

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

Present:

Muhammad Ali Mazhar and
Yousuf Ali Sayeed, JJ

Constitutional Petition No. D-3800 of 2020

Petitioner : Qazi Naseeruddin, through
Yasin Shahid Bhatti, Advocate.

Respondents : Nemo.

Date of hearing : 17.08.2020

ORDER

YOUSUF ALI SAYEED, J - The Petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution, impugning the Order made on 18.03.2020 by the learned 2nd Additional District Judge Karachi Central in Summary Suit Number 30 of 2019, whereby his Application for leave to defend under Order 37 Rule 3 CPC was allowed, albeit conditionally, subject to furnishing of a bank guarantee in the sum of Rs.3,300,000/-, being equivalent to the claim advanced by the Respondent No.1, who was the Plaintiff.

2. Vide the Petition, presented on 13.08.2020, it has been sought that the impugned Order be set aside and the Petitioner be granted unconditional leave to defend in the Underlying Suit mainly on the ground of a violation of the principles of natural justice and harshness due to the condition imposed.
3. At the outset, learned counsel for the Petitioner was called upon to point out the violation of natural justice and defect/illegality in the impugned Order as well as to demonstrate how a direct approach to this Court under its Constitutional jurisdiction was maintainable under the given circumstances, in response to which he

conceded that the impugned Order, as reflected from its terms, had been made after affording a proper opportunity of hearing, but contended that the learned ADJ had failed to properly appreciate the defence set up by the Petitioner and while granting leave had imposed terms which were unjustified under the circumstances, hence, per learned counsel, contravened the rights of the Petitioner and the principles of natural justice.

4. Having considered the matter, we are unable to subscribe to the conception of natural justice, as formulated, since the Petitioner was clearly afforded a proper opportunity of hearing and it was after considering the grounds on which leave was sought by the Petitioner that the learned ADJ arrived at the conclusion that leave should be granted conditionally under the facts and circumstances of the case. Indeed, it is well settled that the discretion to grant leave with or without security vests with the trial Court, and whilst it is axiomatic that such discretion is to be exercised fairly, the impugned order does not suffer from any apparent illegality or irregularity which brings the exercise of discretion into doubt.

5. We are fortified in this assessment by the judgment in the cases reported as *Khalid Javed & Company v. Javed Oil Industries* 1988 CLC 53 and *Col. (Retd.) Ashfaq Ahmed and others v. Sh. Muhammad Wasim* 1999 SCMR 2832. In the former case a learned single Judge of the Lahore High Court, while dismissing a revision application preferred against an order made under Order XXXVII, Rule 3 C.P.C, observed that in a case where the execution of a cheque is not denied and the disputed debt is unsecured, the trial Court was justified in imposing the condition of furnishing of a bank guarantee, which was also the approach of the Honourable Supreme Court in the latter case, where it was observed that:

“Obviously Order XXXVII, Rule 3 (2), C.P.C. enjoins upon the Court reasonable discretion for granting permission to defend on such terms as deemed fit in circumstances of each case. Record clearly discloses that petitioners herein without disputing execution of cheques issued in favour of plaintiff/respondent (Sh. Muhammad Wasim) have expressed that same were not intended to be encashed honoured. Therefore, on proper scrutiny of all the aspects relating to claim in suit we feel that initial order conditionally granting leave to defend the proceedings passed by trial Court did not suffer from any material defect.”

6. Moreover, it falls to be considered that while an order granting conditional leave to defend is not appealable, the ultimate remedy would remain available to the Petitioner to challenge the final judgment as may ensure vide a timely appeal. The Petitioner’s approach to this Court under the writ jurisdiction, and that too, after a lapse of several months, long after the time for compliance of the impugned Order has already passed, cannot be countenanced.

7. Under the circumstances, it is apparent that the Petition is misconceived and is not maintainable, hence is dismissed *in limine*, along with all pending Miscellaneous Applications.

JUDGE

JUDGE

Karachi
Dated _____