JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

RFA No. 69211 of 2023

Nafees Ahmad

versus

Zia-ud-Din

JUDGMENT

Date of hearing	*27.03.2024*
Appellant by	*Mr. Sultan Ali Dogar and Mr. Ali Raza Hanjra, learned Advocates.*
Respondent by	*Mian Imran Mushtaq, learned Advocate.*

SULTAN TANVIR AHMAD, J:–Through this regular first appeal, filed under section 96 of the Code of Civil Procedure, 1908 (the '***Code***'), judgment and decree dated 16.09.2023 passed by learned Additional District Judge, Lahore has been challenged.

2. On 02.12.2020 the respondent instituted suit, under Order XXXVII of the *Code*, for recovery of Rs. 16,000,000/- on the basis of (i) cheque No. 1561725584 dated 25.09.2019 for an amount of Rs. 2,000,000/-, (ii) cheque No. 00000017 dated 09.07.2020 for an amount of Rs. 4,500,000/-, (iii) cheque No. 00000018 dated 09.07.2020 for an amount of Rs. 3,500,000/-, (iv) cheque No. 00000019 dated 09.07.2020 for an amount of Rs. 3,500,000/- and (v) cheque No. 00000020 dated 29.07.2020 for an amount of Rs. 2,500,000/- (the '***cheques***'). The appellant upon receiving summons appeared before the Court and

instituted leave application to defend the case, which was granted vide order dated 22.06.2022 subject to furnishing security / surety bond equal to the suit amount. Afterwards, the appellant remained unable to comply with the condition and as a result thereof leave granting order was recalled on 25.10.2022 by the learned trial Court. On 16.09.2023 judgment and decree was passed in favour of the respondent, which is assailed through the present appeal.

3. Mr. Sultan Ali Dogar, learned counsel for the appellant has argued that vide order dated 25.10.2022 the learned trial Court has wrongly recalled the leave granting order that has resulted into one sided judgment and precluding the appellant from presenting any defense. Learned counsel stated that sufficient opportunities should have been granted by the learned trial Court before recalling the order of granting the leave. Learned counsel has further argued that on the basis of the *cheques* criminal cases were registered but no conviction of the appellant could be secured, which is evident of the fact that the *cheques* were only given as security and they are not backed up by any consideration.

4. Conversely, Mian Imran Mushtaq, learned counsel for the respondent, has argued that the *cheques* were issued for consideration as claimed in the suit and no mistake has been made by the learned trial Court while passing the impugned judgment and decree. Learned counsel has submitted that the appellant availed six opportunities to submit the surety bond and then deliberately and with the view to cause the delay in the proceedings, kept avoiding to comply with the order to file surety, resulting into recalling of the leave granting order; that the appellant built up his case on the basis of order dated 22.06.2022, which was never challenged by him rather by his conduct he has accepted the order, as initially the appellant kept

on making requests before the learned trial Court for granting him further time to file surety and then permitting to cross-examine the witnesses of the appellant instead of raising any challenge to order of recalling leave; that the appellant is fully aware that order dated 22.06.2022 is passed in accordance with law and now the excuse is being made to cause further delay. Learned counsel has relied upon the cases titled *"Col. (Retd.) Ashfaq Ahmed and others v. Sh. Muhammad Wasim"* (**1999 SCMR 2832**) and *"Haji Ali Khan & Company, Abbottabad and 8 others v. M/s. Allied Bank of Pakistan Limited, Abbottabad"* (**PLD 1995 SC 362**).

5. Heard. Record perused.

6. Order XXXVII Rule 2 (2) of the *Code* contemplates that when the summons in the specified form are received, the defender of a suit of summary procedure is required to obtain leave to appear and defend; and, in default of his obtaining such leave or of his appearance and defense in pursuance thereof, the allegations in the plaint are deemed to be admitted, and the plaintiff is entitled to a decree.

7. Order XXXVII Rule 3 (2) of the *Code* authorizes the learned trial Court to grant leave unconditionally or subject to such terms as to payment in the Court or giving security. Granting leave subject to condition or unconditionally is the discretion of the Court which is to be justly exercised while keeping in view the plausibility of the defense. It is not the case of the appellant that the discretion was exercised in arbitrary manners or the condition imposed was harsh or it operated vexatiously to the appellant. The basic argument of the learned counsel for the appellant remained that by recalling the leave granting order on 25.10.2022 the appellant was wrongly ousted to produce his defense and the learned trial Court acted in haste while recalling the leave granting order.

8. Order sheet of the learned trial Court reflects that after the grant of leave subject to above mentioned condition the learned counsel for appellant on 05.09.2022 requested for some time to file surety bond when appellant was given last opportunity. Thereafter, on 20.09.2022 once again same request was made when absolute and final opportunity was granted. The case was fixed for 01.10.2022. On this hearing the appellant was himself present in the Court and he gave undertaking with respect to submission of surety. The relevant part of this order reads as follows: -

> *"...Record perused. PLA was decided vide order dated 22.06.2022 and till then defendant has availed four opportunities. However, today the defendant present in person and gives undertaking. Put up on 15.10.2022 for submission of surety bond..."*

The above continued until 25.10.2022 when learned Court clearly observed that the surety should be filed before closing hours of the Court but the appellant failed, apparently leaving the learned trial Court with no other option but to recall the order dated 22.06.2022 and to observe that as a consequence of the same leave to appear and defend the suit is deemed to be dismissed. The above conduct of the appellant is sufficient indication of the fact that the appellant accepted the condition and then caused undue delay of about four months just to avoid expeditious decision in suit.

9. Order dated 25.10.2022 of the learned trial Court essentially means that the appellant had no leave to appear and defend the case in terms of Order XXXVII Rule 2 (2) of the *Code*. In case titled *"Muhammad Ramzan and others v. Ghulam Qadir"* (**2011 SCMR 659**) the Supreme Court of Pakistan observed that when a defendant of such suits fails to fulfill the

condition of the leave granted to him, the allegation in plaint would be deemed to be admitted and the suit can be decreed against him. The relevant part reads as follows: -

> *"..**The petitioners failed to fulfill the conditions on which leave to defend the suits were granted to them. Perusal of the sub-para (2) of rule 2 of Order XXXVII reveals that in default of obtaining leave to defend or to appear in his defence the allegation in the plaint would be deemed to be admitted and the suit could be decreed against the defendants**. We would like to reproduce the observations of this Court, on the point, made in the judgment titled of Haji Ali Khan and Company, Abbottabad and 8 others v. Messrs Allied Bank of Pakistan Limited, Abbottabad (PLD 1995 Supreme Court 362):-*
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> > *"10. The ratio decidendi of the above-referred cases seems to be that **if a defendant fails to appear or fails to obtain leave to defend in response to a summons served in form No.4 provided in Appendix B to the C.P.C. or fails to fulfil the condition on which leave was granted or where the Court refuses to grant leave, the Court is to pass a decree**. It may further be observed that in sub-rule (2) of rule 2, C.P.C., it has been provided that if a defendant fails to appear or defaults in obtaining leave, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree, but no such consequences are provided for in rule 3 of the above Order in a case where the Court refuses to grant leave or the defendant fails, to fulfil the condition on which leave, was granted. **In our view, notwithstanding the above omission in Rule 3, the effect of refusal of the Court to grant leave or failure on the part of the defendant to comply with the condition of the leave, will be the same i.e. the defendant shall not be entitled to defend the suit on any ground and the Court would pass a decree in favour of the plaintiff**. However, this does not necessarily mean that the Court is not required to apply its mind to the facts and the documents before it. Every Court is required*

> *to apply its mind before passing any order or judgment notwithstanding the factum that no person has appeared before it to oppose such an order or that the person who wanted to oppose was not allowed to oppose because he failed to fulfil the requirements of law."*
>
> (*Emphasis supplied*)

10. In case titled *"Murtaza Haseeb Textile Mills v. Sitara Chemical Industries"* (**2004 SCMR 882**), the Supreme Court found that since the failure of the defendant of the suit to comply with the order of the learned Court with respect to the condition of the leave was contemptuous and the same was a tactic to cause delay, the decree is rightly passed on the basis of material available on record. Almost same view was adopted in the case reported as "*Abdullah v. Shaukat"* (**2001 SCMR 60**). In *"Col. (Retd.) Ashfaq Ahmed and others* case (***supra***), the failure to fulfill conditions, specified in conditional order granting leave to defend, was found fatal when the defendant remained unable to furnish any plausible reason. After hearing the arguments and careful perusal of the law, I am of the opinion that the leave granting order was rightly recalled which has result that the appellant had no leave to appear and defend his case in terms of Order XXXVII Rule 2 (2) of the *Code*.

11. So far as the contentions of the learned counsel for the appellant regarding discharge of the appellant from the criminal cases registered under section 489-F of Pakistan Penal Code, 1860 are concerned, suffice to say that both the criminal as well as civil cases have different standards of proof and acquittal or discharge from criminal case does not absolve a litigant from the civil liability, if burden is discharged by the other side as per the settled principles of civil standard of proof.

12. The respondent has brought on record the *cheques* as Exh.P-1 to Exh.P-5 and the dishonored slips were produced as Exh.P-1/1 to Exh.P-5/1. Exh.P-1/1 reflects that one cheque

was returned due to insufficient fund in drawer's account. Same is reflected from Exh.P-2/1 and Exh.P-4/1 for the other two cheques. Exh.P-3/1 shows that on 08.10.2019 the relevant account of the appellant was dormant. The respondent and his witnesses appeared and supported the plaint. There is nothing available to rebut the presumption that the *cheques* were issued for consideration as well as the other presumptions arising under the Negotiable Instruments Act, 1881, therefore, the learned trial Court has correctly decreed the suit.

13. For what has been discussed above, the present appeal, having no merits, is ***dismissed***. No order as to costs.

(SULTAN TANVIR AHMAD)
JUDGE

Approved for reporting

Announced in open Court on 17.04.2024.

Judge

Nadeem