JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

R.F.A No.56 of 2018

Khalid Javed

Vs

Additional District & Sessions Judge-VII, (West) Islamabad, etc

Appellant by: Ch. Naeem Ali Gujjar, Advocate.

Respondent No.2 by: Mr. Sardar Muhammad Yaqoob Mastoi, Advocate.

Date of Hearing: **11.02.2025**

INAAM AMEEN MINHAS, J.- Through this Regular First Appeal, the appellant has assailed the judgment and decree dated 24.10.2016 **("Impugned Judgment and Decree")**, passed by learned Additional District & Sessions Judge-VII (West), Islamabad **("Trial Court")**, whereby suit under Order XXXVII, Civil Procedure Code,1908 **("CPC")** for Recovery of Rs.80,000/- along with interest filed by respondent No.2 was decreed ex-parte.

2. Brief facts of the case are that respondent No.2/plaintiff owed an amount of Rs. 80,000/- (Rupees eighty thousand only) to the appellant/defendant and in respect of that amount, the appellant/defendant issued a cheque bearing No.4051100, dated 31.12.2013 (**"Subject Cheque"**) to be drawn at Allied Bank Branch, Rawalpindi and an agreement was also executed on 02.02.2010 between respondent No.2/plaintiff and the appellant/defendant in presence of the witnesses. Respondent No.2/plaintiff presented the Subject Cheque before the concerned bank but the same was dishonored due to insufficient funds. Respondent No.2/plaintiff contacted the appellant/defendant regarding return of the amount but he was reluctant

to do so. Thereafter, respondent No.2/plaintiff lodged an FIR against the appellant and also filed a suit under Order XXXVII, CPC for Recovery of Rs.80,000/- along with interest.

3. The appellant/defendant appeared before Trial Court and filed an application for leave to appear and defend the suit on the grounds that the respondent No.2/plaintiff had already entered into a compromise with appellant in front of Jirga and undertaken that no criminal or civil proceedings will be initiated against the appellant/defendant. Respondent No.2/plaintiff also sworn an affidavit on 01.04.2014 in the presences of witnesses that if respondent No.2/plaintiff steps back from his commitment, then Rs.500,000/- will be paid to the appellant/defendant and respondent No.2/plaintiff also recorded statement on 16.09.2014 before learned Special Judge Central, Islamabad that respondent No.2/plaintiff would withdraw all the criminal, civil cases pending before District Court, at Islamabad/Rawalpindi and will not file any complaint against the appellant/defendant. The appellant/defendant also stated that there was no liability against him and respondent No.2/plaintiff was bound to return the Subject Cheque.

4. Respondent No.2/plaintiff filed reply to the application for leave to appear and defend the suit by raising the issue of limitation. It was also averred that the application for leave to defend was hopelessly time-barred, having been filed beyond the prescribed period of ten (10) days. Furthermore, execution of the Subject Cheque is admitted. Respondent No.2/plaintiff categorically denied the existence of any compromise concerning the Subject Cheque amounting to Rs. 80,000/- (Rupees Eighty Thousand only). Respondent No.2/plaintiff acknowledged that a

statement regarding the withdrawal of cases was made before learned Special Judge Central, Islamabad, however, no statement was made concerning the present case.

5. Trial Court after hearing the arguments of parties dismissed the application for leave to appear and defend the suit on 19.10.2016. Thereafter ex-parte proceedings were conducted and on 24.10.2016 Trial Court decreed suit of Respondent No.2/plaintiff ex-parte through the Impugned Judgment, hence, this appeal.

6. Learned counsel for the appellant contended that Trial Court ignored the real facts of the case while deciding the application for leave to appear and defend the suit; that respondent No.2 had already entered into a compromise with the appellant regarding all the disputes through an affidavit on 01.04.2014; that respondent No.2 made formal statement before the Court of learned Special Judge Central, Islamabad on 16.09.2014 and given undertaking to withdraw all pending civil and criminal cases against the appellant before the District Courts of Islamabad/Rawalpindi; that the appellant was not liable to pay the amount to respondent No.2 and the Subject Cheque was to be returned; that Impugned Judgment and Decree is against the law; that Trial Court has not appreciated the evidences in its true perspective; that Impugned Judgment and Decree is based on surmises and conjectures.

7. Conversely, learned counsel for respondent No.2 contended that Trial Court passed the order on the application for leave to appear and defend the suit in accordance with law; that Trial Court has appreciated the evidence in its true perspective; that Impugned Judgment and Decree has been passed in accordance with law.

8. I have heard the learned counsels for the parties and perused the record with their able assistance.

9. Perusal of the record reveals that the appellant in the application for leave to appear and defend the suit claimed that a settlement had reached between him and respondent No.2. He referred to an affidavit dated **01.04.2014**, in which the parties mutually agreed that no one will initiate legal proceedings against each other and the party that will not honour this commitment will pay **Rs. 500,000/-** to the other side. However, this clause of the settlement merely creates a financial obligation in the event of a breach and does not, in itself, operate as a bar to legal proceedings or result in their automatic termination. Under well-established legal principles, an agreement between private parties cannot override statutory rights or preclude the institution of legal proceedings unless such an agreement is legally enforceable and supported by cogent and credible evidence.

10. Moreover, Hon'ble Supreme Court in **Rasheedur Rehman Khan *vs.* Mian Iqbal Hussain (PLD 2006 SC 418)** held that under the law no man can exclude himself from the protection of Courts by contract. The Court further observed that it is a settled principle of law that section 28 of the Contract Act, 1872 **("Act, 1872")** applies where there is absolute restraint against the enforcement of rights. For convenience section 28 of the Act, 1872 is reproduced hereunder:-

"**28. Agreement in restraint of legal proceedings void.** Every agreement, by which any party thereto is restricted absolutely from enforcing his right under or in respect of any contract, by the usual

proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

11. Similarly, in ***Mst. Khair-un-Nisa Channa vs. Federation of Pakistan and others*** **(2004 SCMR 1714)** the Apex Court dealt with a statement made by the judgment-debtor in the execution proceedings to the effect that she would pay decreetal amount as per schedule, which if accepted, then she would not seek remedy against auction of property. The Apex Court ruled that if the Judgment-debtor desires to seek any remedy against any order passed by Executing Court she would be at liberty to do so in accordance with law, which would be decided on its own merits irrespective of her undertaking not to avail any remedy as no party can contract not to avail remedy under the law.

12. In the light of the above referred precedents, an inference can be drawn that the contractual terms between private parties, no matter how clearly worded, cannot be deemed to exclude the operation of statutory provisions unless expressly permitted by law. Private agreements must be interpreted in line with the overarching legal framework and any attempt to circumvent statutory rights or public policy considerations would render such an agreement unenforceable.

13. This concept is also covered under the Latin legal maxim i.e. "*pactum de non petendo"* which translates to "agreement not to sue." This maxim is a contractual principle in terms of which parties conclude an agreement or undertaking not to institute an action against each other. The agreements to 'not litigate' are not necessarily unreasonable, however, they are subject to consideration and must align with public policy. While the law upholds contractual freedom, a balancing exercise

must be conducted in which the Court has to "*employ [the constitutional] values to achieve a balance that strikes down unacceptable excess of "freedom of contract" while seeking to permit individuals the dignity and autonomy of regulating their lives*".

14. The golden rule which has been adopted in Pakistan is that no restriction could be imposed on any party from enforcing their rights provided by the law. Agreements in restraint of legal proceedings are held to be void. Document must be construed and read as a whole and section 28 of the Act, 1872 applies where there is absolute restraint against the enforcement of rights.

15. It must also be observed that the mere existence of a financial liability clause does not *ipso facto* preclude legal action unless the party seeking enforcement establishes, through admissible evidence, that the agreement was intended to operate as a complete bar to further proceedings.

16. In the present case, there exists no legally admissible material to establish that the parties intended to waive their statutory rights or to bar recourse to legal remedies. Consequently, in the absence of such compelling proof, the claim that legal proceedings are barred solely due to the financial liability clause is unsustainable in the eyes of the law.

17. The appellant has failed to provide any substantive evidence to support his claim. Therefore, his argument that a settlement reached at between the parties vide affidavit dated 01.04.2014 lacks legal standing and does not affect the current proceedings. The Court must rely on admissible evidence and applicable laws while deciding the matter.

18. In Paragraph 5 of the application for leave to appear and defend the suit, the appellant sought the return of the cheque but failed to expressly deny its issuance or his signatures on the instrument. Conversely, respondent No.2 acknowledged making a statement before learned Special Judge Central, Islamabad concerning pending cases, explicitly excluding the present matter. Respondent No.2 categorically refuted any assertion of a compromise regarding the Subject Cheque.

19. Under section 118 of the Negotiable Instruments Act, 1881, there exists a statutory presumption in favor of the holder of a negotiable instrument that it was made, drawn, accepted, and endorsed for valid consideration. This presumption automatically attaches upon the admission of the execution of the cheque by the drawer (appellant), thereby shifting the burden of proof upon the appellant to rebut the presumption of liability through cogent and credible evidence.

20. In the present case, the appellant has neither furnished any substantive defense nor produced any admissible evidence to discharge the burden of proof. In the absence of such rebuttal, the presumption remains intact, making the claim legally sustainable against the appellant.

21. The appellant has reiterated the same grounds in the instant appeal, which were raised in his application for leave to appear and defend the suit. However, the said application was dismissed by Trial Court on the ground that the appellant’s defense lacks plausibility and does not disclose any triable issues and this observation of Trial Court is in accordance with law.

22. Furthermore, even at the appellate stage, the appellant failed to adduce any cogent evidence or seek permission for additional evidence under Order XLI, Rule 27, CPC to substantiate the claim made in the defense. The Hon'ble Supreme Court of Pakistan has consistently held that in cases where the defense is frivolous or lacks merit, leave to defend may be refused, and summary judgment may be passed in favor of the plaintiff. Reliance is placed upon ***Rana Mumtaz Ahmed Noon. v. Muhammad Javed Khan*** **(1999 S C M R 1845)**, wherein it was held that where the defendant fails to disclose any plausible defence or even specific question of law or fact which is required to be tried or investigated, the application to appear and defend the suit may be dismissed by Trial Court.

23. In light of the foregoing, this Court finds that the Impugned Judgment and Decree has been passed in accordance with law and there is no justification to interfere with the findings of Trial Court. Consequently, the instant appeal is **dismissed.**

(INAAM AMEEN MINHAS)
JUDGE

Announced in open Court on 24.02.2025.

JUDGE

APPROVED FOR REPORTING.

R.Anjam