Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 358 of 2020

Present

Mr. Justice Muhammad Jaffer Raza

(Mr. Altaf Nazim Versus Mr. Riaz Hussain)

Date of Hearing	:	18.02.2025
Date of announcement	:	21.02.2025
For Plaintiff	:	Mr. Talha Javed, Advocate.
For Defendant	:	Mr. Arjumand Aziz, Advocate.

J U D G M E N T

MUHAMMAD JAFFER RAZA – J: This is a summary suit under Order XXXVII CPC and the same is fixed for orders on CMA No.16970/2024 and final arguments. For the purpose of expediency, the said CMA Under Order IX Rule 9 CPC is taken up or hearing. Prior to deliberating and deciding the merits/demerits of the application it is important to give a brief timeline of the instant case.

2. The instant case was presented on 27.02.2020 and subsequent to issuance of notice and/or summons the Defendant filed application bearing CMA No.13280/2020 under Section 149 CPC for extension of time to file leave to defend application. Subsequently, leave to defend application bearing CMA No.1280/2021 was filed on 14.12.2020. The order sheet of this Court reveals that on 29.01.2021 the Defendant chose not to appear in the said proceedings and both the CMAs bearing No.13280/2020 (for extension of time) and 1280/2020 (leave to defend) were dismissed for non-prosecution. Subsequently on 31.01.2022 the Defendant himself appeared in person and sought two days' time for the said Defendant to appear and pursue the case. Subsequently an application was filed by the Defendant bearing CMA No.3013/2021 seeking restoration of leave to defend application dismissed vide order dated 29.01.2021. On 16.05.2022

request for adjournment was made on behalf of the Defendant and a fresh Vakalatnama was filed on behalf of the said Defendant on 30.08.2022. Subsequently the application seeking restoration of the leave to defend application was dismissed for non-prosecution on 26.09.2022. Thereafter the Defendant moved another application bearing CMA No.4406/2023 seeking restoration of CMA No.3013/2022 (the application was filed after 169 days from the date of dismissal order). Learned counsel for the Defendant remained absent on 19.03.2024 to pursue the application CMA No.4406/2023 the same was also the case on 09.08.2024. Predictably CMA No.4406/2023 was also dismissed for non-prosecution vide order dated 18.11.2024 and subsequent to the same an application bearing CMA No. 16970/2024 which is fixed for orders today was filed for restoration of CMA No.4406/2023. The chart below shall be useful in understanding the longwinded and convoluted timeline above.

Sr. No.	CMA No.	Filed on	Dismissed on	Reason for dismissal
1	13280/2020 (for extension of time)	12.03.2020	29.01.2021	Non-prosecution
2	1280/2021 (leave to defend application)	14.12.2020	29.01.2021	Non-prosecution
3	3013/2021 for restoration of CMA Nos.13280/2020 & 1280/2021	17.02.2021	26.09.2022	Non-prosecution
4	4406/2023 for restoration of CMA No.3013/2021	14.03.2023	18.11.2024	Non-prosecution
5	16970/2024 for restoration of CMANo.4406/2023	19.11.2024		

3. The conduct of the Defendant can only be classified as nonchalant and I am not inclined to allow application bearing CMA No.16970/2024. Even if the said application is allowed it would only restore a previous restoration application bearing CMA No.4406/2023 and this Court cannot go into a meandering exercise of restoring one application after another till the time CMA No.1280/2021 (leave application) is restored. It is noteworthy that restraint is being exercised by not imposing cost for the dismissal of the said application, which in my view would otherwise be warranted.

4. Reverting to the merits, it is reiterated that this is a summary suit for recovery of an amount of Rs.27,063,215/- under Order XXXVII CPC. Learned counsel for the Plaintiff has contended that the Plaintiff is a businessman by profession and was in a partnership agreement with the Defendant. The partnership agreement at page No.19 of the suit file shows both the Plaintiff and Defendant as partners. Further it was argued by the learned counsel for the Plaintiff that purchase orders were issued by NADRA for purchase of computer equipment. It was further argued that irrespective of the transaction which culminated between the said parties, the Defendant issued a cheque bearing No.21529925 amounting to Rs.28,500,000/- (Twenty Eight Million Five Hundred Thousand only) to the Plaintiff and the said cheque was returned due to insufficient balance. Attention was further invited to the legal notice issued by the counsel for the Defendant and more specifically attention was invited to paragraphs 10, 11 and 14 of the said legal notice of the Defendant. Furthermore, it was contended by learned counsel that the Plaintiff has also sought remedy by lodging of FIR under Section 489-F PPC and the Defendant was acquitted in the said case. It is further argued by learned counsel for the Plaintiff that Criminal Acquittal appeal regarding the same is pending before the Court of competent jurisdiction. While deciding the instant suit no further deliberation is warranted in respect of criminal proceedings mentioned above. Learned counsel for the Plaintiff has also invited my attention to page No.83 which is a detailed statement of account showing the balance owed by the Defendant amounting to Rs.27,063,215/- as the decretal amount sought in prayer clause No.1 of the instant suit.

5. The Plaintiff in the instant suit is not seeking a decree of the amount mentioned in the negotiable instrument as he has very candidly admitted that some payments have been received by the defendant after issuance of the negotiable instrument i.e. cheque. The said payment receipts have been correctly adjusted towards the amount mentioned in the negotiable instrument. Learned counsel has relied upon judgment of this Court reported in the case of *Ghulam Mustafa v Rashid Ali*[1], wherein it has been held as under: -

[1] 2024 CLD 435

> *"Notwithstanding, in a summary suit, when Defendant does not obtain leave or leave is refused to him, or where Defendant fails to comply with a conditional order. Defendant is precluded from further contesting Plaintiff's claim. By reasons of the wording of Order XXXVII, Rules 2 and 3 of the Code, there is further disability for Defendant that the allegations in the plaint must be deemed to be admitted, and Plaintiff would be entitled to a decree. Order XXXVII of the Code. not only provides for abridgement of the procedure of suits covered by the said provisions but also the said provisions restrict and/or curtail the rights of the Defendants in these suits to contest the Plaintiff's claims. When the matter is carried in Appeal, the Defendant who did not obtain leave or had failed to comply with the conditional Order continues to suffer under the same disability."*

In the case of *Syed Itrat Hussain Rizvi v Messers Tameer Micro Finance Bank Limited through attorney and another*[2], it has been held as under: -

> *"It is now a well settled that in a summary suit under Order XXXVII of C.P.C., in which summons have been issued in Form No.4 Appendix B, the defendant is not entitled to appear or defend the suit as a matter of course unless he obtains leave from the Court so to appear and defend. In default of his obtaining such leave for his appearance and defence in pursuance thereof the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree. Till such time as leave to defend is granted the defendants cannot even file interlocutory application in order to agitate the point of jurisdiction or to question the transactions between the parties or to challenge validity, and legal effect of the promissory note and crossed cheque issued by them in favour of the plaintiffs."*

In the case of *Naeem Iqbal Mst. Zarina*[3], in which it has been held as under: -

> *"As per sub-rule (2) of Rule 2 of Order XXXVII, C.P.C., if al defendant after being served with summons of a summary suit, does not obtain leave to appear and defend the suit, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree."*

6. The negotiable instrument in the present case is a cheque and therefore a presumption that it was drawn for consideration is attached to the same under Section 118 of the Negotiable Instruments Act 1855 **("Act")**. The same is reproduced as under:-

> *"118. Presumptions as to negotiable instruments---(a) of consideration; (b) as to date; (c). as to time of acceptance; (d) as to time of transfer; (e) as to order of endorsements (1) as to stamp; (g) that holder is a holder in*

[2] 2018 CLD 116
[3] 1996 SCMR 1530

due course. - --Until the contrary is proved, the following presumptions shall be made,

> *(a) 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:*
>
> *(b) that every negotiable instrument bearing a date was made or drawn on such date;*
>
> *(c) that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;*
>
> *(d) that every transfer of a negotiable instrument was made before its maturity; that endorsements appearing upon a negotiable.*
>
> *(e) that endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;"*

There is nothing on record to rebut the said presumption in the instant case. It was held in the case of *M/s. Almoiz Industries Ltd versus Amir Riffat Siddiqui*[4] (authored by me) that the burden of rebutting that presumption is on the defendant. Relevant part of the judgment is reproduced below: -

> *"It is this presumption in favour of the holder of the negotiable instruments that lightens the burden of proof on the plaintiff and in fact shifts the said burden on the Defendant to rebut the presumption so made. The Honourable Supreme Court in the case of Rab Nawaz Khan versus Javed Khan Swati*[5] *held in Paragraph No.7 that: -*
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> *"Although the presumption stated above, that every negotiable instruments is made/drawn for consideration, is rebuttable, it is trite law that the burden to rebut this presumption lies upon the party arguing that the negotiable instrument has not been made/drawn for consideration."*

[4] Suit 1475 of 2020
[5] (2021 CLC 1261)

7. Learned counsel for the Plaintiff was specifically asked regarding the differential in the decretal amount sought and the amount mentioned in the negotiable instrument (the decretal amount being less). Learned counsel in reply has relied upon the judgment by the High Court of New Delhi in the case of *Ttk Prestige Ltd versus M/s India Bulls Retail Services Ltd*[6]. In paragraph No.13 of the said judgment it was held as under:-

> *"13. It may also be recorded that as far as the suit for recovery of the price of goods supplied at Jaipur and parimal garden, Ahmedabad is concerned, it is not for the full amount of invoices raised for supplies at the said destinations but for the balance thereon. The invoices of the total value stand acknowledged as aforesaid by the defendant. The plaintiff itself is admitting receipt of part of the price of the invoices and has made a claim for the balance only. The defendant has not pleaded that the balance due is anything other than as pleaded by the plaintiff. Thus, the said claim is also found to be within the ambit of Order XXXVII of CPC."*

8. In the instant suit it is apparent that the decretal amount sought is less than the amount mentioned in the negotiable instrument. It is therefore held that the Plaintiff has adjusted i.e. reduced the decretal amount sought and the same can be permitted by this court in its summary jurisdiction. The amount adjusted was received by the plaintiff after issuance of the negotiable instrument and therefore has been fairly and justly adjusted towards the decretal amount sought. In light of what has been held above the suit is decreed in respect of prayer clause (a).

9. Office is directed to prepare the decree in favour of the plaintiff in the above terms.

JUDGE

[6] CS (OS) 631/2010