

IN THE HIGH COURT OF SINDH AT KARACHI

First Appeal No.4/2017

Appellant : Khalid Javed Paracha, through Mr. Kashif Paracha, Advocate.
Respondent : Muhammad Khalid, through Mr. Azam Khan Awan, Advocate.

First Appeal No.05/2017

Appellant : Khalid Javed Paracha, through Mr. Kashif Paracha, Advocate.
Respondent : Muhammad Mumtaz, through Mr. Azam Khan Awan, Advocate.

Date of hearing: 05.04.2017

Date of Judgment :

JUDGMENT

YOUSUF ALI SAYEED, J. This common Judgment addresses First Appeals Numbers 4 and 5 of 2017, which arise from Summary Suit Numbers 19 and 20 of 2016 instituted under Order 37, Rules 1 & 2 CPC in the Court of the learned VIIIth Additional District Judge, Karachi, South (hereinafter collectively referred to as the “**Summary Suits**”), which stand decreed against the Appellant pursuant to Judgments dated 25.01.2017 (the “**Impugned Judgments**”).

2. The Summary Suits purport to have been filed by the respective Respondents through their common attorney, one Ameer Hamza Farooq Awan, on the basis of postdated cheques for Rs. 14,500,000/- and Rs.14,300,000/-, bearing Cheque Numbers 893928 and 893932 respectively (the “**Cheques**”), drawn on an Account Number 0018-01003460 (the “**Subject Account**”) maintained by the Appellant with Bank Alfalah Limited (the “**Bank**”), at its Paper Market Branch at Karachi.

3. In terms of each of the Summary Suits it was alleged that the Appellant and concerned Respondent had been transacting for the sale/purchase of rice from time to time, and the Cheques were said to have been issued by the Appellant towards the consideration payable for a specific quantity of rice allegedly purchased by him from each Respondent. In Suit Number 19 of 2016 the alleged quantity was 207 metric tons, and in Suit Number 20 of 2016 the same was 204 metric tons.

4. In both the Summary Suits, the Appellant filed Applications for Leave in terms of Order XXXVII, Rule 2 CPC, wherein he categorically disavowed any dealings whatsoever with the Respondents and submitted that the Respondents are complete strangers to him. Hence, he averred that the question of there being any payment obligation towards the Respondent on his part did not arise, and denied having issued the Cheques. It was submitted that the cheque book in respect of the Subject Account had fallen into the possession of an estranged business partner with whom the Appellant was in dispute and the entire exercise based on the Cheques was an intimidatory tactic being employed against him for ulterior motive. More importantly, it was pointed out that the Bank had confirmed that the Cheques had neither been presented for encashment nor had payment thereof been marked stopped, and it was contended that this showed that the claim espoused by the Respondents in the Summary Suits was based on a fabricated cause of action.

5. On 18.08.2016, leave to appear and defend was granted to the Appellant in both the Summary Suits pursuant to Order XXXVII, Rule 3 CPC. However, this was subject to deposit of the entire amount of the Cheques (i.e.Rs.14,500,000/- and Rs.14,300,000/-). The subsequent Application of the Appellant in the Summary Suits for reduction of the amount to a reasonable level, which in each case was accepted by the Appellant to be an amount up to Rs.5,000,000/-, was dismissed by the learned ADJ on 08.12.2016 on the ground that the Court had no jurisdiction to reduce the same. The Summary Suits then proceeded ex parte, culminating in the Impugned Judgments.

6. It is noteworthy that the figures mentioned in the leave granting Order made in each of the Summary Suits on 18.08.2016 differ markedly from those mentioned in the Orders that followed, in as much as the Orders of 18.08.2016 envisage the amount of the claims to be Rs.1,45,000/- and Rs.1,43,000/- respectively and impose a condition for deposit of such amount, whereas the subsequent Orders made on 08.12.2016 as well as the Impugned Judgment refer to a deposit amount of Rs.14,500,000/- and Rs.14,300,000/-. Whilst there is no clarity on how this came to pass and what correctional order, if any, was made, from the discussion in Paragraph 3 of the Impugned Judgment it is apparent that in actuality, perhaps on realization by the Court of the true quantum of the claims, the deposit amounts that came to be required were that of Rs.14,500,000/- and Rs.14,300,000/- respectively. It may be for this very reason that Paragraph 1 of the Appellant's Application for reduction of the deposit amount suggest the existence of some confusion surrounding the very grant of leave as well as the quantum of deposit.

7. During the course of arguments advanced at the bar, learned counsel for the Appellants has contended that the learned ADJ has materially erred in considering her discretion to reduce the security amount as being fettered. He submits that in the face of a serious dispute apparent on the face of the record, the imposition of terms requiring deposit to the full extent was an unreasonable exercise of discretion and that requiring deposit of such large amounts was completely unmanageable and in the wake thereof the grant of leave was rendered illusory. He submits that the Respondents had not filed or even referred to any document in respect of the so-called business relationship said to exist *inter se* each of them and the Appellant, and that the Appellant had even otherwise established that there was a triable case at hand, which could not be dealt with in a summary manner. He submits further that whilst this was a case for grant of unconditional leave, the Appellant had nonetheless offered to deposit up to Rs.5,000,000/- in each case, which was not an insubstantial amount and established the Appellants *bona fides* in the matter.

8. Learned counsel for the Appellants also invites attention to certified copy of the Examination in Chief of the Respondents attorney in each of the Summary Suits, and points out that even at that stage no documents were produced to establish a business or transactional relationship. He submits further that even the right of cross-examination was denied to the Appellant. Learned counsel for the Respondents does not controvert this submission. He submits however, that the facts and circumstances giving rise to the institution of the Summary Suits is as set out in the respective complaints and relies on the contents of the written objections placed on record in opposition the instant Appeals.
9. Learned counsel for the Respondent submits that the proceedings before the learned ADJ have been proper in all respect and satisfy the mandate of the law.
10. He submits that the learned ADJ afforded ample opportunity to the appellant to comply with the order dated 18.08.2016, which was neither challenged in revision or appeal, and instead the application for reduction of the deposit amount was filed which was not maintainable and hence was dismissed. He maintains that material irregularity has been committed by the learned ADJ. He places reliance on the Judgments of the Honourable Supreme Court in the cases reported as Mian Rafique Saigol and Another v. Bank of Credit and Commerce International (Overseas) Ltd and Another, PLD 1996 Supreme Court 749, Haji Ali Khan & Company, Abbottabad and 8 others v. M/s Allied Bank of Pakistan Limited, Abbottabad, PLD 1995 Supreme Court 362, Aftab Iqbal Khan Khichi and another v. Messrs United Distributors Pakistan Ltd., Karachi, 1999 SCMR 1326, Muhammad Ramzan and others v. Gulam Qadir, 2011 SCMR 659, Col. (Retd) Ashfaq Ahmed and Others v. Sh. Muhammad Wasim, 1999 SCMR 2832, as well as a Judgment of a single bench of this Court reported as M/s Industrial AIR Control (Pak) (Pvt), Limited Karachi and 2 others v. M/s Alpha Insurance Company Ltd and another, 1994 CLC 1526 and of a Division Bench of the Lahore High Court reported as Zubair Ahmad and Another v. Shahid Mirza and 2 Others, 2004 MLD 1010.

11. The principle for grant and refusal of leave to defend a suit was laid down by the Honourable Supreme Court in the case reported as *Fine Textile Mills Ltd., Karachi v. Haji Umar*, PLD 1963 SC 163, where it was held that:-

"In a suit of this nature where the defendant discloses upon his affidavits facts which may constitute a plausible defence or even show that there is some substantial question of fact or law which needs to be tried or investigated into, then he is entitled to leave to defend. What is more is that even if the defence set up be vague or unsatisfactory or there be a doubt as to its genuineness, leave should not be refused altogether but the defendant should be put on terms either to furnish security or to deposit the amount claimed in Court.

12. In *Fine Textile's (Supra)*, their Lordships also went on to observe that the principles upon which the provisions of Order XXXVII of the Code of Civil Procedure should be applied are not dissimilar to the principles which govern the exercise of the summary power of giving liberty to sign final judgment in a suit filed by a specially endorsed writ of summons under Order XIV of the Rules of the Supreme Court in England. In that context, it was observed further that one such principle laid down by the Court of Appeal in the case of *Kodak v. Alpha Film Corporation*, (1930) 2 KB 340, was that at the stage when leave to defend is sought 'the judge is not to try the action; he is to see that there is a bona fide allegation of a triable issue, which is not illusory; he need not be satisfied that the defence will succeed; it is enough that such a plausible defence is verified by affidavit'.

13. I have considered the aforementioned submissions and the material available on record. It is evident that, other than the disputed Cheques and related memoranda, no documents of any real relevance had been mentioned or filed by the Respondents in or along with their complaints, or produced in evidence. The execution of the Cheques stands disputed. Furthermore, the Appellant had even otherwise raised a triable issue as to the very existence of a cause of action with reference to the confirmation said to have been received from the Bank as to whether the Cheques had in fact been presented. The letters issued by the Bank in this regard have been

placed on record. I am of the opinion that all of these factors clearly show that, prima facie, there was a substantive dispute which merited deeper enquiry and required grant of leave so that the relevant material in support of the defense could come to the fore through the process of evidence. Apparently, in realization of this, leave had been granted by the learned ADJ, but on the terms specified. Keeping in view the substance of the dispute and quantum of the claims, I am of the opinion that such terms, requiring deposit of the entire sum, amounted to imposing an obligation that was unduly onerous in the given circumstances, and, as contended by learned counsel for the Appellant, stifled the very grant of leave by rendering it illusory.

14. It also merits consideration that whilst the Respondents, in their capacity as plaintiffs, have not made any specific reference to one another other in the plaints filed by them in the Summary Suits in terms of disclosing any particular interconnection either through the Appellant or independently of him, both of them nonetheless appear to have coincidentally engaged the same counsel to address identical legal notices on their behalf of the same date (i.e. 12.04.2016). Furthermore, both Respondents appear to have entrusted the filing of the Summary Suits to a common attorney, as aforementioned, and authorized the said attorney vide identically worded Special Power of Attorney, both purportedly executed on 14.04.2016, printed on stamp paper issued by the same vendor at Karachi, on the same date, attested before the same notary public at Karachi, and witnessed by the same persons.
15. Whilst some of these common factors may be perhaps be explained on some rational basis or the other, what is even more remarkable, and perhaps less amenable to explanation, is the similarity in signature on the Powers of Attorney purporting to be those of the separate donors/principals (i.e. the Respondents). I am of the opinion that, prima facie, all of this lends some credence to the Appellant's contention that the Summary Suits are a product of manipulation. However, needless to say, an authoritative determination in that regard would require evidence before the appropriate forum.

16. As such, I am of the view that on the touchstone of the ratio in *Fine Textile's* (Supra), the Appellant was entitled to the grant of leave as the fundamental questions as to the factum of execution of the Cheques as well as their presentation for payment remained clouded and required evidence in order to be resolved by the Court. Had the Appellant admitted execution and set out a less plausible defense, then the imposition of the condition for deposit of the entire amount claimed may have been warranted. However, under the prevailing circumstances, it could not be said that the defense disclosed by the Appellant was either vague or disingenuous. As such, in light of the facts and circumstances of the case at hand, the condition of complete deposit appears harsh and runs contrary to the principle enunciated in the aforementioned precedent.
17. With reference to the cases cited by learned counsel for the Respondent, the same appear distinguishable, in as much as they proceed on the basis of circumstances where the execution and subsequent presentment of the negotiable instrument were not in question and it could not be said that the condition imposed served to frustrate the grant of leave. Even otherwise, the general principles that may be distilled from these precedents are essentially that Order XXXVII Rule 3(2) CPC confers a reasonable discretion for granting permission to defend on such terms as deemed fit in the circumstances of each case. Furthermore, the effect of refusal to grant leave or failure to comply with the condition imposed will be that the defendant will not be entitled to defend the suit and the Court would be entitled to pass a decree in favour of the plaintiff. However, in these very judgments it has, equally, also been held that every Court is required to apply its mind to the facts and the documents before it before passing any order or judgment notwithstanding the factum that no person has appeared before it to oppose such an order or that the person who wanted to oppose was not allowed to do so because he failed to fulfil the requirements of law. In the instant case, the reasonableness of the condition imposed under the prevailing circumstances is directly in question and is even otherwise under a cloud due to the discrepancy the amount mentioned in the Order dated 18.08.2016 and the Orders made subsequent thereto, as discussed herein above.

18. Learned counsel for the Respondent's has submitted that the imposition of such a condition is a matter of discretion and does not admit to interference. Suffice it to say that if an order passed by a lower forum is unreasonable or suffers from misapplication of law, this Court would be remiss in its duty to let such an Order stand, or, as in the instant case, a Judgment predicated thereon.
19. Accordingly, both these Appeals are allowed and the Impugned Judgments are set aside subject to Appellant depositing the proposed sums of Rs.5,000,000/- with the Nazir of the District Karachi (South) in respect of each of the Summary Suits within 21 days of the date of this Judgment along with his written statements, where after the learned VIIIth Additional District Judge, Karachi, South shall proceed with the Summary Suits on merits and decide the same in accordance with law, uninfluenced by any observation made herein. It is expected that the Summary Suits shall be proceeded with expeditiously and no undue adjournments shall be granted. Furthermore, it is hereby clarified that if for any reasons the requisite deposits are not furnished as prescribed, these Appeals shall be deemed to have been dismissed.
20. These Appeals are disposed of in the above terms with no order as to costs.

JUDGE

Karachi.

Dated: _____