

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 963 of 2013

Syed Muhammad Ali ----- Plaintiff

Versus

Amjad Yousuf & another ----- Defendants

Date of hearing: 02.03.2018 & 03.04.2018.

Date of judgment: 28.05.2018

Plaintiff: Through Mr. Shahenshah Hussain Advocate.

Defendants: Through Mr. Choudhry Abdul Rashid Advocate.

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit for Recovery of Rs. 5,30,00,000/- (Rupees Five Crore Thirty Lac), initially claiming the following relief(s):-

- “i) Judgment and Decree for Rs. 5,30,00,000/- (Rupees Five Crore and Thirty Lac) against the Defendant.
- ii) Interest at the rate of 25% per annum from the date of the Suit till the recovery of the decretal amount.
- iii) Cost of the Suit.
- iv) Any other relief which this Hon’ble Court may deem fit and proper in the circumstances of the case.”

2. Thereafter, pursuant to order dated 5.3.2014 an amended plaint was filed and following relief was sought:-

- “i) Judgment and Decree for Rs. 5,30,00,000/- (Rupees Five Crore and Thirty Lac) against Defendant No 1 and 2 jointly and severally.
- ii) Interest at the rate of 25% per annum from the date of the Suit till the recovery of the decretal amount.

- iii) Cost of the Suit.
- iv) Any other relief which this Hon'ble Court may deem fit and proper in the circumstances of the case."

3. Briefly stated facts are that Plaintiff is a businessman and is well known to the Defendant, whereas, in 2012 Defendant approached the Plaintiff regarding construction of a multi storeyed building on Plot No.B-29 situated on main Shahrah-e-Faisal, Sindhi Muslim Cooperative Housing Society, Karachi and requested to provide funds by agreeing to buy two premises admeasuring 1670 square feet and 1667 square feet on second floor of the proposed building for a total sale consideration of Rs. 10,000,000/- (Rupees One Crore) each. It is stated that the Defendant promised that he would repurchase both the premises at a higher price of Rs.8000 per square feet within one year, giving an option to the Plaintiff to retain the same if so desired. Accordingly two separate Agreements dated 11.05.2012 with the Plaintiff, and dated 24.10.2012 with his son Syed Faisal Ali were executed and Rs.20,000,000/- (Rupees Two Crore) were paid. It is stated that Defendant who is also a money changer offered to sell US\$3,00,000/- in fourth week of December, 2012 at Rs. 95 per US\$ equivalent to Rs.2,85,00,000/- (Rupees Two Crore Eighty Five Lac) and as an incentive asked the Plaintiff to pay a discounted price of Rs.2,79,00,000/- (Rupees Two Crore Seventy Nine Lac) which was paid on 25.12.2012 against which three receipts were issued in the name of the Plaintiff, his son Syed Faisal Ali and wife Mst. Zahida Begum for an amount of Rs.95,00,000/- (Rupees Ninety Five Lac) each. However, despite payment the dollars were not issued or delivered whereas, the Defendant kept on seeking further time but never repaid the same. Upon demand an amount of Rs.10,000,000/- (Rupees One

Crore) in cash was paid on 12.6.2013. Thereafter, on continuous demands Defendant issued a cheque dated 30.06.2013 drawn on Meezan Bank for Rs.3,79,00,000/- (Rupees Three Crore Seventy Nine Lac) and further acknowledged in writing his liability to pay Rs.66,00,000/- (Rupees Sixty Six Lac) under the Agreement dated 11.5.2012 and 24.10.2012 and Rs.85,00,000/- (Rupees Eighty Five Lac) on account of profit accrued from the sale and purchase of US\$. It is further stated that on presentation, the said cheque was returned unpaid which reflects that the Defendant continuously deceived the Plaintiff of taking undue advantage of his friendship, hence instant Suit.

4. Learned Counsel for the Plaintiff has referred to Exhibit P/1 which is the Agreement dated 11.05.2012 and P/2 which is the Agreement dated 24.10.2012 and two receipts Exhibits P/3 and P/4 each of Rs.10,00,000/- (Rupees One Crore) and has contended that the same have not been denied. Learned Counsel has relied upon Exhibit P/5 to P/9 which are receipts in respect of US\$ 100,000, each totaling Rs.2,85,00,000/- (Rupees Two Crore Eighty Five Lac) and has contended that the Defendant as an incentive gave a discount and against receipt of Rs.2,85,00,000/- (Rupees Two Crore Eighty Five Lac) received cash of Rs.2,79,00,000/- (Rupees Two Crore Seventy Nine Lac). Per learned Counsel, though it is only the Plaintiff before the Court but payments on behalf of his son and wife were made as Benami. He has further relied upon Exhibit P/11 to further justify the claim that the same is a receipt of acknowledgment of Rs.3,79,00,000/- (Rupees Three Crore Seventy Nine Lac) with a further undertaking to pay profit of Rs.85,00,000/- (Rupees Eighty Five Lac) on dollars and Rs.33,00,000/- (Rupees Thirty Three Lac) each in respect of the agreement in question and for which a cheque Exhibit

P/12 dated 30.6.2013 was also issued. According to the learned Counsel out of the total receivable of Rs.4,79,00,000/- (Rupees Four Crore Seventy Nine Lac) an amount of Rs.10,00,000/- (Rupees One Crore) has been paid and for the balance along with markup instant Suit has been filed. Learned Counsel has referred to Para 4 of the written statement of the Defendant and submits that there is a clear admission to that effect whereas; the other part of the written statement cannot be relied upon by the Defendant as he failed to enter the witness box. In support of such proposition, he relied upon ***Faqir Muhammad and 8 others V. Abdul Momin and 2 others (PLD 2003 SC 594), and Ghulam Farid and other V. Mehmood Akhtar and others (PLD 2010 SC 608)***. He further relied upon Section 118 of the Negotiable Instrument Act and has further contended that issuance of cheque is a presumption for consideration from which the Defendant cannot resile and in support he has relied upon ***Col. (Retd.) Ashfaq Ahmed and others V. Sh. Muhammad Wasim (1999 SCMR 2832) and EFU General Insurance Ltd. V. Messrs Security and Management Services (Pvt.) Ltd. (2002 CLD 107)***. According to the learned Counsel, neither the Agreement nor the payment made has been denied and to support such contention he has relied upon the examination in chief of the Plaintiff and his cross examination. He further submitted that issuance of cheque of Rs.3,79,00,000/- (Rupees Three Crore Seventy Nine Lac) is also not denied however, it has been contended by the Defendant that it was obtained by force. Per learned Counsel, such stance was never proved as the Defendant never came in the witness box. As to the objection regarding non-impleading the Plaintiff's son and wife, learned Counsel has contended that all money belongs to the Plaintiff as they were his

Benami, whereas, no other claimant has come forward; therefore, the objection in this regard is misconceived. He has prayed for a Judgment and Decree.

5. On the other hand, learned Counsel for the Defendant has submitted that the two Agreements in question are admitted, whereas, the receipts issued by MEGA Currency Exchange are not receipts of the Defendant; hence, denied. He has further submitted that after filing of written statement by the Defendant, CMA No.12487/2013 was filed under Order 1 Rule 10 CPC for impleading MEGA Currency Exchange and was allowed vide order dated 5.3.2014. According to the learned Counsel such order was impugned in High Court Appeal No.95/2014 and during pendency of the same, Plaintiff filed its affidavit in evidence after settlement of issues on 22.10.2014. He has contended that the affidavit in evidence and its contents are beyond the plaint and there is an attempt of improvement in the Plaintiff's case. Per learned Counsel the order of impleading Defendant No.2 was set aside in the Appeal vide order dated 27.03.2015, but neither the affidavit in evidence nor issues were amended, and therefore, the entire reliance by the Plaintiff's Counsel on the evidence which was recorded in between this period is meaningless and cannot be considered. Learned Counsel has referred to the amended prayer clause wherein, the claim was severally and jointly against two Defendants and after the Appeal was allowed, the claim to the extent of MEGA Currency Exchange cannot be demanded from the Defendant. According to the learned Counsel, as to the Defendant there was a claim of Rs.20,000,000/- (Rupees Two Crore) out of which Rs.10,000,000/- (Rupees One Crore) has been returned which is admitted in the plaint; however, in the affidavit in evidence an attempt has been

made to improve the case by saying that it was in respect of profits. Insofar as the claim pertaining to Syed Faisal Ali in respect of the Agreement is concerned, he has contended that the said Faisal Ali is not before the Court and Plaintiff has failed to bring any material on record that he is authorized to pursue his case and a mere statement that his payment was a Benami by the Plaintiff does not suffice. According to the leaned Counsel, at least the said Faisal Ali ought to have been summoned as a witness to substantiate such assertion. Per learned Counsel the Defendant is ready to implement the Agreement Exhibit P/2 and the Plaintiff is at liberty to approach the Defendant for such implementation. Learned Counsel has further contended that after passing of the appellate order, the Plaintiff's Counsel should have called any witness from MEGA Currency Exchange to establish the genuineness of the receipts being relied upon in respect of the alleged sale and purchase of dollars, but this was not done, therefore, the Plaintiff has no case as against the present Defendant. As to the issuance of cheque for Rs.3,79,00,000/- (Rupees Three Crore Seventy Nine Lac) is concerned, he has contended that the same was given as a security and was not supposed to be paid.

6. I have heard both the learned Counsel and perused the record. Facts have been briefly stated herein above and precisely the Plaintiff's present Suit is for recovery of Rs.5,30,00,000/- (Rupees Five Crore Thirty Lac). It is a matter of record that after filing of written statement wherein, certain stance was taken by the Defendant, the Plaintiff filed an application under Order 1 Rule 10 CPC for impleading proposed Defendant namely Mega Currency Exchange Company Private Limited and this was precisely based on three receipts of Rs.95,00,000/- (Rupees

Ninety Five Lac) each issued by the said Mega Currency Exchange in the name of the Plaintiff, his son and wife. The said application was allowed vide order dated 5.3.2014. Thereafter the plaintiff filed an amended plaint on 10.3.2014 and on 22.10.2014; based on the pleadings before the Court the following issues were settled.

1. Whether the amount as claimed in the suit is due and outstanding against the defendants?

2. Whether the defendant No.2 is liable to pay the amount as claimed or any other amount to the plaintiff?

3. What should the decree be?

The Issues are answered as follows:

Issue No.1 Partly in affirmative

Issue No.2 No answer required

Issue No.3 As below

Issue No.1 & 2

7. Since both these issues are interlinked, therefore, they have been discussed together. It is a matter of record that order dated 5.3.2014 was impugned by the Defendant who was impleaded pursuant to Order 1 Rule 10 application through High Court Appeal No.95/2014 and the order passed for impleading the said Defendant was set aside through order dated 27.3.2015. It is also a matter of record that pursuant to the grant of Order 1 Rule 10 application and after filing of amended plaint as well as title, the plaintiff filed its affidavit in evidence on 17.12.2014. The evidence was proceeded before the learned Commissioner from such date till 27.3.2015 when the said order of the learned Single Judge was in field until it was set aside by the Appellate Court. It is an

admitted position that the entire evidence was recorded during such period, whereas, it is also a matter of record that after passing of the appellate order, no further proceedings were initiated by the Plaintiff either to amend and or file an additional affidavit in evidence, or for that matter, request to amend issues, nor any effort was made to summon any witness in support and justification of the three receipts in question which were purportedly issued by the said currency exchange company. It needs to be appreciated that Issue No.2 is exclusively claiming relief against Defendant No.2, which is no more a party to the Suit. This appears to be a very important aspect of the case and has a direct bearing and nexus on the Plaintiff's claim. Insofar as the Defendant is concerned, the two Agreements in question have not been denied and it is the case of the Defendant that out of Rs.20,000,000/- (Rupees two Crore) Rs.10,000,000/- the (Rupees One Crore) have been returned whereas, he is ready to honor the second Agreement. In such circumstances, the onus in respect of the remaining claim shifts upon the Plaintiff. It is not material for the present purposes that since Defendant did not enter into the witness box, therefore, the entire stance of the Defendant is to be discarded. The repayment of Rs.10,000,000/- (Rupees One Crore) is an admitted fact and if such repayment was in respect of the some profits as alleged, it is for the Plaintiff to prove the same. In the cross-examination as to the three receipts the plaintiff has replied that *"It is correct that Defendant No. 1 has denied the execution of Ex. P/5, 7 and P/9, in his written statement. I did not contact Defendant No. 2, to know about the issuance of Ex. P/5, 7 and 9. Even after impleading Defendant No. 2 in the Suit, I did not contact it. It is not correct that my Suit is against only Defendant No.1 but it is against both the Defendants.* This leaves nothing as to a decision in

respect of Issue No.2 and so also in respect of the claim pertaining to the alleged transaction of US Dollars and the three receipts relied upon in this regard. He has further stated that *“It is also correct that whatever has been stated in Paras 9 and 10 of the affidavit in evidence has not been mentioned in the plaint”*. He has again responded that *“It is correct that the receipt Ex. P/5, P/7 and P/9 do not bear the signature of Defendant No.1. Vol. says that these were brought by Defendant No.1”*. As to the role of Defendant No.1 in the affairs of Mega Currency Company, the erstwhile Defendant No.2, he has stated that *“It is correct that I have not filed any paper to show that Defendant No. 1 was the Director of Defendant No. 2 in the year 2013. It is correct that Defendant No. 1 has paid back to me Rs. one Crore. It is correct that Defendant No. 1 has not paid back to me Rs. One crore pertaining to Ex. P/2”*. As to the extra amount being claimed as profit and other commitments he has stated that *“It is correct that I have not given the explanation about the amount of Rs. 66 lacs towards profit nor I have given the details of Rs. 85 lacs as to how this amount has become due. It is correct that the amount of Rs. 85 lacs is the profit of Ex. P/5, 7 and Ex. P/9”*. When questioned about some discrepancy in Ex-P/9, he has replied that *“I see Ex. P/9 and say that some line / or signature or initial appearing below the date 25.12.2012 is not appearing in the original receipt which is in my possession.”*

8. Perusal of the aforesaid evidence in clear terms reflects that at the relevant time the Plaintiff's claim in respect of the entire Suit was against two Defendants i.e. Defendant No.1 and Defendant No.2. It was his further case that Defendant No.1 is the Director of Defendant No.2 and at the same time it has been admitted that the receipts were issued on behalf of Defendant No.2. After setting aside of the order of impleadment of Defendant No.2 in the appeal, in my view it was

incumbent upon the Plaintiff to lead additional or further evidence and so also to prove his claim in the changed circumstances exclusively against the Defendant. The claim of the Plaintiff is in two parts, one is directly against the present Defendant in respect of the Agreement and payment of Rs.20,000,000/- (Rupees Two Crore). The other one at least in the affidavit in evidence and the cross-examination is against the erstwhile Defendant No.2 who is no more a party to the Suit; hence, for the present purposes, the evidence led by the Plaintiff in respect of the second part of the claim regarding payments to purchase US\$ cannot be accepted and considered for passing of a Decree and Judgment against the present Defendant. The Plaintiff has not been able to prove through any cogent, credible or confidence inspiring evidence, so as to convince and establish his claim that Exh-P/5, P/7 & P/9, were receipts issues by the present defendant, or were at least issued by defendant on behalf of the erstwhile defendant i.e. Mega Currency Exchange. Hence for lack of evidence, his claim to that extent fails. As to the postdated cheque in question, it may be observed that this is not a Suit under Summary Chapter (Order 37 CPC), and therefore, has to be proved. The amount of cheque as contended is in respect of Rs.10,000,000/- (One Crore) pertaining to the purchase of property, and for Rs.29,700,000/- (Two Crore Ninety Seven Lacs) in respect of three receipts of Rs.95,00,000/- (Ninety Five Lacs) each for purchase of US Dollars. Since the plaintiff has failed to prove before this Court, as per above discussion, his claim in respect of the amount of three receipts as above, therefore, the issuance of cheque, if any, and its return, is of no consequence in the given facts. For rest of the amount of Rs.10,000,000/- (One Crore) the defendant has already shown its

willingness to abide by the Agreement. Lastly, the objection of defendant that it is only plaintiff who has come before the Court, and other persons (his son as well as wife) have not, it may be observed, that firstly, at least to the claim on behalf of plaintiffs son, there is no denial, rather an admission. Secondly, the defendant has failed to lead evidence on his behalf, and has also not summoned any witness to that effect, therefore, this objection cannot be sustained, as the plaintiffs' case is justified that they are his benami.

Issue No.3:

9. In view of the peculiar facts and circumstances of this case and the admission on the part of the Defendant that he is willing to perform the second Agreement, (Exh-P/2), I am of the view that Plaintiff is entitled for decree in respect of Exh-P/2, (Agreement dated 24.10.2012), whereby, the first party (Defendant) was bound to purchase the property (1667 Sq.Ft @ Rs8000/ Sq.Ft= Rs:13,336,000/-) after one year from the date of Agreement. Accordingly, Suit is decreed for recovery of Rs. 13,336,000/- (Rupees One Crore Thirty Three Lacs & Thirty Six Thousand Only) with simple profit at the rate of 6% per annum (not on compound basis), from 23.10.2013 (i.e. after one year) till its realization. For rest of the claim the Suit fails and is accordingly dismissed.

10. Suit is partly decreed as above.

Dated: 28.05.2018

J U D G E

ARSHAD/