JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A.No.145 of 2014

Muhammad Ajmal Qureshi and another
Versus
The Additional District Sessions Judge (East) Islamabad, etc.

Date of Hearing:	21.09.2017
Appellants by:	Ch. Naeem Ali Gujjar, Advocate
Respondents by:	Ch. Shabbir and Fazal-ur-Rehman Khan Niazi, Advocates for respondent No.2.

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular first appeal, the appellants, who are the son and the widow of late Muhammad Aslam Qureshi, impugn the judgment and decree dated 29.09.2014, passed by the Court of the learned Additional District and Sessions Judge, Islamabad, whereby the suit for recovery of Rs.14,56,210/- instituted by respondent No.2 (Chaudhary Liaquat Ali) under Order XXXVII, of the Code of Civil Procedure, 1908 ("C.P.C."), was decreed.

2. Respondent No.2/plaintiff had instituted a suit under Order XXXVII C.P.C. against the son and widow of Muhammad Aslam Qureshi claiming that the latter had purchased iron bars from respondent No.2 for a total consideration of Rs.24,56,210/-, out of which Rs.10,00,000/- was paid in cash, whereas for Rs. 14,56,210/-, Muhammad Aslam Qureshi had given him cheque No.7389662 drawn on Habib Bank Limited, Alipur, Islamabad. The said cheque is said to have been dishonoured on presentation. Muhammad Aslam Quereshi died on 03.12.2010. On 29.03.2011, respondent No.2 instituted the said suit. Vide judgment and decree dated 29.09.2014, the said suit was decreed. The said judgment and decree has been impugned in the instant regular first appeal.

3. Learned counsel for the appellants submitted that the appellants were the legal heirs of late Muhammad Aslam Qureshi; that Muhammad Aslam Qureshi never purchased any iron bars from respondent No.2; that Abdul Hameed Abbasi had

purchased iron bars from respondent No.2, and had not paid for them; that Muhammad Aslam Qureshi had issued the cheque in question as a guarantee for the payment which was to be made by Abdul Hameed Abbasi; that the matter regarding the issuance of a cheque was settled in a *Jirga* during Muhammad Aslam Qureshi's lifetime; that after one year of Muhammad Aslam Qureshi's death, respondent No.2 filed the suit under Order XXXVII, C.P.C. against the appellants; that during the recording of evidence, Aamir Imtiaz Abbasi (who was a witness to *Iqrarnama* dated 14.02.2010, and tendered evidence as DW-2), deposed that the *Iqrarnama* was with respect to the purchase of iron bars by Abdul Hameed Abbasi, who was supposed to pay respondent No.2 for the said purchase; that Mehmood Ahmed, who was a part of the *Jirga* and had appeared as DW-3 deposed that Abdul Hameed Abbasi was supposed to pay respondent No.2 for the iron bars; that in the suit instituted by respondent No.2, the other legal heirs of Muhammad Aslam Qureshi were not impleaded as parties; and that the appellants could not be burdened with Muhammad Aslam Qureshi's liabilities, if any. Learned counsel for the appellants prayed for the impugned judgment and decree to be set-aside. In making his submissions, learned counsel for the appellants placed reliance on the judgment in the case of "Muhammad Abaid Ullah Vs. Ateeq-ur-Rehman" (2015 CLD 307), wherein the Honourable Lahore High Court held that a party who is not drawer or maker of a cheque/bill of exchange is not liable thereon and accordingly cannot be sued under Order XXXVII, Rule 2, C.P.C. Furthermore, it was held that under Section 29-A of the Negotiable Instruments Act, 1881, in order for a legal representative of a deceased person to become liable under the cheque issued by his predecessor, it is necessary that he signs the said cheque for assuming liability thereunder.

4. On the other hand, learned counsel for respondent No.2 submitted that respondent No.2 had sold iron bars worth Rs.24,56,210/- to Muhammad Aslam Qureshi, who paid a sum of Rs.10,00,000/- in cash and Rs.14,56,210/- was paid through

cheque No.7389662 drawn on Habib Bank Limited, Alipur, Islamabad; that on 19.02.2010, the said cheque was dishonored; that on respondent No.2's complaint, F.I.R.No.189/2010 was registered on 19.06.2010 under Section 489-F of the Pakistan Penal Code, 1908, at Police Station Koral, Islamabad, against Muhammad Aslam Qureshi; that the said cheque was in possession of the investigation officer; that on 03.12.2010, Muhammad Aslam Qureshi died; that on 29.03.2011, respondent No.2 instituted a suit under Order XXXVII, C.P.C. for recovery of Rs.17,56,210/- against Muhammad Aslam Qureshi's legal heirs; that after leave to appear and defend the suit was granted to the appellants, they contested the suit by filing a written statement; that as per *Iqrarnama* dated 14.02.2010 (Exh.P/2), (to which Muhammad Aslam Qureshi and respondent No.2 were parties), Muhammad Aslam Qureshi had given a cheque for Rs.14,56,210/- to respondent No.2; that the issuance of the said cheque is an admitted fact; that DW-2, who was a witness to the said *Iqrarnama*, had deposed that cheque No.7389662 had been given by Muhammad Aslam Qureshi to respondent No.2 as a guarantee for the payment which Abdul Hameed Abbasi was supposed to make to respondent No.2 for the purchase of iron bars; that the impugned judgment and decree is strictly in accordance with the law and facts of the case; that the appellants, in their application for leave to defend as well as the written statement took no objection to the effect that all the legal heirs of Muhammad Aslam Qureshi had not been impleaded as parties in the suit; that even though the appellants had filed an application for framing additional issues, they had not sought the framing of an issue on the question whether the suit was maintainable without impleadment of all the legal heirs of Muhammad Aslam Qureshi. Learned counsel for respondent No.2 prayed for the appeal to be dismissed.

5. We have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance.

6. The record shows that on 29.03.2011, respondent No.2 instituted a suit for recovery of Rs.17,56,210/- under Order XXXVII, Rules 1 and 2, C.P.C. against the appellants before the Court of the learned Additional District Judge, Islamabad. The position taken by respondent No.2 in the said suit was that respondent No.2 had sold iron bars worth Rs.24,56,210/- to Muhammad Aslam Qureshi, who had paid Rs.10,00,000/- in cash and Rs.14,56,210/- through cheque No.7389662 drawn on Habib Bank Limited, Alipur, Islamabad. On 19.02.2010, the said cheque was dishonored. On respondent No.2's complaint, F.I.R.No.189/2010 was registered against Muhammad Aslam Qureshi under Section 489-F of the Pakistan Penal Code, 1908, at Police Station Koral, Islamabad. Muhammad Aslam Qureshi died on 03.12.2010. On 29.03.2011, respondent No.2 instituted the said suit against the appellants, who are the son and widow of Muhammad Aslam Qureshi.

7. The appellants in their application for leave to appear and defend the said suit admitted that Muhammad Aslam Qureshi had issued the cheque in question, but they assert that the said cheque was issued as a guarantee/security for the payment that one Abdul Hameed Abbasi was supposed to make to respondent No.2 for purchasing iron bars. It was also pleaded that the matter between respondent No.2 and Abdul Hameed Abbasi was settled in different *Jirgas.* After leave to defend the suit was granted to the appellants, they filed their written statement which was substantially the same as their application for leave to appear and defend the suit.

8. The appellants, in their written statement pleaded that Mir Zaman, (who was Abdul Hameed Abbasi's father) had issued cheque No.5619714 in favour of Muhammad Aslam Qureshi. I do not see any relevance of this pleading. If cheque No.5619714 for an amount not known was paid by Mir Zaman to Muhammad Aslam Qureshi, how would that have absolved Muhammad Aslam Qureshi from liability under cheque No.7389622 for Rs.14,56,210/- issued by Muhammad Aslam Qureshi in favour of respondent No.2.

9. From the divergent pleadings of the parties, the learned trial Court framed the following issues on 30.01.2012:-

i. ***Whether the plaintiff has got a cause of action to file the suit against the defendant? OPP***
ii. ***Whether the father of defendant No.1 & husband of defendant No.2 issued a cheque bearing No.7389662 of Habib Bank (amounting to Rs.14,56,210/-) in favour of the plaintiff, which was dishonored on presentation? If so, its effect? OPP***
iii. ***Whether the plaintiff was entitled to present the cheque for encashment to the bank? OPP***
iv. ***Whether the plaintiff is entitled to the decree as prayed for? OPP***
v. ***Relief***

a) ***Whether the father of answering respondent had issued the cheque as guarantee or security? OPD***

10. On 31.07.2012, the following issues were framed:-

1. ***Whether the plaintiff has got a cause of action to file the suit against the defendant? OPP***
2. ***Whether the father of defendant No.1 & husband of defendant No.2 issued a cheque bearing No.7389662 of Habib Bank (amounting to Rs.14,56,210/-) in favor of the plaintiff, which was dishonored on presentation? If so, its effect? OPP***
3. ***Whether the plaintiff was entitled to present the cheque for encashment to the bank? OPP***
4. ***Whether the plaintiff is entitled to the decree as prayed for? OPP***
5. ***Relief.***

11. Respondent No.2 entered the witness box as PW-1 whereas Arshad Ali, Sub Inspector, Islamabad Police gave evidence as PW-2. PW-2 in his evidence produced a copy of cheque No.7389662 for Rs.14,56,210/- drawn on Habib Bank Limited, Alipur, Islamabad as Exh.P/1. The *Iqrarnama* dated 14.02.2010, was produced as Exh.P/2, and FIR No.189/2010 as Mark-A. The dishonored slip was produced as Exh.P/2/3.

12. Appellant No.1 appeared as DW-1, whereas Aamir Imtiaz Abbasi gave evidence as DW-2, Mehmood Ahmed as DW-3 and Ijaz Ahmed as DW-4.

13. Appellant No.1/DW-1 in his cross-examination deposed that his father died on 03.12.2010, and that he did not know anything about his father's affairs in his lifetime. In his examination-in-chief, DW-1 deposed that the cheque in question was issued by Muhammad Aslam Qureshi as a guarantee for the payment to be made by Abdul Hameed Abbasi for the purchase of iron bars. In his testimony, DW-1 also made a reference to a document written by Aamir Imtiaz Abbasi regarding the said transaction.

14. Aamir Imtiaz Abbasi/DW-2 was one of the witnesses to the *Iqrarnama* dated 14.02.2010 (Ex.P-2), between Muhammad Aslam Qureshi and respondent No.2. In his evidence, DW-2 *inter alia* deposed that cheque No.7389622 had been handed over by Muhammad Aslam Qureshi to respondent No.2 as a guarantee cheque. The issuance of the said cheque, according to DW-2's testimony, was as a guarantee for the payment that Abdul Hameed Abbasi was supposed to make to respondent No.2 for the purchase of iron bars.

15. The *Iqrarnama* dated 14.02.2010 (Ex.P-2), which is an admitted document executed between Muhammad Aslam Qureshi and respondent No.2 shows that Muhammad Aslam Qureshi had purchased 44,175 Kilograms of iron bars from respondent No.2 for a consideration of Rs.24,56,210/-, out of which Rs.10,00,000/- was paid in cash, and for the balance amount of Rs.14,56,210/- cheque No.7389662, dated 19.02.2010, drawn on Habib Bank, Alipur, Islamabad, was given by Muhammad Aslam Qureshi to respondent No.2. Now, whether the iron bars were purchased by Muhammad Aslam Qureshi or Abdul Hameed Abbasi, in our view does not make any difference. Even if it is assumed that the said cheque was issued as a guarantee, under Section 128 of the Contract Act, 1872, the liability of a surety is co-extensive with that of the principal debtor. The fact remains that the said cheque No.7389662 was issued by Muhammad Aslam Qureshi to respondent No.2. It is also an admitted position that the said cheque was dishonoured on 19.02.2010. After the said dishonour, Muhammad Aslam Qureshi died on 03.12.2010. When the cause of action accrued to respondent No.2, Muhammad Aslam Qureshi was alive. The appellants were not able to show that Muhammad Aslam Qureshi was under no liability to pay Rs.14,56,210/- to respondent No.2 either because the said amount had already been paid by Muhammad Aslam Qureshi to respondent No.2 or that Abdul Hameed Abbasi had paid the said amount to respondent No.2 and thereby discharging Muhammad Aslam Qureshi from his liability as a guarantor/surety. The appellants therefore, were

unable to dislodge the presumption of consideration regarding the negotiable instrument/cheque in question.

16. Respondent No.2 instituted the suit under Order XXXVII C.P.C. against the appellants on 29.03.2011 i.e. after Muhammad Aslam Qureshi's death. The mere fact that the said suit was instituted after Muhammad Aslam Qureshi's death would not make the same incompetent. As mentioned above, the cause of action accrued in respondent No.2's favour when the said cheque was dishonoured on 19.02.2010, i.e. in Muhammad Aslam Qureshi's lifetime. Muhammad Aslam Qureshi's liabilities devolved on his legal heirs, who were under a liability to clear such liabilities out of the deceased's estate inherited by them.

17. As regards the contention of the learned counsel for the appellants that since the appellants had not signed the cheque in question, they could not be burdened with a liability assumed by their predecessor, Muhammad Aslam Qureshi, it is well settled that a summary suit can be filed against an heir or a legal representative of a deceased and the provisions of Order XXXVII apply in full to such a suit. The decree however, can be executed only to the extent of the estate of the deceased in the hands of the judgment debtors. Order XXXVII does not exclude from its purview a suit in which the heirs or legal representatives of a deceased are parties/defendants. There is also no protection under the Code of Civil Procedure, 1908 to the heirs and legal representatives of a deceased from a decree being passed against them, provided of course, the right to sue them survives their predecessor's death. Section 52 of the Code of Civil Procedure, 1908, is reproduced herein below:-

> ***"52 – (1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.***
>
> ***(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally."***

18. The protection which Section 52 *ibid* gives to the heirs or legal representatives of a deceased is a protection against the enforcement of a decree against them in execution. Under Section 52, where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of such property. The decree can be executed to the extent of the property of the deceased in the hands of the legal heir or legal representative. This is a protection which is granted at the stage of execution. Hence, even in a case where a decree is passed against such an heir or legal representative under Order XXXVII C.P.C., the decree can be executed only to the extent of the estate of the deceased coming to the judgment debtor's hands.

19. We are unable to bring ourselves to agree with the findings of the Hon'ble Lahore High Court in the case of Muhammad Abaid Ullah (*supra*) since it is our view that Section 29 or 29-A of the Negotiable Instrument Act, 1881, do not debar a person from instituting a suit under Order XXXVII C.P.C. against a legal heir or a legal representative of a deceased person who does not sign his name to a promissory note, bill of exchange or a cheque. The said sections are reproduced herein below:-

> "*29. **Liability of legal representative signing.** A legal representative of a deceased person who signs his name to a promissory note, bill of exchange or cheque is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such.*
> *29-A. **Signature essential to liability.** No person is liable as maker, drawer, indorser or acceptor of a promissory note, bill of exchange or cheque who has not signed it as such:*
> *Provided that where a person signs any such instrument in a trade or assumed name he is liable thereon as if he had signed it in his own name."*

All that Section 29 (*ibid*) mandates that if a legal representative of a deceased person signs his name to a promissory note, bill of exchange or cheque, he would be personally liable thereon unless he expressly limits his liability to the extent of his assets received by him as such. In the case at hand, no legal representative or heir of Muhammad Aslam Qureshi signed his

name to the cheque in question. This *ipso facto* would not absolve the legal heirs of Muhammad Aslam Qureshi from liability under the said cheque (which was dishonoured on presentation). Had any of a legal heirs signed his or her name to the cheque in question, he or she would have been personally liable thereon unless of course he or she had expressly limited his or her liability to the extent of the assets received by him or her. As regards Section 29-A (*ibid*), the same would also not absolve from liability the legal heirs of a person liable as a maker, drawer, indorser or acceptor of a cheque simply because such legal heirs have not signed a cheque. The cause of action that accrues to a person on a cheque issued to him being dishonoured does not extinguish simply because the maker of the cheque dies. Such cause of action survives the death of the maker of such a cheque, and the liability thereon devolves on the legal heirs in proportion to the deceased's estate inherited by them. Hence, we find that a suit under Order XXXVII C.P.C. against the legal heirs of a person who had issued a cheque, which was dishonoured on presentation, to be competent.

20. As regards the contention of the learned counsel for the appellants that other than the two appellants Muhammad Aslam Qureshi had other legal heirs who had not been impleaded as parties/defendants in the suit instituted by respondent No.2, we have noticed that the appellants in their application for leave to defend the suit as well as their written statement did not take an objection to the said effect. Furthermore, the learned trial Court did not frame an issue on whether the suit could proceed in the absence of all the legal heirs of Muhammad Aslam Qureshi. We have also noticed that the appellants had applied for the framing of additional issues, but had not applied for an issue to be framed on whether the suit could proceed in the absence of the other legal heirs (if any) of Muhammad Aslam Qureshi. The appellants did not even bother to file Muhammad Aslam Qureshi's succession certificate to show that he had legal heirs other than the appellants. Even in the proceedings before this Court, no document was brought on record to show that Muhammad Aslam

Qureshi had other legal heirs. Therefore, we have no hesitation in spurning the said contention of the learned counsel for the appellants.

21. In view of the above, we do not find any merit in this appeal, which is dismissed with no order as to costs.

(ATHAR MINALLAH)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017.

(JUDGE) **(JUDGE)**

Ahtesham *

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