

*Judgment Sheet*IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**1st Civil Appeal No.S-30 of 2021**

Appellant : Ghulam Mustafa
Through Mr. Niazuddin N. Memon, Advocate

Respondent : Rashid Ali through Mr. Asif Hyder
Phulpoto, Advocate

Date of hearing : **16.10.2023**

Date of Decision : **06.11.2023**

JUDGMENT

ARBAB ALI HAKRO, J.-Through this Appeal under Section 96 of the Code of Civil Procedure, 1908 (“**of the Code**”), the Defendant (Appellant herein) has impugned Judgment and Decree dated 12.8.2021, passed by Additional District Judge Gambat (“**the trial Court**”), in Summary Suit No.05 of 2019, whereby the said Suit filed by Plaintiff (“**Respondent herein**”) was decreed.

2. The brief facts of the case are that the Appellant and his father, Ameer Bux, were engaged in business to purchase seeds, fertilizer and diesel on a credit basis from Respondent during the tenure of said business, an amount of Rs.22,00,000/- remained outstanding towards Defendant (Appellant herein). It is asserted that on 05.08.2018, the Appellant visited the shop of Respondent and issued a cheque bearing No.1591976308 of his bank account No.0529529301000209, MCB Branch, Sobho Dero, in lieu of repayment of said amount. On the cited date, Respondent presented the said cheque before the concerned Bank for encashment, but the same was dishonoured due to insufficient funds. After that, Respondent approached Applicant for repayment, but he kept him false hopes and ultimately refused; hence, he filed a summary suit for recovery of the aforesaid amount.

On being summoned, the Appellant filed an application under Order XXXVII Rule 3 of the Code for leave to defend the Suit, which was allowed by the trial Court on 22.10.2020, with directions to furnish a security in the shape of a Savings Certificate in the sum of Rs.2,200,000/- by next date of hearing viz: 06.11.2020. However, on the said date, the Appellant moved an application under Section 151 of the Code, praying to convert the Security amount into equal surety amount. The trial Court declined the said application and, in consequence thereof, recalled the Order dated 22.10.2020 and debarred the Appellant from filing a written statement. Thereafter, on the direction of the Court, the Respondent filed his Affidavit-in-evidence in *ex parte* proof and then the Suit was decreed.

3. At the very outset, learned Counsel representing the Appellant contended that the impugned judgment and decree passed by the trial Court is illegal, unlawful and unsustainable under the law. It is next argued that the instrument/cheque did not contain the signature of Appellant, which was managed by the Respondent; besides Manager of that Bank in his report has stated that the signature on the cheque is different from the signature of Appellant; that the condition imposed by learned trial Court with regard to payment of principle amount of Rs.22,00,000/- together with interest @ 6% percent per annum from the date of institution of summary suit is concerned, the same is punitive as there is no any procedure provided by the law for payment of decretal amount as set by learned trial Court; besides Appellant has been condemned unheard; however law favours adjudication of matter on merits rather on technicalities; that the right of fair trial has not been provided, which is a fundamental right under Article 10-A and in the presence of such constitutional obligations, the Court is required to decide the matter on merits. In the end, he submits that the impugned judgment and decree passed by the learned trial Court may be set aside by granting unconditional leave to appear and defend the Suit so that the matter may be adjudicated afresh on merits.

4. Learned Counsel representing the Respondent, while supporting the impugned judgment and decree passed by the learned trial Court, contended that the same is legal, lawful and warranted by law. So far, the contention of learned Counsel for the Appellant by declining leave to defend the Suit is concerned, and the Appellant had failed to fulfill conditions specified in the conditional Order granting leave to defend the Suit, the trial Court was justified in passing the decree against the Appellant; that financial inability to provide security has never been accepted as a ground for allowing unconditional defence, hence such argument of learned Counsel is not tenable in law. Ultimately, he submits that instant 1st Civil Appeal, devoid of merit, may be dismissed with costs. In support of his contention, learned Counsel placed reliance upon the case law reported as **1999 SCMR 2832 and 2004 SCMR 882**.

5. I have heard the arguments advanced by learned Counsel for the parties and minutely perused the material available on record, including the case law cited at the bar.

6. Perusal of the record reveals that vide Order dated 22.10.2020, the trial Court allowed the application for leave to defend subject to furnishing security in the shape of Savings Certificates equal to the suit amount. On the fixed date, Appellant, instead of complying with the above Order, had moved an application seeking the direction that security amount may be converted into a surety amount. Rule 3 of Order XXXVII of the Code deals with the case in which the appellant/Defendant, after receipt of the summons, applied for leave to defend. It will be advantageous to reproduce the same for ready reference as under: -

3. Defendant showing defence on merit to have leave to appear. (1) The Court shall, upon application by the Defendant, give leave to appear and to defend the Suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

7. A plain reading of sub-rule 2 of Rule 3 of the above Order of the Code reflects that leave to defend in a suit can be granted unconditionally or subject to such terms as to payment into the Court giving **security**, framing and recording issues or otherwise as the Court think fit. It would be appropriate to discuss the difference between “**security**” and “**surety**”. In the context of finance, **security** refers to a financial instrument such as a stock or bond that represents ownership or creditorship rights and is often traded in secondary markets. It can also refer to measures adopted by a government or organization to prevent espionage, sabotage, or attack. In general, security is freedom from or resilience against potential harm caused by others. On the other hand, **surety** is a promise by one party to assume responsibility for the debt obligation of another party if that party defaults. Usually, a surety bond or surety is a promise by a surety or guarantor to pay one party (the obligee) a certain amount if another party (the principal) fails to meet some obligation, such as fulfilling the terms of a contract. In summary, security refers to freedom from harm or measures taken to prevent harm, while surety refers to a promise by one party to assume responsibility for the debt obligation of another party if that party defaults.

8. As per law, it is for the trial Court to have cognizance of the matter to decide the condition on which leave to defend is to be granted. The trial Court has taken into consideration the facts of the case and, with the conscious application of mind, granted leave to the appellant subject to furnishing security in the shape of Savings Certificates. However, the Appellant did not comply with the Order of the trial Court, so he was not entitled to any relief and the Order for granting leave to defend was rightly recalled. In this regard, reliance is placed on the case of Haji Ali Khan and company

Abbottabad and 8 others v. M/s Allied Bank of Pakistan Limited Abbottabad (PLD 1995 Supreme Court 362).

9. It is evident from the record that the conditional Order was passed on 22.10.2020, and the case was posted for 6.11.2020 for furnishing security; however, on 06.11.2020, the Appellant moved an application for conversion of security amount into surety amount, and application was dismissed by the trial Court on 6.11.2020; consequently, Suit was finally decreed on 12.8.2021. For about nine months and six days, the proceedings remained pending for adjudication before the trial Court. However, the Appellant did not bother to challenge the above Orders and had attained finality. In the case of Col. (Retd.) Ashfaq Ahmed and others v. Sh. Muhammad Wasim (1999 SCMR 2832), it was observed by the Apex Court that:

"It may be seen that claim for recovery of amount in Suit filed by plaintiff/respondent is mainly based on pronote and various post-dated cheques issued by petitioners for clearing their liability. Trial Court, in the instant case had conditionally granted leave to defend on 9-10-1994, whereas final decree was eventually passed against the petitioners by said Court on 13-5-1998. Evidently petitioners have not fulfilled the condition and failed to provide bank guarantee till final disposal of the Suit, besides on inquiry during arguments, learned Counsel for petitioners was not able to furnish any plausible reasons why despite presentment of cheques which had been undisputedly issued by the petitioners, no protest was lodged for displaying their stand and alleged intention of not honouring encashing the same. We are aware that unless anything contrary is duly established, presumption of validity flows in favour of Negotiable Instruments specially when its execution is not disputed. Therefore, in the absence of any tangible rebuttal, justifiable reasons or plausible cause the trial Court was competent to award decree on the existing material. There is hardly any glaring defect or legal infirmity in the conclusions for passing impugned judgment; which may warrant interference."

In the case of Murtaza Haseeb Textile Mills v. Sitara Chemical

Industries(2004 SCMR 882), the Apex Court observed the conduct of the Defendant during the trial of the Suit and held that: -

"A perusal of the decree passed by the learned trial Court demonstrates that the petitioner's conduct was very much contumacious. He tried not to comply with the Order of the learned trial Judge through different tactics and ultimately the learned trial Judge had no option but to decree the Suit as the petitioner failed to comply with the direction. The learned trial Judge gave the petitioner sufficient time to comply with his earlier direction. The petitioner, on the contrary instead of complying with the same, unnecessarily involved the Respondent in this uncalled-for litigation."

10. Notwithstanding, in a summary suit, when Defendant does not obtain leave or leave is refused to him, or where Defendant fails to comply with a conditional order, Defendant is precluded from further contesting Plaintiff's claim. By reasons of the wording of Order XXXVII Rule 2 and 3 of the Code, there is further disability for Defendant that the allegations in the plaint must be deemed to be admitted, and Plaintiff would be entitled to a decree. Order XXXVII of the Code not only provides for abridgement of the procedure of suits covered by the said provisions but also the said provisions restrict and/or curtail the rights of the Defendants in these suits to contest the Plaintiff's claims. When the matter is carried in Appeal, the Defendant who did not obtain leave or had failed to comply with the conditional Order continues to suffer under the same disability. It could never be said that because of presenting an Appeal against the *ex parte* decree, the Defendant would have any greater right to contest the Plaintiff's claim. The appeals preferred from such *ex parte* decrees passed in summary suits must proceed on the basis that such Defendants had admitted the Plaintiff's case as stated in the plaint and that the Plaintiffs were entitled to a decree. Although there are undoubtedly similarities between an *ex parte* decree and a decree passed under Order XXXVII Rule 3 of the Code, the analogy cannot be carried too far in view of the basic differences between the two kinds of decrees. Therefore, even in law, although an Appeal lies from the

exparte decree passed under Order XXXVII Rule 3 of the Code, the consistent judicial view has been that the finality of a conditional order practically precludes the Defendant/Appellant from assailing the decree on merits.

11. In case of an appeal against an *exparte* decree passed in a summary suit for recovery amount based on a dishonoured cheque, which was given in a business transaction, the Appellant cannot raise an objection that the cheque in question does not bear his signature and handwriting, or that it was taken/stolen from his Otaq or kept at the shop of the Respondent. The Appellant is no longer allowed to defend the Suit and submit any further evidence because he failed to comply with the conditional Order of leave to defend. The Appellant was required to raise questions regarding the proof and admissibility of documents in a suit, but he failed to do so; resultantly, his failure to furnish the security and obtain leave to defend, in such eventualities, Court shall be considered allegations in the plaint to be admitted. In view of the specific provision in Rule (2) (*ibid*) and also in view of the presumption as to the cheque in question under section 118 of the Negotiable Instruments Act 1881, the contents of the plaint and the allegations made therein are to be deemed to be admitted. The plaintiff was therefore entitled to a decree. In case **of Muhammad Ramzan and others v. Ghulam Qadir (2011 SCMR 659)** it was held by Hon'ble Supreme Court of Pakistan as under:-

“it is not denied that it was within the discretion of the learned trial court to grant leave to defend the suit subject to imposition of condition. The order of the trial court on that regard was perfectly legal, furthermore it was not challenged by the petitioners. The petitioners were given sufficient time to comply with the direction of the trial court vis-a-vis furnishing the surety bounds but the orders were not complied with for no justifiable reasons. The learned trial court rightly dismissed the applications of the petitioners seeking leave to defend. The learned counsel failed to point out an irregularity or infirmity in the judgments passed by the learned courts below.”

12. Since the Appellant has not complied with the conditional Order, therefore, he is not entitled to challenge the decree on such grounds that he has taken in an application for leave to defend at this forum.

13. Under the circumstances, the impugned Judgment and Decree of the trial Court cannot be interfered with in this Appeal. The only point that the Appellant can raise is “whether the trial Court has erred in law by passing a decree” if he did not comply with the conditional Order; however, such objection is neither pleaded nor argued by the learned advocate for the Appellant.

14. The upshot of the discussion is that the Appeal in hand is devoid of any force hereby **dismissed**. Parties to bear their costs.

JUDGE

Faisal Mumtaz/PS