

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

Present:

Nadeem Akhtar, J
Yousuf Ali Sayeed, J

1st Appeal No.67 of 2022

Ali Asghar Hashim Ali.....Appellant

Versus

Shabbir Hussain and others.....Respondents

Qaim Ali Memon, Advocate, for the Appellant.
R.F Virjee, Advocate, for the Respondents.

Date of hearing : 09.10.2023

ORDER

YOUSUF ALI SAYEED, J. - The captioned Appeal under Section 96 of Code of Civil Procedure impugns the Judgment rendered by the XIth Additional District & Sessions Judge, Karachi South on 15.07.2019 in Summary Suit No.59 of 2019 filed by Respondent No.1, decreeing the same in the sum of Rs.15,00,000/- with interest at the rate of 5% per annum from the date of filing until realization of that amount, and the Decree that then came to be drawn up accordingly on 18.07.2020.

2. Learned counsel for the Appellant broadly submitted that the impugned Judgment was bad in law as it was based on conjectures and surmises and was the result of a misreading and non-reading of evidence, thus constituted a miscarriage of justice. However, to bolster that submission, he merely argued that the cheques on which the Respondent No.1 had founded his claim had not been issued by the Appellant to him, hence the learned trial Court had erred in its interpretation of Section 118 of the Negotiable instruments Act, 1881, while considering the same to be applicable in the given circumstances marking the proceedings so as to accordingly hold the Appellant liable on those instruments and decree the Suit. On that basis, he sought that the impugned Judgment and Decree be set-aside.

3. Conversely, learned counsel for the Respondent submitted that the learned trial Court had arrived at a correct determination in terms of the impugned Judgment after properly appraising the evidence and applying the relevant provisions of law. He submitted that the Appeal was devoid of merit and sought its dismissal.

4. We have heard the arguments and considered the same in light of the material placed on record.

5. Considering the singular thrust of the argument advanced on behalf of the Appellant, it merits consideration that on examination of the respective pleadings put forward in the Suit, the learned trial Court framed the following issues:

1. Whether the suit of the plaintiff is not maintainable?

2. Whether the defendants are under obligation to pay the sum of Rs. 15,00,000/- to the plaintiff as remaining investment amount for which defendant No. 1 issued two cheque No. 19876746 dated 24-04-2016 of Rs. 500,000/- and cheque No. 19876745 dated 22-04-2016 of Rs. 10,00,000/- drawn on Soneri Bank, Barkat-e-Haidery Branch, Karachi which were dishonored on presentation due to insufficient balance?

3. Whether plaintiff is entitled for relief claimed by him?

4. What should the decree be?

6. As it transpired, while addressing Issues Nos.1 and 2, the learned trial Court observed and held as follows:

“5. Plaintiff in support of his case, examined himself and he produced five cheques, one cheque of Rs. 500,000/- of the account of defendant No. 1 and photocopy of cheque return memo of cheque No. CDA19876746 of Rs. 500,000/-, certified true copy of deposition of Muhammad Rafiq s/o Abdul Ghaffar recorded in Criminal case No. 2478/2017 pending before 24th Judicial Magistrate, Karachi South, and certified true copy of cheque No. CDA19876745 of Rs. 10,00,000/- and its bank return memo dated 25-07-2016 at Ex. P/1 to P/10 and he was also cross examined by the counsel for the defendant at length. The counsel for the plaintiff closed side of evidence vide endorsement at Ex. P. Defendant No. 1 also led his evidence and examined himself and produced his affidavit-in-evidence at Ex. D/1, certified true copy of judgment dated 22-07-2019 passed by the 24th Judicial Magistrate,

Karachi South in Criminal Case No. 2478/ 2017 Reg: The State Versus Ali Asghar Hashim and the certified true copy of the deposition of witness namely Muhammad Rafiq s/o Abdul Ghaffar in said criminal case at Ex. D/2 & D/3 and he was also cross examined by the learned counsel for plaintiff. The counsel for the defendant closed side of evidence vide endorsement at Ex. D.

Per section 118 of Negotiable Instruments Act, 1881, it may be legally presumed, until the contrary is proved, that every Negotiable Instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted endorsed, negotiated or transferred for consideration. Therefore, in the instant suit it may be legally presumed that the cheques in question was accepted, endorsed, negotiated or transferred for consideration, as the contrary is not proved by the defendant No. 1 in the suit in hand. Therefore, in my humble opinion the present summary suit filed by the plaintiff under Order XXXVII Rule 1 & 2, C.P.C. being within four corners of law is maintainable.

Therefore, Issue No. 1 is replied in negative.

12. Issue No.02.

From the evidence of the parties, it appears that the defendant No. 1 has not denied the issuance of two cheques bearing cheque No. CDA 19876746 of Rs. 500,000/- and cheque No. CDA 19876745 of Rs. 10,00,000/- both to be drawn on Soneri Bank, Barkat-e-Haidery Branch, Karachi. However, in his evidence, he has also deposed that he had given the said cheques to defendant No. 2. On the contrary, the plaintiff has deposed that defendant No. 2 had to pay Rs. 15,00,000/- to him against the goods purchased by him from the plaintiff but when he failed to pay the said amount within time then defendant No. 1 gave him two said cheques of total amount of Rs. 15,00,000/-for defendant No. 2 which were subsequently bounced on presentation. Per section 8 of the Negotiable Instruments Act, 1881, the plaintiff falls within the definition of 'holder' of the said cheques. For the convenience section 8 of the Negotiable Instruments Act, 1881, is reproduced as under:

“8. Holder. --- The 'holder' of a promissory note, bill of exchange or cheque means the payee or endorsee who is in possession of it or the bearer thereof but does not include a beneficial owner claiming through a benamidar.”

It further appears that per section 53-A of the same Act a holder in due course may enforce payment of the Instrument for the full amount thereof against all parties liable thereon; and per section 57-B of the same Act, a holder may receive payment in due course under a negotiable instrument and he may also sue on such instruments in his own name. For the convenience section 53-A and 57-B of the same Act, are also reproduced as under:

“53-A. Rights of holder in due course.---A holder in due course holds the negotiable instruments free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.”

“57-B. Rights of holder.---A holder may receive payment in due course under a negotiable instrument and further negotiate it in the manner provided by this Act; he may also sue on such instrument in his own name.”

Per section 118 of the Negotiable Instruments Act, 1881, it may also be legally presumed, until the contrary is proved, that holder is a holder in due course. Section 118 of the same Act, is also reproduced as under for the convenience:-

“118. Presumption as to negotiable Instruments.— Until the contrary is proved, the following presumption shall be made:-

(a) of consideration: that every negotiable instrument was made or drawn for consideration and that every such instruments, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

(b) as to date: that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time for acceptance: that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer: that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsement: that the indorsements appearing upon a negotiable were made in the order in which they appear thereon;

(f) as to stamp: that a lost promissory note, bill of exchange or Cheque was duly stamped;

(g) that holder is a holder in due course: that the holder of a negotiable instrument is a holder in due course; provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.”

Here it will not be out of place to mention that in this matter defendant No. 1 has not pleaded that the cheques in question were obtained by means of an offence or fraud or for unlawful consideration; and therefore, in my humble opinion defendant No. 1 has no any rebuttal to the legal presumption that the plaintiff being holder of the said cheques is a holder in due course per section 118 of the said Act.

So far as the consideration is concerned; same section 118 of the said Act provides that it may be legally presumed, until the contrary is proved that every negotiable instrument was made or drawn for consideration and the same was accepted, endorsed, negotiated or transferred for consideration. Since defendant No. 1 has failed to prove the contrary, therefore, it may be legally presumed that the said cheques were made or drawn and subsequently negotiated or transferred for consideration viz. for remaining payment of goods supplied by the plaintiff to defendant No. 2.

Therefore, in view of the above discussion issue No. 2 is replied in affirmative.”

7. As is apparent, the very argument canvassed before us has been appraised in the impugned Judgment at some length, and upon consideration of the matter we see no infirmity in the assessment of the learned trial Court dispelling the same in view of the attendant circumstances and cited provisions of the Act on which reliance was placed.

8. The Appeal is thus found to be meritless, and stands dismissed accordingly, but with no order as to costs.

JUDGE

JUDGE

Karachi
Dated