JUDGMENT SHEET
THE HIGH COURT OF SINDH, CIRCUIT COURT, MIRPURKHAS

First Appeal No. S-31 of 2024
(Old Appeal No. S-13 of 2021; transferred from Hyderabad)

Appellant	:	Mst. Rehana Anjum through Mr. Vijesh Kumar, Advocate
Respondent	:	Usman, not represented despite notice
On Court Notice	:	Mr. Muhammad Sharif Solangi, Assistant Advocate General Sindh
Date of Hearing	:	01.09.2026
Date of Judgment	:	07.09.2026

JUDGMENT

Muhammad Humayon Khan, J.: The Appellant is the unsuccessful plaintiff of a summary suit under Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter the "CPC"), being Summary Suit No. 25 of 2020, for the recovery of a sum of Rs. 2,000,000/- (rupees twenty lac only) with markup from the Respondent. The suit was before the learned District Judge, Mirpurkhas.

2. She claims to have paid the amount to the Respondent for the purposes of investing in a joint plotting/property business against which the Respondent issued a Cheque No. 2752537 dated 28.08.2018 drawn on MCB Bank Limited, Grain Market Branch, Mirpurkhas. The cheque was deposited thrice but each time it was returned as dishonoured. In the plaint it is stated that the Bank Manager informed the Appellant that there were no funds in the account but it will be seen from the record that the return was due to the cheque being on an inactive account. The Appellant statedly lodged FIR No. 173 of 2018 against the Respondent and one other in which both have been convicted. (The plaint does not bear any judicial record of the proceedings in the said FIR (though the FIR is annexed), although with the appeal a copy of the certified copy of a judgment dated 25.09.2019 in Criminal case No. 124 of 2019 by the learned Judicial Magistrate, Mirpurkhas, has been attached at Annex G/1.) Her claim is that she repeatedly demanded the amount from the Respondent but he failed to pay it and as such she instituted the summary suit.

3. The Respondent seems to have joined the proceedings in the summary suit, but only for a limited time. He filed an application dated 26.08.2020 for leave to defend under rule 3 of Order XXXVII of the CPC (Exh-7) which was granted by Order dated 24.10.2020 (Exh-10) conditionally on furnishing a surety equivalent to the claimed sum of money within twenty days. The Respondent, however, chose to remain absent thereafter, and on 14.11.2020 (being after the date for fulfilment of the condition of leave) he was declared *ex parte* (Exh-10) and was called absent all subsequent dates. The Appellant therefore recorded *ex parte* evidence through an affidavit (Exh-13) and produced the original Cheque dated 28.08.2018 and return memo dated 29.08.2018 in her evidence (Exh-13/A and 13/B). She was however not cross-examined due to the Respondent and his counsel's absence. Her summary suit was dismissed by Judgment dated 12.02.2021 and Decree dated 15.02.2021, and against which this appeal, under section 96 of the CPC, has been filed.

4. The appeal was admitted on 16.04.2021 and thereafter taken up on numerous dates when the Respondent remained absent despite multiple notices during the many years of this appeal's pendency. Consequently, when the matter came up before me on 01.09.2026, I had heard Mr. Vijesh Kumar, the learned Counsel for the Appellant, and by means of my short order of the same date, reserved the matter. I may note that Mr. Muhammad Sharif Solangi, the learned Assistant Advocate General Sindh was kind enough to stand at the bar as his office was named in the cause list although the matter involved private interest only. He also very kindly assisted the court on the legal position.

5. Mr. Vijesh Kumar argued that the impugned Judgment and Decree are erroneous on facts and law and that the summary suit of the Appellant was liable to be decreed as prayed. He contended that the impugned Judgment has proceeded on an erroneous view of the law relating to summary suits and that the case of the Appellant had to be presumed as admitted as the Respondent had failed to fulfil the conditions of the leave granted to him. On this proposition, he referred to rule 2 of Order XXXVII of the CPC and section 118 of the Negotiable Instruments Act, 1881 (hereinafter the

"1881 Act"). He then referred to the learned Magistrate's Judgment dated 25.09.2019 (Annex G/1) according to which the Respondent has been convicted of fraud and dishonouring of cheque in the same subject matter and contended that the summary suit was essentially the same dispute in its civil form. Finally, he prayed for this appeal to be allowed and for the summary suit to be decreed.

6. I have heard Mr. Vijesh Kumar for the Appellant and have gone through the record of the case with his assistance. Being a first appeal under section 96 of the CPC, I have the advantage of the jurisdiction to undertake a full reappraisal of the facts and the law applied in the case. That being so, the following points fall for the determination of this appeal:

i) What is the legal effect of rule 2 of Order XXXVII of the CPC and section 118 of the 1881 Act?

ii) In light of their legal effect, whether the pleadings and evidence of the Appellant were sufficient for the suit to be decreed, and if so, whether the impugned Judgment and Decree are erroneous on facts and law?

iii) What should the decree be?

Point No. 1

7. The procedure followed in a summary suit is quite different from an ordinary suit due to the statutory requirement that the defendant must seek leave to appear and defend the suit. This is provided in rule 2(2) of Order XXXVII of the CPC. In rule 3(2) of Order XXXVII, it is then provided that leave may be unconditional, in which case the defendant will have the right to defend and appear without any condition, or conditional upon "such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit." It is well-established that, when leave is granted conditionally, it will only operate upon fulfilment of the condition so imposed and not otherwise. Consequently, where the condition for leave to defend is not fulfilled it would naturally be that no leave would exist and the right of the defendant to contest

would be extinguished on the same footing as it was before any conditional leave granting order was made.

8. Consequently, the statutory presumption under rule 2(2) of Order XXXVII of the CPC would come into effect, which in its relevant part, provides (emphasis added):

> (2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend; **and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted,** and the plaintiff shall be entitled to a decree---
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> (a) for the principal sum due on the instrument and for interest calculated in accordance with the provisions of section 79 or section 80, as the case may be, of the Negotiable Instruments Act, 1881, (XXVI of 1881) up to the date of the institution of the suit, or of the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit; and
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> (b) for such subsequent interest, if any, as the Court may order under section 34 of this Code; and
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> (c) for such sum for costs as may be prescribed.
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> Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way.

9. It will thus be seen that, in *Naeem Iqbal v Mst. Zarina* 1996 SCMR 1530, the Supreme Court held that, upon failure to obtain leave, the contents of the plaint would be deemed to be admitted by the effect of rule 2(2) of Order XXXVII and the plaintiff would be entitled to a decree. In that case, the defendant had, without obtaining leave, challenged the genuineness of the promissory note attributed to him, and it was observed that this defence could not be taken into consideration because the appropriate course was to obtain leave from the Court and to disprove the document thereafter, and no such course was adopted. It was observed as follows (emphasis added):

> “We have gone through the pronote and do not agree with the learned counsel for the petitioner that it is not covered by the definition of negotiable instrument as defined in the

> Negotiable Instruments Act. It is unfortunate that after being properly served with the process, the petitioner did not move an application under Rule 3 of Order XXXVII, C.P.C., **if a defendant after being served with summons of a summary suit, does not obtain leave to appear and defend the suit, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree. It was in pursuance of the aforesaid provisions that the suit was decreed in favour of the plaintiff on 20-1-1992.**"

10. In another case, *Haji Ali Khan & Company, Abbotabad v M/s Allied Bank of Pakistan Limited, Abbotabad* PLD 1995 SC 362, it was observed at para 10 that (emphasis added):

> "10. The ratio decidendi of the above-referred cases seems to be that if a defendant fails to appear or fails to obtain leave to defend the response to a summons served in Form No. 4 provided in Appendix B to the C.P.C. **or fails to fulfil the condition on which leave was granted** or where the Court refuses to grant leave, **the Court is to pass a decree. It may further be observed that in sub-rule (2) of Rule 2, C.P.C., it has been provided that if a defendant fails to appear or defaults in obtaining leave, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree**, but no such consequences are provided for in Rule 3 of the above Order in a case where the Court refuses to grant leave or the defendant fails to fulfil the condition on which leave was granted. **In our view, notwithstanding the above omission in Rule 3, the effect of refusal of the Court to grant leave or failure on the part of the defendant to comply with the condition of the leave, will be the same i.e. the defendant shall not be entitled to defend the suit on any ground and the Court would pass a decree in favour of the plaintiff. However, this does not necessarily mean that the Court is not required to apply its mind to the facts and the documents before it. Every Court is required to apply its mind before passing any order or judgment notwithstanding the factum that no person has appeared before it to oppose such an order or that the person who wanted to oppose was not allowed to oppose because he failed to fulfil the requirements of law.**"

11. Consequently, once the defendant fails to obtain leave or fails in fulfilling the condition of leave (thereby reverting to the same position as never having obtained one), there would be a deemed admission of the contents of the plaint by the defendant, and that being so, the Court will not bear the authority to dispute the pleaded background or allegations of the bargain resulting in the instrument against which recovery is sought. In my respectful understanding of *Haji Ali Khan & Company*, the Court will however not lose the authority to assess whether, on the pleadings as brought on the

record, and presuming them to be admitted, there is sufficient material to constitute the requisites under Order XXXVII of the CPC and the 1881 Act for a decree to be passed. If there is sufficient material, the Court will have to find that its authority to further go into the merits has ended and it will pass a decree. However, if there is no such material, the result would be a dismissal, but it would be so not because the case on facts has not been established. The Court is bound by the language of rule 2(2) of Order XXXVII. It would only be because there is no material that suffices legally, even after presuming the facts to be admitted, to make out a case for a decree. This, in my view, avoids the two extreme and improper positions, the first being that no leave means that the judge becomes a mere rubber stamp and the second that the judge must nonetheless conduct the very factual trial which the defendant lost the right to.

12. The next aspect to be considered is that, under section 118 of the 1881 Act, there are seven presumptions in respect of negotiable instruments (including, of course, cheques). For the present purposes the Court is concerned with the presumptions under section 118(a) which reads:

> "**118. Presumptions as to negotiable instruments. –** Until the contrary is proved, the following presumptions shall be made:
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> (a) **of consideration:** that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;"

It is clear from the words used ("until the contrary is proved") in section 118 that the presumptions to be made under the said provision are all rebuttable but the burden of proving the contrary is on the shoulders of the party denying the proposition in favour of the presumption, i.e. the defendant. Reference may be made to *Haji Karim and another v Zikar Abdullah* 1973 SCMR 100 and *Muhammad Azizur Rehman v Liaquat Ali* 2007 CLD 1605 and *Najaf Iqbal v Shahzad Rafique* 2020 SCMR 1621.

13. In *Muhammad Azizur Rehman*, five judges of the Supreme Court heard a direct appeal under Article 185(2) of the Constitution

of the Islamic Republic of Pakistan, 1973 arising out of proceedings in a summary suit on the basis of a promissory note for Rs. 600,000/-. The presumption under section 118(a) of the 1881 Act came into discussion and on which the following was held at para 6 (emphasis added):

> "6. The appellant denied the execution of promissory note or receipt in his written statement but in the cross-examination admitted that the pro note and the receipt were executed by him as a guarantee for business with respondent. According to section 118 of the Act, until the contrary is proved, the presumption shall be made that every negotiable instrument was made or drawn for consideration. The appellant has not been able to establish on record through independent and cogent evidence that consideration of the promissory note has not been received by him."

The Supreme Court there relied on *Muhammad Boota v Fiaz Ahmed* 1979 SCMR 465 and *Haji Karim*.

14. In *Haji Karim*, the case before the Supreme Court was in respect of a summary suit for the recovery of Rs. 50,000/- against promissory notes. The defendant had alleged that the promissory notes were managed, but he failed to deny his signatures on them and as such the Supreme Court held that the presumption under section 118(a) of the 1881 Act was not rebutted. The relevant portion of the judgment reads:

> "…Under section 118 of the Negotiable Instruments Act, 1881, there is an initial presumption that a negotiable instrument is made, drawn, accepted or endorsed for consideration. Although this presumption is a rebuttable presumption, yet the onus is on the person denying consideration to allege and prove the same. In the present state of the record, we are not at all able to say that the presumption attaching to the two promissory notes under section 118 aforesaid stands rebutted. In these circumstances, the High Court was clearly right in imposing terms on the two defendants."

15. In his judgment, the learned District Judge relied upon a case from the Lahore High Court, *Ghulam Murtaza v Muhammad Rafi* 2020 MLD 772, and in which the interpretation of section 118 of the 1881 Act is in rather odd terms. In para 6 of the judgment, as far as is relevant, the Lahore High Court has observed as follows:

> "…Whereas learned counsel for the appellant has relied on case reported as Asif Ali and 6 others v. Saeed Muhammad

> (2010 CLD 1301 (DB) wherein relying on the principle handed down in Salar Abdur Rauf v. Mst. Barkat Bibi (1973 SCMR 332) it has been held that under section 118 Act ibid, it is not a conclusive presumption of drawing consideration of negotiable instruction, rather it can be held to be rebuttable in nature and initial burden of proving the case i.e. Negotiable Instrument/cheque has been executed against consideration lies on the plaintiff."

16. In my respectful view the imposition of an initial burden on the plaintiff in the above terms is in clear conflict with the specific intent of section 118 of the 1881 Act as well as the above discussed cases of *Muhammad Azizur Rehman*, *Muhammad Boota* and *Haji Karim*. The learned Lahore High Court has relied on two cases to deliver its view on the imposition of initial burden, one from the Supreme Court and the other statedly from its own Divisional Bench. The Supreme Court case is *Salar Abdur Rauf v Mst. Barkat Bibi* 1973 SCMR 332. There, the Supreme Court reached its conclusion to decline the presumption under section 118 after the parties had recorded their evidence and the "petitioner having undertaken to show that the pro note was for consideration actually paid at the time of the execution of the pro note, but having failed to produce credit-worthy evidence in that behalf…" Their lordships referred to an Indian case, *Lai Gurwar Lai v Dau Dayal* AIR 1935 All. 509, and discussed it in the following manner (emphasis added):

> "In that case the defendant denied that he had executed any pro note in favour of the plaintiff. He also denied the passing of any consideration and pleaded that the document filed by the plaintiff had been obtained from him by practising fraud. It was held that **'where the Court has after a consideration of the entire evidence recorded a clear finding one way or the other, then the findings is based not on mere presumption but on the evidence**, and has to be accepted. The decree was proper and the plaintiff therefore could not be allowed to take advantage of the weakness in the defendant's evidence that the want of consideration had not been satisfactorily established, when his suit was professedly not based on the bond.'"

The Division Bench case is *Asif Ali and 6 others v Saeed Muhammad* 2009 CLD 1301 (not 2010 CLD 1301) which is on the same lines as above. Therefore, the findings of the learned Lahore High Court, it seems to me with all due respect, are in conflict with the five-member Bench judgment in *Muhammad Azizur Rehman* and therefore *per incuriam* as far as it reverses the burden and imposes and initial burden on the plaintiff. I therefore hold that the learned District Judge fell in error in applying this judgment to the case in ignorance of binding judgments from the Supreme Court.

17. For argument's sake, if it were to be stated or understood that the application of mind would be the same as giving the evidence a full appraisal, this would, in my view, not be consistent with the summary intent of Order XXXVII. It is well-established that redundancy cannot be attributed to the legislature. The Court must therefore look into the competing reading of the principle of exercising judicial mind, which could perhaps be framed as allowing a complete power to enter into factual appraisal despite the deemed admission, in this proper context. The flaw is obvious on the face of this reading, and it is that it renders a material part of rule 2(2) of Order XXXVII as meaningless and redundant as if it does not exist. In my view, this is not the proper approach.

Point No. 2

18. I now turn to the facts of the present case which do not require much to be discussed. The plea taken in the suit, which is taken as admitted, is that the Appellant had invested Rs. 2,000,000/- and against which the said cheque dated 28.08.2018 was issued by the Respondent drawn on MCB Bank Limited, Grain Market Branch, Mirpurkhas, Account No. 0589031601001857. For a moment, if I were to allow the Respondent his best case and to accept his plea that the cheque was lost and somehow found its way to the Appellant, it is not a reasonable conclusion, in the absence of any contrary material, it will be the most astonishing coincidence that the Respondent somehow lost his cheque which found its way to the Appellant and on which the Appellant turned up in court with a summary suit and an FIR against two persons. It is also unreasonable to believe that a person would leave blank cheques signed in their wallet and, once stolen, not make efforts for the cheques to be cancelled or stopped through the bank concerned.

19. The cheque was not dishonoured for handwriting defects or for stopped payments, but rather for the cheque being on an inactive or dormant account. The cheque was, by a legal presumption, for consideration, where the Respondent accepted Rs. 2,000,000/- for

some business investment from the Appellant against which the cheque was issued and when it was presented upon demand it was dishonoured. He did not deny his signatures but claimed that the cheque under his own signatures was somehow lost and which plea became unprovable and therefore beyond consideration. Upon its dishonour, the facts pleaded were sufficient for the Court to pass a decree and it did not have to inquire into the depths of the business transaction where the Respondent, being the person best placed to defend himself, had remained absent. There was a case which, once admitted as correct, did lead to sufficient material entitling the Appellant to a decree in terms of Order XXXVII of the CPC, and I therefore hold that the learned Court below fell in serious error in concluding otherwise.

20. The circumstances before the Supreme Court in *Najaf Iqbal*, cited above, were quite similar. The defendant had pleaded having lost the cheque on which the summary suit had been filed, but the signatures were not denied. The trial court dismissed the suit on somewhat similar grounds but the High Court reversed the decision and which was upheld by their lordships of the Supreme Court. At para 6, it was observed that (emphasis added):

> "6. **Presumptions mentioned in section 118 of the Negotiable Instruments Act (XXVI of 1881) are attached with a negotiable instrument unless proved contrary. In the instant case it is an admitted position that the cheque was of the account and cheque book of the appellant.** The case pleaded by him was that the cheque was dropped/lost, he reported the matter to the police through an application which is Ex.P.3…Neither it is the statement of PW-2 nor mentioned on memorandum of refusal of cheque that the cheque does not contain signatures of the appellant-defendant nor suggested in cross-examination to this witness that the cheque does not contain signatures of the defendant-appellant… **The reliance of learned counsel for the respondent on 'Rohitbai Jivanlal Patel v. State of Gujarat and another' (AIR 2019 Supreme Court 1876) and 'Uttam Ram v. Devindar Singh Hudan and another' (2019 (10) SCC 287) supports the version of the learned counsel for the plaintiff-respondent that the presumption was to be rebutted by the appellant and further that when the ground for dishonour of a cheque was 'insufficiency of funds' and 'stopped payment,' there can be no presumption that the cheque was not having signatures of the appellant…**"

Point No. 3/Conclusion

21. In view of my discussion above, I would allow the appeal and answer the points for determination in the following terms:

i) **Point No. 1**: As regards Order XXXVII Rule 2(2) of the CPC, I hold that:

(a) Once leave to defend is refused, or the defendant fails to fulfil its conditions and thereby reverts to the same position as being without any leave to defend, under Rule 2(2) the Court is bound to deem all allegations in the plaint as admitted.

(b) The Court, upon the deemed admission under Rule 2(2), cannot discuss the intricacies of the facts of the case if the pleadings are sufficient.

(c) The Court is not absolved from applying its judicial mind, but it is not to dilute the deemed admission under rule 2(2) of Order XXXVII. It will therefore be applying its mind to the following question: assuming all allegations in the plaint to be correct, whether, on the pleadings as brought on the record, and presuming them to be completely admitted, there is sufficient material to constitute the requisites under Order XXXVII of the CPC and the 1881 Act for a decree to be passed?

As regards section 118 of the Negotiable Instruments Act, 1881, I hold that:

(a) There are seven presumptions under the said section attached to negotiable instruments and, on their own language (except section 118(g) which has its own qualification), the burden to disprove those presumptions is upon the defendant once the plaintiff raises a legally sufficient plea in their plaint.

(b) There is no concept of initial burden on the plaintiff under section 118(a) of the 1881 Act to prove that the negotiable instrument was for consideration. The presumption operates in favour of the plaintiff from the inception, unless it is later on rebutted sufficiently.

(c) These presumptions cannot be displaced where the pleadings disclose sufficient material and where the defendant has failed to rebut the same by way of the procedure prescribed in Order XXXVII of the CPC.

ii) **Point No. 2**: The question was in two parts, the first being whether the pleadings were sufficient for the Court to pass the decree and the second as to whether the impugned Judgment and Decree are erroneous on facts and law. I answer both the parts in the affirmative.

iii) **Point No. 3**: The impugned Judgment and Decree of the learned District Judge, Mirpurkhas, are set aside and the summary suit filed by the Appellant is decreed to the extent of the recovery of Rs. 2,000,000/- (rupees twenty lac only).

Following the view in *Irshad H. Khan v Mrs. Parveeen Ajaz* PLD 1987 Karachi 466 and *Aijaz Haroon v Inam Durrani* PLD 1989 Karachi 304, no order as to interest or markup is made. Since the Respondent has not been heard throughout, the Court is also exercising caution in the matter of costs. There shall be no order as to costs.

22. All listed applications are disposed of. Office is directed to draw a decree in the above terms. R&Ps may be returned.

JUDGE

APPROVED FOR REPORTING
Faisal