

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Shafi Siddiqui
& Jawad Akbar Sarwana JJ

Muhammad Muzzammil v. Khurram Saeed

First Appeal No.61 of 2023

Appellant: Muhammad Muzzammil, through
Mr. Sardar Sher Afzal, Advocate

Respondent: Khurram Saeed through Mr.
Sardar Abdul Hameed, Advocate

Date of hearing: 06.11.2023

Date of decision: 14.11.2023

J U D G M E N T

Jawad A. Sarwana, J: The Appellant/Defendant (“Muhammad Muzammil” / “Muzammil”) has filed First Appeal No.61 of 2023 under Section 96 CPC aggrieved by the IXth Additional District & Sessions Judge (MCAC) Karachi East (the “trial court”) impugned judgment and decree dated 29.04.2023 passed in Summary Suit No.162/2022.

2. The brief facts of the First Appeal are that in 2021, the Respondent/Plaintiff (“Khurram Saeed” / “Khurram”) extended a loan of Rs.5,000,000 to Muzammil, who defaulted on the loan repayment. Thereafter, Muzammil issued two cheques of Rs.2,500,000 each drawn on Bank AL Habib Limited favouring Khurram. When both the cheques were dishonoured/bounced, Khurram filed Summary Suit No.162/2022 against Muzammil on 28.11.2022. Muzammil contested the Suit and applied for leave to defend. On 22.03.2023, the trial court granted conditional leave to defend to Muzammil subject to furnishing

solvent surety of Rs.5,000,000 within three weeks' time. Muzammil did not submit surety within the specific time. On 17.04.2023, the trial court recalled the earlier order granting conditional leave. Khurram's summary suit proceeded unchallenged as if no leave to defend was filed. The trial court recorded Khurram's evidence and, on 29.04.2023, passed judgment and decree against Muzammil. On 27.05.2023, Muzammil filed First Appeal before the High Court of Sindh and, pursuant to an Order dated 24.08.2023 passed by an earlier Bench on 12.09.2023, he deposited in Court surety furnished by one Shah Zaman Raheel in the decretal amount comprising Gift Deed, Irrevocable Power of Attorney, General Power of Attorney and Sale Deed of Office Premises No.1003, 10th Floor, measuring 780 sq. yds. In Serai Quarters, Gul Tower, Karachi.

3. Muzammil's Counsel submits that now that Muzammil has submitted a solvent surety in the High Court, the Appellant (Muzammil) may be allowed to defend the Summary Suit before the trial court. He argues that the Judgment was passed hurriedly in a slipshod manner without considering that a review application was pending. As such, the Judgment and Decree may be set aside. Khurram's Counsel vehemently opposes Muzammil's contentions. He contends that Muzammil's Counsel kept delaying the filing of the leave to defend application from the date of his appearance before the trial court on 06.12.2022 to 10.01.2023. He alleges that Muzammil's Counsel kept seeking adjournments and filing frivolous applications such that the substantive hearing of the leave to defend application was delayed. Further, when conditional leave to defend was granted to Muzammil, he failed to furnish solvent surety. Consequently, the trial court has rightly passed judgment and decree against Muzammil, and the appeal filed by Muzammil should be dismissed.

4. We have heard the arguments of both Counsels and perused the documents available with the Appeal. A summary of the salient

points in deciding this Appeal is highlighted through summarized headlines with underlining. Details of the headlines appears below each headline.

Delays by Appellant in the filing of leave to defend application
(06.12.2022 to 10.01.2023)

5. The record shows that on 01.12.2022, the trial court fixed the case for repeat service through bailiff and publication and courier confirmation on 06.12.2022. Khurram Saeed's Advocate submitted courier receipt to the trial court on the next date when Muzammil's Counsel entered appearance before the trial court on 06.12.2022. He was required to file his leave to defend application within ten (10) days, but he did not do so.¹ Instead, on 16.12.2022, Muzammil filed an application under section 148 seeking an extension of time to file leave to defend application, which was allowed, and the matter was adjourned to 23.12.2022. On 23.12.2022, he filed yet another application for an extension of time, and the case was adjourned to the following day, i.e. 24.12.2022. Thereafter, on 24.12.2022 the matter was adjourned to 10.01.2023 for filing of leave to defend application, when he finally filed the leave to defend application. Muzammil's Counsel submission that Muzammil was incarcerated during this period and was not available to sign the Affidavit is not denied by Khurram's Counsel and is also mentioned in the short orders passed by the trial court. Accordingly, in the circumstances, this delay, as contended by Khurram's Counsel, does not carry weight.

Delays by Appellant in the hearing of leave to defend application
(10.01.2023 to 22.03.2023)

¹ Article 159 of the Limitation Act, 1908 for leave to appear and defend a suit under the summary procedure referred to or under Order XXXVII of the Civil Procedure Code, 1908, prescribes ten days from the date when the summons is served to the defendant to file leave to appear and defend a summary suit.

6. Muzammil filed leave to defend application on 10.01.2023, which was not heard and decided until 22.03.2023. The following points emerge from a perusal of the trial court's order sheets as well as the orders passed by the District Court Karachi East, as attached to the appeal. The bullet points suggest a highly contentious approach to prolong the trial was adopted by Muzammil's Counsel from 10.01.2023 to 22.03.2023:

- (i) Frequent adjournments: The trial court's diary reveals that Muzammil's Counsel requested adjournments on 04.02.2023, 10.02.2023, 22.02.2023, 25.02.2023, and 04.03.2023.
- (ii) Civil Transfer Application No.18 of 2023 before District Court Karachi East: Muzammil's Counsel filed a Civil Transfer Application before the Court of District Judge Karachi East with prayer to transfer the Summary Suit No.162/2022 from the trial court to the Court of First SCJ Karachi East for consolidation of Muzammil's Suit for cancellation with Khurram's summary suit. The Application was dismissed on 20.02.2023.
- (iii) Application under Order 46 Rule 1 r/w Section 113 CPC: As soon as (ii) above was decided, on 25.02.2023, Muzammil's Counsel filed before the trial court an Application under Order 46 Rule 1 r/w/ Section 113 CPC to draw up a statement of the facts of the case and the point on which doubt is entertained for reference of questions to the High Court. Muzammil's Counsel used the aforesaid application and its rounds of filing counter-affidavit and rejoinder as an excuse to delay the hearing of his client's leave to defend the application. Both applications were listed together before the trial court. This application under Order 46 Rule 1 r/w/ Section 113 CPC was eventually dismissed on 17.04.2023.

7. The aforementioned applications filed by Muzammil, from time to time, provided his Counsel with continuing opportunities to ask for time from the trial court and delay the hearing of Muzammil's leave to defend application pending hearing in Khurram's Summary Suit.

Delays by Appellant in furnishing Solvent Surety to the trial court
(22.03.2023 to 29.04.2023)

8. The trial court granted Muzammil conditional leave to defend vide order dated 22.03.2023. He was ordered to furnish one solvent surety in the sum of Rs.5,000,000 to the satisfaction of the trial court, along with a written statement within three weeks, failing which the trial court's leave granting order would stand recalled. On 10.04.2023, Muzammil filed an application for an extension of time to furnish solvent surety, which request was granted by the trial court but he did not do so. On 17.04.2023, the trial court recalled the leave granting order.

9. Yet again, instead of submitting a solvent surety before the next date of hearing, i.e. 29.04.2023, Muzammil filed an Application under Order 47 read with Section 114 CPC to review and recall the order of 17.04.2023. However, on 29.04.2023, the said Application was dismissed by the Court, whereafter the Court proceeded to record ex-parte evidence and announce Judgment and Decree in Khurram's Civil Suit – all on the same date, i.e. 29.04.2023.

Appellant Delays in furnishing Solvent Surety before High Court

10. Muzammil filed this First Appeal in the High Court on 27.05.2023, yet he did not proceed with the matter. Instead, on 16.08.2023, he filed in this Court a Civil Transfer Application No.49/2023 seeking certain orders from the High Court regarding the execution proceedings arising out of Khurram's Summary Suit No.162/2022 and another Suit No.543/2022 filed by him (Muzammil).

The said Application was eventually dismissed by the learned Single Judge on 18.08.2023.²

11. Muzammil's Counsel moved an urgent application for a hearing of this Appeal on 24.08.2023 and thereafter finally submitted solvent surety pursuant to the Order passed by the earlier bench on 12.09.2023.

12. Muzammil's conduct does not inspire confidence. There appears to be a consistent pattern of delaying tactics on his part. Muzammil's grounds of appeal rest on Article 10-A of the Constitution of the Islamic Republic of Pakistan. His Counsel argued that his client had been deprived of his right to a fair trial. Reliance on Article 10-A is misconceived. Article 10-A is applicable where a person is condemned unheard or action against a person is taken without resorting to due process of law. This is clearly not the case. If anything, the record of the trial court highlighted above shows repeated indulgence granted by the trial court to Muzammil's Counsel to defend the summary suit. He was not condemned unheard by the trial court. Another ground of appeal was that the cheques were tempered, but there is no documentary evidence to corroborate this position. Finally, Muzammil seeks cancellation of the underlying agreement, which is the basis of his suit for cancellation. His plea does not lie in this summary suit. In short, we are not convinced by the defence raised by Muzammil's Counsel against the enforcement of the Judgment and Decree. We have also perused the impugned judgment and find the same to be well-reasoned. The summary suit against Muzammil turned on dishonoured cheques, and the proof of dishonour was annexed to the Plaint. The trial court has rightly observed that the presumption regarding the cheques in question

² There appears to be some disconnect with regards to the transfer application filed in the High Court, The Appeal file on page 123 has a copy of a civil transfer application apparently filed in the High Court, but the said application does not bear a presentation stamp of the Court except that its last/final page states: "DATED ___ April 2023". On the other hand, the certified copy of the title page of CTA No.49/2023 bears a presentation date of filing of CTA as "16.08.2023".

under Section 118 of the Negotiable Instruments Act, 1881, is to be admitted. Muzammil has not raised any material grounds in this First Appeal to negate such inference. The trial court even took the more conservative and cautious approach in a summary suit, by not immediately announcing judgment and decree. Instead, the trial court ordered Khurram to file an affidavit in evidence of ex-parte proof before passing judgment and decree. This enabled the trial court to satisfy itself further as to the veracity of Khurram's claim against Muzammil. No legal grounds or special circumstances have been made out to set aside the decree and, if necessary, to stay or set aside the execution. Even otherwise, no case has been made out to hold that the conditional order was illegal or unjustified. Be that as it may, the solvent surety is already deposited with this Court. Muzammil now has to live with its consequences. We are of the opinion that the learned trial court has not fallen into any error while passing the impugned judgment. The impugned judgment is a speaking order. It is evident that the Court has applied its mind.

6. In view of the above discussion, the impugned judgment and decree in the summary suit do not suffer from any illegality or material irregularity which calls for any interference. Accordingly, this First Appeal is dismissed along with all listed applications, with parties to bear their own costs. The fate of the surety furnished to this Court is now linked to and to be articulated with the execution proceedings, which will decide, as deemed fit and proper, the satisfaction of execution/decreed.

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