

**IN THE HIGH COURT OF SINDH, AT
KARACHI**

Present:

Irfan Saadat Khan and
Yousuf Ali Sayeed, JJ

1st Appeal No. 22 of 2018

Appellant : Mashooq Ali Rajpar, through
Syed Amir Ali Shah Jeelani,
Advocate.

Respondents : (1) Raja Abdul Hameed, and
(2) Sirajuddin, through, M. Peer
Rahman Advocate.

Date of hearing : 14.10.2020

JUDGEMENT

YOUSUF ALI SAYEED, J - Vide this Appeal under Section 96 CPC, the Appellant has impugned the Judgment of the learned Vith Additional Sessions Judge Karachi dated 29.01.2018 in Summary Suit No.66 of 2016 (the "**Suit**"), which was thereby decreed against the Appellant, with the Respondents being declared entitled to recover a sum of Rs.50,00,000/- along with 5 % markup per annum.

2. The Suit had apparently been filed under Order 37 CPC on the basis of a cheque bearing No. E-7339778 dated 11.06.2014 drawn for the aforesaid sum on an account maintained by the Appellant with MCB Bank Limited, at its Zamzama Branch, Karachi, in favour of the Respondent No.1, for onward payment to Respondent No. 2, but was dishonored on presentment.
3. The case setup by the Respondents/Plaintiffs was that the Respondent No.2 had advanced a sum of Rs.1,50,00,000/- to the Appellant for business purposes, and upon a dispute having subsequently arisen, the same had been resolved under the aegis of the

Respondent No.1, with a sum of Rs.1,00,00,000/- (Rupees Ten Million) being adjusted by the Appellant and time being sought by him for repayment of the balance amount of Rs.50,00,000/- (Rupees Five Million), and to have issued the aforementioned cheque in favour of the Respondent No.1 to secure such obligation. However, as it transpired, the cheque was dishonored, following which the Respondent No.1 tried to approach the Appellant, but to no avail, hence recourse to the Suit.

4. Following admission of the Suit, notices were issued, with the Appellant/Defendant being served on 18.02.2017 through the Court of the 5th Additional District Judge Karachi (South), where Criminal case No. 250 of 2015 ensuing from FIR No. 460 of 2014 registered under Section 489-F PPC on account of the dishonor of the cheque was pending. Thereafter, the Appellant entered appearance through counsel on 22.02.2017 but did not file his Application for Leave to Defend until 14.03.2017, which then came to be dismissed vide Order dated 20.10.2017 on the grounds that issuance of the cheque had not been denied and the Application had also been filed with delay and was barred by limitation. The Respondent No.1 then filed his Affidavit-in-Evidence and produced the original documents for substantiating the claim, with the Suit being decreed on that basis as aforementioned.
5. In this backdrop, learned counsel for the Appellant contended that the Appellant had been condemned unheard as his Application for Leave to Defend had been wrongly dismissed on what was termed by him to be a technicality and the substantial defense that was said to have otherwise been raised was not considered as the Appellant was precluded from advancing his case in that regard. In furtherance of that submission, it was argued that prior to the date of filing, when the matter had been fixed for filing of such Application on 08.03.2017, the

Appellant had applied for an adjournment, which was allowed with the matter being adjourned to 14.03.2017, and the Application for Leave to Defend had been filed on that date. It was contended that as the Court had granted the adjournment, the Appellant ought not to have been penalized so as to be knocked-out on the point of limitation. Furthermore, learned counsel argued that had the Appellant been afforded the opportunity, he would have properly mounted his defense in response to the claim and been able to disprove the same.

6. Conversely, learned counsel for the Respondents submitted that the Appellant's Application for Leave to Defend had been filed with considerable delay, well beyond the prescribed period of ten days and without any supporting Application under Section 5 of the Limitation Act, hence had been rightly found by the trial Court to be barred by limitation. He invited attention to the fact that counsel had entered appearance on behalf of the Appellant in the Suit and filed his vakalatnama on 22.02.2017, and for purpose of limitation, the learned trial Court had reckoned the period from that date. As to the merits, it was submitted that the Appellant had failed to raise any substantial defense and had taken contradictory pleas before various forums.
7. Turning firstly to the plea raised as to time for filing of the Application for Leave to Defend having been extended by the learned trial Court, the same appears to be misconceived, as on 08.03.2017 the matter was simply put off to 14.03.2017 without any extension specifically being granted. Moreover, the 10-day period of limitation prescribed in terms of Article 159 of the Limitation Act had already lapsed by that date, even if the period of time is reckoned to have commenced from 22.02.2017, when the Appellant entered appearance in the Suit through counsel.

8. Even otherwise, looking to the merits of the defense sought to be raised in terms of the Application for Leave to Defend, the same appear to be vague and bereft of substance. Paragraphs 3 and 4 thereof are illustrative in that regard, reading as follows:

“3. That in fact it was the plaintiff who had entered into transaction with the defendant for purchase of vehicle from him against sale consideration of Rs.50,00,000/- in June 2014 and for that purpose the defendant had issued cheque in question to plaintiff as security deposit. However, the plaintiff failed to stick to the commitment and did not deliver the vehicle to the defendant in time. Hence the defendant stopped encashment of cheque through the concerned Bank.

4. That the plaintiff knowing that he himself breached the verbal contract by not supplying the vehicle, was not entitled to the amount of cheque, yet he submitted the cheque before the bank, which speaks of malafide on his part. Apparently, he attempted to usurp the amount of cheque without supplying the vehicle. Such intention is also evident from the fact that after alleged bouncing of cheque, he did not lodge FIR, but after a week when he failed to achieve his evil object of grabbing the amount.”

9. As such, the Appellant’s defense turns on the assertion that he had entered into a contract with the Respondent No.1 for purpose of vehicle for sum of Rs.50,00,000/- (Rupees Five Million) and acknowledges that the cheque had been issued by him, albeit as a security deposit in that regard, but the Respondent No.1 had failed to abide by his obligation due to non-delivery of the vehicle, despite which he had presented the cheque which was dishonored. While examining this defense, what is immediately conspicuous is the absence of any of the relevant details of the so-called transaction for sale/purchase of a vehicle said to underpin issuance of the cheque, as no date of the alleged transaction or document in that regard have been referred to and even the particulars of the vehicle said to have been transacted for have not been mentioned. Suffice it say that such a bald plea as that taken by the Appellant in his Application for Leave to Depend has little credence and can scarcely be accorded any weight.

10. Moreover, as was pointed out by learned counsel for the Respondents, the Appellant had himself filed Suit No.41 of 2015 in the Court of IInd Senior Civil Judge Karachi, South (the “**Prior Suit**”), seeking a declaration that the Respondent No.1 was a defaulter for not handing over custody of the vehicle for which the plaintiff had issued the cheque, hence was not entitled to encashment and payment thereof had been rightly stopped and that the instrument was therefore liable to be cancelled. Damages had also been sought by way of compensation for the loss said to have been sustained by the Appellant. Whilst a case similar to that set up in the Application for Leave to Defend had been pleaded by the Appellant in plaint submitted in the Prior Suit, no material particulars of the alleged transaction or vehicle were disclosed. For purpose of reference, it may be observed that in his Affidavit-in-Evidence, the Appellant had merely stated as follows:-

“1. That the deponent had entered into transaction with the defendant for purchase of a vehicle from him against consideration amounting to Rs.50,00,000/- in June 2014 for which the deponent had issued cheque No. E-5339778 dated June 2014, as security deposit but the defendant failed to fulfill his commitment to the contract and did not deliver the vehicle in time. Hence the deponent stopped encashment of cheque through the concerned Bank. I produce the copy of cheque as Ex.P-1 and stop payment application as Ex.P-2”.

2. That inspite of knowledge to the defendant that the said cheque was issued by the deponent to him as security, the payment was subject to delivery of vehicle, he failed to deliver custody of said vehicle to the deponent in time in breach of contract. Still with malafide object to usurp the cheque amount, tendered the cheque before the concerned bank before due date, therefore the same was dishonored.”

11. The Prior Suit accordingly culminating in dismissal vide Judgment dated 27.03.2018, with the learned IInd Senior Civil Judge finding against the Appellant on the specific issue framed in respect of the plea taken that the cheque had been issued as security for a transaction entailing the sale/purchase of a vehicle, and also finding that the

cheque had been received from the Appellant by the Respondent No.1 in his capacity as an arbitrator, for onward payment to the Respondent No.2. Such findings appear to have remained unchallenged, as learned counsel for the Appellant was unable to state whether the aforementioned Judgment of 27.03.2018 had been assailed vide an appeal.

12. Furthermore, the Appellant has apparently taken contradictory pleas before various fora at different points in time, as in his Bail Application presented before the District and Sessions Judge Karachi (South) he had contrarily denied any dealings with the Respondent No.1, while stating:

“3. That as per contents of FIR, the present applicant issued the said cheque only for security / guarantee for the purpose of purchasing the vehicle, but the complainant deposited the said cheque before its date with malafide intention and ulterior motives, as the complainant is only the Arbitrator and is not entitle to lodge the FIR and the complainant failed to give the vehicle to the applicant and lodged the instant FIR with malafide intention and ulterior motives only to blackmail and harass the present applicant, as the complainant have a Showroom of Vehicles.

4. That the present applicant did not enter into any deal in any manner with the complainant, the complainant with malafide and intention involved the present applicant in this case”

[emphasis supplied]

13. It also transpires that after dismissal of his bail application, the Plaintiff had approached this Court and taken yet a different plea in his grounds that the Respondent No.1 had not delivered the complete file of the vehicle, and for that reason the vehicle was returned by the Appellant the next day. The fact that this even more disparate ground was raised stands confirmed through the cross-examination of the Appellant conducted in the Prior Suit.

14. Under the circumstances, it is apparent from the record that, as noted by the learned judicial officers seized of the civil and criminal proceedings predating the present appeal, the Appellant has taken vague and unsubstantiated pleas as well as shifted his stance and raised contradictory defenses from time to time. Suffice it to say that the pleas raised in such superficial and variable manner offend the principle *allegans contraria non est audiendus* and cannot serve to unsettle the presumptions to be made in terms of Section 118 of the Negotiable Instruments Act, 1881. As such, we are of the view that no substantial defense had been raised in the Suit.

15. There being no apparent error or infirmity in the impugned Judgment, no interference is warranted, hence this Appeal fails and is dismissed accordingly, along with the pending miscellaneous Application.

JUDGE

JUDGE

TariqAli/PA