

THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench

Mr. Justice Munib Akhtar
Mr. Justice Athar Minallah

Civil Petitions 202-L and 203-L of 2022

(Against judgment dated 09.12.2021 the Lahore High Court, Lahore passed in Civil Revision No.77081 and 77089 of 2021

Adamjee Insurance Company Limited	...	Petitioner(s)
		(In both cases)

Versus

Techno International and others	...	Respondent(s) (In both cases)
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For the petitioner(s): Mr. Farooq Amjad Meer, ASC

For the respondent(s): Not represented.

Date of hearing: 15.11.2024

ORDER

Athar Minallah, J.- In both the petitions before us, M/s Adamjee Insurance Company Limited (**'petitioner-company'**) has sought leave under Article 185(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ('Constitution') against judgment dated 09.12.2021 passed by the High Court whereby the respective civil revisions were dismissed and consequently the orders passed by the trial court, granting leave to appear in and defend the two separate suits subject to furnishing surety equivalent to the amount claimed, were upheld.

2. The petitioner-company had filed two separate recovery suits by adopting the summary procedure provided under Order XXXVII of the Code of Civil Procedure 1908 ('CPC'). The respondents filed applications for grant of leave to appear and defend the suits. Rejoinders were also filed by the petitioner-company. The trial court allowed the applications and granted leave to appear and defend the suits subject to furnishing surety bonds by the respondents. The latter complied with the

conditions set out in the orders dated 25.09.2021. These orders were challenged by the petitioner-company before the High Court by way of filing separate civil revisions which were dismissed by the High Court in *limine* vide the consolidated impugned judgment dated 09.12.2021.

3. We have heard the learned counsel for the petitioner and have also perused the record.

4. It is the stance of the petitioner-company that the trial court had exercised its discretion arbitrarily while granting leave to appear and defend the suits and the High Court had erred in upholding the said orders. The learned counsel has argued that no case was made out for grant of leave to appear and defend. He has further argued that the High Court had relied on the judgment of this Court in the case of Mian Rafique Saigol¹ but did not consider that in that case the security was ordered to be furnished in the form of a bank guarantee. In this case the High Court, having relied on the aforementioned judgment, should have ordered the conversion of security from a surety bond to furnishing of a bank guarantee. In the facts and circumstances of the case the conditional grant of leave to appear and defend the suits subject to furnishing surety bonds was, therefore, an arbitrary exercise of discretion. The petitioner-company has raised contradictory stances. On the one hand it has been argued that the application for leave to appear and defend had not disclosed any material issue or a question requiring regular trial while, on the other, it is asserted that, since reliance was placed by the High Court on the aforementioned judgment of this Court, therefore, furnishing of the security by way of submission of a surety bond ought to have been converted to furnishing a bank guarantee.

¹ Mian Rafique Saigol and another v. Bank of Credit and Commerce International (Overseas) Ltd. and another (PLD 1996 Supreme Court 749)

5. It is not disputed that the petitioner-company had filed its claims by adopting the summary procedure set out under Order XXXVII of the CPC which is in respect of suits upon bills of exchange, hundies or promissory notes. Rule 3 of Order XXXVII provides that the court shall, upon application by the defendant, give leave to appear and 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. Sub-rule (2) of Rule 3 explicitly provides that leave to defend may be given unconditionally or subject to such terms as payment into court, giving security, framing and recording issues or otherwise as the court thinks fit. It is evident from a plain reading of the aforementioned provisions that grant of leave to appear and defend the suit is given by the court upon affidavits disclosing facts that would require the holder of the bills of exchange, hundies or promissory notes, as the case may be, to prove consideration. Moreover, the court in its discretion may also require disclosure of such other facts sufficient to support the application. The leave to appear and defend the suit may be given unconditionally or the court in its discretion may impose conditions by way of subjecting the leave to appear and defend to such terms as payment in the Court or giving security in some other form. The grant of leave to appear and defend the suit, whether unconditionally or subject to condition, falls within the exclusive discretion of the court and it has to be exercised on the basis of the facts and circumstances of each case.

6. The principles regarding the exercise of discretion by a trial court in the context of granting leave to appear and defend the suit unconditionally or conditionally, as the case may be, have been enunciated by this Court in the case of *Fine Textile Mills*². This Court

² *Fine Textile Mills Ltd. Karachi v. Haji Umar* (PLD 1963 Supreme, Court 163)

has observed that the principles upon which the provisions of Order XXXVII 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. The court referred to the principles laid down in the case of Kodak³ to the effect that at the stage when leave to appear and defend the suit is sought then the judge is not to try the action, rather, the latter has to see that there is a bona fide allegation of triable issue which is not illusory. The judge need not be satisfied that the defence will succeed and that it is enough that such a plausible defence is verified by affidavits. This Court has, therefore, held on the aforementioned analogy that, in a suit in the nature of one instituted under Order XXXVII where 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 the court would be justified to grant leave to appear and defend the suit. This court has further held that, even if the defence set up by the defendant is vague or unsatisfactory or there is any doubt as to its genuineness, leave should not be refused altogether but, rather, the defendant should be required either to furnish security or to deposit the amount claimed in the court. These principles were reaffirmed by this Court in the case of Abdul Karim Jaffarani⁴. After reviewing the precedent cases this court held that no hard and fast rule can be laid down for determining the question as to how the discretion vested in the court to subject the order for grant of leave to defend to conditions ought to be exercised as this question depends on the facts and circumstance of each case. This court was of the opinion that laying down a rule for the exercise of

³ Kodak v. Alpha Film Corporation (1930) 2 K B 340

⁴ Abdul Karim Jaffarani v. United Bank Ltd. and others (1984 SCMR 568)

powers in matters of discretion vesting in a court would be improper since the legislature itself has not placed fetters on how the discretion has to be exercised under sub-rules 2 of Rule 3 of Order XXXVII of the CPC. However, it has been observed that, while exercising discretion it was necessary for the court to take into consideration the scope and object of the summary procedure of suit provided under Order XXXVII. If the Court is of the opinion that the defendant is attempting to prolong the litigation and impeding a speedy trial, then it would be justified to impose conditions. It has been further observed that it would be an improper exercise of discretion to impose conditions merely because the defendant at the leave stage has not been able to adduce his evidence on the pleas raised in his defense. The proper stage for substantiating and taking evidence would not be the leave granting stage but the subsequent trial proceedings.

7. In the case of Mian Rafique Saigol (*supra*), while affirming the principles enunciated in the aforementioned judgments this court has held that where a fact disclosed by the defendant in the affidavit makes out a case for shifting the onus on the plaintiff to prove consideration of the instrument, then leave to defend ought to be granted. The leave could also be granted on any other ground or facts which the court considers sufficient to support the application for grant of leave to appear and defend the suit. It has been held that refusal of grant of leave to defend is a rare phenomenon and it is confined to cases where no defence at all is disclosed by the defendant. Thus, ordinarily, leave would not be declined even in cases where the defence appears to be very weak or a sham one, because in such cases the grant of leave by a court can be made conditional. The grant of conditional or unconditional leave has been held to be a matter within the discretion of the court which is to be exercised keeping in view the facts and

circumstances of each case and that no hard and fast rule could be laid down as to how it should be exercised by the court. In a nutshell, if it appears to the court that the facts disclosed in the affidavit in support of the application for grant of leave to appear and defend are such that it becomes necessary for the plaintiff to prove consideration of the instrument then, in such an eventuality, leave to appear and defend may also be granted unconditionally provided the defense is found to be bonafide and the conduct of the defendant is free from suspicions. This Court has referred to other instances where unconditional leave could be granted but has observed that they are only illustrative and by no means exhaustive because there could be other similar circumstances which may persuade the Court to grant leave to defend unconditionally. However, where the defense disclosed by the defendant in the affidavit is found to be illusory, or lacking bona fides, or is intended to delay the proceedings or is based on allegations of a vague and general nature relating to misrepresentation, fraud and coercion, without any supporting material, then leave may be granted conditionally i.e. by way of deposit of the amount claimed in the suit in the court or on furnishing of security for the same or on such other terms and conditions which the court may think fit.

8. In the case before us, the defendants have denied the issuance of the cheques. They had also denied having authorized the petitioner-company to encash the cheques. The question regarding maintainability of the two suits was also raised. The facts disclosed in the affidavits were not found by the court to be illusory or lacking in bonafide. There is also nothing on record to show that the conduct of the defendants reflected an intent to impede or delay the trial proceedings. The stance taken by the petitioner-company that the record conclusively determined all the issues raised by the defendants is misconceived

because, at the stage of granting leave to appear and defend the suit, the court has to confine itself to the facts disclosed in the affidavits in support of the applications and cannot form a positive opinion and thus determine the defence raised by the defendant. The argument that since the High Court had relied on a judgment of this court, wherein the grant of leave to appear and defend was subjected to furnishing a bank guarantee, therefore, the same should have been ordered, is also without force. The principles laid down regarding the exercise of discretion while deciding an application for grant to leave to appear and defend the suit instituted under Order XXXVII have been highlighted above. The discretion exercised by a court is essentially dependent on the facts and circumstances of each case. The High Court had relied on the judgment in the context of the principles enunciated therein. By no stretch of the imagination does the judgment lay down a binding rule that in case of reliance the form of security ordered to be furnished would be a bank guarantee. As already noted, the nature of security which a court may order falls within its exclusive discretion and it has to be exercised on the basis of facts disclosed in the affidavits supporting the applications. No hard and fast rule can be applied in order to compel a court to order a particular form of security. The facts and circumstances in the cases before us were distinct from those which were involved in the aforementioned cases. The discretion exercised by the trial court while granting the defendants leave to appear and defend in the two separate suits, subject to furnishing of surety bonds, has not been found by us to have been exercised arbitrarily. We have not been able to persuade ourselves that the trial court had exercised its discretion otherwise than in accordance with law and the principles highlighted above. The High Court had rightly upheld

the orders whereby leave to appear and defend the suits was granted subject to furnishing security by way of surety bonds.

9. In the circumstances, no question of law has been raised for our consideration for grant of leave. Consequently, leave is refused and the petitions are dismissed.

Islamabad the

15th November, 2024

NOT APPROVED FOR REPORTING

Aamir Sh./*