Order Sheet

IN THE HIGH COURT OF SINDH, AT KARACHI

1st Appeal No.35 of 2022

[Athar Waseem & another v. Sheikh Anjum Rehmat]

PRESENT:

Mr. Justice Zafar Ahmed Rajput

Mr. Justice Arshad Hussain Khan

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Appellant:	Athar Waseem & another through Mr. Liaquat Ali Khan, Advocate.
Respondent:	Sheikh Anjum Rehmat through Mr. Salman Ahmed, Advocate.
Date of Hearing:	17.01.2025.
Date of Order:	17.01.2025.

ARSHAD HUSSAIN KHAN, J -. Through instant 1st Appeal, the appellants have assailed the Judgment & Decree dated 09.03.2022, passed by learned Additional District Judge-IX, Karachi [West], in Summary Suit No.39 of 2019, under Order XXXVII CPC filed by respondent/plaintiff for recovery of Rs.33,00,000/- on the basis of dishonored cheque against the appellants/defendants.

2. Concisely, the stated facts of the case are that the respondent/plaintiff is engaged in business of sale/supply of Ghee through his firm namely; Western Industries having place of business at C-38, Estate Avenue SITE, Karachi. Both the appellants/defendants are brothers and partners in their business viz. Azhar Karyana Store, Quli Bazar, Khanewal, Punjuab, and the respondent/plaintiff had business relationship with them and had been supplying / selling Banaspati Ghee to them since the year 2015 and most of the supplies / sales were based on credit purchase and the payments were to be settled on later dates given by the appellants/defendants and this practice had been done on mutual trust & faith and on account of such supplies during the year 2015 and 2016 an unpaid amount of Rs.33,59,300/- was outstanding against the appellants/defendants being their debt/liability towards the respondent/plaintiff, which was delayed by them on different pretexts. However, in discharge of their business liabilities and to secure the outstanding dues of respondent/plaintiff, both the appellants/defendants had handed over a cheque No.2267536855 dated 14.02.2017 [the **" subject cheque"**] amounting to Rs.33,00,000/- to the

respondent/plaintiff to be utilized on or after its due date if the appellants/defendants failed to pay outstanding dues of respondent/plaintiff, thereafter they failed to pay the same despite repeated demands of respondent/plaintiff and upon deposit of the said cheque by the respondent/plaintiff in the bank account on 15.02.2017, it was dishonoured. Hence, the aforesaid suit No. 39 of 2019 was filed for recovery of Rs.33,00,000/- against the appellants/defendants. Pursuant to the notice of suit the appellants/defendants filed application for leave to defend the case which was allowed subject to furnishing the surety which was deposited.

3. Subsequently, on the pleadings of the parties the trail court framed the following issues:

i. Whether the suit of the plaintiff is not maintainable under the law?
ii. Whether the cheque was issued being "guarantee/security" purpose?
iii. Whether there was an agreement between the plaintiff and the defendants?
iv. Whether the defendants received goods from the plaintiff?
v. Whether the defendants failed to perform their obligation under the agreement?
vi. Whether the defendants made a transaction to the plaintiff through cheque No.2267536855?
vii. Whether the plaintiff is entitled to receive amount of Rs.33,00,000/- from the defendants?
viii. What should the decree be?

4. In order to prove the case, before the trial court, attorney of the plaintiff was examined himself as Exh. P, who produced his affidavit in evidence as Exh.P/1, special power of attorney as Exh.P/2, true copy of cheque No.2267536855 of Allied Bank, main branch, Akber Road, Tehsil Khanewal as Exh P/3, letter issued by Branch Manager, MCB, Siemens Chowrangi Branch, SITE, Karachi, as Exh. P/4. Defendant No.1-Athar Waseem was examined himself as Exh. D/1, who produced his affidavit in evidence as Exh. D/2, attested copy of plaint of civil suit as Exh.D/3. Learned trial court after recording the evidence and hearing the learned counsel for the parties decreed the suit of the plaintiff. The defendants have challenged the aforesaid judgment and decree in the present appeal.

5. Learned counsel for the appellants contended that the order passed by the trial court is bad in law and not on merits and the same is

against the provisions of law. It is also contended that the appellants raised the question of maintainability of the suit, however, same was not considered in true perspective of law. It is argued that neither the subject cheque was in the name of Sheikh Anjum Rehmat nor he is competent to file summary suit, therefore, the suit of the respondent is barred by law. It is further argued that the subject cheque was issued as the guarantee / security instead of encashment purpose, therefore, the suit under summary chapter was not maintainable in the eyes of law. It has further been argued that the respondent's claim is false, baseless, exaggerated, arbitrary and based on concocted please and wrong accounts. It has been argued that the respondents had misused the "Guarantee/Security Cheque" for his nefarious designs whereas neither the cheque was in the name of the respondent nor the respondent is competent to deposit the cheque for encashment. It is also argued that appellant No.1 has been acquitted in the criminal case lodged by the applicant under section 489-F PPC. It is urged that the respondent has no cause of action to file the suit and there is no business relationship among the appellants and the respondent. In the last, he has contended that the impugned judgment and decree are not sustainable under the law and liable to be set aside and the appeal may be allowed.

6. On the other hand, learned counsel for respondent vehemently opposed the arguments put forth by learned counsel for the appellants. He while supporting the impugned judgment and decree contended that the same is well reasoned and within the parameters of law as such does not warrant any interference by this Court. The impugned judgment is based on the thorough examination of the evidence. Lastly, he has prayed for dismissal of the instant appeal.

7. We have heard learned counsel for the parties, perused the material available on the record and the relevant laws.

The case of the appellants predominantly hinges upon that (i) the subject cheque was not issued in the name of respondent/ plaintiff (Shaikh Anjum Rehmat) as such he is not competent to file the suit, (ii) the said cheque was issued as the guarantee/security and not for encashment purposes and (iii) there is no acknowledgment of receiving of the goods/articles from their side against which the subject cheque was issued.

8. Insofar as issuance of the subject cheque is concerned, from the record it appears that the cheque was issued in the name of the firm namely; M/s. Western industries, which is admittedly a registered partnership and the plaintiff is one of the partners of the said firm, as such, being one of the partners of the firm he was competent to file suit for recovery of the amount on behalf of the firm.[1]

9. Insofar as the second point with regard to issuance of the cheque for the purpose of guarantee/security is concerned, appellant No.1 in his deposition has admitted the execution of subject cheque in favour of the respondent's firm and it is well settled that after the admission of the execution of cheque, onus to prove that cheque issued as a guarantee or otherwise was on the appellants but they miserably failed to prove their version through oral or documentary proof. In the present case, the appellants did not produce any independent documentary evidence or otherwise to support their plea that the cheque issued by them was merely a guarantee/security. It is well settled law that under section 118 of the Negotiable Instruments Act, 1881, there is an initial presumption that the negotiable instrument is made, drawn, accepted or endorsed for consideration, yet the onus is on the person denying consideration to allege and prove the same .[2]

10. Before going into further discussion, it would be conducive to reproduce relevant excerpts of the deposition of appellant No.1

> "… It is incorrect to suggest that I have given cheque to the plaintiff for return of amount of the plaintiff. Vol. say I have given the cheque to the plaintiff as guarantor of my brother Azhar Farooq. It is correct that I have not produced any documentary evidence to show that I am doing business of Aluminum. It is correct that my brother Azhar Farooq was doing business with the plaintiff for purchasing Ghee. It is correct that we used to take Ghee without paying any amount and after selling the ghee we pay the amount to the maker. It is correct that we used to pay the money to the maker through cheques, on line and through cash. It is incorrect to suggest that previously some cases were filed against us for not paying the amount to the sellers. It is correct that Muhammad Saleem lodged FIR No. 414/2016 under section 489-F at P.S KIA which was finally disposed of as we paid the amount to complainant. It is incorrect to suggest that I am deposing falsely. It is correct to suggest that some other FIRs are also lodged against me and my brother under section 489-F PPC for dishonoring the cheque. It is correct that our previous cheques were also bounced. It is incorrect to suggest that I have not given this cheque as guarantee. It is incorrect to suggest that I have given this

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[1] M/s. Combined enterprises v. Water and Power Development Authority [PLD 1988 SC 39]
[2] Muhammad Azizur Rehman v. Liaquat Ali [2007 CLD 1542]

> cheque as payment of ghee sold by the plaintiff to me. It is correct that there is dispute in between plaintiff and my brother in respect of purchase & sale of ghee. I do not know whether my brother cleared all amount to plaintiff or not. It is incorrect to suggest that I am deposing falsely."

11. In support of their stance, the appellants did not produce any independent witness, more so, appellant No.2 also chose not to appear in the witness box and stayed away. Article 129 of the Qanun-e-Shahadat Order 1984 is quite relevant under which *the court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.* Illustration (g) illuminates "that evidence which could be and is not produced would, if produced, be un-favourable to the person who withholds it". It may be observed that adverse inference for non-production of evidence is one of the strongest presumptions known to law and the law allows it against the party who withholds the evidence.[3]

12. The Supreme Court of Pakistan in the case of *Jehangir v. Mst. Shams Sultana and others* [2022 SCMR 309] has held as follows:

> "4……We are surprised that the plaintiff/respondent No.1 did not come forward to testify that she had not sold the property as reflected in the said sale mutation, particularly when her sister and mother had testified in support of the said sale. A direct challenge had also been thrown to her husband/ attorney that if the plaintiff came to testify she would acknowledge the sale. When the best evidence is intentionally withheld an adverse presumption ensues that if it was produced it would be against the person withholding it as per Article 129(g) of the Qanun-e-Shahadat, 1984."

Notwithstanding the above, from the deposition of appellant No.1, it clearly transpires that there was business dealing between the appellants and the respondent, they issued the subject cheque and further previously also the appellants were involved in similar nature of cheque bouncing cases.

13. Insofar as the stance of the appellants that *there is no acknowledgment of goods/articles from their side against which the*

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[3] Mst. Zarsheda v. Nobat Khan [PLD 2022 SC 21]

subject cheque was issued is concerned, it may be observed that Section 118 of the Negotiable Instruments Act, 1881, provides that *'until the contrary is proved, a presumption shall be drawn that every negotiable instrument was made or drawn for consideration'* and the burden to rebut this presumption lies upon the party arguing that the negotiable instrument has not been drawn for consideration and that a bare denial of any 'consideration' does not show any defence. Something probable has to be brought on the record for getting the benefit of shifting the onus of proof upon the respondent/plaintiff.[4]

14. From perusal of the evidence, recorded before the trial court, it transpires that the respondent / plaintiff successfully proved that the subject cheque was issued by the appellants / defendants, which was dishonoured upon deposit of the same in the bank account of the firm. The cheque and the dishonor slip were produced before the trial court. It is also proved from the bank slip/endorsement that the cheque was presented and bounced due to insufficient amount and was returned to the bearer, who claimed that the cheque issued by the appellants has been dishonored and that he is entitled for recovery of the amount mentioned in the cheque. In the backdrop of above discussion, it appears that the trail court has passed the impugned judgment after proper evaluating the facts as well as material available on the record and the judgment is based on the sound reasoning. No misreading or non-reading of the evidence is found nor any illegality or irregularity has been established by the appellants, which could warrant any interference of this Court in the present Appeal.

15. In view of the above discussion, the present Appeal, being devoid of any force, was dismissed with compensatory costs of Rs.100,000/- to be paid by the appellants to the respondent by means of short order dated 17.01.2025, and above are the reasons thereof.

JUDGE

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[4] Rab Nawaz Khan v. Javed Khan Swati [2021 CLD 1261] and Muhammad Aziz ur Rehman v. Liaquat Ali [2007 SCMR 1820].