

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
R.A. No. 32 of 2023

Dated: Order with signature of Judge(s)

1. For orders on CMA No.2829/2023.
2. For orders on CMA No.2001/2023.
3. For orders on CMA No.2002/2023.
4. For hearing of Main Case.

Date of hearing: 18th April, 2023.

Applicants : Farhan Anwar Shaikh & Another through
Mr. Maroof Hussain Hashmi, Advocate.

Respondent : Haroon Rasheed.

ORDER

Mohammad Abdur Rahman, J. The Applicants have preferred this Civil Revision Application under Section 115 of the Code of Civil Procedure, 1908, impugning an order dated 3 March 2023 that was passed by the Vth Additional District & Sessions Judge Karachi (West) in a Summary Suit instituted under the provisions of Order XXXVII of the Code of Civil Procedure, 1908 bearing Summary Suit No. 31 of 2022 (hereinafter referred to the "Impugned Order") and by which the Vth Additional District & Sessions Judge Karachi (West) conditionally allowed the Applicants' Application for Leave to Defend by permitting them to deposit a sum of Rs. 2,980,000/- representing the value of cheques that had been purportedly issued by the Applicant No. 2 in favour of the Respondent and which had been presented by the Respondent on the Applicant No. 2's bank account maintained with Bank Islami Pakistan Limited.

2. The Respondent (who was the Plaintiff in the Summary Suit), had on 30 August 2022 instituted the summary suit for the return of a sum of Rs.3,500,000/- along with profit at the prevailing bank rate. From the pleadings the contention of the Respondent is that he had initially given a sum of Rs.500,000/- to the Applicant No.1 which was to be invested by the applicants to turn a profit for the Respondent. The placement of the sum of

Rs.500,000/- was, as according to the Respondent in his pleadings, confirmed in a document entitled Iqrar Nama dated 21 October 2020, wherein it was *inter alia* recorded that:

- (i) the Respondent was investing a sum of Rs. 500,000 in the business of the Applicant No. 1;
- (ii) the Applicant No. 1 was to pay a sum of Rs. 50,000 to Rs. 60,000 every month as profit to the Respondent;
- (iii) that two cheques for a sum of Rs. 250,000 were being issued by the Applicant No. 1 to the Respondent to secure the investment that was being made by the Respondent in the business of the Applicant No. 1; and
- (iv) that the Applicant No. 1 and the Respondent would each give the other two months' notice in the event that they wished to terminate the agreement as between them.

3. The Respondent further contended in his pleadings that the Applicant No. 1 thereafter requested a further sum of Rs.3,000,000/- for investment and which was also placed by the Respondent with the Applicant No. 1 on the same terms as per Iqrar Nama dated 21 October 2020 i.e. a profit of Rs.50,000/- per month.

4. That after a period of about a year, the Respondent demanded repayment of the amount and to which demand, according to the Respondent, the Applicant No.2 (being the wife of the Applicant No. 1) on the instructions of the Applicant No. 1 issued the following cheques for the amount specified in the table below and each of which were dishonoured for the reason stated as against each cheque:

S.No.	Bank	Date	Cheque No.	Amount	Reason
01.	Bank Islami Pakistan Limited	21 March 2022	00161047	Rs.680,000	Payment Stopped by Drawer
02.	Bank Islami Pakistan Limited	21 March 2022	00128517	Rs.250,000	Funds Insufficient

03.	Bank Islami Pakistan Limited	21 March 2022	00161042	Rs.350,000	Payment Stopped by Drawer
04.	Bank Islami Pakistan Limited	21 March 2022	00161043	Rs.350,000	Payment Stopped by Drawer
05.	Bank Islami Pakistan Limited	21 March 2022	00161044	Rs.350,000	Payment Stopped by Drawer
06.	Bank Islami Pakistan Limited	21 March 2022	00161045	Rs.150,000	Payment Stopped by Drawer
07.	Bank Islami Pakistan Limited	21 March 2022	00161046	Rs.600,000	Payment Stopped by Drawer
08.	Bank Islami Pakistan Limited	21 March 2022	00128518	Rs.250,000	Funds Insufficient
Total				Rs.2,980,000	

5. The cheques being dishonored caused the Respondent to:

- (i) Register FIR No. 200 of 2022 under Sections 489(f), 420 and 34 of the Pakistan Penal Code, 1860 with PS Pak Colony on 13 June 2022, and
- (ii) Institute Summary Suit No. 31 of 2022 before the District & Sessions Judge Karachi (West).

Needless to say, for the purpose of this judgment, the proceedings emanating from FIR No. 200 of 2022 being criminal in nature are separate to these proceedings and each has to be decided independently on their own merits.

6. The Applicants, after being served, jointly filed an application for Leave to Defend in Summary Suit No. 31 of 2022 whereby in Paragraph 3 of the Application for Leave to Defend the Agreement as between the Applicant No. 1 and the Respondent was admitted in the following terms:

- “
3. That it true the defendant No. 1 obtained the Rs. 5,00,000/= from enter plaint for investment purpose which was invested in profitable company on the basis

for profit and loss but unfortunately the profitable company usurp the invested amount Rs. 5,00,000/= and closed the company. It is submitted that there has no concern of defendant No. 2 of that agreement.

Further, paragraph 2 of the Application for Leave to Defend avers to repayment of a certain amounts by the Applicant No. 1 to the Respondent by stating:

“ 2. No any cause of action has been accrued against defendants. *Moreover the defendant No. 1 returned the amount more than 2,50000/=.*”

(The statement italicised was inserted by an interpolation on the Application for Leave to Defend and initialed).

Finally, in Paragraph 5 of the Application for Leave to Defend the Applicants clarify the factual premise for issuing the 8 cheques mentioned in Paragraph 4 above:

“ 5. ... It is further submitted that these cheque which given by the plaintiff in the Plaint the defendant No. 2 already cancelled/block these cheques from bank. That some persons namely (1) Aisha, (2) Haroon (3) Faheem (4) Misbah forcibly took the cheques from her house when she ill due to pregnancy time thus defendant No.2 submitted the application before concerned S.H.O.

7. The Applicants through the Annexures have attached various documents that were also referred to, but which were not specifically referred to in the pleadings of the Application for Leave to Defend as under:

- (i) A letter dated 6 April 2022 to the Branch Manager Dastagir Branch Bank Islami (Pakistan) Limited requesting that payment on various cheques, that had issued by her under duress, be stopped.
- (ii) A letter issued by Bank Islami (Pakistan) Limited, Dastagir Branch confirming that operation of an identified cheque book had been stopped from 7 April 2022.
- (iii) A letter to the Station House Officer PS Joharbad dated 16 May 2022 wherein she stated that she had received certain

sums of monies from her cousin (1) Amreena wife of Afzal, and from two other ladies namely (2) Aisha wife of Faheem and (3) Saiqa wife of Haroon for investment in a company known as Rajput Group of Investments. She further alleged that Rajput Group of Investments had defrauded her and other people and on account of which the amounts that had been placed with her for the purpose of investment by these three ladies could not be returned. She further alleged that these ladies were attending her residence where she resided with her mother in law and her children initially by themselves and later with certain men, and were abusive and threatening to abduct her children if these amounts were not repaid. As a consequence of these actions and under duress she handed over certain cheques to these people and she requested that action be taken as against these persons.

- (iv) A copy of a notice of Civil Suit No. 1088 of 2022 dated 16 August 2022 against one Aisha wife of Fahim and Bank Islami (Pakistan) Limited, Dastagir Branch for “Cancellation of Instruments and Permanent Injunction”

8. The Vth Additional District & Sessions Judge Karachi (West) by the Impugned order conditionally granted the application for Leave to Defend filed by the Applicants holding that:

- “
3. The record prima facie shows that the cheques were issued by the defendant No.2. The defendant No.2 has neither denied his signature nor the amount mentioned therein. The defendant has pleaded that the cheques have already been cancelled/blocked from the bank and some person namely Aisha, Haroon, Faheem and Misbah forcibly took the said cheques from his house when she was ill due to pregnancy time and such application was also filed by the defendant No.2 before the concerned police. It is obvious that the above said cheques were dishonored and FIR No.200/2022 U/s 489-F, 420, 34 PPC was registered against the defendants at PS Pak Colony on 13.06.2022.
 4. In the above scenario, the defendant has not furnished any plausible reason for allowing leave to defend unconditionally, I therefore, allow leave to defendant conditionally subject to deposit amount equivalent to cheques within 10 days.”

9. Against the Impugned Order, the Applicants have preferred this Civil Revision Application under Section 115 of the Code of Civil Procedure, 1908 contending that the order should be revised on the grounds:

- (i) that while the prayer clause in Summary Suit No.31 of 2022 prayed for return of an amount of Rs. 3,500,000/- the cheques that were issued amounted to Rs.2,800,000/-; and the Vth Additional District & Sessions Judge Karachi (West) had directed that the entire amount of Rs.3,500,000/- was to be deposited.
- (ii) had incorrectly applied the principles in deciding an application for Leave to Defend under Rule (3) of Order XXXVII of the Code of Civil Procedure 1908

That no case law was advanced by the Applicants in support of their contentions

10. I had on 18 April 2023 heard the counsel for the applicants and perused the record.

11. The law governing the adjudication of an application for leave to defend under Rule 3 of Order XXXVII Rule 3 of the Code of Civil Procedure, 1908 was settled by the Supreme Court of Pakistan in **Fine Textile Mills Limited, Karachi vs. Haji Umar**¹ wherein it was held:²

¹ PLD 1963 SC 163. The decision has been followed by the Supreme Court of Pakistan in **Dr. Azizur Rehman Chowdhury vs. Chowdhary Muhammad Din** 1972 SCMR 352; **Darab Shah B. Dalal vs. Messrs Premier Bank Limited., Karachi** 1976 SCMR 67; **Abdul Karim Jaffarani vs. United Bank Limited** 1984 SCMR 568; **Habib Bank Limited, Circle Officer, Multan vs. Al-Oaim Traders** 1990 SCMR 686; **Niaz Ahmed vs. Habib Bank Limited** 1991 SCMR 75; **Messrs Ark Industrial Management Limited vs. Messrs Habib Bank Limited** PLD 1991 SC 976; **Haji Ali Khan & Company, Abbotabad vs M/s Allied Bank of Pakistan Limited, Abbotabad** PLD 1995 SC 362; **Naeem Iqbal Vs. Mst. Zarina** 1996 SCMR 1530; **Mian Rafique Saigol vs Bank of Credit and Commerce International (Overseas) Limited** PLD 1996 SC 749; **Messrs Malik Muhammad**

“ In a suit of this nature where the defendant discloses upon his affidavits facts which may constitute a plausible defense or even show that there is some substantial question of fact or law which needs to be tried or investigated into, then he is entitled to leave to defend. What is more is that even if the defense set up be vague or unsatisfactory or there be a doubt as to its genuineness, leave should not be refused altogether but the defendant should be put on terms either to furnish security, or to deposit the amount claimed in Court.

The principles upon which the provisions of Order XXXVII of the Code of Civil Procedure should be applied are not dissimilar to the principles which govern the exercise of the summary power of giving liberty to sign final judgment in a suit filed by a specially endorsed writ of summons under Order XIV of the Rules of the Supreme Court in England. One of such principles laid down by the Court of Appeal in the case of *Kodak v. Alpha Film Corporation* (1930) 2 K B 340) was that at the stage when leave to defend is sought "the Judge is not to try the action; he is to see that there is a bona fide allegation of a triable issue, which is not illusory; he need not be satisfied that the defense will succeed; it is enough that such a plausible defense is verified by affidavit."

12. On the basis of this decision, the standard to be applied while granting an Application for Leave to Defend unconditionally is:

- (i) to see as to whether the defendant has in his affidavit disclosed facts which may constitute a plausible defense; or
- (ii) to show that there is some substantial question of fact or law which needs to be tried or investigated into.

In the alternative, in the event that the defense that is pleaded is “vague or unsatisfactory or there be a doubt as to its genuineness”, then leave to defend should be granted conditionally putting the defendant on terms to either furnish security or deposit the amount claimed by the plaintiff in the summary suit.

13. The Applicants contention **from their pleadings** in paragraph 2 and 3 of the Application for Leave to Defend confirm the Respondents’ contention that there was in fact an Agreement as between the

Nawaz, Haji Aziz Ahmad, Commission Agents, Chakwal vs. Syed Mehmood Hussain 1997 SCMR 264; **Messrs Ali Match Industries Limited vs. Industrial Development Bank of Pakistan** 1997 SCMR 943; **Col (Retd.) Ashfaq Ahmed vs. Sh. Muhammad Wasim** 1999 SCMR 2832; **Umer Khan vs. Haji Musa Jan** 2009 SCMR 1101

² *Ibid* at pg. 168

Respondent and the Applicant No. 1 by which monies were advanced by the Respondent to the Applicant No. 1 for placement in an investment scheme. The Agreement in the Iqar nama dated 21 October 2020 being admitted, it would follow that the Respondent owed the Appellant a sum of Rs.50,000 per month as profit. At the very least it has therefore come on record that prima facie monies were to be paid by the Applicant No. 1 to the Respondent and as no accounts have been provided by the Applicants in their Application for Leave to Defend that prima facie certain amounts remain to be paid by the Applicant No. 1 to the Respondent. The Applicants defense in Paragraph 5 of the Application to Leave to Defend that the cheques that were presented by the Respondent were in fact “forcibly” taken from her from four unrelated persons does not explain either the exact date when the cheques were “forcibly” taken or as to how those cheques came to be in the possession of the Respondent on 21 March 2022 on the date when they were presented from encashment. More importantly, and as has been correctly noted by the Vth Additional District & Sessions Judge Karachi (West), it has also not denied by the Applicant No. 2 that the cheques were or were not in fact issued by her or as to whether her signature had been forged on the cheques. The explanation given by the Applicants is clearly vague and unsatisfactory casting doubt as towards the explanation genuineness and which would lean towards Leave to Defend being granted conditionally to the Applicants.

14. The documents that have been attached to the Leave to Defend application also do not help the Applicants. If one is to consider the pleadings of the Applicants as against the documents that have been attached by them, further ambiguities arise in as much that:

- (i) the cheques being issued on 21 March 2022, were presented on 22 March 2022 and represented on 25 March 2022 and finally represented on 19 May 2022 but the letter

that was written Applicant No. 2 to Bank Islami (Pakistan) Limited was issued on 6 April 2022 and no justification is given by the Applicant No. 2 for not approaching her bank after the cheques were presented for encashment on 22 March 2022 or 25 March 2022 and dishonoured.

- (ii) the complaint written to the Station House Officer PS Joharabad dated 16 May 2022 which admits that the Applicant No. 2 had made certain investments on behalf of certain persons mentioned in the letter (who have not been stated to have any nexus with the Respondent) and who attended her residence, threatened her while asking for the return of the amounts invested by them and then took away cheques from her is in conflict with the contents of Paragraph 5 of the Application for Leave to Defend which states that these person took the cheques from her residence while she was “ill during pregnancy time”; and
- (iii) no documents were made available to even indicate that the Applicant No. 2 was pregnant in March / April 2022.

Clearly, each of these contentions raise further doubts as to the Applicants contentions.

15. Finally, the contention of the Mr. Maroof Hussain Hashmi, Advocate appearing on behalf of the Applicants, that a material irregularity has been committed by the Vth Additional District & Sessions Judge Karachi (West) and calling for the Impugned Order to be revised on the basis that the direction that had been given to the Application when leave to defend had granted to the Applicants conditionally was subject to the entire decretal amount of Rs. 3,500,000 being deposited as opposed to the amount of Rs.2,980,000 representing the value of the cheques which had not been honoured is also misread as the order clearly states:

“ In the above scenario, the defendant has not furnished any plausible reason for allowing leave to defend unconditionally, I therefore, allow leave to defendant conditionally subject to deposit amount equivalent to cheques within 10 days.”

16. To surmise, the Impugned Order suffers from no material irregularity nor is in excess of the jurisdiction of the Vth Additional District & Sessions Judge Karachi (West) who has correctly granted the Application for Leave to Defend conditionally and does not warrant to be revised under Section 115 of the Code of Civil Procedure, 1908. The Civil Revision Application had on 18 April 2023 been dismissed by me through a short order; the foregoing are the reasons for that order.

Karachi;
Dated; 29 April, 2023.

JUDGE