

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
First Civil Appeal No.13 of 2016

DATE	ORDER WITH SIGNATURE OF JUDGE
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Date of hearing: 10 .11.2016.

Date of judgment: 18 .11.2016.

Mr. Syed Kamran Ali, Advocate for appellant.

Mr. Abdul Aziz A. Shaikh, Advocate for respondent No.1.

Mr. Allah Bachayo Soomro, Additional A.G Sindh.

J U D G M E N T

MUHAMMAD FAISAL KAMAL ALAM, J:- This First Appeal under Section 96 of CPC has been preferred against the judgment dated 29.03.2016, which culminated into the impugned decree dated 02.04.2016, passed by the learned VIth Additional District Judge, Hyderabad in Summary Suit No.47 of 2015, which was instituted by the present Respondent Muhammad Yaseen Atta against Nadeem Ali, the present appellant, under Order XXXVII of CPC relating to Summary Procedure for negotiable instruments.

2. The relevant facts which relate to the filing of the present appeal are that the cross cheque issued by the appellant being Cheque No.97057724 dated 05.03.2014 (**subject cheque**), which was subsequently corrected as 10.03.2015 drawn at Summit Bank, Latifabad Unit No.7 Branch, Hyderabad, which on presentment was dishonoured. Subsequently, the appellant was notified about this fact but despite many demands, the appellant avoided to make the

payment to the respondent, who consequently filed the above mentioned summary suit.

3. Syed Karman Ali, the learned Counsel for the appellant has vehemently argued that the impugned judgment and decree have been passed by overlooking the provisions of law as expounded by a judicial pronouncement reported as *2016 MLD 206 (Sindh)*. According to the learned Counsel, the time of 10 days for filing an Application for Leave to Defend will commence only upon providing the copy of the entire plaint alongwith the annexures to the defendant [in the present case the Appellant], enabling him to file a leave to defend application. It is further contended that since the copies of the claim/summary suit were never provided to the present appellant/defendant, resultantly the latter [present appellant and defendant in the above summary suit] could not file a leave to defend application within time. The learned Counsel argued that no doubt in the proceedings of the nature, the appellant first has to seek a leave to defend the case, but considering Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, the Court below should have ensured that the defendant/appellant was provided the entire set of the plaint in order to provide him a fair opportunity to participate in the trial. The learned Counsel further submits that the learned trial Court failed to exercise a judicious discretion when it refuses to receive the application for leave to defend prepared by the present appellant and thus this very act of the Trial Court is a ground to set the impugned decision at naught. The learned Counsel for appellant has also contended with vehemence that the appellant is a permanent resident of Karachi and therefore service of

the summary suit was not effected on him as per rules, therefore, he should be given a fair chance to contest the proceedings below after setting aside the impugned judgment and decree. Simultaneously, the other grievance of the appellant is that his another application under Order 9 Rule 7 of CPC was also not properly decided by applying a judicial mind to the facts mentioned therein. Learned counsel for Appellant has also placed reliance on a reported decision of the Hon'ble Apex Court; PLD 1985 Supreme Court page 405.

The above arguments were controverted by the learned Counsel Mr. Abdul Aziz A. Shaikh, who is representing the respondent and has referred to orders passed on different dates by the learned trial Court and record of which has been produced by the appellant in the present appeal. As per the respondent's Counsel, the appellant has failed to file leave to defend application within the stipulated time of 10 days. The learned Counsel specifically refers to the order dated 07.12.2015, wherein it has been mentioned that one Mr. Zulfiqar Ali Chang, Advocate filed Vakalatnama on behalf of Defendant (that is, present appellant). On 15.12.2015, the present appellant and his Counsel was present. On 07.01.2016, the present appellant was debarred from filing leave to defend application as the time for filing the same had already lapsed. On 20.01.2016, the present Counsel Syed Kamran Ali, filed the application under Order 9 Rule 7 of CPC, on behalf of present appellant, which was decided by the order dated 27.02.2016 and consequently the said application was dismissed by way of a speaking order. According to respondent side that till the filling of the instant appeal, the leave to defend application was not filed by the present

appellant. Respondent's Counsel has further referred to the application under Order 9 Rule 7 of CPC, which is available at Page-51 and pointed out Paragraph No.2 whereof, in which it has been stated by the present appellant that though his Advocate has prepared the application for leave to defend but since the appellant was suffering from fever, therefore, he could not attend the Court for swearing the affidavit and filing the same in the office. The learned counsel urges that if the contention of the appellant with regard to non-provision of copy of the summary suit is correct then how the erstwhile Counsel prepared the leave to defend application. *In rebuttal*, the learned Counsel for the appellant has refuted the allegation of respondent side that leave to defend application was not filed, but refers to Page-57 of the case file on which leave to defend application is available. With regard to the contention of appellant's permanent residence, the respondent's Counsel pointed out his affidavit filed with his application under Order 9 Rule 7 of CPC, which is available at Page-53, wherein it has been specifically mentioned that the appellant is resident of B-2, Unit No.10, Shah Latifabad, Hyderabad.

4. I have heard the arguments of the learned Counsel for the parties and examined the record with their able assistance.

5. Firstly, the case law cited by the Appellant's counsel are distinguishable. Basic facts of the first reported decision [MLD 2016 page 206] are that the party/defendant and his advocate in that case repeatedly asked for the copy of the summary suit and when the same was supplied, he then filed the Application seeking court's leave to

defend the case, whereas, in the present case the overall stance of the Appellant is self-contradictory. The second case law of Hon'ble Supreme Court is with regard to a settled rule that when an appeal is filed against a final decision then other interim orders passed earlier also get merged with the final impugned decision and re-opened before the appellate forum. This decision is hardly of any help to the Appellant, except, it can lend a limited assistance to the present Appellant with regard to the Order dated 27-2-2016, whereby, the Application filed by present Appellant under order 9 Rule 7 of CPC was dismissed. Even if this order is examined, it does not suffer from any illegality. Secondly, when this Order of 27-2-2016 was passed, it was already too late in the day for filing Application for leave to defend the case, as the stipulated time for filing the same had lapsed **on 17-12-2015**. The Appellant in his present appeal has mentioned that though Application for leave to defend was prepared by 2-2-2016, but the learned Trial Court refused to accept the same. This is yet another contradiction rather admission, that the requisite Application was prepared after the cut-off date for filing the same [as mentioned above] has already been passed.

6. Thirdly, the Appellant has not taken any defence that contains the quality to rebut the presumption of consideration attached to the subject cheque by virtue of Section 118 of the Negotiable Instruments Act, 1881.

7. Fourthly, notwithstanding to the arguments of respondent's Counsel about non-filing of Application for Leave to Defend, even if the

application for leave to defend, which is available in present appeal record, is perused, the undisputed fact that emerges is that the appellant has not denied the issuance of the subject cheque with regard to a sale transaction of shops, however, with a rider that the subject cheque was liable to be returned on payment/refund of the sale consideration of rupees nineteen lacs in respect of the said shops. It has been further stated by the present appellant in his leave to defend application that the respondent has changed the date on the subject cheque by committing forgery for which he reserved the right of lodging a FIR, but till date no such proceeding has been initiated by the present appellant against the respondent. Conversely, the respondent in his Counter Affidavit to the Stay Application [under Order 41, Rule 5 of CPC, being CMA 828/2016] filed with instant appeal, has stated that the present appellant is facing a criminal trial in respect of Crime No.213 of 2014, under Section 489-F of PPC, and a non-bailable warrant of arrest against him, issued by the concerned Court of Civil Judge and Judicial Magistrate Hyderabad-I is also appended by Respondent.

8- Fifthly, a minute examination of pleadings of the appellant at both fora leads to the conclusion that he has not only failed to plead any genuine triable issue for which he can be granted a leave to defend in the referred summary suit, but had miserably failed to comply with the specific provisions of Order 37 of CPC, *inter-alia*, by not filing a leave to defend application within the stipulated time. In this regard, the well-known judgment of *Haji Ali Khan & Co. V/s. M/s. Allied Bank of Pakistan Limited reported as PLD 1995 Supreme Court 362*, is of

relevance and guidance, wherein a complete procedure has been laid down by the Hon'ble Supreme Court; at Page-371, it has been mentioned that if the defendant within 10 days did not file/apply for leave to defend the case, then the allegations in the plaint shall be deemed to have been admitted and the plaintiff shall be entitled to a decree in terms of sub-clauses (a), (b) and (c) of sub-rule (2) of Rule 2 of Order 37 of CPC. 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 Oder 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."

9. The upshot of the above is that while passing the impugned decision the learned Trial Court has applied its judicial mind hence, no case of interference is made out in the impugned judgment and decree, which has rightly applied the law to the facts of the case and particularly considering the fact that the suit proceedings were of summary nature and the object of such type of proceedings cannot be allowed to be defeated on some fanciful grounds. Consequently, the present appeal is dismissed with costs.

JUDGE

Shahid