

IN THE HIGH COURT OF SINDH, KARACHI
First Appeal Nos.93 and 94 of 2022
First Appeal No.08 of 2023
[Muhammad Muzammil v. Umar Farooq Khan Durrani & others]

Present:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Muhammad Osman Ali Hadi

28.03.2025.

Sardar Sher Afzal Khan, advocate for appellant in all appeals.
Sardar Abdul Hameed, advocate for respondents.

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MUHAMMAD IQBAL KALHORO J: Respondent filed Summary Suits No.31 and 61 of 2022 against appellant for recovery of Rs.80,00,000/- (Eighty Lacs) in the Court of 9th Additional District Judge, Karachi-East stating that he and appellant were close friends. The appellant was proprietor of Hajwari Textile but on account of Covid sustained losses in business, hence he approached him for a loan and he gave him a loan of Rs.80,00,000/- against certain assurances to return the amount within stipulated time. When, the appellant did not return the amount, he approached him and in return he gave him two postdated cheques amounting to Rs.80,00,000/- which on presentation in the bank were dishonored. His efforts to persuade appellant to return the amount went in vain. Hence he filed the suits.

2. The summons were issued against appellant and despite service he failed to appear; hence substitute service by means of publication in a newspaper was adopted. Yet, when the appellant did not appear in the Court to contest the matter, he was declared ex-parte and respondent was examined on oath. He filed his affidavit along with all necessary documents to prove his claim which went un-rebutted. Hence, the suits were decreed vide judgment and decree dated 31.05.2022.

3. The appellant after gaining knowledge of such judgment and decree, filed an applications under Order IX Rule 13 CPC for setting aside the ex-parte judgment which has been dismissed by the impugned orders. Hence these appeals.

4. Learned counsel for appellant has argued that appellant at the time of filing of the suits, judgments and decrees was not in the country; he was not properly served, hence the ex-parte judgments and decrees are bad in law and dismissal of his applications for setting aside the ex-parte judgments and decrees is not sustainable because the suits have been allowed on technicalities rather than on merits.

5. Learned counsel for respondent has opposed these pleas and has further submitted that even the execution applications have been allowed and only remedy, if any, to the appellant is under Order 37 Rule 4 CPC.

6. We have heard learned counsel for the parties and perused the judgments decreeing the suits ex-parte and the orders dismissing the applications under Order IX Rule 13 CPC for setting aside the judgments and decrees. We find no illegality in both the judgments of the Court as despite service held good on the appellant, when he did not turn up in the Court, the substitute service by means of publication was resorted to, yet he failed to respond and appear in the Court. The substitute service by means of publication in newspaper is always held to be good in law and if the defendant does not appear in response to such mode of service, he is held to have been validly served and the matter is proceeded in his absence. Until and unless he subsequently appears and shows reasonable and valid grounds that in fact even that mode of service was not validly adopted for service upon him. Or by presenting evidences, establishes that in spite of such mode, the service could not be made, and he could not come to know of the suits pending in the Court .

7. In the present case, learned counsel for appellant has pleaded that appellant was out of the country but in this regard he has not submitted any valid documentary proof to convince the Court. That said, before the trial Court such plea was not taken and only in these appeals he has referred to such ground. It is a well settled proposition of law that if any ground is available, but the party has not taken it up before the Court of first instance, the same cannot be resorted to in the subsequent proceedings including the appeal, for such ground would be deemed to have been waived.

8. The trial Court while dismissing the application has discussed in detail mode of service adopted for service upon the defendant, his failure to appear before the Court in response thereof to contest the matter.

9. We, therefore, do not find any illegality or error in the impugned orders to justify its reversal in these appeals. Consequently, we find these appeals to be without any merit, and accordingly dismiss them along with pending applications. Notwithstanding, the appellant would be still at liberty to move a proper application including but not limited to application under Order 37 Rule 4 CPC, if the law allows him, before the Executing Court, however, subject to all exceptions for a decision in accordance with law.

These appeals are dismissed in above terms along with pending applications.

JUDGE

JUDGE

HANIF