

**JUDGMENT SHEET  
IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT, HYDERABAD.**

1<sup>st</sup> Appeal No. 50 of 2010

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<b>DATE</b>	<b>ORDER WITH SIGNATURE OF JUDGE</b>
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1. For Katcha Peshi.
2. For hearing of C.M.A 1099 of 2010

Date of hearing: 08.12.2016.

Date of judgment: 15.12.2016.

Appellant: Through Mr. Aslam P. Sipio, Advocate.

Respondent. Through Mr. Zaheeruddin S. Laghari,  
Advocate.

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**JUDGMENT**

**MUHAMMAD FAISAL KAMAL ALAM, J:-** The appellant has called in question the impugned order dated 13.10.2010 and subsequent decree of 18.10.2010, passed by the learned District Judge, Hyderabad (Re: Haji Farooque Versus Muhammad Ilyas), whereby the learned Trial Court has dismissed the application of present appellant, who was defendant in the above Summary Suit, seeking condonation of delay in furnishing surety “ in the sum of Rs.1.5 Million” and the above summary suit was decreed as prayed with costs.

2. Succinctly, case of the present appellant is that he has raised triable issues in his application for leave to defend filed under Order 37 Rule 3 of C.P.C, which was though granted earlier by the order of 18.09.2010, but conditional, subject to furnishing surety “in the sum of Rs.1.5 Million with P.R Bond in the like amount within a

month from the date of the order”, that is, the compliance was to be made by 18.10.2010. It is averred by the present Appellant that on account of *force majeure* factors, latter moved an application on 20.09.2010 for condonation of delay in furnishing the surety, which was disallowed by the impugned order.

3. The case of the present appellant is, what he has also stated in his above leave to defend application, that the cheque in dispute, that is, Cheque No. 5263133 dated 04.12.2009 drawn on Allied Bank Limited was actually issued to one Ghulam Shabeer from whom the present appellant had purchased an agricultural land, viz. Survey No.241, 242, 261, 238/A & B, 366, 367, 369 admeasuring 16-24 acres, situated in Deh Bao Dero and Abrejani, District Matiari. As an evidence the sale deed has also been annexed in the present proceedings as Annexure-D available at Page 51 of the file. According to present appellant when the entire sale consideration was paid to above Ghulam Shabbir, he torn the cheque in question in front of witnesses and therefore, the authenticity of the entire above cheque is in dispute. The present appellant has further denied any relationship between him and the respondent, by stating that the respondent is a stranger to the appellant and hence, no consideration could be attached to the subject cheque.

4. Mr. Alsam P. Sipio, who represents the Appellant, has argued that on the contrary it is the respondent/plaintiff in above suit who has defrauded the present appellant by filing the above mentioned summary suit, which was filed with *ulterior motives*. He has relied upon the following case law in support of his arguments\_\_

- (i) *MUHAMMAD TARIQ v. BASHIR-UD-DIN and another* {2013 CLC 1669 (Sindh)}

(ii) *ASIF NADEEM v. Messers BEXSHIM CORPORATION and others* {2001 CLC 653 (Karachi)}

(iii) *A.B.L v. KHALID MAHMOOD* {2009 CLC 308 (Lahore)}

5. After going through the above case law, the crux of which is that if the defendant (in the instant case the present appellant) raises a triable issue indicating that he has a fair or *bona fide* and reasonable defence, then the defendant is entitled to unconditional leave to defend the case. It has been further held in the *Asif Nadeem's* case (supra) that even the defendant in his leave to defend application discloses a plausible defense, which makes his case an arguable one for the trial, even then the Court can grant him leave by imposing the conditions as to the time frame of the trial, but without directing him to furnish security. It has been further held in *Muhammad Tariq's* case (ibid) that even if Court comes to the conclusion that a defense of the defendant is such in which investigation is required, even then the defendant is entitled to the grant of leave to defend the case, but where such factors are not present, the Court in its discretion can grant a conditional leave by imposing certain condition, which includes security or to deposit the claimed amount.

6. The above submission of the appellant's side has been controverted by Mr. Zaheeruddin S. Laghari, the learned Counsel representing the present respondent (plaintiff in above suit). His submission is that the subject cheque was in fact for consideration as the present appellant in his leave to defend application has not disputed a very basic fact which has been stated in the plaint of the summary suit that the subject cheque was part of the transaction wherein present appellant wanted to purchase an agricultural land from one Ghulam Shabbir.

7. According to learned Counsel for respondent, the appellant in Paragraph-3 of his leave to defend application has confirmed the fact that he has purchased the agricultural land from above named Ghulam Shabbir. According to Mr. Laghari, the actual transaction was that the present respondent had earlier given a loan to appellant for purchase of the above agricultural land from above named seller (Ghulam Shabeer). It has been further refuted that cheque was torn in front of witnesses after payment of entire sale consideration to above named Ghulam Shabeer. According to learned Counsel, the basic ingredients of a valid negotiable instrument are present in his case, viz. (i) issuance of cheque; (ii) signature of the drawer (the present appellant); (iii) name of beneficiary is even written, who is present respondent; and (iv) its presentment in the Bank, though it was subsequently dishonored. The copy of the subject cheque has been produced under statement of the Counsel alongwith three different Bank Slips in order to show that thrice on different dates the cheque was presented and was dishonored for the same reason, that is, for want of insufficient funds. Reason for presenting the cheque thrice, as according to learned Counsel for respondent, is that the latter (respondent) was requested by present appellant to grant him some time for making arrangement of the funds so that the subject cheque on its re-presentment should not be dishonored, but despite that it was bounced.

8. Submissions of both learned Counsel have been taken into consideration and with their able assistance the case record has been examined.

9. In the above cited judgment of *Asif Nadeem*, it has been held, *inter alia*, that presumption under Section 118 of Negotiable Instruments Act, 1881, attached to a negotiable instrument is a rebuttable presumption but the onus is on the person denying such consideration to allege and prove the same. It has been further held on Page-659(D) that if the defence set up is illusory or sham then the defendant is not entitled to obtain a leave to defend. The undisputed and inescapable factual aspect of the case is that present appellant has not challenged the order dated 18.08.2010, whereby conditional leave was granted to defend the case, but only the above mentioned subsequent order. It is also an admitted fact that compliance of the conditional leave granting order was not made within the specified time frame. On this factual and legal issue the reported decision of Honourable Supreme Court in the case of *Haji Ali Khan & Co. V/s. M/s. Allied Bank of Pakistan Limited (PLD 1995 Supreme Court 362)* provides a guidance, wherein it has been held that if the condition of the leave is not fulfilled by the defendant, then the effect of such non-fulfillment will result in decreeing the suit. This ratio of Honourable Supreme Court is with regard to Rule 3 of Order 37 of C.P.C. It would be advantageous to reproduce here-in-below the Paragraph No.10 of the above judgment\_

*“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 in response to a summons served in Form No.4 provided in Appendix B to the CPC or fails to fulfill 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 CPC, 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 fulfill 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 fulfill the requirements of law."*

*(Underlining to supply emphasis)*

10. A perusal of contents of present appeal as well as leave to defend application, which is available at Page-33, shows that the present appellant has failed to make out a case that at least for the time being it can be argued that the cheque in question was not for consideration. In other words, Section 118 of the Negotiable Instruments Act, 1881, is applicable to the case of present respondent; that is, the subject cheque in fact was given/drawn for consideration. With regard to one of the grounds of present appeal that the original cheque was not produced before the Trial Court, the same has been categorically disputed by the respondent's side. More so, on 18.11.2016 when the matter was adjourned, the original subject cheque was produced before this Court, which was returned back to the respondent's Counsel and whereafter he filed a photocopy of the same under his Statement, as mentioned in the preceding paragraphs. The defence set up by the appellant's side

that the cheque was torn in front of witnesses and therefore, the cheque in question is either a bogus one, or, Respondent 'might have' obtained a photo copy of the same, is not a plausible defence. Appellant has not lodged any complaint against the concerned Allied Bank Limited for entertaining a purported 'photo copy' cheque. This argument (of Appellant's side), in my humble view, falls within the category of illusory or sham defence, as held in above referred Asif Nadeem's case (2001 CLC 653).

Karachi The present appellant neither in present appeal nor in the suit proceeding has setup an arguable and triable defence against the claim of respondent.

11. The observation as contained in the impugned order that even the application for condonation of delay, for not complying the condition mentioned in the leave granting order, has been filed after the time had lapsed and not before that, in order to show *bona fides* of appellant, has been rightly made.

12. The upshot of the above discussion is that I do not find any illegality or material irregularity in the impugned order and subsequent decree, which justifies any interference in it and consequently the instant appeal is dismissed being *de void* of any merits alongwith pending application.

Parties are left to bear their own costs.

JUDGE