

**Form No. HCJD/C-121**  
**ORDER SHEET**

**IN THE LAHORE HIGH COURT, LAHORE**  
**JUDICIAL DEPARTMENT**

Civil Revision No.276/2015

Haji Mehr Muhammad    Versus    Kamran Mukhtar Khan

S.No.of order/ Proceedings	Date of order/ Proceedings	Order with signature of Judge and that of the parties, where necessary.
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2.2.2015      Malik Shabbir Ahmad, Advocate for the petitioner.

This Civil Revision under Section 115 of Civil Procedure Code, 1908 is directed against order dated 21.1.2015 passed by learned Additional District Judge Lahore whereby respondent's application for leave to appear and defend the suit for recovery under Order XXXVII Rule 1 & 2 of the Code of Civil Procedure, 1908 has been allowed.

2.      It is argued by learned counsel for the petitioner that despite proclamation in the newspaper respondent failed to appear before the learned trial court and was proceeded ex-parte vide order dated 26.4.2014; that consequently on 6.5.2014 respondent through counsel lodged an application for setting aside the ex-parte order dated 26.4.2014 and further lodged an application on 13.6.2014 seeking leave to appear and defend the suit which is barred by limitation; that the learned trial court has miserably failed to appreciate this legal point and thus erred in law and facts while granting leave to appear and defend the suit through the impugned order dated 21.1.2015 which is untenable and liable to set aside.

3.      Arguments heard. Record perused.

4. Sub-rule (1) of Rule 2 of Order XXXVII of the Code of Civil Procedure, 1908 stipulates that all suits under the said provision be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No.4 in Appendix 'B'. It may be expedient to reproduce the Form No.4 *ibid* which reads below:-

*“To*

*(Name description and place of residence)*

*WHEREAS \_\_\_\_\_ has instituted a suit against you under Order XXXVII of the Code of Civil Procedure, 1908, for Rs. \_\_\_\_\_ balance of principal and interest due to him as the \_\_\_\_\_ of a \_\_\_\_\_ of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs. \_\_\_\_\_ and the sum of Rs. \_\_\_\_\_ for costs together with such interest, if any, from the date of the institution of the suit as the Court may order.*

*Leave to appear may be obtained on application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.*

*GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_.*

*Judge”*

5. Bare reading of the afore-quoted provision and contents of Form No.4 makes it crystal clear that the plaintiff as well as the court concerned are obliged to ensure that a copy of the plaint is annexed with the prescribed summons in order to enable the defendant to obtain leave to appear and defend the suit within

stipulated period of 10 days from the service of summons. Needless to say that Article 159 of the Limitation Act, 1908 furnishes 10 days' period of limitation for filing leave to appear and defend such suit and the time from such period will start when the summon is served.

6. In view of the above legal position, perusal of the record reveals that in this case respondent was not served upon through a prescribed summons rather a publication was issued against him for 26.4.2014 when he was proceeded against ex-parte. Consequently he lodged an application on 6.5.2014 seeking setting aside of the ex-parte order. On the said date i.e. 11.6.2014 learned counsel for the respondent while appearing before the learned trial court submitted that criminal case FIR No.608/2013 under Section 489-F PPC P.S. Factory Area Lahore was registered against the respondent and he remained in jail from 1.4.2014 to 26.5.2014 and in the meanwhile ex-parte proceedings were initiated against him on 26.4.2014 during the period of his detention in the jail. Faced with the situation learned counsel for the petitioner made a statement before the learned trial court that he has no objection on acceptance of application for setting aside the ex-parte proceedings subject to cost. Consequently learned trial court vide order dated 11.6.2014 accepted the respondent's application for setting aside the ex-parte proceedings dated 26.4.2014 subject to cost of Rs.1000/- and adjourned the case for 20.7.2014 for filing a petition for leave to appear and defend the suit.

7. It is obvious on the record that copy of the plaint was never served upon the respondent therefore respondent's application for leave to appear and defend the suit lodged on 13.6.2014 is not hit under Article 159 of the Limitation Act, 1908. Needless to say that penal provision can only be invoked when the summon was issued and served upon the defendant in accordance with law. When the law requires an act to be done in a particular manner it has to be done in that manner alone and such dictate of law could not be termed as a mere technicality. Reliance is made upon Muhammad Anwar and others v. Mst. Ilyas Begum and others (PLD 2013 SC 255). In the instant case neither the summon was served upon the respondent in a prescribed manner nor copy of the plaint was ever disbursed upon him therefore learned trial court has rightly granted the permission to the respondent for leave to appear and defend the suit in order to ensure safe administration of justice. I do not find any legal infirmity, irregularity or jurisdictional error in the impugned order.

8. For the above reasons this Civil Revision having no merit is dismissed in *limine*.

(ABDUS SATTAR ASGHAR)  
JUDGE

Approved for reporting.

JUDGE