

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

1st Civil Appeal No. S-15 of 2023

Arslan Buriro s/o Habib-ur-Rehman

v.

Rustam Ali Tunio s/o Eid Muhammad

Appellant : Arslan Habib Buriro s/o Habib-ur-Rehman through Mr. Bahadur Ali Shahani, Advocate

Respondent : Rustam Ali Tunio s/o Eid Muhammad through Mr. Asif Ali M. Nawaz Chandio, Advocate.

Civil Rev. Appln. No. S-10 of 2024

Arslan Buriro s/o Habib-ur-Rehman

v.

Rustam Ali Tunio s/o Eid Muhammad

Applicant : Arslan Habib Buriro s/o Habib-ur-Rehman through Mr. Bahadur Ali Shahani, Advocate

Respondent: : Rustam Ali Tunio s/o Eid Muhammad through Mr. Asif Ali M. Nawaz Chandio, Advocate.

Date of Hearing : 09-02-2024

Date of Judgment : 19-02-2024

J U D G M E N T

JAWAD AKBAR SARWANA, J.: Through this common judgment, this bench proposes to dispose of two cases, i.e. (i) 1st Civil Appeal No.S-15 of 2023, in which appellant/defendant-Arslan Habib Buriro has challenged the judgment and decree dated 07.06.2023, passed by the learned IIIrd-Additional District Judge, Larkana (hereinafter referred to as “the trial court”) in Summary Suit No.04/2020, filed by

respondent/plaintiff-Rustam Ali Tunio against the appellant for recovery of amount of Rs.1,500,000/- (Rupees fifteen lacs only), and (ii) Civil Revision Application No.S-10 of 2024, in which the applicant - defendant-Arslan Habib Buriro has challenged the order dated 05.01.2024, passed by the trial court in Execution Application No.08/2023 in Summary Suit No.04/2020 allowing the said Execution Application. For ease of reference, the appellant-applicant, Arslan Habib Buriro, is referred to in this judgment as “defendant-Arslan Buriro.”

2. The brief facts of the case are that on 11.10.2019, the respondent/plaintiff-Rustam Ali Tunio, presented a cash cheque no. CD-30154564 drawn on Bank Al-Falah Limited (“BAL”) account name “Universal Cable Network” allegedly signed by defendant-Arslan Buriro dated 10.10.2019 in the sum of Rs.1,500,000 (Rupees Fifteen lacs only).¹ According to BAL’s Cheque Return Memo dated 11.10.2019,² the said cheque was returned unpaid for the reason “Company Rubber Stamp Required.” When efforts to settle the matter failed, respondent/plaintiff-Rustam Ali Tunio, filed a summary suit under Order 37 Rule 2 CPC for recovery of Rs.1,500,000 (Rupees Fifteen lacs only).³ After service of summons, defendant-Arslan Buriro, appeared and contested the suit by filing his leave to defend application cum Written Statement on 07.08.2020.⁴ After hearing the parties, the trial court passed Order dated 11.09.2020 granting conditional leave to defend. Consequently, defendant-Arslan Buriro deposited in the Court as surety the original registration certificates of two motor vehicles, namely a Suzuki Mehran and a Jeep (BF-2827) and the matter proceeded to trial. After recording evidence and hearing the parties, the trial court passed judgment and decree dated 07.06.2023 against defendant-Arslan Buriro, which is impugned in Appeal No.S-15/2023. During the pendency of the

¹ Available on page 45 of the Appeal file

² Available on page 45 of the Appeal file

³ Available on page 17 of the Appeal file

⁴ Available on page 23 of the Appeal file

appeal before this Court, the plaintiff/respondent-Rustam Ali Tunio filed Execution Application No.08/2023 in Summary Suit No.04/2020, which was allowed vide order dated 05.01.2024; hence, the defendant-Arslan Buriro, preferred Civil Revision No.S-10/2024.

3. The learned Counsel for Arslan Buriro submitted that on 09.09.2018, when plaintiff/respondent-Rustam Ali Tunio and his son, Jibran Ali Tunio, were visiting his office/shop “Universal Cable Network” and he had stepped out of the office shop, he realized that he had misplaced his wallet, which included, inter alia, an open BAL cheque leaf no.CD-30154564. He claimed that promptly on 09.09.2018, defendant-Arslan visited the Police Station Sachal, and registered an entry in the Roznamcha on the same date. Although the Roznamcha was not produced in his evidence, a copy came on the trial court’s record through a copy duly attested by the Station House Officer, Police Station Sachal.⁵ The Counsel argued that the prompt action by the defendant-Arslan Buriro, of rushing to the Police demonstrated that he had genuinely misplaced his wallet along with the BAL cheque leaf inside. According to the Counsel, defendant-Arslan Buriro also verbally informed the concerned Manager (as evidenced in paragraph 2 of his Application for Leave to Defend cum Written Statement) that he had lost the cheque leaf but did not instruct BAL in writing to “Stop Cheque.” He contended that BAL’s Cheque Return Memo produced in evidence indicated the above facts. Defendant-Arslan’s Counsel further submitted that during the trial, Counsel for Rustam Ali Tunio moved an Application U/o 16 Rule 1 CPC dated 06.05.2022 to call the bank’s representative to give evidence. In this connection, BAL’s representative submitted a Report dated 14.11.2022 to the Court stating that on the trial court’s direction to verify the defendant-Arslan’s signature on the cheque, the said signature was not similar to the customer’s signature with the Specimen Signature (“S.S.”) Card.⁶ BAL’s Report also enclosed a

⁵ Available on pages 39, 41 and 61f of the Appeal file.

⁶ Available on page 43 of the Appeal file

copy of the S.S. Card. None of the parties cross-examined the bank's representative, and no further evidence was produced in this regard. The learned Counsel argued that this confirmed that the cheque was unsigned and the signature appearing on the cheque was not that of the defendant-Arslan Buriro. The learned Counsel further submitted that there was no underlying consideration for the cheque presented by the respondent/plaintiff-Rustam Ali Tunio. The defendant-Arslan Buriro denied receiving any loan from respondent/plaintiff-Rustam Ali Tunio in 2018 or 2019 or otherwise. He pleaded that there was no underlying commercial transaction between the parties and the trial court had misread the evidence. Hence, the appeal and the civil revision should be allowed.

4. The learned Counsel for the respondent/plaintiff-Rustam Ali Tunio contended that Arslan had produced no evidence to challenge the assertions made by Rustam Ali in his Summary Suit No.04 of 2020. He claimed that on 09.06.2019, defendant-Arslan Buriro had asked for and obtained a loan from the respondent/plaintiff-Rustan Ali Tunio, in the presence of two witnesses. He contended that the Roznamcha Entry of 2018 was bogus as Arslan had filed the same at Police Station Sachal, whereas the alleged cheque was misplaced near defendant-Arslan Buriro's office/shop. The "Universal Cable Network" office/shop was closer to Police Station Market, but this was not the Police Station where defendant-Arslan Buriro's statement was entered in the Roznamcha. The defendant-Arslan Buriro, had no cause to lodge an entry in the Roznamcha of P.S. Sachal on 09.09.2018. He claimed that this raised doubt in Arslan's assertions pleaded in his defence. He argued that respondent/plaintiff-Rustam Ali Tunio had given a loan to Arslan and, in return, received from him a signed cheque. When defendant-Arslan Buriro refused to return the loan, the respondent/plaintiff-Rustam Ali Tunio presented the latter's signed BAL cheque for collection. He denied that defendant-Arslan Buriro's signature on the BAL's cheque was not his (Arslan's) and that the cheque handed to him was not signed. The Counsel

invited the bench to compare Arslan's signature appearing on the BAL cheque No. CD-30154564 with the signature appearing in the Roznamcha. He contended that the two signatures matched each other and were the same. He argued that the Report submitted by BAL's Representative in evidence was irrelevant and vague and could not be relied upon. He argued that it was irrelevant because during the trial the defendant-Arslan Buriro could have approached the Bank and changed his signature at any time without any intimation to anyone. He elaborated that BAL submitted its Report on 14.11.2022, whereas the cheque bounced on 11.10.2019. The defendant-Arslan Buriro, could have gotten his signature changed on the S.S. card before the submission of BAL's report such that the Bank generated a favourable report in Court. BAL did not state in its Report that at the material time, i.e. on 10/11 October 2019, Arslan's signature on the cheque did not match with the signature on the S.S. card as available with the bank on that date. Therefore, BAL's statement in 2022 that Arslan's signature on the cheque was not similar to the signature available on the bank's S.S. card in the year 2022 was good for as of the year 2022 when the Court recorded it, but as it was silent about the position in 2019 when the cheque was presented. Therefore, BAL's report submitted in Court in 2022 did not help the defendant-Arslan Buriro's defence, for a cheque presented in 2019. He further contended that in the criminal complaint filed by respondent/plaintiff-Rustam Ali Tunio against defendant-Arslan Buriro under section 489-F CrPC, the bank's Customer Service Officer ("C.S.O.") had stated before the Magistrate in case No.105/21 that "It was incorrect to state that the signature on the cheque was different."⁷ He submitted that in view of the aforementioned submissions and considering the evidence available in the Summary Suit, the trial court had passed the judgment and decree against the defendant-Arslan Buriro in accordance with law.

⁷ Available on Page No.79 of the Appeal file

5. Heard the counsels for the parties and reviewed the documents and material available in the civil appeal and the civil revision application.

6. A summary suit, when filed under Order 37 CPC, may be said to have essentially two stages: the first stage, which is the stage of “special proceeding” commences from the date of filing of the suit and ends with the decision on the leave to defend application by the trial court; and the second stage which commences after the conclusion of the first stage, ends with the announcement of judgment and decree by the trial court. All summary suits do not need to have two stages. It may be that the trial court dismisses the application for leave to defend and then announces judgment and decree in the Summary Suit at the conclusion of the first stage of the “special proceeding”. In such an event, the Summary Suit ends at the first stage, with no second stage. During the first stage, the burden is on the defendant, who must disclose such facts, which would raise sufficient ground(s) for the trial court to grant the application for leave to defend. After the trial court grants the application for leave to defend, the “special proceeding” comes to an end. In the second stage, the Summary Suit may be said to be converted into a regular suit to be decided by the trial court in accordance with the general procedure prescribed under the civil procedure code. The trial court settles the points of fact and law on which parties are at variance, and the matter proceeds as in the normal course of a trial. At this second stage of the Summary Suit, the burden of proof for the Plaintiff to succeed in his case is determined by the issues settled. After hearing the parties, the trial court decides the Summary Suit based on the issues settled, evidence brought on record and applicable law.

7. In the present case, it appears that the trial court may not have entirely appreciated the above-described two-step stages of summary proceedings. After the settlement of issues, it appears that the trial court decided the case as if it was still at the first stage of the “special

proceeding". The trial court did not examine the issue as in the ordinary course of a civil suit. For example, Plaintiff brought no evidence on record to show any agreement/arrangement between the parties showing any underlying consideration for the cheque. The trial court decided the entire matter based on the oral testimony of two brothers who stated that they were present when respondent/plaintiff-Rustom Ali Tunio, advanced the loan to defendant-Arslan Habib, and the latter handed over a cheque to the former. An amount of Rs.1,500,000 (Rupees fifteen lacs only) is a sizable amount, yet there was no documentation whatsoever, not even a simple paper receipt which confirmed the alleged loan that was agreed between the parties as the underlying consideration for the cheque. All this time, the defendant continued to deny the existence of the loan and issuing of a cheque. Yet the trial court decided against the defendant on the assumption that the production of the cheque was sufficient and/or no further proof was required as the cheque was a negotiable instrument. This may be one of the considerations in deciding an application for leave to defend, but it was not proper for the trial court to overlook the circumstantial evidence produced by the defendant-Arslan Buriro and available in the suit file surrounding the alleged loan and the cheque issuance. After the recording of evidence, the trial court was operating at the second stage and had to dig deeper into the evidence to decide the suit. The evidence brought on record required greater scrutiny, and the threshold of the burden of proof was on a higher pedestal based on the general principles of the law of evidence. The defendant had brought on-record evidence in support of his defence that the said BAL cheque had been misplaced/lost in 2018, no loan was advanced to him by respondent/plaintiff-Rustam Ali Tunio in 2019, the signature on the cheque was not the same as the one on the Specimen Signature ("S.S.") card, and the mandatory company stamp was missing from the company cheque. Yet, the trial court did not discuss or mention these points in the judgment. Instead, the trial court passed judgment and decree against the defendant in the absence of cogent evidence

to show that there was an underlying agreement/arrangement between the parties, without discussing the logic for why the defendant-Arslan Buriro, would, out of the blue, issue a company cheque with a mandatory company stamp missing from it in the name of the respondent/plaintiff-Rustam Ali Tunio, ignoring consideration of public documents available in the file and avoiding judicial recitals. Accordingly, this bench now turns to those pieces of evidence that were ignored/overlooked by the trial court and were relevant and necessary for the proper adjudication of this case and merit consideration for determination of the appeal and the revision filed by defendant-Arslan Ali Buriro.

8. Roznamcha Entry on 09.09.2018 of Lost Cheque: The defendant-Arslan Buriro claimed that he lost the BAL Cheque on 09.09.2018 when respondent/plaintiff-Rustam Ali Tunio was visiting his office/shop, "Universal Cable Netwok" and such incident appeared in the Roznamcha Entry of P.S. Sachal of the same date. Therefore, the cheque claimed by Rustam in 2019 was the lost cheque in 2018, and respondent/plaintiff-Rustam Tunio's claim was bogus and malafide. The learned Counsel for the respondent/plaintiff-Rustam Ali Tunio, argued that although Arslan mentioned the Roznamcha Entry dated 09.09.2018 in his examination-in-chief, it was never exhibited by him and was not part of the evidence recorded in the suit. Therefore, it could neither be relied upon by Arslan nor be used by the trial court to decide the Summary Suit. Hence, it was rightly discarded by the trial court in the impugned Judgment. It is apparent from the perusal of the record of the Summary Suit filed with the Revision and the Appeal that on 06.03.2022, that after the recording of the evidence by the trial court in the Summary Suit, the Counsel for the defendant-Arslan Buriro, had filed an application under Order 13 Rule 2 CPC read with Section 151 CPC requesting the Court to allow him to produce the entry of 09.09.2018 in the Roznamcha of P.S. Sachal and attached with the said Application the certified copy of the P.S. Departure Entry No.101 dated 15.03.2022 along with Entry

No.19 dated 09.09.2018 of P.S. Sachal and a certified copy of the Judgment dated 15.03.2022 passed by the IIIrd Additional Sessions Judge Larkana in Crl. Appeal No.02/2022 filed by the respondent/plaintiff, Rustam Ali Tunio, against the accused, Arslan Buriro.⁸ The first attachment evidenced an entry for defendant-Arslan Buriro in the Roznamcha of P.S. Sachal regarding the loss of BAL cheque No.CD-30154564 on 09.09.2018 which was attested by the S.H.O. P.S. Sachal, Larkana. The second attachment was a court-certified copy of the Judgment in Crl. Appeal No.02/2022, dated 15.03.2022, passed by the same learned trial court judge who was hearing the Summary Suit.⁹ The said learned Judge while exercising criminal jurisdiction in Crl. Appeal No.02/2022, filed by defendant-Arslan Buriro against respondent/plaintiff, Rustam Ali Tunio, referred to the very same Entry No.19 dated 09.09.2018 of P.S. Sachal, and acknowledged this had also been produced before him. Further, in his Judgement dated 15.03.2022, the learned IIIrd Additional Judge, Larkana mentioned that the concerned SHO had also produced Entry no.19 in the Roznamcha of P.S. Sachal before the District & Sessions Judge Larkana in Criminal Misc. Application No.263/2020, filed by Rustom Tunio on 12.03.2020, which the District and Sessions Judge, Larkana, subsequently dismissed. Rustom filed no appeal against the District & Sessions Judge's Order. Accordingly, the learned IIIrd Additional Judge allowed the Crl. Appeal No.02/2022 vide Judgement dated 15.03.2022 reversed Arslan's conviction and sentence awarded to him by the IInd Civil Judge and Judicial Magistrate (MTMC), Larkana, in Criminal Case No.105/2021 in FIR No.53/2020 and acquitted defendant-Arslan. The reference to the criminal proceedings of 12.03.2020 was also mentioned by defendant/-Arslan Buriro in his Leave to Defend Application cum Written Statement filed in the Summary Suit. However, the very same learned judge on 07.04.2023 in the Summary Suit rejected Arslan's Application under Order 13 Rule 2 CPC to bring the above evidence on record on the

⁸ Available on Page 61 of the Appeal File.

⁹ Available on Page 83 of the Appeal File

ground that the application was filed during the stage of final arguments in the Summary Suit. The learned Judge of the trial court completely ignored that: (i) the Roznamcha duly attested by the S.H.O. of the concerned P.S. was a public document; (ii) the Roznamcha, once filed, was available on the record of the trial court in the summary suit, (iii) the Roznamcha was mentioned in the certified true copy of the Judgment dated 15.03.2022 announced by the Illrd Additional Sessions Judge Larkana in Crl. Appeal No.02/2022 brought on the trial court's record; and (iv) the District & Sessions Judge had also dismissed Rustom Tunio's Application in 2020 based on the said Roznamcha Entry dated 09.09.2018 (paragraph 3 of Arslan's Application for leave to defend cum written statement read with paragraph 13 of the Judgment dated 15.03.2022). The Roznamcha Entry dated 09.09.2018 was critical for Arslan's defence and material to the proper adjudication of the Summary Suit but was completely ignored by the learned Judge, and the impugned Judgment is totally silent about it. The trial court had to address this important issue, which was necessary to adjudicate the dispute properly. If the Roznamcha Entry dated 09.09.2018 was true, then Rustom's claim that he got the cheque from Arslan in 2019 was false. The Roznamcha Entry dated 09.09.2018 is a public document, has a presumption of truth associated with it, and the trial court could have taken judicial notice of the same given its (the Roznamcha's Entry) cross-references in the judicial proceedings. These proceedings (read: judgments) were in the knowledge of the trial court in the Summary Suit. Further, the Roznamcha Entry dated 09.09.2018 was produced before and cross-referenced in the Judgment dated 15.03.2022 of the Illrd Additional Sessions Judge Larkana. It was not only part of the recital of the Judgment dated 15.03.2022 but also mentioned in the Judgment of the District and Sessions Judge Larkana dismissing Rustom's Application under Section 22-A and 22-B CrPC filed against Arslan, which dismissal order had obtained finality as no appeal was filed against the same. The several references to the Roznamcha Entry dated 09.09.2018

were well known to the trial court (the IIIrd-Additional District Judge) in the judicial recitals of these judgments. In the case of Malik Din and Another v. Muhammad Aslam, PLD 1969 SC 136 at page 145, paragraph 3, the Supreme Court of Pakistan observed as follows regarding the implication of recitals when mentioned in an Order of the Court in a separate proceeding involving the same parties and/or subject matter:

“Judgments, whether inter parties or not, are conclusive evidence for and against all persons whether parties, privies, or strangers of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered. In other words, the law attributes unerring verity to the substantive as opposed to the judicial portions of the record. But where the judgment is inter parties, even recitals in such a judgment are admissible. A previous judgment is admissible also to prove a statement or admission or an acknowledgement made by a party or the predecessor-in-interest of a party, in his pleadings in a previous litigation. Similarly, a judgment narrating the substance of the pleadings of the parties to a litigation is admissible to establish the allegations made by them on that occasion.

The next contention of the learned counsel is that in any event, the recital could not be used against Malik Din, without confronting him with it, as required by section 145 of the Evidence Act. This argument is again misconceived, as such confrontation is necessary only for the purposes of contradiction. In the present case, however, the purpose for which the recital was sought to be utilised was to induce the Court to draw the inference that the present case sought to be made out through the plaintiff. Imam Din, was an after thought, for, on the previous occasion, no such case was made out. No confrontation was, therefore, necessary.”

9. Thus, the trial court (IIIrd-Additional District Judge, Larkana) could have taken judicial notice of the Roznamcha Entry dated 09.09.2018, particularly when it was within his knowledge as he had conducted the Criminal Appeal No.02/2022, considered the

Roznamcha as one of the factors to allow the criminal appeal filed by Arslan and acquitted him. It is most strange that the learned judge discarded the Roznamcha Entry dated 09.09.2018 in these circumstances. This bench finds that there was little or no window available to the learned trial judge to discard such material evidence that corroborated the defendant-Arslan Buriro's defence that the BAL cheque had been misplaced on 09.09.2018, almost a year prior to respondent/plaintiff's claim that the same cheque was issued to him in return of an alleged loan advance to him in 2019. The Roznamcha Entry dated 09.09.2018 was also the only documentary evidence before the trial court to explain the background of the cheque, as all the remaining evidence aside from the cheque and memo was purely oral testimony. The Roznamcha Entry of 09.09.2018 supports the defence raised by defendant-Arslan Buriro and creates doubt in the veracity of the pleadings of respondent/plaintiff-Rustam Ali Buriro set out in Summary Suit No.4/2020.

10. BAL's Report - signature on the company cheque did not match the signature available with the bank on S.S. card: It is common ground that when the BAL cheque CD-30154564 was presented, it was not cleared because "company rubber stamp required" was missing. When this bench asked the learned Counsel for the defendant-Arslan Buriro why Arslan did not give "Stop Cheque" instructions to BAL, he replied that as the BAL cheque was drawn on the company account, i.e. "Universal Cable Network" and did not bear the rubber stamp of the company and was unsigned, he assumed that it could not be encashed. Therefore, he did not instruct BAL to "Stop Cheque." However, the learned Counsel for Rustam Ali submitted during arguments of the Appeal/Revision that he had filed an application under Order 16 Rule 1 CPC in the Summary Suit requesting the trial court to call BAL's representative to give evidence, which culminated in BAL's Report submitted to the Court which stated that Arslan Buriro's signature on the cheque did not match with the signature available in the Specimen Signature ("S.S.")

card. The burden that the cheque was lost/misplaced/stolen in 2018 was on the defendant-Arslan Buriro, that he never issued any cheque favoring respondent/plaintiff Rustom Ali Tunio.. Thus, the evidence given by the officer of BAL to the Court that the signature on the cheque did not conform with the signature on the S.S. card further eroded respondent/plaintiff-Rustom Tunio's claim. The Counsel for Rustom Tunio did not bother to cross-examine the officer who had submitted the Report. He did not put any question about the signature on the cheque and that the signature available with the bank was the same on the date of presentation of the cheque in 2019 and that Arslan had not subsequently changed the signature at the time of production of BAL's Report. Rustom's Counsel cited BAL's C.S.O's testimony without reading the complete evidence. Further, the Judgment in which the C.S.O.'s testimony was mentioned was set aside in appeal. Lastly, the cheque was drawn on the company's bank account with BAL and did not bear the company stamp. This was clear from the face of the cheque, which was printed with the company name: "Universal Cable Network." The matter begged the question if Arslan had truly issued the cheque to Rustom Ali Tunio, then the latter would have insisted on endorsing the company stamp on the said cheque. Additionally, a company cheque for completeness requires both a company stamp and signature. If either one of these two items is missing from the cheque, it cannot be cleared/encashed. Thus, the company cheque in possession of Rustom, which he presented to the bank to encash, was also incomplete because of the missing company stamp. If Rustom was to be believed he had received a company cheque from Arslan, then Rustom took a risk when he accepted such a cheque without the company stamp, knowing fully well from the face of the cheque that it was a cheque drawn on the company account and had the name of the company printed on it. In the circumstances, there was no underlying consideration for the cheque, and none was made out of the evidence. On the contrary, according to the evidence brought on

record, the company stamp was missing from a company cheque, and the signature also did not match.

11. According to the evidence produced before the trial court and in view of the above discussion, 1st Civil Appeal No.15/2023 and Civil Revision No.S-10/2024 are allowed. As a consequence, the Judgment and Decree dated 07.06.2023 in Summary Suit No.4/2020 passed by the IIIrd-Additional District Judge, Larkana, are set aside, and the Execution Application No.8/2023 in Summary Suit No.4/2020 is dismissed. The surety - two car registration certificates - deposited by Arslan Habib Buriro with the trial court is ordered to be returned to him subject to identification and as per rules.

12. Parties to bear their own costs.

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