

JUDGEMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Civil Revision No.130 of 2015.

Muhammad Imran Hafeez.

Vs.

Naveed Ali

Petitioner's by: Mian Tahir Iqbal, Advocate.

Respondents by: Mr. Abdul Ghafoor Qamar, Advocate.

Date of decision: 15.05.2015

Aamer Farooq, J.- Through the instant civil revision, the petitioner has assailed order dated 07.03.2015 whereby the application for leave to defend filed by the respondent was accepted subject to security of Rs.600,000/- (Rupees six hundred thousand only).

2. The facts, in brief, are that the petitioner filed a suit for recovery of Rs.6,000,000/- (Rupees six million only) against respondent on the basis of cheque No.7716636 dated 25.02.2014 drawn on HBL Blue Area Branch, Islamabad, inasmuch as the referred cheque when presented for payment was dishonoured due to insufficient funds. In the referred suit summons were ordered to be issued to the respondent in the prescribed form and on the basis thereof application for leave to defend was filed which was allowed by the learned Trial Court

subject to security of Rs:600,000/- (Rupees six hundred thousand only).

3. The learned counsel for the petitioner, inter alia, submitted that the condition imposed by the Trial Court for granting leave to defend is security to the tune of Rs.600,000/- (Rupees six hundred thousand only) whereas the suit is for recovery of Rs.6,000,000/- (Rupees six million only). It was further contended that the application for leave to defend was barred by time inasmuch as the period prescribed for filing of application for leave to defend is ten (10) days and in the instant case the summons were received by the respondent on 02.12.2014 whereas the application was filed on 19.12.2014 i.e. with a delay of seven (7) days. It was further contended that the application was not supported by an affidavit and, therefore, was incompetent. The learned counsel for the petitioner in support of his contentions placed reliance on cases titled “Mirza Irfan vs. Muhammad Yaqoob” (**2011 MLD 1024**), “Malik Zafar Iqbal vs. M/s APCO through Managing Partner APCO” (**1998 CLC 1133**), “Raja Zahid Hussain vs. Director-General National Housing Authority” (**2005 YLR 1521**).

4. The learned counsel for respondent, inter alia, submitted that the respondent was behind the bars and service of summons was affected in jail and the respondent came to know about the summons belatedly i.e. on 12.12.2014, therefore, the application is within time. The learned counsel further submitted that it is a settled law that the technicalities should not defeat justice and non appending of affidavit has no consequences. The learned counsel further submitted that the cheque tendered to the petitioner was for a sum of Rs.600,000/-

(Rupees six hundred thousand), however, the petitioner tampered and forged the same and made it for Rs.6,000,000/- (Rupees six million only).

5. Under Order XXXVII Rule 2 Code of Civil Procedure (CPC) where a suit is filed on the basis of negotiable instruments the defendant has to obtain leave to defend from the Court by making an application in this regard. The application has to be supported by an affidavit as the same is provided in Rule 3 of Order XXXVII CPC. In this behalf the relevant rule i.e. rule 3 ibid is reproduced and is as follows:

3. Defendant showing defence on merits to have leave to appear.—(1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

(3) The provisions of Section 5 of the Limitation Act, 1908 (IX of 1908), shall apply to applications under sub-rule (1).

The defence which the defendant raises or makes out should be verified by an affidavit. In this regard the seminal judgement on the issue is “Fine Textile Mills Ltd., Karachi vs. Haji Umar” (PLD 1963 SC 163) in which it was held as follows:

“In a suit of this nature where the defendant discloses upon his affidavits facts which may constitute a plausible defense or even show that there is some

substantial question of fact or law which needs to be tried or investigated into, then he is entitled to leave to defend. What is more is that even if the defense set up be vague or unsatisfactory or there be a doubt as to its genuineness, leave should not be refused altogether but the defendant should be put on terms either to furnish security, or to deposit the amount claimed in Court.

The principles upon which the provisions of Order XXXVII of the Code of Civil Procedure should be applied are not dissimilar to the principles which govern the exercise of the summary power of giving liberty to sign final judgment in a suit filed by a specially endorsed writ of summons under Order XIV of the Rules of the Supreme Court in England. One of such principles laid down by the Court of Appeal in the case of *Kodak v. Alpha Film Corporation* (1930) 2 K B 340) was that at the stage when leave to defend is sought "the Judge is not to try the action; he is to see that there is a bona fide allegation of a triable issue, which is not illusory; he need not be satisfied that the defense will succeed; it is enough that such a plausible defense is verified by affidavit.

Again in the case of *Powszechny Bank Związkowy W. Polsce v. Paros* ((1932) 2 K B 353) Scrutton, L. J., quoted with approval the observations of Field, J., from the case of *Millard v. Baddeley* ((1884) W N 94) to the following effect: -

"It has been settled law for nearly twenty years that where there is fraud in the inception of a bill, there is no longer a presumption that value has been given and the onus of proof is shifted. Where a defendant says that a bill was obtained from him by fraud, and that he therefore desires to have the fact that value was given by the plaintiff strictly proved, there is no power upon a summons under Order XIV to test the story of either party."

These observations clearly indicate that where the allegations are not merely illusory leave to defend should be granted."

Similar view was taken by Lahore High Court in case titled “Mirza Irfan vs. Muhammad Yaqoob” (2011 MLD 1024) wherein it was observed as follows:

“That the application for leave to defend the suit is not accompanied by an affidavit. In all other cases, it is an application which is a substantial document and an affidavit only lends support to it. To the contrary, an affidavit under Order XXXVII Rule 3, C.P.C. is the basic document which should disclose such facts as would make it incumbent on the plaintiff to prove the consideration. The application similarly sets the affidavit into motion. No application seeking leave to appear and defend the suit without an affidavit and that too embodying such facts that would make it incumbent on the plaintiff to prove the consideration, can be entertained and be followed by an order permitting leave to appear and defend. In my view I am supported by the judgments cited as (2005 YLR 1521 (Lahore)) titled "Raja Zahid Hussain v. Director General National Housing Authority, Islamabad and 2 others (1998 CLC 1183 (Lahore) titled "Malik Zafar Iqbal v. Messrs APCO through Managing Partner APCO, Bahawalpur".

6. The application filed by respondent was incompetent inasmuch as no affidavit was filed with the same. The filing of the affidavit cannot be regarded as a mere technicality, in view of the case law mentioned above.

7. This Court in exercise of its powers under section 115 CPC can intervene with respect to orders passed by Sub-Ordinate Courts where material irregularity has been committed in exercise of jurisdiction.

8. The learned Trial Court in granting conditional leave to defend to the respondent exercised its jurisdiction with

material irregularity because the application filed by respondent was not maintainable.

9. In view of the foregoing reasons the civil revision is allowed. Consequently order dated 07.03.2015 passed by the learned Additional District Judge-III (West), Islamabad, granting conditional leave to defend to the respondent, is set aside and the application for leave to defend is dismissed.

10. The Trial Court is directed to proceed further with the suit in accordance with law.

(AAMER FAROOQ)
JUDGE

Altaf Malik

Approved for reporting.

JUDGE.

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