IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Irfan Sadat Khan &
Sana Akram Minhas JJ

High Court Appeal No.104 of 2015

Appellant:	M/s Nina Industries Ltd Through Mr. Mujahid Bhatti, Advocate
Respondent:	M/s E.F.U. General Insurance Ltd Through Mr. Naved Ahmad, Advocate
Date of hearing:	28.4.2023
Date of announcement:	12.5.2023

J U D G M E N T

1. **Sana Akram Minhas, J**: This High Court Appeal (**"HCA"**) is directed against the judgment announced through short order dated 27.11.2014, followed by detailed reasons dated 31.1.2015 (**"Impugned Judgment"**) and decree dated 18.2.2015. The Impugned Judgment was passed by a learned Single Judge of this Court in a Summary Suit for recovery of money instituted on 30.4.2011 under Order XXXVII of the *Code of Civil Procedure, 1908* (**"CPC"**) bearing Suit No.641/2011 (*EFU General Insurance Ltd vs. Nina Industries Ltd*) (**"Summary Suit"**) whereby he rejected the Leave to Defend application of the Appellant (who was Defendant in Summary Suit) and decreed the Summary Suit as prayed of the Respondent (who was Plaintiff in Summary Suit).

2. The facts, as pleaded by the Respondent in its plaint filed in the Summary Suit are that the Respondent was an insurance concern carrying on business of insurance. At the Appellant's request, the Respondent issued various all risks policies of insurance in consideration of insurance premium which the Appellant agreed and promised to pay later on. While the Appellant availed the insurance cover, over time the amount of premium accrued and became outstanding against it. In response to the

Respondent's reminders, the Appellant would assure that payment would be made but did not for one reason or another. As per the Respondent, the Appellant never disputed the statements of outstanding premium forwarded to it from time to time nor disputed the amount of premium due to the Respondent. In consideration of the agreed premium, the Appellant issued a total of sixteen (16) cheques for various amounts, bearing different dates of year 2008 and all drawn on Bank AL Habib Ltd. On presentation of the cheques to the Appellant's bank, all of them were dishonoured and returned to the Respondent for reasons of "*Funds Insufficient*". The Respondent, thereafter, repeatedly approached the Appellant seeking payment but the same was never done. The Respondent, thus, filed the Summary Suit claiming a sum of Rs.15,098,520/- with 19% profit per annum from the date of filing of the Suit till its realization which has been decreed by the Impugned Judgment. In support of its claim, the Respondent annexed with the plaint copies of dishonoured cheques along with the concerned bank's cheque return memos.

3. After being served, the Appellant on 1.12.2011 filed an application for unconditional Leave to Defend in the Summary Suit. The Respondent filed its Counter-Affidavit on 7.5.2012 whereafter the Appellant on 22.11.2014 filed its Rejoinder. The learned Single Judge after hearing the parties dismissed the Appellant's application for Leave to Defend and decreed the Respondent's Summary Suit as prayed through the Impugned Judgment.

4. Against the Impugned Judgment of the learned Single Judge, the Appellant has instituted the instant HCA. The learned Counsel for the Appellant Mr. Mujahid Bhatti has submitted before us that the Impugned Judgment be set aside and unconditional Leave to Defend be granted on the grounds detailed in the Leave to Defend application with its supporting affidavit and the Rejoinder to it. He contended that:

   i) All the dishonoured cheques had been given by the Appellant to its lenders i.e. banks as blank and unfilled at the time of grant of different finance facilities.

   ii) After a dispute arose between the Appellant and Askari Bank Ltd and Habib Bank Ltd, the said banks instituted banking suits in this High Court, misused the cheques and handed them over to the Respondent in collusion with each other.

   iii) The Summary Suit was a retaliatory tactic to penalise and compel the Appellant to withdraw its legitimate claim against the Respondent. After the Appellant turned down the Respondent's meagre monetary offer to settle the Appellant's huge monetary claim and filed a suit in January 2011 bearing Suit No.16/2011 (**"Insurance Suit"**) against the Respondent before the Insurance Tribunal (Sindh) at Karachi for recovery of loss along with liquidated damages, the Respondent instituted the Summary Suit on 30.4.2011 as a counter blast.

iv) The Respondent has to-date not produced any insurance policy against which the premium was allegedly due to be paid by the Appellant or any request letter or any proposal allegedly made by the Appellant for issuance of insurance policies. The Appellant in its Leave to Defend application had denied the alleged policies were issued by the Respondent in consideration of insurance premium and had also denied agreeing to pay the premium later.

v) The Appellant had obtained different finance facilities from financial institutions and had mortgaged/hypothecated its different immovable/movable assets with them. It was on the instructions of the financial institutions that the Appellant had got insured its hypothecated/mortgaged assets with the Respondent under specific insurance policies whose number and dates were detailed in paragraph 15 of the affidavit to the Leave to Defend application and premium amounts of which had all been duly paid for and nothing remained outstanding.

vi) No notice of dishonour of cheques under section 93 of the *Negotiable Instruments Act, 1881* (**"1881 Act"**) was given by the Respondent to the Appellant in order to conceal the fact about misuse of cheques by the Respondent in collusion with the financial institutions.

vii) Five out of sixteen dishonoured cheques (at HCA File Pg. 87 to 95, Annex A–22 to A–31) amounting to Rs.4,876,480/- bear the date 25.1.2003 and the claim under them is time barred in view of Art. 73 of the *Limitation Act, 1908* which provides a limitation period of 3 years. So also, these are stale cheques which had been presented more than six months after the ostensible date of issue which is in violation of section 84(2) of the 1881 Act.

viii) The award of 19% profit/interest violates section 79(b) of the 1881 Act.

ix) The Appellant had explained in paragraph 10 of its Rejoinder that its two letters dated 10.5.2007 and 24.1.2008 (which had been relied upon and reproduced in the Impugned Judgment) were written on the instructions of the lending banks and which insurance policies in any event were never issued or renewed by the Respondent due to the dispute between the Appellant and the lenders. The letter of 10.5.2007 did not mention any amount as outstanding or due and nor did it make any mention of any cheque being issued by the Appellant to the Respondent.

x) No sum was due or payable by the Appellant which fact was established from Respondent's letter dated 7.6.2010 (at HCA File Pg. 301, Annex D/5) offering an amount of Rs.38,201,639/- as full and final settlement after adjustment and letter dated 26.1.2008 enclosing Pay Order dated 26.1.2008 (at HCA File Pg. 305 & 307, Annex G & G–1) whereby it had not only refunded a sum of Rs.6

million to the Appellant but had also admitted adjusting a sum of Rs.1 million against the premium of various policies.

5. The learned Counsel for the Respondent Mr. Naved Ahmad in reply controverted the submissions of the Appellant and whilst supporting the Impugned Judgment made the following submissions before us:

i) All the annex/documents filed with the memo of Appeal were never filed with the Leave to Defend application and, therefore, cannot now be entertained in this HCA.

ii) In the Leave to Defend application, the Appellant stated that blank, unfilled cheques were handed over to Habib Bank Ltd and Askari Bank Ltd but all the dishonoured cheques which are subject matter of Summary Suit pertain to and have been drawn on Bank Al Habib Ltd (HCA File Pg. 65–95, Annex A to A–31). Thus, these dishonoured cheques could not be mixed up with the cheques of other lending banks with whom the Appellant had a dispute.

iii) In paragraph 15 of the Leave to Defend application, the Appellant has admitted that it used to obtain different insurance policies from the Respondent.

iv) In the entire Leave to Defend application, the Appellant has never denied its liability nor denied issuance of cheques.

v) The Appellant has not denied its two letters dated 10.5.2007 and 24.1.2008 referred in the Impugned Judgment.

vi) The Insurance Suit pending before the Insurance Tribunal was on a completely different aspect.

vii) On one hand, the Appellant has relied upon proceedings of Insurance Suit pending before the Tribunal while on the other hand, the Appellant states that the policies of the Insurance Suit have no relevancy to the instant HCA.

viii) All the dishonoured cheques were filled by the Appellant's Director in his own handwriting and he endorsed and put his signature twice.

ix) The Impugned Judgment righty allows profit @ 19% as the learned Single Judge is empowered to do so under the 1881 Act, under Order XXXVII Rule 2(2)(b) CPC and section 34 CPC.

6. During the course of hearing on 28.4.2023, no case law was advanced by the parties in support of their contentions before us. However, both the parties later submitted their written synopsis and the Counsel for the Respondent therein referred to the

cases reported in 2004 SCMR 1747 (*Zubair Ahmad vs. Shahid Mirza*), 2021 CLD 1261 (*Rab Nawaz Khan vs. Javed Khan Swati)*, *2001 CLD* 783 (*Mashooq Ali Rajpar vs. Abdul Hameed*), 2011 CLD 1757 (*Saeed Abbas vs. Agar International (Pvt) Ltd*), 1993 MLD 1239 (*S.M. Abdullah & Sons vs. Crescent Star Insurance Co.)*.

7. We have heard the arguments advanced by the counsel for both parties and have also gone through the available record of the HCA as well as the R & P of the Summary Suit which was called by a Division Bench of this Court vide order dated 25.1.2021.

8. Adverting to the first and foremost objection raised by the Respondent's Counsel that no new documents can be entertained and considered by us at the appellate stage, we have noted that although the Appellant has filed as an annex a copy of its Rejoinder (with its attachments) to Leave to Defend application with the memo of main Appeal (available at HCA File Pg. 241, Annex E), the said Rejoinder is not available in the record of the Summary Suit. However, the Respondent to-date has not filed any objections/reply to the main Appeal and its annex nor raised any objections during the course of its arguments to the copy of the Rejoinder filed by the Appellant with the instant HCA. Even during the course of his arguments, the Respondent's Counsel only objected to the annex attached with the Rejoinder and not the Rejoinder itself. Given its relevance and the fact that no opposition to its consideration by this Court was raised by the Respondent, we are inclined to treat the Appellant's Rejoinder to the Leave to Defend application as duly filed in the Summary Suit and have considered its contents. An examination of the R & P of the Summary Suit shows that except for three documents annexed with the memo of main Appeal (available at HCA File Pg. 303 to 307, Annex F, G & G–1 being an insurance policy issued on 4.12.2007, the Respondent's refund Pay Order for Rs.6 million and its cover letter both dated 26.1.2008), all other remaining documents attached with the memo of main Appeal have been annexed by the Appellant either with its Leave to Defend application or its Rejoinder. It is, therefore, incorrect for the Respondent to state that no annex/documents were attached with the Leave to Defend application or for that matter the Rejoinder filed in the Summary Suit.

9. We now take up the question whether or not this Court sitting in appeal can consider the aforesaid three documents which were not filed in the Summary Suit in particular the Respondent's letter dated enclosing refund Pay Order both dated 26.1.2008 (at HCA File Pg. 305 & 307, Annex G & G–1). Firstly, in paragraph 7 of the memo of Appeal, the Appellant has specifically stated that during the course of arguments before the Single Judge, it had produced the said documents but the same were not considered in the Impugned Judgment. Since no reply has been filed by the Respondent, this paragraph remains undenied. These documents, thus, cannot be said to have not been produced in the Summary Suit. Secondly, the Respondent has

not disputed the authenticity of these documents before us. Thirdly, and very importantly, the plea taken by the Appellant based on these documents is not a new plea. These documents only bolster the Appellant's earlier plea (taken in paragraph 15 of its Leave to Defend application and paragraph 9 of the Rejoinder) that all payments had been made by it and that nothing remained outstanding. For these reasons, we find the objection of the Respondent's Counsel to the aforesaid documents without merit.

10. The next contention of the Respondent is that the Appellant is mixing up the cheques because as per the Appellant, it had handed over blank, unfilled cheques to Habib Bank Ltd and Askari Bank Ltd whereas the dishonoured cheques were all drawn on Bank Al Habib Ltd. This argument of the Respondent is misconceived. The Appellant in its Leave to Defend application and Rejoinder had stated that all the dishonoured cheques were given by it to its lending banks with whom it had a dispute viz. Habib Bank Ltd and Askari Bank Ltd. The Appellant in its entire pleadings has not even once mentioned the name of the bank whose inchoate cheques were given by it to its aforesaid lenders. The name of the bank on whom the dishonoured cheques were drawn (viz. Bank Al Habib) is, thus, immaterial. We, therefore, do not find any inconsistency in the Appellant's plea regarding the dishonoured cheques and the submission of the Respondent in this regard is, thus, without force. We might add here that since the Appellant has completely denied giving the dishonoured cheques to the Respondent, the presumption as to consideration contained in section 118(a) of the 1881 Act will not come into play.

11. The learned Single Judge through the Impugned Judgment dismissed the Appellant's application for Leave to Defend and decreed the Respondent's Suit as prayed and in doing so observed as under:

> *11. I have heard the learned counsel for the parties at length and have carefully examined the material available on record, the case law cited by the learned counsel for the parties* ***and have come to the conclusion that it is an admitted position that the plaintiffs at the request of defendants and pursuant to the proposals of insurance made by the said defendants*** *issued various all risks policies of insurance* ***in consideration of insurance premium which the defendants agreed and promised to pay later on to the plaintiff****.* ***[Emphasis supplied by us]***
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> *12. As discussed above* ***the defendant has denied the liability altogether by stating that the defendant never took the insurance policy from the plaintiff****. The instance [sic] of the defendant that the defendant has taken in the leave to defend application and its supporting affidavit is belied by its own aforesaid two letters dated May 10, 2007 and January 24, 2008 which are annexures "B and E" to the Counter Affidavit filed by the plaintiff in response to the leave to defend application of the defendant wherein the defendants have categorically admitted their liability to pay premium on the insurance policies issued to them by the plaintiff."* ***[Emphasis supplied by us]***

12. The above quoted passages of the Impugned Judgment show that the learned Single Judge on the basis of the record had concluded and was of the view that the Appellant had "admitted" (either in categorical terms or if not categorically then the Appellant had at least not denied which constituted admission) that:

(a) It was at the request and proposal of the Appellant that various insurance policies were issued by the Respondent;

(b) The various policies were issued in consideration of insurance premium which the Appellant had agreed and promised to pay later;

(c) The Appellant has altogether denied liability by denying it ever took insurance policies from the Respondent.

13. We have gone through the pleadings of the parties minutely and with utmost respect to the learned Single Judge, the Appellant (i.e. Defendant in Summary Suit) has nowhere made the aforesaid admissions (directly or indirectly) ascribed to it either in its Leave to Defend application or in its Rejoinder. The Impugned Judgment does not pinpoint any paragraph of either the Leave to Defend application or its Rejoinder where the Appellant is said to have made such an admission. On the contrary, the Appellant has very emphatically stated in its Leave to Defend application that the issuance of insurance policies to the Appellant by the Respondent was not denied but their issuance at the "*request*" and "*proposal*" of the Appellant, their issuance "*in consideration of insurance premium*", the giving of the dishonoured cheques to the Respondent and the claim of any outstanding amount were all flatly and specifically denied by the Appellant. Reference in this regard is made to the following paragraphs of the affidavit of the Leave to Defend application:

> *5. I say that the cheques in question were handed over to the Financial Institutions i.e. Habib Bank Ltd and Askari Bank Ltd etc as blank and unfilled at the time of granting different finance facilities to the Defendant but since the disputes were arose between the said Financial Institutions and the Defendant and in this regards proceedings is also pending before this Honourable Court which is still sub judice before this Honourable Court therefore, the said Financial Institutions misused the said cheques and handed over the same to the Plaintiff.*
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> *6. I say that the Suit of the Plaintiff is a counter blast suit to the suit of the Defendant earlier filed against the Plaintiff bearing Suit No.16 of 2011 before the Honourable Insurance Tribunal for recovery of loss along with liquidated damages hance the present suit of the Plaintiff is nothing just only harassment to compel the Defendant to withdraw their legitimate claim against the Plaintiff.*
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> *15. I say that the contents of paragraph-2 of the plaint are misleading hence specifically denied and the Plaintiff is put to strict proof thereof. **I say that the Plaintiff has badly failed to produce a single request letter or any proposal made by the Defendant for issuance of so-called allege policies which have neither been filed with the plaint nor any other documentary proof to prove the statement of the Plaintiff is correct and true. I***

> ***vehemently deny that said so-called alleged insurance policies were issued by the Plaintiff in consideration of Insurance Premium which the Defendant agreed to pay later on to the Plaintiff and the Plaintiff is put to strict proof thereof.*** *I further say that the Defendant has obtained different Finance Facilities from Financial Institutions and mortgaged / hypothecated its different immovable / movable assets with the creditors.* ***I say that the Defendant had got Insured*** *its immovable assets / hypothecated assets / mortgaged assets against the loss or damage by fire and explosion, Riot and Strike, Burglary, earthquake, and such other risks* ***as per instructions of the Financial Institutions with the Plaintiff*** *under Insurance Policies bearing Nos. 52325065/11/2007 dated 14.11.2007, 52325096/12/2007 dated 04.12.2007, 52325096/12/2007 dated 04.12.2007, 52325100/012/2007, 52325088/12/2007 dated 04.12.2007, 52325091/12/2007 dated 04.12.2007, 52325089/12/2007 dated 04.12.2007, 52325093/12/2007 dated 04.12.2007, 52325087/12/2007 dated 04.12.2007, 52325090/12/2007 dated 04.12.2007, 52325094/12/2007 dated 04.12.2007, 52325092/12/2007 dated 04.12.2007, 52325098/12/2007 dated 04.12.2007, 52325099/12/2007 dated 04.12.2007, 52325064/12/2007 dated 04.12.2007, 52325101/12/2007 dated 04.12.2007 and 52325095/12/2007 dated 04.12.2007 etc.* ***and amounts of the which have been duly paid far*** [sic]. ***[Emphasis supplied by us]***
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> *16. … … … …. I further say that neither the Plaintiff has filed any documentary proof with the plaint regarding issuance of so-called allege policies under the instructions of the Defendant nor any single request letter of the Defendant has been produce to prove the contention of the Plaint. … … ….*
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> *17. I say that the contents of paragraph-4 of the plaint are misleading hence denied. I vehemently deny that in consideration of the said agreed premium and having admitted the amount of premium, the Defendant issued their cheques of different amount contained therein, in confirmation and admission of the outstanding premium which was accrued by the Plaintiff on various insurance policies from time to time towards the part payment of the said premium against the said policies in favour of the Plaintiff and the Plaintiff is put to struct proof thereof. I further say that the above referred cheques were provided to the said Financial Institutions at the time of grant of finance facilities in favour of the Defendant and the same were also blank and unfilled, no any date or name of any Bank/Financial Institution etc was mentioned therein. This is the main reason the same were misused by the Plaintiff with the collusions of said Financial Institutions … … …*

14. The Appellant has doubled down and reiterated its above stance in its Rejoinder. Reference is made to following paragraphs of the Rejoinder:

> *9. … … … … I further say that if the said plea of the Defendant is harassment then as to why the Plaintiff through its letter dated 7th June 2010 offered an amount of Rs.38,201,639/- as full and final settlement after adjustment of alleged and baseless outstanding premium of Rs.15,433,262/- which was declined by the Defendant hence the aforesaid suit was filed by the Plaintiff with the collusion and malafide intention. … … … …*
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> *10. With respect to the contents of paragraph-7 of the counter affidavit of the alleged sub-attorney, I say that the Plaintiff instead of itself producing the alleged insurances policies on the basis of which alleged claim of suit was fabricated, the Plaintiff stating that same can not be produce unless this Honourable Court direct the Defendant to produce the office copy of the Insurance Policies and other documents which are neither issued nor supplied to the Defendant. It is vehemently denied that the alleged insurance*

> *policies are in possession of the Defendant and they have already enjoyed the risks cover there under and the Plaintiff is put to strict proof thereof. … … … With respect to the annexure "F" it is fabricated and fake documents neither the same was ever provided to the Defendant nor has it any concern with the Defendant but the same has been prepared to mislead this Honourable Court … … …. … … … … … … … … … ….*

15. The averments of the Appellant have to be seen and considered in their precise and complete context. The above quoted paragraphs of the Appellant's Leave to Defend application and Rejoinder lucidly demonstrate the vigorous and forceful denials of the Appellant regarding any request or proposal made by it to the Respondent for issuance of insurance policies. The defence set up by the Appellant in its Leave to Defend application is that it had availed finance facilities from financial institutions with whom it had hypothecated its assets and it was on their instructions that the Appellant had got the hypothecated assets insured with the Respondent thereby making the lending banks the beneficiaries of the policies. The dishonoured cheques were given to the lending banks as blank and unfilled at the time of granting of the finance facilities but which cheques were handed over by the lending banks to the Respondent after a dispute ensued between the Appellant and the lending banks who instituted banking suits against the Appellant in this High Court. The Appellant had instituted the Insurance Suit against the Respondent in the Insurance Tribunal as it found the Respondent's claim settlement offer and adjustment unjust when it did not owe any outstanding premium to the Respondent. In retaliation and as a pressurising tactic the Respondent filed the Summary Suit against the Appellant. In support of its Leave to Defend application and its Rejoinder, the Appellant attached various documents which amongst others included:

i) Plaints of Suit No.B–178/2009 and Suit No.B–24/2009 filed in this Court by Askari Bank Ltd and Habib Bank Ltd against the Appellant and its guarantors;

ii) Plaint of Insurance Suit No.16/2011 filed in January 2011 by the Appellant against the Respondent before the Insurance Tribunal (Sindh) at Karachi;

iii) Schedules of various policies obtained on the instructions of lending banks;

iv) Receipts issued by Respondent for premium paid (to demonstrate that some payments were made by the different lending banks themselves to the Respondent and some by the Appellant);

v) Respondent's letter dated 7.6.2010, inter alia, offering the Appellant a sum of Rs.38,201,639/- subject to conditions.

16. The Appellant in its Leave to Defend application and during its submissions before us has laid particular emphasis on the Respondent's failure to produce copy of a single insurance policy in respect of which outstanding premium is allegedly due. The

Respondent in paragraph 7 of its Counter-Affidavit to Leave to Defend had stated that insurance policies and other relevant documents could not be produced under the provisions of summary chapter unless the Court directed the Respondent to do so. This Court's order dated 21.12.2021 records that separate Statements dated 21.12.2021 have been filed by both parties. The Respondent's Statement available in the HCA file states that copies of 17 insurance policies have been attached. We have gone over the attached policies and have noted they happen to be exact copies of the same policies which the Appellant has already attached with its Leave to Defend application and remarkably bear the same annex number as given to them by the Appellant (and which according to the Appellant's paragraph 15 of Leave to Defend application had been obtained on the instructions of the lenders and all premiums have been paid). By order dated 8.2.2022 this Court directed the parties to file proper statement relating to policies under dispute on the next date of hearing. This Court's order of 11.5.2022 reflects that the Respondent had requested for further time to place on record copy of one such policy for consideration by the court on the next date of hearing. During the course of his arguments before us, the Respondent's Counsel stated that the copies of policies cannot be produced as the Respondent Company maintains its record for only 3 to 4 years whereafter it is destroyed. No provision of law was cited or policy document produced before us by the learned Counsel for Respondent to support his bare statement. We may add here, for the purpose of example only, that various statutes specifically provide the minimum period for record retention/preservation, for instance the *Companies Act, 2017 (*in section 472), *Income Tax Ordinance, 2001* (in section 174), *Federal Excise Act, 2005* (in section 17) and *Sales Tax Act, 1990* (in section 22). The seesawing stance of the Respondent has not helped it but has only served to fuel doubts.

17. The yardstick for adjudicating leave to defend applications under Order XXXVII Rule 3 CPC was laid down by the Supreme Court of Pakistan in the case of *Fine Textile Mills Ltd, Karachi vs. Haji Umar* (PLD 1963 SC 163) wherein it was held:

> [At Pg. 168, A] *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 be 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.*
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> *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. One of such principles laid down by the Court of Appeal in the case of Kodak v. Alpha Film Corporation [(1930) 2 K B 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".

18. In *Rafique Saigol vs. Bank of Credit & Commerce International (Overseas) Ltd* (PLD 1996 SC 749), the Supreme Court after a comprehensive review of authorities on the subject (which included *Fine Textile Mills Ltd, Karachi vs. Haji Umar*) held:

> *20. From the preceding discussion, it is quite clear that leave to defend in a suit instituted under Order XXXVII, C.P.C. shall be granted by the Court where the facts disclosed by the defendant on affidavit make out a case of shifting of onus on plaintiff to prove consideration for the instrument, which is the basis of the suit. Leave may also be granted on any other ground or facts which the Court considers sufficient to support the application for grant of leave meaning thereby that refusal to grant leave to defend, is a rare phenomena, confined to cases where no defence at all is disclosed by the defendant. Ordinarily, the Court would not decline leave to defend even in cases wherein defence appears to be very weak or a sham one, as in such cases leave may be granted by the Court conditionally. The next important question which arises for consideration is, when leave to defend may be granted by the Court unconditionally. Grant of conditional or unconditional leave, is undoubtedly a matter within the discretion of the Court which is to be exercised keeping in view the facts and circumstances of each case. It is, however, neither possible nor advisable to lay down any hard and fast rule in this behalf. From a careful analysis of the provisions of Order XXXVII, Rule 3, C.P.C. and review of the case-law, it appears that when the facts disclosed by the defendant in the affidavit filed in support of his application for grant of leave to defend, are such that it becomes necessary for the plaintiff to prove consideration of the instrument, which is the basis of the suit, leave to defend may be granted unconditionally, provided the defence is found to be bona fide and the conduct of defendant is free from suspicion. Leave to defend may also be granted unconditionally, in case where the execution of the negotiable instrument is denied by the defendant and from the material before the Court it is not possible for it to record a positive finding in this regard at the stage of consideration of the application for grant of leave to defend. Similarly, where the claim in the suit on its face appears to be prima facie time-barred and there is no material before the Court to infer that the defendant has acknowledged his liability to pay the time-barred debt, leave to defend may be granted unconditionally. These instances are however, only illustrative and by no means exhaustive, as there may be other similar circumstances, which may persuade the Court to grant leave to defend unconditionally. However, where the defence disclosed by the defendant in his affidavit filed in support of application for grant of leave to defend is found by the Court to be illusory, or lacking bona fides, or is intended to delay the proceedings or is based on allegation of vague and general nature relating to misrepresentation, fraud and coercion without any supporting material, leave may be granted on condition of either deposit of the amount claimed in the suit or on furnishing of security for the same or on such other terms and conditions which the Court may think fit.*

19. Applying the standard laid down in the above cited two Supreme Court cases to the present case, it cannot be said that no defence at all is disclosed by the Appellant or that the defence set up by the Appellant is fake, without any material to support or just bald allegations without any substance. At worst, even if the Appellant's defence is treated as vague or unsatisfactory or there is a doubt as to its genuineness or appears to be very weak or a sham one, then leave to defend should be granted conditionally

putting the Appellant on terms to either furnish security or deposit the amount claimed by the Respondent in the Summary Suit.

20. In addition, the very factual premise on which the learned Single Judge had predicated his judgment being fallacious (as described in the preceding paragraphs) on account of misreading and non-reading of the pleadings and/or documentary record, on this ground too, the Impugned Judgment cannot sustain.

21. In our view, plausible defence has been made out by the Appellant and triable issues have been raised which require determination by the Court. The facts narrated and the documents produced in the Summary Suit by the Appellant 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 on the record through the process of evidence. The granting of the Leave to Defend application does not mean the Respondent is being non-suited. But the non-granting of the Leave to Defend application would be fatal for the Appellant in the given facts and circumstances who would be left with no recourse to establish its case (subject of course to any orders passed by the Supreme Court in appeal if any). The case law cited by the learned Counsel for Respondent are distinguishable and will not apply due to the materially different facts of the instant HCA.

22. In view of the reasoning herein, we, therefore, allow this HCA, set aside the Impugned Judgment and decree and grant the Appellant conditional leave to defend the Summary Suit with the direction to deposit the sum of Rs.15,098,520/- claimed in the Summary Suit with the Nazir of this Court within a period of twenty-one (21) days from today. The Nazir shall invest the said amount in any profit bearing government scheme. The Suit No.641 of 2011 stands restored and the parties may appear before the Single Judge (O.S.) for further proceedings in accordance with law. The pending application in the instant HCA stands disposed of. Each party shall bear its own costs.

JUDGE

JUDGE