

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

1st Appeal No. 01 of 2016

DATE	ORDER WITH SIGNATURE OF JUDGE
Date of hearing:	14.11.2016.
Date of judgment:	18.11.2016.
Appellant:	Through Mr. Muhammad Asif Shaikh, Advocate.
Respondent.	Through Mr. Ashfaque Ali Khaskheli, Advocate. -.-.-.-.-

J U D G M E N T

MUHAMMAD FAISAL KAMAL ALAM, J:- This first appeal under section 96 of C.P.C. has been preferred against the order dated 17.12.2015, whereby the leave to defend application filed by the Appellant was dismissed and consequently Suit filed by present Respondent (Ali Akbar) was decreed by the impugned decree dated 23.12.2015 passed by the learned District Judge, Hyderabad, in Summary Suit No. 32/2015.

2. Relevant facts leading to the filing of present appeal are that present Appellant, who was the defendant in the above summary suit, had good business relations with the present Respondent-the Plaintiff, who has filed the above summary suit.

3. It has been averred by the present Appellant that as the latter is an experienced real estate dealer, the Respondent gave him money for investment and on account of these regular transactions, the present Appellant issued two cheques for a total amount of Rs.49,00,000/- (Rs.4.9 Million), which were subsequently bounced on presentment and consequently present Respondent lodged a FIR under Crime No. 05/2015 at P.S Qasimabad, Hyderabad, against present Appellant and

while the criminal case No. 166/2015 was pending adjudication before the concerned learned Civil Judge & Judicial Magistrate, Hyderabad, a compromise under section 345(6) of Cr.P.C. was effected vide order dated 10.03.2015, which was passed on the application under the above provisions filed and signed by both the parties to the present proceedings.

4. In consideration of the above compromise another Cheque No.2456355 for an amount of Rs.4 Million dated 08.06.2015 drawn on Allied Bank Ltd. Qasimabad Branch (**the subject cheque**) was admittedly issued by the present Appellant to the Respondent, which was also dishonored on presentment in the Bank. Consequently, the present Respondent has filed the above mentioned Summary Suit No. 32 of 2015, wherein notices and summons in the prescribed form were issued to Appellant, who filed leave to defend application, which is available at Page-33 of the present file, and said application was opposed by the present Respondent by filing the counter affidavit thereto. The learned Trial Court after considering the facts and ground agitated by both the parties has passed the impugned order dated 17.12.2015, which culminated into a decree dated 23.12.2015.

5. Mr. Muhammad Asif Shaikh, who represents the Appellant, has vehemently argued that in the leave to defend application the present Appellant has specifically mentioned that the summary suit filed by the present Respondent is based on misrepresentation and concealment of material facts which can only be proved by the present Appellant by leading the evidence, for which leave to defend ought to have been granted and the matter should be treated as a long cause. It has been further stated by the Appellant's Counsel that in the leave to defend application it has been specifically stated that cheques were issued on account of continuous harassment caused to the Appellant by the Respondent and thus this being a triable issue, the leave to defend should have been granted by the Trial Court, which erred in refusing to grant the same to the Appellant for defending the above mentioned summary suit. It was next contended on behalf of the Appellant that the impugned order itself suffers from material irregularity, as a decree directly has

been passed while passing the impugned order, which is not permissible in law.

6. Learned Counsel for Appellant has cited the following case law in support of his arguments:-

- (i) 2004 CLC 356 (Karachi)
- (ii) 2009 CLC 308 (Lahore)
- (iii) 2007 YLR 187 (Lahore)
- (iv) 1997 SCMR 943
- (v) 2008 MLD 1448.

7. On the other hand, Mr. Ashfaque Ali Khaskheli representing the respondent has vehemently controverted the arguments of Appellant's side, inter alia, by referring to the compromise application in the above mentioned criminal case, wherein in Paragraph-4 it has been clearly mentioned that both the parties hereto have compromised the matter outside the Court and the Appellant was pardoned by the present Respondent due to intervention of notables. In consideration of this compromise, the subsequent cheque of Rs.4 Million (as referred to hereinabove) dated 08.06.2015 was issued and criminal case No.166/2015 was subsequently ordered to be compromised by a judicial order dated 10.03.2015. Copy of the subject cheque dated 08.06.2015 for Rs.4 Million is available at Page-67 of the case file and is part of one of the documents filed by the Respondent's Counsel under his Statement dated 02.11.2016. It is further contended that case of Appellant is nothing but of contradictions and he has not only deceived the Respondent but also attempted to mislead the Courts. To fortify his arguments, the Respondent's Counsel has referred to the Objections of present Appellant filed before the Executing Court (in the above referred Summary Suit), which is available at Page-11 of the afore referred Statement filed by the Respondent, and according to Paragraphs-3 and 8 of these Objections, the present Appellant while acknowledging his liability has undertaken to pay the amount to Respondent whenever his financial position would improve, besides Appellant has pleaded compassionate grounds for consideration of the Court that the decree passed in the referred Summary Suit may not be executed against him.

8. I have taken into account the arguments of learned Counsel representing the parties and with their able assistance have gone through the case record.

9. The last citation of Honourable Supreme Court is just a leave granting order and not a judgment of the Honourable Supreme Court, as envisaged by Article 189 of the Constitution of Islamic Republic of Pakistan, 1973, hence is not binding. The crux of the other judgments relied upon by the Appellant is that when triable issues are specifically pleaded in the leave to defend application by the defendant or the pleadings of the plaint in summary suit itself is vague, which requires further proof than the leave to defend the suit (case) should be granted to the defendant. Examining the pleadings of the parties in the light of above citations, in my considered view the present Appellant has neither pleaded the nature of triable issues nor has come up with any legal justification that the nature of the financial transactions between him (the Appellant) and the respondents was such that it lacks consideration for issuance of subject cheque; or, the present Appellant has neither pleaded such facts, which has the quality to rebut the presumption of consideration as provided by Section 118 of the Negotiable Instruments Act, 1881.

10. The consideration for issuing of subject cheque of Rs.4 Million was withdrawal of a criminal case by the present Respondent, which is an undeniable fact and can be easily ascertained from the available record of the present case, besides discharging the Appellant's earlier liability towards Respondent in respect of commercial transactions. In resisting the Execution Application No. 04 of 2016 filed in the above mentioned summary suit, on one hand the present Appellant is pleading humanitarian grounds for dropping the proceedings against him and not disclosing the facts allegedly concealed by the Respondent, which was earlier mentioned by the same Appellant in his leave to defend application, and on the other hand in the present appeal, the Appellant has pleaded, inter alia, that the impugned order is opposed to law and facts as the learned Trial Court did not consider the strong defense of the Appellant. It has been also mentioned as one of the grounds in the

present appeal that the learned Trial Court has not considered the material which was brought on behalf of the Appellant and overlooked the legal point applicable to the present case, which resulted in miscarriage of justice. However, the Appellant has failed to point out that what material was brought by him before the learned Trial Court, which was not considered, except his contradictory averments. On the other hand, if the pleadings of Summary Suit filed by Respondent is examined, they appear to be quite specific about the entire controversy, inter alia, in respect of the subject cheque as well.

11. Not only this, due to Appellant's persistent default, the Respondent has to lodge another FIR in Crime No. 73 of 2015, inter alia, under Section 489-F of PPC (Pakistan Penal Code), which is pending adjudication before the concerned Trial Court.

12. With regard to the arguments of learned Counsel for Appellant that while passing the impugned order, the decree has also been passed, the same is meritless, in view of a well-known judgment in the case of Haji Ali Khan and Company Versus M/s Allied Bank of Pakistan Limited reported as PLD 1995 Supreme Court 362. Thus, the learned Trial Court has not fallen into any error while passing the impugned order/decreed, except to the extent of rate of interest, which the impugned decision has awarded at the rate of 8% by invoking Section 79 of the Negotiable Instruments Act, 1881, instead of 6%, as provided in the above cited provision. To this extent the impugned Decree stands modified.

13. The *ratio decidendi* of the above cited case law (by the Appellant's Counsel) is not applicable to the case at hand and therefore, the impugned order and subsequent decree do not suffer from any illegality or material irregularity which calls for any interference except what is discussed above, that the rate of interest on the payable amount shall be at the rate of 6% (six per centum) per annum. Therefore, the present appeal is dismissed. The parties are left to bear their own costs.

JUDGE