

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

1st Appeal No. 36 of 2018

Ashraf Ali Qureshi	-----	Appellant
	<i>Versus</i>	

Qamaruddin Shaikh		Respondent

Mr. Irfan Ahmed Qureshi, advocate for appellant
Syed Kamran Ali, Advocate for respondent

Date of hearing : **22.08.2022**
Date of judgment : **02.09.2022**

J U D G M E N T

ADNAN-UL-KARIM MEMON, J. Through this 1st Appeal, Appellant is asking for setting aside the Judgment dated 11.4.2018 passed by learned Illrd Additional District Judge, Hyderabad in Summary Suit No. 15 of 2017 (Re- Qamar Uddin Shaikh v. Ashraf) filed by the respondent/plaintiff, whereby the learned Judge decreed the aforesaid suit.

2. Brief facts of the case are that respondent filed Summary Suit for recovery of Rs. 60,00,000/- against the appellant. It was stated that respondent/plaintiff is a government servant and an income taxpayer. The appellant/defendant is his neighbor and friend. On 15.11.2016 the appellant/defendant requested the respondent/plaintiff for a loan of Rs. 60,00,000/-, as such, the Respondent/plaintiff gave the said amount to the appellant/defendant, and as guarantee, he issued a cheque bearing No. 03781477 dated 06.01.2017, which was presented before the bank authorities but the same was returned on 03.02.2017, 06.02.2017 and 08.02.2017 with a memo. Thereafter, on 07.02.2018, the respondent/plaintiff demanded his loan amount from the appellant/defendant but he allegedly issued threats and refused to return the amount, consequently, the respondent/plaintiff lodged FIR bearing Crime No. 11/2017 at PS Cantonment Hyderabad, such criminal case has culminated into the acquittal of the appellant vide judgment dated 27.03.2018 by the learned VIIIth Civil Judge/Judicial Magistrate Hyderabad. The plaintiff also filed the above suit against the appellant/defendant with the following prayers:-

- a. That, this Honourable Court may be pleased to direct the defendant to pay the cheque amount Rupees sixty lac only to the plaintiff.
- b. To award markup for the period from 06.01.2017 till realization of the negotiable instrument act.

- c. That in case the defendant fails to pay the loan amount of rupees sixty lac in alternative same may be recovered by way of attachment of moveable and immovable properties of the defendant.

3. After admission of the suit, the appellant/defendant appeared and filed leave to defend application with the assertion that the respondent/plaintiff had neither submitted any agreement nor any proof regarding business deal and further the appellant/defendant had not issued any cheque in favor of respondent/plaintiff; that respondent/plaintiff is government servant and he has not disclosed the source of income in respect of the huge amount of Rs. 60,00,000/- and had given to appellant/defendant without any written instrument; that respondent/plaintiff has already lodged FIR vide Crime No. 11/2017 and Crime No. 12/2017 under Section 489-F PPC both at PS Cantonment and the same FIRs have been registered on the same date, same PS and on the same allegations meaning thereby that he was/is habitual of registering FIRs against innocent people; that in paras 5 & 6 of the plaint respondent/ plaintiff claimed that he gave Rs.60,00,000/- on 15.11.2016 to the appellant/defendant as guarantee, he received a cheque but such fact is not disclosed in FIR No. 11/2011, which is contradictory to FIR and summary suit; that respondent/plaintiff has failed to produce any document in respect of the proof that the appellant/defendant was in business deal with him and he has also failed to prove that appellant/defendant has issued him the subject cheque for consideration; that respondent/plaintiff has concealed the material facts and has not approached the court of law with clean hands.

4. Mr. Irfan Ahmed Qureshi, learned counsel for the appellant, has argued that the impugned Judgment dated 11.4.2018 of learned trial court is opposed to facts and law; that learned trial court failed to take into consideration that the respondent failed to produce any proof of payment of loan to the appellant; that the appellant was acquitted from the criminal case lodged by the respondent against the appellant and the trial court allowed summary suit based on the said cheque, hence the findings of trial court are against the facts on record; that learned trial court without taking into consideration the financial position of the appellant passed order for submitting surety equivalent to the amount involved in the suit; that the burden of proof was upon the respondent to prove that the cheque was issued by the appellant but he failed and inspite of that the trial court decreed the suit in his favour, hence the impugned Judgment is liable to be reversed; that the respondent even did not produce any memo of bank and the Investigating Officer of criminal case had not associated the bank officials as witness or mashirs of the case and on that basis the appellant was acquitted of the charge in terms of the judgment dated 27.03.2018 passed by the trial Court in Criminal Case No.41/2017, hence the impugned Judgment is also liable to be reversed. He, however, agreed that the appellant is ready and willing to submit a PR bond before the trial Court for the balance amount as he has already

deposited Rs. 35,00,000/- before the trial Court. He lastly prayed for allowing the instant appeal.

5. The aforesaid stance of the appellant has been refuted by Syed Kamran Ali, learned counsel representing the respondent on the premise that a cheque is intended to be issued for immediate payment under Section 6 of the Negotiable Instruments Act, 1881 ("the Act") which defines the term 'cheque'. He further argued that in ordinary circumstances cheques are exchanged between parties for immediate payment and any different interpretation would render redundant the object behind making cheques payable on demand. Learned counsel referred to section 118 of the Act which sets out certain presumptions applicable to negotiable instruments; that every negotiable instrument was made or drawn of consideration, and that every such instrument, when it has been accepted, endorsed negotiated, or transferred, was accepted, endorsed negotiated or transferred for consideration. He further argued that the burden to rebut this presumption lies upon the party arguing that the negotiable instrument has not been made/drawn for consideration. He next argued that bare denial of passing of the consideration is not a defense; something has to be brought on record for getting benefit of shifting the onus of proving to the plaintiff. He added that a perusal of the decree passed by the trial Court demonstrates that the appellant's conduct was very much contumacious on the premise that in his abortive attempt, he tried not to comply with the order of trial court as well as this Court through different tactics and ultimately learned trial court had no option but to decree the suit vide impugned judgment as the appellant failed to comply with the direction contained in the earlier order.

6. At this stage, learned counsel for the appellant refuted his claim on the ground that a sufficient cash amount has been deposited with the trial court, for that counsel for respondent submitted that this is no way to comply with the leave granting order, thus the appellant is not entitled to such concession at this juncture as sufficient time has already been granted to the appellant to comply the directions. He lastly submitted that there is no apparent error or infirmity in the impugned Judgment of learned trial court, as such no interference is warranted by this court; therefore, the instant Civil Appeal is liable to be dismissed. In support of his contentions, he relied upon the cases of *Murtaza Haseeb Textile Mills v. Sitara Chemical Industries*, **2004 §CMR 882**, *Najaf Iqbal v. Shahzad Rafique*, **2020 §CMR 1621**, and *Rab Nawaz Khan v. Javed Khan Swati*, **2021 CLD 1261**.

7. Heard learned counsel for the parties and perused the material available on record.

8. In the present case, the summary suit was instituted under the summary chapter. The trial court granted leave to defend with certain condition which order

is assailed before this court. So far as Summary Suit in terms of specific provisions of Order 37 of CPC is concerned, in this regard, the well-known judgment of *Haji Ali Khan & Co. V/s. M/s. Allied Bank of Pakistan Limited* reported as **PLD 1995 Supreme Court 362**, is of relevance and guidance, wherein a complete procedure has been laid down by the Hon'ble Supreme Court; that the niceties of the cheques are concerned, according to Section 6 of the Negotiable Instruments Act, a cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise on demand.

9. A cheque is a peculiar sort of instrument in many ways resembling a bill of exchange, but entirely different. A cheque is not intended for circulation but it is given for immediate payment and not entitled to days of grace, thus it is strictly speaking an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet, in the ordinary understanding of persons, it is not so considered. A cheque whether payable to bearer or to order is not rendered void by post-dating it and is admissible in evidence in an action brought after the date of the cheque by the holder although he took with knowledge of the post-dating. However, under Order XXXVII Rule 1, C.P.C, the suit can be entertained to deal with the cases based on negotiable instruments which trigger on presentation of the plaint, and in case the defendant fails to appear or defend and in default, the allegation in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree.

10. Primarily, the essence of the summary suit is that the defendant is not, as in any ordinary suit, entitled to a right to defend the suit. He must apply for leave to defend within ten days from the date of service of the summons and such leave will be granted only if the affidavit filed by the defendant discloses such facts as will make it incumbent upon the plaintiff to prove consideration or such other facts as the Court may deem sufficient for granting leave to the defendant to appear and defend the suit. If no leave to defend is granted, the plaintiff is entitled to a decree. The object underlying the summary procedure is to prevent unreasonable obstruction by a defendant who has no defense. The tests laid down on the subject point are as under:

(a) If the defendant satisfies the Court that he has a good defense to the claim on merits, the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defense, although not a possibly good defense, the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts may be sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defense to the plaintiff's claim the Court may impose conditions at the time of granting leave to defend the conditions being as to the time of trial or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defense, or if the defense is sham or illusory, or practically moonshine, the defendant is not entitled to leave to defend.

(e) If the defendant has no defense or the defense is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defense but at the same time protect the plaintiff by imposing the condition that the amount claimed should be paid into Court or otherwise secured.

11. In the present case, the trial court, after hearing both the parties, granted leave to defend the suit conditionally, subject to his furnishing surety equivalent to the amount claimed in the suit viz. Rs. 60,00,000/- within twenty (20) days from the date of Order dated 22.11.2017, but the appellant failed to furnish such surety and challenged the said order before this Court. Subsequently, counsel for the appellant/defendant moved an application for grant of time for furnishing solvent surety which was granted. During proceedings of the suit, counsel for appellant/defendant also filed an application to stay the proceedings of suit till the final decision of Civil Revision No. 304/2017 filed by appellant Ashraf Ali, but no stay order was produced before the trial court; therefore, the said application was dismissed vide Order dated 09.02.2018; therefore, on 20.12.2017, counsel for appellant/defendant applied for reduction of surety amount which application was disposed of vide Order dated 09.02.2018. Subsequently, counsel for appellant/defendant instead of furnishing security/surety to leave to defend the case, filed another application for unconditional leave to defend on 29.03.2018 on the ground that the court has not considered that the respondent/plaintiff has neither submitted any written agreement before the court nor any proof regarding business deal, as well as, appellant/defendant had not issued any alleged cheque in favor of respondent/ plaintiff; that the court has also not considered that the respondent/plaintiff is a government employee and he has not disclosed the source of income in respect of such huge amount and from where he arranged the said amount and allegedly had given to the appellant/defendant without any written agreement; that the appellant has already been acquitted in Crime No.11/2017 under Section 489-F PPC, which was lodged by the complainant/plaintiff of the present suit. Therefore, counsel for respondent/applicant prayed to pass order for unconditional leave to defend. The said application was dismissed in limine vide Order dated 29.03.2018. Since, the court had already passed the order dated 22.11.2017, which was intact; therefore, counsel for appellant/defendant was directed to finally argue the matter accordingly. Learned trial court while rejecting the claim of the appellant observed that despite affording reasonable time, the appellant neither proceeded with the matter nor required surety was furnished by him; therefore, the trial court heard the matter and decreed the suit vide Judgment dated 11.4.2018.

12. In view of the above, the overall object of the suit under Order XXXVII CPC was to provide expeditious disposal of litigation involving commercial transactions of a particular nature by a summary procedure so that the defendant does not

have the means open to exploitation in the ordinary procedure for trial of suits to prolong the litigation and to prevent the plaintiff from obtaining an early decision by raising untenable and frivolous defenses. If the court believes that the defendant is trying to prolong the litigation and impeding a speedy trial although, on the allegation made in the application, a triable issue has been raised then the Court would be justified to impose a condition. The Hon'ble Supreme Court while dealing with the matter held that the exercise of discretion by the Court while granting leave to defend the suit under Order XXXVII CPC with the condition of furnishing bank guarantee is a matter of discretion of the trial court and this discretion granted by the statute itself; therefore, the discretion exercised by the court in such like cases, based upon the facts and circumstances of each case. It is neither possible nor advisable to lay down any hard and fast rule on this behalf.

13. Primarily, the grant of conditional or unconditional leave has direct nexus with the plausibility of defense, the ultimate success or failure in the suit is not the consideration for refusal or grant of leave, rather the consideration is that the grounds taken in the application for grant of permission to defend the suit are plausible and defendant has an arguable case.

14. I have been informed that the appellant has already been acquitted in the FIR 11/2017 registered for the offenses under Section 489F, 506 PPC at PS Cantonment Hyderabad vide judgment dated 27.3.2018 passed by the trial court in Criminal Case No.41/2017, besides the appellant has deposited cash amount of Rs.35,00,000/- before the learned trial Court vide receipt dated 25.04.2022.

15. The appellant has made out a case for interference by this Court in the impugned Judgment, for the reason that the appellant has shown a valid ground to defend the suit proceedings, more particularly in terms of orders dated 27.08.2022, 29.04.2022, and 02.06.2022 passed by this Court in the matter; besides other reasons discussed in the preceding paragraph, as a result, the condition imposed by the learned trial court is modified to the extent of the cash amount of Rs.35,00,000, already deposited by the appellant, before the trial Court.

16. This appeal is allowed and the impugned Judgment dated 11.4.2018 passed by learned Illrd Additional District Judge, Hyderabad in Summary Suit No. 15 of 2017, is set aside, and the matter is remitted to the trial court with direction to decide the case of the parties on merits, by allowing them to adduce evidence on the issues involved in the matter, as per law. The aforesaid exercise shall be undertaken within one month positively.

JUDGE