

**IN THE HIGH COURT OF SINDH
AT KARACHI**

SUIT NO. 506 OF 2010

Plaintiff : Haji Mir Fateh Muhammad through
Mr. Faiz Durrani, Advocate

Defendant : Mrs. Sajida Zaheer & others, through
Mr. Shakeel Ahmed, Advocate

Date of hearing : 31.05.2018

J U D G M E N T

YOUSUF ALI SAYEED, J - The instant Suit under Order 37 CPC stems from the dishonour of a cheque for Rs.10,000,000/-, bearing No.9805082, dated 02.05.2007 (the “**Subject Cheque**”) , drawn in favour of the Plaintiff by one Muhammad Zaheer (the “**Drawer**”) on PLS Account Number 0000050268 maintained by him with MCB Bank Limited at its Sindh Secretariat Branch, Karachi (the “**Underlying Account**”).

2. The Case of the Plaintiff is that the Drawer approached him with an offer to participate in a venture for the acquisition of immovable property measuring 7.00 acres located in Deh Okewari, Gulshan-e-Iqbal, Karachi, on the premise that the same would be sold at a profit, with the Plaintiff being entitled to 25% of the proceeds, and a formal contract was firstly executed between them on 03.07.2006 in that regard, as witnessed by the present Defendant, who is the wife/widow of the Drawer and was impleaded in his stead following his demise during the pendency of the Suit, by virtue of being his legal heir.

3. It is said that the aforesaid agreement of 03.07.2006 could not reach fruition and came to be substituted by another agreement arrived at between the parties on 02.11.2006, when the Defendant received an amount of Rs.10,000,000/- from the Plaintiff for completion of the documentation and transfer of physical possession of the aforesaid property on the understanding the said amount would be returned within six months (i.e. by May 02, 2017); such repayment obligation initially being secured through a post-dated cheque bearing No.9805080 dated 02.11.2006 for that amount, and upon the instrument becoming stale following lapse of a six month period from the date of issuance, being subsequently secured vide the Subject Cheque issued in lieu thereof.

4. Apparently, the Subject Cheque was presented by the Plaintiff thrice, on 02.05.2007, 05.05.2007 and 11.05.2007, and was returned for the reason of there being “**insufficient funds**” in the Underlying Account and also with the additional endorsement of “**stop payment request received from customer**”, hence the instant Suit for recovery of the amount payable thereunder, with prayers being elicited in the following terms:
 - (a) For recovery of Rs.10,000,000/- against the defendant with the mark-up w.e.f. May, 02, 2007, at the normal commercial banking rate till realization of decretal amount.
 - (b) For the attachment before Judgment, the salary and retirement benefits of the defendant, as the defendant as on the date of filing of this suit is serving as Section Officer, in Education Department, Government of Sindh, Karachi, in order to realize decretal amount.
 - (c) Cost of the suit.
 - (d) Grant such further any other relief(s) deem fit and proper in special circumstances of the case.

5. The Drawer filed an Application seeking leave to defend, which was granted vide the Order made on 29.09.2010, subject to furnishing of solvent surety to the satisfaction of the Nazir of a sum commensurate to the amount payable under the Subject Cheque. In compliance, the Drawer and the present Defendant deposited the title of their respective immovable properties with the Nazir, following which the Drawer was permitted to file a Written Statement, whereafter issues were settled as follows:

- (1) Whether the defendant has executed the agreements dated 3.7.2006 and 2.11.2006 with the plaintiff?
- (2) Whether the defendant has issued the cheque bearing No.9805080 dated 2.11.2006 and cheque bearing No.9805082 dated 2.5.2007 in the name of the plaintiff on Account of repayment?
- (3) Whether the defendant is liable to pay the suit amount with mark-up thereon on the basis of the cheques issued by him to the plaintiff.
- (4) Whether the suit as framed is maintainable or not?
- (5) Whether the plaintiff has received a huge amount from the defendant with malafide intention and filed the above matter with intention to blackmail him and usurp his amount or not?
- (6) Whether the plaintiff is entitled to recover any amount from the defendant or not?
- (7) What shall be the judgment and decree?

6. The Plaintiff as well as the Drawer and present Defendant filed their respective Affidavits-in-Evidence during the course of proceedings on commission, and were cross-examined accordingly.

7. In support of his Affidavit-in-Evidence the Plaintiff produced documents relating to the land measuring 7.00 acres Located in Deh Okewari, Gulishan-e-Iqbal, the Agreements dated 03.07.2006 and 02.11.2006 executed between him and the Drawer, a Receipt issued by the Drawer dated 02.11.2006, Cheque Nos. 9805080 and 9805082 dated 02.11.2006 and 02.05.2007, each made out by the Drawer in favour of the Plaintiff for the sum of Rs.10 million, the Cheque Return Memos dated 05.05.2006 and 11.05.2006 and a copy of a legal notice dated 08.03.2010 along with the courier receipt. The original documents were seen and returned, and photocopies thereof were marked and placed on record.

8. For his part, in support of his Affidavit-in-Evidence, the Drawer merely produced certain letters dated 04.11.2006, 04.01.2007 and 08.07.2008, whereas, apart from her Affidavit-in-Evidence, no further document was produced by the present Defendant.

9. Learned counsel for the Plaintiff meticulously went through the evidence and pointed to various contradictions in the stance of the Drawer and to the various admissions on his part as well as that of the present Defendant, which could not be effectively explained or rebutted by the learned counsel appearing on behalf of the Defendant.

10. It was pointed out that whilst admitting to the execution of the Agreements dated 03.07.2006 and 02.11.2006 and issuance of Cheque Nos. 9805080 and 9805082 as well as stoppage of payment on the Subject Cheque, in his defence the Drawer had contended that a sum of Rs. 2,426,000/- (Rupees Two Million Four Hundred and Twenty-Six Thousand) was in fact due to the Defendant from the Plaintiff on account of financing provided at the request of the latter to facilitate him in engaging in the business of transacting in gold dust, the profits from which were to be shared with the Defendant in addition to repayment of the amount advanced. It was said that the Plaintiff failed to honour his commitment in that regard, and no amount was ever paid by him to the Defendant, except bringing and giving two packets of purported gold dust which, on testing by a goldsmith, proved to be a mixture of Zinc, Silver and other different metals etc, which assertion was denied by the Plaintiff, and his testimony remained unshaken during the course of cross-examination. The relevant excerpts from the deposition of the Plaintiff is as follows:

“It is incorrect to suggest that the said amount of Rs.24,26,000/- was paid to me by the defendant for taking gold dust to test in laboratory and sell the same to a buyer and introduce by myself. It is incorrect to suggest that gold dust was artificial. It is incorrect to suggest that disputed cheque of Rs.1 crore was handed over to me as a Security towards the said gold dust by the defendant. It is incorrect to suggest that the said cheque was not given to me for return of loan amount.”

“It is incorrect to suggest that I have not produced any documentary proof regarding loan paid to me by the defendant. I see Ex. P-15 as proof of loan/amount. It is incorrect to suggest that again payment of Rs.24,26,000/- I had given to the defendant the said gold dust and which in for laboratory test was declared artificial, as a result of laboratory test.”

11. It was also pointed out that, conversely, under cross-examination, the Drawer had admitted to the property transaction, as well as to the execution of the Agreements dated 03.07.2006 and 02.11.2006 and issuance of Cheque Nos. 9805080 and 9805082 as well as stoppage of payment on the Subject Cheque, as aforementioned, but could not substantiate his contention as to the arrangement for transacting in gold dust. Certain relevant excerpts from the cross-examination of the Drawer are as follows:

“It is correct that I have mentioned in para 2 of my affidavit-in-evidence that I required some investment from sound party to purchase said property for whom. I had entered into purchase agreement. It is correct that I required sound investor and sincere party for investment to purchase property for which I had entered into purchase agreements.”

“It is correct that property in question 7 acres of land situated in Deh Okawari Na Class 118. I had never entered into sale transaction in respect of any other land. I wanted to purchase of this land for the purpose of investment in order to earn profit by selling the same on higher price. These brokers had introduced to me with Plaintiff.”

“It is correct that this entire transaction had taken between 2006 to 2007.”

“It is correct that documents annexures P/2 to P/11 are copies of documents that I had given to plaintiff for the purpose of purchase of said land of 7 acres. It is correct that there are the documents of 7 acres of land which belongs to Mst. Sayeda Yar. It is correct that I had provided photo copies of these documents to Plaintiff.”

“It is correct that I have not annexed any documents of whatsoever with my affidavit-in-evidence which could prove the sale purchase transaction of dust gold with Plaintiff.”

“I see statement annexed with my affidavit in evidence and say it is correct that it does not established and prove if payments were made by me to Plaintiff. It is correct that I have attached the statement with my affidavit in evidence and it is correct that there is no proofs, if I have made these payments to Plaintiff.”

“It is correct that I had entered into agreement with Plaintiff on 3.7.2006 for investment of 7 acres of land mentioned in plaint. It is correct that I had undertaken to return the said amount within 3 months with profit of 25% to plaintiff. It is correct that I had committed to return the entire received amount from Plaintiff. It is correct that I had committed to return the entire received amount from Plaintiff, if the transaction would not complete. It is correct that I see agreement dated 2.11.2006 and I confirmed that it was executed by me with Plaintiff.”

“It is correct that it is written in agreement that Plaintiff shall pay Rs.1 Crore to me in form of cash which will be for completing the documents of 7 acres of land. It is correct that I have mentioned in para 2 of agreement dated 2.11.2006 that I will issue receipt on stamp paper upon receipt of Rs.1 Crore from Plaintiff. It is correct that it is mentioned in para 3 of agreement dated 2.11.2006 that I have returned the said amount to plaintiff within 6 months from the date of receiving.”

“It is correct that I had issued two (2) cheques No.9805082 of M.C.B dated 2.5.2007 of Rs.1 Crore and Cheque No.9805080 of M.C.B dated 2.11.2006 of Rs.1 Crore. It is correct that there two (2) Cheques were issued by me in pursuance of agreement dated 2.11.2006 and it is correct that cheque dated 2.5.2007 bearing No.9805-82 was dishonoured due to insufficient of funds and I had stopped payment of cheque No.9805082 dated 2.5.2007 of Rs.1 crore.”

12. It was further pointed out that similarly, under cross-examination, the present Defendant had also conceded to the execution of the Agreements dated 03.07.2006 and 02.11.2006 and issuance of Cheque Nos. 9805080 and 9805082 by the Drawer, and admitted that the only document put forward in support of the purported gold dust transactions was self-created. The relevant excerpts from her cross-examination are as follows:

“The document, statement of account does not bear my signature and it was prepared and written by me. It is correct that I have not witnesseth any of documents annexed with my affidavit in evidence as witness. I see agreement dated 3.7.2006 and 2.11.2006 and say I admit preparations, executions of the same.”

“I see para 4 of my affidavit in evidence and say it is correct that agreement dated 3.7.2006 was executed between the parties. It is correct that the said two (2) cheques referred in para 9 of my affidavit in evidence were issued by Defendant Muhammad Zaheer. It is correct that said two (2) cheques were issued in pursuance of agreement dated 2.11.2006”.

13. Accordingly, having considered advanced at the bar in light of the material on record, it is apparent that the Drawer had executed the agreements dated 03.7.2006 and 02.11.2006 with the Plaintiff and also issued Cheques bearing Nos.9805080 and 9805082 dated 02.11.2006 and 02.5.2007 in favour of the Plaintiff in the context thereof and that the Subject Cheque was issued for consideration and dishonoured on presentment albeit that the Drawer clearly had a payment obligation underpinning the issuance thereof. Accordingly, Issues Numbers 1, 2, 3 and 6 are answered in the affirmative. Furthermore, in the absence of any probative evidence as to the alleged business arrangement between the Plaintiff and Drawer for transacting in gold dust as well as the absence of an independent claim advanced in that regard, Issue Number 5 is answered in the negative.

14. As to Issue Number 4, pertaining to the subject of maintainability, the only point advanced in that regard was that the Suit was barred by limitation, which appears misconceived in as much as the Subject Cheque was dishonoured on 05.05.2007 and 11.05.2007 and the Suit instituted through presentation of the plaint on 25.03.2010, within the 3-year period prescribed under the Limitation Act. Accordingly, this issue is also answered in the affirmative.

15. In view of the foregoing, the Plaintiff has evidently succeeded in making out his case, and the Suit is accordingly decreed against the Defendant in the sum of Rs.10,000,000/- (Rupees Ten Million), along with compensation at the commercial bank rate from the date of dishonour/default till realization. Office is directed to prepare the decree in the above terms.

JUDGE

Karachi
Dated _____