IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

First Civil Appeal No. S- 47 of 2023

(Shahbaz Ahmed vs. Abdul Khalique)

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE

1. For orders on O/objection at flag-A.
2. For hearing of main case.
3. For hearing of CMA No.911 /2024 (Stay)

Date of hearing: **27 May 2024**
Date of order: **31 May 2024**

Mr. Rana Hafiz Tanveer Ahmed, Advocate for the Appellant.
Mr. Achar Khan Gabole, Advocate for the Respondent.

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O R D E R

MOHAMMAD ABDUR RAHMAN, J. Through this Appeal, maintained under Section 96 of Code of Civil Procedure, 1908, the Appellant impugns the Judgement dated 30 August 2023 and Decree dated 6 September 2023 passed by the Ist Additional District Judge, Naushehro Feroze in Summary Suit No. 9 of 2018.

2. The Respondent had maintained Summary Suit No. 9 of 2018 under Order XXXVII Rule 1 of the Code of Civil Procedure, 1908 on the basis of Cheque No. 2277761614 dated 5 April 2017 (hereinafter referred to as the "Cheque") presented on account No.38ABP0010035512320015 maintained with Allied Bank of Pakistan Limited, Bhirya Road Branch being dishonoured on account of unavailability of funds. The dishonor of the Cheque also led to the Respondent registering FIR No.23 of 2017 under Section 489-F of the Pakistan Penal Code, 1860 at Police Station Bhirya Road and in which case the Appellant was acquitted vide judgment dated 9 December, 2017 and against which order a Criminal Acquittal Appeal is pending before this Court.

3. Upon filing of the Summary Suit the Appellant maintained an application under Order XXXVII Rule 3 read with Section 151 of the Code of Civil Procedure, 1908 being an application for Leave to Defend which was allowed vide order dated 25 October, 2018 subject to the furnishing of surety.

4. The Respondent contends that he runs a wholesale sugar business. He contends that on 5 January 2017 he supplied the Appellant with sugar of an amount

of Rs 950,000 (Rupees Nine Hundred and Fifty Thousand) payment of which was made by the Appellant by the Cheque which was postdated so as to offer the Appellant credit.

5. The Appellant denies such a contention and states that while the Cheque is presented on his account and while the signature is not forged, he claims he had accidentally lost the Cheque and which has ended up in the custody of the respondent and who presented it to blackmail the Appellant.

6. After granting the Application for leave to Defend the Ist Additional District Judge, Naushehro Feroze was framed the following issues:

> *" … 1. Whether defendant issued cheque of Rs.9,50,000/- to the plaintiff, which was dishonoured and such payment was made out of business dealing?*
>
> *2. Whether the plaintiff lodged FIR No.23/2017 P.S Bhirya Road on the basis of Cheque in which defendant has been acquitted?*
>
> *3. Whether plaintiff is entitled for any relief claimed?*
>
> *4. What should the decree be?"*

7. Evidence was adduced by both the Appellant and the Respondent and where after the Ist Additional District Judge, Naushehro Feroze was pleased to decree Summary Suit No. 9 of 2018 holding that:

(i) on the balance of probabilities, as the Appellant was unable to demonstrate how he had come to misplace the Cheque, the contentions of the Respondent as to the manner in which the Cheque had been issued were not been rebutted;

(ii) that presumptions under Section 118 of the Negotiable Instruments Act, 1881 regarding the veracity of the issuance of the Cheque had not been rebutted by the Appellant; and

(iii) the dismissal of the FIR No.23 of 2017, being a criminal case would not have any bearing on Summary Suit No. 9 of 2018

8. Mr. Rana Hafiz Tanveer Ahmed entered appearance on behalf of the Appellant and contended that the Judgement and Decree each passed by the Ist Additional District Judge, Naushehro Feroze in Summary Suit No. 9 of 2018 could not be sustained. He argued that the Cheque was admittedly presented on his

account and was executed by him but which the Appellant had accidently misplaced and which had been come into the hands of the Respondent and who had, with mala fide intent, presented the same. While admitting that the Respondents is known to him he contended that he has never entered into any agreement for the purchase of sugar as he is the poultry business. He further averred that if there was such a transaction the onus was on the Respondent to prove the consideration had passed to the Appellant before he is to be lumbered with obligation of proving as to whether or not payment was to be made by him in respect of such an Agreement. He relied upon the decision reported as ***Salar Abdul Rau v. Mst. Barkat Bibi***[1] to state that the onus was on the Respondents to prove the entire transaction prior to him justifying why the Cheque was not honoured. He also relied upon an unreported decision of learned Single Judge of this Court bearing First Civil Appeal No.S-04 of 2023 entitled ***Arsalan Buriro v. Rustam Ali Tunio*** wherein the procedure for deciding a summary suit maintained under Order XXXVII of the Code of Civil Procedure, 1908 was clarified.

9. Mr. Achar Khan Gabole, who entered appearance on behalf of the Respondent simply relied on the evidence of the Appellant and contended that as he had admitted that the Cheque was presented on his account and that the signature had not been forged, clearly his contention that the Cheque had been misplaced and somehow ended up in the custody of the Respondent and who presented the same with mala fide intent cannot be believed. He submitted that once these two facts are proved, keeping in mind the nature of the business of the respondents, no further obligation occurred on him to prove the entire agreement as between himself and the Appellant as to do so would defeat the entire process of the summary suit. He did not rely on any law decision in his support.

10. I have heard Mr. Hafiz Rana Tanveer Ahmed and Mr. Achar Khan Gabole and perused the record. The points the require determination in this Appeal are as hereinunder:

(i) Whether the Appellant had issued the Cheque in favour of the Respondent ?;

(ii) Whether the Appellant has, on the balance of probabilities been able to, rebut the presumptions under Section 118 of the Negotiable Instruments Act, 1881?

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[1] 1972 SCMR 332

(iii) What should the Decree be?

I propose to decide each issue in turn.

(i) Whether the Appellant had issued the Cheque in favour of the Respondent?

11. The Appellant in his deposition has confirmed that the Cheque was issued on his account and that the signature on the Cheque is in fact his. He however denies that he ever issued the Cheque in favour of the Respondent and contends that he misplaced the Cheque and it came to be in the possession of the Respondent and who with mala fide intent presented it with an intent to blackmail the Respondent. As the averment has been made by the Appellant that he misplaced the Cheque, hence under Article 117 of the Qanun-e Shahdat Order, 1984, the onus is on the Appellant to prove as to the fact that he misplaced the Cheque. In this regard I have perused the deposition of the Appellant and which does not inspire much confidence. The Plaintiff has averred that he was being blackmailed by the Respondent and deposed in his Examination in Chief that:

> " … *I had lost two cheques where-after I received phone call of the Complainant that he had my cheques with him and demanded payment of Rs, 1500,000/- and told that if I pay him such amount he would return the cheques to me…"*

Under Cross Examination the Appellant further deposed that:

> " … *I do no remember the exact date and place on which and where I received phone call from the Plaintiff asking me to pay Rs. 15,00,000/- I did not complain to any respectable personality against the phone call and threat made by the plaintiff. Voluntarily states that I went to my bank asked them not to honour the cheque. I do not remember the exact date on which I went to bank. I have not produced my application made to the bank in this regard. Voluntarily states the bank manger has produced my application. …"*

I must admit that on an appraisal of the evidence I find the contentions of the Appellant unconvincing. A reasonable man when confronted with a phone call by which monies are being extorted from him would at the very least make a complaint to the police submitting, not only that Cheques have been misplaced by him, but also that he is being blackmailed and then to allow the Police to carry out the requisite investigation. Surprisingly this was not done by the Appellant. Instead the only action taken by him was to make an application to his Bank not to honour the Cheque and which fact has been deposed by the Manager of Allied Bank Dour Branch. The Appellant has not deposed as to how and when he lost the cheque, as

to why these alleged lost cheques were signed by him and also has failed suggest as to how the Cheque could possibly have come into the possession of the Respondent. All that has been proved is that the Cheque was executed by the Appellant and was correctly presented on his account and that he stopped payment on the Cheque. The remaining facts in dispute that Cheque was in fact lost and the manner in which it was lost remained unproved. In the circumstances I am of the opinion that the Appellant having failed to prove that the Cheque was in fact lost by him to my mind would lead to the conclusion that in fact the Cheque had been issue by him to the Respondent.

(ii) Whether the Appellant has, on the balance of probabilities been able to, rebut the presumptions under Section 118 of the Negotiable Instruments Act, 1881?

12. The Appellant contends that it is necessary for the Respondent to prove that consideration had passed from the Respondent to the Appellant and in lieu of which the Cheque was issued, failing which no demand for payment can be made as against the Appellant. In this regard the Appellant contended that as the Respondent had alleged that there was an agreement as between the Appellant and the Respondent, in the first instance, the onus was on the Respondent to prove the Agreement and that consideration had passed pursuant to that Agreement and which entitled the Respondent to maintain a claim for payment. While this would, in terms of Article 117 of the Qanun e Shahdat Order, 1984, generally be correct, however those provisions are subject to the presumptions that are contained in Section 118 of the Negotiable Instruments Act, 1881 and which reads as hereinunder:

> " … *118. Presumptions as to negotiable instruments---(a) Of consideration; (b) as to date; (c). as to time of acceptance; (d) as to time of transfer; (e) as to order of endorsements (1) as to stamp; (g) that holder is a holder in due course. ---Until the contrary is proved, the following presumptions shall be made*
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> *(a) that every negotiable instrument was made or drawn of consideration, and that every such instrument, when it has been accepted, endorsed negotiated or transferred, was accepted, endorsed negotiated or transferred for consideration:*
>
> *(b) that every negotiable instrument bearing a date was made or drawn on such date;*
> *(c) that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;*
>
> *(d) that every transfer of a negotiable instrument was made before its maturity; that endorsements appearing upon a negotiable.*
>
> *(e) that endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;*
>
> *(f) that a lost promissory note, bill of exchange or cheque was duly stamped;*

> *(g) 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 of 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."*

As can be seen in terms of the passing of consideration under Sub-Section (a) of Section 118 of the Negotiable Instruments Act, 1881 there is a presumption that consideration had passed in favour of the person issuing the negotiable instrument. The presumption is of course rebuttable, but on account of the presumption, the onus would be on the Appellant to prove that in fact consideration had not passed to him. Reliance in this regard can be placed on the decision of the Supreme Court of Pakistan reported as ***Fine Textile Mills Ltd, Karachi vs. Haji Umar***[2] has held that:

> *" … It is no doubt true that under section 118 of the Negotiable Instruments Act there is an initial presumption that a negotiable instrument is made, drawn, accepted or endorsed for consideration, but this presumption is a rebutable presumption* ***and the onus is on the person denying consideration to allege and prove the same."***

In this regard, in his Examination in Chief, the Appellant has contended that:

> *" … I have never had any kind of business relationship with him nor did I purchase any commodity from him as I am engaged in poultry business."*

Under Cross Examination the Appellant again contended that:

> *" … It is incorrect to suggest that I issued the cheque No. 22776164 towards said consideration of sugar worth the above mentioned amount in presence of witnesses Mehboob Illahi and Abdul Rehman."*

Conversely, the Respondent aside from deposing himself caused to depose two person i.e. Mehboob Illahi and Abdul Rehman each of whom who deposed in favour of the Respondents and whose evidence confirms the time and date when the Agreement took place and who also confirm that the Cheque was issued by the Appellant in favour of the Respondent on that date and which evidence to my mind has not been rebutted by the Appellant.

13. The standard of proof in civil cases has been described in the decision reported as ***Miller v Minister of Pensions***[3]*:*

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[2] PLD 1963 SC 163

[3] 1947 2 All ER 372

> " … *"If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not."*

A similar, albeit more mathematical explanation, was given in the decision reported as ***Re: B***[4] wherein it was held that:

> " … *If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."*

The question that remains is whether or on the balance of probabilities, keeping in mind the nature of business being undocumented, as to whether the bare statement of the Appellant and his witness or the Respondents and his witnesses are to be believed. To my mind, the contentions of the Respondents and the consistency of their statements and the fact that they have a Cheque issued in the favour does tilt the balance in favour of the Respondents. I am therefore of the opinion that the Appellant has failed to rebut the presumption that he had not received consideration for the payment. This Appeal must therefore be dismissed.

(iii) What should the Decree be?

14. For the foregoing reasons, I am of the opinion that there is no illegality or material infirmity in either the Judgement dated 30 August 2023 or the Decree dated 6 September 2023 passed by the Ist Additional District Judge, Naushehro Feroze in Summary Suit No. 9 of 2018 and each of which are maintained in this Appeal. This Appeal is therefore misconceived and is dismissed, along with all listed applications, with no order as to costs.

J U D G E

[4] 2008 UKHL 350

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