

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Arshad Hussain Khan

Mr. Justice Amjad Ali Sahito

First Appeal No.20 of 2024

Appellants : Ghulam Murtaza S/o Ghulam Nabi Abbas
& others through Mr. Javed Anwar,
Advocate

Respondents : Touseef Ahmed S/o Abdul Majeed &
others
Nemo.

Date of Hearing : 07.08.2026
& Short order

Date of Reasons : ____ .08.2026

J U D G M E N T

Amjad Ali Sahito, J.- The appellants, by way of the instant First Appeal under Section 96, C.P.C., have called into question the judgment and decree dated 14.10.2023, passed by the learned IX-Additional District Judge/MCAC, Karachi East, in Summary Suit No.34 of 2022, whereby the suit was decreed and the present appellants along with Respondent No.3/defendant were jointly and severally directed to pay a sum of Rs.35,00,000/- to Respondent No.1/plaintiff, Touseef Ahmed, together with interest thereon at the rate of 6% per annum from the date of institution of the suit until actual realization of the decretal amount. The appellants and Respondent No.3 were further directed to pay a sum of Rs.30,000/- to Respondent No.1/plaintiff towards costs of the suit.

2. Briefly stated, the facts emerging from the plaint are that Respondent No.1/plaintiff purchased Plot No.292, Sector-C, Haji Taj Muhammad Goth, Bagh-e-Korangi, Karachi, through the present appellants and Respondents No.2 and 3, against a total sale consideration of Rs.35,00,000/-. Subsequently, it came to light that the appellants and respondents had allegedly sold the

said property to another person. Upon the plaintiff's demand for refund of the sale consideration, Appellant No.2 issued two cheques, bearing Nos.00000055 dated 02.07.2021 for Rs.5,00,000/- and 00000096 dated 30.08.2021 for Rs.15,00,000/-, whereas Respondent No.3 issued cheque No.00000100 dated 28.09.2021 for Rs.15,00,000/-. Upon presentation before the concerned bank, all three cheques were dishonoured on account of insufficient funds. Consequently, Respondent No.1 also lodged FIR No.530 of 2021 under Sections 489-F, 420 and 34, P.P.C., at Police Station Tipu Sultan, Karachi.

3. The record further reflects that the present appellants and Respondent No.2 were initially granted conditional leave to defend, subject to furnishing solvent surety in the sum of Rs.20,00,000/-, which amount was subsequently reduced to Rs.5,00,000/-. Respondent No.2 was likewise granted conditional leave to defend subject to furnishing surety in the sum of Rs.15,00,000/-. Subsequently, Respondent No.2 was struck off from the proceedings. Since the present appellants and Respondent No.3 failed to comply with the conditions imposed by the learned trial Court by furnishing the requisite sureties, they were proceeded against ex parte.

4. Thereafter, Respondent No.1/plaintiff led ex parte evidence by filing his affidavit-in-evidence and produced, inter alia, the agreement relating to the transaction, the three dishonoured cheques, their respective return memos and other supporting documents. Upon appraisal of the uncontroverted oral and documentary evidence brought on record, the learned trial Court decreed the suit against the present appellants and Respondent No.3 jointly and severally for recovery of Rs.35,00,000/-, together with interest at the rate of 6% per annum from the date of institution of the suit until realization, besides costs. Aggrieved by and dissatisfied with the said judgment and decree, the appellants have preferred the instant appeal.

5. Learned counsel for the appellants, at the outset, sought condonation of the delay in filing the instant appeal, contending

that the delay was neither deliberate nor intentional. It was submitted that the appellants had already instituted Revision Application No.122 of 2023 before this Court and that the said fact had duly been brought to the notice of the learned trial Court. Despite being apprised thereof, the learned trial Court proceeded to pronounce the impugned judgment and decree and treated the appellants as *ex parte*. Learned counsel contended that the appellants have a strong *prima facie* case on merits and that, in the event the delay is not condoned, they would suffer irreparable loss and prejudice, whereas no corresponding prejudice would be caused to the respondents. He, therefore, prayed that, in the interest of substantial justice, the delay in filing the appeal be condoned.

6. On merits, learned counsel for the appellants contended that the impugned judgment and decree are contrary to the facts and law and, therefore, are liable to be set aside. He submitted that the learned trial Court failed to properly appreciate the material available on record while decreeing the suit. According to him, the appellants had raised substantial and *bona fide* questions of fact and law which required adjudication upon recording of evidence; however, the learned trial Court proceeded against them *ex parte* merely on account of their failure to comply with the conditional order granting leave to defend, without adjudicating the controversy on its merits. Learned counsel further contended that Appellant Ghulam Murtaza was neither the drawer nor the signatory of any of the dishonoured cheques and, therefore, no liability could legally be fastened upon him merely on the basis of the alleged agreement. It was further argued that Respondent No.1/plaintiff had failed to establish, through independent, cogent and legally admissible evidence, any legally enforceable liability against the appellants. Learned counsel maintained that the learned trial Court had misapplied the provisions of the Negotiable Instruments Act, 1881 and the Contract Act, 1872, in holding the appellants jointly and severally liable for the entire claim. He lastly prayed that the delay in filing the appeal be condoned, the impugned judgment and decree be set aside and the appeal be allowed.

7. Despite service of notice, none appeared on behalf of the respondents. The record shows that Mr. Abdul Rauf, Advocate, had been appearing on behalf of Respondent No.1; however, Respondents No.2 and 3 have neither appeared before this Court at any stage of the proceedings nor has any counsel entered appearance on their behalf. We have also examined the report submitted by the learned Bailiff regarding service upon Respondents No.2 and 3. The report indicates that, upon visiting the given address of Respondent No.2, a lady came out and stated that no person by the said name was residing at the premises. Similarly, when the learned Bailiff visited the given address of Respondent No.3, despite repeated knocking at the door, no one appeared or responded. Thus, notwithstanding the efforts undertaken to effect service at the addresses available on record, Respondents No.2 and 3 failed to appear before this Court and no representation has been made on their behalf.

8. We have heard the learned counsel for the appellants and have perused the material available on record.

9. The appeal, as is evident from the record, was presented beyond the period prescribed by law. In order to overcome the consequent bar of limitation, the appellants preferred CMA No.340/2024, seeking condonation of the delay. It is an admitted position that the instant appeal was instituted after expiry of the prescribed period of limitation. The appellants have principally sought condonation of the delay on the ground that, prior to the pronouncement of the impugned judgment and decree, they had instituted Revision Application No.122 of 2023 before this Court, and that the pendency of the said proceedings had duly been brought to the notice of the learned Trial Court. It has, therefore, been contended that the appellants bona fide believed that the matter continued to remain sub judice and that the delay in filing the appeal was neither deliberate nor intentional.

10. However, for the purposes of Section 5 of the Limitation Act, 1908, a mere assertion that the delay was not deliberate, intentional or mala fide does not, in itself, constitute sufficient cause warranting condonation of the delay. The party seeking

such indulgence is required to discharge the burden of furnishing a cogent, plausible, satisfactory and legally tenable explanation accounting for the entire period of delay and demonstrating sufficient cause for its failure to institute the appeal within the prescribed period of limitation. The discretion to condone delay is, therefore, to be exercised upon a judicial assessment of the explanation furnished and not merely on the basis of an unsubstantiated plea of bona fide belief.

11. In the present case, the explanation furnished by the appellants does not satisfactorily account for the delay occasioned in filing the instant appeal. The mere pendency of Revision Application No.122 of 2023, in the facts and circumstances of the case, cannot be construed as constituting sufficient cause for permitting the statutory period of limitation to expire. The appellants were required to demonstrate that, notwithstanding the exercise of due diligence, they were prevented by circumstances beyond their control from preferring the appeal within the prescribed period. No such circumstance has either been pleaded with requisite particularity or established from the record. The assertion that the delay was neither deliberate nor actuated by mala fide, without more, is insufficient to meet the statutory requirement of “sufficient cause” contemplated by Section 5 of the Limitation Act, 1908. Equally, the plea that the appellants possess a meritorious case or that refusal to condone the delay would occasion prejudice to them cannot, in the absence of sufficient cause, override the statutory mandate of limitation. It is a settled principle that the law of limitation is founded upon public policy and is not a mere technicality; upon expiry of the prescribed period, a valuable right accrues in favour of the successful party, which cannot ordinarily be defeated except where the applicant satisfactorily establishes sufficient cause warranting exercise of the Court’s discretionary jurisdiction.

12. Consequently, the appellants have failed to establish any sufficient cause for condonation of the delay in filing the instant appeal. CMA No.340/2024, being the application under Section 5

of the Limitation Act, 1908, is accordingly found to be devoid of merit and is hereby dismissed. As a necessary consequence, the appeal, being barred by limitation, is liable to be dismissed on this ground alone. Nevertheless, as the merits of the matter have also been addressed, the same are considered hereunder.

13. Adverting to the merits of the case, it is an admitted position, borne out from the record, that the appellants were granted conditional leave to defend by the learned Trial Court vide order dated 03.08.2023, subject to furnishing solvent surety in the sum of Rs.20,00,000/- each. The record further reveals that the appellants thereafter moved an application seeking reduction of the surety amount on the ground of financial constraints. The said application was duly considered by the learned Trial Court after hearing the parties, and vide order dated 06.09.2023, the amount of surety was reduced from Rs.20,00,000/- to Rs.5,00,000/- each. Thus, the learned Trial Court, while exercising its discretion, afforded the appellants a further and substantial concession so as to enable them to contest the proceedings on merits. Despite such relaxation, the appellants failed to furnish even the reduced sureties within the prescribed period. Consequently, the learned Trial Court recalled the order granting leave to defend and proceeded with the matter in accordance with law. In these circumstances, the appellants cannot legitimately contend that they were denied an opportunity of defending the suit. The record, rather, demonstrates that adequate opportunity was afforded to them, which they failed to avail on account of their own omission and non-compliance with the condition imposed by the learned Trial Court.

14. It is observed that the object and underlying purpose of *Order XXXVII, C.P.C.* is to provide an expeditious and efficacious remedy in respect of claims arising out of commercial transactions and negotiable instruments, thereby preventing such claims from being unnecessarily delayed through protracted litigation. Proceedings under the said Order are summary in nature, and the defendant does not possess an unfettered or vested right to contest the suit on merits. The right to defend is

subject to the grant of leave by the Court in accordance with the provisions of *Order XXXVII, C.P.C.* In the present case, the learned Trial Court, in exercise of its judicial discretion, granted conditional leave to the appellants to defend the suit, subject to furnishing reasonable surety. Such condition is neither onerous nor unusual; rather, it constitutes a recognized judicial safeguard intended to secure the plaintiff's claim and to ensure that the summary remedy provided by law is not rendered nugatory by dilatory or protracted proceedings.

15. The scheme of *Order XXXVII, C.P.C.* is founded upon the legislative intent of providing a summary and expeditious remedy in cases arising out of commercial transactions and negotiable instruments, where the claim is founded upon written instruments carrying a presumptive evidentiary value. The special procedure prescribed thereunder is intended to prevent a defendant from defeating or delaying a *prima facie* established claim merely by entering appearance and raising a formal defence. Consequently, unlike an ordinary civil suit, a defendant in proceedings under *Order XXXVII, C.P.C.* has no unqualified or vested right to defend the suit. The right to defend is conditional upon obtaining leave of the Court in the manner prescribed by law.

16. In the present case, the learned Trial Court, upon consideration of the material before it, exercised its discretion under Rule 3 of *Order XXXVII, C.P.C.* and granted leave to defend to the appellants subject to the furnishing of reasonable surety. The imposition of such a condition was within the express contemplation of the law and constituted an integral part of the order granting leave. The leave, therefore, was not absolute; its efficacy and continuance were expressly made contingent upon compliance with the condition so imposed. The appellant, having accepted the benefit of the order, was under a corresponding obligation to comply with the condition within the stipulated period. The record, however, shows that despite having been afforded sufficient opportunity, the appellants failed to furnish

the requisite surety and did not secure any order suspending, modifying or setting aside the said condition.

17. The consequence of such failure is not merely procedural or technical. It goes to the very foundation of the appellant's entitlement to defend the summary suit. Once the condition attached to the leave to defend remained unfulfilled, the conditional leave could not operate in favour of the appellants, and the statutory consequences contemplated by *Order XXXVII, C.P.C.* were attracted. In such circumstances, the allegations contained in the plaint stood liable to be treated as admitted and the plaintiff became entitled to a decree in accordance with law. This principle is well settled through the judgments of the Supreme Court of Pakistan in *Haji Ali Khan & Company, Abbottabad and 8 others v. M/s. Allied Bank of Pakistan Limited, Abbottabad* (PLD 1995 SC 362), *Naeem Iqbal v. Mst. Zarina* (1996 SCMR 1530), *Col. (Retd.) Ashfaq Ahmed and others v. Sh. Muhammad Wasim* (1999 SCMR 2832), and *Muhammad Ramzan and others v. Ghulam Qadir* (2011 SCMR 659). The same principle has also been reaffirmed by this Court in cases concerning failure to comply with a condition attached to leave to defend.

18. It is equally significant that the appellant did not challenge the conditional order in a manner recognised by law, nor did he obtain its suspension or modification. Having failed to comply with the condition, he cannot be permitted to retain the benefit of the leave while repudiating the very condition upon which that benefit was made available. The appellants cannot, by the mere filing of an appeal against the eventual decree, revive a right of defence which stood lost by reason of their failure to comply with the conditional order. An appeal does not, by itself, confer upon the appellants a better right or a more advantageous position than that which they possessed before the learned Trial Court.

19. Viewed in the aforesaid legal framework, the plea now sought to be advanced by the appellants, that the cheque in question was allegedly snatched from Appellant No.1 by

Respondent No.1 and was not issued in discharge of any legally enforceable liability of Rs.35,00,000/-, cannot be entertained at this stage. Such plea constitutes a defence on the merits of the respondent's claim and was required to be specifically pleaded and substantiated in proceedings before the learned Trial Court after obtaining and availing leave to defend in accordance with the conditional order. The appellants, having failed to fulfil the condition upon which his right to defend was made dependent, cannot be permitted to circumvent the consequences of such default by introducing, for the first time or by seeking reconsideration in appeal, a defence which they had been precluded from pursuing by their non-compliance.

20. The position becomes still more compelling in view of Section 118 of the *Negotiable Instruments Act, 1881*, which raises, subject to the statutory requirements, the presumption in favour of the holder of a negotiable instrument as to consideration and the matters specified therein. The burden of displacing such statutory presumption lies upon the person seeking to challenge the liability represented by the instrument. In the present case, however, the appellant's failure to comply with the condition attached to the leave to defend prevented him from properly entering upon and establishing such defence before the learned Trial Court. Consequently, the plea that the cheque was allegedly snatched, rather than voluntarily issued towards a legally enforceable liability, cannot now be permitted to reopen the merits of the claim.

21. The dishonour of the cheque with the specific endorsement "Insufficient Balance" further demonstrates that, upon presentation, the instrument did not yield realization of the amount for which it had been issued. Such dishonour, in itself, does not extinguish or dilute the liability represented by the cheque. Rather, in the absence of a legally sustainable defence capable of displacing the claim, it constitutes a circumstance consistent with the respondent's assertion that the amount remained unpaid.

22. The principle laid down by the Supreme Court in *Muhammad Ramzan and others v. Ghulam Qadir* (2011 SCMR 659) is directly attracted. The authoritative pronouncement makes it clear that where leave to defend is granted subject to a condition and the defendant fails to comply therewith, he cannot thereafter seek to assail the decree by resurrecting the merits of a defence which he had failed to pursue in accordance with the procedure prescribed by *Order XXXVII, C.P.C.* The rationale is founded not merely upon procedural technicality but upon the statutory character of the summary jurisdiction: the defendant was afforded an opportunity to contest the claim, but that opportunity was expressly conditioned upon compliance with the order of the Court. Having failed to avail such opportunity in the manner prescribed, the defendant must bear the legal consequences flowing from their default.

23. It is further evident from the record that Respondent No.1 produced both oral and documentary evidence in support of his claim, including the agreement relating to the underlying transaction, the dishonoured cheques, the respective bank return memos and other corroborative documents. Such evidence remained wholly unchallenged and unrebutted, as the appellants, having failed to comply with the conditional order granting leave to defend, did not avail themselves of the opportunity to contest the claim. It is a settled principle of law that where oral and documentary evidence remains uncontroverted and unrebutted, and otherwise inspires confidence, the Court is justified in placing reliance thereon, particularly where the opposing party has failed to bring on record any material capable of impeaching its authenticity, genuineness or evidentiary worth.

24. The contention advanced by learned counsel for the appellants that the dispute ought to have been adjudicated only after recording regular evidence is devoid of substance. The appellants themselves failed to comply with the condition attached to the leave granted by the learned Trial Court and, consequently, were proceeded against in accordance with law.

Having failed to avail the opportunity expressly afforded to them, they cannot now be permitted to take advantage of their own default by asserting that they were deprived of an opportunity to defend the suit. It is also significant that, during the relevant period, the appellants were admittedly pursuing proceedings before the criminal Court arising out of the same transaction, yet they failed to diligently pursue the proceedings before the learned Trial Court. The principle that a party cannot be permitted to derive benefit from its own wrong or omission is fully attracted to the circumstances of the present case.

25. As regards the contention that appellant Ghulam Murtaza was neither the drawer nor signatory of the dishonoured cheques and, therefore, could not legally be held liable, the same also does not merit acceptance in the peculiar facts of the present case. The suit instituted before the learned Trial Court was not founded exclusively upon the dishonoured cheques; rather, the claim arose out of the underlying contractual transaction between the parties. The material available on record indicates that the appellants, along with the other respondents, were alleged to have jointly entered into the agreement for sale of the property and received the sale consideration from Respondent No.1. The cheques in question were subsequently issued towards repayment/refund of the amount received pursuant to the said transaction. Thus, the liability asserted against the appellants was not founded solely upon the negotiable instruments, but also upon the contractual obligations arising from the underlying agreement and the transaction undertaken by the parties. Consequently, the mere fact that appellant Ghulam Murtaza did not sign or draw the dishonoured cheques, without examining the nature and extent of his obligations under the underlying contractual arrangement, cannot, by itself, operate to absolve him of civil liability arising from the transaction.

26. We have also carefully examined the impugned judgment and decree as well as the material available on record and find no misreading or non-reading of any material piece of evidence by the learned Trial Court. On the contrary, the findings recorded

therein are founded upon the documentary material brought on record and are supported by cogent and plausible reasoning. It is a settled principle governing appellate jurisdiction that an appellate Court does not ordinarily interfere with findings of fact recorded by the Trial Court merely because another view may be possible. Interference is warranted only where such findings are shown to be arbitrary, perverse, based upon misreading or non-reading of material evidence, or otherwise suffering from patent illegality or material irregularity. The appellants have failed to identify or establish any such infirmity in the impugned judgment and decree as may warrant interference by this Court in exercise of its appellate jurisdiction.

27. For the foregoing reasons, and upon an overall appraisal of the material available on record, we are of the considered view that the learned Trial Court committed no illegality or material irregularity in decreeing the suit on the basis of the evidence brought before it. The appellants have failed to demonstrate any jurisdictional defect, misreading or non-reading of evidence, or other legal infirmity warranting interference by this Court in exercise of its jurisdiction under Section 96, C.P.C. The appeal, being devoid of merit as well as barred by limitation, is accordingly dismissed. Consequently, the impugned judgment and decree dated 14.10.2023 passed by the learned IX-Additional District Judge/MCAC, Karachi East, in Summary Suit No.34 of 2022, are hereby maintained.

JUDGE

JUDGE

KAMRAN/PS