

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

W.P no.150 /2022

Ch. Amir Ali
Versus
Raaz Muhammad and another

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
03	21 .01.2022	Mr. Muhammad Zafar Khokhar, Advocate.

The petitioner is the defendant in a suit filed under Order XXXVII CPC. The learned trial Court granted him leave to defend conditional upon furnishing surety in the sum of the cheque on which the suit is based. The petitioner hails from Lahore. He applied for the trial Court to accept surety from Lahore on the grounds that he did not have property in Islamabad, nor had any friends or relatives in Islamabad who could stand surety for him. The learned trial Court rejected his application, thereby requiring surety from within its territorial jurisdiction. As the said order is not appealable, the petitioner seeks relief in the Constitutional jurisdiction. Hence this petition.

2 Learned counsel for the petitioner initially sought to question both the conditional grant of leave vide order dated 06.11.2021 and the rejection of his application for furnishing surety from Lahore vide order dated 14.12.2021. He however confined himself to the second ground only when he found this Court disinclined to interfere with the discretion of the learned trial Court in granting conditional leave.

3 As the learned trial Court did not give any reason in its order dated 14.12.2021 for rejecting the petitioner's application to furnish surety from Lahore, other than a circular observation that the application was "without

plausible reason”, which, with respect, did not address the grounds raised in the application, this Court infers that the reason operating in the learned trial Court’s mind was the question of enforcing the surety beyond its territorial jurisdiction. If there were a legal disability standing in the way of the learned trial Court to accept surety from Lahore, one would expect that to have been stated in so many words on the face of the order itself. As the only deducible reason concerns the trial Court’s power to enforce the surety and not the rights of the plaintiff, the leave to defend having been granted already, I did not consider it necessary to issue notice to the respondent/plaintiff, this being a matter between the learned trial Court and the petitioner only, for the surety demanded by the trial Court has to be to its satisfaction and not to the satisfaction of the opposite party.

4 In its order dated 06.11.2021 granting leave, the learned trial Court has recorded that “[T]he application in question shows substantial question of law needing trial and the defense leading trial [sic!].” Once having been persuaded that leave was to be granted, the learned trial Court ought not to have imposed a condition incapable of fulfillment in the circumstances of the petitioner, for it would amount to granting leave with one hand and taking it away with the other. The concern of the learned trial Court on enforcement of the surety is indeed relevant, but that is not the sole concern, for were that the case, the enforcement of any final decree in a suit against a defendant residing beyond its territorial jurisdiction would seem to require a surety. Both the decree and any order for enforcement of surety can be executed by transfer to a Court in Lahore.

5 Learned counsel for the petitioner cited *PLD 1959 (W.P) Karachi 252*, *2019 CLC 486*, *1993 CLC 1291* and *2012 CLC 1546*. He relies in particular on *Javed Parekh*

Vs. Muhammad Safdar Malik, 2014 SCMR 1830, where the Hon'ble Supreme Court allowed substitution of title deeds of property instead of the bank guarantee demanded by the trial Court which had decreed the suit for failure to fulfil the condition for leave while dismissing the application for substitution. The Supreme Court found the insistence by the trial Court and the High Court on a bank guarantee when the title documents sought to be substituted were of equivalent value of the sum claimed in the suit to have been "harsh".

6 I too find the learned trial Court, having once decided that there was a substantial question of law involved, ought not have deprived the defendant from offering substitute surety. On the facts of this case, I say, respectfully, that the learned trial Court ventured beyond a reasonable exercise of the discretion vested in it under Order XXXVII Rule 3(2) CPC in rejecting the petitioner's application to furnish surety from Lahore.

7 Resultantly, the order dated 14.12.21 is set aside. The learned trial Court is to accept surety to its satisfaction furnished from outside its territorial jurisdiction. The petitioner is allowed two weeks to submit the surety.

8 This petition is disposed of in terms of the order at para 7.

(SARDAR EJAZ ISHAQ KHAN)
JUDGE