IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Ist Civil Appeal No. S-06 of 2023

Appellant	**Muhammad Tasleem, son of Jamil Ahmed Arain, through Mr Prem Chand R. Sawlani, Advocate**
Respondent	**Kashif Fayaz son of Fayazuddin Arain, through Mr. Atta Hussain Chandion, Advocate.**
Date of Hearing	**21.12.2023**
Date of Judgment	**25.01.2024**

JUDGMENT

KHADIM HUSSAIN SOOMORO, J:- Through this Appeal under section 96 Code of Civil Procedure 1908 **(C.P.C.),** the appellant/defendant impugned judgment and decree dated 20.10.2023, passed by the learned Additional District Judge, Ratodero in Summary Suit No.04 of 2023 Re-Kashif Fayaz Vs. Muhammad Tasleem Arain, whereby the suit of the plaintiff/respondent was decreed ex-parte.

2. Precisely facts of the case are that the plaintiff/respondent filed a suit under Order XXXVII Rule 2 C.P.C. against the appellant/defendant averred there in that the defendant/appellant received an amount of Rs.70,00,000/- [in words Rupees Seven hundred thousand] **(amount in question)** for investment in purchasing plots, as the respondent in dire need of the amount which was required to him to arrange the marriage ceremony for his brother, therefore, he demanded the return of his amount from the appellant who for the repayment of the amount in question issued a cheque No.D-83384537 dated 19.12.2020, amounting to rupees 55,00,000/ drawn to Meezan Bank Shikarpur Branch, which was dishonoured on its presentation. The

plaintiff/respondent asserted in the plaint that the appellant sought an extension of time for the repayment of the remaining amount of 1700,000/ in the presence of the witnesses. However, the requisite payment was not paid to the respondent; consequently, he registered an F.I.R. against the defendant/appellant; after usual investigation, the case came up for a trial to the learned 1st Judicial Magistrate, Ratodero who, after that full dressed trial, awarded the conviction and sentenced to him vide judgement dated 21.02.2023. The plaintiff /respondent further stated that the appellant had issued a false cheque to him that was not honoured. Hence, he committed fraud with him, resulting in financial and mental harm to him. Consequently, he claimed that the appellant is liable to pay amount in question, along with a 20% annual markup, calculated from the date of the dishonouring of the cheque. Hence, the plaintiff/respondent filed a suit with the following prayers:-

> a). That this Hon'ble Court may be pleased to pass Judgment and decree against the defendant to pay the sum of Rs.55,00,000/- to the plaintiff along with pendent lite and future interest at the rate of 20% per annum, since 31.12.2020, till the realization of the decree.
> b). Award cost of the suit in favour of the plaintiff.
> c). Any other relief.

3. In the wake of the institution of the suit, the notice was issued upon the defendant/appellant on the address specified in the title page of the plaint, who appeared before the learned trial Court on 07.04.2023 and moved an application for time to engage a counsel and claimed the copy of the plaint which was allowed, and the matter was fixed on 11.04.2023, on that date the defendant/appellant could not file leave to defend. Consequently, the learned trial Court passed an ex-parte order on 11.04.2023.

4. The plaintiff/respondent, in order to establish his case, first examined himself Ex.01; he produced various documents, including an affidavit in evidence as Ex.01/A, a copy of a cheque amounting to rupees Rs.55,00,000/- along with a memo issued by a concerned bank as Ex.01/B, C.T.C. of an order passed by the learned Additional Sessions Judge/EX-Officio Justice of Peace, Larakna as Ex.01/C, C.T.C, copy of Judgment passed by learned 1st Judicial Magistrate Ratodero in Criminal Case No.43/2021, RE-State Versus Muhammad Tasleem as Ex.01/D, C.T.C. of Judgment passed by the trial Court in Criminal Appeal No.01/2023, RE-Muhammad Tasleem Versus the State as Ex.01/E, C.T.C. of verification of cheque and return memo issued by Meezan Bank Shikarpur **(branch**) as Ex.01/F. The learned trial Court, after hearing the counsel for the parties, decreed the suit of the plaintiff/respondent as cited above.

5. The learned counsel for the appellant/defendant submits that the impugned Judgment was passed in violation of the rights guaranteed under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973. The counsel states that the trial Court passed the ex-party order without providing opportunities for filing the leave to defend. He further states that the defendant/appellant appeared before the learned trial Court on 07.04.2023 and moved an application for adjournment with a specific prayer that the plaintiff/respondent had not supplied the memo of plaint; hence, he could prepare his defence, but neither the required memo of plaint nor annexures had been supplied to the appellant/defendant. The counsel argued that the procedural law provides 10 days' time for filing of leave to defend, but the learned trial Court passed the ex-part order within four (04) days, which was not in accordance with the law. He further argued that the ex-parte evidence was recorded by the trial Court without adhering to the

procedures outlined in section 19 of the Code of Civil Procedure 1908. Furthermore, it is argued that the defendant/appellant was not afforded the opportunity for cross-examination. He lastly argued that the counsel who appeared on behalf of the defendant/appellant before the trial Court filed a statement dated 11.04.2023 demonstrating that the defendant/appellant had filed a Transfer Application before the learned District Judge, Larkana, which was subsequently dismissed. The counsel argued that though he had shown his complete dissatisfaction and lack of faith in the Presiding Officer of the trial Court on the ground that the same judge who had decided a criminal appeal on the same cheque while exercising the Criminal Appellate Jurisdiction and dismissed the Appeal of the appellant. While concluding his arguments, the counsel requested that the matter be remanded to the learned trial Court to decide the same after allowing the appellant/defendant to file his leave to defend and provide a proper opportunity to lead the evidence.

6. The learned counsel for the plaintiff/respondent submits that notice was issued at the address of the defendant/appellant specified on the title page of the plaint, and he duly received the summons but failed to appear before the learned trial court. The counsel further submits that apart from the personal Service, a notice was also issued through T.C.S; however, the learned trial Court took extraordinary efforts to serve the notice upon the appellant and issued a Production Order **(P.O)** of the appellant/defendant to Jail Superintendent District Prison and Correctional Facility, Larkana. However, on 29.03.2023, one Huazaifa Arain appeared and submitted an application for an excuse for the absence of the defendant/appellant, meaning the appellant was aware of the pendency of the suit before the trial court. He submits that the defendant/appellant was properly served with the notice and was supplied the copy plaint, but he did not file leave to

defend. He further submits that the defendant/appellant, instead of filing an application under order 37 rule 4 C.P.C. before the trial court, has preferred instant Appeal, which is not maintainable and is liable to be dismissed.

7. Heard learned counsel for the parties and perused the material available on record. Regarding the grounds asserted by both counsels concerned with the procedural law, which deals with Service of notice, it is essential to examine whether the learned trial court adopted the correct procedure for Service. Was the appellant supplied a copy of the plaint along with the annexure or not?

8. The record reflects that the plaint was presented on 28.02.2023, and notice was issued to the appellant. The case diary reveals that on 18.03.2023, the counsel for the respondent filed a statement and informed the trial court that the appellant was confined in District Prison and Correctional Facility Larkana, on which Production Order (P.O) was issued and the matter was fixed on 27.03.2023, but the respondent was called absent, however, again the P.O was issued to procure the attendance of the appellant, for 29.03.2023, but again he called absent, however, one Huzifa Arain appeared to move an application to excuse the absence of the appellant. There is nothing on the record to establish who he was? the entire record is silent in this regard. When a defendant is admittedly incarcerated, procedural law outlines a specific procedure for serving notices to the imprisoned defendant. The Rule 24 Order V of C.P.C 1908 provides ways and means of Service on a defendant in prison. The relevant rule is reproduced as under:-

> "Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant".

9. The record does not demonstrate that the trial court adopted the correct procedure, as provided by the aforementioned rule. Moreover, no bailiff report is available on the record confirming the Service of notice to the appellant. Furthermore, the Record and Procedure **(R & P)** do not reveal that the order of Service held good was passed against the appellant, with the help of which time could be calculated to justify the ex-parte order passed by the trial court. However, the case diary shows that on 04.04.2023, the appellant appeared in person and moved an application with a supporting affidavit and sought time to engage a counsel and a request was also made for the supply of a memo of the plaint that application was allowed. Had the appellant either been served the notice or provided a copy of the memo of plaint, the trial court could have passed an order to effect, but the trial court allowed his application and fixed the matter on 11.04.2023, in the wake of seven days. Consequently, an exparte order was passed with directions to the respondent to file an affidavit in evidence. Consequently, the computation of the limitation period under Article 159 does not arise. In this regard, I am fortified by the dictum laid down in PLD 1984 Karachi 252 (supra), wherein it has been held as follows:--

> "The Service can be said to have been effected only if it effectively brings the claim to the knowledge of the defendant. In a suit under Order XXXVII, C.P.C. prescribed summons with the copy of the plaint should be issued otherwise the defendant will not be able to know the nature of the suit and claim involved in it and may not move the machinery expeditiously for obtaining leave to appear and defend the suit. In the present case as the summons was not accompanied with the plaint there could not be a proper service on the appellant and, therefore, the question of computing the period of limitation under Article 159 did not arise".

10. After the ex-parte order, the respondent filed an affidavit in evidence, and the same was brought on the record without an order passed Rule 1 of Order 19 C.P.C. No doubt affidavit in evidence is permissible either there is

an order as provided in the rule 1 or parties agreed to such procedure. In this regard, neither a specific order nor parties had agreed to such a procedure. Furthermore, the record reveals that the appellant was not provided with the opportunity for cross-examination. It is a settled principle of law; even during the ex parte proceedings, the defendant preserves the right to participate in the ongoing proceedings and join in the suit if a final decree has not been passed. However, the right of cross-examination was denied. Refuting this opportunity to the appellant is deemed a materially illegal act, resulting in a miscarriage of justice. Reliance is placed upon Ch. Mazhar Ali v. Deputy Commissioner Islamabad and another (1992 MLD 116), Messrs Landhi Industrial Trading Estates Ltd., Karachi v. Government of West Pakistan through Excise and Taxation Officer, "N" Division, Karachi (1970 SCMR 251), Mst. Bilqees Begum v. Syed Ali Turab and others 1980 CLC 930; Aziz Ullah Khan and 4 others v. Arshad Hussain and 2 others (PLD 1975 Lah. 879), Habib Ismail Bajwa v. Khawaja Ghulam Mohy-Ud-Din (PLD 1970 Lah. 428) and Snagram Singh v. Election Tribunal, Kotah and another (A.I.R. 1955 SC 425).

11. The procedural law guarantees that legal proceedings are conducted in a fair and just manner. It establishes standards for legal proceedings and is designed to maintain the concept of due process, which guarantees that individuals receive just treatment and a fair opportunity of hearing before a court. This includes an entire course in procedural proceedings, from presenting the plaint, submitting a written statement, framing the issues, producing the documents, leading evidence and equal opportunity of hearing. Noncompliance with procedural law can result in the denial of due process. Due process is not merely a procedural formality but a fundamental right that guarantees persons are treated fairly in accordance with the law and have a fair opportunity of hearing in a legal proceeding. Ignoring those

rules may result in a violation of fundamental rights. The legislature enacted the procedural law on the sound principle of justice. Noncompliance with these rules can lead to disorder, confusion, and inefficiency in the administration of justice.

12. In the case of Imtiaz Ahmed v. Ghulam Ali (PLD 1963 SC 382), the apex court observes that the principal aims and objectives of the procedural law and rules made there under are to expedite the justice system rather than hindered. The evasion of technicalities is encouraged unless their compliance is obligatory for public policy reasons. Although our legal system is based on the English system, we are not obligated to replicate its shortcomings despite its technical characteristics. A system that prioritizes form over substance, resulting in the frustration of substantive rights, is considered defective to that extent. In this context, Mr. Justice B.Z. Kaikaus, while dissenting with the majority view of the case, opined as under:--

> "I think the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy (emphasis supplied). The English system of administration of justice on which our own is based may be to certain extent technical but we are not to take from that system its defects. Any system, which by giving effect to the form and not to the substance defeats substantive rights, is defective to that extent. The ideal must always be a system that gives to every person what is his."

13. In the light of the above facts and circumstances, the case law discussed above, the impugned Judgment and decree 20.10.2023, passed by Additional District Judge Ratodero, is not sustainable in the eyes of the law hence the same are set aside. The matter is remanded back to trial Court. The learned District Judge Larkana is directed to withdraw the suit from the court of Additional District Judge Ratodero and either to keep this suit on his

own board or entrust it to any other Additional District Court having jurisdiction for its disposal according to law within three months preferably after receipt of this order. The appellant is directed to appear before District Judge Larkana on 06.02.2023 and file leave to defend, which will be decided on its merits.

14. The Appeal stands disposed of in the above terms with no order as to costs.

JUDGE

Manthar Brohi