

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1026 of 2015

[Khalid Mahmood Shah v. Province of Sindh through Chief Secretary and others]

Date of hearing : 29.10.2021
Date of decision : 29.10.2021
Plaintiff : Through M/s. Sher Ali Rizvi and Muhammad Irfan, Advocates
Defendants : *Nemo*

JUDGMENT

Zulfiqar Ahmad Khan, J:- The plaintiff has instituted present proceedings under summary chapter of Civil Procedure Code 1908, under order XXXVII rule 1 praying for recovery of an amount of Rs.30,741,000/- on the basis of dishonored cheque bearing No.4686790 (undated) drawn on National Bank of Pakistan Shahbaz Building Branch, Hyderabad (**the subject cheque**), alongwith markup/surcharge at the rate of 12% or at Bank rate.

2. Precise facts of the instant suit are that the plaintiff is a sole proprietor of M/s. A.M Global Co., whereas, the defendants are Government functionaries, who invited quotations from various contractors/suppliers for supply of tents and ration bags for 2012 Rain/Flood victims, to which the plaintiff submitted his quotation, which was approved by the defendant No.3 being lowest one. Thereafter, defendant No.4 issued supply order for 6000 tents vide order No.R/F-922/2012 dated 28.09.2012 (Annexure B) which, the plaintiff supplied accordingly. In pursuance thereof, defendants made payment of Rs.15 million through cheque No.468672 dated 12.10.2012 (Annexure C) and for the balance amount of Rs.30,741,000/- issued the subject cheque (Annexure D) alongwith letter bearing No.R/F-102/2013 (Annexure D/1) on 12.02.2013, which was returned on its presentation on 26.05.2015 by the HBL, Clifton Broadway Branch, Karachi with remarks of insufficient amount and stopped payment.

3. Summons were issued to the defendants in the prescribed form on 10.08.2015, which were duly served on them. Thereafter, defendants Nos.3 and 4 filed application seeking leave to defend the suit unconditionally under order XXXVII rule 3 read with section 151 CPC

bearing CMA No.13492 of 2015 on 15.09.2015 alongwith supporting affidavit, in which they have denied the contentions raised by the plaintiff. The main thrust of the defence taken in the affidavit is that the plaintiff had earlier filed C.P No.D-1674 of 2013, to which this Hon'ble Court ordered for holding an enquiry, which was awaited, hence outstanding dues of the plaintiff (if any) could not be ascertained before enquiry report. Thus the plaintiff has no cause of action and the instant suit is not maintainable. However, defendant Nos.1 and 2 did not file their stance.

4. The said leave to defend application came up before the Court on 11.09.2017, where this Court granted one week's time to the defendants for depositing the cost and ordered for issuance of direct notice to the defendants for 25.09.2017. On which date, none was present and the said application was dismissed. Thereafter, vide order dated 01.03.2019, the defendant Nos.1 and 2 were ordered to be proceeded *ex parte*.

5. Learned counsel for the plaintiff contended that the quotation of the plaintiff for supply of the required tents for flood victims was approved by the defendants after fulfilling all codal formalities being lowest one, for which even the defendants have already made part payment. His next stance was that making a part payment by the defendant unequivocally, established that the defendant admitted claim of the plaintiff made in the plaint. He further contended that the leave to defend application of defendant Nos.3 and 4 has already been dismissed by this Court, whereas defendant Nos.1 and 2 failed to file any such application, and it is settled position that if the defendant fails to appear or defaults in obtaining leave, the allegations in the plaint shall be deemed to be admitted and the plaintiff is entitled to a decree. While concluding his submissions, he submitted that the summary procedure has been provided under the law, which is special in nature and the Court is saddled with an obligation to get recovered the claim/amount of plaintiff under the special summary procedure as provided under order XXXVII CPC. With regards the constitutional petition and inquiry proposed therein, per learned counsel, the very fact that an inquiry is proposed in a constitutional petition speaks volumes about the merit of that petition.

6. Heard and perused the record. It is crystal clear that considerable time was afforded to the defendant Nos.1 and 2 to introduce on record their stance/notion, which they have failed to do so. Furthermore, a minute examination of the pleading leads that the defendant Nos.3 and

4 have failed to plead any genuine triable issue for which they can be granted a leave to defend in the referred summary suit, rather have miserably failed to pursue their leave to defend application. It is settled law 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, 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.¹

7. The defendant No.4 in most part of the accompanying affidavit of his leave to defend application has not responded to the claim of the plaintiff on the pretext of pendency of enquiry. In para 7 of the affidavit, he has admitted issuance of the subject cheque, which was dishonored on its presentation. It is settled law that in the summary suit on promissory notes and cheques when the defence is without any material to support, and just bald allegations without any substance, both on legal and factual grounds, the leave is to be refused outright, and when the issues raised by the defendants in the leave to defend applications are illusory, the leave should not be granted, and should be refused.² It is also an established position that no finding on question of facts could be undertaken in a Constitutional Petition.³

8. The above discussion leads to the conclusion that the plaintiff is entitled for a judgment and decree. Accordingly, I decree the suit in terms of clause (a) of order XXXVII, rule 2 CPC, for an amount of Rs.30,741,000/- against the defendants together with statutory interest as mentioned in section 79 of the Negotiable Instruments Act, 1881 from the date of filing this suit, till realization of the amount.

Judge

B-K Soomro

¹ PLD 1995 SC 362, (Haji Ali Khan & Co. M/s. Allied Bank of Pakistan Limited).

² 2017 CLC Note 233 [Sindh], (Messrs Siddiq Sons Industries (Pvt.) Limited through Managing Director v. Messrs Joes Fashion Export (Pvt.) Limited and others).

³ 2001 SCMR 1493, PLD 1983 SC 280, 2011 SCMR 279 and 2020 YLR 537 [Sindh(Hyderabad Bench)].