

JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

RFA No.65/2018

Aurangzeb

versus

Muhammad Rizwan

RFA No.317/2021

Aurangzeb

versus

Muhammad Rizwan & another

And

W.P. No. 1610/2021

Muhammad Rizwan and another

Vs.

Learned Civil Judge 1st Class, Islamabad-West, etc

Appellant by: Ch. Muhammad Asad Raan and
Mr. Moazzam Ali Shaikh, Advocates.

Respondents by: Mr. Sajid Abbas Khan and Mr. Ehsan
Ullah Sial, Advocates.

Date of Hearing: 21.02.2022.

MOHSIN AKHTAR KAYANI, J: Through this single judgment, I intend to decide the captioned regular first appeals as well as writ petition, as similar facts and parties are involved.

2. Through the captioned RFA No.65/2018, the appellant has called in judgment and decree of the learned Additional District Judge-VIII (West), Islamabad, dated 02.05.2018, whereby the suit filed by the respondent Muhammad Rizwan for recovery of Rs.400,000/- has been decreed against the appellant.

3. Similarly, through the captioned RFA No.317/2021, the appellant has assailed the judgment and decree dated 29.04.2021, passed by learned Civil Judge (West), Islamabad, whereby suit filed by the appellant for

declaration, cancellation of cheques and forged, fake and fraudulent agreement dated 13.08.2010, permanent and mandatory injunction has been dismissed.

4. Brief facts referred in the captioned RFA No.65/2018 are that Muhammad Rizwan (respondent) filed a suit under Order XXXVII Rule 1 & 2 CPC for recovery of Rs.400,000/- contending that the appellant had given a cheque of Rs.400,000/- to him, as such, the appellant contested the suit by filing his written statement, whereafter the learned trial Court framed the issues, per se, after recording of pro and contra evidence, the learned trial Court vide impugned judgment and decree dated 02.05.2018 decreed the suit against the appellant.

5. On the other hand, facts as unfolded from the captioned RFA No.317/2021 are that the appellant borrowed some amount from the respondent for the purpose of investment, in lieu of which the appellant gave a guarantee cheque to the respondent, as such, when the appellant returned the borrowed amount, the respondent refused to return the cheque, which compelled the appellant to file a suit for declaration, cancellation of cheques and forged, fake and fraudulent agreement dated 13.08.2010, permanent and mandatory injunction, which was dismissed vide impugned judgment and decree, dated 29.04.2021.

6. In W.P. No. 1610/2021, the petitioners/Muhammad Rizwan & Malik Muhammad Bostan/defendants in suit filed by the appellant/Aurangzeb for declaration and cancellation of cheques, have assailed the orders dated 12.04.2021 & 20.04.2021, passed by learned Civil Judge 1st Class (West), Islamabad in terms of Order XVII Rule 3 CPC,

whereby, their right to cross examine the PWs as well as to produce the evidence in their defence has been struck of.

7. Learned counsel for appellant contends that the learned trial Court has passed the impugned judgments and decrees as result of misreading and non-reading of evidence; that the learned trial Court has not gone through the record properly and passed the impugned judgments and decrees in a slipshod manner; that the findings recorded by the learned trial Court while passing the impugned judgments and decrees are not based on cogent reasons and causing miscarriage of justice; that the learned trial Court has not considered the documentary evidence produced by the appellant, rather appreciated the case one-sided in favour of the respondent.

8. Conversely, learned counsel for respondents stressed that the appellant has failed to prove his case in terms of the *Qanun-e-Shahadat Order, 1984* as he raised a flimsy superstructure to set up his case before the learned trial Court, as such, the appellant has also failed to prove his claim that he had issued the cheque as guarantee against the borrowed amount, per se, the learned trial Court has appreciated each and every aspect of the case in accordance with law and decreed the suit filed by the respondent, while dismissing the one filed by the appellant.

9. Arguments heard, record perused.

10. Perusal of record reveals that the appellant/Aurangzeb has assailed the judgment and decree dated 02.05.2018, passed in the suit under Order XXXVII Rule 1 & 2 CPC for recovery of Rs.4,00,000/- and the judgment and decree dated 29.04.2021, whereby, his own suit for declaration and cancellation of cheques has been dismissed by learned Trial Court on the

same negotiable instrument, which was part of the suit under Order XXXVII Rule 1 & 2 CPC.

11. The brief facts narrated in both the captioned appeals are that the appellant acknowledged this fact that he has received an amount of Rs.5,00,000/- as loan from Malik Muhammad Bostan alongwith interest of Rs.4,00,000/- for the purpose of investment, as such he was duty bound to return the amount of Rs.9,00,000/- to the defendant as referred in Para-3 of the plaint of the suit for declaration and cancellation of cheques. The appellant also acknowledged that he issued different postdated cheques to defendant No.2, as guarantee, which were not returned, despite the fact that he has given amount of Rs.15,87,000/- to the defendant in cash as well as in shape of transfer of land measuring one kanal in Mouza Talhar, Tehsil & District, Islamabad. The suit for declaration and cancellation of cheque has been contested, whereby, the respondents/Malik Muhammad Bostan and his Son/Muhammad Rizwan, who are decree holders have denied this aspect in unequivocal terms. On the other hand, one of the respondents/Muhammad Rizwan has filed suit for recovery in terms of Order XXXVII Rule 1 & 2 on the basis of same negotiable instrument, which were issued by the appellant.

12. Learned Additional District Judge-III (West), Islamabad while dealing with the suit under Order XXXVII Rule 1 & 2 CPC has recorded evidence of plaintiff/Muhammad Rizwan, who has submitted copy of Cheque as Ex. P-2 and Dishonor slips as Ex. P-3 to substantiate his claim, whereas, the present appellant while appearing as DW-1 in the said suit acknowledged issuance of guarantee cheques to Malik Muhammad Bostan/father of the plaintiff, even he acknowledged receiving of amount

of Rs.5,00,000/- for the purpose of investment, as such minimum requirement of law has been demonstrated against the appellant, in which he has acknowledged receiving of consideration, issuance of postdated cheques and business transaction, but no fruitful justification has been extended as to why the amount has not been returned/paid, though he has taken a stance that matter had been settled in *Jirga*, however, no evidence of *Jirga* or its meeting convened to settle the issue is available. During the cross examination the appellant has acknowledged issuance of negotiable instrument, date, amount and receiving of principal amount, hence, there is no cavil to proposition that everything has been acknowledged by the appellant.

13. In such scenario, Section 118 of the *Negotiable Instrument Act, 1881* comes into play which creates presumption in favour of the respondents/decreed holders, who have proved consideration factor, the date and time and its acceptance, therefore, the onus is upon the appellant to prove the contrary in terms of Article 117 of the *Qanun-e-Shahadat, 1984* as well as in terms of Section 118 of the *Negotiable Instrument Act, 1881*. As such the appellant has failed to demonstrate in rebuttal and the presumption is in favour of the respondent/plaintiff in terms of the law laid down in the judgments reported as 2000 CLC 296 (Sardar Muhammad Ramzan Vs. Muhammad Yahya Khan), 2000 CLC 1967 (S.K. Abul Aziz Vs. Mahmoodul Hassan and others) & 2002 CLD 1545 (Muhammad Sabir Vs. Khalil-Ur-Rehman).

14. It is settled law that once an execution is admitted then it is important to disprove the consideration factor, therefore, if any person intends to prove the said presumption which is not available or he dispute

the same, must prove contrary as held in the judgment reported as 2005 YLR 3321 (Syed Kausar Abbas Shah Vs. Sardar Khan), hence, the decree has rightly been passed against the appellant for return of amount.

15. Now adverting towards that second suit which was filed by the appellant himself for declaration and cancellation of cheques in which he acknowledged the issuance of cheques, receiving of amount, therefore, primary onus is upon the appellant in terms of issue No.1, whereby he while appearing in Court as PW-1 produced documentary evidence i.e. receipts as Ex. P-1 & P-2, copy of bank statement as Ex. P-3, attested report U/S 173 Cr.P.C. as Ex.P-4, receipt dated 24.05.2010 as Ex.P-5, receipt dated 29.06.2010 as Ex.P-6 and copy of plaint of the suit titled (Muhammad Rizwan Vs. Aurangzeb) as Ex.P-7, though he has placed heavy reliance upon these documentary evidence.

16. The appellant has produced Lal Khan as PW-2 and Muhammad Zameer as PW-3 in support of his case, though the witnesses have not been cross examined, as right of cross examination of the respondent/defendant has been closed in terms of Order XVII Rule 3 CPC, which has not yet been set-aside, therefore, over all view has to be gathered from the evidence of these three witnesses brought by the appellant in his civil suit.

17. The primary case of the appellant in his civil suit for declaration and cancellation of cheques is that he has paid the amount to the defendant through difference receipts, which have been exhibited in the presence of witnesses, but despite commitment by the respondent/defendant the cheques were not returned and later on got dishonored by the respondent with malafide, even the appellant claims that he has transferred one kanal land in the name of respondent in Mouza Talhar, Tehsil and District

Islamabad, but despite transfer of land the cheques were not returned to him, therefore, the cheques be declared without consideration and cancelled. Similar statement has also been recorded by PW-1 and PW-2, in which it has been alleged that the respondent/Muhammad Rizwan and his father Malik Muhammad Bostan have failed to prove the transaction and reference of *Jirga* has been given in this regard.

18. PW-3/Muhammad Zameer has also stated that the respondent after dishonor of the cheques got registered the criminal case against the appellant/Aurangzeb, whereas, in the *Jirga* proceedings respondent has acknowledged receiving of amount, though the cheques were not returned nor the transferred land was returned.

19. While going through the evidence of these three star witnesses where much emphasis has been placed upon the *Jirga*, but surprisingly not a single member of *Jirga* has been called as witness in terms of Article 117 of the *Qanun-e-Shahdat, 1984* to discharge the burden of plea taken by the appellant himself. Even otherwise the receipts Ex. P-1, Ex. P-2, Ex.P-5 & Ex. P-6 are unilateral documents allegedly executed by respondent, but no effort has been made in order to prove the signatures of the executants nor any such request has been made during the proceedings, hence, it has no legal worth to consider as a proof for payment.

20. I have also gone through the receipts EX.P-1 & Ex. P-2, which reveals that certain amount has been transferred in the account of credit card of one Raza Sarwar, who has no nexus with the respondent, therefore, impact of the Ex.P-1 & P-2 is adverse to the claim of the appellant.

21. I have also gone through the Ex. P-5 receipt of receiving of cash amount allegedly by Malik Muhammad Bostan, but the same is in absence

of any witness and similar aspect has been observed in Ex.P-6, in such scenario receipts have no evidentiary value to be considered or accepted against the claim of the appellant, who failed to demonstrate any lawful justification, nor proved the receipts under the law, therefore, adverse effect has to be considered against the appellant himself who is not able to place any justifiable evidence to discharge his own onus.

22. This Court has gone through the evidence, issues and finding given by learned Trial Court in which proper appreciation has already been made qua the evidence against the appellant, even otherwise, the decree which has been passed against the appellant in suit for recovery in terms of Order XXXVII Rule 1 & 2 CPC and his conviction in two cases i.e. FIR No. 307/11 dated 22.08.2011, U/S 489-F PPC, and FIR No. 420 dated 05.11.2011, U/S 489-F PPC, both registered at P.S. Kohsar, Islamabad, whereby, the appellant has been convicted and his conviction has been maintained by learned Appellate Court, as such this aspect also gone adverse is the appellant who has been convicted for dishonestly issuance of cheques.

23. Primarily, the appellant has failed to prove his onus under Section 118 of the *Negotiable Instrument Act, 1881*, even he has failed to prove that the cheques which were subject matter of other civil suit and criminal litigation has been issued as guarantee, in such scenario presumption has been drawn against the appellant who was failed to prove his own plea in terms of Article 117 of the *Qanun-e-Shahdat, 1984*.

24. The respondent/Muhammad Rizwan has filed W.P. No. 1610/2021, whereby, his right of cross examination has been closed by the learned

Trial Court in the civil suit for declaration/cancellation of cheques filed by the appellant in terms of Order XVII Rule 3 CPC.

25. The record has been perused with the able assistance of learned counsel for the parties which reveals that number of opportunities have been granted to the petitioner/defendant to cross examine the three witnesses of appellant/plaintiff, but despite grant of (آخری موقع), even notice U/O XVII Rule 3 CPC was issued, and absolute last opportunity was also granted to the petitioner/defendant, but he failed to cross examine, even, no justiciable reason has been brought on record before this Court as to why the witnesses have not been cross examined. In this situation, this Court has been guided by the principle laid down in the judgment reported as 2020 SCMR 300 (Moon Enterpriser CNG Station, Rawalpindi Vs. Sui Northern Gas Pipelines Limited).

26. In view of above, no interference is required in the impugned order of closing of right to cross examine in terms of Order XVII Rule 3 CPC.

27. While considering each and every aspect and discussion, no case of reappraisal of the evidence is made out by the appellant/Aurangzeb as well as by the petitioner/Muhamm ad Rizwan, as the learned Trial Court has rightly observed the law and appreciated the evidence, therefore, Regular First Appeals No. 65/2018 & 317/2021 as well as Writ Petition No. 1610/2021, stand DISMISSED.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 1st March 2022.

JUDGE

Khurram.