IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Ist Appeal No. S – 43 of 2024

(Ahmed Ali Penhwar v. Waseem Ahmed Shah)

Date of hearing : **13.03.2025**

Date of decision : **13.03.2025**

Syed Nadeem Haider Shah, Advocate for appellant.

O R D E R

Zulfiqar Ahmad Khan, J. – The appellant (defendant) has preferred the instant appeal against the order dated 21.10.2024, passed by learned Additional District Judge, Ubauro in Summary Suit No.10 of 2024, whereby the application under Section 5 of the Limitation Act was disposed of by condoning the delay, but the application for leave to defend under Order XXXVII Rule 3, CPC, was dismissed, and consequently, the suit was decreed in favour of the respondent (plaintiff).

2. The background of the dispute is that the respondent, in January 2023, gave Rs.2,60,00,000/- (Rupees two crore sixty lac) to the appellant for investment in property / estate business, and in lieu thereof, he obtained a post-dated cheque bearing No.10209955 of Bank Al-Habib, Ubauro Branch from him. The respondent, on the promised date i.e. 16.04.2024, went to the concerned bank and presented the cheque for encashment, which was dishonoured due to the reason of “insufficient funds.” He then approached the appellant, who refused to return the amount, rather issued him threats of dire consequences. Thus, he filed the summary suit under Order XXXVII Rule 2, CPC, for recovery of the subject amount.

3. The trial Court, after issuance of summons, which was not served upon the appellant, ordered the substituted service through pasting and publication. The appellant thereafter filed an application under Section 5 of the Limitation Act seeking condonation of delay in filing the application for

leave to defend, claiming lack of knowledge of the suit and acquiring information through a newspaper publication on 26.06.2024. The trial Court, after appreciating the facts, allowed the application for condonation of delay, holding that no material was available to show that the appellant had prior knowledge of the proceedings before 25.06.2024 i.e. the date of publication, and that he promptly appeared thereafter. However, with respect to the application for leave to defend, the trial Court thoroughly examined the grounds and dismissed the same, holding that the appellant had failed to raise any bonafide triable issue. The suit was, accordingly, decreed as prayed with 10% annual mark-up on principal amount from the date of the decree till recovery of the decretal amount.

4. Heard learned Counsel for the appellant and perused the material available on record.

5. The appellant has challenged the impugned order on several grounds, *inter alia*, that the trial Court failed to consider that the cheque in question was lost much earlier and was misused by the respondent; that a non-cognizable report (NC) was registered at Police Station Daharki on 10.11.2021 to this effect; and that the case involves disputed questions of fact and law, which could only be decided after full trial and not in a summary manner. He further contended that the trial Court erred in discarding the defence of cheque misplacement as implausible, thereby denying leave to defend.

6. The first question requiring consideration is whether the trial Court rightly exercised its discretion in refusing leave to defend under Order XXXVII Rule 3, CPC. The test in such cases is well-settled viz. the defence must disclose plausible facts or triable issues that merit adjudication on evidence, not mere denial or self-serving assertions. Where the defence is found to be sham, frivolous, or illusory, leave may be lawfully refused.

7. In the instant case, while the appellant is not denying his signature on the subject cheque, his sole defence was that the cheque was lost nearly three years ago and that he lodged an NC report in this regard.

However, neither the appellant informed the bank or stopped payment, nor did he initiate any legal proceedings to safeguard against misuse of his cheque. More significantly, the dishonour memo dated 16.04.2024 cites “insufficient funds” as the reason, with no mention of payment stoppage, forgery, or unauthorized signature.

8. The reliance of the appellant on the NC report dated 10.11.2021, without any corroborating action (such as issuance of public notice, FIR, or letter to the bank) for almost three years, is not sufficient to rebut the statutory presumption under Section 118 of the Negotiable Instruments Act, 1881. This presumption, being rebuttable, casts an evidentiary burden on the drawer of the cheque, which the appellant has failed to discharge.

9. Mere assertion of loss or misplacement, unaccompanied by substantive action, does not dislodge the presumption of consideration and lawful issuance. In the case at hand, there is not even a denial of signature, and only a vague plea of prior loss, devoid of legal or evidentiary support, has been made.

10. In light of the above discussion, I find that the trial Court has committed no illegality or jurisdictional error in refusing leave to defend. The reasons assigned are cogent, well-reasoned and supported by both precedent and the facts on record. The appellant has miserably failed to raise any genuine triable issue or to dislodge the statutory presumptions arising from the negotiable instrument in question.

11. Accordingly, the present appeal, being without merit, is **dismissed**, and the order dated 21.10.2024 passed by the trial Court is hereby maintained.

Above are the reasons of my short order dated 13.03.2025.

J U D G E

Abdul Basit