

## IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1526 of 2008

[Creek Marina Private Limited  
versus

Guangdong Overseas Construction Group Company Limited and another]

Date of hearing : 14.03.2018  
Date of Decision : 08.06.2018  
Plaintiff : Creek Marina Private Limited through Ms. Sahar Rana, Advocate.  
Defendants : Nemo.

### Case law relied upon by Plaintiff's counsel

1. 2007 C L C page-77  
[*Sardar Shafiq Hyder Khan Laghari v. Syed Tasneem Nawaz Gardezi*]

**Law under discussion:** 1. The Negotiable Instrument Act.  
2. Civil Procedure Code, 1908 ("CPC")

### Other precedent

PLD 1995 Supreme Court Page-362 [*Haji Ali Khan & Co. V/s. M/s. Allied Bank of Pakistan Limited*]

## J U D G M E N T

**Muhammad Faisal Kamal Alam, J:** The Plaintiff, who is engaged in business of real estate development has instituted this proceeding under summary chapter of Civil Procedure Code 1908 (CPC) against the Defendants, in respect of the cheque No.0383151 dated 19.10.2007, issued by Defendant NO.2 (GOCA ASIA (PRIVATE) LIMITED) and drawn on HSBC (the Hongkong and Shanghai Banking Corporation Limited) at its Karachi Clifton Branch, Phase-V, DHA, which on presentment was dishonoured. As per averments mentioned in the plaint, Plaintiff and both the Defendants entered into a contract,

which is appended as Annexure 'A' with the plaint, for, *inter alia*, construction, completion and maintenance of the contract work for Creek Marina Residential Development Project situated at Defence Housing Authority, Karachi. Defendant No.2, who is the drawer of the impugned cheque is a private limited company incorporated under the companies laws of Pakistan, having registered office at the address mentioned in the title of the present suit.

2. It is the case of Plaintiff that the Defendants could not maintain their work schedule and in order to avoid any adverse claim by third party, the Plaintiff, on the request of Defendants, advanced an amount of Rs.48,301,524/- (Rupees Four Crore Eighty Three Lacs One Thousand Five Hundred Twenty Four only) to the latter (Defendants), as they were facing financial constraints also.

3. Ms. Sahar Rana, learned counsel representing the Plaintiff has referred to Annexure 'E', which is an Undertaking dated 04.10.2007, submitted by Defendant No.1, for return of the above amount of Rs.48 Million (approximately) to Plaintiff. It has been further argued as also pleaded that in view of the above Undertaking, the afore-referred cheque was issued, which was / is for consideration. The Plaintiff's side twice presented the cheque in the bank but on both occasions it was dishonoured; firstly on 22.10.2007 and then on 31.10.2007. The subject cheque, bank advice / slips are appended as annexures 'F', 'G' and 'G-1' respectively, in which the reason for not paying the amount is mentioned as insufficient funds.

4. The Plaintiff served notice dated 12.05.2008 upon the Defendants (annexure 'I-1'). Consequently, a F.I.R. in respect of the dishonoured cheque was also lodged against the Defendants under Section 489-F of

Pakistan Penal Code, 1860 (“P.P.C.”), at Police Station Clifton, Karachi. The same is appended as annexure ‘K’.

5. Summons were issued in the prescribed form to Defendants and in order to give the Defendants a fair opportunity to defend their interest, publication was made in daily newspapers ‘DAWN’ and ‘JANG’ dated 11.05.2009 respectively. The service was held good by the concerned Registrar on 28.05.2009, as is apparent from A. R. diary. Despite this, the Defendants admittedly failed to file leave to defend application within the prescribed time of ten days as envisaged in sub-rule (2) of Rule 2 of Order XXXVII of CPC. The consequences of such a default on the part of Defendant is also mentioned in the sub-clauses (a), (b) and (c) of the afore-referred provision.

6. To a query, learned counsel for the Plaintiff submitted that since the original cheque was misplaced, therefore, Plaintiff reported the matter to the concerned Police Station and in this regard has filed a report under the Statement dated 14.03.2018. She has further relied upon the reported decision of Sardar Shafiq Hyder (*supra*). In this case, it has been held that if an original negotiable instrument is lost, then it does not deprive a party of a legal remedy and the suit under summary chapter would still be maintainable. Under the order dated 28.01.2010, the Plaintiff filed an affidavit in ex parte proof along with the documents, wherein it has been stated on oath that F.I.R. against the Defendants has been lodged under Section 489-F of P.P.C. as mentioned hereinabove in respect of the same subject cheque, as it is permissible under the law, that in such case, a party can pursue his remedy under both Civil and Criminal jurisdiction. The report for lost of cheque was lodged by the authorized representative of the Plaintiff Faheem Ahmed Khan, who is a signatory to the plaint of present proceeding, as he has been authorized

by the Board of Plaintiff. Certified copy of the Board Resolution of Plaintiff is produced and exhibited as P/2, with the above Affidavit in *Ex parte* proof. Copy of the F.I.R. has been exhibited as P/52. The afore-referred Contract, Undertaking, the impugned cheque and the bank advise / slips confirming that the same is dishonoured have been exhibited as P/3, P/41, P/42, P/43 and P/44, respectively.

7. The record shows that on 26.04.2011, the above named Officer of Plaintiff Company also appeared in Court along with his counsel and the matter was heard and reserved for Judgment. However, on 27.04.2011, the Plaintiff was called upon to file a copy of decision given in another Suit No.701 of 2008, which was filed by present Defendants. The Plaintiff's counsel under Statement dated 14.12.2016, filed the copy of the Order passed in afore-mentioned suit of Defendant No.1, perusal whereof shows that the injunction application preferred by the present Defendant No.1 against the Plaintiff and other two banks in respect of encashment of bank guarantee was dismissed. It further transpires that parties were at that time contesting their claim in an arbitration proceeding. This decision, in my considered view, does not have any bearing on the dispute involved in present *lis*, which can be decided on its own merits.

8. The above discussion leads to the conclusion that the Defendants despite being provided ample opportunity did not contest the present claim of Plaintiff and never even filed a leave to defend application. The version / claim of Plaintiff about the dishonouring of subject cheque has gone un-rebutted / undisputed.

9. In view of the above, Plaintiff is entitled for a judgment and a decree. In this regard, a well-known Judgment of *Haji Ali Khan & Co.*

*V/s. M/s. Allied Bank of Pakistan Limited* reported as *PLD 1995 Supreme Court Page-362*, is of relevance, wherein a complete procedure has been laid down by the Hon'ble Supreme Court; at Page-371, it has been mentioned that if the defendant within 10 days did not file/apply for leave to defend the case, then the allegations in the Plaintiff shall be deemed to have been admitted and the Plaintiff shall be entitled to a decree in terms of sub-clauses (a), (b) and (c) of sub-rule (2) of Rule 2 of Order 37 of CPC. It would be advantageous to reproduce here-in-below the Paragraph No.10 of the above judgment\_

*“The ratio decidendi of the above referred cases seems to be that if a defendant fails to appear or fails to obtain leave to defend in response to a summons served in Form No.4 provided in Appendix B to the CPC or fails to fulfill the condition on which leave was granted or where the Court refuses to grant leave, the Court is to pass a decree. It may further be observed that in sub-rule (2) of Rule 2 CPC, it has been provided that if a defendant fails to appear or defaults in obtaining leave, the allegations in the plaintiff shall be deemed to be admitted and the plaintiff shall be entitled to a decree, but no such consequences are provided for in Rule 3 of the above Oder in a case where the Court refuses to grant leave or the defendant fails to fulfill the condition on which leave was granted. In our view, notwithstanding the above omission in Rule 3, the effect of refusal of the Court to grant leave or failure on the part of the defendant to comply with the condition of the leave, will be the same i.e. the defendant shall not be entitled to defend the suit on any ground and the Court would pass a decree in favour of the plaintiff. However, this does not necessarily mean that the Court is not required to apply its mind to the facts and the documents before it. Every Court is required to apply its mind 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 oppose because he failed to fulfil the requirements of law.*

9. *The upshot of the above is that while passing the impugned decision the learned Trial Court has applied its judicial mind hence, no case of interference is made out in the impugned judgment and decree, which has rightly applied the law to the facts of the case and particularly considering the fact that the suit proceedings were of summary nature and the object of such type of proceedings cannot be allowed to be defeated on some fanciful grounds. Consequently, the present appeal is dismissed with costs.”*

10. Accordingly, I decree the suit in terms of clause (a) of Order XXXVII, Rule 2 of C.P.C., for an amount of Rs.48,301,524/- (Rupees Four Crore Eighty Three Lacs One Thousand Five Hundred Twenty Four only) against Defendant No.2, as it is the latter who is the drawer of the impugned cheque.

**Judge**

Karachi, Dated: 08.06.2018.

Riaz / P.S\*