

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

R.F.A No. 92/2014

Muhammad Khalid

Versus

Muhammad Adnan Qureshi

APPELLANT: In person.

RESPONDENT BY: Nemo

DATE OF DECISION: 26.10.2017

.....

MOHSIN AKHTAR KAYANI, J. Through this Regular First Appeal, the appellant has assailed the judgment and decree dated 21.05.2014, passed by learned Additional District Judge-VIII (West), Islamabad.

2. Brief facts of the instant case are that Muhammad Adnan Qureshi/respondent filed a suit for recovery of Rs. 4,300,000/- U/O XXXVII, Rule 1 & 2 CPC on the basis of cheque No. 1270109 dated 15.03.2003 amounting to Rs. 23,00,000/- and cheque No. 1270110 dated 01.04.2003 amounting to Rs. 2,000,000/- against the present appellant and others. The suit was contested by the present appellant by filing application for leave to appear and defend, the same was allowed by learned Additional District Judge-VIII (West), Islamabad vide order dated 27.03.2004 subject to furnishing of surety amount equal to the amount mentioned in the cheque. The appellant filed his written statement and also referred his set-off claim of amount of Rs. 8,310,950/- as well as prayed for decree of his amount. Learned Trial Court framed the issues, however, during the course of proceedings of the suit, a compromise agreement has been placed on record alongwith application for withdrawal and dismissal of the suit through C.M No. 1107/2008, which was pending at that time before this Court in C.S No. 2183/2008. Learned Single Bench of this Court has dismissed the application for grant of permission for withdrawal of the suit vide order dated 15.01.2009, whereas respondent filed a civil revision No. 08/2009 before Hon'ble Division Bench of this Court, which was renumbered as C.R No. 522/2009 and later on transferred to Lahore

High Court Rawalpindi Bench due to cessation of Islamabad High Court, which was also dismissed vide order dated 10.12.2009. Thereafter civil suit was transferred to District Court from Islamabad High Court, whereby respondent did not produce any evidence and present appellant produced two witnesses DW-1 & DW-2 namely Muhammad Pervez, Assistant Clerk/Record Keeper/Social Security Department KPK Circle Office, Haripur and DW-2, (Record Keeper). However, learned Additional District Judge-VIII (West), Islamabad dismissed the suit vide judgment and decree dated 21.05.2014 due to non prosecution of plaintiff/respondent without determining the set-off of Rs. 8,310,950/-, hence this appeal.

3. Appellant in person contends that the suit cheques were given to the respondent as sale consideration of B & B Oil Mills (Pvt) Ltd. vide agreements to sell dated 30.12.2002 and 10.01.2003, this fact was also acknowledged by respondent in his plaint at para No. 1; that in pursuance of the agreements, the appellant has paid the part payment, out of total sale consideration of Rs. 9.7 million and issued three (03) post dated cheques to the respondent as balance sale consideration, whereafter it was revealed that B& B Oil Mills (Pvt) Ltd. is a registered company with the SECP having 14 shareholders which were not disclosed by respondent and the agreements were executed under fraud and misrepresentation and concealment from other shareholders; that it further came into the knowledge of appellant that an arbitration application is pending in Civil Court, Haripur between the shareholders and respondent U/Ss 14 & 17 of Arbitration Act, 1940, in which award dated 17.04.2003 had already been announced and matter is only pending for decision on the objections to make the award rule of Court. The matter was agitated by the appellant whereby the appellant claimed return of his cheques, however, respondent replied that the cheques were cancelled. He further argued that the agreement dated 30.12.2002 is result of cheating and fraud as the entire assets of the B& B Oil Mills (Pvt) Ltd. were mortgaged with Muslim Commercial Bank, Haripur and suit regarding mortgaged property was also pending in this regard before the Banking Court. All these factors were concealed by the respondent and in the light of evidence of two witnesses, these cheques were without consideration. Appellant

further contends that he in order to safeguard his interest took over the entire liability of the said company whereas possession was already delivered to appellant.

4. The appellant got published a proclamation in the newspaper in order to settle the claims of different individuals against B & B Oil Mills (Pvt) Ltd. The appellant also paid entire liability of the Banking Court amounting to Rs. 5,714,694/- in favour of the bank, whereafter the property of the B & B Oil Mills (Pvt) Ltd cleared and certificate dated 13.02.2009 was issued in this regard. Entire settlement was made on the basis of judgment and decree dated 17.12.2004, passed by Banking Court, Rawalpindi, whereby it was declared by the Banking Court that after redemption of the mortgaged property, the security documents will be handed over to the appellant. Appellant further contends that he has specific claim of set-off on the basis of the judgment, passed by Banking Court, different litigation of individuals having their claims against B & B Oil Mills (Pvt) Ltd as well as the other shareholders which were not disclosed by respondent. He further contends that respondent has never submitted any replication /re-joinder of the written statement to counter the claim of set-off submitted by the appellant, however, he further contends that the claim of set-off could not be dismissed under the garb of dismissal of the suit due to non prosecution.

5. It has been observed from record that respondent never put appearance before the Court rather he has been proceeded against ex-parte after due process of service vide order dated 10.03.2016, passed by Hon'ble Division Bench of this Court after publication of notice in Daily "Nawa-e-Waqt" and Daily "The News" dated 18.02.2016.

6. Arguments heard, record perused.

7. From the perusal of record, it has been observed that appellant entered into agreement to sell with respondent regarding B & B Oil Mills (Pvt) Ltd against the total sale consideration of Rs. 9.7 million vide agreements dated 30.12.2002, 10.01.2003 and 18.01.2003.

8. In pursuance of above said agreements, appellant had issued three (03) post dated cheques to the respondent amounting to Rs. 5,500,000/- including the cheque of Rs. 1,200,000/- as earnest money, whereby the proportionate shares were transferred to the appellant and Kashif Zubair/appellant's brother. The respondent in his suit claimed

the recovery of balance sale consideration of Rs. 4,300,000/-, which was given to him through cheque No. 1270109 dated 15.03.2003 amounting to Rs. 2,300,000/- and cheque No. 1270110 dated 01.04.2003 amounting to Rs. 2,000,000/-. It was also mentioned in the agreement that appellant is under obligation to pay the bank loan of Muslim Commercial Bank Hattar Labaik, Haripur amounting to Rs. 3,900,000/- with mark-up, whereas, cheques issued by the appellant were presented and dishonoured thereafter suit was filed.

9. It has further been observed from record that appellant has filed an application for leave to appear and defend the suit and took the specific stance that the agreement was executed under misrepresentation and concealment of fact as it was not disclosed by the respondent that B & B Oil Mills (Pvt) Ltd has 14 shareholders and the company is registered with Securities & Exchange Commission of Pakistan and after the execution of agreement the shareholders initiated the arbitration proceedings U/s 14 & 17 of Arbitration Act, 1940 before Civil Court Haripur, whereas the award had already announced vide award dated 17.04.2003. It has further been observed from record that the appellant claims that he paid an amount of Rs. 6,295,000/- to different claimants and at the same time, the appellant came to know that property of the B & B Oil Mills (Pvt) Ltd, was mortgaged by respondent which has not been redeemed, although the appellant had taken the responsibility of the same, but the Muslim Commercial Bank, Haripur filed suit before the Banking Court for recovery of their claim at that time, whereupon the appellant filed application before Banking Court to owe the entire liability of B& B Oil Mills (Pvt) Ltd as a result Banking Court vide order dated 17.12.2004, passed the judgment under Order 21 Rule 58, 62 CPC read with Section 15 of the financial institutions (Recovery of Finances) Ordinance, 2001 and directed the appellant to deposit due amount of Rs. 3,943,244.78 within 40 days and also directed for the release of security documents in his favour. In compliance of the judgment, passed by the Banking Court, the appellant paid total amount of Rs. 5,714,694/- vide certificate dated 13.02.2009 whereafter property documents of Plot No. 62, Phase-1, B & B Oil Mills (Pvt) Ltd, Hattar, Industrial Estate, District Haripur were cleared and redeemed in favour of appellant.

10. All these defences have not taken into account by learned Trial Court while passing the order on the application for leave to appear and defend, granted the relief vide order dated 27.03.2004, whereafter the appellant filed his written statement on his behalf as well as on behalf of B & B Oil Mills (Pvt) Ltd, in which he claimed that the respondent is liable to pay Rs. 8,310,950/- as set-off, therefore, appellant claims the dismissal of suit and prayed for decree with the direction to shareholders to transfer the rest of the shares in his favour as appellant cleared the entire liabilities of B & B Oil Mills (Pvt) Ltd. The learned Trial Court framed issues and matter was fixed for recording of evidence, in the meanwhile C.M No. 1107/08 was filed in the Islamabad High Court i.e. Trial Court (at that time) in the civil suit No. 2183/08 for withdrawal of the suit U/O XXXVII CPC. The learned Single Judge in Chamber after hearing the parties had dismissed the application for withdrawal of the suit vide order dated 15.01.2009, whereafter respondent never produced his evidence and case was fixed for recording of evidence of appellant, whereby appellant produced two witnesses as DW-1 & DW-2, who were Record Keepers, whereafter appellant himself recorded his statement on 27.03.2012. However, at that juncture the suit was dismissed due to non prosecution vide judgment and decree dated 21.05.2014 by learned Additional District Judge-VIII (West), Islamabad as the matter was transferred from High Court to District Court. The operative part of impugned judgment which has been assailed before this Court is as under:-

"The plaintiff instituted suit under order 37 CPC and thereafter he failed to appear but meanwhile, after framing of issues, the defendant raised plea of set-off and claimed amount of more than Rs. 87,00,000/-.

There is no one to appear on behalf of the plaintiff and defendant claimed set-off. First of all there is no provision of set-off of civil nature in summary trial instituted under order 37 CPC, moreover, the forum of both is also different. The suit under order 37 CPC is filed before District Court while suit for recovery can be filed before a civil judge, moreover, in case of set-off of a civil recovery, this Court cannot take cognizance directly, even otherwise the pecuniary jurisdiction of this Court is limited upto Rs. 25,00,000/- and claim of set-off is more than Rs. 87,00,000/-, so this Court is again barred by jurisdiction, this Court has not framed any issue regarding set-off, so there is no question of defence evidence. Plaintiff is

already absent, so the suit is hereby dismissed for non-prosecution. File be consigned to the record room after its due completion and compilation”.

11. The above background clearly reveals that claim of appellant regarding set-off in terms of order VIII Rule 6 CPC has been made in the written statement to counter the claim of respondent/plaintiff in suit under Order XXXVII CPC for recovery of Rs. 4,300,000/-, whereas claim of set-off of Rs. 8,310,950/- has been submitted. However, Order VIII Rule 6 (3) CPC deals with the concept of filing of written statement against the claim of set-off and all rules relating to written statement apply in this regard but perusal of record reveals that the respondent has never submitted any rejoinder or written statement to counter the claims of set-off in any manner on record. Learned Trial Court while passing the impugned judgment and decree dated 21.05.2014 has not considered the law in its true perspective, whereas it is settled proposition of law that all the principles of set-off provided in Order VIII Rule 6 CPC confer the maintainability of claim of set-off even in case when suit was dismissed on merits or due to non prosecution the principles referred in Rule 6 (2) CPC is reproduced as under:-

“6. Particulars of set off to be given in written statement.- (1) Where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set off.

Effect of set off--(2) The written statement shall have the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree”.

The above referred provisions clearly prove that the claim referred in the written statement under set-off has to be treated as independent plaint in terms of Order VII Rule 1 CPC and the plaintiff is bound to submit his written statement against the written statement of the defendant in terms of Order VIII, Rule 6 (3) CPC who has raised the

claim of set-off, failing which it would be treated that plaintiff has no defence in terms of Order VIII Rule 6 CPC as the rules of written statement apply to such situation. For convenience Order VIII Rule 6(3) is reproduced as under:

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

12. The claim of set-off has to be placed in written statement at the first instance and in case defendant has failed to submit his claim of set-off in the written statement, he is barred from raising such defence which is not claimed in the written statement, however, the claim for set-off can be represented at a subsequent stage after leave of Court in terms of Order VIII Rule 9 CPC. The Apex Court in case titled as **"2009 SCMR titled as Civil Aviation Authority, Quaid-e-Azam, International Airport, Karachi Vs. JAPAK International (PVT.) Limited, Lahore"** has given the essential conditions of a legal set-off which are as under:-

"The above provisions of law permit a defendant to raise in his defence what is called a legal set-off. The essential conditions of legal set-off are as follows:

- (i) The suit must be one for the recovery of money.*
- (ii) As regards the amount claimed to be set-off---*
 - (a) it must be an ascertained sum of money;*
 - (b) such sum must be legally recoverable;*
 - (c) it must be recoverable by defendant or by all the defendants if more than one;*
 - (d) it must be recoverable by the defendant from the plaintiff or all the plaintiffs if more than one;*
 - (e) it must not exceed the pecuniary limits of the jurisdiction of the court in which the suit is brought;*
 - and*
 - (f) both parties must fill, in the defendants claim to set-off, the same character as they fill in the plaintiffs' suit."*

It is also settled that the doctrine of an equitable set-off permits on an equitable considerations of defendant, to raise a plea of set-off, even in respect of unascertained sum of money, set-off can be claimed subject to condition that if there be some connections between the plaintiff's claim for a debt and the defendant's claim to a set-off, it will be inequitable for the defendant to prove the same through separate suit,

however, such kind of equitable set-off have been claimed by the parties arising out of same transactions or to a cross demands which are connected in their nature and circumstances.

13. The principles of set-off are clear in understanding as it is a counter claim for a specific amount and the same can be claimed where defendant and plaintiff are reciprocally debtors of each other. Reliance is placed upon **AIR 1956 Patna 199 titled as Jyanti Lal and another Vs. Abdul Aziz and another**, wherein it was held that:-

“The doctrine of set-off may be defined as the extinction of debts of which two persons are reciprocally debtors to one another by the credits of which they are reciprocally creditors to one another.

“Set-off has two kinds

- a) Legal set-off---Court has to decide.*
- b) Equitable Set-off---Court has discretion to adjudicate”.*

“Under Sch. 1 Art. 1 of the Court Fee Act “Ad valorem Court fee is payable on the set-off claimed in either description whether legal or equitable”.

Similarly, when party claimed set-off had to comply with the rules of pleading contained in Civil Procedure Code, 1908, even the defendant while claiming set-off regarding any amount which is beyond the claim of plaintiff was in fact, pleaded to write-off plaintiff's claim and claimed for decree for the balance amount, however, the defendant must state the particulars and basis of the claim in detail by applying the principles of pleadings referred in Order VI & VII CPC which are applicable in all respect.

14. Besides the above referred principles of set-off the main question raised in the instant Regular First Appeal is regarding the survival of claim of set-off when the suit of the plaintiff has been dismissed in default, or has been withdrawn or dismissed on the basis of evidence. As per our estimation, the claim of the set-off survives and the same requires separate adjudication, even in cases where plaintiff has failed to prove his case or has withdrawn the claim, the learned Trial Court is under obligation to frame a separate issue of set-off raised in the written statement by the defendant and adjudicate upon the matter in terms of Order XIX CPC. Reliance is placed upon **AIR 1941 Nagpur**

258 titled as Jamnadass Nagindass Vs. Beharilal Bishweshwarlal Zunzunwalla,

whereby it has been held that:

“I can arrive at an adequate decision by reconciling these two decisions and by holding that in the case of genuine set-off, such as is contemplated by O.8 R.6 CPC, if the plaintiff’s claim breaks down for any reason including a withdrawal, as in the present case, the defendant would be entitled to have his set-off considered by the same Court, and he could be given a decree for set-off in the same suit.”

Similar view has also been taken in **AIR 1934 Allahabad 543 titled as (Firm) Bansi Dhar Kunji Lal Vs. Lalta Prasad and another.** whereby it has been held that:

“In my view therefore on the claim for set-off this Court should grant a decree in favour of defendants 1 to 3. I may enumerate the proposition of law on which I have this opinion as follows:

(1) A set-off under O.8 R.6 may be pleaded although the claim of the plaintiff is denied. It is not merely a defence to the plaintiff’s claim, and decree may be granted under O. 20 R. 19 to the defendant although the suit of the plaintiff is dismissed by the decree.

(2) A set-off under O.8 R. 6 is wider than a set off at English law, but it is not so wide as a Counter-claim.

(3) Where a plaintiff sues several defendants alleging a joint debt, a defendant who denies the joint debt may plead a set-off due to him alone.

(4) A defendant-Respondent whose set-off has not been decreed, or has not been referred to in the decree may make this a ground of Cross-objection in appeal.”

15. From the above referred judgments, following principles emerged out in case of set-off:-

1. Set-off should be claimed in written statement at the first instance in clear words.
2. Principles of pleadings in terms of Orders VII & VIII CPC are equally applicable in case of set-off.
3. In case, plaintiff failed to file any re-joiner against the claim of set-off of defendant, he may be proceeded ex-parte in this regard.
4. Issues regarding set-off should be framed separately.
5. In case of dismissal of suit of plaintiff on default or on merit or its withdrawal, claim of set-off in written statement shall subsist and requires adjudication and Trial Court has to give its findings separately and pass judgment and decree in this regard.
6. Principles of Qanun-e-Shahadat Order, 1984 fully applies to claim of set-off and defendant has to prove his case on all these principles.

7. Defendant has to value his claim of set-off for the purpose of jurisdiction and Court fee and pay Court fee on his claim of set-off at the very initial stage in case of non submission of Court fee his claim should be rejected in terms of Order VII Rule 11 CPC.
8. Decree passed on the claim of set-off is executable in a similar manner under Order XXI CPC as of decree in favour of plaintiff in his suit.

Whereas, the above referred principles have not been considered by learned Trial Court while passing the impugned judgment and decree dated 21.05.2014 as the claim of the present appellant remains intact, even though the suit of the plaintiff regarding Order XXXVII, Rule 1 & 2 CPC was dismissed for non prosecution or even on merits. The Court is bound to adjudicate upon the claim of set-off independently by treating it an independent civil suit on the basis of evidence whereas all the principles of Civil Procedure Code 1908 to prove the claim in terms of Qanun-e-Shahadat Order, 1984 shall apply in letter and spirit.

16. In view of above reasons we are convinced that learned Trial Court has passed the impugned judgment and decree in violation of law, therefore, the same is hereby set-aside. Instant Regular First Appeal is allowed and matter is remanded back to the learned Trial Court with direction to record the complete evidence of the appellant/ Muhammad Khalid and decide the matter within the period of six (06) months under intimation to this Court.

(AAMER FAROOQ)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Approved for reporting

Ramzan

Uploaded By: Zulqarnain Shah