JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A No.48 of 2025

Adeel Nawaz
Vs.
Attiqur Rehman

Appellant by:	Malik Nasir Abbas Awan, Advocate.
Respondent:	Ex-parte.
Date of Hearing:	**24.03.2025.**

INAAM AMEEN MINHAS, J:- Through the instant appeal, the appellant has assailed the order dated 03.09.2024 **("Impugned Order")**, passed by the learned Additional District Judge (West), Islamabad **("Trial Court")**, whereby the application for leave to appear and defend the suit filed by the appellant was refused. The appellant has also assailed the judgment and decree dated 07.11.2024, passed by the learned Trial Court, whereby suit under Order XXXVII, Rule II, CPC for recovery of Rs.2,500,000/- filed by the respondent was decreed as ex parte.

2. Brief facts giving rise to the instant appeal are that the respondent filed a suit under Order XXXVII, Rule, II, CPC for recovery of Rs. 2,500,000/- against the appellant/defendant. The respondent/plaintiff stated that the appellant/defendant was running a mobile shop, who enticed him to invest amount in his business. After some time the appellant/defendant wound-up his business and rendition of the account was conducted between the appellant/defendant and respondent/plaintiff. As a result of the closure of his business, the

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appellant/defendant issued a cheque No. 2436781916, dated 04.04.2022 of Allied Bank for Rs. 2,500,000 in favour of the respondent/plaintiff, but the same was dishonoured on 25.04.2022. Thereafter, the appellant/defendant extended threats and on 21.10.2022 lodged FIR No. 631/22, u/s 489-F PPC at P.S. Shalimar, Islamabad against the appellant/defendant.

3. The appellant/defendant appeared before the Court and filed application for leave to appear and defend the suit challenging the respondent/plaintiff's claim of Rs. 2,500,000/- arising out from a cheque No. 2436781916, dated 04.04.2024 of Allied Bank, which was dishonored on 25.04.2022 on the grounds that the amount was given as an investment is incorrect; that the respondent/plaintiff has concealed material facts and acted with mala fide intent; that the suit lacks a required certificate and affidavit; that the respondent/plaintiff initially worked at the appellant/defendant's mobile shop, later invested Rs. 200,000/- on a profit-loss basis; that the respondent/plaintiff withdrew funds before business failure and misused pre-signed cheques; that two FIRs (one for Rs. 900,000/-, another for Rs. 2,500,000/-) and two civil suits were filed in different jurisdictions, indicating an attempt to harass the appellant/defendant; that the respondent/plaintiff has failed to establish any transaction proving a loan; that the cheques in question were allegedly taken from the shop and used to file false claims; that instead of filing a suit for the rendition of accounts, the respondent/plaintiff improperly pursued a recovery suit under Order XXXVII, Rule II, CPC; that the appellant/defendant seeks

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unconditional leave to appear and defend the suit as the case involves triable issues and lacks legal standing under Order VII, Rule 11, CPC.

4. The respondent/plaintiff contested the matter by filing reply to the application for leave to appear and defend the suit while raising the issue of limitation. It was averred that the application for leave to appear and defend the suit was hopelessly time-barred, having been filed beyond the prescribed period of ten (10) days; that execution of the cheque is admitted; that the respondent/plaintiff categorically denied the existence of any compromise concerning the subject cheque amounting to Rs. 2,500,000/- (Rupees Two Million Five Hundred Thousand only). Consequently, the respondent/plaintiff sought dismissal of the application for leave to appear and defend the suit.

5. Upon hearing the arguments of both the parties, the learned Trial Court dismissed the application for leave to appear and defend the suit through the Impugned Order on 03.09.2024. Thereafter, ex parte evidence of the respondent/plaintiff was recorded and after hearing the arguments, the learned Trial Court decreed the suit through the Impugned Judgment and Decree dated 07.11.2024, against which the present appeal has been preferred by the appellant/defendant.

6. Despite personal service, none appeared on behalf of the respondent, therefore, vide order dated 26.02.2025, he was proceeded against ex parte.

7. I have heard the ex parte arguments and perused the record.

8. From perusal of the record, it is evident that the summons was received by Hamza, the appellant’s younger brother on 01.04.2024. However, the appellant’s counsel filed the application for leave to

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appear and defend the suit on 15.04.2024, which was beyond the limitation period of 10 days as prescribed under Article 159 of the Limitation Act, 1908. In accordance with the legal provisions, the application should have been submitted by 11.04.2024, but the same was submitted with delay of four days.

9. The report of the Process Server recorded on the back of the summons dated 12.03.2024 received by younger brother of the appellant is reproduced as under:-

"گزارش ہے کہ درج سمن ہٰذا پتہ پر آیا۔ مسمی مذکورہ کی سبب ۔۔ دریافت کیا۔ بعداز دریافت مسمی مذکورہ کا چھوٹا بھائی حمزہ ملا، جسکو کہ پرت سمن وصول کروا کر پڑھایا اور سمجھایا۔ سمن کی تعمیل وکالتاً کروایا"

The above referred report indicates that only a copy of the summons was delivered to the appellant's younger brother. There is no conclusive evidence to suggest that the copy of the plaint was annexed with the summons and duly received by the appellant's younger brother. In a summary suit, it is a mandatory requirement that summons be served along with a copy of the plaint. In the absence of such compliance, proper service of summons cannot be presumed on the appellant. The limitation period stipulated under Article 159 of the Limitation Act, 1908, therefore, would not commence against the appellant as the summons was not served with copy of the plaint. Reliance is placed on ***Abdul Karim vs. Nazir Ahmed***, **(1998 PLD 163 Lahore).**

10. Similarly, the failure of the learned Trial Court to ensure that a copy of the plaint was annexed with the summons amounts to a violation of a mandatory provision. The imposition of an extreme penalty upon the appellant, by way of passing a decree on the basis of an unrebutted claim set forth in the plaint, contradicts the fundamental

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principles of justice and fair play. In this regard, reference is made to ***Abdul Ghaffoor vs. Ghulam Qadir***, **(1989 MLD 3954 Lahore)**.

11. When a law prescribes that a particular act should be performed in a specific manner, any deviation from that prescribed procedure renders the act legally untenable. In the present case, the suit is based on a negotiable instrument and the summons was to be issued in accordance with Forms 2 and 4 of Appendix-B of CPC. However, the record shows that the summons was not issued in the prescribed form. As such the service upon the appellant cannot be deemed proper and the limitation period for filing the application seeking leave to appear and defend the suit would commence only from the date when the appellant actually appeared before the learned Trial Court and filed such an application. Reliance is placed on ***Muhammad Ali Khalid vs. Muhammad Talha***, **(2024 CLC 1184 Lahore)**.

12. Since the summons served upon the appellant's younger brother was neither issued in the prescribed form nor accompanied by a copy of the plaint, it stands legally untenable, therefore, the period of limitation to file application for leave to appear and defend the suit commenced from the date on which the appellant first appeared before the learned Trial Court. Consequently, the findings of the learned Trial Court regarding the limitation period are legally unsustainable.

13. In view of the foregoing, the instant appeal is **allowed**. The Impugned Order as well as the Impugned Judgment and decree of the learned Trial Court are **set aside**. The matter is remanded to the learned Trial Court with the direction to decide the application for leave to

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appear and defend the suit strictly on its own merits and thereupon proceed with the suit in accordance with law.

(INAAM AMEEN MINHAS)
JUDGE

Announced in open Court on <u>09.04.2025</u>

JUDGE

R.Anjam.

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