

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

Writ Petition No. 29 of 2022

M/s H.J (Pvt) Ltd through its Chief Executive
Officer, Rawalpindi and another

Versus

Learned Additional District & Sessions Judge,
West-Islamabad and another.

Petitioners by: Raja Inaam Ameen Minhas and Mr.
Faiz Muhammad Mahar, Advocates.

Respondent No.2 by: Mr. Junaid Jahangir, Advocate.

Date of Decision: **17.02.2022.**

TARIQ MEHMOOD JAHANGIRI, J: Through
the instant writ petition, the petitioners have impugned
Order dated 20.11.2021, passed by learned Additional
District & Sessions Judge, West-Islamabad, whereby
petitions filed by the petitioners for the grant of leave
to appear and defend the suit under Order XXXVII,
Rule 3 C.P.C as well as application under Order 1 Rule
10 (2) C.P.C for deletion of name of the petitioner No.
2 from the suit, have been dismissed.

02. Succinctly stated facts of the case are that the petitioner No. 1 / defendant is a company duly incorporated under The Companies Ordinance, 1984, which is set up for the import of vehicle for embassies of different countries situated in Pakistan by establishing a state of the art network throughout the country to facilitate in meeting the growing requirements of imported vehicles and currently is one of the leading and fully integrated Companies in field of importing vehicles. The respondent No.2 / plaintiff approached the petitioner No. 1 for the import of vehicle and after negotiation, he booked a vehicle for himself i.e. Toyota Land Cruiser "ZX", Model 2018, thereafter respondent No.2 / plaintiff and petitioner No. 1 / company entered into an agreement dated 27.10.2017, for the sale and purchase of subject vehicle and under agreement, the petitioner No. 1 / company booked / ordered the subject vehicle from company in Japan and paid the entire amount to the provider company from its own pocket. The respondent No. 2 / plaintiff did not pay the entire consideration amount in lieu of subject vehicle rather paid partial consideration

amount that too in installments. The invoice was issued against the payment and subject vehicle was shipped and Bill of Lading was also issued by the company in favour of the respondent No.2 / plaintiff. The respondent No.2 / plaintiff cancelled the deal without any plausible and lawful justifications, whereby the petitioners recorded their protest and requested the respondent No.2 / plaintiff that as per the terms and conditions of agreement dated 27.10.2017, once the order was confirmed / booked by the company then it cannot be cancelled or otherwise the advance payment / money will be forfeited in favour of the company. Upon the intervention of mutual friends and to save the reputation of company in market, petitioners agreed to return the partial amount paid by the respondent No.2 / plaintiff despite of the fact that vehicle provider company had deducted 25% of the total consideration amount upon the cancellation order of subject vehicle and the same loss was also caused to the petitioners. Even though it is crystal clear that as per agreement dated 27.07.2017, the petitioners were not under an obligation to return the partial

amount in lieu of subject vehicle to the respondent No.2 / plaintiff. Thereafter the respondent No.2 / plaintiff entered into another negotiation / mutual agreement dated 30.05.2019, with the petitioners and as per mutual agreement the petitioner No. 1 / company issued six (06) post dated cheques and one conditional undated cheque bearing No. 1695960168 drawn at MCB Bank Limited, Faizabad Branch, Rawalpindi, upon the condition that if the previous six (06) cheques are not encashed / honoured, then the respondent No.2 might present the said cheque. Thereafter, petitioners paid an amount of USD 60,000/- to the respondent No.2 / plaintiff in installments on different occasions as per schedule and after payment of entire amount, the petitioners / defendants requested the respondent No. 2 / plaintiff to return the undated conditional cheque, but the respondent No.2 / plaintiff delayed the matter on one pretext or the other, made lame excuses and did not return the subject undated cheque to the petitioner No.1 / company. Thereafter cheques were presented in the bank

which were dishonored, consequently FIR bearing No. 298/2020 dated 15.07.2020, offence under Section 489-F P.P.C was registered against the petitioners. Another FIR bearing No. 190/2021 dated 12.04.2021, offence under Section 489-F was also registered at police station Kohsar, the pre-arrest bail of the petitioner No. 2 was confirmed in both FIRs, the respondent No.2 with malafide intention filed false and frivolous suit under Order XXXVII Rule 2, C.P.C for recovery of US Dollars 60,000/- wherein, the petitioners filed application for leave to defend the suit along with the application under Order 1 Rule 10 (2) for the deletion of name, however both the petitions were dismissed by the consolidated Order dated 20.11.2021. Being aggrieved from the impugned order, the petitioners have filed the instant writ petition for setting aside the same.

03. Learned Counsel for the petitioners *inter alia* contends that the suit has been filed on the basis of agreement dated 27.10.2017 and mutual agreement dated 30.05.2019. As per mutual agreement, the dispute is arising out of the terms and conditions settled therein and undated conditional cheque in

question is also subject matter of mutual agreement, as mentioned above, both the parties at the time of execution of agreement dated 30.05.2019, categorically agreed that if any of the postdated cheques is dishonored then the respondent No.2 / plaintiff has a right to present aforementioned undated conditional subject cheque before the concerned bank; the impugned order dated 20.11.2021, is against the fundamental rights as enshrined under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 which guarantees, right to fair trial; the impugned order has been passed in violation of the Civil Procedure Code, settled law and principles laid down by the Superior Judiciary, Equity, principles of natural justice, good conscience and fundamental rights guaranteed by the constitution of Islamic Republic of Pakistan, 1973 and the same is liable to be set-aside. Learned counsel for the petitioners has relied upon the cases titled as **Khushi Muhammad Vs. Muzammal Khatoon and 10 others (2014 CLD 92), Rasheed Ahmed Vs. Muhammad Asim and another (2019 CLC Note 68), Rao Khalid Anjum Vs. Shamas-Ur-Rehman (2017 YLR**

**Note 69) and Bashir Ahmed Vs. Messrs Skyline
Lahore (Pvt.) Company through Chief
Executive (2012 CLD 1627).**

04. Conversely, learned counsel for the respondent No.2 has controverted the arguments made by learned counsel for the petitioners and has stated that neither in the leave to defend application nor in the writ petition, the petitioners / defendants have put forth a defence worth the name on the fact or in law and thus, the same has been rightly dismissed by the learned Trial Court; the illusionary defence that was put forth by the petitioners / defendants does not give rise to any triable issue; no appeal is provided against the interlocutory / interim order and has prayed for dismissal of instant writ petition. Learned counsel for the respondent No. 2 has relied upon the cases titled as **Tahir Hassan Choudhery Vs. Shahid Ahmed Khan (2006 CLC 640), Raja Saeed Ahmad Khan Vs. Sabir Hussain (2000 CLC 199) and Qayyum Khan Vs. Muhammad Yamin (2013 CLC 1650).**

05. Arguments advanced by learned counsel for the parties have been heard and record has been perused with their able assistance.

06. The suit has been filed under Order XXXVII Rule 2 CPC for recovery of USD 60,000/- against the cheques issued by the respondents which have been dishonored. The petitioners have filed an application for leave to defence under Order XXXVII Rule 3 C.P.C accompanied by an affidavit, wherein, it is categorically mentioned in Para 6 of the affidavit *"that thereafter, respondent / plaintiff proceed to enter into negotiations with the deponent and finally entered into a mutual agreement dated 30.05.2019. As per mutual agreement, the deponent issued six (06) post dated cheques and one undated cheque bearing No. 1695960168 drawn at MCB Bank Limited, Faizabad Branch, Rawalpindi – Murree Road as guarantee cheque to the respondent / plaintiff. After that, as per the mutual agreement dated 30.05.2019 the deponent paid an amount of USD 60,000/- to respondent / plaintiff in installment on different occasions as per schedule and after payment of entire amount as mentioned supra,*

the deponent requested the plaintiff to return the undated guarantee cheque, but the plaintiff delayed the matter on one pretext or the other, made lame excuses and did not return the subject undated cheque to the deponent / company, whereupon, the deponent made hue and cry and also recorded protest, then the plaintiff vehemently assured that he will return all the aforementioned cheques to the deponent and upon the assurance, friendly relationship and trust of plaintiff, the deponent trusted upon him and became silent.

07. The petitioners have admitted the issuance of cheques and dishonoring the same from the bank, the only plea / defence taken by the petitioners in the instant writ petition as well as in the petition for leave to defend / affidavit that the petitioners have paid the amount of 60,000/- USD to the respondents in installments on different occasions, however they have not mentioned on which dates or through which mode the amount was paid, whether it was paid in cash or through cheques and during which period the payment was made, why without getting back the cheques

from the respondents, the petitioners continued the payment of amount.

08. Learned counsel for the petitioners has also admitted that no suit for cancellation of cheques was ever filed, as almost all the averments made by the plaintiff / respondent No.2 in the suit are admitted by the petitioners, as far as the rejection of petition under Order 1 Rule 10 CPC is concerned, learned counsel for the petitioners has made no argument on the said issue and only argued on the point that petition for leave to defend should have been allowed.

09. It is trite law that application for leave to appear and defend the suit could be decided on the principles laid down in a case titled as **Asif Nadeem Vs. M/s Bexshim Corporation (2001 CLC 653)**, which is as under:

(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bonafide or

reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend. That is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shows such a state of facts as leads to the inference that at the Trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory of sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then, although ordinarily the

plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence."

10. It is established that petitioners have admitted the issuance of cheques, dishonoring from the bank, however the defence that the amount has been paid in different installments to the respondent No.2 is imaginary and illusionary as the petitioners have not mentioned any time / date / mode of the payment etc.

11. It has been held by the Hon'ble Supreme Court of Pakistan in a case titled as **Haji Ali Khan & Company, Abbottabad and 8 others Vs. M/s. Allied Bank of Pakistan Limited, Abbottabad (PLD 1995 Supreme Court 362),**

that:

"The defendants, appellants herein, did not, in their affidavit, disclose such facts as would have made it incumbent on the plaintiff to prove consideration or such

other facts as the Court might have deemed to be sufficient to support the application. The Court was, therefore, entitled to take the allegations in the plaint to be deemed to be admitted. And as there was nothing in the allegations of fact to disentitle the plaintiff to a decree, the Court was within its right to pass the decree". Reliance is also placed on a case titled as **Rana Mumtaz Ahmed Noon Vs. Muhammad Javed Khan (1999 SCMR 1845).**

12. As no appeal is provided in the law against impugned order, reference in this regard is made upon a case titled as **Syed Saghir Ahmad Naqvi Vs. Province of Sindh (1996 SCMR 1165)**, wherein it has been held as follows:-

"The statute excluding a right of appeal from the interim order cannot be passed by bringing under attack such interim orders in Constitutional jurisdiction. The party affected has to wait till it matures into a final order and then to attack it in the proper exclusive forum created for the purpose of examining such orders."

Similarly in a case titled as **Ms. Afshan Ahmed Vs. Habib Bank Limited (2002 CLD 137)**, it has been held as follows:

"It is a settled principle of law that when a statute does not provide an appeal against an

interlocutory order then the same cannot be challenged by way of a Constitutional Petition as allowing such an order to be impugned by way of a Constitutional Petition would amount to negating the provisions of the statute which does not provide for an appeal against an interlocutory order. According to the principles of interpretation of statute the Court would not act in a manner by which the object of a statute is defeated and the same is rendered nugatory”.

13. The exceptional circumstances which could justify invoking the jurisdiction of the High Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 would be when the order or action assailed was palpably without jurisdiction, malafide, void or *coram non judice*. The impugned order is neither without jurisdiction, nor malafide, void or *coram non judice* so as to warrant interference in the Constitutional jurisdiction of this Court under Article 199 of the Constitution.

14. Since I do not find the pre-requisites for interference in the Constitutional jurisdiction of this Court with the impugned order dated

20.11.2021, to be satisfied in the case at hand,
hence the instant writ petition is **dismissed**.

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

Bilal /-

Approved for reporting.