

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Muhammad Shafi Siddiqui &
Sana Akram Minhas JJ

First Appeal No.38 of 2020

(Mumtaz Hussain Siddiqui v. Muhammad Tahir)

Appellant:	Mumtaz Hussain Siddiqui Through, Mr. Hyder Raza, Advocate
Respondent:	Muhammad Tahir Nemo
Date of Hearing / Short Order:	8-5-2024
Date of Reasons:	15-5-2024

ORDER

1. **Sana Akram Minhas, J:** The instant First Appeal stems from a Summary Suit No.59/2016 (*Muhammad Tahir v. Mumtaz Hussain Siddiqui*) (“**Suit 59**”). It challenges the ex parte judgment dated 27.1.2018 and decree dated 29.1.2018 (“**Impugned Judgment & Decree**”) issued by the learned Trial Court in favour of the Respondent (Plaintiff in Suit 59) and against the Appellant (Defendant in Suit 59). Additionally, the Appellant contests an order of the Trial Court dated 25.2.2020 (“**Impugned Order**”) which dismissed the Appellant’s application under Order 9 rule 13 CPC read with section 12(2) CPC (seeking to set aside the Impugned Judgment & Decree).
2. The Suit 59 was instituted on 22.12.2016 under the provisions of Order 37 CPC by the Respondent against the Appellant in the Trial Court. The aim of this Suit was to recover a sum of Rs.4,900,000/-, representing the outstanding balance due under a Sale Agreement. This agreement obligated the Appellant to pay the said amount to the Respondent for the purchase of the ground floor of a residential property owned by the latter. The Appellant asserts that payments, comprising both cash and cheques, were made to the Respondent. Subsequently, additional cash payments were rendered by the Appellant with the intention of replacing the cheque payments. However, the Respondent failed to return the cheques to the Appellant. Consequently,

when the cheques were dishonoured, the Respondent initiated Suit 59 against the Appellant

3. Before this Court, the learned Counsel for Appellant has presented two-fold submissions:
 - i) One, the Appellant was never formally served with summons of Suit 59, and, therefore, the ex parte Impugned Judgment & Decree as well as the Impugned Order refusing to set aside the Impugned Judgment & Decree are bad in law.
 - ii) Two, assuming without conceding the Appellant was served, he was unjustly barred from filing the Leave to Defend application and his defence struck off before the expiration of the mandatory ten (10) day period provided by law for filing the said application.
4. We have heard the Counsel and with his assistance gone through the Record and Proceeding (“R&P”) of Suit 59, which had been summoned by this Court vide order dated 16.1.2024.
5. Article 159 of the *Limitation Act, 1908* mandates a period of ten (10) days for submitting a leave to defend application in a suit governed by the summary procedure outlined in Order 37 CPC. This period commences from the date of service of the summons.
6. Order 37 rule 2 CPC explicitly outlines the procedure for summons, requiring it to be served in Form No.4 of Appendix B, which coincides with the 10-day period stipulated in aforesaid Article 159. Hence, the party served with the summons has 10 days from the date of service to submit its Leave to Defend Application. The significance of both the contents and language of Form No.4 necessitates its reproduction for ready reference:

Form No.4 of Appendix B of the Code of Civil Procedure, 1908

To

(Name, description and place of residence)

Whereas _____ has instituted a suit against you under Order XXXVII of the Code of Civil Procedure, 1908 for Rs. _____, balance of principal and interest due to him as the _____ of a _____ of which a copy is hereto annexed, **you are hereby summoned to obtain leave from the Court within ten days from the service hereof 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).

Leave to appear may be obtained on an application to the Court supported by affidavit 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.

Given under my hand and seal of the Court, this
 _____ day of _____ 19_____.

JUDGE

[Emphasis added]

7. The Diary Sheet of Suit 59 displays the following:

SR. NO.	DATE	DIARY SHEET
i.	22-12-2016	Suit 59 was presented
ii.	6-1-2017	Suit 59 was admitted and orders were passed for issuance of summons in Form No.4 of Appendix-B of CPC through Bailiff, registered acknowledgment of delivery (AD) and courier service Case was listed on 24.1.2017 for service
iii.	24-1-2017	Service upon Appellant was held good in view of Bailiff report according to which Appellant had been served [on 23.1.2017] Case was listed for 1.2.2017 for appearance/filing leave to defend and Respondent's Counsel was directed to submit receipt of courier and AD
iv.	1-2-2017	No one was present from the Appellant's side and Appellant was debarred from filing leave to defend and his defence was struck off. The Respondent was directed to file affidavit in ex parte proof Respondent's Counsel was once again directed to submit receipt of courier and AD

8. According to the Diary Sheet dated 24.1.2017, the service upon the Appellant was held good based on the Bailiff report. Upon our examination of the Bailiff report dated 24.1.2017 (available in the R&P), it is apparent that the Appellant was served on 23.1.2017. If we calculate the 10-day period for filing the Leave to Defend application from 23.1.2017 (i.e. the date the Appellant was served as per the Bailiff report), it would expire on 2.2.2017. However, the Diary Sheet indicates that on 1.2.2017 i.e. on the ninth (9th) day (before the full 10-day period as provided by law had elapsed), the Trial Court barred the Appellant from filing the Leave to Defend application and struck off his defence.
9. When a statute grants a defendant a statutory right to seek leave of the court within a specified time frame (in this case 10 days from the receipt of the summons), it establishes a clear procedural safeguard. The court is expected to respect and uphold this statutory provision. By waiting for the expiration of the stipulated period before taking any action, the court ensures that the defendant has a reasonable opportunity to exercise his legal rights and present his defence. In the absence of such a waiting period, a defendant's ability to avail

himself of the statutory right is compromised. Striking off the defence of a defendant before the expiration of the specified time frame undermines the fundamental principles of fairness and due process inherent in legal proceedings.

10. In the present case, the Trial Court unfairly and prematurely¹ deprived the Appellant of his statutory entitlement to seek leave within the prescribed period, by curtailing it even by just one day, thereby impeding his ability to mount an adequate defence. Under Order 37 rule 2 and 3 CPC, proceedings are summary. Failure of the defendant to apply for defence within 10 days of service leads to a deemed admission of allegations in plaint, which may in turn result in a decree. The court must ensure the defendant is served and comprehends the proceedings; hence, the legislature mandated specific forms for the plaint and summons. Therefore, it is imperative for a court to exercise caution and patience in such matters, refraining from striking down the defence of a defendant ahead of time. By allowing the statutory period to run its course, a court ensures that the defendant's rights are fully respected and that the legal process proceeds in a manner consistent with the principles of justice and equity.
11. There is yet another troubling aspect which is equally disconcerting to note and warrants attention. On 24.1.2017, the Trial Court held the service as good. However, simultaneously and paradoxically, in the same order issued on that date (i.e. 24.1.2017) as well as on the following date (i.e. 1.2.2017, which is also the date on which the Appellant was barred from filing Leave to Defend application and his defence was struck off), it directed the Respondent to file courier receipts and acknowledgment of delivery (“AD”). It is, thus, apparent that the Trial Court considered the service as valid despite the absence of essential documents (like courier receipts and AD). This anomaly raises significant concerns and calls into question the thoroughness and reliability of the Trial Court's evaluation of service validity.
12. In view of the foregoing, the ex parte Impugned Judgment & Decree dated 27.1.2018 and 29.1.2018 respectively and the Impugned Order dated 25.2.2020 are unsustainable and are all set aside, with no order as to costs. The Appellant shall file his Leave to Defend application in Suit 59 within ten (10) days from today.
13. The Office is directed to remit back immediately the R&P of the said Summary Suit No.59//2016 to the learned Trial Court, which shall proceed with the said Suit in accordance with law.

¹ *Meer Javed Asghar v. Citibank* (2007 CLD 304); *Muhammad Shafique v. National Bank of Pakistan* (PLD 1992 Lah 60)

14. By short order dated 8.5.2024, we had allowed the instant First Appeal. The above are our reasons for doing so.

JUDGE

JUDGE

Karachi
Dated: 15th May, 2024