ORDER SHEET

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

R.A No.232 of 2004

(Zeal Pak Cement Factory Employees Union & another versus Kazi Nisar Ahmed & another)

DATE		ORDER WITH SIGNATURE OF JUDGE
Applicants	:	Through Mr. Kamaluddin advocate
Respondent No.1	:	In person
Respondent No.2	:	Nemo
Date of hearing:		08.11.2021
Date of decision:		22.11.2021

O R D E R

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ADNAN-UL-KARIM MEMON, J. - Captioned revision application has been directed against the order dated 23.09.2004 passed by learned IInd Additional District Judge Hyderabad on the application of defendant/respondent No.1 filed by him under Order XXXVII Rule 3 CPC in Summary Suit No. 34 of 2003 [Re: Kazi Nisar Ahmed versus The Zeal Pak Cement Factory Employees Union (CBA) & others], whereby, defendants/applicants herein were allowed to defend the suit; however, subject to furnishing surety against the disputed amount viz. Rs. 3,56,35,311/- within thirty (30) days of the impugned order.

2. The facts of the case, as unfolded, in the plaint are that applicants and respondent No.2 herein were the employees of M/s Zeal Pak Cement Factory, which as alleged was abandoned on 04.12.1996, resultantly workers / employees of the Factory became jobless and were consequently facing financial problems; accordingly the applicants being the then President and General Secretary of the Employees Union had requested the respondent No.1/plaintiff for financial assistance of Rs.1,80,76,500/- in the shape of loan with assurance that the same will be paid to respondent No.1 / plaintiff within three months, as at that time there was dispute between the employer / Zeal Pak Cement Factory and employees, hence employees were unable to draw their provident fund; accordingly agreements dated 15.03.1997 were executed between the applicants and respondent No.1/plaintiff, whereby loan of Rs.1,80,76,500/- was

paid by plaintiff / respondent No.1 to applicants, who had also executed Promissory Note dated 13.11.1997 with regard to re-payment of loan amount including 17% interest per annum thereon after agreed period of three months; the applicants, as alleged, were failed in re-payment of loan amount, hence various letters / notices were served upon them by plaintiff / respondent No.1, which were replied by respondent No.2 being the then General Secretary of the Union. Finally, the plaintiff filed the aforementioned Summary Suit under Order 37 Rule 2 CPC for recovery of the loan amount of Rs.1,80,76,500/- along with interest of Rs.17,558,811/- thereon total amounting to Rs.3,56,35,311/- wherein applicants / defendants moved an application under Order 37 Rule 3 for leave to defend, which was allowed; however, subject to furnishing surety against the disputed amount, hence applicants / defendants preferred this revision with a prayer that leave may be granted unconditionally.

3. Mr. Kamaluddin learned counsel for the applicants, *inter-alia*, contended that the impugned order, requiring furnishing of surety by the applicants is against the law, facts, and natural justice. He next contended that the documents attached with the summary suit/ plaint were / are forged and fabricated, which does not bear the signatures of applicants; however, the same was not considered by the learned trial Court. He also contended that the alleged Promissory Note is insufficiently stamped as such no Suit under Order 37 Rule 2 can be filed. He further contended that learned trial Court has failed to appreciate that Provident Fund of the employees of the Factory was under the control of Trust Board, hence General Secretary of the Employees Union (CBA) had no power to deal with the same. He argued that learned trial Court has failed to appreciate that Defendants / applicants had made out a plausible defense for grant of unconditional leave. He finally prayed that this revision may be allowed and unconditional leave to defend the Suit may be granted to the applicants/defendants.

4. Respondent No.1 / plaintiff present in person, supported the impugned order while submitting that leave to defend was granted to applicants / defendants, subject to furnishing surety equivalent to the disputed amount with learned trial Court till finalization of subject Suit, hence there is no illegality or irregularity in the impugned order, requiring interference by this Court. He also argued

that the stipulated period of 30 days had elapsed long back hence applicants / defendants are not entitled to any relief, as they are just lingering on the matter for 18 years. He prayed for dismissal of this revision application.

5. None present for respondent No.2, though served.

6. Heard the parties and perused the material available on record.

7. The important question that arises in the present revision application is whether the summary suit under Order 37 Rule 2 is not maintainable before the learned District Judge Hyderabad.

8. I have gone through the order passed by learned District Judge Hyderabad in Summary Suit No.34 of 2003, the learned Judge while granting leave to defend the applicants subject to furnishing surety to the extent of Rs.3,75,35,311/- the same has been assailed through this revision application, inter-alia, on the ground that the impugned order dated 25.09.2004 requiring the applicants to furnish solvent surety to defend the suit is against the law; that the documents filed with the plaint are fabricated as there are no signatures of the applicants; that respondent No.2 was General Secretary of applicant No.1 up to 13.03.1998 and after that, the alleged admission of him in his letter addressed to respondent No.1 and his advocate are inoperative and without any lawful authority.

9. A minute examination of pleadings of the applicants leads to the conclusion that they have pleaded genuine triable issues. So far as Summary Suit in terms of the specific provisions of Order 37 of CPC is concerned, in this regard, the well-known judgment of *Haji Ali Khan & Co. V/s. M/s. Allied Bank of Pakistan Limited* reported as **PLD 1995 Supreme Court 362**, is of relevance and guidance, wherein a complete procedure has been laid down by the Hon'ble Supreme Court; and on that basis, the question of determination of jurisdiction is of paramount consideration.

10. Coming to the main point, whether Agreement for Finance dated 15.3.1997 falls within the ambit of Negotiable Instruments Act or otherwise. The Negotiable Instruments Act is intended to lay down the whole law regarding cheques, bills of exchange, and promissory notes. The negotiability can be attached to documents by mercantile usage. The Negotiable Instruments Act is a statute dealing with a

particular form of contract and the law laid down for special cases must always overrule provisions of a general character. According to the interpretation clause of the Negotiable Instruments Act, “issue” means the first delivery of a promissory note, bill of exchange, or cheque complete in the form to a person who takes it as a holder; “delivery” means the transfer of possession, actual or constructive, from one person to another; “bearer” means a person who by negotiation comes into possession of a negotiable instrument, which is payable to bearer; and “banker” means a person transacting the business of accepting, for lending or investment, of deposits of money from the public, repayable on demand or otherwise and drawable by cheque, draft, order or otherwise, and includes any Post Office Savings Bank. According to Section 4 of the Negotiable Instruments Act, a promissory note is an instrument in writing (not being a banknote or a currency note) containing an unconditional undertaking, signed by the maker, to pay on demand or at a fixed or determinable future time a certain sum of money only to, or to the order of, a certain person, or the bearer of the instrument. An instrument that fulfills all the conditions mentioned in Section 4 of the Negotiable Instruments Act would be termed as a promissory note.

11. To determine the nature of an instrument where there is a promise to pay, the best way is to see what is the intention of the parties and what is the instrument in the common acceptance of men of business or persons among whom it is commonly used. Ordinarily, to amount to a promissory note, an instrument must simply contain a promise to pay and nothing else. The true import of the words “on-demand” is that the debt is due and payable immediately. The endorsement does not mean that it is not payable immediately or without any demand.

12. A negotiable instrument is a document guaranteeing the payment of a specific amount of money, either on-demand or at a set time, with the payer usually named on the document. It can serve to convey value constituting at least part of the performance of a contract, albeit perhaps not obvious in contract formation, in terms inherent in and arising from the requisite offer and acceptance and conveyance of consideration. The instrument itself is understood as memorializing the right for, and power to demand, payment, and an

obligation for payment evidenced by the instrument itself with possession as a holder in due course being the touchstone for the right to, and power to demand payment. A promissory note typically contains all the terms about the indebtedness, such as the principal amount, interest rate, maturity date, date and place of issuance, and issuer's signature. The difference between a promissory note and a bill of exchange is that the latter is transferable and can bind one party to pay a third party that was not involved in its creation. Banknotes are common forms of promissory notes. Bills of exchange, order a debtor to pay a particular amount within a given period issued by the creditor. The promissory note is issued by the debtor and is a promise to pay a particular amount of money in a given period. A bill of exchange must detail the amount of money, the date, and the parties involved (including the drawer and drawee). The following are some points of differences between promissory notes and bills of exchange,

a) A promissory note generally involves two parties, i.e. a maker (the debtor) and a payer (the creditor). On the other hand, bills of exchange include a drawer, a drawee, and a payee;

b) As the bills of exchange introduction above shows, a bill orders the drawee to pay as per the drawer’s directions. A promissory note, however, is not an order but a promise to pay;

c) The liability of the maker of a promissory note is absolute, while that of the drawer of a bill is conditional;

d) Notes cannot be payable to their makers, while the drawer and the payee in bills can be the same person.

13. So far as the niceties of the cheques are concerned, according to Section 6 of the Negotiable Instruments Act, a cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise on demand. A cheque is a peculiar sort of instrument in many ways resembling a bill of exchange, but entirely different. A cheque is not intended for circulation but it is given for immediate payment and not entitled to days of grace and thus it is strictly speaking an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet, in the ordinary understanding of persons, it is not so considered. A cheque whether payable to bearer or to order is not rendered void by post-dating it and is admissible in evidence in an action brought after the date of the cheque by the holder although he took with knowledge of the post-dating.

14. It is well-settled law that neither the court can assume the jurisdiction not conferred by law nor the jurisdiction can be assumed or entertained by consent of parties but the doctrine of assuming the jurisdiction by the courts is strictly based on the law conferring that particular jurisdiction. The details of the jurisdiction under the summary chapter are altogether different than the jurisdiction of an ordinary court, therefore, it is incumbent upon every plaintiff while in setting the plaint, his claim should have been within such realm and sphere. Order XXXVII C.P.C applies only to the High Court and to the district courts and any other civil court as specifically notified on this behalf by the High Court.

15. The C.P.C is consolidatory and procedural law nevertheless it encompasses substantive stipulations as to the branch of law for dispensing the process of litigation. According to Section 9 C.P.C., the courts have jurisdiction to try all suits of civil nature except suits of which their cognizance is expressly or impliedly barred. The word and expression jurisdiction refers to the legal authority to administer justice under the methods and avenues provided subject to the limitation imposed by law. Whenever any jurisdiction is conferred to any court of law subject to several prerequisites, then such prerequisites should be complied with. In this case, the defendant had objected to the jurisdiction so it was the judicious and commonsensical responsibility of the trial court to decide the objection before moving ahead and if reached to the conclusion that it had no jurisdiction to entertain or try the suit, the plaint could have been returned under Order VII Rule 10 C.P.C.

16. The letters of law make it obvious without any ambiguity that under Order XXXVII Rule 1, C.P.C, the suit can be entertained to deal the cases based on negotiable instruments which trigger on presentation of the plaint and in case the defendant fails to appear or defend and in default, the allegation in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree. Prima-facie, the present suit is not based on any negotiable instrument nor the plaintiff has demonstrated that any cheque which was issued by the applicants in favor of the respondent No.1/plaintiff was dishonored rather the plaintiff has framed the suit on the premise that loan was obtained by the applicants and amount was deposited in their account. he austerely hinged on the loan agreement as discussed

supra in which as per the plaintiff, the applicants agreed to pay off certain amounts with markup/interest but due to noncompliance of agreement, the summary suit was instituted under the summary chapter. The trial court granted leave to defend with the condition which order is assailed before this court.

17. The maxim of equity, "actus curiae neminem gravabit" an act of the court shall prejudice no man is applicable in every proceeding which is founded upon the justice or good sense and obliges a safe and sound guidebook for the administration of law and justice. As no findings have been given by the trial court to hold whether the loan Agreement, the nucleus of the case was a negotiable instrument or not, or it is covered in the sphere of any other negotiable instrument therefore at the very beginning, the trial court could have returned the plaint with the directions to institute the same in an ordinary court rather than admitting the suit under Order XXXVII C.P.C. Failing to act strictly under law and inattentiveness of the trial court, considerable time of the parties elapsed and fizzled out. The suit filed in the year 2015 is found to have been emaciated, unproductive, and vexatious exercise of jurisdiction. All claims lodged by the plaintiff in the plaint including the claim of damages could have been considered after framing proper issues and adducing evidence by the parties and in case of disagreement of the decree by any party, the appeal could have been filed before the District Judge. But in this case, the direct exercise of jurisdiction inadequately by the trial court in the summary chapter has also deprived the parties of at least one forum of appeal. Due to the admission of suit wrongly in the summary chapter, the revision has been filed in this Court. There may be another aspect that the court has to do the substantial justice between the parties while avoiding technicalities but here the question of jurisdiction is involved which is quite essential and important for every court to contemplate before entertaining the lis and exercising the jurisdiction. Though in the spirit of Order XXXVII Rule 7 C.P.C. where the leave to defend is allowed conditionally or unconditionally or where the defendant fulfills the condition imposed, the procedure in suits shall be the same as the procedure in the suit instituted in the ordinary manner which refers to the filing of the written statement, framing of issues, leading evidence by the parties and thereafter, the judgment shall be announced but this no way

means that the suit should be allowed to be admitted and entertained under the wrong notion, forum or without jurisdiction. No notification has been issued by this High Court, whereby, the jurisdiction has been conferred under Order XXXVII C.P.C to any civil court but the said jurisdiction is still confined and limited to be exercised by the High Court and District Courts only. In the case of Sheikh Abdul Majid v. Syed Akthar Hussain Zaidi (PLD 1988 SC. 124), the facts of the case depict that the revision was filed by the respondent in the Lahore High Court on the question of jurisdiction of a Civil Judge in Lahore to avail the procedure prescribed under Order XXXVII C.P.C. The learned Court concluded that due to the provisions of Central Laws (Statute Reforms) (Ordinance XXI of 1960), such a power was not available to the Civil Judge as amendments introduced by the Lahore High Court stood revoked. As regards the other question whether the court seized of the matter should be asked to proceed with the trial of the suit as an ordinary one or return the plaint. The learned Judge in the revisional jurisdiction held that order XXXVII of the Code did not apply to the learned trial Court of the Civil Judge, Lahore and consequently it had no jurisdiction to try the suit. It was further held that the impugned order granting leave to the respondent was without jurisdiction and the learned Judge returned the plaint to be presented to the Court in which the suit should have been instituted. When this order was challenged in the apex court, the honorable Supreme Court held that the amendment introduced by clause (e) of the High Court of Lahore remains intact and has been intentionally keeping intact. It was further held that amendments introduced by the High Court only identify the courts where a resort can be made by Order XXXVII C.P.C. for the trial of a suit of the particular category. The apex court allowed the appeal to set aside the judgment of the learned Lahore High Court and remanded the case for trial by the Civil Judge under the law. Here in my sight and understanding, the most crucial and distinguishing fact is that the above judgment was based on the powers conferred on by the learned Lahore High Court to try the case by the civil court under Order XXXVII C.P.C. which otherwise means that the originally the said suit was instituted in the civil court notwithstanding it was filed in the summary chapter or as the ordinary suit. The Honourable Supreme Court directed the civil court to decide the case under the law which had otherwise jurisdiction in the matter as an ordinary suit but here

the suit was originally filed before the learned District Judge Hyderabad under misconception being a summary suit so the argument advanced by respondent No.1 who is present in person cannot be sustained that though the suit was not in the summary chapter which he candidly admitted despite that it could have been tried and decided by the IInd Additional District Judge Hyderabad as an ordinary suit and all reliefs claimed by him could have been granted which is not the correct exposition of the law in my farsightedness.

18. In the case of Muhammad Abdullah Sufi v. Messrs. Muhammad Bux & Sons (PLD 1957 (W.P) Karachi 445), the facts were that the plaintiff had filed a suit for the recovery of Rs.2,236/- based on a cheque drawn on Mercantile Cooperative Bank by the defendant in his favor. The suit was filed under Order XXXVII C.P.C and was admitted on 04.09.1956. During the pendency, the plaintiff realized that the subordinate judge at Karachi had no power to issue summons under Order XXXVII Rules 1 and 2 C.P.C. so he applied for amendment in the plaint. The application was rejected on the ground that the subordinate judge had no jurisdiction to hear the suit under Order XXXVII C.P.C. The learned Judge of this court accepted the revision application on 17.04.1957 and set aside the order of the learned subordinate judge with the directions to entertain the suit and try it ordinarily no matter even if he does not possess the power under section XXXVII C.P.C. Yet again what I have comprehended and grasped is that the learned Judge in the cited dictum issued directions to try the suit ordinarily merely for the reason that if the court had no jurisdiction under Order XXXVII C.P.C. it had otherwise been a civil court entrusted with the jurisdiction to try the suit even in an ordinary manner which is lacking in the case in hand as the court of district judge specifically entrusted jurisdiction to entertain and decide summary chapter suits cannot be equated with the court of the civil judge or senior civil judge but hierarchically it is their appellate court.

19. According to Section 15 C.P.C., every suit is required to be instituted in the court of lowest grade competent to try it with the exception provided under Order XXXVII Rules 1 & 2 C.P.C. According to Section 2 (4) C.P.C (definition clause), district means the local limit of the jurisdiction of a principal civil court of original jurisdiction

which is called district court and includes the local limits of the ordinary civil jurisdiction of high court whereas Section 5 C.P.C explicates subordination of courts and expounds that for the Code, the district court is subordinate to the high court and every civil court of a grade inferior to that of a district court and every court of small causes is subordinate to the high court and district court.

20. The trial court, in this case, has tried the suit in a summary chapter and not as an ordinary suit and for the same reasons granted conditional leave to defend. In such circumstances the impugned Order dated 23.9.2004 is set-aside. Since sufficient time has elapsed in the proceedings, therefore to save time and avoid further protracted litigation, matter is remanded back to the learned District Judge, Hyderabad to consign the matter to the concerned Senior Civil Judge as an ordinary suit for the decision on merits after considering the pleadings of the parties. The consignee court shall provide ample opportunity of hearing to the parties or their advocates and if required, the court may also frame issues and allow parties to lead evidence. I expect that the learned consignee court will decide the matter on merits within four months.

21. This revision application is allowed in the above terms.

JUDGE

Karar_Hussain/PS*