018.

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Muhammad Ali Mazhar, J: The appellants in I.A. N0.76/2018 have brought this appeal to challenge the Judgment and Decree dated 31-05-2018 passed by the learned VIth Additional Session Judge, Karachi, Central in Summary Suit No.27/2015 whereas in cross appeal i.e I.A. NO.77/2018, the appellant has also challenged the same judgment and decree with the prayer to modify/set-aside the impugned Judgment & Decree and direct the respondents jointly and or severally to pay principle amount and profit in view of the agreement dated 12-02-2012 and also pay damages and compensation to the appellant. Both the parties agreed to argue the main appeal at katcha peshi stage. The R & P was called from trial court and parties had extensively argued their appeals.

2. The evanescent facts of the case are as follows:-

The appellant Abid Ali Advocate had filed a Summary Suit No.27/2015 against Muhammad Ahmed Siddiqui and Mashood Ahmed Siddiqui under Order 37 Rule 1 & 2 C.P.C. on the plea that both the defendants approached him for investing Rs.6,00,000/- in cement business and assured to return on principle amount 10% profit per month. The plaintiff paid this amount, however after few days, the defendant No. 2 informed the plaintiff that they cannot pay 10% profit per month, but they can pay 5% on borrowed amount. The plaintiff many times approached and

requested the defendants to return his borrowed/loan amount of Rs.6,00,000/- but it was not paid by the defendants. The plaintiff with his colleague advocate Mr. Zafar Alam went to the house of defendant No.1 on 21.4.2013 and requested for executing an indenture of "Iqrarnama" for refund/repayment of said loan amount on which the defendant No.1 (Muhammad Ahmed) in his own handwriting executed Iqrarnama in presence of the defendant No.2 (Mashood Ahmed Siddiqui) according to which the defendant N0.1 took responsibility and gave the schedule of repayment of amount and agreed to pay amount in installments of one lac per month for which both the defendants put their respective signatures on such "iqrarnama". Due to nonpayment as per terms of iqrarnama, the plaintiff sent a legal notice and then filed aforesaid summary suit with the following prayers:

"1.To direct the defendants jointly and or severally to pay Rs.14,000,000/- (Fourteen Million) as damages with principle amount plus 10% profits per month on 1 lac as they promised according to the agreement from dated 12.02.2012 when defendants took amount from the plaintiff and with the compensation to the plaintiff pecuniary and non-pecuniary lump sum with the date of filing of this suit till the realization of decree on account of causing.

a. Loss of health.
b. Loss of valuable time.
c. Damages for mental torture.
d. Damages for mental agony/shock and extreme physical pain.
e. Financial loss.

2. To grant cost of the whole litigations.

3. To grant any other better relief or relief(s) …….. "

Both the defendants filed leave to defend application and were allowed to defend the suit conditionally on furnishing surety/security equivalent to the principal amount. The trail court decreed the suit in the sum of Rs.6,00,000/- which has been challenged vice versa, the defendants have assailed the judgment on the plea that suit was not maintainable under the summary chapter (Order 37 C.P.C) whereas the plaintiff has claimed the damages including interest/markup along with other relief(s) which he jot down in his summary suit instituted in the court of Additional District and Sessions Judge for trail.

3. The learned counsel for the appellants in I.A. NO.76 of 2018, argued that judgment and decree is contrary to the law. It was further argued that iqrarnama does not come within definition of the Negotiable Instruments. The learned trial court had wrongly assumed the jurisdiction and despite taking objection that the suit was not triable under the summary chapter which is only meant for the claims arising out of Negotiable Instruments Act, this crucial objection was ignored. He further argued that the trial court failed to consider the law and evidence and passed the judgment in hasty manner which is liable to be set aside.

4. The appellant in person in I.A. No.77 of 2018 argued that the impugned judgment and decree to the extent of non-allowing his full claim is erroneous. The learned trial court committed error while refusing the appellant's full claim against the respondents. The author of iqrarnama admitted that his brother respondent No.2 took Rs.6,00.000/- and promised to pay profit. It was further argued that overwhelming evidence was available on record to grant full claim of the plaintiff lodged in the summary suit but the trial court only

decreed the suit for principal amount. Iqrarnama and reply of the respondent No.1 fully established that it was a valid agreement, therefore the respondents are bound to comply with the conditions stipulated in the agreement. It was further argued that under Section 34 C.P.C, ample discretion was available to the trial court to award interest. The trial court has erroneously declined other claims also including damages and compensation in the decree.

5. Heard the arguments. The skeleton and framework of the plaint unequivocally demonstrates that the plaintiff had in fact filed a suit for damages in the sum of Rs.14,00,000/- with principle amount due to alleged default in making payment by dint of agreement dated 12.02.2012 but the suit was instituted and presented under Order 37 C.P.C. The seclusion bordered by a summary suit and an ordinary suit is that in a summary suit, the defendant is not entitled as a right to defend the suit as in ordinary suit but he has to submit an application for leave to defend. If no leave is granted by the court then the plaintiff is entitled to a decree. By and large, summary suits are perceptibly easy-going to establish for the plaintiff and somewhat strenuous and resilient for the defendant to defend than ordinary suits. Notionally, a summary suit is acknowledged as a quick remedy under Order XXXVII C.P.C with clear statement of the plaintiff that no relief has been claimed beyond the realm and sphere of summary chapter set down under Order XXXVII of C.P.C. The court may not decline the permission to defend unless it considers that the disclosure by the defendant does not show any substantial defence, however the court may grant conditional or unconditional leave to defend keeping in mind the facts and circumstances of each case independently.

6. Undeniably the suit was filed under Order XXXVII Rules 1 & 2 C.P.C with several prayers including damages as a consequence of alleged loss of health, valuable time, mental torture and agony and financial losses. It is also translucent that the case was all-encompassing converged on Iqrarnama coupled with some reliefs. Meaning of the word Indenture in Urdu language is “اقرار نامہ”. A

mutual agreement in writing between two or more parties. The R&P shows that before admission of the suit by the trial court, the office had raised objection for non-filing of cheque and memorandum of bank for the amount which the plaintiff claimed and non-filing of negotiable instrument. Despite these objections, the suit was admitted on 11.09.2015 subject to all just exceptions. The leave to defend application was filed in which specific objection was taken that suit does not fall within the summary chapter. The leave to defend application was decided by the trial court vide order dated 08.02.2016. It is translucent that the crucial objection raised to the maintainability of the summary suit was not decided by the trial court rather a conditional leave to defend was allowed subject to deposit of surety in the sum of Rs.600,000/- to the Nazir of the trial court within one month which was furnished as reflected from the trial court order dated 23.02.2013.

7. On 16.04.2016 an application under Order VII Rule 11 C.P.C. was filed by the defendants in which it was specifically pleaded that the suit does not fall within the ambit of summary suit. This application was decided by the trial court vide order dated 30.09.2016 but again in this order instead of deciding the nucleus of the matter as to whether the suit was maintainable under the provisions of Order XXXVII C.P.C. or not, the trial court again relied on Iqrarnama without considering whether the Iqrarnama can be considered negotiable instrument for which the suit was filed along with other claims including damages on account of mental agony. It is quite strange to note that in the order granting leave to defend and in the order passed on the application moved by the defendants under Order VII Rule 11 C.P.C. for the rejection of plaint, the trial court in both orders failed to consider and decide the fundamental question of jurisdiction and maintainability of the suit under summary chapter which was also essential as prerequisite to mull over while admitting the suit.

8. In the judgment authored by one of us (Muhammad Ali Mazhar-J) in First Appeal No.78 of 2017 reported as **2019 CLD 1241**

(Mohammad Moazam Khan versus Mohammad Iqbal & another), we held as under:

> **7. ..... The Negotiable Instruments Act is intended to lay down the whole law regarding cheques, bills of exchange and promissory notes. The negotiability can be attached to documents by mercantile usage. The Negotiable Instruments Act is a statute dealing with a particular form of contract and the law laid down for special cases must always overrule provisions of general character. According to interpretation clause of the Negotiable Instruments Act, *"issue"* means the first delivery of a promissory note, bill of exchange or cheque complete in form to a person who takes it as a holder; *"delivery"* means transfer of possession, actual or constructive, from one person to another; *"bearer"* means a person who by negotiation comes into possession of a negotiable instrument, which is payable to bearer; and *"banker"* means a person transacting the business of accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, and includes any Post Office Savings Bank. According to Section 4 of the Negotiable Instruments Act, a promissory note is an instrument in writing (not being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay on demand or at a fixed or determinable future time a certain sum of money only to, or to the order of, a certain person, or the bearer of the instrument. An instrument which fulfils all the conditions mentioned in Section 4 of the Negotiable Instruments Act would be termed as promissory note. To determine the nature of an instrument where there is a promise to pay, the best way is to see what is the intention of the parties and what is the instrument in the common acceptance of men of business or persons among whom it is commonly used. Ordinarily in order to amount to a promissory note, an instrument must simply contain a promise to pay and nothing else. The true import of the words *'on demand'* is that the debt is due and payable immediately. The endorsement does not mean that it is not payable immediately or without any demand.**
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> **8. A negotiable instrument is a document guaranteeing the payment of a specific amount of money, either on demand, or at a set time, with the payer usually named on the document. It can serve to convey value constituting at least part of the performance of a contract, albeit perhaps not obvious in contract formation, in terms inherent in and arising from the requisite offer and acceptance and conveyance of consideration. The instrument itself is understood as memorializing the right for, and power to demand, payment, and an obligation for payment evidenced by the instrument itself with possession as a holder in due course being the touchstone for the right to, and power to demand payment. A promissory note typically contains all the terms pertaining to the indebtedness, such as the principal amount, interest rate, maturity date, date and place of issuance, and issuer's signature. The difference between a promissory note and a bill of exchange is that the latter is transferable and can bind one party to pay a third party that was not involved in its creation. Bank notes are common forms of promissory notes. Bills of exchange, orders a debtor to pay a particular amount within a given period of time issued by the creditor. The promissory note is issued by the debtor and is a promise to pay a particular amount of money in a given period. A bill of exchange must clearly detail the amount of money, the date, and the parties involved (including the drawer and drawee). The following are some points of differences between promissory notes and bills of exchange, a) A promissory note generally involves two parties, i.e. a maker (debtor) and a payer (creditor). On the other hand, bills of exchange include a drawer, a drawee and a payee; b) As the bills of exchange introduction above shows, a bill orders the drawee to pay as per the drawer's directions. A promissory note, however, is not an order but a promise to pay; c) The liability of maker of a promissory note is absolute, while that of the drawer of a bill is conditional; d) Notes cannot be payable to their makers, while the drawer and the payee in bills can be the same person. So far as the niceties of the cheques are concerned, according to Section 6 of the Negotiable Instruments Act, a cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. A cheque is a peculiar sort of instrument in many ways resembling a bill of exchange, but entirely different. A cheque is not intended for circulation but it is given for immediate payment and not entitled to days of grace and thus it is strictly speaking an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet, in the ordinary understanding of persons, it is not so considered. A cheque whether payable to bearer or to order is not rendered void by post-dating it and is admissible in evidence in an action brought after the date of the cheque by the holder although he took with knowledge of the post-dating.**

9. Neither the court can assume the jurisdiction not conferred by law nor the jurisdiction can be assumed or entertained by consent of parties but the doctrine of assuming the jurisdiction by the courts is strictly based on the law conferring that particular jurisdiction. The niceties or minutiae of the jurisdiction under the summary chapter is altogether different than the jurisdiction of an ordinary court, therefore, it is incumbent upon every plaintiff while insetting the plaint, his claim should have been within such realm and sphere. Order XXXVII C.P.C applies only to the High Court and to the district courts and to any other civil court as specifically notified in this behalf by the High Court. The C.P.C is consolidatory and procedural law nevertheless it encompasses substantive stipulations as branch of law for dispensing the process of litigation. According to Section 9 C.P.C., the courts have jurisdiction to try all suits of civil nature except suits of which their cognizance is expressly or impliedly barred. The word and expression jurisdiction refers to the legal authority to administer justice in accordance with the methods and avenues provided subject to the limitation imposed by law. Whenever any jurisdiction is conferred to any court of law subject to a number of prerequisites, then such prerequisites should be complied with. In this case, the defendant had raised the objection thrice to the jurisdiction so it was the judicious and commonsensical responsibility of the trial court to decide the objection before moving ahead and if reached to the conclusion that it had no jurisdiction to entertain or try the suit, the plaint could have been returned back under Order VII Rule 10 C.P.C.

10. The letters of law make it obvious without any ambiguity that under Order XXXVII Rule 1, C.P.C, the suit can be entertained to deal the cases based on negotiable instruments which triggers on presentation of plaint and in case defendant fails to appear or defend and in default, the allegation in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree. The present suit is not based on any negotiable instrument nor the plaintiff has demonstrated that any cheque which was issued by the

defendant in favour of the plaintiff was dishonored rather the plaintiff has framed the suit on the premise that a sum of Rs. 200,000/- was paid to the defendant through bearer cheque which he got encashed in his presence but he austerely hinged on the Iqrarnama in which the defendants agreed to pay off certain amounts with markup/interest but due to noncompliance of agreement, the suit was instituted under summary chapter. The trial court framed seven issues and the suit was decreed in the sum of Rs.600,000/- on the notion that this amount was agreed to be paid through Iqrarnama. So far as the claim of damages is concerned, the trial court held that the claim of damages cannot be entertained in the summary suit.

11. The foremost oversight and misstep which trial court failed to countenance that how the Iqrarnama could be considered negotiable instrument. In the counter Appeal No.77/2018, the appellant who was plaintiff in suit (Mr. Abid Ali Advocate) has himself entreated for modification/setting aside the impugned judgment and decree and grant of his claim of damages on account of causing loss of health, loss of valuable time, mental torture & agony and financial loss to him. It is quite apparent from the tenor of law that these claims could not be decided in the summary suit and if the decree granted in the sum of Rs.600,000/- is taken into consideration based on the Iqrarnama that too does not fall within the parameter of Order XXXVII Rules 1 & 2 C.P.C. Though the trial court asked the plaintiff to satisfy before admission but the suit was admitted subject to all just exceptions but these exceptions were never taken into consideration. The leave to defend was allowed with security/surety and application under Order VII Rule 11 C.P.C. was also dismissed without adverting to the legal pleas raised in the application.

12. Seeing the ground reality that the Iqrarnama neither can be construed or decipherable as a promissory note nor it is covered in the sphere of any other negotiable instrument therefore at the very beginning, the trial court could have returned the plaint with the

directions to institute the same in an ordinary court rather than admitting the suit under Order XXXVII C.P.C. Failing to act strictly in accordance with law and inattentiveness of the trial court, considerable time of the parties elapsed and fizzled out. The suit filed in the year 2015 is found to have been emaciated, unproductive and vexatious exercise of jurisdiction. All claims lodged by the plaintiff in the plaint including the claim of damages could have been considered after framing proper issues and adducing evidence by the parties and in case of disagreement of the decree by any party, the appeal could have been filed before the District Judge. But in this case direct exercise of jurisdiction inadequately by the trial court in summary chapter has also deprived the parties at least one forum of appeal. Due to admission of suit wrongly in summary chapter, the appeals have been filed in the High Court. There may be another aspect that court has to do the substantial justice between the parties while avoiding technicalities but here the question of jurisdiction is involved which is quite essential and important for every court to contemplate before entertaining the lis and exercising the jurisdiction. Though in the spirit of Order XXXVII Rule 7 C.P.C. where the leave to defend is allowed conditionally or unconditionally or where the defendant fulfills the condition imposed, the procedure in suits shall be the same as procedure in suit instituted in the ordinary manner which in fact refers to the filing of the written statement, framing of issues, leading evidence by the parties and thereafter, the judgment shall be announced but this no way means that the suit should be allowed to be admitted and entertained under wrong notion, forum or without jurisdiction. No notification has been issued by this High Court, whereby, the jurisdiction has been conferred under Order XXXVII C.P.C to any civil court but the said jurisdiction is till confined and limited to be exercised by the High Court and District Courts only. In the case of **Sheikh Abdul Majid v. Syed Akthar Hussain Zaidi (PLD 1988 SC. 124),** the facts of the case depicts that the revision was filed by the respondent in the Lahore High Court on the question of jurisdiction of a Civil Judge in Lahore to avail the procedure prescribed under Order XXXVII

C.P.C. The learned Judge in the High Court came to the conclusion that due to the provisions of Central Laws (Statute Reforms) (Ordinance XXI of 1960), such a power was not available to the Civil Judge as amendments introduced by the Lahore High Court stood revoked. As regards the other question whether the court seized of the matter should be asked to proceed with the trial of the suit as an ordinary one or return the plaint. The learned Judge in the revisional jurisdiction held that order XXXVII of the Code did not apply to the learned trial Court of the Civil Judge, Lahore and consequently it had no jurisdiction to try the suit. It was further held that the impugned order granting leave to the respondent was without jurisdiction and the learned Judge returned the plaint to be presented to the Court in which the suit should have been instituted. When this order was challenged in the apex court, the honourable Supreme Court held that amendment introduced by clause (e) of the High Court of Lahore remains intact and has been intentionally kept intact. It was further held that amendments introduced by the High Court only identifies the courts where resort can be made by Order XXXVII C.P.C. for the purpose of trial of a suit of particular category. The apex court allowed the appeal, set aside the judgment of the learned Lahore High Court and remanded the case for trial by the Civil Judge in accordance with the law. Here in our sight and understanding, the most crucial and distinguishing fact is that the above judgment was based on the powers confer on by the learned Lahore High Court to try the case by the civil court under Order XXXVII C.P.C. which otherwise means that the originally the said suit was instituted in the civil court notwithstanding it was filed in the summary chapter or as ordinary suit. The apex court directed the civil court to decide the case in accordance with law which had otherwise jurisdiction in the matter as an ordinary suit but here the suit was originally filed before the learned District Judge under misconception being a summary suit so the argument advanced by Mr. Abid Ali Advocate cannot be sustained that though the suit was not in summary chapter which he candidly admitted despite that it could have been tried and decided by the District Judge as an

ordinary suit and all reliefs claimed by him could have been granted which is not correct exposition of law in our farsightedness.

13. In the case of **Muhammad Abdullah Sufi v. Messrs. Muhammad Bux & Sons (PLD 1957 (W.P) Karachi 445),** the facts were that the plaintiff had filed a suit for the recovery of Rs.2,236/- based on a cheque drawn on Mercantile Cooperative Bank by the defendant in his favour. The suit was filed under Order XXXVII C.P.C and was admitted on 04.09.1956. During the pendency, the plaintiff realized that the subordinate judge at Karachi had no power to issue summons under Order XXXVII Rules 1 and 2 C.P.C. so he filed an application for amendment in the plaint. The application was rejected on the ground that subordinate judge had no jurisdiction to hear the suit under Order XXXVII C.P.C. The learned Judge of this court accepted the revision application on 17.04.1957 and set aside the order of the learned subordinate judge with the directions to entertain the suit and try it in the ordinary way no matter even if he does not possess the power under section XXXVII C.P.C. Yet again what we have comprehended and grasped that the learned Judge in the cited dictum issued directions to try the suit in an ordinary manner merely for the reason that if the court had no jurisdiction under Order XXXVII C.P.C. it had otherwise being a civil court entrusted with the jurisdiction to try the suit even in an ordinary manner which is lacking in the case in hand as the court of district judge specifically entrusted jurisdiction to entertain and decide summary chapter suits cannot be equated with the court of civil judge or senior civil judge but hierarchically it is their appellate court. According to Section 15 C.P.C. every suit is required to be instituted in the court of lowest grade competent to try it with the exception provided under Order XXXVII Rules 1 & 2 C.P.C. According to Section 2 (4) C.P.C (definition clause), district means the local limit of the jurisdiction of a principal civil court of original jurisdiction which is called district court and includes the local limits of ordinary civil jurisdiction of high court whereas Section 5 C.P.C explicates subordination of courts and expounds that for the purposes of the

Code, the district court is subordinate to the high court and every civil court of a grade inferior to that of a district court and every court of small causes is subordinate to the high court and district court. The trial court in this case has tried the suit in a summary chapter and not as an ordinary suit and for the same reasons disallowed other reliefs which were never quit or relinquished by the plaintiff. In our considerate view, the impugned judgment cannot be protected as a judgment in an ordinary suit.

14. We are sanguine that both parties are not satisfied with the judgment. One is aggrieved by whole judgment and grant of decree whereas other is aggrieved due to non-allowing all claims and praying us to grant him remainder also. The maxim of equity, “actus curiae neminem gravabit” an act of the court shall prejudice no man is applicable in every proceedings which is founded upon justice or good sense and obliges a safe and sound guidebook for the administration of law and justice. No findings have been given by the trial court to hold whether the Iqrarnama, the nucleus of the case was negotiable instrument or not. The evidence was also led but at this stage, we do not want to deliberate and touch on the evidence but at this moment in time want to be confined to the question of jurisdiction alone. Had the trial court examined the plaint at right time to figure out the question of jurisdiction, the precious time of court should not have wasted nor should the parties have burdened to continue the litigation before the forum having no jurisdiction. The record reflects that while admitting suit in summary chapter, the trial court had framed issue No.2 pertaining to the claim of damages lodged by the plaintiff but in the judgment, nothing was said except that in summary suit damages cannot be granted and strictly treating the suit in summary manner the suit was decreed for principal amount. It is clear that the plaintiff did not claim any special damages but damages in general. Mental shock, agony and torture imply a state of mind. Such state of mind can be proved only by a positive assertion of one who experiences the same. Ref: (1996 CLJ 283). Appellant Abid Ali Advocate wants us to grant these damages

in appeal which claim was not considered by the trail court under the notion that it cannot be granted in summary suit whereas we have already held that the suit should have been instituted as an ordinary suit rather than summary suit where the claim of damages could also be considered by the concerned court in an ordinary suit. It is well settled exposition of law that it is the obligatory duty of the Judge to apply the correct law to a lis and not of the litigant to point out the law applicable. The primary duty to do the justice and to apply the correct law to the facts of a case is the exclusive duty of a Judge.

15. In the judgment reported as **2020 YLR 578**, **(Muhammad Yousuf & others versus Trustees of the Port of Karachi & others),** we after surveying various local and foreign dictums held that to perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience. Legal Maxim Coram non judice indicates a proceeding which is outside the authority of a judge or without legal jurisdiction.

16. The judgment is based on erroneous reasoning and incorrect exposition of law therefore the impugned judgment and decree dated 31-05-2018 are set aside. Since the evidence has already been recorded therefore to save time and avoid further protracted litigation, we do not deem it appropriate to direct de novo trial, however the matter is remanded back to the learned District and Sessions Judge, Karachi, Central to consign the matter to the concerned Senior Civil Judge as an ordinary suit for decision on merits after considering the pleadings and evidence lead by the parties. The consignee court shall provide ample opportunity of hearing to the parties or their advocates and if required, the court may also frame additional issues and allow parties to lead additional evidence. We expect that the learned consignee court will decide the matter on merits within four months.

Karachi:-
Dated.30.7.2020 **Judge**

Judge