IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1954 of 2010
[Razak Latif and another vs. ACE Securities Pvt Limited)

Dates of hearing	:	03.09.2019 and 16.09.2019
Plaintiffs *[Razak Latif and Raheel Latif]*	:	Through Mr. Manzoor Hameed Arain, Advocate.
Defendant *[ACE Securities Pvt. Limited)*	:	Nemo

Case law cited by learned counsel for Plaintiffs

Case law relied upon by learned counsel for Defendant

Other Precedent:

1. *Abbas Ali v. Liaquat Ali and another* [**2013 S C M R page-1600**].

2. *Abdul Majeed Khan v. Tawseen Abdul Haleem* [**2012 CLD page 6] {**Supreme Court of Pakistan**}-***Abdul Majeed case.*

3. *Sufi Muhammad Ishaque versus The Metropolitan Corporation, Lahore* **[PLD 1996 Supreme Court 737]**- *Sufi case.*

Law under discussion: (1). The Central Depositories Act, 1997

(2). Brokerage and Agents Registration Rules, 2001.

(3). Code of Civil Procedure, 1908 ***(CPC).***

(4). Qanoon-e-Shahadat Order, 1984. ***[Evidence Law).***

JUDGMENT

***Muhammad Faisal Kamal Alam, J*:** The present action at law has been filed by Plaintiffs for recovery of different amounts as mentioned in the Prayer Clause, which is reproduced herein below_

> ***"In the light of the facts and circumstances stated hereinabove it is respectfully prayed that this Hon'ble Court, in the interest of justice and equity be pleased to pass Judgment and money decree in favour of Plaintiffs.***
>
> ***i) For the sum of Rs.47,168,594.50 being the then market value of the subject shares and securities misused / misutilized / pilfered by the Defendant Company with profit / mark-up @ 18% per annum from 31st October 2008 till the filing of the suit which comes to Rs.17,957,665.45 and further mark up from the date of filing of the suit till realization.***
>
> ***ii) For the sum of Rs.375,000.00 in respect of credit balance in Account No.054-034 along with Mark-up @ 18% Per Annum from 1st October 2008 till filing of this suit which comes to Rs.150,349.00 and further mark up from the date of filing of the suit till realization.***
>
> ***iii) For the sum of Rs.1,014,016.00 being mark-up @ 18% Per Annum on Rs.6,900,000/- which was retained by the Defendant Company unnecessarily from 25th November 2008 to 19th September, 2009 and further mark up from the date of filing of the suit till realization.***
>
> ***iv) For the sum of Rs.2,500,000.00 Loan advance by the Plaintiff No.1 to the Defendant Company along with Mark-up @ 18% per Annum from 6th February, 2007 the date of resignation of Plaintiff No.1 as Sponsor Director till filing of suit which comes to Rs.1,743,287.67.***
>
> ***v) For the sum of Rs.50 Million being pecuniary losses sustained by the Plaintiffs as well as for mental torture and***

agony and damaging the high business reputation / good will of the Plaintiff No.1 amongst the business community.

vi) To grant permanent injunction to restrain the Defendant Company from selling / transferring / alienating or create any third party interest in the Karachi Stock Exchange (Guarantee) Certificate No.040 dated 29th May 2000.

vii) Any other further better relief/s that may be deemed fit and necessary by this Hon'ble Court in the circumstances of the case.

viii) Costs of the proceedings."

2. The claim of Plaintiffs as mentioned in their plaint is that in view of long standing relationship with the Chief Executive Officer of Defendant Company, namely, Haroon Iqbal, Plaintiffs opened two different accounts, viz. 012-036 and 054-034, for trading in shares / securities but in due course Plaintiffs found out that Defendant unauthoziedly and illegally pledged the shares belonging to Plaintiffs and reflecting in their accounts as of 31.10.2008, to settle outstanding liabilities of Defendant. The second segment of claim is that on the request of Defendant, Plaintiffs advanced a loan of Rupees Twenty Five Hundred Thousand to Defendant Company, which is also reflected in their Yearly Financial Statement of June 30, 2008, but was never paid back by Defendant. It is averred with the aid of supporting documents that upon complaint of Plaintiffs, the then Karachi Stock Exchange (KSE), Securities and Exchange Commission of Pakistan (**SECP**) and Federal Investigation Agency (**FIA**) conducted separate inquiries.

3. Upon issuance of summons and notices, the Defendant contested the claim by filing a detailed Written Statement. Stance of Defendant as mentioned in the Written Statement is that the Plaintiffs took undue

advantage of trust reposed in them and exposed the Defendant Company to financial liabilities and during course of the business it transpired that other accounts of different persons were all *benami* and in fact Plaintiffs were the main beneficiaries of these other accounts, some of which belonging to their near family members. It is further averred that present Defendant instituted a suit prior to the present ***lis***, being Suit No.1001 of 2009 against present Plaintiffs, besides other persons, who were purportedly had independent accounts with Defendant Company as its clients. With regard to the averments about inquiry done by Securities and Exchange Commission of Pakistan (SECP) and its Report dated 07.10.2020, it is mentioned in the Written Statement that against the same, another Suit No.246 of 2011 was filed in this Court in which (at the relevant time) restraining order dated 21.02.2011 was operating. Copy of this order and plaint of Suit No.1001 of 2009 are appended with the Written Statement as Annexures "C" and "E", respectively.

4. From the pleadings of the parties, following Issues were framed by the Court vide order dated 17.04.2015_

> ***"1. Whether the Plaintiff is entitled for the recovery of amount as claimed?***
>
> ***2. What should the decree be?"***

5. Record shows that vide order dated 17.01.2017, a Commissioner was appointed for recording the evidence and on that day both learned counsel for Plaintiffs and Defendant were present. Subsequently, the then Advocates for Defendant withdrew their Vakalatnama as mentioned in the order of 18.05.2017. Again the process for effecting service on Defendant

was done, including by way of publication in Daily 'Jang' and vide order dated 06.12.2017 it was observed that since publication is made as required, therefore, the Commissioner who was appointed to record the evidence may complete the task. Vide order dated 18.12.2018, the evidence of only Plaintiffs was concluded by the learned Commissioner. Office was directed to fix this matter for final arguments.

6. From the above it is clear that despite providing opportunities, Defendant did not participate in the evidence; whereas, both Plaintiffs examined themselves as PW-1 and 2, along with one other witness, namely, Safdar Mummanka (PW-3) and produced relevant record.

7. Findings on the above Issues are as under:-

ISSUE NO.1 In Affirmative.

ISSUE NO.2 The present suit is decreed.

REASONS

ISSUE NO.1.

8. Since Defendant has not led the evidence despite providing ample opportunities, therefore, it is a settled rule that pleadings of parties, viz. plaint and Written Statement itself cannot be treated as evidence **{**subject to certain exception(s), including admission**}**, unless a party enters a witness box and lead evidence in support of his claim or defence, as the case may be. But at the same time, when Defendant has not led the evidence, even then the Court has to evaluate the claim of Plaintiff on its own merits and in accordance with law.

9. Primarily, the claim of Plaintiffs in the present ***lis*** is of two categories; ***firstly***, the financial assistance / loan advanced to Defendant Company and ***secondly,*** losses incurred (purportedly) by Plaintiffs as a result of pledging of shares / securities of different Companies, which were owned by Plaintiffs, which is specifically mentioned in plaint and Affidavit-in-Evidence (paragraph-15) and reiterated in examination-in-chief.

10. Mr. Abdul Razzaq Latif (Plaintiff No.1) examined himself as P.W.-1 and produced number of documents relating to the controversy, including the relevant record of other proceedings. It was deemed appropriate during course of hearing, to call the suit files of the above referred cases. Summary of Enquiry Report and finding of SECP on the complaint lodged by Plaintiffs is produced as Exhibit-**P/16**, which Report was challenged subsequently by Defendant in Suit No.246 of 2011 and although, initially restraining order dated 21.02.2011 was passed in favour of present Defendant (as the record of the proceeding confirms) but subsequently on account of continuous absence of present Defendant and his counsel, **ultimately Suit was dismissed on 14.12.2018.**

Similarly, it is argued by learned counsel for Plaintiffs that proceeding initiated by Defendant against Plaintiffs and other persons in the shape of Suit No.1001 of 2009 practically met the same fate. He has referred to Exhibit-**P/17** of the evidence file, which is an order dated 13.04.2010 of concerned Registrar, for striking off plaint (of Suit No.1001 of 2009) under Rule 128 of the Sindh Chief Court Rules (Original Side). Record of Suit No.1001 of 2009 is examined. Contention is not completely correct, because record shows that Application under Rule 128 of the above

SCCR was allowed and summons were issued and in due course of time Written Statement on behalf of the Defendants No.1 and 2 (of Suit No.1001 of 2009) who in fact are present Plaintiffs, was filed. However, diaries of 11.09.2014 and 28.11.2014 reveal that upto that time summons could not be issued to Defendants No.4 to 8 as cost was not paid by present Defendant since 15.03.2013 and eventually plaint was struck off against above Defendants.

11. Adverting to the first claim of Plaintiffs, the above witness produced Audit Financial Statement of Defendant for the year ending June 30, 2008 as Exhibit-**P/2**. Serial No.3 of this Financial Statement mentions Directors' unsecured loan. Name of Plaintiff No.1-Razzak Latif is mentioned along with above named Chief Executive Officer (CEO) of Defendant Company as those persons who gave long term and interest free loan to Defendant, as its sponsoring Directors. Figure of Rs.2.5 Million as loan advanced by Plaintiff No.1 is confirmed from this Report, even though in paragraph-6 of its Written Statement, it is averred that amount shown in the balance sheet was repaid by Defendant, but no contrary evidence is led by Defendant in this regard. Authenticity of the above Financial Statement is not under question nor the amount of Rs.2.5 Million as loan advanced by Plaintiffs has been disproved by Defendant, thus, this category of claim of Plaintiffs about providing financial assistance of Rs.2.5 Million stands proved and the Defendant is liable to pay the same to Plaintiffs, but without any markup, as above Financial Statement itself has stated that the loan does not had / have interest component.

12. Adverting to the main claim of Plaintiffs, about pledging of shares / securities. Plaintiff No.1 (P.W.-1) has produced a letter dated 17.11.2008 as **Exhibit P/6**, addressed by Defendant to Plaintiffs together with a Statement bearing heading 'CLIENTS SECURITIES BALANCE AS ON 31.10.2008'. As per this Statement shares / securities of different companies having value of Rs.4,71,68,594.50 (Four Crore Seventy One Lacs Sixty Eight Thousand Five Hundred Ninety Four and Fifty paisas) have been shown to exist in the names of Plaintiffs, which means, Plaintiffs had purchased shareholding in different entities / companies as mentioned in this Statement. The other document is crucial, which is **Exhibit P/7**, an Account Balance Report dated 31.10.2008 by Central Depository Company of Pakistan Limited ("**CDC**"). In this Report name of Plaintiff No.2 and Account number is mentioned. Participant I.D. of Defendant is mentioned as 03863. In this Report shares / securities of different entities, which were / are owned by Plaintiffs, as reflected in the earlier document – Exhibit P/6 (above), **are shown to have been pledged**.

13. Mr. Manzoor Arain, Advocate for the Plaintiffs, has referred to Exhibit P/15 (at page-54 of the evidence file), which is a correspondence of May 04, 2010, addressed to Plaintiff No.1 (by SECP) in which it is stated that the SECP, and the then Karachi Stock Exchange also advised Defendant to maintain *status quo* in respect of securities belonging to Plaintiffs till the decision of this Court in Suit No. 1001 of 2009. It is argued that despite this the Defendant illegally and with *mala fide* and dishonest intentions pledged the securities belonging to Plaintiffs, as also reflected in the above Account Balance Report of CDC (Exhibit P/7).

14. The Enquiry Report prepared by Securities Market Division of SECP, produced in the evidence, as Exhibit P/16 also mentions this fact (in paragraph-4) that Defendant was called upon to maintain the *status quo*. This Report has also made certain adverse observations against Defendant, including that *prima facie* the latter (Defendant) violated Rule 12 of Brokerage and Agents Registration Rules, 2001, terms and conditions of the Account Opening Form contained in KSE General Regulations and hence is responsible of all acts of his registered agents as per above Rule 17. For a ready reference Rules 12 and 17 are reproduced herein under_

> **"***12.* ***Brokers to abide by code of conduct.*** **–** *A broker holding a certificate of registration under these rules shall abide by the code of conduct specified in the Third Schedule.***"**

> **"***17.* ***Agent not to deal with clients in his name.*** **–** *(1) No agent shall deal with his clients in his own name. All the transactions shall be in the name of his member or broker and shall be settled with broker or member only.*

15. Even though, it is mentioned in paragraph-b of conclusion of above Report that Plaintiffs and Defendant relationship *inter se* was not merely an investor client relationship, but it is further stated (in paragraph-c), *inter alia*, that Defendant cannot hold securities of Plaintiffs for debit of other clients.

16. It has also come on record as an undisputed fact that Plaintiff No.1 although was Director in Defendant's Company but that relationship ended on 06.02.2007 when the former (Plaintiff No. 1) resigned. Correspondence dated 30.10.2009 of KSE produced in the evidence as Exhibit P/3, confirms this fact.

17. Even though, as already discussed in the preceding paragraphs, that pleadings themselves cannot be taken as an evidence, but there is an exception to this rule, that when the pleading, more particularly, a Written Statement, either wholly or in part, admits a claim of Plaintiff or any other adversary, then it falls within the ambit of 'admission' as envisaged in Article 30 of the Evidence Law.

18. The above concept is discussed in various precedents, including, by the Honourable Supreme Court in a reported case of ***Abbas Ali v. Liaquat Ali and another*** [**2013 S C M R page-1600**]. The afore- mentioned Article of Evidence Law is reproduced herein under for a ready reference_

> **"*30. Admission defined**: An admission is a statement, oral or documentary, which suggests any inference as to any fact-in-issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.*
>
> **[***Explanation: Statements generated by automated information systems may be attributed to the person exercising power or control over the said information system.***]".**

More so, Order XII, Rule 6 of CPC specifically deals with the above situation, where a Court can pronounce a judgment or order upon an application of a party, in view of admission made in the pleadings (including written statement) or by any other permissible manner, as contained in the above provision.

Consequently, in view of the above discussion the Written Statements filed by SECP and Defendant to the extent of undisputed facts can be considered in the present case.

19. It is also noteworthy to mention that Written Statement filed on behalf of SECP is available in the main Court file, in which main stance of the Plaintiffs with regard to illegally pledging of shares by Defendant, has not been disputed. Not only this, the Defendant even though has not led the evidence, but has made an admission in paragraphs-18 and 21 of its Written Statement with regard to pledging of respective shares of Plaintiffs, although with an averment that fraud was perpetuated by Plaintiffs. However, no evidence has been led by Defendant in support of its assertion about fraud or other contrary claim.

20. The other two witnesses, that is, Plaintiff No.2 (P.W.-2) and above named P.W.-3 have corroborated the testimony of Plaintiff No.1.

21. The conclusion of the above discussion is that Plaintiffs have successfully proved their two categories of claims, that is, advancing loan to Defendant Company, which is also reflected in its yearly Report and secondly, pledging of shares owned by Plaintiffs, in an illegal and deceptive manner. The above Clients Security Balance Statement of Defendant itself (Exhibit P/6) confirms that total value/worth of the subject shares / securities at the relevant time was Rs. 47,168,594.50. This act of Defendant is also in violation of Section 12 of the Central Depositories Act, 1997, wherein a procedure is prescribed for pledging shares / securities, which was never followed in the present case. Accordingly, **Issue No.1 is answered in Affirmative in the above terms.**

22. The other monetary claims of Plaintiffs (as set forth in paragraph 49 of the Affidavit in Evidence/examination-in-chief) towards markup at the rate of 18%, credit balance and plea to award damages of Rupees Fifty

Million are not sustainable, because rate of markup varies periodically; ***secondly***, no convincing and independent evidence is led with regard to the credit balance in account No.054034; and ***thirdly***, damages to the tune of Rupees Fifty Million fall within the category of special damages, for which it is a settled rule, that special damages can only be awarded when Plaintiffs prove the same by leading positive evidence, which has not been done in the present case. But at the same time, since it is now proved that Defendant had illegally pledged various shares / securities of Plaintiffs having the worth above mentioned, therefore, the Plaintiffs are entitled for a reasonable markup thereon, besides, also entitled for claim of general damages, because it is just logical to say that in all these years (approximately more than one decade) Plaintiffs could have easily earned a reasonable amount of accruals/profits while trading in the subject shares / securities. It is a settled principle that the quantum of general damages can be determined by the Court by looking at the facts of a case. In my considered view, looking at the conduct of Defendant and the illegality committed by it, the effect of which is lasting and is felt till date, a sum of Rupees Two Million would be a reasonable amount, which should be awarded to Plaintiffs as general damages. Reported decisions handed down in **Abdul Majeed [2012 CLD page 6] and Sufi cases** *(supra)* **[PLD 1996 SC 737]** are relevant here relating to the award of damages.

ISSUE NO.2:

23. The present suit is decreed in the following terms_

i. Defendant is liable to pay back a sum of Rs. 2.5 Million towards loan earlier advanced to it by Plaintiffs;

ii. Defendant is liable to pay an amount of Rs.47,168,594.50/- (rupees four crores, seventy one lacs, sixty eight thousand, five hundred and ninety four and fifty paisas) along with 10% {ten percent} markup from the date of institution of the suit till the realization of the amount, to Plaintiffs; and

iii. General damages of Rupees Two Million are awarded to Plaintiffs, which is payable by Defendant.

24. Parties to bear their respective costs.

JUDGE

Karachi.
Dated :_____