# ORDER SHEET.
# IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
# JUDICIAL DEPARTMENT

**R.F.A. No.143 of 2014**
**Hafiz Shahbaz**
**Versus.**
**Mst. Hamda Khatoon**

| S. No. of order / proceedings | Date of order/ Proceedings | Order with signature of Judge and that of parties or counsel where necessary. |
|---|---|---|
| | 16.10.2017 | **Ch. Sajid A Sraa, Advocate for the appellant.** |

Through the instant regular first appeal, the appellant, Hafiz Shahbaz, impugns the judgment and decree dated 19.06.2013 passed by the Court of the learned Additional District Judge, Islamabad, whereby the respondent's suit for recovery of Rs. 1,54,000/- under Order XXXVII of the Code of Civil Procedure, 1908, ("C.P.C."), was decreed.

2. The record shows that on 27.04.2011 the respondent instituted a suit for recovery of Rs.154,000/- along with profit before the Court of the learned Additional District Judge, Islamabad. The said suit was instituted under Order XXXVII C.P.C. The appellant's application for leave to appear and defend the said suit was contested by the respondent. Vide order dated 23.06.2012 the learned trial Court dismissed the appellant's application for leave to appear and defend the suit. Thereafter, the respondent recorded her statement as PW.1 and closed her documentary evidence on 11.02.2013. Vide judgment and decree dated 19.06.2013, the learned trial Court decreed the respondent's suit for recovery of Rs.1,54,000/- along with interest at the rate of 6% per annum from the date on which the cheques in question were dishonored till the realization of the decretal amount. The said judgment and decree has been impugned by the appellant in the instant appeal.

3. On 18.12.2014, the instant appeal was first taken up for hearing by this Court. Notices were directed to be issued to the respondent, and a status quo order was passed. The order dated 11.02.2016 shows that the respondent had been served. Despite the same no one tendered appearance on the respondent's behalf. In order to meet the ends of justice, it was directed that notices be reissued to the respondent. Since the office report had shown that notices had been served on the respondent, and since no one tendered appearance on the respondent's behalf on 03.05.2016, she was proceeded against *ex-parte.*

4. Learned counsel for the appellant submitted that the suit instituted by the respondent could not have been decreed under Order XXXVII C.P.C.; that the three cheques in question were issued to the respondent on 20.09.2007, 08.01.2008, and 15.02.2008; that the said cheques were submitted for encashment beyond a period of six months from the dates of their issuance; that the dishonored slips show that all the three cheques were dishonored because they were "out of date"; that the respondent should not have presented stale cheques for encashment; that the provisions of Order XXXVII C.P.C. are not attracted when a stale cheque is dishonored on presentation; that the appellant in his application for leave to defend had taken a specific plea to the said effect, but the same was not taken into account by the learned trial Court; that the respondent had also filed a criminal complaint against the appellant, and consequently, FIR No.445, was registered under Section 489-F of the Pakistan Penal Code against the appellant at Police Station Sabzi Mandi, Islamabad; that as per the contents of the said FIR, the incident occurred on 09.10.2008; and that by 09.10.2008 all the

three cheques issued by the appellant had become stale, and could not have been encashed by the bank. Learned counsel for the appellant prayed for the appeal to be allowed and for the impugned judgment and decree dated 19.06.2013 to be set-aside.

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

6. The respondent's case before the learned civil Court was that the respondent had paid Rs. 1,00,000/- as earnest money to the appellant for the purchase of an eight marlas plot in Sangjani, Islamabad; that there was no plot available for transfer to the respondent; that the appellant defrauded the respondent of a Motorcycle CD-70 which was worth Rs.65,000/-; that she asked the appellant to return the amount taken from her; that the respondent gave three cheques (i.e. cheque No.CD-0275788, dated 20.09.2007 for an amount of Rs.50,000/-, cheque No.CD-0275790, dated 08.01.2008 for an amount of Rs.4,000/- and cheque No.CD-0235422, dated 15.02.2008 for an amount of Rs.1,00,000/-; that the said cheques were drawn on Bank Alflah I-10 Markaz, Islamabad; that all the three cheques were dishonored on 09.10.2008; that FIR No.445, dated 14.10.2008 was registered against the appellant under Section 489-F PPC at Police Station Sabzi Mandi, Islamabad. As mentioned above, the said suit was instituted on 27.04.2011.

7. The appellant in his application for leave to appear and defend the suit clearly pleaded that the said cheques were presented for

encashment after a lapse of six months from the dates of their issuance.

8. As mentioned above, vide order dated 23.06.2012, the learned trial Court dismissed the appellant's application for leave to appear and defend the suit. The respondent appeared as PW.1 and gave evidence, which is in reiteration of her pleadings in the suit. The impugned judgment dated 19.06.2013 shows that the original cheques were seen and returned by the Court. Attested copies of the said cheques and the dishonored slips were brought on record.

9. The vital question that needs to be determined is whether a suit under Order XXXVII C.P.C. can be instituted, when a cheque is dishonored, because it is "out of date" i.e. it is presented for encashment beyond a period of six months from the date of its issuance. As the matter of common practice, a bank does not encash a cheque bearing a date which is more than six months earlier than the date on which the cheque is presented for encashment.

10. In the case at hand, the three cheques were admittedly issued on 20.09.2007, 08.01.2008 and 15.02.2008. The respondent, in her suit has pleaded that the cause of action accrued on 09.10.2008 when the said cheques were dishonored. FIR No.445, dated 14.10.2008 also shows the date of the incident as 09.10.2008. Despite the fact that the appellant's application for leave to defend the suit was dismissed by the learned trial Court, it was nonetheless essential for the learned trial Court to have adverted to the question as to whether the dishonor of stale cheques furnished the respondent with a cause of action to file a suit under Order XXXVII C.P.C. Indeed, where an application for leave to appear and defend a suit is dismissed, the allegations in the plaint are deemed to be admitted. In the case at hand, the

cheques in question were presented for encashment beyond a period of six months from their dates of issuance. This is an admitted position. The learned trial Court should have adverted to the question as to whether a suit under Order XXXVII C.P.C. was maintainable in the facts and circumstances of the case.

11. In the case of "Kamran Akhter Vs. Jawed Ahmed Khan" (2005 CLC 797), a cheque issued on 07.12.2000 was presented for encashment to the bank on 24.07.2001, i.e. with a delay of more than six months from the date of the issuance of the said cheque. The bank declined to encash the cheque as the same had become stale due to a lapse of more than six months from the date of its issue. The suit instituted by the respondent under Order XXXVII C.P.C. was nonetheless decreed by the learned trial Court. The Honourable High Court of Sindh allowed the appeal against the decree, and held that "the disputed cheque having been presented after six months of its issue became stale, and the suit based on such out of date stale cheque could not have been decreed by the learned trial Court". The suit was remanded to the lower Court with a direction that the same be treated to have been filed under the ordinary provisions of the Code of the Civil Procedure, 1908, and be tried and decided accordingly.

12. In the case of Habib Bank Limited Vs. Jamil-ur-Rehman" (1994 MLD 271), a bank draft was presented to the bank for encashment about seventeen months from the date of its issue. The bank refused to encash the bank draft on the ground that the same was out dated. The Honourable High Court of Sindh held that the encashment of a cheque or a negotiable instrument which was overdue or stale was rightly refused by the bank. In holding so, the Honourable High Court relied on the law laid

**down in the case of "Griffiths Vs. Dalton" (1940 (2) K.B. 264).**

**13. In view of the law laid down in the afore noted judicial precedents, and taking into account the fact that the three cheques in question had become stale/out of date when they were presented for encashment, the instant appeal is allowed, and the impugned judgment and decree dated 19.06.2013 is set-aside. The matter is remanded to the learned trial Court to decide the case afresh after taking into consideration the *dicta* of the superior courts. There shall be no order as to costs.**

**(ATHAR MINALLAH)**
**JUDGE**

**(MIANGUL HASSAN AURANGZEB)**
**JUDGE**

**Sultan***

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