

## IN THE HIGH COURT OF SINDH, KARACHI

SUIT No.1187 / 2018

**BEFORE****MR. JUSTICE ARSHAD HUSSAIN KHAN****FOR HEARING OF CMA 10986/2018**

[u/o XXXVII Rules 2(2) &amp; (3) r/w Section 151 CPC]

Mr. M. Ishaque Memon, Advocate for the Plaintiff.

Mr. Zeeshan Abdullah, Advocate for the Defendant.

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**ORDER**

**ARSHAD HUSSAIN KHAN, J.-** This is an application [C.M.A. No. 10986 of 2018] Under Order XXXVII Rules 2 (2) & 3, C.P.C. r/w Section 151, C.P.C., whereby the Defendant has prayed to grant him unconditional leave to appear and defend the instant suit enabling him to file Written Statement and contest the matter accordingly.

2. The facts relevant for the purpose of disposal of this application, as per the Complaint, are that the Plaintiff is an investor and a financial consultant, *inter alia*, engaged in the business of providing financial consultancy to assist his clients by way of providing security on their behalf to facilitate/enable them to obtain finance facilities from banks and financial institutions, for consideration of profits/commissions. The plaintiff in pursuit of his business became a co-guarantor of Finance Facility acquired by Habib Trading Company, owned by defendant, against pledged stock and mortgages from Summit Bank Limited, which the defendant failed to repay. The outstanding liability against trading company of the defendant reached up to the tune of Rs.951,498,101/- and on account of failure of the defendant to pay back the said outstanding liability, the Summit Bank instituted a suit bearing No.B-22/2016 against the defendant before this Court, wherein the present plaintiff has also been impleaded as defendant No.2. The defendant has also filed a counter Suit No.B-29/2016 against Summit Bank before this Court wherein the Plaintiff has also been impleaded as defendant No.2. It is also averred that in order to get released the pledged stock, defendant contacted with plaintiff through a mutual friend and in this regard issued a cheque bearing No.00584806 dated 26.04.2017 amounting to Rs.450 millions, drawn at Summit Bank,

Clifton Branch [the subject cheque]. The amount of the said cheque was to be paid by the Plaintiff to the Bank against outstanding liability of the defendant. The Plaintiff presented the said cheque in his bank account maintained in Bank Al-Falah, Clifton Branch Karachi, but the same was returned on 25<sup>th</sup> May, 2017 with the endorsement of insufficiency of funds in the account of the defendant. Consequently, the plaintiff sent legal notice to the defendant and demanded the payment of the amount of the subject cheque within a period of thirty days from the receipt of information of returned cheque. It is also averred that despite such notice the defendant neither paid the amount to the Plaintiff nor did he reply the said notice. It is further averred that the liability for which the cheque was issued by Defendant to the Plaintiff is a legally enforceable liability apart from any other arrangement and litigation. Ultimately, the plaintiff filed the titled summary suit for recovery of amount of the subject cheque.

3. Upon notice of the case, the defendant filed present application [C.M.A.\_10986 of 2018] for leave to appear and defend the instant case unconditionally. In the application, the defendant while taking legal objections with regard to the maintainability of the present suit has stated that the defendant never issued the subject cheque and the signature on the cheque has been forged, besides there was no consideration of the plaintiff for which he became possessor of the subject cheque and, as such, the plaintiff has no legal character to file the present suit. It has been stated that defendant is mainly engaged in the business of ship-breaking and production of iron bars. Further the plaintiff and defendant had been the partners in two ships namely, TOPAZ and KAGHAN through their partnership firm namely M/s. National Ship-Breaking Company. However, owing to losses in the said partnership business, the plaintiff persuaded the defendant to shift the liability of aforesaid firm and ships on the defendant's firm namely, M/s. Habib Trading Company. It was agreed by the plaintiff that he will get two (2) to three (3) months' time from the bank against the above referred ships and further he will try to get the loan approved from the bank which will be paid by the parties proportionately that is 65% and 35%. It was further agreed that from then onwards all business of ship-breaking will be done in the name of defendant's firm

whereas the plaintiff will give his personal guarantee only and in this regard, he will be having Rs.500/- per ton as profit from the said business. Thereafter, the plaintiff managed to get the loan facility for the Firm from Summit Bank Limited. It has been further stated that plaintiff did not invest any amount in the business but became partner of defendant due to his relation with Banks and his share was for the reason that he used to make arrangement of funds from the banks. However, later on difference cropped up between the parties on account of illegal acts of the plaintiff upon which cases, mentioned in the plaint, were filed. It has also been stated that two cheques bearing Nos. 00584806 & 00584821 of Summit Bank, Clifton Branch, Karachi of the defendant's bank account had been misplaced in the year 2015, which fact was immediately reported to local police and the concerned Bank. Much thereafter, the abovementioned litigations were initiated in the year 2016. It has been also averred that in the month of April 2018, the defendant came to know that out of two misplaced cheques, on the basis of one cheque No. 00584806 of Summit Bank, the plaintiff filed a petition bearing No. 542/2018 before the learned Sessions Judge/Ex-officio Justice of Peace, Karachi (South), under Section 22-A of Cr. P.C., for registration of criminal case against the defendant. The said case was dismissed against which the plaintiff preferred Cr. Misc. Application bearing No. 131/2018, which was allowed by this Court and against the said decision the defendant filed Criminal Petition for leave to appeal before the Honourable Supreme Court of Pakistan which is pending adjudication. It has been further stated the plaintiff has forged and fabricated the signature of defendant on disputed cheque and on the basis of which the present suit was filed. It has also been stated that for ascertainment of fraud of the plaintiff, leave to defend may be granted to the defendant. It has been further stated that the plaintiff approached this Court with unclean hands and malafide intentions by suppressing the facts, and that the plaintiff having no cause of action to file the present suit, as such, the suit being devoid of any merit is liable to be dismissed.

4. The plaintiff filed counter affidavit to the application wherein he denied the allegations levelled in the application. It has been stated that the signature on the cheque is of defendant himself which was

given to the plaintiff for a valid consideration. The defendant has concocted the story of his missing cheques in the month of February 2015. The Bank confirmed to have not received the letter nor it is signed by the person registered with the bank. Further the Garden Police Station, where the defendant lodged report, have also denied to receive any information regarding missing of cheques by the defendant. It has also been stated that the subject cheque satisfies all requirement of Negotiable Instrument Act 1881, and the present application for grant of leave to the defend is not maintainable and is liable to be dismissed.

5. Whereas, in reply to the said counter affidavit filed by the Plaintiff against the subject application, the Defendant also filed an affidavit-in-rejoinder denying the allegations levelled in the plaint as well as in the counter affidavit. It has been stated that instant matter involves intricate questions of law and facts, which cannot be resolved without recording of evidence, hence the Defendant is entitled to the grant of unconditional leave to defend the case. It has been stated that until the application under reference is allowed, the defendant shall suffer irreparable loss and injury.

6. Learned counsel for the applicant/defendant, during the course of arguments while reiterating the facts mentioned in the application has contended that the plaintiff has no legal character to file the instant suit as admittedly there was no consideration of the plaintiff for which he became possessor of the subject cheque. Further contended that the bank with the connivance of the plaintiff on the basis of forged and fabricated documents filed a suit bearing Suit No.B-22/2016 before this Court for the recovery of Rs.951,498,101/- being alleged outstanding amount against the defendant. Further contended that since the bank claiming illegal and unwarranted amount from the defendant in connivance with the plaintiff, therefore, the defendant also filed Suit bearing No.B-29/2016 against the Bank and plaintiff, wherein, inter alia, seeking decree of redemption of mortgage property, cancellation of forged and fabricated documents and recovery of amount. Further contended that the plaintiff is not a holder in due course of the subject cheque, as his title to the subject cheque is defective. Since the

signature on the subject cheque is forged, therefore, there can be no liability on the defendant to pay the amount mentioned therein. Learned counsel further argued that the subject cheque admittedly was not issued in favour of the Plaintiff for any of his payment. Learned counsel further argued that the plaintiff has played a negative role in the dispute amongst the Summit Bank and the applicant / defendant wherein the Plaintiff has stood as guarantor and further the initiation of present suit is nothing but a fraudulent attempt on the part of the Plaintiff to cover-up his own miss-deeds, which is unwarranted under the law. Learned counsel further argued that it does not appeal to a prudent mind that a person who is in litigation with a Bank and instead of directly paying to the Bank in respect of his liability, issued cheque in favour of another person, who first had to deposit the same in his account and on realization of the same was to issue his cheque to the Bank. Had the Defendant's intention to pay this amount to the Bank, the same would have directly been paid to the Bank and a compromise shall have to be effected in Suit Nos.B-22/2016 and B-29/2016. Lastly, argued that in the instant matter intricate questions of law and facts are involved which cannot be decided without recording evidence, hence the defendant is entitled to the grant of unconditional leave to defend the present suit. Learned counsel in support of his stance in the case has relied upon the cases of FINE TEXTILE MILLS LTD., KARACHI v. HAJI UMAR (**PLD 1963 SC 163**), Messrs MUSLIM COMMERCIAL BANK Ltd. v. BANK OF CREDIT AND COMMERCE INTERNATIONAL (**1986 MLD 45**), Messrs BASHIR ENGINEERING INDUSTRIES and 3 others v. THE MUSLIM COMMERCIAL BANK LTD and another (**1988 CLC 941**), ABBAS ALI and another v. ASIF ABBAS and 3 others (**2012 CLC 1762**), BALOOCH AKBAR KHAN v. MUHAMMAD HUSSAIN and another (**2004 CLC 356**), MANAGER, MUSLIM COMMERCIAL BANK LIMITED and another v. BABAR (**2006 CLC 1309**), ASIF NADEEM v. Messrs BEXSHIM CORPORATION and other (**2001 CLC 653**), ABDUL KARIM JAFFARANI v. UNITED BANK LTD. and 2 others (**1984 SCMR 568**), PAKISTAN WATER AND POWER DEVELOPMENT AUTHORITY [WAPDA] v. Messrs SEA GOLD TRADERS through Partners and 2 others (**2003 CLD 392**), Haji ABDUL WAHID v. HOECHST PAKISTAN LIMITED and another

**(1993 CLC 1291)**, HABIB BANK LTD. v. ASGHAR ALI and others **(1988 CLC 353)**, ABDUL MALIK K. LAKHA through Legal Heirs v. ABDUL KARIM K. KARA **(PLD 2004 Karachi 399)** and MUHAMMAD SHAFI v. ABDUL SHAKOOR and 2 others **(1986 MLD 151)**

7. Learned counsel for the plaintiff, during the course of arguments at the outset while reiterating the contents of his counter affidavit to the application has urged that the application is not maintainable in law as the signature on the subject cheque is of defendant himself and the said cheque upon deposit was bounced/returned by the Bank on the ground that there was insufficient balance in the account of the defendant. Learned counsel has also referred to Section 6 of Negotiable Instruments Act, 1881, and in support of his case he has argued that the Cheque of Rs.450 million satisfies all the requirements/essential elements as per the law as well as it was issued for a valid consideration, hence the Plaintiff is a bonafide holder of cheque in due course. Learned counsel further argued that there was no partnership between the plaintiff and the defendant in the business of ship-breaking. Learned counsel further contended that the two ships namely TOPAZ and KAGHAN were imported in the month of August, 2014, by Habib Trading Company, owned by Defendant and has nothing to do with the dispute in the present case. Further argued that the cheque of Rs.450 Million was issued subsequent to the aforesaid two suits, being a different obligation upon defendant hence he cannot mingle the issue of present case with above referred two banking cases. Further argued that the defendant has concocted the story of missing of (two) 2 cheques in the month of February 2015 as the Bank confirmed to have not received the letter, nor it is signed by the person registered with the Bank. Further argued that no FIR was lodged nor any entry in police station diary was made regarding misplacement of said cheques by the defendant. It has also been argued that the legal notice was issued to the defendant after the subject cheque was bounced and the suit was filed within the time as provided under the law. It has been further argued that the present leave to defend application, even otherwise, is not maintainable as neither the defendant filed his own affidavit nor the affidavit of Muhammad Asif Moosa, the alleged General Manager of

defendant who as per the defendant lodged complaint before the concerned bank and the police station regarding alleged misplacement of the cheques, in support of leave to defend application and as such the affidavit filed by Muhammad Ismail being the attorney of the defendant in support of leave to defend application, who was neither the witness nor well aware of the facts, is liable to be discarded as his statement is based on hearsay and whereas the oral evidence must be direct under Article 71 of Qanoon-e-Shahadat Order 1984. Lastly, he has argued that in view of his submission the present application is not maintainable and as such the same is liable to be dismissed with cost. Learned counsel in support of his arguments has placed reliance on the cases of Mst. SIDDIQA BEGUM and others v. IRSHAD ALI SHAH (**PLD 1999 Karachi 311**), MUHAMMAD SIDDIQUE through Legal Representatives v. Mst. NOOR BIBI through Legal Heirs and others (**PLD 2016 Lahore 140**), HABIB BUX v. ZAHOOR\_UL-HASSAN (**1986 CLC 1119**), Mian RAFIQUE SAIGOL and another v. BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LTD and another (**PLD 1996 SC 749**), ABDUL RAUF GHOURI v. Mrs. KISHWAR SULTANA and 4 others (**1995 SCMR 925**), KHALID JAVED PARACHA through Authorized Attorney v. MUHAMMAD KHALID (**2017 YLR 210**), TASAM ALI BUKHARI v. GHULAM MUSTAFA and 4 others (**2014 CLC 244**), MUHAMMAD ANWAR v HOECHST PHARMACEUTICAL PAKISTAN (PVT.) Ltd. and others (**1989 MLD 171**), WASH DEV v. GANVO MAL (**2018 MLD 109**).

8. I have heard both the learned counsel for the parties, perused the documents on the record and have also gone through the case law cited at the bar.

9. The plaintiff for recovery of amount under the subject cheque has filed the present suit under Order XXXVII, C.P.C. which is a special dispensation. Under this Order, procedure has been provided to file and proceed with the suits filed on the basis of negotiable instruments, as contemplated in the Negotiable Instruments Act 1881; unlike the regular civil suits where general procedure provided under the C.P.C. is followed. In a suit filed under this Order, which is

summary in nature, under Rule 3 of the said Order, a defendant who has been served has to seek leave to appear and defend the suit and once the same is allowed, the suit shall be converted into a regular suit and will be decided in accordance with the general procedure prescribed in C.P.C. For convenience, Rule 3 of Order XXXVII, C.P.C. is reproduced hereunder:

**"3. Defendant showing defence on merits to have leave to appear.**---(1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

(3) The provisions of Section 5 of the Limitation Act, 1908 (IX of 1908), shall apply to applications under sub-rule (1)".

A perusal of the above provisions reflects that in order to contest a suit filed under Order XXXVII, C.P.C., a defendant has to file an application under Rule 3 of the Order for seeking leave to appear and defend the suit and if this application is accepted, may be subject to some condition, defendant will be allowed to contest the suit, however, if his application is rejected, he shall have no right to "appear" in further proceedings of the suit and to "defend" his case, unlike the regular civil suits, wherein even if a defendant is proceeded against ex parte or during the course of the suit any adverse order is passed against him, he as of right can participate in further proceedings of the suit.

The principle for grant and refusal of leave to defend a suit was laid down by the Honourable Supreme Court in the case reported as *Fine Textile Mills Ltd., Karachi v. Haji Umar* (PLD 1963 SC 163), wherein it is held that:-

"In a suit of this nature where the defendant discloses upon his affidavits facts which may constitute a plausible defence or even show that there is some substantial question of fact or law which needs to be tried or investigated into, then he is entitled to leave to defend. What is more is that even if the defence set up by vague or unsatisfactory or there be a doubt as to its genuineness, leave should not be refused altogether but the defendant should be put on terms either to furnish security or to deposit the amount claimed in Court.



In *Fine Textile's (Supra)*, their Lordships also went on to observe that the principles upon which the provisions of Order XXXVII of the Code of Civil Procedure should be applied are not dissimilar to the principles which govern the exercise of the summary power of giving liberty to sign final judgment in a suit filed by a specially endorsed writ of summons under Order XIV of the Rules of the Supreme Court in England. In that context, it was observed further that one such principle laid down by the Court of Appeal in the case of **Kodak v. Alpha Film Corporation, (1930) 2 KB 340**, was that at the stage when leave to defend is sought the judge is not to try the action; he is to see that there is a bona fide allegation of a triable issue, which is not illusory; he need not be satisfied that the defence will succeed; it is enough that such a plausible defence is verified by affidavit.

10. In the present case, the claim of the plaintiff is that the plaintiff stood guarantor of the finance facility acquired by the defendant, however, when the defendant committed default in repayment of loan amount to the Summit Bank, the bank filed a suit bearing No.22/2016 against the defendant and plaintiff. The defendant also filed suit bearing No.29/2016 before this Court against the Bank and the present plaintiff. However, in order to facilitate the release of pledge stock, the defendant contacted the plaintiff and issued subject cheque of Rs.450 million which amount was to be paid by the plaintiff to the bank. The said cheque was deposited by the plaintiff in his account however same was bounced/dishonored.

No doubt, under section 118 of the Negotiable Instruments Act, presumption is attached to negotiable instrument and the burden lies upon the person denying the same to prove contrary but this presumption is rebuttable by evidence. In the present case, there is nothing available on the record which could show that there was any agreement/arrangement entered into between the plaintiff and the defendant whereupon the defendant issued the subject cheque in favour of the plaintiff. The said fact reflects that the subject cheque appears to have been issued without any consideration. Furthermore, the defendant has denied that he neither owed any amount to the plaintiff nor he ever issued the subject cheque and the signature on the said cheque is forged and fabricated. Per the defendant his two cheques,

including the subject cheque were misplaced in the year 2015 upon which he lodged complaint to the concerned police station and also informed the concerned bank branch. The defendant annexed letters addressed to the bank and the concerned police station, informing about the missing cheques, along with leave to defend application. The plea of the defendant though disputed by the plaintiff through his counter affidavit yet it is difficult at this stage to decide such controversy without recording evidence. It is, however, sufficient to note that the defendant has denied his signature on the subject cheque and has brought on record material facts to support his contention. Moreover, in absence of any document viz. agreement/arrangement entered into between the plaintiff and the defendant, the logic for issuance of the subject cheque in the name of plaintiff, which was to be deposited by the plaintiff first in his account and after encashment thereof was to be issued to the Bank in respect liability of the defendant, could only be determined after the evidence is led.

Record further transpires that the defendant has also filed suit bearing No. 1630 of 2018 against the plaintiff for cancellation of the subject cheque, which suit is pending adjudication before this Court. Record also reflects that the plaintiff against dishonoring of the subject cheque also filed application under section 22-A of Cr. P.C. for registration of FIR against the defendant, which was dismissed against which the plaintiff filed Criminal Misc. Application before this Court which was allowed. The defendant has challenged the said order before the Honourable Supreme Court in Criminal Petition for Leave to Appeal, which is pending adjudication. Record also reflects that the defendant also filed application bearing No. 865 of 2018 under Section 22-A Cr. P.C. for registration of FIR against the plaintiff for forgery. The said application is also pending adjudication. Record also transpires that the defendant lodged FIR No. 26 of 2018 against the plaintiff for illegal and forceful removal of pledged stocks from the yard of defendant.

The afore-mentioned facts clearly show that, prima facie, there is a substantive dispute which merited deeper enquiry and required grant of leave so that the relevant material could come to the record through the process of evidence. And keeping in view the substance of

the dispute and quantum of the claims, any terms, requiring deposit of the amount of the subject cheque, would not only amount to imposing an obligation but would be unduly onerous in the given circumstances, and would stifle the very grant of leave by rendering it illusory. As such, in the light of the facts and circumstances of the case in hand, any condition for deposit of amount for the grant of leave to defend would not only be harsh but would also run contrary to the principle enunciated in the case law cited by the learned counsel for the defendant, more particularly in view of the fact that parties are already tagged in litigation and the cases between the parties are pending adjudication in various forums including this Court as well as Honourable Supreme Court of Pakistan. As such, I am of the view that on the touchstone of the ratio in *Fine Textile's (Supra)*, the defendant is entitled to the grant of leave as the fundamental questions as to the factum of execution of the cheque as well as consideration for payment of said cheque remained clouded and required evidence to be resolved by the Court. Had the defendant admitted execution and set out a less plausible defense, then the imposition of the condition for deposit of the amount claimed may have been warranted. However, under the prevailing circumstances, it could not be said that the defence disclosed by the defendant is either vague or disingenuous.

11. Insofar as the cases cited by learned counsel for the plaintiff is concerned, the same appear distinguishable from the facts of the present case, inasmuch as, they have been proceed on the basis of circumstances where the execution and subsequent presentment of the negotiable instrument were not in question and further these are finally determined cases decided after leading evidence. Even otherwise, the general principles that may be distilled from these precedents are essentially that Order XXXVII, Rule 3(2), C.P.C. confers a reasonable discretion upon the Court for granting permission to defend on such terms as it deems fit in the circumstances of each case.

12. Upshot of the above discussion is that the application of the defendant for leave to defend is allowed unconditionally. The defendant is allowed to file written statement within four weeks.

JUDGE