

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar and Agha Faisal, JJ.**

First Appeal 09 of 2019 : Natiq Ali Lashari
vs. Rashid Khan

For the Appellant : Mr. Abdul Qayyum Abbasi
Advocate

For the Respondent : Mr. Nazir Ahmed Shar, Advocate

Date of Hearing : 23.04.2019

Date of Announcement : 23.04.2019

JUDGMENT

Agha Faisal, J: The present appeal has assailed the judgment dated 27.11.2018 (“**Impugned Judgment**”) delivered by the Court of the learned IInd Additional District Judge, Malir in Summary Suit 14 of 2017 (“**Suit**”), the operative content whereof is reproduced herein below:

“I have heard and perused contents of the plaint as well as application for grant of leave to defend and the documents relied upon by the parties. Learned counsel for the Plaintiff mainly contended that application under order XXXVII rule 1 & 2 CPC is hopelessly time barred. From perusal of record, it reflects that summons were served upon Defendant through Bailiff on 26-10-2017, and application for permission to leave is filed on 07-11-2017. Admittedly, the application for defend the suit is not filed within time i.e. ten days, neither any application for condonation of such delay under section 5 of Limitation Act 1908 is moved nor sufficient cause for such delay within the parameters of law is mentioned in the application, hence I feel no hesitation to hold that application for permission to appear and defend suit is time barred.

5. So far the merits of the case is concerned, it is mentioned in Para No.03 and Para No.04 of the plaint that the Defendant came into contract with the Plaintiff in the month of June 2016, he assured that he will arrange all formalities for

installation of water hydrants, the charges of water hydrants were fixed Rs.25,00,000 (Twenty Five lacs), which were paid by the plaintiff to the defendant in presence of two witnesses namely Ghulam Yasin and Muhammad Shabir. After receiving entire payment for installation of water hydrants, the defendant remained fail to arrange formalities of the water hydrant and also failed to install water hydrant, due to reasons the plaintiff approached to defendant and demanded his paid amount back from Defendant. Defendant for payment of liabilities issued a cheque bearing No.A-15217447 of J.S bank Abul Hassan Isphani Road Branch, dated 30-12-2018, amounting to Rs.25,00,000 (Rupees Twenty Five Lacs), but this cheque was dishonored when deposited for clearance at Meezan bank Limited, Bin Qasim Town, Malir, Karachi, with reason of "Insufficient Balance and alteration requires full signature of the drawer", whereas Defendant in application for grant to leave to defend does not deny in respect of installation of a water Hydrant, but in Para No.03 of application to defend the suit, it is mentioned that there had been a deal between the Plaintiff and one Abdul Qadeer Khan with the effort of the Defendant, for installation of a water hydrant. Said Abdul Qadeer Khan had introduced himself to be a Assistant Director in the Water Board. The Plaintiff had paid Rs.20,00,000/-, on 03-11-2016 to Abdul Qadeer Khan for paper work and obtaining NOC from the concerned authorities. He later neither delivered papers to the Plaintiff nor refunded the amount. Since the agreement was made at the house of Defendant the Plaintiff used to force him for return of the amount. Plaintiff had stolen the cheque from the office of the Defendant and made entries therein in his own name showing an amount of Rs.25,00,000/- and then submitted the same before the concerned bank. Since due to some alterations and over writings were made in the cheque, it was dishonored Defendant, in support of his contention has not produced any document, neither he had moved any application to concerned Police Station against Plaintiff in respect of stealing of cheque.

6. It is further argued by the learned counsel for the Defendant that the plaintiff had also lodged FIR No.247/2017 under section 489-F PPC against Defendant at PS Shah Latif Town and criminal case has been disposed off under C Class. The standard of proof in civil and criminal cases is quite different. In civil suit the court has to see only probability of truth whereas in criminal proceedings, the prosecution has to prove the alleged offence "beyond reasonable doubt" and if there is any doubt, the accused is entitled to its benefit not as the matter of grace or concession but as of right. Reference may also be made to the case of Tariq Pervaiz VS. the State (1995 SCMR 1345). The agitated point raised by the learned counsel for the applicant is, therefore, having no sanctity in the eyes of law.

7. The submissions made by the parties and on the basis of available material I am of the view that the Defendant is not

entitled for relief to grant him to leave to defend. Under the circumstances, leave to defend is declined. According to Order XXXVII, Rule 2 (2), CPC, if Defendant is failed to obtain leave to appear and defend the suit, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree (Messrs Ahmed Autos and another Vs. Allied Bank of Pakistan Limited PLD 1990 SC 497), therefore, the suit of the plaintiff is decreed as prayed. Let decree be prepared.”

2. Mr. Abdul Qayyum Abbasi, Advocate appeared on behalf of the appellant and submitted that the leave to defend application was not considered by the learned trial Court on the premise that the same was not filed within the stipulated time, therefore, the Impugned Judgment was rendered there against without consideration of the merits of the case. Learned counsel submitted that notice of the Suit was received by the brother of the appellant on 26.10.2017, conveyed to the appellant later that evening and thereafter the appellant filed the leave to defend application on 07.11.2017, which was to be treated as within time. It was argued that dismissal of the leave to defend application was unwarranted and the same lead to the Impugned Judgment being delivered without proper appreciation of the facts. Learned counsel also sought to argue that while a cheque, subject matter of the present case, was dishonored, however, the memorandum issued by the bank in such regard also eludes to the discrepant signature of the drawer. It was contended that notwithstanding the fact that the said memo stated insufficient balance but that the absence of the signature would in any event place the veracity of the instrument into doubt. It was further stated that the memorandum was dated 30.12.2016, whereas the clearing stamp appearing at the back of the cheque contained the date of 15.02.2017. Per learned counsel, this demonstrated foul play on the part of the respondent and the issue ought to have been addressed by the learned trial Court. Learned counsel also submitted that the same cheque came under consideration in criminal proceedings, which concluded in favour of the present appellant. It was thus prayed that the present appeal may be allowed and the Impugned Judgment may be set aside.

3. Mr. Nazeer Ahmed Shar, Advocate appeared on behalf of the respondent and supported the Impugned Judgment in its entirety. Learned counsel submitted that notice of the Suit was duly issued to the appellant and he had admittedly failed to file a leave to defend application within the stipulated timeframe. Learned counsel submitted that the contentions of the appellant regarding the cheque in question, argued to have been discrepant, is demonstrably negated by the record. Learned counsel also adverted to the pleadings filed herein and submitted that the same were at variance to the arguments advanced by the learned counsel for the appellant in Court. Learned counsel also pointed to a letter issued by the appellant to his bank wherein it was clearly admitted that the cheque in question was presented on 15.02.2017 and not earlier as being fallaciously represented by the learned counsel for the appellant. In conclusion, it was argued that the present appeal was prima facie misconceived, hence, ought to be dismissed forthwith.

4. We have considered the arguments of the respective learned counsel and have also appreciated the record arrayed before us. In compliance with the provisions of Order XLI rule 31 CPC, we do hereby frame the following points for determination:

i) *Whether the question of limitation was addressed by the learned trial Court in its proper perspective?*

ii) *Whether the facts and circumstances of the case were adequately appreciated by the learned trial Court in arriving at the conclusion contained in the Impugned Judgment.*

5. Learned counsel for the appellant had admitted that notice of the Suit was received by brother of the appellant on 26.10.2017. Learned counsel had stated that the said notice was delivered to the appellant by his brother later that evening and that the appellant went to the learned trial Court to ascertain the status on the very next date. It was rightly pointed out by the learned counsel for the respondent that this argument was at variance to the pleadings of the appellant, wherein in paragraph 11 of the memorandum of

appeal it is stated that the appellant was out of city on 26.10.2017 when the brother of the appellant received the notice, and arrived back in Karachi on 29.10.2017 at which point the said notice was delivered to him. We have also perused the leave to defend application filed by the appellant before the learned trial Court and observed that there is no mention of the appellant having been out of city on the date that notice was admittedly served. The learned counsel for the appellant, in rebuttal, made no efforts to reconcile the two divergent stances taken by the appellant in this regard.

Article 159 of the 1st Schedule to the Limitation Act, 1908 prescribes a period of ten days for filing of leave to appeal and defend a suit in summary proceedings and the said time is to run from when the summons are served. Learned counsel for the appellant admitted that the appellant received the summons on the evening of 26.10.2017, however, filed the leave to defend application on 07.11.2017, post expiration of the period of limitation prescribed in such regard. It is observed that no application for condoning the delay was ever filed before the learned trial Court. Surprisingly, the appellant has preferred CMA 621 of 2019 along with the present appeal wherein this Court has been called upon to condone the delay in filing of the leave to defend application belatedly preferred in the Suit. While such an application is not maintainable in the present appeal, it is observed that the affidavit in support thereof raises no grounds while the memorandum of the application itself seeks to rely upon the assertion of the appellant being out of city till 29.01.2017, which assertion finds no mention in the record of the Suit and is also controverted by the submissions by the learned counsel for the appellant made before us. It is thus our considered view that the learned trial Court has properly considered the issue of limitation and correctly applied the law in such regard deeming the leave to defend application to have been barred by limitation.

6. A bare perusal of the Impugned Judgment demonstrates that the learned trial Court has delved extensively into the merits of the case and has arrived at the determination after giving due

consideration to the facts and circumstances. It may be pertinent to record at this juncture that the contention of the learned counsel for the appellant, regarding the merits of the case not being considered in the Impugned Judgment at all, is negated from the text of the Impugned Judgment itself.

7. The cheque in question was stated to have been dated 30.12.2016. The said cheque was dishonored by the bank and the memorandum issued in such regard adverted to two reasons for the dishonor; insufficient balance and alteration requiring the full signature of the drawer. This prima facie established the insufficiency of balance in the account of the appellant conclusively. The second notation regarding the alteration requiring the full signature of the drawer does in no way signify that the cheque did not carry the correct signature of the account holder but that an alteration thereupon did not contain the full signature. It is also observed that the cheque contained a stamp of the appellant and also his signature, which has not been denied by the learned counsel for the appellant. In such regard it is observed that whether or not an alteration was correctly signed or not is not material to the established fact that the cheque appeared to have been issued by the appellant and was dishonored by the bank, inter alia, on the premises of there having been insufficient balance in the appellant's concerned account.

Learned counsel for the appellant attempted to cloud this fact by arguing that the clearance stamp at the back of the cheque was dated 15.02.2017 whereas the memo of the bank was dated 30.12.2016. This assertion is unfounded as the memo merely records the particulars of the cheque, including the date thereof, and the said date does not signify the date upon which the cheque was presented and dishonored. This fact is cemented by a letter issued by the appellant to his bank on 31.05.2017 wherein it has been admitted that the aforementioned cheque was presented for onward clearing on 15.02.2017. The aforesaid letter to the bank claims that the said cheque was stolen, however, no FIR has ever been registered in such regard and the learned counsel for the appellant

was unable to justify this apparent afterthought as the said letter is dated 31.05.2017, whereas, the dishonor of the cheque took place on 15.02.2017.

8. Arguments of the learned counsel for the appellant regarding criminal proceedings having been adjudicated in favour of the appellant have no merit in the present appeal. The issue was considered by the learned trial Court and it was rightly maintained that the proof of the case in civil and criminal cases is different and it is lawful not only for the two proceedings to continue simultaneously but also for divergent views to be concluded in such regard. Notwithstanding the legal position, it is clear that no criminal trial ever took place adjudicating the issue and on the contrary the proceedings were cancelled in "C" class by a learned Judicial Magistrate.

9. It is thus maintained that the learned trial Court has duly appreciated the facts and circumstances of the case in arriving at the conclusion contained in the Impugned Judgment. In view of the reasoning and rational herein contained we are of the considered view that the appellant has failed to make out a case, hence, the present appeal along with listed applications was dismissed vide our order dated 23.04.2019. These are the reasons for our aforecited short order.

J U D G E

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Dated 10th May, 2019.

Farooq PS/*