

Form No: HCJD/C-121

ORDER SHEET
LAHORE HIGH COURT,
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

Regular First Appeal No.20 of 2024

Muhammad Waseem **V/S** *Maple Leaf Cement Factory Limited*

| <i>S.No.of order / Proceedings</i> | <i>Date of order /Proceedings</i> | <i>Order with signatures of Judge, and that of parties or counsel, where necessary.</i> |
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| 09.09.2024 | Ms. Nosheen Nazeer Raja, Advocate for the Appellant. Mr. Irshad Hussain Wattoo, Advocate for Respondent. |
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 This regular first appeal under Section 96 of The Code of Civil Procedure (V of 1908) (the “CPC”) is directed against the judgment and decree dated 08.11.2023, whereby the Additional District Judge, Mianwali decreed the suit filed by the Respondent as ex-parte.

2. Brief facts of instant appeal are that the Respondent instituted a suit for recovery of Rs.70,000,000/- in terms of Order XXXVII of the “CPC” against the Appellant/defendant claiming therein that the Appellant misappropriated an amount of Rs.79,617,591/- by committing criminal breach of trust and in this respect, a criminal case bearing F.I.R.No.100/22 u/s 406 PPC, P.S. Daud Khel was registered. It was further claimed that an amicable settlement was effected, pursuant thereto, the Respondent wrote off an amount of Rs.9,617,591/- however, for remaining amount the Appellant/defendant issued a cheque No.77953245 dated 17.01.2023 for the purposes of payment of remaining amount. The cheque,

when presented in the concerned bank, the same was dishonoured. The Appellant was proceeded against *ex parte* on 30.05.2023. The learned trial court thereafter recorded *ex-parte* evidence and consequently decreed the suit as such vide judgment and decree dated 08.11.2023.

3. Learned counsel for the Appellant *inter alia* submitted that the impugned judgment is not tenable under the law; that the Appellant was not afforded proper opportunity of hearing and *ex-parte* judgment is not tenable; that despite *ex-parte* proceedings, the Respondent was obliged to lead cogent and convincing evidence for proving its claim; that evidence to this effect was deficient but the Additional District Judge decreed the suit on extraneous reasons.

4. Conversely, learned counsel the Respondent defended the impugned judgment with hilt.

5. We have heard learned counsel for the parties and also perused the record.

6. As the suit was in a summary character and it was instituted while invoking the provisions of Order XXXVII the “CPC”, so on receipt of the plaint, summons were issued to the Appellant in the prescribed form. In pursuance thereof, the Appellant put his appearance and filed application for leave to defend the suit on 10.04.2023 which was accepted vide order dated 06.05.2023 subject to his furnishing surety bond backed by some immovable property equal to the amount of cheque to the satisfaction of the Court. Thereafter, the Appellant filed petition for review of order dated 06.05.2023 that was dismissed vide order dated 20.05.2023 with direction to the Appellant to furnish requisite surety bond otherwise his application for leave to appear and defend the suit shall be deemed to be rejected. On 30.05.2023, application for leave to defend was rejected

due to non-submission of surety bond and case was fixed for recording of ex parte evidence that was ultimately decreed vide ex parte judgment and decree dated 08.11.2023.

7. Adverting to the merits of the case, it is observed that suit was instituted on the basis of Exh.P1 (Company board resolution, copy of F.I.R.No.100/2022 as Exh.P2 and copy of Cheque as Exh.P3) purportedly issued by the Appellant, which was dishonoured on presentation to the concerned bank. The Respondent in order to prove the validity of the cheque produced Mehmood-ul-Hassan, Executive Marketing Maple Leaf as PW1 and Muhammad Usman as PW-2. It evinces from the record that the Appellant had categorically denied the issuance of cheque (Exh.P3) in favour of the Respondent however, for the purpose of recording of evidence, leave to defend was conditionally allowed vide order dated 06.05.2023. When confronted whether there is any agreement between the parties to show the relationship of the Appellant and the Respondent; in response, learned counsel for the Appellant stated that cheque was given through some agreement which is not on the file of this case rather in another file of criminal proceedings but the Respondent has not shown any relationship before the Court. Chapter-II of the Negotiable Instrument Act, 1881 deals with promissory note, bill of exchange and cheques etc. Cheque is defined under Section 6 of the Act *ibid* which reads:

A “cheque” is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand”.

8. Order XXXVII Rule 2 of the “CPC” envisages that a suit can be instituted in a summary character on the basis of bills of exchange, hundies or promissory notes. As the

cheque is a negotiable instrument under the Negotiable Instrument Act, 1881 and without negotiation of the parties on an agreement, no such suit could be filed. When confronted to counsel for the Respondent, whether he has copy of agreement, he stated that he does not have such copy however, the same will be produced before the trial Court if an opportunity is provided. He further stated that the Appellant was the employee of the Respondent who misappropriated certain amount as a result whereof criminal cases were registered against him during the proceedings of which, he agreed to pay certain amount as per agreement between the parties which shows the relationship for filing of suit. We have examined the judgment and observed that the Respondent has only exhibited three documents (Exh.P1 to Exh.P3), mentioned above. It has been held in a number of cases that suit under Order XXXVII of the “CPC” has to be filed alongwith supporting negotiable instruments of the parties, instrument through a contract or through any relationship, which must be express, implied or in written form or oral. At this stage, learned counsel for the Respondents requested some time to file the agreement before the trial Court. It is settled law that for the purpose of filing suit there has to be a relationship between the parties as has been held by the Supreme Court of Pakistan in “Mehr NOOR MUHAMMAD Versus NAZIR AHMED” (PLD 2024 Supreme Court 45) wherein it has held that *“the plaintiff, in his cross-examination, admitted that he had no business relationship with the defendant or family ties with him. This statement causes eyebrows to be raised as given a fillip to ponder how the plaintiff could lend a considerable amount to a stranger”*. In another pronouncement cited in “TELENOR MICROFINANCE BANK LIMITED Versus SHAMIM BANO and others”

(2023 SCMR 1560) it has held that “*where a person signs an instrument otherwise than as a maker, drawer or acceptor, he incurs the liabilities of an indorser to a holder in due course. However, if there is ambiguity as to the capacity in which a party signed an instrument, the whole facts and circumstances attendant upon the making, issue and transfer of the instrument may be legitimately referred to for the purpose of ascertaining the true relation of the parties to each other; and reasonable inferences, derived from these facts and circumstances are admitted to the effect of qualifying, altering or even inverting the relative liabilities which the law merchant would otherwise assign to them*”. Moreover, in “CHAND BAGH FOUNDATION through Authorized Representative Versus STANDARD CHARTERED BANK LIMITED through Manager and another” (PLD 2011 Lahore 473), it has held that “*the reasons given by the learned trial Court for dismissing the suit of the appellant namely absence of relationship of debtor and creditor and existence of a loan, are neither sustainable nor in line with dicta of the Supreme Courts*”. When further confronted to counsel for the Appellant whether the Appellant had submitted surety bond as directed in aforesaid order, he stated that the Appellant could not furnish surety bond due to his poor financial position and incapacity at that time, however, he is now ready to furnish surety bond.

9. In this view of the matter, without going into the other merits of the case, we are inclined to **allow** this appeal subject to furnishing of surety bond backed by some immovable property to the extent of 50% of the amount of cheque (Exh.P3) before the trial Court. The impugned judgment and decree is therefore, set aside. Consequently, petition for leave to defend stands accepted and trial Court

shall decide the suit afresh after recording the evidence of the parties, in accordance with law preferably within a period of four months. The Respondent shall also file certain documents before the trial Court through proper application. The parties shall appear before the Court concerned on 25.09.2024.

(Muhammad Sajid Mehmood Sethi)
JUDGE

(Jawad Hassan)
JUDGE

Approved for Reporting

JUDGE

JUDGE

*Usman**