

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI  
I.A. No.180 of 2017

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Date	Order with signature of Judge
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Hearing case (priority)

- 1.For hearing of CMA No.1149/2018
- 2.For hearing of main case.
- 3.For hearing of CMA No.2700/2017

16.05.2018

Mr.Ahsan Raza, Advocate for the Appellant.  
Ms.Uzma Farooq and Mr.Ahmed Masood, Advocate for  
the Respondent No.1

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The appellant has preferred this 1<sup>st</sup> Appeal against the order passed by VIth A.D.J. Karachi South in Summary Suit No.49/2012 on 11.7.2017, whereby the application filed under Section 151 CPC by the appellant to modify the order passed on leave to defend application of the defendant was dismissed, whereas application filed by the respondent No.1 for decreeing the suit for non-compliance of the leave to defend order was allowed and the suit was decreed in the sum of Rs.4,840,000/- along with interest in terms of Section 79 and 80 of the Negotiable Instruments Act, 1881.

2. Learned counsel for the appellant argued that the respondent No.1 also initiated parallel proceedings under Section 489-F PPC in which the appellant obtained bail. During proceedings this court in Criminal Bail Application No.657/2010 also directed to AIGP to carry out forensic test for verifying signatures of the appellant on 02 post- dated cheques. The learned counsel argued that the criminal proceedings have already been culminated in favour of the appellant, which fact has not

been denied by the learned counsel for the respondent No.1. The leave to defend application filed in the Summary Suit No.49/2012 was allowed by the Vith A.D.J. Karachi South on 5.1.2013 subject to deposit of bank guarantee equivalent to the amount of Rs.48,40,000/- within 20 days, but despite lapse of more than 05 years the appellant failed to comply with the order and the matter remained pending till deciding the application of appellant for modifying the order.

3. Learned counsel for the appellant pointed out an application moved under Section 151 CPC on 21.01.2013 in the trial court in which he prayed for the modification of order with the permission to enable the defendant to furnish solvent surety. He further stated in the application that the original documents of immoveable property i.e. Plot No.B-50, Sub- Block-B, Sector 4(4-B), Scheme No.41 Surjani Town, Karachi are already lying with the Nazir of District and Sessions Court, Karachi South, which the appellant/defendant furnished in the Criminal Case No.2418/2010. Notice of this application was issued to the plaintiff/respondent No.1. Both the learned counsel submit that this application was dismissed in the year 2013 mainly on the ground that the same property is already offered as surety in some criminal case, therefore, the trial court was not inclined to accept this property as surety in the civil matter between the same parties. Learned counsel for the appellant argued that after acquittal of the appellant they have withdrawn the surety papers from the Nazir of the District and Sessions Court Karachi Sindh and appellant is willing to furnish the same documents as surety which is owned by the father in law of the appellant.

4. On the contrary, the learned counsel for the respondent No.1 argued that the appellant failed to comply with the leave to defend order thus the trial court has rightly passed the decree, however, they have not disputed that the appellant earlier offered the same property to be furnished as surety but this request was declined by the trial court.

5. We have seen the order passed on 05.01.2013 by the trial court whereby the conditional leave was allowed to the appellant. The concluding paragraph is reproduced as under :-

“The controversy between the parties is based on facts and the allegations of the defendant need to be proved or disproved at the time of recording the evidence but at this stage of the case the plaintiff has produced sufficient material on record which linked up the dispute between the parties and transaction is from the sequence of such dispute, therefore, I found that such dispute will be decided after recording the evidence and unless the defendant is provided opportunity to defend the suit, the matter cannot be resolved on merits. The valuable rights of the defendant are involved in the subject suit, therefore, in the interest of justice I hereby allow the defendant to defend the suit subject to deposit of the security amount equivalent amount of Rs:48,40,000/= in the shape of Bank Guarantee against two bounced cheques which were issued by the defendant for Rs:48,40,000/- or cash amount with the Nazir of District Court South, within 20 days after passing of this order. The application in hand is disposed of accordingly.”

6. On one hand the learned trial court observed that the plaintiff has produced sufficient material on record which linked up the dispute between the parties and transaction is from the sequence of such dispute, but at the same time it was further observed that such dispute

will be decided after recording the evidence and unless the defendant is provided opportunity to defend the suit, the matter cannot be resolved on merits. It was further observed that the valuable rights of the defendant are involved in the subject suit, therefore, in the interest of justice the defendant was allowed to defend the suit subject to furnishing security. No doubt the court may grant conditional leave or unconditional leave, but at the same time before deciding any such application the trial court has to see whether a prima facie case is made out for leave or not, but here the court itself observed that unless the defendant is provided opportunity to defend the suit the matter cannot be resolved on merits, which means that the defendant through leave to defend application made out some arguable case.

7. Despite arguing at some length learned counsel for the appellant is willing to furnish solvent surety to the satisfaction of the Nazir of the District and Sessions Court, District South Karachi on which learned counsel for the respondent No.1 is also agreed.

8. By consent of both the learned counsel this Ist Appeal is disposed of in the following terms:-

(1) The appellant is allowed to furnish solvent surety equivalent to the amount of Rs.4,840,000/-through depositing of original title documents of Plot No.B-50, Sub- Block-B, Sector 4(4-B), Scheme No.41 Surjani Town, Karachi as surety/security to the satisfaction of Nazir of District and Sessions Court, Karachi South within seven days.

(2) The Nazir shall also verify the valuation of property through Estate Agents. After due satisfaction, the documents shall be accepted as surety/security on proper notice to the respondent No.1

(3) The Nazir shall also secure personal bond from the surety with condition that in case the suit is decreed

and/or the decree is not satisfied by the appellant/defendant the surety shall be responsible for payment of decretal amount which will be recovered by the executing court after selling the property offered as surety/security.

(4) After furnishing surety the order for leave to defend shall be revived. The appellant/defendant may file the written statement within next 15 days and thereafter, the suit will be decided by the learned trial court preferably within 06 months. The parties shall not claim any unnecessary adjournment for lingering on the case.

(5) If the appellant is failed to furnish surety within the stipulated period, the decree passed by the learned trial court shall be revived and resurrected.

(6) The appeal is disposed of accordingly along with pending application. The office is directed to return the R&Ps immediately.

The seven days' time will reckon from receiving the R&Ps by the trial court.

Judge

Judge

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