

**JUDGMENT SHEET  
IN THE PESHAWAR HIGH COURT,  
MINGORA BENCH (DAR-UL-QAZA), SWAT  
(Judicial Department)**

**R.F.A No.66-M/2022**

**Akbar Ali Vs. Hidayat Ullah**

**Present:** Muhammad Hayat Khan, Advocate for Petitioner.

Mr. Hidayat Ali, Advocate for Respondent.

Date of hearing: **18.05.2023**

**JUDGMENT**

**MUHAMMAD NAEEM ANWAR, J.**- This appeal filed u/s 96 of the Code of Civil Procedure, 1908 (C.P.C) has been directed against the judgment and decree of the learned Additional District Judge/Izafi Zila Qazi, Swat at *Matta* dated 28.06.2022, whereby the suit of the respondent filed under order XXXVII C.P.C for recovery of Rs.70,00,000/- (rupees seven million) was decreed against the appellant in terms of non-fulfillment of the conditional order dated 16.09.2021, through which, the leave to defend the suit was granted to the appellant with directions for furnishing security bond to the tune of Rs.70,00,000/-.

**2.** Shorts facts of the matter is that the respondent filed a suit under order XXXVII C.P.C against the petitioner for recovery of Rs.70,00,000/- by alleging therein that the petitioner, for repayment of his outstanding amount, has given him three cheques, out of which, one amounting to Rs. 40,00,000/- was of Muslim Commercial Bank Green Chowk Mingora Branch while the other two were of Fysal Bank Mingora, which on presentation before the Banks got dishonoured for want of sufficient balance in

accounts of the petitioners. On being summoned, the petitioner filed an application for leave to defend the suit, which was allowed by the learned trial Court on 16.09.2021 but with directions to him to furnish a security bond in the sum of Rs.70,00,000/- and when despite several directions till 28.6.2022, he could not fulfill the condition, the suit was decreed against him, hence, instant appeal.

3. Arguments heard and record perused.

4. The clear condition with specific reference of the date for its compliance was unambiguous and explicit but even then w.e.f. 16.09.2021 till 28.06.2022 (nine months and twelve days) the proceedings remained pending adjudication before the learned trial Court and the appellant has never intended to fulfill the directions of the learned trial Court, resultantly the suit was decreed against him through impugned order. The contentions of learned counsel for the appellant was of two-fold; (i) unawareness /ignorance of the fact for furnishing the security bonds; and (ii) that after granting leave to defend the suit, the learned trial Court was required to decide the suit in accordance with the procedure as provided for ordinary suit, irrespective of the fact that it was filed under order XXXVII C.P.C. The order of the learned trial Court regarding the acceptance of the application and allowing the appellant/ defendant to defend the suit as against the contention of the appellant regarding his ignorance could not be given any preference because the presumption of truth is attached to the judicial proceedings. It is an established law that a plea of ignorance of law could not be construed or sustained as a bona

fide excuse. This view is fortified on the principle enunciated in the cases of "Muhammad Ameen and another v. Jawaid Ali and 5 others" (2017 YLR Note 429) & "Zaman and 2 others v. Muhammad Khan" (2017 YLR 353). Secondly, it is well settled law that provision of Article 129 (e) of Qanun-e-Shahadat Order, 1984, provides presumption of regularity to all acts performed in a judicial proceeding. The judicial proceedings are blessed with presumption of truth on the principle intended to be conveyed by the rule, Omnia praesuntur rite et solenniter esse acta, i.e., all acts are presumed to have been rightly and regularly done. The Hon'ble Supreme Court of Pakistan in the case of "Fayyaz Hussain v. Akbar Hussain and others" (2004 SCMR 964), has held that credibility is attached to proceedings before a judicial forum. Reliance may be placed on the principle laid down in the case of "Muhammad Ramzan v. Lahore Development Authority, Lahore" (2002 SCMR 1336).

5. Turning to the next objection that the suit should have been decided after recording of evidence, on merits. True, that the appellant/ defendant was allowed to defend the suit but this order itself was conditional for fulfilment of which, a date was fixed by the learned trial Court. The inbuilt directions given in the order for fulfilment of the condition in the shape of furnishing of a security bond on the next date of hearing i.e., 06.10.2021 has bound down the appellant to pursue the suit and to defend it through his written statement but in case when the condition has not been fulfilled, the consequence thereof shall be borne by the party who fails to

comply with the order of the Court or to fulfil his obligation. Order XXXVII C.P.C provides a specific procedure for cases wherein the person against whom the *lis* is required to get permission from the Court to defend the suit. Sub rule 2 of rule 3 of order XXXVII C.P.C provides that “leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.” It is not disputed that the validity and propriety of the order granting leave to defend has not been questioned by the appellant to the extent of condition and in such circumstances, the fulfilment of condition was prerequisite for further progress in the suit and his participation in proceedings in order to defend the suit against him. Since, the provision of order XXXVII rule 3 C.P.C with regard to filing of the application alongwith affidavit for grant of such leave is mandatory and failure thereof results into a decree against the defendant even without recording of evidence in the matter. In the case of “Murtaza Haseeb Textile Mills Vs. Sitara Chemical Industries” (2004 SCMR 1882) wherein the apex Court has observed the conduct of the defendant during trial of the suit and held that:

“A perusal of the decree passed by the learned trial Court demonstrates that the petitioner's conduct was very much contumacious. He tried not to comply with the order of the learned trial Judge through different tactics and ultimately the learned trial Judge had no option but to decree the suit as the petitioner failed to comply with the direction. The learned trial Judge gave the petitioner sufficient time to comply with his earlier direction. The petitioner, on the contrary instead of

complying with the same, unnecessarily involved the respondent in this uncalled-for litigation.”

6. The conditional order was passed on 16.09.2021 and the case was posted for 06.10.2021 for submission of written statement by the appellant/defendant, however, on 06.10.2021, the appellant requested for adjournment and as such the proceedings were posted for 11.10.2021, on which date, he submitted written statement and proceedings were adjourned for 06.11.2021, thereafter the matter remained pending adjudication before the trial Court vide orders dated 20.12.2021, 29.1.2022, 28.2.2022, 11.4.2022, 11.5.2022 and 07.6.2022 and lastly on 28.06.2022, the appellant has not fulfilled his part of obligation in shape of furnishing a security bond, as per the directions of the trial Court. In the case of “Col. (Retd.) Ashfaq Ahmed and others Vs. Sh. Muhammad Wasim” (1999 SCMR 2832) it was observed by the apex Court that:

“It may be seen that claim for recovery of amount in suit filed by plaintiff/respondent is mainly based on pro-note and various post-dated cheques issued by petitioners for clearing their liability. Trial Court, in the instant case had conditionally granted leave to defend on 9-10-1994, whereas final decree was eventually passed against the petitioners by said Court on 13-5-1998. Evidently petitioners have not fulfilled the condition and failed to provide bank guarantee till final disposal of the suit, besides on inquiry during arguments, learned counsel for petitioners was not able to furnish any plausible reasons why 'despite presentment of cheques which had been undisputedly issued by the petitioners, no protest was lodged for displaying their stand and alleged intention of not honouring encashing the same. We are aware that unless anything contrary is duly established, presumption of validity flows in favour of Negotiable Instruments specially when its execution is not

disputed. Therefore, in the absence of any tangible rebuttal, justifiable reasons or plausible cause the trial Court was competent to award decree on the existing material. There is hardly any glaring defect or legal infirmity in the conclusions for passing impugned judgment; which may warrant interference.

7. This Court, in the case of “Makhdoomzada Abdul Karim Vs. Ajab Khan” (2013 CLC 1471, Peshawar), has held that non-fulfillment of a conditional order has left the Court with no other option but to decree the suit of the plaintiff. Reliance may also be placed on the case of “Muhammad Nawaz Vs. Muhammad Akram” (2013 MLD 325, Lahore), wherein it was held that:

“Defendant failed to submit surety despite many opportunities given to him to submit said surety. Entire scenario showed utter lack of interest on part of defendant to pursue the matter and the Trial Court had committed no illegality while dismissing his application for leave to appear and defend the suit. If a party failed to abide by any order of the court, such party had no right for relief which was granted to the party on fulfillment of a condition. Defendant himself remained aloof from the proceedings and could not claim that he was not provided an opportunity of hearing.”

The case law relied upon by the appellant i.e., case titled “Sahibzada Azhar Saleem Vs. Muhammad Hanif” (2002 MLD 696) and “Muhammad Nasim Vs. Kashif Nasim and another” (2018 CLC 1659, Peshawar), being distinguishable, is not applicable to the case of appellant with reference to the principle as set out by the apex Court in **Murtaza Haseeb Textile Mills’ case (supra)**.

8. Thus, for the reasons discussed above, the instant appeal, being devoid of force, is hereby dismissed, with no order as to cost.

Date of Announcement  
18.05.2023

Date of Writing Judgment  
23.05.2023

  
**JUDGE**