

THE HIGH COURT OF SINDH, KARACHI

Suit No. 1035 of 2020

[Ali Gohar (since deceased) through his legal heirs versus Nisar Ahmed]

Plaintiff : Ali Gohar (since deceased] through his legal heirs through Mr. Wasim Ali, legal heir 1(c)/Advocate.

Defendant : Nisar Ahmed through Mr. Amir Saleem, Advocate.

Date of hearing : 07-04-2022 & 21-04-2022

Date of decision : 14-09-2022

ORDER

Adnan Iqbal Chaudhry J. - This order decides CMA No. 8962/2020 which is an application for leave to defend the suit under Order XXXVII Rule 2 CPC.

2. The negotiable instrument subject matter of the suit is a crossed cheque made out by the Defendant (maker/drawer) to the Plaintiff (payee) in the amount of Rs. 25,000,000/- and said to be dated 28-10-2019, which was dishonored on presentation on 30-10-2019 with the bank's note that the cheque had been stopped by the drawer.

3. It is the case of the Plaintiff that the cheque was given to him as balance sale consideration of a plot measuring 1400 sq. yds. in Sector 22, Deh Dozan, KDA Scheme 33, Karachi, sold by him to the Defendant; that on the dishonor of the cheque, the Plaintiff lodged FIR No. 364/2019 against the Defendant under section 489-F PPC; that the criminal case was settled and the Defendant acquitted when the parties entered into a compromise agreement dated 16-05-2020 where under the Defendant paid Rs. 5,000,000/- to the Plaintiff and agreed to pay the balance of Rs. 20,000,000/- in two months after constructing the boundary wall around the plot; that thereafter, the Defendant vanished and thus the Plaintiff filed the instant suit to recover the balance of Rs. 20,000,000/- under said cheque.

4. The leave application discloses that before the dishonor of the cheque, the plot and its possession had already been conveyed by the Plaintiff to the Defendant under a registered sale deed dated 19-06-2017, and that the subject cheque had been given in substitution of an earlier cheque. These facts are not denied by the Plaintiff in its counter-affidavit.

5. For the grant of leave to defend, it is contended by the Defendant that the Plaintiff's title to the plot was under litigation by third-parties who were preventing the construction of a boundary wall around the plot, and thus it was categorically stipulated at the back of the cheque that it was being given not for presentation, but only as a guarantee; that for this reason the date-box in the cheque had also been struck-off in pen, but the Plaintiff, acting with malafides, proceeded to fill in a date and presented it so as to lodge a false FIR against the Defendant; that in any case, the subsequent compromise agreement between the parties had stipulated that the amount of Rs. 20,000,000/- was payable by the Defendant only after the boundary wall of the plot could be constructed jointly by the parties which has not happened thus far; and that at present the original of the cheque was in possession of the Defendant and a suit under Order XXXVII CPC was not maintainable.

6. Heard the learned counsel and perused the record. Though the Defendant does not deny his signature on the cheque, however, the back-side of the cheque bears the following note in hand writing:

"This cheque is only as Guarantee Balance Payment. This cheque can't be presented unless the land measuring 1400 sq situated in sectors 22 Deh Dozan, KDA Scheme 33 Karachi - is clear if the Suit No. 1574/17 pending in the Court of XI SCJ Karachi East is dismissed or finally decided."

Apparently, Suit No. 1574/2017 mentioned at the back of the cheque, was by a third-party to lay claim to the plot. On the query whether that suit was still pending, learned counsel for the Defendant acknowledged that the plaint of that suit was rejected on 22-10-2019 and the cheque was presented only thereafter. However, he

submitted that since an appeal against that rejection was still pending, the case had not been 'finally decided', and till such time the Defendant does not incur liability.

7. It is not, and cannot be the case of the Defendant that there was no consideration behind the cheque. While the cheque may have been given as a 'guarantee', it was nonetheless a 'guarantee of the balance payment'. It is also futile to argue that the cheque was not intended to be presented. The note at the back of the cheque states that "*This cheque can't be presented unless*", i.e. the cheque could be presented *albeit* on the event stipulated. There was no point in giving a cheque to guarantee payment if the same could not be presented. For this reason, even if the date-box of the cheque had been struck-off by the Defendant, that only signified that the same had not been dated by the Defendant, and that the authority to fill in the date was given to the Plaintiff as payee of the cheque. However, in view of subsequent events discussed *infra*, the note at the back of the cheque loses significance.

8. After the cheque was dishonoured, the parties had entered into a compromise agreement dated 16-05-2020 for payment of the amount under the cheque. The Defendant paid Rs. 5,000,000/- to the Plaintiff and for the balance of Rs. 20,000,000/- clause 3 of the compromise agreement was:

"3. That the Second Party Nisar Ahmed (Defendant) will pay the remaining amount of Rs.20 Million (Rupees Two Crores) to the First Party Ali Gohar (Plaintiff) after boundary wall within two months by both title holder Nisar Ahmed along with help of Ali Gohar through Nazir of the Honorable Court". (Note: underlined portion in the clause appears to have been added by hand).

9. Learned counsel for the Defendant contended that after the compromise agreement, the payment of Rs. 20,000,000/- was conditioned on the construction of a boundary wall around the plot keeping in view the fact such wall could not be constructed until title of the plot conveyed by the Plaintiff to the Defendant was under

question not only by third-parties but also by the revenue authorities. On the other hand, learned counsel for the Plaintiff submitted that since the title and possession of the plot had already been conveyed to the Defendant, the intent of clause 3 of the compromise agreement was that the payment of Rs. 20,000,000/- would be made by the Defendant within 2 months during which time the Plaintiff would remain available to provide all assistance in constructing the boundary wall.

10. Given the circumstances discussed above, there does appear to be a issue of fact between the parties as to the intent of clause 3 of the compromise agreement dated 16-05-2020 viz. whether that was intended as a condition to payment in view of third-party claims to the plot, or whether the Plaintiff had merely assured his assistance for a period of two months during which it was for the Plaintiff as owner to construct the boundary wall ? It cannot be said at this stage that the interpretation placed by either side is implausible. Therefore, leave to defend the suit is granted to the Defendant subject to the condition of furnishing security equivalent to Rs. 20,000,000/- to the satisfaction of the Nazir of this Court.

JUDGE

Karachi
Dated: 14-09-2022