IN THE HIGH COURT OF SINDH AT KARACHI

First Appeal No. 154 of 2017

Before : **Mr. Justice Irfan Saadat Khan**
Mr. Justice Fahim Ahmed Siddiqui

Mr. Ali Asghar Dawood Bhoy. ….. Appellant.

Versus

Mr Ibrahim. …… Respondent.

Date of hearing : **20.01.2020**

Date of judgment : _____

Appellant Mr. Ali Asghar Dawood Bhoy through Mr. S. M. Jahangir, advocate.

Nemo for Respondent.

J U D G M E N T

FAHIM AHMED SIDDIQUI, J:- The appellant filed a leave to defend application in a Summary Suit (Summary Suit No. 2/2008) initiated against him by the respondent and subsequently entrusted to the Additional District Judge-III, Karachi South. The leave to defend application was dismissed by the trial Court and said Summary Suit was decreed through the impugned judgment dated 02-09-2009. By filing this appeal, the appellant has questioned the legality of the impugned judgment and decree.

2. Succinctly, the facts of the case are that the respondent has filed a Summary Suit based upon a negotiable instrument i.e. a cheque, allegedly issued by the appellant, which could not be honoured by the concerned bank. The said Suit was filed without presenting the original negotiable instrument for which, the respondent has claimed that the same was taken

by the appellant and torn into pieces along with dishonouring memo. Service was effected through publication when the appellant was out of Pakistan i.e. in Saudi Arabia and the Suit proceeded ex-parte. Subsequently, the appellant's wife filed an application under Order XXXVII Rule 4, which was allowed. While the leave to defend application was pending, an offer was made for the special oath, which was accepted but later on the appellant's wife withdrew the same. The learned trial Court after hearing; dismissed the leave to defend application and consequently, the Suit was decreed through the impugned judgment.

3 The learned counsel for the appellant submits that on withdrawal from the special oath no adverse inference could be drawn. According to him, the Suit was wrongly proceeded under the summary provisions, as the original cheque was not produced before the trial Court, which was a mandatory requirement. He submits that the factual aspect of the case is that the appellant and the respondent entered into an agreement of sale of the house of the appellant, which could not be materialized and the same was cancelled by the respondent in writing on a stamp paper, wherein it was also mentioned that the amount of earnest money i.e. Rs.1,10,000/- was returned but this important document was not considered by the trial Court. He draws our attention towards the said stamp paper, duly signed by the respondent and attested by the Justice of Peace. According to him, service was not properly affected, as at that time the appellant was in Saudi Arabia. He submits that the judgment and decree is incorrect and the same may be set aside. In support of his contentions, he relied upon the decision reported as **Asif Nadeem vs Messrs Bexshim Corporation and others (2001 CLC 653)**.

4. Nobody has attended from the respondent.

5. We have heard the arguments advanced by the counsel for the appellant and have also gone through the available record.

6. The first and foremost objection raised was regarding the non-production of the original cheque, which according to the learned counsel, was a mandatory requirement. No doubt, under Order XXXVII Rule 5 of CPC, trial Court has the power to direct the plaintiff to deposit the negotiable instrument with an official of the Court, usually Nazir of the Court, but it is not a mandatory requirement of law. In the plaint instituted by the respondent in appeal, no reference has been made to any written contract and it has also been mentioned that the cheque was taken by the appellant and torn into pieces. No doubt, certain legal presumptions are given regarding a lost promissory note under Section 118 of the Negotiable Instruments Act, 1881 and a Summary Suit is fully competent on a lost negotiable instrument but the plaintiff has to establish its existence as per the provisions of the Qanoon-e-Shahadat Order, 1984. In the present case, the respondent has filed the photocopies of the cheque and memo of the bank, which may be considered as secondary evidence. From the photocopy, it appears that the said cheque was not in the name of the respondent but the same was a bearer cheque. Nevertheless, another aspect in such a situation is considerable. Besides establishing the lost cheque through secondary evidence, the respondent (plaintiff) should bear in mind the exception given in Order VII Rule 16 of the CPC, which permits suing on a lost negotiable instrument subject to the conditions stipulated thereunder. Normally, a plaintiff who sues on a cause of action has to produce the basic document on which the Suit claim is based. But in the case of a lost negotiable instrument, an exception has been made under Order VII Rule 16 of the C.P.C. which reads thus:

> *"Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint."*

7. The essential condition to be satisfied in such a case is that the plaintiff, who sues on a lost negotiable instrument must give an indemnity to the satisfaction of the trial Court against the claim of any other person upon such an instrument. We consider that an affidavit sworn by the respondent (plaintiff), at the time of filing Summary Suit, with an undertaking to indemnify any person if a claim is made on the basis of a lost negotiable instrument i.e. cheque will satisfy the requirement of Order VI Rule 16 of the CPC but the said course was also not adopted by the respondent, as such the Suit could not be proceeded under Summary jurisdiction.

8. It appears from the impugned judgment, that the trial Court has given undue weightage to the offer of special oath for disposal of the matter. There are two types of special oath under the law. One is mentioned in Article 163 of the Qanoon-e-Shahadat Order, 1984 which reads as under:

> *"**163. Acceptance or denial of claim on oath.** --- (1) When the plaintiff takes oath in support of his claim, the court shall, on the application of the plaintiff, call upon the defendant to deny the claim on oath.*
> *(2) The Court may pass such orders as to costs and other matters as it may deem fit.*
>
> *(3) Nothing in this Article applies to laws relating to the enforcement of Hudood or other criminal cases."*

9. The above provisions are operative in a case when the plaintiff has no evidence in support of his claim, and he seeks decision on the basis of an oath, then he may place his case on a special oath and if the same is denied on oath by the defendant on oath, the plaintiff's Suit fails. Since in the instant case no oath was taken by the respondent (plaintiff) and the offer was made on behalf of the appellant (defendant); therefore, this special oath definitely pertains to Section 9 of the Oath Act, 1873, which reads as under:

> ***"9. Court may ask party or witness whether be will make oath proposed by opposite Party.***— *If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation:*
>
> *Provided that no party or witness shall be compelled to attend personally in court solely for the purpose of answering such question.*

10. In the instant case, the offer was made on behalf of the appellant, as such not the appellant (defendant) but the respondent (plaintiff) was required to take oath, as such in case of non-appearance, the matter may be decided in favour of the respondent after administering special oath on him or if the appellant has withdrawn his offer before administration of oath, there will be no question of administering oath.

11. For the reasons recorded above, we allow this appeal, set aside the impugned judgment dated 02-09-2009 under appeal and remand the case for trial afresh. We further direct that the Suit shall proceed as an ordinary Suit and not as a Summary Suit under the provisions of Order XXXVII of the CPC. The learned District Judge, Karachi South is directed to entrust the Suit to any Court of competent jurisdiction. However, there will be no order as to costs.

JUDGE

JUDGE