HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

1st Appeal No. S-50 of 2013
[Akber Zaman Shah & 2 others Vs. Anwar Ali]

Miscellaneous Civil Appeal No. S-01 of 2016
[Akber Zaman Shah & 2 others Vs. Anwar Ali]

14.11.2022

M/s. Ghulam Abbas Sangi, Assistant Attorney General for Pakistan and Badar uddin Khoso, representing the appellants.

Mr. Ashfaque Ahmed Lanjar, Advocate for respondent.

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Date of hearing & order: 14.11.2022.

O R D E R

ADNAN-UL-KARIM MEMON, J. Through this single order, I intend to decide captioned appeals wherein appellant-Trade Development Authority has called in question the legality of Judgment and Decree dated 24.09.2013 & 28.09.2013 passed by learned District Judge MirpurKhas in Summary Suit No.5 of 2010 filed by respondent-Anwar Ali, which was allowed against them and secondly through order dated 17.12.2015 its execution application too was allowed hence both matters are interconnected with each other.

2. Brief facts of the case are that respondent was running the business of catering with the name of Amad Catering Services Mirpurkhas who was approached by the appellant- Trade Development Authority Government of Pakistan for decorating the scheduled festival "Numaish / exhibition of handicrafts works" on 24th and 25th October 2009 at Fruit Farm, Mirpurkhas. Per respondent both parties agreed to fix service charges at Rs.7,68,000/- for which cheque amounting to Rs.3,50,000/- was issued in favor of respondent vide letter dated 19th October 2009 with clear title / status of "Advance service charges for exhibition at Mirpurkhas; however, on presentation of said cross cheque to the concerned Bank it was returned due to stoppage of payment, hence the respondent filed Summary Suit for recovery of Rs. 3,50,000/- under Order 37 Rule 1 & 2 C.P.C seeking direction for payment of principal amount along with interest.

3. After service of notice appellant filed an application U/O 37 Rule 3 C.P.C for grant of leave to defend the suit, the same was granted hence written statement was filed denying the assertions made in the plaint on the premises that charges of exhibition were not of Rs.768,000/- but the charges were of Rs.350,000/-; that payment of cheque amount of Rs.350,000/- earlier issued to respondent was made through online on his request from HBL FTC Branch Karachi vide memorandum dated 21.10.2009, hence the claim of respondent stood satisfied and the payment of cheque was stopped by writing a letter to Bank Authorities; appellant also pleaded for dismissal of Summary Suit. On divergent pleadings of the parties, learned trial court framed two issues.

4. After recording evidence of respective parties and hearing the counsel for the parties, learned trial court decreed the Suit of respondent vide Judgment and Decree dated 24.09.2013 & 28.09.2013, followed by Execution Application No.4 of 2013 vide order dated 17.12.2015, hence appellant has preferred instant appeals against such acceptance of summary suit and execution application by learned Additional District Judge Mirpurkhas.

5. I have heard learned counsel for the parties, and also gone through the available record.

6. The entire claim of respondent is that the services charges rendered by him to the extent of Rs.350,000/- were required to be paid by the appellant. A bearing Cheque No. 4943604 dated 19.10.2009 to the extent of above amount was issued by the appellant on presentation before the Bank was returned due to stoppage of payment on the premise that the said amount had already been credited in the account of respondent, which was admitted by him in his evidence thus the question of filing summary suit based on the purported cheque was not called for and the judgment and decree obtained by respondent were based on incorrect facts thus liable to be reversed.

7. At the very outset, I would like to make it clear that though a negotiable instrument always carries a presumption of its being an unconditional promise to pay the amount on demand or at a fixed or determinable future time but by no imagination it can be believed that execution of a document (a negotiable instrument) can be for any other purpose but to clear (pay-up) certain liability (consideration) though not need to be referred/mentioned in such a document. This position stands

clear from the reading of Section 118 of the Negotiable Instruments Act, 1881 (be referred to hereinafter as **'the Act'**). The Section reads as under:

> 118. Presumptions as to negotiable instrument of consideration.—Until the contrary is proved, the following presumptions shall be made:-
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> (a) of consideration; that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;
> (b)
> (c)
> (d)
> (e)
> (f)
> (g)

8. Though the presumption, referred to in Section 118 of the Act, is rebuttable but once it prima facie appears that a document is qualifying the definition of 'negotiable instrument' the lis would require to be dealt within the meaning of Order XXXVII CPC else the presumption, though rebuttable, attached with 'negotiable instrument' shall lose its purpose.

9. I would also like to make it clear that even if before execution of 'negotiable instrument' the parties were under certain liabilities through some written agreement, this would not be sufficient to deprive one of resorting to course, provided by Order XXXVII of the Code if it is established that earlier liabilities were settled by execution of 'negotiable instrument'. This is for the simple reason that execution of 'negotiable instrument' itself means to make an unconditional promise to pay certain sum on demand or at certain future date to the holder which is always against some 'consideration'. If a contrary view is allowed to hold the field it would not only frustrate the purpose and object of 'the Act' but shall also fail the object of Order XXXVII of the Code through which the law, at least, gives hope for recovery of amount in 'summary manner. It, however, need not be mentioned that if the other side succeeds in bringing the document out of the meaning of 'negotiable instrument' then the proper course for the holder would be to file a 'regular suit' and proceedings under Order XXXVII of the Code which would not defeat the right of the holder to establish his claim for recovery of amount in such 'regular suit'. In the instant matter, the respondent had filed suit for recovery of amount of 'cheque' and since a 'cheque' within the meaning of Section-6 of the Act has been defined as a 'bill of

exchange' which amount arising out of said cheque was already paid to the respondent.

10. Reverting to the merits of the case, the point of determination of the appeal in hand would be that 'whether the judgment of learned trial court is legal or otherwise.

11. To appreciate the aforesaid proposition, it is admitted position that cheque No.4943604 dated 19.10.2009 for an amount of Rs.350,000/- which was agreed to be paid in lieu of services rendered by the respondent was issued to make prompt payment of the agreed amount and to enable the respondent to complete necessary arrangements for providing satisfactory services; that after issuance of said cheque by the appellant/TDAP, the amount was deposited in the account of respondent on his request through online transfer and to avoid duplication of payment, instructions were issued to the bank to stop payment of the cheque which was inadvertently issued; and, the respondent was requested to return the cheque, however; he declined. The appellant claims that the entire payment of Rs.350,000/- was paid thus there was no question of further payment to the respondent vide impugned cheque which was inadvertently issued as the payment of the said amount had already been credited to the account of respondent so payment was stopped and the criminal case lodged by the respondent under Section 489-F P.P.C was disposed of as 'C' Class vide order dated 23.11.2010 passed by learned Magistrate Mirpurkhas; however, a further amount of Rs.350,000/- was deposited with learned Additional District Judge Mirpurkhas vide order dated 29.11.2010.

12. It appears from the record that respondent examined himself and he produced a quotation for acceptance at Ex.49-A, cheque No.4943604 dated 19.10.2009 at Ex.49-B, Memo of Bank at Ex. 49-C Letter of Appellant at Ex.49-A and Legal Notice at Ex.49-E. He admitted that he received the amount online and he withheld the cheque. He deposed that D.G. flatly refused to pay the outstanding payment compelling him to send legal notice to the appellant which was not replied and then he filed civil suit.

13. Appellant was examined at Ex. 6, who produced attested copy of Memo of Bank at Ex.60-A, letter of Trade Development Authority for stoppage of payment of Cheque No. 4943604 at Ex. 6-B, Photostat copy

of cheque at Ex. 60-C, cost memorandum at Ex. 6-D, confirmation of remittance at. Ex. 60-E, attested copy of F.I.R. at Ex. 60-F, and certified copy of charge sheet at Ex.6-G. Appellant Akbar Zamán Shah deposed that one exhibition was held on 24-10-2009 and 25-10-2009 for two days in Mirpurkhas, of Handicrafts works, its project director was Fareed Ahmed Yousafani, Director Administration. He deposed that for the catering a sum of Rs. 3.5 lacs was to be paid to Ammad Catering Mirpurkhas, therefore, from their department account a cheque of Rs. 3.5 lacs was forwarded by him to Fareed Ahmed Yousafani on 19.10.2009. He has deposed that it was mutually, agreed that Ammad Catering would get an online amount of Rs.3.5 lacs and in barter he would return the cheque. He has deposed that on 21-10-2009, only one transaction was effected from the account of Mr.Yousafani to Ammad Catering but the latter party did not return the cheque. He deposed that as a precautionary method, the Bank was also instructed to stop payment. After the conclusion of exhibition, they did not receive the cheque from the Ammad Catering whereas several requests were made to them but to no avail. He has deposed that on 29.10.2010, they appeared before the Court and the case was disposed of under "C" Class. He denied that TDAP received a quotation of Rs. 768,000/- which was accepted. He admits that in Ex. 49-D, it is mentioned "advance catering service charges for exhibition at Mirpurkhas." He admits that the legal notice went un-replied. He admits that the cheque number is different from the one mentioned in their letter to the bank. He admits that no intimation was communicated to Ammad Catering about stopping of payment of the cheque. He admits that no written request was made to Ammad Catering for return of the cheque. He admits that he has not produced any proof that would suggest that an amount of Rs. 3.5 lac was online transacted to the personal account of Mr. Fareed Ahmed Yousafani.

14. From the above, evidence, learned trial court inferred that there was a settlement between the parties for rendering services, and the amount of Rs.768,000/- was finally settled; and appellant, agreed to pay the entire amount; however, only Rs.350,000/- was paid to respondent online in advance; and arising out of the principal amount, the cheque No.4943604 dated 19.10.2009 at Ex.49-B amounting to Rs. 350,000/- was dishonored, which influenced the mind of learned trial court to decree the suit. Primarily learned trial court completely failed to appreciate that respondent failed to bring on record the memorandum of settlement of the subject amount to be paid to him and in his absence,

the suit ought not to have been decreed; besides the respondent received Rs. 350,000/- and refused to return the cheque to the appellant, thus the payment of cheque No.4943604 dated 19.10.2009 at Ex.49-B was stopped as payment of that cheque had already been made to respondent. The cheque in question was dishonored on account of "payment stopped by the drawer". And, the appellant/defendant has placed on record a copy of letter given to the banker showing the reason why he had stopped the payment. Thus the question of filing summary suit based on stoppage of payment for reasons discussed supra was not called for.

15. In view of the above factual position of the case the summary suit No.5 of 2010 filed by respondent which was decreed on 24.09.2013 was wrongly decreed based on the aforesaid purported cheque for which payment was already stopped as the subject amount had already been credited in the account of respondent thus issuance of decree based on the same cheque was an erroneous decision on the part of learned 1st Additional District Judge Mirpurkhas which is hereby set-aside and appeals are allowed in the above terms.

JUDGE

*Karar_Hussain/PS**