

ORDER SHEET

**HIGH COURT OF SINDH AT KARACHI**

1st Appeal No.20 of 2015

Date	Order with signature of Judge
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- For hearing of priority case
1. For hearing of CMA No.7134/2015 (Stay)
  2. For hearing of Main Case

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25.11.2015.

Mr. Muhammad Rehman Ghous, advocate for the appellant.

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This Appeal has been filed with the following prayers:

*“It is, therefore, prayed that this Hon’ble Court may be pleased to call for R&P of Summary Suit No.03 of 2015 (Muhammad Yahya /Shaikh Muhammad Shahid & others) and after consideration the material available on record may be pleased to set aside the judgment dated 21.09.2015 and decree dated 09.10.2011 passed by learned Vth Additional District Judge Karachi South and dismiss the suit of the respondent No.1.*

*Cost and any other relief which this Hon’ble Court may deem fit and proper in the facts and circumstances of the case”.*

1. Briefly stated the facts of the case are that the appellant is engaged in the construction business since the last more than 20 years. That in January 2014, the appellant found that some cheques were missing from his cheque book. The appellant thereafter immediately informed the concerned bank about the missing of those cheques. After some time the appellant came to know that the respondent No.1 has presented a missing cheque in a bank. The appellant was immediately informed by the concerned bank that a cheque bearing No.PK 92 Sindh 0032 91226571000 was presented by the respondent No.1 before the said bank. When the respondent No.1 was enquired about the cheque he stated that the said cheque was given to him by the late respondent No.2, who stated that the said cheque was given to him by the appellant himself as a security. It is the claim of the appellant that no such cheque was ever given by him to the respondent No.1 and he has no idea how the said cheque reached the

hands of the respondent No.1. The respondent No.1 who is not known to the appellant as per the appellant's statement, after the dishonouring of the cheque moved an application under Section 22-A Cr.P.C against the appellant.

2. That in the meantime the appellant also filed a suit against the respondent No.1 for declaration and cancellation of cheques. That the application moved by the respondent No.1 was allowed and a FIR bearing No.239/2014 under Section 489-F PPC was lodged against the appellant. The appellant thereafter obtained bail in the said FIR, which afterwards was confirmed. A compromise was then entered between the appellant and the respondent No.1 and the appellant gave a cheque of Rs.22,00,000/- to the respondent No.1 which subsequently was dishonoured. Thereafter again it was decided between the parties that the appellant would pay a sum of Rs.1,00,000/- per month to the respondent No.1. The appellant then deposited a cheque of Rs.1,00,000/- however did not pay any further installment to the respondent No.1. The respondent then filed a summary suit against the legal heirs of the respondent No.2 as well as against the appellant. The matter proceeded before the Vth Additional District Judge Karachi Central who vide order dated 21.09.2015, disposed of the two applications filed by the respondent No.1 for striking off the defence of the appellant and as well as dismissed the leave to defend application of the appellant. It is against this order that the present Appeal has been filed.

3. Mr. Muhammad Rehman Ghous, advocate has appeared on behalf of the appellant and has reiterated the above facts and submitted that the order passed by the learned Judge is against the principles of natural justice as according to him, the two applications were allowed without affording proper opportunity of hearing to the appellant, hence the order is not sustainable under the law. Learned counsel further submitted that striking off the defence of the appellant is not in accordance with Rule 65 of Sind Chief Court Rules. He further submitted that where there is a right there is a remedy. He further submitted that learned Court has failed to

observe that the suit has maliciously been filed by the respondent No.1 as the cheque was deposited by some other person whereas the suit has been filed by another person. He further submitted that the appellant is ready to furnish an equal amount of surety before this Court. In support of his above contentions, the learned counsel has placed reliance on the cases of *Fine Textile Mills Ltd., Karachi Vs. Haji Umar* (PLD 1963 SC 163), *Naveed Haider Vs. Messrs Noman Abid Co. Limited* (2009 CLC 1123), *Javed Parekh Vs. Muhammad Safdar Malik* (2014 SCMR 1830), *Mian Rafique Saigol and another Vs. BCCI and another* (PLD 1996 SC 749) and *Nasir Ahmad Vs. Pakland Cement Limited* (2001 CLC 1156).

4. I have heard the learned counsel and have perused the record and the decisions relied upon by him.

5. It is an admitted position that there was a business connection between the respondent No.1 and the deceased respondent No.2. The respondent No.1 has given an amount of Rs.22,00,000/- to the late respondent No.2, however, some conflict arose between the parties and the respondent No.2 defaulted in returning back the amount to the respondent No.1. The appellant, who was a partner of the respondent No.2, thereafter stepped in and gave an assurance to the respondent No.1 that in case respondent No.2 fails to pay the said amount to him, he will pay the said amount to him. The appellant then issued a cheque of Rs.22,00,000/- to the respondent No.1. As the respondent No.1 was not having any bank account, he asked his brother-in-law to deposit the said cheque in his account. However, when the said cheque was presented the same was dishonoured with the remark "No sufficient funds". The respondent No.1 then was left with no option but to file a Cr. Misc. Application No.566/2014 under Section 22-A Cr.P.C before the Justice of Peace who allowed the same vide order dated 8.7.2014 and a FIR bearing No.239/2014 under Section 489-F PPC was registered at Police Station New Karachi against the appellant. The appellant then obtained interim bail and approached the respondent No.1 to enter into a compromise with him and thereafter it was agreed on Special Oath between the parties that

the appellant would give a sum of Rs.1,00,000/- p.m. to the respondent No.1 and the respondent No.1 would in turn withdraw all the pending cases against him. The appellant then paid a sum of Rs.1,00,000/- only to the respondent No.1 which he encashed however subsequently the appellant backed out from his promise, which is evident from the record.

6. I disagree with the submission of the learned counsel for the appellant that when an assurance of payment was made by the appellant and an amount of Rs.1,00,000/- was accepted by the respondent No.1 hence a novation in the contract took place. If this argument is accepted then after Special Oath was the appellant not under obligation to pay the outstanding amount of Rs.1,00,000/- each month? It is an admitted position that the appellant after the Special Oath has given a categorical assurance to the respondent No.1 that he will pay the outstanding amount of Rs.22,00,000/- to the respondent No.1 by way of installment of Rs.1,00,000/- p.m however, paid one installment only and no amount was paid afterwards, hence how could the appellant take any advantage of the situation so created by himself. The learned Court has categorically observed that the appellant has neither filed any application for leave to defend nor sought extension of time for filing the same, on which aspect not a single word has been said by the learned counsel for the appellant. Hence, in my view, it is the appellant who is to be blamed for the lapses created by him and no leave at this juncture could be granted to him. The decisions relied upon by the learned counsel are found to be distinguishable to the facts obtaining in the present case.

6. In view of the above discussion, I find no merit in this appeal and dismiss the same in limine, along with the listed application.

JUDGE