IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

1st Appeal No. 66 of 2021

Appellant : Umer Farooque through Mr. Behzad Ali, Advocate

Respondents : Muhammad Shafique present in person

Date of Hearing & order : 20 .12.2021

JUDGMENT

ADNAN-UL-KARIM MEMON J: Through instant Appeal, the appellant has impugned the Judgment dated 30.9.2021 and Decree dated 02.10.2021 passed by learned District Judge, Mirpurkhas in Summary Suit No. 03 of 2021, whereby the learned Judge was pleased to dismiss the Suit.

2. It is inter-alia contended that the appellant filed Summary Suit before learned District Judge, Mirpurkhas claiming therein that he is doing business of motorbike and is also a dealer of Hi-Speed Bikes; that respondent and his brother Shakeel purchased new motorcycles from him on credit and cash; that after reconciling the accounts an amount of Rs. 8,000,000/- become due against the respondent hence he issued four cheques of Rs.2,500,000/- dated 20.08.2020, Rs. 1,500,000/- dated 20.12.2020, Rs. 2,000,000/- dated 20.02.2021 and Rs.2,000,000/- dated 20.06.2021; that on 02.01.2021, the appellant presented the cheques of Rs. 2,500,000/- & Rs. 1,500,000/- for encashment in the concerned Bank but the same were returned due to insufficient funds. Thereafter appellant repeatedly demanded the amount from the respondent but he kept him on false hopes hence he filed Summary suit for recovery of Rs.4,000,000/-; however, the respondent was granted leave to appeal vide order dated 07.05.2021 subject to furnishing surety of equal amount. The respondent failed to furnish the required surety despite extension of time hence he was declared *ex parte* vide order dated 17.07.2021. He further submitted that the appellant filed an affidavit in *ex parte* proof and produced cheques and memos at Ex.17-A to Ex.17-F; that witness Rasheed Ahmed also filed his affidavit in evidence at Ex.18. Thereafter learned

counsel for the plaintiff closed the side of plaintiff's evidence; and thereafter learned trial court after hearing the counsel for appellant dismissed the suit vide impugned Judgment and Decree, hence the instant appeal.

3. Respondent-Muhammad Shafique present in person has mainly submitted that he has nothing to do with the case; and, only his account and cheque Book has been used in this case, whereas the entire burden has been put on him by the appellant, though he has no any business terms with the appellant; however, he admitted that whatever has been done is his real brother as he misused his cheque book and put his signature, however on presentation before the concerned bank, the same was dishonored, therefore he is not liable for any transaction made by and between the appellant and his brother. He supported the impugned judgment passed by the trial court and prayed for dismissal of the instant appeal.

4. I have heard learned counsel for the appellant and respondent, who is present in person and perused the material available on record.

5. The trial Court vide judgment and decree dated 30.9.2021 based on its findings as under:-

> *"11. It was held by the Honourable Lahore High Court in the case of* **Ghulam Murtaza v/s Muhammad Rafi reported as 2020 MLD 772** *that "The careful scrutiny/examination of the evidence on record leads me to an irresistible conclusion that neither in the plaint nor in evidence PWs have given any specific date when this loan amount was advanced to the appellant. It is not readily believable that just on request of the appellant such a huge amount was advanced by the respondent without any documentation or even issuance of cheque in favour of the respondent at that time. Obviously, both parties have no blood or family relation. Mere fact that the appellant is in cultivating land on lease adjacent to the land of father in law of respondent (PW-3) is not sufficient to pay such a huge amount without any formal documentation. As such I am justified to draw the conclusion that on the basis of evidence on record passing on Rs.500,000/- to the appellant is not established particularly when no date of such transaction has been mentioned in the plaint and in the testimony of the P.Ws." I am also fortified in this view by the case of* **Salar Abdul Rauf v/s Mst. Barkat Bibi reported as 1973 SCMR 332**.
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> *12. Therefore suit of the plaintiff is dismissed with no order as to costs."*

6. Appellant-plaintiff filed suit for recovery of Rs.40,00,000/- based on a cheque under Order XXXVII of the C.P.C. before learned District Judge, Mirpurkhas. For summary trial of the suit, summons was issued, the respondent-defendant was served. He applied for

grant of leave which was granted to him subject to furnishing security of equal amount. He failed to furnish the security despite extension of time thus he was declared *ex parte* vide order dated 17.7.2021. The defense pleaded by the respondent was that he never issued the cheque based on which suit was filed, however, he insisted that appellant-plaintiff managed the fake and false cheque; and his brother gave the same cheque to the appellant; and, finally denied the relationship with the appellant-plaintiff. The learned trial court failed to frame the issues and invited the appellant to produce his evidence. Appellant produced documentary evidence i.e. cheques and memos at Ex.17-A to 17-F. He also examined witness Rasheed Ahmed at Ex.18. The learned trial court after hearing the appellant dismissed the suit vide judgment and decree dated 30.9.2021 on the premise that the plaintiff failed to prove his business of motorbikes and dealership of Hi-Speed motorbikes; that he failed to prove transaction of new motorcycles by the respondent and his brother Shakeel on credit and cash; that Shakeel has not been made a party to this suit; that no receipt or any agreement is produced in evidence regarding sale and purchase of motorcycles; that the account books showing an amount of Rs.8,000,000/- as outstanding against the defendant have also not been produced in evidence; that witness Rasheed Ahmed has not produced any documentary proof regarding payment of consideration to the defendant for which the cheques were issued. The learned Judge finally concluded that the initial burden to prove the consideration for issuance of cheques was upon the plaintiff which he badly failed to discharge.

7. Primarily entire case of the appellant was/is based on the Negotiable Instruments Act (XXVI of 1881) and presumptions mentioned in section 118 of the Negotiable Instruments Act (XXVI of 1881) are attached with a negotiable instrument unless proved contrary. I am not impressed by the submission of respondent that the trial Court rightly dismissed the suit of the appellant or that the document in question which was the basis of the suit, was not a promissory note, in light of the provisions contained in the Negotiable Instrument Act. If this was the position, the respondent could have challenged the genuineness of the cheque once he succeeded in obtaining leave to defend the suit. His allegation that the document in question is not a genuine one, do not take it out from the definition of a negotiable instrument under the Negotiable Instrument Act.

8. In the instant case, it is an admitted position that the subject cheque was of the account of respondent, who is present in court and has pleaded that his signature on the cheque is fake. Be that as it may, it was the duty of the trial court to have it verified from the handwriting expert or examined himself if law permits, but nothing could be done, rather other ancillary points were taken into consideration. Primarily, when a person delivers to another a cheque, the delivery prima facie authorizes the receiver of such cheque to ensure for delivery of the amount specified therein from the concerned bank, therefore, the burden of proving cannot be shifted upon the Drawer under the Negotiable Instrument Act, 1887. The learned counsel for the appellant relied upon the cheque which falls within the ambit of provisions of Negotiable Instrument. The assertion of the appellant on oath remained un-rebutted on record.

9. Prima-facie, it appears from the record that the claim for recovery of the amount in the suit filed by appellant-plaintiff is mainly based on cheques issued by the respondent for clearing his liability. In these circumstances, the vague and general denial of the respondent of his liability to the amounts claimed in the suit and the assertion misrepresentation; and/or signed by his brother did not justify, the trial court to directly conclude that appellant-plaintiff failed to prove his case of business transaction. In principle, unless anything contrary is duly established, the presumption of validity flows in favor of Negotiable Instruments especially when its execution is not disputed. Therefore, in the absence of any tangible rebuttal, through evidence, justifiable reasons, or plausible cause, the trial Court ought not to have dismissed the suit on other immaterial points.

10. For the foregoing reasons, I find merit in this appeal which is consequently allowed. The matter is remitted to the learned trial to decide the case on merits by framing proper issues allowing the parties to adduce evidence and if feel necessary examine handwriting expert on the subject issue and after hearing the parties decide the matter on merit within two months from today.

JUDGE

***Karar-Hussain/PS ***