IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Arshad Hussain Khan
Mr. Justice Amjad Ali Sahito

1st Appeal No.48 of 2022

Appellant	:	Muhammad Sumair S/o Salahuddin through Ch. Mohammad Rasheed, Advocate
Respondents	:	Huzaifa S/o Abdul Nasir & other through Mr. Muhammad Imran Meo, Advocate
Date of Hearing	:	05.05.2026
Date of Judgment:		05.05.2026

J U D G M E N T

Amjad Ali Sahito, J-. The instant 1st Appeal, instituted under Section 96 of the Code of Civil Procedure, 1908, is directed against the Judgment/Decree dated 18.02.2022, passed in Summary Suit No.23 of 2021, whereby the said Summary Suit filed by the plaintiff (now Defendant No.1) was decreed against Defendant (now the appellant). Being aggrieved by the said judgment and decree, the appellant has preferred the present appeal.

2. Briefly stated, the facts are that Respondent No.1 is an iron and steel merchant and had business dealings with the appellant, who used to purchase iron material on credit basis. It is alleged that during the course of such transactions, an amount of Rs.8,39,000/- became due and outstanding against the appellant. In discharge of the said liability, the appellant allegedly issued eight cheques of Rs.1,00,000/- each drawn on Bank Al-Habib Ltd., which upon presentation were dishonored. Consequently, an FIR under Section 489-F PPC was lodged in the year 2019 in police station Napier and thereafter the instant summary suit was filed for recovery of the said amount.

3. The learned trial Court, after proceedings under Order XXXVII CPC, granted conditional leave to defend subject to deposit of cheque amount; however, upon failure of the appellant to comply with such condition, the learned trial Court proceeded ex-parte and passed the judgment/decree in favour of Respondent No.1.

4. Learned counsel for the appellant contended that the impugned judgment and decree are contrary to the law as well as the facts and circumstances of the case. He submitted that the alleged liability is not founded upon any written agreement or admitted document; rather, Respondent No.1, in his deposition recorded during the criminal proceedings, himself admitted that no written contract existed between the parties and that the alleged transactions were being maintained through a private "khata" (manual ledger). It was argued that such record does not fall within the purview of summary jurisdiction. Learned counsel further pointed out material contradictions in the deposition of Respondent No.1 with regard to the issuance and adjustment of cheques, thereby giving rise to serious and bona fide triable issues. He submitted that the learned trial Court failed to properly appreciate these material aspects and, as such, wrongly deprived the appellant of unconditional leave to defend. It was further contended that the cheques in question had merely been issued by way of guarantee/security; however, Respondent No.1 misused the same by depositing them in the bank without prior intimation to the appellant. Learned counsel further argued that the impugned judgment and decree were passed ex-parte in undue haste and without proper application of judicial mind.

5. Learned counsel further contended that the appellant has already been acquitted in the criminal case arising out of the same F.I.R. registered under Section 489-F, P.P.C., after a full-fledged trial and recording of evidence. He argued that although such acquittal may not be binding upon the civil proceedings, nevertheless, it constitutes a relevant circumstance demonstrating that the alleged liability is not free from doubt and involves disputed questions of fact. It was thus contended that,

in the presence of such acquittal, the claim could not have been treated as an admitted or unimpeachable liability so as to justify summary adjudication, and therefore the appellant was entitled to unconditional leave to defend.

6. Conversely, learned counsel for Respondent No.1, while supporting the impugned judgment and decree, contended that the appellant had admittedly issued the cheques in question, which were subsequently dishonoured, thereby establishing his liability. He submitted that despite the grant of conditional leave, the appellant failed to comply with the order directing deposit of the amount and, consequently, rightly suffered ex-parte proceedings. It was further argued that the claim of Respondent No.1 remained unrebutted and, therefore, the learned trial Court had rightly decreed the suit. Learned counsel maintained that no illegality, infirmity, or material irregularity has been committed by the learned trial Court warranting interference by this Court in appellate jurisdiction. He accordingly prayed for dismissal of the appeal.

7. We have heard the learned counsel for the parties at considerable length and have minutely examined the material available on record with their able assistance.

8. It is an admitted position on record that business transactions existed between the parties and that Respondent No.1 was maintaining a private “khata” with regard to such dealings. However, Respondent No.1 has claimed that, during the course of such business transactions, he supplied iron material worth Rs.8,39,000/- to the appellant and, in consideration thereof, received eight cheques of Rs.1,00,000/- each. Significantly, none of the said cheques were issued in the name of Respondent No.1; rather, the same were admittedly bearer/cash cheques, which prima facie creates serious doubt regarding their nexus with the alleged liability. Such mode of issuance does not convincingly support the contention that the cheques were issued specifically towards discharge of a determined and acknowledged debt.

9. Perusal of the record further reflects that, instead of initially instituting a summary suit, Respondent No.1/plaintiff lodged F.I.R. bearing Crime No.168 of 2019 at Police Station Napier, Karachi, for an offence under Section 489-F, P.P.C. Upon completion of investigation, the Investigating Officer submitted a report under Section 173, Cr.P.C. (challan) before the competent Court of law. Thereafter, after completion of all codal formalities, the evidence of the plaintiff/respondent and his witnesses was recorded. During the course of his deposition, the plaintiff/respondent admitted that *"It is correct that there is no written agreement between me and accused. Voluntarily says that in business there is only khata which is available. It is correct to suggest that the cheques were issued as guarantee. Voluntarily says that these were cheques for material, not guarantee. It is correct to suggest that in Ex.05/A-9 (Khata), the balance amount is reflected as Rs.39,050/-."*

10. Thereafter, upon conclusion of a full-fledged trial, the accused/appellant was acquitted by the competent Court of law. However, it is clarified that during the pendency of the criminal proceedings, the plaintiff/respondent instituted Summary Suit No.23 of 2021 before the learned District Judge, Karachi South. Which was subsequently transferred to the Court of learned Additional District Judge-IX, Karachi South, for disposal in accordance with law. The appellant/defendant filed an application under Order XXXVII Rule 3, C.P.C., through his counsel, which was allowed subject to the condition of depositing the cheque amount, i.e., Rs.8,39,000/-, before the Court. However, the defendant/appellant failed to deposit the said amount and, consequently, ex-parte proceedings were initiated against him. Thereafter, the plaintiff/respondent examined himself and produced the relevant documents in support of his claim, whereafter the learned trial Court, vide judgment and decree dated 18.02.2022, decreed the suit.

11. In the instant case, the specific plea of the appellant was that he had already paid the entire amount to the respondent/plaintiff and that only an amount of Rs.39,050/-

remained outstanding, which he was willing to pay. Since leave to defend had been granted conditionally, the defendant/appellant, being a person of limited financial means, could not arrange the deposit of the cheque amount; consequently, his defence was struck off. Learned counsel for the appellant vehemently contended that the appellant had a good and substantial defence to establish before the learned trial Court that no cheque amount was due against him, particularly in view of the evidence available on record, including the evidence recorded before the learned Magistrate wherein the plaintiff himself admitted that, as per the "khata", the outstanding liability against the appellant was only Rs.39,050/-.

12. It is pertinent to mention here that the Code of Civil Procedure, 1908 came into force on the 1st day of January, 1909, whereas Section 489-F, P.P.C. was introduced on 25.10.2002. Likewise, the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as "the Ordinance") was promulgated in the year 2001, whereby exclusive jurisdiction was conferred upon the Banking Courts in matters where a customer or a financial institution commits default in fulfillment of any obligation relating to finance, enabling the financial institution or, as the case may be, the customer, to institute proceedings before the Banking Court by presentation of a plaint.

13. At the same time, the District Courts are vested with jurisdiction to entertain summary suits under Order XXXVII Rules 1 and 2, C.P.C., in respect of bills of exchange, hundies, promissory notes, and bounced/dishonoured cheques for recovery of amounts due thereunder. Simultaneously, where any person dishonestly issues a cheque towards repayment of a loan or fulfillment of an obligation and the same is dishonoured upon presentation, the aggrieved person is competent to lodge an F.I.R. under Section 489-F, P.P.C.

14. Further, Section 78 of the Negotiable Instruments Act provides that: "Subject to the provisions of Section 82, clause (c), payment of the amount due on a promissory note, bill of

exchange or cheque must, in order to discharge the maker or acceptor, be made to the holder of the instrument."

15. It is, therefore, well settled that civil and criminal proceedings may proceed simultaneously and side by side. In the instant case, although the appellant was acquitted by the competent Court of law in proceedings arising out of an offence under Section 489-F, P.P.C., after recording of evidence, nevertheless, the suit instituted against him was decreed by the learned trial Court.

16. In the above backdrop, the question that arises for consideration is whether reliance can be placed, in civil proceedings, upon a subsidiary finding of fact recorded in a prior criminal case, though not amounting to a finding directly relating to the guilt or innocence of the accused, particularly where such finding is founded upon the testimony of the same witnesses who subsequently deposed with regard to the same alleged liability and recovery of amount.

17. The provisions relating to the relevancy of previous judgments rendered by Courts in other proceedings are contained in Articles 54, 55, and 56 of the Qanun-e-Shahadat Order, 1984; however, for the purposes of the present controversy, the most relevant provision is Article 57 of the Qanun-e-Shahadat Order, 1984, which is reproduced hereinbelow:

> ***Article57 Qanun-e-Shahadat Order, 1984.*** *Judgments, etc., other than those mentioned in Article 54 to 56, when relevant. Judgments, orders or decrees, other that those mentioned in Articles 54, 55 and 56, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Order.*

18. The provisions of Article 57 of the Qanun-e-Shahadat, 1984 are the same as contained in Section 43, Evidence Act, 1872, since repealed the later provisions are reproduced below:

> ***Section 43 Evidence Act, 1872.*** *Judgments, etc., other than those mentioned in section 40 to 42, when*

> *relevant. Judgments, orders or decrees, other that those mentioned in section 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.*

19. Article 57 of the Qanun-e-Shahadat Order, 1984 provides that judgments, orders, or decrees other than those referred to in Articles 55 and 56 are, as a general rule, irrelevant unless the existence of such judgment, order, or decree itself constitutes a fact in issue or is otherwise rendered relevant under any other provision of the Qanun-e-Shahadat Order, 1984. In other words, whether inter partes or otherwise, a prior judgment becomes admissible only where its very existence is directly in issue or where it acquires relevancy by virtue of some independent provision of the law of evidence.

20. The category of cases contemplated under this Article is distinct from those where a judgment is relied upon either as res judicata or as evidence possessing binding force by reason of the adjudication contained therein. Rather, the Article applies to situations where the existence of the judgment, order, or decree itself is a relevant fact for determination in subsequent proceedings.

21. The latter portion of Article 57 further recognizes two additional exceptions to the general rule of irrelevancy and provides that a prior judgment, order, or decree may become relevant where:

> (i) the existence of such judgment, order, or decree itself constitutes a “fact in issue”; or
>
> (ii) its existence is otherwise rendered relevant under any other provision of the Qanun-e-Shahadat Order, 1984.

22. In this regard, reliance may be placed upon the case reported as **(1985 SCMR 181).** It has further been held that the mere fact that a party was arrayed as a defendant in earlier proceedings, or that the controversy in the former suit pertained to another portion of the same property, would not by itself

render the earlier judgment relevant in subsequent proceedings. Reference may be made to (**1976 SCMR 282).**

23. The settled legal position, therefore, is that the only permissible use of a previous judgment in circumstances falling under Article 57 is to treat the existence of such judgment or the findings recorded therein as an additional piece of evidence, to be evaluated alongside other evidence available on record, for determining the truth or otherwise of a fact in issue or a relevant fact in the subsequent proceedings. Reliance in this regard may again be placed upon (**1985 SCMR 181).**

24. In the case reported as ***1985 SCMR 181 (Atta Muhammad V. The State)*** Hon'ble Supreme Court of Pakistan held as follows;

> *"11. As such, the question that arises for consideration is as to whether or not reliance can be placed, in a criminal case, on a subsidiary finding of fact (i.e. not a finding of guilt or innocence of the accused), in the judgment recorded in a previous case, involving, inter alia, the same accused person, specially when the finding in question is based on the testimony of the same witnesses, who have deposed regarding the same recovery in the subsequent trial.*
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> *12. A similar question had arisen before this Court in Muhammad Khurshid's case P L D 1963 S C 157 in which leave was granted.*
>
> *" . for considering the question as to whether evidence which had been disbelieved in the other case should be accepted for the purpose of conviction under the Arms Act when the witnesses examined in the case were the same and gave identical evidence."*
>
> *In that case, after considering all the relevant case-law Mr. Justice Hamoodur Rahman, who recorded the judgment, held that:-*
>
> *"Evidence Act does not make findings arrived at on the evidence before the Court in one case, evidence of that fact in another case, each case has to be dealt with upon its own facts established by the evidence led therein."*
>
> *13. The provisions of law relating to the relevancy of prior judgments of Courts, in other cases, is contained in sections 40 to 43 of the Evidence Act, 1872."*

25. In another case as PLD 1988 Quetta 60 (DB) (Syed Abdullah Shah V. Abdul Ghaffar*)* Hon'ble Quetta High Court held as follows;

> *"Before proceeding further it would be appropriate to dispose of the legal objections raised by Mr. Basharatullah regarding the admissibility of the judgments in evidence produced by petitioners and relied upon by the Tribunal. It was mainly contended that as per provisions of Article 57 of Qanun-e-Shahadat, 1984 judgments orders or decrees, other than those mentioned in articles 54, 55 and 56, are irrelevant unless the existence of such judgment, order or decree is a fact in issue or relevant in some other provision of this Order. It may be pointed out that Article 57 of Qanun-e-Shahadat is corresponding to section 43 of Evidence Act, 1872. It is well-settled rule of law that no man should be bound by the decision, or judgment of a Court in which he was not a party. But in this case the judgments which were produced were between the same parties or persons claiming rights through the same parties, therefore, such Judgments are relevant and admissible in evidence".*

26. The fundamental principle underlying Article 57 is that judgments, orders, and decrees rendered in other proceedings are ordinarily irrelevant in a subsequent trial. Articles 54 to 56 carve out specific exceptions to this general rule by identifying circumstances in which such prior judgments may become relevant, such as where they operate as a bar to subsequent proceedings on the principles of res judicata, autrefois acquit, or autrefois convict, or where they relate to matters of a public nature, including questions concerning existence of rights of way, customs, or usages.

27. After the introduction of Section 489-F, P.P.C., it has frequently been observed that litigants, instead of directly instituting summary suits, prefer first to initiate criminal proceedings by lodging F.I.Rs. under Section 489-F, P.P.C. against the accused/respondents. Thereafter, upon recording of evidence, the accused persons are, in many cases, acquitted by the competent Courts of law on various pleas and defences, including that the cheque in question had been stolen by the complainant, that no outstanding liability existed against them,

or that after payment of the entire outstanding amount the complainant/plaintiff had failed or refused to return the cheques. In certain cases, acquittal is also recorded on other legally sustainable defences raised by the accused. Subsequently, the aggrieved party institutes a summary suit before the competent civil Court for recovery of the alleged amount.

28. It is by now a settled proposition of law that leave to defend in a suit instituted under Order XXXVII, C.P.C. ought ordinarily to be granted where the facts disclosed by the defendant through affidavit make out a case requiring the plaintiff to prove consideration for the instrument forming the basis of the suit. Leave may likewise be granted on any other ground or factual circumstance which the Court considers sufficient for purposes of adjudication of the application seeking leave to defend. The legal effect thereof is that refusal to grant leave to defend is an exceptional course, confined only to cases where the defendant discloses no defence whatsoever.

29. Ordinarily, even where the defence appears weak, doubtful, or sham in nature, the Court would not outrightly decline leave to defend; rather, in such circumstances, leave may appropriately be granted subject to conditions. The more significant question, however, relates to the circumstances under which leave to defend ought to be granted unconditionally.

30. The grant of conditional or unconditional leave undoubtedly falls within the judicial discretion of the Court, which discretion is to be exercised judiciously in light of the facts and circumstances of each individual case. It is neither possible nor advisable to formulate an inflexible or rigid rule governing exercise of such discretion. Nevertheless, a careful examination of Order XXXVII Rule 3, C.P.C. reveals that where the facts disclosed by the defendant in the affidavit filed in support of the application for leave to defend are such as to necessitate the plaintiff proving consideration of the instrument constituting the basis of the suit, unconditional leave to defend may be granted, provided that the defence raised appears bona fide and the conduct of the defendant is free from suspicion.

31. Similarly, unconditional leave may also be granted in cases where execution of the negotiable instrument itself is denied by the defendant and the material available before the Court at the stage of consideration of the application for leave to defend is insufficient to enable the Court to record a definite or conclusive finding regarding such execution. Reliance is placed in the case of **Mian Rafique V. Bank of Credit and Commerce Internal. *(*PLD 1996 SC 749).**

32. In another case of 2014 CLC 1063 (DB) (Abdul Kareem Mengal V. Sultan Badshah*)* Hon'ble Quetta High Court held as follows;

> *"We have carefully considered the contentions put forth by learned counsel and have also gone through the impugned judgment as well as evidence on record. It is appellant's case that he and respondent were partners in business and on settlement of account Rs.80,00,000/- were .found outstanding against respondent for which he issued a cheque dated 7-8-2003 which was dishonoured whereas on the other hand respondent has taken plea that on 3-4-2003 his cheque book containing Cheque Nos.26919266 to 26919295 was misplaced for which he lodged report with concerned Tehsildar as well as informed the concerned Bank and cheque in dispute was one of those missing cheques which was illegally used by appellant. Learned Judicial Magistrate after putting the prosecution and defence version in juxta position found the defence plea more plausible and acquitted respondent of the charge. After having gone through the evidence produced by both parties we are also of the same view because appellant has not produced any witness with regard to settlement of account or to prove that on such settlement any amount was found outstanding against respondent who issued cheque in dispute. On the other hand respondent produced representative of Bank who supported his plea with regard to submission of application by him informing the bank about misplacement of cheque book. He also produced application submitted by respondent as mark/D.W.2-A which shows that said application was moved on 3-4-2003, much prior to the date on which cheque in question was allegedly issued to appellant and we have no reasons to disbelieve his statement as he is an independent witness. In the light of his statement the case of appellant has become doubtful and benefit has to be extended to respondent which was rightly extended so by learned Judicial Magistrate. After acquittal respondent carries double presumption of innocence and findings of trial Court*

warrants no interference merely because on reappraisal of evidence, we may come to a different conclusion when conclusion drawn by trial Court is equally plausible in peculiar facts and circumstances of the case."

33. In the case reported as 2018 CLC 1659 (DB) (Muhammad Nasim V. Kashif Nasim*)* Hon'ble Peshawar High Court held as follows;

"Similarly, in the case titled Habib Bank Limited, Circle Office, Multan v. Al-Qaim Traders and another (1990 SCMR 686), it was held that Higher forum can examine the question whether the discretion exercised in this behalf has been exercised legally, reasonably, fairly and not oppressively, capriciously or perversely and in that case the condition imposed by the lower court while granting leave to defend to deposit Rupees one crore in the Court was modified to the extent only to deposit Rupees 50 lacs. Similarly, the august Supreme Court in the case titled Abdul Rauf Ghauri v. Mrs. Kishwar Sultana and 4 others (1995 SCMR 925) followed the earlier view of the apex Court and held that where a plausible defence is raised in leave to defend which needs to be tried, leave to defend can be granted unconditionally."

34. Reverting to the facts of the present case, Respondent No.1/plaintiff, during the course of his cross-examination recorded in the criminal proceedings instituted under Section 489-F, P.P.C., admitted that, as per the "khata", the outstanding balance against the appellant was only Rs.39,050/-. It has further been alleged that the cheques in question were issued towards discharge of the outstanding liability; however, the entries reflected in the said "khata" indicate that certain cheques had already been shown as received and corresponding amounts had been marked as cleared. These material contradictions prima facie create serious doubt regarding the exact extent of liability and, therefore, necessitate a full-fledged trial for proper and effective adjudication of the controversy. Such discrepancies cannot be conclusively resolved without recording evidence and affording the parties an adequate opportunity of cross-examination. In these circumstances, we are conscious of the fact that the alleged liability cannot be regarded as clear, definite,

or free from doubt so as to attract the strict parameters governing summary jurisdiction.

35. It is further observed that the learned trial Court proceeded to decree the suit primarily on the ground that the claim remained unrebutted owing to the ex-parte proceedings against the appellant. Such an approach is not in consonance with the settled principles governing summary suits, inasmuch as the Court is first required to satisfy itself that the claim strictly falls within the ambit and parameters of Order XXXVII, C.P.C. Mere absence of defence does not automatically entitle a plaintiff to a decree, particularly where the claim itself is not founded upon an undisputed written obligation. The learned trial Court, therefore, appears to have overlooked the essential requirements of law while passing the impugned judgment and decree.

36. It is also pertinent to observe that it is a settled proposition of law that evidence recorded in criminal proceedings cannot be treated as substantive evidence in civil proceedings, as both jurisdictions operate in distinct fields and are governed by different standards of proof. Whereas findings in criminal proceedings are based upon proof beyond reasonable doubt, civil liability is determined on the touchstone of preponderance or greater weight of probability. Likewise, a judgment rendered by a civil Court is not admissible in criminal proceedings for purposes of establishing the truth of the facts stated therein. In this regard, reliance may be placed upon the case reported as **(1995 SCMR 1621).**

37. In view of the foregoing discussion, we are of the considered opinion that the appellant had raised substantial, bona fide, and triable questions which could only be effectively resolved through recording of evidence after affording full opportunity to the parties. The denial of unconditional leave to defend, therefore, has resulted in miscarriage of justice. It is a settled principle of law that where bona fide triable issues are disclosed, leave to defend should ordinarily be granted unconditionally. The present case squarely falls within such category and, therefore, warrants interference by this Court in appellate jurisdiction.

38. For the foregoing reasons, the instant First Appeal is **allowed.** Consequently, the impugned judgment and decree are hereby **set aside.** The application seeking leave to defend is allowed and the appellant is granted unconditional leave to defend the suit. The matter is remanded to the learned trial Court for decision afresh in accordance with law after affording fair and reasonable opportunity to both parties to lead evidence in support of their respective claims.

JUDGE

JUDGE

KAMRAN/PS