JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A.No.69 of 2016
Ahmed Ali
Versus
Saleem Iqbal Khan

Date of Hearing: 08.03.2021
Appellant by: Mr. Basharat Ullah Khan, Advocate
Respondent by: Syed Javed Akbar, Advocate

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, we propose to decide regular first appeal No.69/2016 and civil revision petition No.48/2016 since they arise from the same proceedings and the contesting parties are common.

2. On 11.06.2015, the respondent / plaintiff filed a suit under Order XXXVII C.P.C. for recovery of Rs.60,08,756/- against the appellant / defendant before the Court of the learned Additional District Judge, Islamabad. Leave to appear and defend the suit was granted by the learned Trial Court vide order dated 15.12.2015 *"subject to furnishing surety bond equal to the amount claimed against defendant."* The matter was adjourned to 06.01.2016 for the submission of surety bond and written statement. On 06.01.2016, the appellant did not furnish the surety bond, and the matter was adjourned to 18.01.2016 since lawyers were not appearing in the Courts due to a projection meeting organized by the Bar. On 18.01.2016, the appellant sought one opportunity so that surety could be furnished. The Court adjourned the matter to 30.01.2016 for the furnishing of the surety. On 30.01.2016, after the appellant informed the learned Trial Court that a civil revision petition had been filed by the appellant before the High Court, the matter was adjourned to 08.02.2016.

3. On 28.01.2016, the appellant had filed civil revision petition No.48/2016 against the order dated 15.12.2015 passed by the learned Trial Court. The appellant had sought the modification of the said order so that he could be allowed to defend the suit unconditionally. Although, along with the said civil revision petition, the appellant had filed an application seeking the suspension of the

proceedings before the learned Civil Court, no order was passed on the said application.

4. In the meanwhile, the proceedings before the learned Trial Court continued. In the order dated 08.02.2016, the learned Trial Court noted that by not furnishing a surety bond, the appellant had failed to fulfill the condition on which leave to appear and defend the suit had been granted. The appellant was given a last chance to submit a surety bond by 18.02.2016. Even on 18.02.2016, the appellant did not submit the surety bond. Consequently, the learned Trial Court proceeded to recall the leave to appear and defend the suit which had earlier been granted to the appellant. For the purposes of the clarity, the said order dated 18.02.2016 is reproduced herein below:-

> ***"Defendant's application for leave to appear and defend the suit is accepted subject to submission of surety bonds, thereafter, the defendant was given as many as four chances, to submit the surety bonds and finally on 08.02.2016, defendant was directed to submit surety bonds with final opportunity. The defendant was specifically apprised that if he fails to submit the surety bonds, this court shall proceed forthwith with the suit. Case was repeatedly called, learned counsel for defendant appeared but defendant did not comply with the order of this court. Consequent thereupon, defendant's leave to appear and defend the suit is dismissed. Now to come up for ex-parte evidence of plaintiff for 26.02.2016."***

5. On 24.02.2016, the appellant filed an application for the setting-aside of the order to proceed *ex-parte.* The said application was dismissed by the learned Trial Court vide order dated 09.03.2016, and on the same day the respondent's *ex-parte* evidence was recorded and thereafter, the suit instituted by him was decreed. The judgment and decree dated 09.03.2016 has been assailed by the appellant in the instant appeal.

6. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that the appellant, in his reply to respondent's application under Section 151 C.P.C. as well as in his application for setting-aside the order to proceed *ex-parte*, had requested the Court for permission to furnish a surety with respect to a property in Faisalabad; that the appellant was a resident of Faisalabad and was not in a position to make arrangement for a local surety; that cheque No.97229623 dated

23.10.2014 for an amount of Rs.52,60,000/- was from Tandlianwala Branch of the Bank of Punjab which is located in District Faisalabad; that the interaction between the appellant and the respondent also took place at Faisalabad; and that the learned Trial Court should have permitted the appellant to furnish a surety with property in Faisalabad.

7. Learned counsel for the appellant further submitted that the respondent in paragraph 2 of the suit had admitted that he had received Rs.42,51,244/- from the appellant; that cheque No.97229620 dated 08.12.2013 for an amount of Rs.50,00,000/- had never been presented for encashment and had not been dishonoured; that the learned Trial Court erred by including Rs.7,48,756/- in the decree which was in addition to the amount of Rs.52,60,000/- pertaining to cheque No.97229623 dated 23.10.2014; that the amount of Rs.42,51,244/- which had admittedly been returned by the appellant to the respondent should have been deducted from the amount of Rs.61,75,000/- which had been paid by the respondent to the appellant through banking channels; and that this Court ought to be set-aside the judgment and decree dated 09.03.2016 and remand the matter to the learned Trial Court with the direction to accept a surety with respect to a property located in Faisalabad, and to decide the respondent's suit on merits. Learned counsel for the appellant prayed for the appeal to be allowed in terms of the relief sought therein.

8. On the other hand, learned counsel for the respondent submitted that after the learned Trial Court granted leave to appear and defend the suit subject to the condition of furnishing a surety, the appellant instead of fulfilling the said condition sought adjournments before the learned Trial Court, and subsequently on 28.01.2016 challenged the learned Trial Court's order dated 15.12.2015 whereby conditional leave to appear and defend the suit had been granted; that the appellant wanted the suit to be defended unconditionally; and that in the civil revision petition, it has not been pleaded that the appellant was in a position to furnish a surety with property in Faisalabad.

9. Furthermore, learned counsel for the respondent very fairly submitted that since cheque No.97229620 dated 08.12.2013 for an amount of Rs.50,00,000/- had not been presented for encashment, and therefore had not been dishonoured, the decretal amount may be modified by subtracting Rs.7,48,756/- therefrom; that after Rs.42,51,244/- had been returned by the appellant to the respondent, the appellant had issued cheque No.97229623 dated 23.10.2014 for an amount of Rs.52,60,000/-, which was dishonoured on presentation; that the bank statement on the record clearly shows that the amount of Rs.42,51,244/- had been returned by the appellant to the respondent before the issuance of the said cheque No.97229623 dated 23.10.2014. Learned counsel for the respondent prayed for the judgment and decree to be upheld to the extent of Rs.52,60,000/-.

10. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 5 above and need not be recapitulated.

11. It is an admitted position that the condition on which leave to appear and defend the suit was granted to the appellant vide order dated 15.12.2015 was never fulfilled. As mentioned above, the learned Trial Court granted several opportunities to the appellant to furnish the surety. The conditional leave granting order dated 15.12.2015 was assailed by the appellant in civil revision petition No.48/2016, which was filed on 28.01.2016. We have gone through the pleadings in the said petition. It is nowhere pleaded that the appellant was ready to furnish a surety with property in Faisalabad. In the prayer clause of the said petition, the appellant had sought the permission to defend the suit unconditionally.

12. Vide order dated 08.02.2016, the learned Trial Court gave a last chance to the appellant to submit a surety bond. The appellant did not even furnish a surety with property in Faisalabad. No such surety bond was brought on the record. Since leave to appear and defend the suit was granted on the condition to furnish a surety bond, and

since the appellant failed to fulfill the said condition, We are of the view that the order dated 08.02.2016 whereby the learned Trial Court recalled the conditional leave granting order and dismissed the appellant's application for leave to appear and defend the suit, does not suffer from any legal infirmity.

13. It is an admitted position that cheque No.97229620 dated 08.12.2013 for an amount of Rs.50,00,000/- had not been presented for encashment. Therefore, the question of the said cheque being dishonoured does not arise. Since the respondent admitted having received Rs.42,51,244/- from the appellant, the learned Trial Court held that the appellant was liable to pay Rs.7,48,756/- (i.e. Rs.50,00,000/- minus Rs.42,51,244/- = Rs.7,48,756/-). Since the said cheque No.97229620 dated 08.12.2013 had never been dishonoured, it could not have formed the subject matter of a suit under Order XXXVII C.P.C. Therefore, the learned Trial Court erred by including the amount of Rs.7,48,756/- in the decretal amount. Paragraphs 10 and 12 of the judgment in the case of Zahoor Ahmad Vs. Mushtaq Ahmad (2016 CLC 937) are reproduced herein below:-

> ***"10. Another crucial fact that escaped the attention of the trial court was the non-presentment of the sixteen cheques to the bank by the respondent-plaintiff for their encashment. It was admitted by the respondent-plaintiff in evidence that the cheques in question were never presented to the concerned branch of the bank. As such, the cheques were never dishonoured. For filing of a suit under Order XXXVII, C.P.C. on the basis of a cheque, it is necessary for the plaintiff to present the cheque to the bank for its dishonour in order for cause of action to accrue to him against the drawer of the cheque. If a cheque is not presented to the bank for its payment, the procedure provided for in Order XXXVII, C.P.C. shall not be available to a plaintiff and the suit so filed shall not be maintainable. The reason is not hard to fathom as in the absence of presentment of the cheque before the bank, it shall remain at best a piece of evidence corroborating the original loan transaction.***
>
> ***11. ...***
> ***12. The various provisions of the Negotiable Instruments Act dealing with presentment clearly bring out the fact that unless a cheque is presented for payment, the drawer of the cheque will be absolved from liability. In other words, the presentment of a cheque is a condition precedent in order for a payee to charge the drawer/maker of a cheque. It is thus evident that for filing of a suit under Order XXXVII, C.P.C. based on a cheque, it is necessary to present the said cheque to the bank. Admittedly, the 16 cheques allegedly given by the appellant-defendant were not presented for payment. The suits under Order XXXVII, C.P.C., therefore, were not maintainable before the Additional District Judge. It may again be emphasized that the tenor of the plaint showed that the respondent-plaintiff had relied***

solely upon the cheques to agitate his cause of action against the appellant-defendant."

14. As regards cheque No.97229623 dated 23.10.2014 for an amount of Rs.52,60,000/-, it is an admitted position that the said cheque had been dishonoured on presentation. The appellant's assertion that since he had already repaid Rs.42,51,244/- to the respondent, the respondent should not have presented the said cheque No.97229623 for encashment, does not carry merit. This is because the bank statement produced as Mark-B and Mark-C shows that the amount of Rs.42,51,244/- was returned through transactions which were prior to 23.10.2014 when the said cheque No.97229623 was issued. This cheque was dishonoured on 24.10.2014 due to insufficient funds. The appellant's stance in the application for leave to appear and defend that blank cheques had been obtained by the respondent from the appellant is not believable since it has not been pleaded as to who was the principal debtor and what the guarantee was for. Learned counsel for the appellant was not able to show that the discretion exercised by the learned Trial Court in granting leave to appear and defend the suit to the appellant subject to furnishing a surety bond was neither arbitrary nor unlawful. Consequently, C.R.No.48/2016 is liable to be dismissed being devoid of merit.

15. In view of the above, the instant appeal is partly allowed; and the impugned judgment and decree dated 09.03.2016 for an amount of Rs.60,08,756/- is modified by excluding therefrom Rs.7,48,756/- whereas C.R.No.48/2016 is dismissed. There shall be no order as to costs.

(LUBNA SALEEM PERVEZ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 15/03/2021

(JUDGE) **(JUDGE)**

Qamar Khan*