HCJD/C-121

ORDER SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

C.R. No. 114 of 2014

Trust Investment Bank Limited
Versus
Shifa Co-operative Housing Society

S.No. of order/ Proceeding	Date of hearing	Order with signature of Judge, and that of parties or counsel, where necessary.

01-7-2014 Malik Muhammad Siddique Awan Advocate for petitioner.

This Civil Revision has been filed, impugning order dated 19-2-2014 passed by the learned Additional District Judge (West), Islamabad.

2. Briefly stated, facts of the case are that a suit under Order-XXXVII of Civil Procedure Code, 1908, was filed by Shifa Co-operative Housing Society Limited, for the recovery of an amount of Rs.10 million, alongwith settled accrued mark up at the rate of 14%. The case of Shifa Co-operative Housing Society Limited is, that it was induced by the representations made by the defendants for making investments. The petitioners were holding themselves out as investment Bank/Company. It is claimed that induced by the representations, the plaintiff deposited with defendant No.2, a branch of defendant No.1, an amount of Rs.10 million for a fixed period of three months. The TDRs/COIs/CODs, which were issued in the name of the plaintiff on February 11, 2011, were to mature on May 11, 2011, for encashment alongwith expected rate of profit of 14%. It is the case of

the plaintiff that it made hectic efforts but the defendants failed to fulfil their solemn commitment.

3. The defendant No.1 filed an application for leave to appear and defend the suit. The Additional District Judge (West) Islamabad, while accepting the application allowed the defendants to appear and defend the suit, subject to furnishing of surety worth Rs.10 million in the Court.

4. The learned counsel for the petitioner, relying on Judgment of the Lahore High Court in the case of *"Bashir Ahmed Vs. Messrs Skyline Lahore (Pvt.) Company",* reported as 2012 C.L.D. 1627, contends that once leave was granted to the defendant in the suit, making it conditional by way of furnishing of surety was not in accordance with law. The learned counsel further contends that such conditional leave is not just, rather harsh and oppressive.

5. It is not mandatory that the leave to defend is made conditional in every case. In appropriate circumstances leave to defend can either be conditional or unconditional. It is also to be noted that power to allow conditional or unconditional leave is within the discretion of the Court which inevitably has to be exercised depending on the circumstances of each case and in consonance with the settled principles of exercise of discretion. Some of the factors weighed by the Courts while exercising discretion under Order XXXVII C.P.C. are elaborated in the Judgment of Sindh High Court in case of *"Abdul Rahman & others Vs. Messrs United Bank Ltd. of Pakistan"*, reported as P.L.D. 1997 Karachi 62. The relevant portion is as follows:-

> *"The concept of furnishing a security during pendency of litigation is not new. Order XXXVIII of C.P.C. is one such illustration where the Civil Court is empowered to direct litigant to furnish security or pass an order of attachment before judgment. However, this power is to be exercised sparingly and as a matter of last resort where the Court is satisfied that the person against whom such an order is sought may abscond, there is likelihood of that person transferring away his funds outside the jurisdiction of the Court or where a person is likely to thwart a prospective decree".*

6. The Honourable Supreme Court in case of *"Mian Rafique Saigol and other Vs. Bank of Credit and Commerce International"* reported as P.L.D. 1996 S.C. 749, has elaborated some of the essentials for grant of leave to defend the suit conditionally or unconditionally. It has been observed that grant of conditional or unconditional leave is a matter within the discretion of the Court which is to be exercised keeping in view the facts and circumstances of each case. It was further observed that it is neither possible nor advisable to lay down any hard and fast rule in this behalf.

7. In the present case respondent, in the Civil Revision, consists of members who are employees of a hospital. Their hard earned money was invested with the petitioner for a fixed period of three months. It is alleged that the said funds invested in TDRs/COIs/CODs have not been encashed despite lapse of more than three years. The petitioner in the instant civil revision has been holding itself out as an investment company/bank, and through representations induced bonafide innocent citizens to make investments. The nature of the relationship between the petitioners and

respondents is fiduciary, entailing a high degree of care on part of the petitioner. Moreover, the petitioner admits the amount having been received from the respondents against which TDRs/COIs/CODs were duly issued and executed by the petitioner/defendant.

8. In the light of the above discussion, this Court is of the view that on facts and circumstances of the case, the Additional District Judge (West) Islamabad, vide order dated 19-02-2014 has exercised powers in accordance with law, in a just and fair manner by securing the interests of the respondents. No infirmity has been pointed out in the impugned order nor suffers from any material defect. This Court is not inclined to interfere with the said order. The discretion has been exercised legally, reasonably, fairly and is not oppressive, capricious or perverse. The Civil Revision is, therefore, dismissed.

9. The observations made in this order shall in no way prejudice or in any manner influence the proceedings pending in the Court where the suit filed by the respondent is pending.

(ATHAR MINALLAH)
JUDGE

*Luqman/