

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.160 of 2016
Shafique Ahmed Qureshi
Versus
Walait Khan and others

Date of Hearing: 17.10.2016
Petitioner by: Mr. Khurram Mehmood Qureshi, Advocate,
Respondent No.1 by: Mr. S. Mahmood, Advocate

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, Shafique Ahmed Qureshi, impugns the Order dated 25.02.2016, passed by the Court of the learned Additional District Judge (West), Islamabad, whereby respondent No.1's application for leave to appear and defend the suit, filed by the petitioner under the provisions of Order XXXVII of the Code of Civil Procedure, 1908 ("C.P.C."), was allowed subject to furnishing surety bonds in the sum of Rs.13,00,000/- with one surety to the satisfaction of the Trial Court.

2. Learned counsel for the petitioner submitted that on 22.10.2015, the petitioner filed a suit for recovery of Rs.13,00,000/- under Order XXXIV C.P.C. against the respondents before the Court of the learned District Judge (West), Islamabad; that in the said suit, it was *inter-alia* pleaded that respondent No.1 had issued to the petitioner cheque No.2862615, dated 28.11.2013 for an amount of Rs.13,00,000/- drawn on Habib Bank Limited, Civic Centre, Islamabad, and that the said cheque was dishonoured when presented for encashment on 05.12.2013; that on 13.11.2015, respondent No.1 filed an application for leave to defend the said suit; that along with the said application, respondent No.1 has filed a brief affidavit, which is not as per the requirements of Order XXXVII, Rule 3(1) C.P.C.; that the affidavit sworn by respondent No.1 on 13.11.2015 does not *"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"*; that respondent No.1 should have filed a detailed

affidavit disclosing the necessary facts; that on account of the deficient affidavit filed by respondent No.1, the learned Trial Court was under an obligation not to take it into consideration; and that as there was no affidavit in accordance with the requirements of Order XXXVII, Rule 3(1) C.P.C., the learned Trial Court should have decreed the petitioner's suit. While making these submissions, the learned counsel for the petitioner placed reliance on the following case law:-

- i) Umer Khan Vs. Haji Musa Jan (2009 SCMR 1101), wherein it has been *inter-alia* held that the Court would grant leave to defend the suit whether conditional or unconditional, when the petitioner through affidavit with the application for leave to defend would show "plausible defence" or showing some substantial question of fact or law which needs to be tried.
- ii) Haji Ali Khan and Company Vs. Allied Bank of Pakistan Limited (PLD 1995 SC 362), wherein it has *inter-alia* been held that under Sub Rule (1) of Rule 3, of Order XXXVII C.P.C., leave can be granted if a defendant upon affidavit discloses such facts as would make it incumbent on the holder of the document on the basis of which the suit had been filed to prove consideration or such other facts as the Court might deem sufficient to support the leave application.
- iii) Fine Textile Mills Limited, Karachi Vs. Haji Umar (PLD 1963 SC 163), wherein it has been *inter-alia* held that where in a suit under Order XXXVII C.P.C., the defendant discloses upon his affidavit facts which may constitute a plausible defence 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. Furthermore, it was held that the defendants defense has to be verified by affidavit.
- iv) Rafique Saigol Vs. Bank of Credit and Commerce International (Overseas) Limited (PLD 1996 SC 749), wherein it has *inter-alia* been held that where the defense

disclosed by the defendant in his affidavit filed in support of the application for grant of leave to defend is found by the Court to be illusory, or lacking bonafides, or is intended to delay the proceedings or is based on allegations of vague and general nature relating to misrepresentation, fraud and coercion without any supporting material, leave may be granted on the condition of either the deposit of the amount claimed in the suit or on furnishing security for the same or on such other terms and conditions which the Court may think fit.

- v) Javed Qayyum Khan Vs. Muhammad Ismail Sabri (2002 CLC 439), wherein it has *inter-alia* been held that leave to defend can be refused if the defense disclosed on affidavits is shame, colourable or illusory /imaginary and may not give rise to triable issues.

3. Learned counsel further submitted that the learned Trial Court erred by granting leave to defend the suit to the respondent No.1 on the condition of furnishing surety bonds in the sum of Rs.13,00,000/- with one surety; that sub Rule (2) of Rule 3 of Order XXXVII C.P.C. *inter-alia* provides that a Court may grant leave to defend subject to such terms as to payment into Court, or giving security; and that the requirement to furnish surety bonds cannot be termed as a "security".

4. On the other hand, the learned counsel for respondent No.1 submitted that an affidavit was filed by respondent No.1 in support of the application for leave to defend the suit; that in the said affidavit, respondent No.1 deposed that the contents of the application for leave to defend were true and correct to the best of his knowledge and belief; and that by filing such an affidavit, the requirements of Rule 3(1) of Order XXXVII C.P.C. had been complied with. The learned counsel for the respondent prayed for the petition to be dismissed.

5. I have heard the contentions of the learned counsel for the contesting parties, and perused the record with their able assistance.

6. The record shows that on 22.10.2015, the petitioner filed a suit for recovery of Rs.13,00,000/- under Order XXXIV C.P.C. against the respondents before the Court of the learned District Judge (West), Islamabad. In the said suit, it was *inter-alia* pleaded that respondent No.1 had issued to the petitioner cheque No.2862615, dated 28.11.2013 for an amount of Rs.13,00,000/- drawn on Habib Bank Limited, Civic Centre, Islamabad, and that the said cheque was dishonoured when presented for encashment on 05.12.2013. On 13.11.2015, respondent No.1 filed an application for leave to defend the said suit. Along with the said application, respondent No.1 filed an affidavit, which has been attested by an Oath Commissioner. The lone paragraph of the said affidavit reads as follows:

“That the contents of accompanying application leave to defend are true and correct to the best of my knowledge and belief and nothing has been concealed therefrom.”

7. Now, respondent No.1's affidavit makes reference to respondent No.1's application for leave to defend the suit, which had been filed along with the said affidavit. In the said application, respondent No.1 has condescended to the particulars in the suit. Respondent No.1 in his affidavit, makes express reference to the contents of the said application deposes that its contents are correct to the best of his knowledge and belief. The pleadings in the said application and the submissions of the learned counsel for respondent No.1 prevailed over the learned Trial Court to grant leave to defend the suit, subject to the furnishing of surety bonds. Since the respondent No.1's affidavit is on the record *albeit* short, the learned Trial Court did not commit any illegality by taking it into consideration. The case law relied upon by the learned counsel for the petitioner lays emphasis on the requirement of an affidavit disclosing a plausible defence. In the case at hand, the mandatory requirement of filing an affidavit appears to have been satisfied, and express reference in the said affidavit is made to the facts contained in the application for leave to defend the suit. For the learned counsel for the petitioner to insist that facts set out in the application for leave to defend the suit should

have been repeated in respondent No.1's affidavit is, in my opinion, hyper-technical. In the case of Zohair Akhtar Vs. Jawad Adil (2006 YLR 1510), the Division Bench of the Hon'ble Lahore High Court, in similar circumstances, has held as follows:-

"5. For the argument of the respondent side that the leave application does not conform to the form of the application of such a nature. Suffice it to say that according to law, no specific form has been prescribed; it is the substance of the application and not the form which really matters, and even if parawise reply to the plaint having been given in the application but also specifically stating the ground on which the applicant seeks the leave, the said application could not be delined as lacking in qualifying ingredients to be a leave application. As regards the affidavit, it has been filed in support of the application which is the requirement of the law, may be shorter in form. But it embodies the requisites of an affidavit which has been duly attested by an Oath Commissioner. The only deficiency that it is not in an elaborate form, does not render the same ineffective. Resultantly, the objection is repelled."

8. As regards the contention of the learned counsel for the petitioner that if the learned Trial Court was inclined to grant leave to defend the suit conditionally, respondent No.1 should have been called upon to furnish 'security' instead of surety bonds, ordinarily in a suit under Order XXXVII C.P.C., the defendants should be called upon to furnish security in liquid form/cash or in the form of bank guarantee if the Trial Court is inclined to grant leave to defend conditionally. But it is not unheard of to require a defendant to furnish a surety. In the case of Sharaaf Ali Shah Vs. Liaquat Ali Shah (2000 CLC 1646), the Hon'ble High Court of Sindh spurned the contention of the learned counsel for the petitioner that the Court could not accept a surety instead of a security, which the respondent had been directed to furnish. In giving its findings, the Court placed reliance on the following passage in the judgment in the case of Lagu Velkataramanayya Setti Vs. Gunda Subbayya Chatty (AIR 1962 Andhra Pradesh 175):-

"Security.--- (1) A 'Security', speaking generally, is anything that makes the money more assured in its payment or more readily recoverable; as distinguished from e.g., .a mere I.O.U. which is only evidence of a debt.

It does not, therefore, exclude the guarantee which can be provided by any surety. In fact, the same dictionary adds further on 'security given by the borrower' may mean a third party's guarantee provided by a borrower and may be 'security

given by the borrower'. Of course this has been with reference to the English Money-lenders Act, 1927 (17 and 18 Geo, 5 c 21 S.6) but could be said to be of E general application also. There is yet another indication which can be culled out from the manner in which the term 'security' has been employed in the Civil Procedure Code itself. That word occurs with reference to the proceedings under Order XXXVII, Rules 2 and 3, and also in the matter of furnishing sureties when property is distrained or a person is arrested. In that context also, the words 'security' has been used as synonymous with 'security' and, therefore, in my view, the meaning that has to be given to the word 'security' should be taken to be comprehensive enough to include a 'surety' or at least not to exclude it. "

9. As the Hon'ble Judges who authored the judgments in the cases of Zohair Akhtar Vs. Jawad Adil (Supra) and Sharaaf Ali Shah Vs. Liaquat Ali Shah (Supra), rose to grace the Hon'ble Supreme Court of Pakistan, the said judgments deserve respect and reverence.

10. By reason of the aforementioned, I do not find any jurisdictional irregularity in the impugned order dated 25.02.2016, passed by the learned Trial Court. Resultantly, the civil revision petition is dismissed with no other as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*

Uploaded By: Zulqarnain Shah