

2010 C L D 1014

[Lahore]

Before Nasir Saeed Sheikh and Mian Shahid Iqbal, JJ

NASCO PACKAGING (PVT.) LTD. and others---Appellant

Versus

Sheikh INAM-UL-HAQ and another---Respondents

Regular First Appeal No.154 of 2007, heard on 25th June, 2010.

(a) Civil Procedure Code (V of 1908)---

---O.IX, Rr.6, 13 & O.XXXVII, Rr.2, 3---Qanun-e-Shahadat (10 of 1984), Art.133---Suit for recovery of money on basis of cheque---Report of Process Server showing service of summons upon a person alleged to be Incharge of defendant's factory---Initiation of ex parte proceedings against defendant on basis of such report---Application for setting aside order of ex parte proceedings on ground that said person was neither employee of defendant nor was he authorized to receive summons, thus, service upon defendant could not be deemed to have been lawfully effected---Rejection of such application and passing of decree by Trial Court after recording plaintiffs evidence without allowing defendant to cross-examine plaintiffs witnesses---Validity---Defendant had right to be treated in accordance with law and could avail opportunity to defend suit instituted against him---Nothing was available on record to show as to how such person was believed to be Incharge of defendant company---Report of Process Server did not show parentage or Identity Card number of such person---Defendant had specifically denied his connection with such person, thus, Trial Court was duty bound to frame issue on such point and allow him to lead evidence thereon---Order of ex parte proceedings was not legally sustainable---Defendant despite having been proceeded ex parte could still join proceedings of pending suit and cross-examine witnesses produced by plaintiff in ex parte evidence---Denial of opportunity to defendant to cross-examine plaintiffs witnesses was illegal, which had resulted into miscarriage of justice---High Court set aside impugned judgment/decree while directing Trial Court to frame issue on such application and decide same after recording evidence.

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. Bilgees 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 AIR 1955 SC 425 rel.

(b) Civil Procedure Code (V of 1908)---

----O.IX, R.6---9anun-e-Shahadat (10 of 1984), Art.133---Order of ex parte proceedings against defendant---Effect---Defendant could join proceedings of pending suit and cross-examine witnesses produced by plaintiff in ex parte evidence---Denial of opportunity to defendant to cross-examine plaintiffs witnesses would be illegal resulting into miscarriage of justice.

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 AIR 1955 SC 425 rel.

Jahangir A. Jhojha for Appellant.

Sh. Zulfiqar Haider Mankee for Respondents.

JUDGMENT

NASIR SAEED SHEIKH, J.---This R.F.A. is directed against the judgment and decree dated 20-9-2006 passed by learned Additional District Judge, Lahore against the appellant under provisions of Order XXXVII, rule 1 and 2 of C.P.C.

2. Briefly stating the facts of the case are that the respondent No.1 Sheikh Inaam-ul-Haq instituted a suit against the appellant and the respondent No.2 under Order XXXVII, rule 1 and 2 of C.P.C. for the recovery of sum of Rs.20,00000 on the basis of cheque dated 25-2-2005 drawn upon United Bank Limited. This cheque is attributed to respondent No.2. This suit was instituted on 8-6-2005. Notices under Order XXXVII, rule 1 and 2 of C.P.C. were directed to be issued by the learned Additional District Judge. In pursuance to the order dated 10-6-2005, notices were issued against the defendants of the suit including the present appellant and the notice was stated to have been served upon the appellant through one Iftikhar Hussain on 11-6-2005. The process server reported that the service has been effected through said Iftikhar Hussain upon the appellant. Acting upon the said report of Process Server, the learned Additional District Judge directed vide order dated 14-7-2005, the ex parte proceedings against the defendants of the suit. It shall be important to submit that from 10-6-2005 to 14-7-2005, there were three dates of hearing on which dates the learned Presiding Officer was on leave. The appellant moved an application dated 29-10-2005 before the learned Additional District Judge for setting aside ex parte proceedings. It was contended in paragraph No.3 of the application that Iftikhar Hussain mentioned in the report of Process Server is neither an employee of the defendant No.1 nor was authorized to receive such like summons, therefore, the service upon the appellant cannot be deemed to have been lawfully effected. Learned Additional District Judge vide order dated 9-5-2006 rejected this application by holding that the notices issued to the defendant/applicant has been served upon the incharge of the factory namely Iftikhar Hussain, therefore, application moved by the appellant for setting aside ex parte proceedings is barred by time. The learned Additional District Judge after passing of the said order recorded the ex parte evidence of the respondent No.1 on 5-9-2006 and vide judgment and decree dated 20-9-2006 passed a decree for

recovery of Rs.20,00000 against the appellant. It is important to submit that the appellant also moved an application dated 12-7-2006 seeking an opportunity for cross-examining the witnesses produced by the respondent No. 1 before the learned Additional District Judge and the learned Additional District Judge rejected this application vide order dated 17-7-2006. Against the judgment and decree dated 20-9-2006, the instant R.F.A. was instituted.

3. It is contended by the learned counsel for the appellant that the learned Additional District Judge has acted illegally by holding that the service upon the appellant was effected through Iftikhar Hussain, incharge of the company. The learned counsel contended that it was specifically raised in the application moved by the appellant that said Iftikhar Hussain is neither the employee of the appellant nor has any authority to receive any notice and that the report of the Process Server dated 11-6-2005 on the summons/notices issued by the learned Additional District Judge is a fictitious report and that the appellant has the right of an opportunity to establish the fact that said Iftikhar Hussain was not at employee of the appellant's company. The learned counsel argued that the opportunity was denied by the learned Additional District Judge and therefore, judgment and decree was passed.

4. It is further argued that even if ex parte proceedings was initiated against defendant in the suit still if an application is moved seeking a permission for cross-examining the witnesses, the defendant has the right to be allowed the said opportunity because the defendant against whom ex parte proceedings are directed, can join proceedings at any time. According to the learned counsel for the appellant, this denial of opportunity for cross-examining the appellant through order dated 17-7-2006 has also material and prejudicially affected the cause of justice in the instant case.

5. Learned counsel for the respondent No.1 has controverted the arguments of the learned counsel for the appellant by arguing that in paragraph No.2 of the application, the appellant has specifically stated that the information has been received by the defendant No.1 through his Chief Executive Muhammad Azhar Butt on 27-10-2005, therefore, it means that the appellant has come to know about the institution of the suit through Mr. Muhammad Azhar Butt, Chief Executive of the Company. The learned counsel then argued that the person against whom the ex parte proceedings are directed and whose application for leave to appear and defend is rejected has no right of cross-examination, therefore, the learned Additional District Judge rightly rejected the application vide order dated 17-7-2006 moved by the appellant seeking an opportunity to cross-examine the witness of the respondent No. 1.

6. It is further argued by the learned counsel for the respondent No.1 that the appellant has no case on merit because the cheque which is the basis of the institution of the suit in question has not been denied by the appellant, therefore, the judgment and decree has rightly been passed by the learned Additional District Judge.

7. We have considered the arguments of learned counsel for the parties and have perused the record.

8. The appellant was defendant No.1 in the suit and has the right to be treated in accordance with law and can avail the lawful opportunity to defend the suit which has been instituted against him.

The ex parte proceedings were ordered against the appellant on the basis of the report of Process Server wherein one Iftikhar Hussain has been served upon as an incharge of the respondent but there is no proof of the fact as to how Iftikhar Hussain has been believed by the Additional District Judge in that context. There is no identity card number of Iftikhar Hussain noted nor his parentage is given in the report of Process Server. The plea has been raised by the appellant specifically denying the connection of the said Iftikhar Hussain with appellant company. It was thus necessary for Additional District Judge to frame the issue on this point and allow an opportunity to the appellant to bring the fact that said Iftikhar Hussain has no relation with the appellant company and therefore, the passing of ex parte proceedings order against the appellant is not legally sustainable.

9. We have asked the learned counsel for the respondent that is there any material on the file to establish that Iftikhar Hussain is the incharge of the company. The learned counsel for the respondent could not refer to any such document as a proof of the said fact. We also observe that even if defendant of a suit has been proceeded against ex parte still he can join the proceedings of the suit if the decree has not been passed and the proceedings are pending, therefore, the appellant had the right to be granted an opportunity to cross-examine the witnesses which were produced by respondent No.1, ex parte in this case and the denial of this opportunity to the appellant by the learned Additional District Judge through order dated 17-7-2006 is also materially illegal act which has resulted into 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. Bilquees 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 (AIR 1955 SC 425).

10. We feel that the impugned judgment and decree is not sustainable in the eyes of law and is set aside. The case is sent back to the learned District Judge Lahore who shall frame the issues on the application moved by the appellant for setting aside of the ex parte proceedings and after recording the evidence shall decide the application in accordance with law. This is an old case, therefore, we direct the learned District Judge to decide the application within the period of three months. On 12-7-2010, the parties shall appear before District Judge Lahore without any further notice who shall proceed with the matter himself.

11. With the above-mentioned observation and direction, the instant R.F.A. stands disposed of without any order as to costs.

S.A.K./N-69/L

Order accordingly.