IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 862 of 2011

[Pervaiz Hussain and another vs. Mian Khurram Rasool]

Date of hearing	:	11.02.2019
Date of Decision	:	19.07.2019
Plaintiffs No.1 and 2 *[Pervaiz Hussain and Sameer Pervaiz Hussain, Respectively]*.	:	Through M/s. Asim Mansoor Khan and Bashir Ahmed Khan, Advocates.
Defendant *[Mian Khurram Rasool]*.	:	Nemo for Defendant.

JUDGMENT

***Muhammad Faisal Kamal Alam, J*:** The Plaintiffs have filed the present action at law under Order XXXVII Rule 1 of the Civil Procedure Code, 1908, *(Summary Procedure)* in respect of four cheques of different dates, with the following Prayer Clause_

> ***"In light of the above circumstances, it is most respectfully prayed that a decree may kindly be passed in favour of the Plaintiffs and against the Defendant in the following terms:***
>
> ***a. Recovery of Rs.633,300,000/- as the principal amount that was paid by the Plaintiffs to the Defendants from time to time, along with interest / mesne profit at the rate prevailing on the date of payment from the date the cheques were dishourned till the date of realization of the aforesaid amount:-***
>
> ***b. Any subsequent interest as this Honourable Court may deem fit in terms of Section 34 of the Code of Civil Procedure, 1980;***

c. Cost of the suit be awarded to the Plaintiffs;

d. Any other relief which this Honourable Court deems fit and proper in the circumstances of the case may also be awarded to the Plaintiffs."

2. Upon issuance of summons, the Leave to Defend Application being CMA No.11482 of 2011 was filed by the Defendant.

3. The record of the case shows that the Defendant never pursued his aforesaid Application and in this regard on various dates, observations were made and the matter was adjourned only in the interest of justice but with a note of caution. Eventually, on 11.05.2018, the above Leave to Defend Application was dismissed for non-prosecution.

4. M/s. Asim Mansoor Khan and Bashir Ahmed Khan, Advocates for Plaintiffs, have argued that since the Leave to Defend Application of Defendant has been dismissed for non-prosecution, therefore, the suit may be decreed as prayed. They have stated that the following four subject cheques were issued for consideration, as also mentioned in the pleadings / plaint and particularly in paragraph-57 thereof.

Sr.#	**Cheque Nos.**	**Amounts**	**Dated**	**In favour of**
1.	0363330	133,300,000	20.01.2011	Plaintiff No.1
2.	0363329	200,000,000	05.01.2011	Plaintiff No.2
3.	0363328	200,000,000	20.12.2010	Plaintiff No.1
4.	0363331	100,000,000	20.01.2011	Plaintiff No2

5. Submissions considered and record of the case has been perused.

6. On 29.11.2018 and 11.02.2019, the original subject cheques along with the Bank advice(s) were presented in the Court and subsequently after

their comparison with the cheques available on record, the same were returned.

7. The subject cheques could not be encashed / honoured because Bank Advice(s) issued by City Bank bearing caption ***"Statement of cheque returned",*** shows that each of the above cheque was not encashed for the reasons mentioned at serial No.19, that is, ***"Account is Closed"***

8. The question is that whether closure of account by the drawer of the cheques, viz. the present Defendant, amounts to dishonoring of the subject cheques.

9. Plaintiffs' legal team argued that there is a difference between stop payment of cheque and closure of one's Bank Account after issuance of cheques, which falls within the ambit of 'dishonest intention'. The Legal Team of Plaintiffs have relied upon the following case law of Indian Jurisdiction and Circular issued by State Bank of Pakistan, in support of their arguments_

1. 2001 CriLJ 2629, ILR 2001 Kar 737 (Karnataka High Court)
   [Thirumala Agencies and another vs. Samala Mareppa and Sons]

2. AIR 1986 Raj 132, 1988 (1) WLN 243 (Rajastan High Court)
   [Mohan Lal vs. Om Prakash]

3. 1999 (3) ALD 719, 1998 (2) ALD Cri 689, 1999 (2) ALT 121, 1999 97 CompCas 13 AP. (Andhra High Court)
   [G. Venkataramanaiah vs. Sillakollu Venkateswarlu]

10. The case law ***(ibid)*** of foreign jurisdiction has also been examined, primarily interpreting Section 138 of the Indian Negotiable Instruments Act. The Indian High Courts (Karnataka, Rajastan and Andhra) have expounded the said provision (Section 138) to the extent that <u>closure of account before or after a cheque is given / issued, in effect means insufficiency of funds in the account of a person who gave the cheque and this will attract the penalty as mentioned in Section 138</u> of the Negotiable

Instruments Act (Indian), which is reproduced herein under for the sake of ready reference_

> ***"Section 138.—Dishonour of cheque for insufficiency, etc., of funds in the account-Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:***
>
> ***Provided that nothing contained in this section shall apply unless:***
>
> ***(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity; whichever is earlier;***
>
> ***(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and***
>
> ***(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be: to the holder in due course of the cheque within 15 days of the receipt of the said notice".***

11. Even though the above provision is not mentioned in the Negotiable Instruments Act, 1881, (as presently enforced in Pakistan), but the nearest provision about dishonouring of cheques entailing a penalty, although in a criminal Jurisdiction, is Section 489-F of Pakistan Penal Code. The afore-referred Section 138, also makes the dishonouring of cheques, subject to certain exceptions, an offence.

From the above discussion, the concept of 'dishonest intention', by analogy, can be invoked in the present nature of proceeding also, when

cheque(s) is / are issued for consideration. It is an undisputed fact, as no defence is offered by the Defendant, that the relationship between the parties hereto was governed by the Agreement filed with the plaint as Annexure ‘P/1’ and the subject cheques were issued for consideration.

12. The BPD Circular Letter No.22 of 2005 dated 14.06.2005, issued by State Bank of Pakistan, mentions the provision of ‘stop payment written instructions’ but subject to time to time instructions issued by State Bank of Pakistan in this regard. However, this is completely different from the reasons mentioned by City Bank in the present case that subject cheques could not be honored / paid to the Plaintiffs, as account has been closed by the present Defendant.

13. In view of the above discussion, it can be held that if a party / in the instant case, the present Defendant issues / has issued the cheques in favour of Plaintiffs as stated in the preceding paragraph, but those cheques upon presentation could not be encashed because of closure of account, then this conduct on the part of Defendant is a *mala fide* one and is done with a dishonest intention to defraud the Plaintiffs. This amounts to dishonouring of subject cheques and hence the consequences shall follow.

14. Since, admittedly the Leave to Defend Application of the Defendant has been dismissed due to his continuous absence, therefore, at present there is no plausible defence of the Defendant available before this Court. In paragraph-57 of the plaint, it is specifically mentioned that when the inquiry was ordered against the Defendant on the instructions of Senior Officials, then the said Defendant also wrote an Undertaking by acknowledging his liability towards the Plaintiffs. The said document (Undertaking) has been appended with the plaint as Annexure ‘P/64’,

wherein factum of issuance of subject cheques to the Plaintiffs has been mentioned.

15. The record shows that the three of the four subject cheques were issued in the month of January, 2011, and the fourth cheque was issued in the month of December, 2010, which upon presentment were dishonoured in the manner as already stated hereinabove. Present ***lis*** was instituted on 13.06.2011, that is, after seven months and thus present suit is within time and is not hit by the Limitation Act, 1908, which prescribes a three years' time.

16. Consequently, the contents of the plaint are to be accepted as true, considering the nature of the present proceeding, as has been held in number of judicial pronouncements, particularly in the case of ***Haji Ali Khan & Co. vs. M/s. Allied Bank of Pakistan Limited*** reported as PLD 1995 Supreme Court page-362. It would be advantageous to reproduce herein below the relevant paragraph from the above reported 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 Trail 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."

17. The conclusion of the above is that the present suit is decreed to the extent of the total amount mentioned in the subject cheques, that is, Rs.633,300,000/- *(Rupees Sixty Three Crores Thirty Three Lacs only)* along with statutory interest of 6% (percent) in terms of Section 79 of the Negotiable Instruments Act, 1881, from the date of institution of the suit till realization of the above amount. However, parties are left to bear their own costs.

Dated: _____ **JUDGE**

M.Javaid.P.A.