

Order Sheet

IN THE HIGH COURT OF SINDH, KARACHI

Ist Civil Appeal No.27 of 2024
[Abdul Rauf vs. Muhammad Ramzan]

Date	Order with signature of Judge(s)
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PRESENT:
Mr. Justice Zafar Ahmed Rajput
Mr. Justice Arshad Hussain Khan

Appellant	Through M/s Abdul Hafeez and Allah Ditta, Advocates
Respondent	Through M/s. Muhammad Amin Motiwala and Muhammad Yahya, Advocates
Date of Hearing:	13.01.2025
Date of Decision	13.01.2025

JUDGMENT

ARSHAD HUSSAIN KHAN, J: The appellant through this appeal has called in question the judgment and decree dated 30.01.2024, passed by the learned Additional District & Sessions Judge-VII ,Karachi-Malir in Summary Suit No.10/2022 whereby the said suit was decreed.

2. Precisely, the facts giving rise to the present Appeal are that the respondent / plaintiff filed a summary suit No. 10/2022 before learned Additional District and Sessions Judge-VII, Karachi-Malir, against the present appellant/defendant for recovery of the amount Rs. 1,41,64,000/- with bank interest on the basis of cheque bearing No.137609771 dated 20.06.2021 of Habib Metro Politan Bank Limited, PECHS Block-6 Branch, Karachi, allegedly issued by the appellant/defendant Abdul Rauf, against payment of loan/outstanding, which was dishonored on presentation before the concerned Bank.

3. Before the trial court, notice was served upon the appellant/defendant on 28.04.2022. However, the appellant / defendant filed application for leave to appear and defend on 25.08.2022 after an inordinate delay of about four (04) months for which no reason was given and no application was filed for

condonation of such delay. Keeping in view the said position, the application for leave to appear and defend was dismissed by the trial court through order dated 27.05.2023 and the matter was fixed for ex-parte proof. Thereafter, the aforesaid suit was decreed only to the extent of Rs.81,64,000/- by the trial court vide the impugned judgment and decree.

4. Learned counsel for the appellant / defendant, during the course of arguments, has contended that the impugned order is not sustainable as the same is bad on facts and law both as the learned trial judge while dismissing the leave to appear and defend application has failed to apply his judicious mind as the appellant/defendant was in jail custody in Cr. Case No.934/2022 of FIR No.19/2022 under Section 489-F PPC and he was not in the knowledge about the pendency of the summary trial; and the court has every power to condone such a delay. He has further contended that the respondent / plaintiff has no legal character, right and interest to file the aforesaid suit as he has failed to prove that he had paid any amount to the appellant/defendant against which such cheque was issued to him. He has argued that the trial court has also failed to consider that on 8.11.2022, the appellant/defendant was acquitted of the charge by the trial court in the said criminal case but such evidence / acquittal has not been considered by the trial court while passing the impugned judgment and decree. It is also contended that the suit was filed with malafide intention and with unclean hands, as such the suit was liable to be dismissed instead decreed. Lastly, he has argued that the impugned order is totally against the provisions of law and the same is liable to be set aside.

5. On the contrary, learned counsel appearing on behalf of the respondent / plaintiff, during the course of arguments, while supporting the impugned order submits that the appellant / defendant despite having received the notice of the case did not file leave to defend application within the prescribed time and further he has also failed to file any application for condonation of delay in respect of the application for leave to defend. Learned counsel further argued that the plaintiff has recorded his evidence wherein the issuance of cheque by the appellant/defendant was not disputed by the counsel

for the appellant/defendant in his cross-examination, therefore, the issuance of cheque against the outstanding amount has been admitted, as such the respondent/plaintiff is entitled for the relief claimed for. He has contended that the impugned order is well within the four corners of law and equity, hence does not warrant any interference by this Court in the present appeal.

6. Heard the arguments of the learned counsel for the parties and perused the material available on the record.

Indeed the proceedings under Order XXXVII rule 2 and 3 C.P.C. are summary in nature and where the defendant does not submit an application for leave to appear and defend within the statutory period of 10 days, as envisaged by Article 159 of the Limitation Act from the date of service, the allegations in the plaint shall be deemed to have been admitted and the suit so instituted shall be decreed. We are also aware of the fact that at the same time the court ceased of the matter is not relieved of the responsibility to see and ensure before decreeing the suit that the person proceeded against was not only served but was also made to understand the nature of the proceedings. It may be observed that the Legislature in its wisdom prescribed a form for the plaint and a form for the summons to be served on the defendant of such proceedings.

7. From perusal of the record, it appears that before the trial court the appellant/defendant despite having received the notice did not file his application for leave to appear and defend within the time, but filed the same on 25.08.2022, after expiry of the prescribed period of limitation. Thus, defendant's application for leave to appear and defend was miserably barred by time. Moreover, appellant/defendant despite having knowledge of the delay, did not file any application for condonation of delay. Thus, the appellant's time barred application for leave to appear and defend cannot be entertained in any case. The Hon'ble Supreme Court in the case of Messers Qureshi Salt & Spices Industries, Khushab and another v. Muslim Commercial Bank Limited, through President, and 3 others, [1999 SCMR 2353], while dealing with the issue of non-filing of application within the prescribed period of limitation

and condonation of delay, inter alia, held that the delay under Section 5 of the Limitation Act cannot be condoned without an application as the delay of each day is to be explained before a court, which can condone the delay, and therefore, the same cannot be done unless an application stating a sufficient reason for condonation is made. In another case of Shahid Pervaiz alias Shahid Hameed v. Muhammad Ahmad Ameen [2006 SCMR 631], it was held by the Hon'ble Supreme Court that it is a settled principle of law that valuable right accrues to the other side by lapse of time and each day's delay has to be satisfactorily explained.

8. It is now also well settled law that when a defendant fails to appear or fails to obtain a leave to appear and defend, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree. In such an event, the court shall pass a decree in favour of the plaintiff against the defendant. Reliance in this regard can be placed on the cases of *Haji Ali Khan & Company, Abbottabad and 8 others v. M/s. Allied Bank of Pakistan Limited, Abbottabad*, [PLD 1995 SC 362], *Naeem Iqbal v. Mst. Zarina* [1996 SCMR 1530] and *Col. (Retd.) Ashfaq Ahmed and others v. Sh. Muhammad Wasim* [1999 SCMR 2832].

9. Insofar as the contention of learned counsel for the appellant /defendant that the respondent/plaintiff has failed to prove that he had paid any amount / loan to the appellant / defendant against which the said cheque was issued to him is concerned, in the instant case the appellant / defendant has not denied his signature on the cheque nor such question was raised by the appellant / defendant's counsel in the cross- examination of the respondent / plaintiff's witness. As such the burden of proof is on the appellant / defendant to rebut the presumption under Section 118 of the Negotiable Instruments Act, 1881, to prove that the cheque was issued without consideration, but in the instant case, he failed to prove it.

10. From perusal of the evidence, it transpires that the respondent /plaintiff successfully proved that the cheque was issued by the appellant / defendant in the account, being maintained by the appellant at Habib Metro Politan Bank Limited, PECHS Block-6

Branch, Karachi, which upon presentation was dishonoured. The said cheque and the dishonoured slip were produced before the trial court as such the respondent/plaintiff is entitled for recovery of the amount mentioned in the cheque. Record also shows that the trial court has passed the impugned judgment after evaluating the facts as well as the material available on the record and the judgment is based on the sound reasonings.

11. In view of the above facts and circumstances, we do not find any merit in the present appeal as such the impugned order does not call for any interference by this Court; hence the appeal was dismissed by our short dated 13.01.2025, these are the reasons for the same.

JUDGE

JUDGE

*Jamil**