

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Civil Revision No. 406/2018.

Amjad Ali, etc.
versus
Shakeel Ahmed Sajjad

Petitioners by: Mr. Niazullah Khan Niazi, Advocate.

Respondent by: Syed Jehanzaib Javed, Advocate.

Date of Hearing: 16.05.2019.

MOHSIN AKHTAR KAYANI, J:- Through this Civil Revision, the petitioners have assailed the order dated 05.12.2018, passed by learned Additional District Judge (East), Islamabad, whereby application for grant of leave to appear and defend the suit under Order XXXVII CPC, filed by petitioners was dismissed.

2. Brief facts referred in the instant civil revision are that petitioner No.1 entered into agreement with respondent vide agreement dated 24.03.2015, whereby respondent invested an amount of Rs.3 Million in cement supply for the period of six months, who was already engaged in construction project with Gammon Pakistan Limited near Saddqal Oil Field Fateh Jang and petitioner No.1 agreed to pay profit of Rs.30± per bag (Rs.180,000/- at the end of each month) and as such a post dated cheque of the said amount was issued by petitioner No.1 in favour of respondent. The cheque was presented in the bank which was dishonoured as a result whereof respondent filed a suit for recovery of amount in which application for leave to appear and defend the suit filed by the petitioners was dismissed.

3. Learned counsel for the petitioners contends that agreement was executed between petitioner No.1 and respondent with clear terms and respondent

invested an amount of Rs.3 Million in the business of petitioner No.1 but respondent filed the suit against petitioner No.1 as well as against his wife/petitioner No.2, who has nothing to do with this case; that Court below has not appreciated the fact that both the parties are already in litigation and petitioner has serious dispute with the Gammon Pakistan Limited which is pending before the competent Court and as such it has been contended that respondent is not entitled for the amount claimed and all these defences have not been looked into by the learned trial Court and dismissed the application without considering the merits and law.

4. Conversely, learned counsel for the respondent contends that agreement between petitioner No.1 and respondent is admitted, even amount of Rs.3 Million has been admitted and cheque in question is also admitted by the petitioners which is the minimum requirement of prima-facie case in terms of Order XXXVII CPC; that suit for cancellation of cheque filed by the petitioners' side has nothing to do with the instant matter as petitioner No.1 has received Rs.3 Million and has not paid the due amount; that petitioners have failed to point out any triable issue and have taken shame defence, whereas learned trial Court has rightly dismissed the application for leave to appear and defend the suit.

5. Arguments heard, record perused.

6. Perusal of record reveals that petitioner No.1 and respondent entered into agreement of investment dated 24.03.2015, whereby petitioner No.1 agreed to pay profit of Rs.180,000/- per month on the investment of Rs.3 Million of the respondent. The respondent also claimed that petitioner No.1 issued a post dated cheque in his favour vide cheque No.20017695 drawn at bank of Punjab, Choorh Chowk, Rawalpindi, which was dishonoured on its presentation within the

territorial jurisdiction of Islamabad, where-after respondent filed suit for recovery in terms of Order XXXVII CPC.

7. The respondent presented the post dated cheque in order to secure his amount which was dishonoured on its presentation before the bank, where-after suit U/O XXXVII CPC was filed. The petitioner filed application for leave to appear and defend the suit in which he acknowledged agreement dated 24.03.2015, investment of Rs.30,00,000/- as well as terms of profit. However, besides the said acknowledgment, the petitioner has raised an additional plea regarding dispute with Gammon Pakistan Limited, against whom he has filed a suit for recovery of Rs.95.752 Million, which is pending before learned Civil Judge, Rawalpindi.

8. It is trite law that application for leave to appear and defend the suit could be decided on the principles laid down in 2001 CLC 653 (Asif Nadeem vs. M/s Bexshim Corporation), which are 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 bona fide 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 or 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.

9. Similarly, it is also well settled that if the Court comes to conclusion that any *bona fide* allegation of a triable issue *prima facie* made out then leave should be granted unconditionally. Reliance in this regard is placed upon 1975 SCMR 393 (Muslim Commercial Bank vs. Tayab Sharif). The very objectives of provisions of Order XXXVII CPC are intended to provide an earlier decision to avoid the prolonged cases of the civil trials as the suits are based upon negotiable instruments where adverse presumption is available on record against the defendants. Reliance is placed upon 2000 CLC 913 (Asif Khursheed vs. Saeed Ahmad).

10. It is well established that the petitioner No.1 has acknowledged that he had issued a post dated cheque of the principal amount of Rs.3/- Million and the same has also been proved from the contents of application, however the defence raised by the petitioner side is vague and illusionary as the respondent/ defendant has nothing to do with the dispute of petitioners with Gammon Pakistan Limited, which is the personal affair of petitioners, as the agreement dated 24.03.2015, executed between petitioner No.1 and respondent evidently explains that a sum of Rs.3/- Million has been paid to petitioner No.1 for purchase of cement for the period of 06 months through a cheque for his construction project with Gammon Pakistan Limited and as such, the petitioner has issued a cheque of Rs.3,180,000/-, over which the signature has been admitted. Hence, the petitioners have no case on merits and the learned Trial

Court has rightly dismissed the application. Even otherwise, this Court in categorical terms asked the learned counsel for petitioners for his willingness to deposit Rs.3,180,000/- as security in the Court, whereby such offer has not been appreciated, therefore, the instant civil revision is not maintainable and the same is hereby **DISMISSED**.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on 11.6.2019.

JUDGE

Zahid