

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1312 of 2011

 DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before:-**Mr. Justice Yousuf Ali Sayeed,**

Date of hearing : 07.12.2016

Date of Announcement :

Plaintiff : Mr. Nauman Jamali, advocate, for
The Plaintiff.

Defendants : None present for Defendants.

J U D G M E N T

YOUSUF ALI SAYEED, J. This Suit under Order XXXVII of the Code of Civil Procedure stems from the dishonor of various cheques issued in favour of the Plaintiff by the Defendant No.1 pursuant, inter alia, to a Deed of Settlement dated 31.05.2010 (the "**Settlement Agreement**") executed inter se the Plaintiff and Defendant Nos.1 to 5. This Settlement Agreement, which envisages repayment of an amount of Rs.35,000,000/- (Rupees Thirty Five Million) to the Plaintiff by the Defendant No.1 as the principal obligor and the Defendants Nos. 2 to 5 as guarantors, was itself predicated on the rescission of 9 (Nine) earlier Agreements of Sale (hereinafter collectively referred to as the "**Sale Agreements**"), whereby the Plaintiff had contracted to purchase various immovable properties from the Defendants.

As per learned counsel, it was contended that the preceding facts of the case are that pursuant to the Sale Agreements, an amount of Rs.36,822,500/- (Rupees Thirty Six Million Eight Hundred and Twenty Two Thousand and Five Hundred) had been paid by the Plaintiff to the Defendants by way of advance against the total sale consideration of the immovable properties, and the title documents of the underlying immovable properties were handed over to the Plaintiff and remained in his possession. It is stated further that it subsequently transpired that the title of the Defendants in respect of one of these immovable properties was found to be defective, inasmuch as, the documents relating thereto were found to be bogus/forged. Hence, following some initial wrangling in the shape of a civil suit filed by the Defendants and initiation of criminal proceedings by the Plaintiff, it was mutually agreed that the Sale Agreements be rescinded and the amount that had been received by the Plaintiff from the Defendant be returned accordingly, hence the Settlement Agreement.

Learned counsel submits that in pursuance of the Settlement Agreement, ten post-dated cheques of Rs.1,000,000/- (Rs. One Million) each, drawn on Account No. 6502252044 maintained at Samba Bank Ltd, Bahadurabad Branch, Karachi, were initially issued in favour of the Plaintiff by the Defendant No.1, and further states that, thereafter, albeit that the Settlement Agreement only envisaged the repayment of an amount of Rs.35,000,000/- (Rupees Thirty Five Million), further post-dated cheques, cumulatively amounting to Rs.26,822,500/- (Rupees Twenty Six Million

Eight Hundred and Twenty Two Thousand), were issued by the Defendant No.1 for settlement of the total advance amount of Rs.36,822,500/- (Rupees Thirty Six Million Eight Hundred and Twenty Two Thousand and Five Hundred) that had been paid by the Plaintiff.

Learned counsel states that, however, only the first cheque dated 18.6.2010 was honoured, whereas, all the other post-dated cheques of subsequent dates were dishonoured on presentment, hence the present Suit wherein the Plaintiff has prayed inter alia for a decree in the sum of Rs.35,822,500/- (Rupees Thirty Five Million Eight Hundred and Twenty Two Thousand and Five Hundred), being the cumulative amount of the aforementioned dishonoured cheques. He has also explained that the Suit was initially filed for a decree in the sum of Rs.22,000,000/- (Rupees Twenty Two Million), which he states was the cumulative amount of such cheques as had already been presented and dishonoured as on the date of filing of the Suit (i.e. 27.10.2011), and that subsequently the remaining cheques were presented and dishonoured from time to time, due to which the quantum of the claim was enhanced in terms of an amended plaint filed on 06.10.2012 in pursuance of permission conferred by this Court vide an Order passed on 02.10.2012.

At the outset, learned counsel has invited my attention to the fact that as the suit had been filed under Order 37 of the Code of Civil of Procedure, the Office had raised an objection regarding the maintainability thereof as against the Defendants Nos. 2 to 5 on the grounds that such defendants were not signatories to any of the underlying cheques said to have been dishonoured and that proceedings under summary chapter

could therefore not be initiated against them. In this regard, learned counsel has pointed out that this objection was overruled in terms of an Order dated 31.10.2011, wherein it was directed that in view of the Judgment in the case of Mst. Suriya Waseem Usmani and 9 others v. L & M International (Private) Limited and another, reported at 2002 CLD 624, the suit against the signatory to the negotiable instrument would proceed in a summary manner, whereas, as against other parties who were guarantors, the matter would proceed as an ordinary suit, and has also placed considerable emphasis on the point that it is conceivable and permissible for more than one decree to be passed in a suit. In support of the aforestated propositions, he has cited a Judgment of the Honourable Supreme Court, reported at PLD 1978 SC 96, as well as Judgments of this Court, reported at PLD 1978 Karachi 263, 1993 CLC 913 and 2002 CLD 624.

In the first cited case, being that of **Khatija Bai & Another v Muslim Commercial Bank**, reported at **PLD 1978 SC 96**, in the context of a contention by counsel that the splitting of the case between defendants in the underlying suit as a short cause against one defendant and as a long cause against the other defendant would lead to injustice and a duplication of proceedings, it was observed by his Lordship, Dorab Patel, J (as he then was), that "The arguments is fallacious because it is of great importance to the public that the holder of a Bill of Exchange should be able to obtain judgment for what is due to him as speedily as possible".

In the case of ***Habib Bank Limited, Karachi v Ghazangarullah Khan and Another***, reported at **PLD 1978 Karachi 263**, one of the issues before this Court was whether a suit under Order XXXVII CPC was maintainable against a defendant on the basis of a guarantee. Whilst holding that the suit was maintainable, his Lordship, Naimuddin, J (as he then was), placed reliance on two unreported judgments of this Court in Suit No.335/72 and Suit No.400/76 respectively, wherein the maintainability of suits that had been filed by the plaintiff in each instance against one of the defendants on the basis of a promissory note and other persons on the basis of a guarantee had been upheld, and in HCA No. 75/73 emanating from the former suit, it had been observed by his Lordship Mahmud, J, who authored the opinion of the Court, as follows:

"In my opinion the submission of learned counsel is misconceived. Under rule 239, a Court has a discretion to direct the plaint filed in support of the originating summons to be admitted as a plaint in an ordinary suit, instead of referring the party to a separate suit in the ordinary course"

Following an examination of the aforementioned unreported Judgments it was held by his Lordship that *"Thus, it is clear that in one and the same suit claim against one defendant on the basis of the guarantee was allowed to proceed and therefore, the maintainability of the suit was not considered to have been affected."* Furthermore, it was also observed that *"There might have been some serious objection as to the maintainability of the suit if more than one decree could not have been*

passed in the same suit. But under the provisions of the Civil Procedure Code more than one decree can be passed in a suit against one defendant or several defendants during the course of proceedings and at the conclusion of the proceedings. Even otherwise, a Court is entitled to proceed on the principle that every procedure which furthers the administration of justice is permissible even though there is no express provision permitting the same."

In the case of **BCCI v Ali Asbestos & Others**, reported at **1993 CLC 913**, in the context of an objection that two decrees had been passed and the total amount of these decrees exceeded the claim in the Suit, it was observed by his Lordship, Saleem Akhtar, J, then a Judge of this Court, that *"these two decrees were passed separately against defendant No. 1, 3 and 6 on the one hand and defendant No. 2, 4 and 5 on the other hand. It does not mean that these decrees will be executed separately and the plaintiff would be entitled to recover the total amount of these two decrees. The decree will be executed jointly and severally to the extent of the amount mentioned in the decree itself. By passing two decrees which is permissible in law it cannot be argued that the judgment and decree were without jurisdiction or obtained by fraud."*

Lastly, in the aforementioned case reported at **2002 CLD 624**, with reference to the earlier cases of Mst. Khatija Bai and another v. Muslim Commercial Bank (PLD 1978 SC 96) and Syed Sarwar Hussain Zaidi (1999 MLD 2931), it was held by his Lordship, Mushir Alam, J, then a Judge of this Court, that *"When the claim in suit against some of the defendant is based on negotiable instrument and against other on*

guarantee or indemnity or otherwise, then it is permissible to entertain and decide the suit against drawer of instrument under Order 37 and to proceed under normal procedure against the other defendant who is not privy to such instrument."

Whilst, in terms of the above referred authorities the law is well settled as to the coupling/consolidation of associated causes of action as against the issuer of a negotiable instrument and against other parties whose obligations may be co-extensive, as in for example a guarantor, in the matter at hand the aspect of concurrent proceedings against one defendant as a short cause and others as a long cause under the umbrella of a single suit perhaps remains of little importance in view of the fact that due to the non-appearance of the Defendants the matter is uncontested and it has already been Ordered on 16.01.2012 that the Suit proceed ex parte, and has thus been put down to proceed entirely as a short cause by virtue of Rule 22 of the Sindh Chief Court Rules (O.S.).

Learned counsel has duly taken me through the processes issued in the matter, and it appears that following publication of summons in Daily Jang on 23.12.2011 the matter was placed in Court for ex parte Orders due to the non-appearance of the defendants, and on 16.01.2012 it was ordered that the suit proceed against them ex parte. He has further submitted that following the amendment of the Plaintiff, it was ordered on 21.11.2012 that fresh summons be issued to all the defendants through all modes, along with copies of the amended plaintiff. Thereafter, on 19.12.2012, upon it being noted that publication had not been effected in compliance with the Order of 21.11.2012, an Order was passed directing

publication of summons in one Urdu and one English newspaper having large circulation in Karachi. In compliance therewith, publication was effected accordingly, and vide Order dated 13.08.2013 service upon all of the defendants was held good and in view of their continued non-appearance it was once again ordered that the matter proceed ex parte and be fixed for final disposal.

Thereafter, the Plaintiff filed his Affidavit- in-ex parte proof along with copies of various documents, and his examination in chief was recorded in Court on 09.05.2013, at which time his Affidavit was exhibited in evidence as Exhibit PW-1/3, and the original documents of which copies had been attached with the Affidavit, were exhibited as Exhibits PW-1/4 to Exhibit PW-1/82(x), whilst other documents that were produced in the form of copies were marked X-1 to X-38. Since no one was present on behalf of any of the Defendants, therefore cross of the Plaintiff was marked as "Nil". Subsequently, an application was filed by the Plaintiff to lead further evidence and produce two persons who had borne witnesses to the execution of Deed of Settlement and the terms of the arrangement encapsulated therein. Permission was granted by this Court on 29.01.2015, and on 09.10.2015 the examination-in-chief of these two persons was recorded as PW-2 and PW-3 and their affidavits-in-evidence were marked as Exhibit PW-2/1 and Exhibit PW-3/1 respectively. Since no one was present on behalf of the Defendants to proceed with cross-examination on that date as well as on subsequent dates, therefore, cross-examination of PW-2 and PW-3 was also duly marked as "Nil".

Learned counsel contends that in view of there being no contest to the suit, the same ought to be decreed in favour of the Plaintiff, and has referred to the case of **Haji Ali Khan & Company, Abbotabad & 8 Others v M/s. Allied Bank of Pakistan Limited, Abbotabad**, reported at **PLD 1995 SC 362**, where, after considering the *ratio decidendi* of the various decided cases, it was held by his Lordship Ajmal Mian, J (as he then was), that in matters under Order XXXVII CPC the failure of a defendant to appear or to obtain leave to defend in response to a summons or to fulfill the condition on which leave was granted, the court was to pass a decree in favor of the plaintiff. Needless to say, notwithstanding the fact that a proceeding is uncontested/ex parte, the Court is nonetheless obliged to ascertain the plaintiffs entitlement to relief, and even in the aforesaid Judgment, his Lordship went on to note the requirement that "*every Court is required to apply its mind before passing any order or judgment notwithstanding the fact 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 fulfill the requirement of law*".

Accordingly, I have gone through the evidence, and have seen the Plaintiff's affidavit-in-ex parte proof as well as the documents exhibited in evidence, including copies of the (a) the Sale Agreements, (b) the receipts issued by the defendants on account of monies had and received from the Plaintiff thereunder, (c) the title documents of the immovable properties subject thereto, (d) the Settlement Agreement, and (e) the cheques that were issued to the Plaintiff by the Defendant No.1 along with the

Memoranda of the bank confirming the dishonor thereof, the originals thereof having been returned to the Plaintiff and replaced with good legible copies pursuant to the Order passed by this Court on 31.05.2013

The plaint, the affidavit-in-ex-parte proof and the examination-in-chief of the plaintiff and other witnesses are on oath and remain unrebutted. Furthermore, the dishonoured cheques issued by the defendant by themselves establish that the defendant is liable to pay the amount to the plaintiff, as a cheque is a negotiable instrument and there is rebuttable presumption that every such instrument is made, drawn, accepted and endorsed for consideration. In the instant suit, the defendants have not come forward to rebut the evidence or this presumption.

In view of the above, I am of the opinion that in light of the entire parcel of evidence adduced, the plaintiff has satisfactorily proved his case and is entitled to the relief for which he has prayed. Accordingly, this suit is decreed in the sum of Rs.35,822,500/- (Rupees Thirty Five Million Eight Hundred and Twenty Two Thousand and Five Hundred) against the Defendants jointly and severally.

Office is directed to prepare the decree in the above terms.

JUDGE

Karachi
Dated _____