

2012 C L D 1627

[Lahore]

Before Mehmood Maqbool Bajwa, J

BASHIR AHMED----Petitioner

Versus

**Messrs SKYLINE LAHORE (PVT.) COMPANY through Chief Executive----
Respondent**

Civil Revision Petition No.478 of 2009, decided on 25th January, 2012.

(a) Civil Procedure Code (V of 1908)---

---O. XXXVII, R.1---Leave to appear and defend the suit, grant of---Principles:

Following focal points can be formulated to be kept in view while deciding the question of grant of leave to appear and defend the suit.

(1) If any kind of defence is made out, either plausible or illusory, leave is to be granted to defend the suit;

(2) If leave is to be granted to the defendant to defend the suit, it can be conditional or un-

conditional, depending on the strength of defence set up by defendant. If a plausible defence, either on facts or in law, is made out, un-conditional leave is to be granted while deciding question of plausible defence, following points can be taken into consideration amongst others (a) substantial question of law and fact; (b) jurisdiction of court doubtful; (c) complex question of limitation; (d) Instrument not property stamped; (e) Instrument allegedly not attested by two witnesses; (f) Document issued without consideration; (g) Allegation of fraud requiring inquiry;

(3) Even if the defence is plausible but the conduct of the defendant is mala fide or is clothed with suspicion, leave may not be granted un-conditionally;

(4) If no defence is made out, on factual or legal premises, leave may be refused, resulting in decretal of suit; and

(5) If the defence set up is not plausible leave to defend be granted but conditionally, either on condition of furnishing security or deposit of amount.

Fine Textile Mills Ltd. v. Haji Umar PLD 1963 SC 163; Muslim Commercial Bank Ltd. v. Tayyab Sharif 1975 SCMR 393; Mian Rafique Saigol and another v. Bank of Credit and Commerce International Overseas Ltd. and another PLD 1996 SC 749; Azmat Wali v. Hassan Al-Adawi and 2 others 1983 CLC 546; Shahzad Ice Factory v. Special Judge, Banking PLD 1982 Lah. 92; Dur Muhammad Pracha v. Judge Special Court Banking 1982 CLC 1625; Habib Bank Ltd. v. Karachi Properties Investment Co. Ltd. PLD 1984 Kar. 257; Habib Bank Limited v. Messrs Pazhong Traders and 12 others 1986 CLC 1086; Raja Saeed Ahmad Khan v. Sabir Hussain 2000 CLC 199; Asif Khurshid v. Saeed Ahmad 2000 CLC 913; Sheikh Muhammad Ayub v. Muhammad Yousuf PLD 2005 Lah. 197; Asif Javed and others v. Ghulam Shabbir 2007 YLR 187; Umer Khan v. Haji Musa Jan 2009 SCMR 1101 and Zubair Ahmad and another v. Shahid Mirza and 2 others 2004 SCMR 1747 rel.

(b) Civil Procedure Code (V of 1908)---

---O. XXXVII, Rr.1 & 2---Suit for recovery of money---Leave to defend the suit, grant of---Plausible defence---Scope---Trial Court granted conditional leave to defend the suit to defendant subject to submission of surety bond---Defendant failed to submit surety bond as Trial Court declined to extend time for the same--- Plea raised by defendant was that as he had raised plausible defence, therefore, leave should have been granted unconditionally---Validity---Defendant wrote name of plaintiff company in his own hand, put his signatures but amount in words and figures was written by one of his companion---Plausible defence was

offered by defendant while seeking leave to appear and defend the suit---Prima facie, malice could not be attributed to defendant in order to decline him leave unconditionally, in view of dates of institution of other suits and private complaint by brother of defendant---Substantial question of law and facts was raised by defendant, entitling him to get leave to appear and defend the suit unconditionally---Trial Court, though noted down facts but did not consider such aspect and as such order passed by Trial Court granting conditional leave suffered from jurisdictional defect, therefore, declining extension of time for submission of surety bond was also legally not sustainable---High Court in exercise of revisional jurisdiction, set aside order passed by Trial Court and application for leave to appear and defend the suit was allowed unconditionally---Revision was allowed in circumstances.

Haji Abdul Wahid v. Hoechst Pakistan Limited and another 1993 CLC 1291; Crystal Seeds (Pvt.) Ltd., Lahore through Chief Executive and 2 others v. Crescent Commercial Bank Limited Lahore through Branch Manager 2007 CLD 229 and Sarwar Khan v. Mehran Bibi and others 2005 SCMR 521 ref.

Muhammad Safdar Shaheen Pirzada for Petitioner.

Nisar Ahmad Kausar for Respondent.

ORDER

MEHMOOD MAQBOOL BAJWA, J.---The respondent instituted suit against petitioner under Order XXXVII of The Code of Civil Procedure, 1908, for recovery of Rs.10 million in which application for leave to appear and defend the suit was made by the petitioner which was allowed vide order dated 5-6-2008 subject to submission of surety bond. An application for extension of time for submission of surety bond made by petitioner was dismissed vide order 30-10-2008. Both the orders have been assailed by the petitioner before this Court.

2. Learned counsel for the petitioner making reference to the contents of plaint and application for leave to appear and defend the suit maintained that plausible defence was agitated which was duly noted down by the learned trial court and as such the unconditional leave should have been granted. Help was sought from the rule of law laid down in "Haji ABDUL WAHID v. HOECHST PAKISTAN LIMITED and another" (1993 Civil Law Cases 1291) and "CRYSTAL SEEDS (PVT.) LTD., LAHORE through Chief Executive and 2 others v. CRESCENT COMMERCIAL BANK LIMITED LAHORE through Branch Manager" (2007 CLD 229).

On the other hand, the learned counsel for the respondent while seeking help from the dictum laid down in "SARWAR KHAN v. MEHRAN BIBI and others" (2005 SCMR 521) contended that the revision petition is barred to the extent of order dated 5-6-2008 and as such no relief can be granted to the petitioner.

Repelling the contention of adversary on merits, it was submitted that keeping in view the merits of the application for leave to appear and defend the suit, the learned trial court rightly imposed the condition for submission of surety bond. Continuing the arguments, the learned counsel for the respondent while exhibiting the conduct of petitioner maintained that he was guilty of negligence who failed to submit surety bond even in the first extended period and then again sought extension.

3. First of all, it is desirable to deal with the objection raised at the instances of respondent raising question of limitation. At the time of filing of revision petition, no such objection was raised by the office. Keeping in view the date of delivery of certified copies the revision petition cannot be said to be barred by time. The objection as such has no relevance.

4. Question of grant of "Leave to appear and defend the suit" was dealt with by honourable apex Court and different High Courts in following celebrated judgments amongst others. "FINE TEXTILE MILLS LTD. v. Haji UMAR" (PLD 1963 SC 163), "MUSLIM COMMERCIAL BANK LTD. v. TAYYAB SHARIF" (1975 SCMR 393), "Mian RAFIQUE SAIGOL and another v. BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LTD. and another" (PLD 1996 SC 749), "AZMAT WALI v. HASSAN AL-ADAWI and 2 others" (1983 Civil Law Cases 546), "SHAHZAD ICE FACTORY v. SPECIAL JUDGE, (BANKING)" (PLD 1982 Lahore 92), "DUR MUHAMMAD PRACHA v. JUDGE SPECIAL COURT BANKING" (1982 Civil Law Cases 1625), "HABIB BANK LTD v. KARACHI PROPERTIES INVESTMENT CO. LTD" (PLD 1984 Karachi 257), "HABIB BANK LIMITED v. Messrs PAZHONG TRADERS and 12 others" (1986 Civil Law Cases 1086), "Raja SAEED AHMAD KHAN v. SABIR HUSSAIN" (2000 Civil Law Cases 199), "ASIF KHURSHID v. SAEED AHMAD" (2000 Civil Law Cases 913), "Sheikh MUHAMMAD AYUB v. MUHAMMAD YOUSUF" (PLD 2005 Lahore 197), "ASIF JAVED and others v. GHULAM SHABBIR" (2007 YLR 187), "UMER KHAN v. Haji MUSA JAN" (2009 SCMR 1101) and "ZUBAIR AHMAD and another v. SHAHID MIRZA and 2 others" (2004 SCMR 1747).

While reviewing the case-law, following focal points can be formulated to be kept in view while deciding the question of grant of leave to appear and defend the suit.

(1) If any kind of defence is made out, either plausible or illusory, leave is to be granted to defend the suit;

(2) If leave is to be granted to the defendant to defend the suit, it can be conditional or unconditional, depending on the strength of defence set up by defendant. If a plausible defence, either on facts or in law, is made out, unconditional leave is to be granted while deciding question of plausible defence, following points can be taken into consideration amongst others (a) substantial question of law and fact; (b) jurisdiction of court doubtful; (c) complex question of limitation; (d) Instrument not properly stamped; (e) Instrument allegedly not attested by two witnesses; (f) Document issued without consideration; (g) Allegation of fraud requiring inquiry;

(3) Even if the defence is plausible but the conduct of the defendant is mala fide or is clothed with suspicion, leave may not be granted unconditionally;

(4) If no defence is made out, on factual or legal premises, leave may be refused, resulting in decretal of suit; and

(5) If the defence set up is not plausible leave to defend be granted but conditionally, either on condition of furnishing security or deposit of amount.

5. Keeping in view the yardstick respective contention of adversaries are to be examined.

It is the case of the respondent in the plaint that petitioner was working in the respondent's company as an accountant since 1996 whose services were terminated by Muhammad Wasif (Chief Executive) due to corruption and mal-practices and Mst. Sumera Wasif became the Chief Executive after the demise of her husband and after that the petitioner again started working as commission agent with the respondent company, hijacked the password of Blue Airlines given and sold out air tickets to the tune of Rs.1,06,91,146 on behalf of respondent. However, fraud was detected and ultimately with the intervention of others, petitioner issued cheque in question which was bounced.

The petitioner in the application for leave to appear and defend the suit, while controverting the assertion of respondent alleged that cheque was stolen and private complaint was filed by petitioner against the respondent sub-judice before the learned Judicial Magistrate. He also

pointed out that suit for declaration and perpetual injunction has been instituted by the petitioner questioning the execution of cheque and for cancellation of same.

The learned trial court while taking note of the facts though granted leave but subject to imposition of submission of surety bond.

Record reveals that cheque was issued on 15-9-2006. The present petitioner instituted suit for declaration and cancellation of said cheque on 29-12-2006, put up before the civil court on 8-1-2007. The brother of petitioner filed private complaint against respondent on 3-2-2007 under sections 379, 420, 468 and 471 of the Pakistan Penal Code, 1860 regarding the same matter. The respondent instituted suit for recovery on 26-7-2007. Pendency of the civil suit and private complaint by petitioner and his brother, Walayat Ali is not disputed. Case under section 489-F of the Pakistan Penal Code, was registered against the petitioner but on 1-10-2006. Contents of para (5) of the plaint of the suit for recovery are also to be referred, according to which, the petitioner wrote words "Sky Line Lahore (Pvt.)" in his own hand, put his signatures but the amount in words and figures was written by one of his companion (identity not disclosed). In view of all the circumstances, plausible defence was offered by the petitioner while seeking leave to appear and to defend the suit. Keeping in view the dates of institution of suit for declaration and cancellation of cheque and private complaint made by brother of petitioner, prima facie, malice cannot be attributed to the petitioner in order to decline him leave un-conditionally.

6. Pursuant to above discussion, substantial question of law and facts was raised by petitioner, entitling him to get leave to appear and to defend the suit un-conditionally.

The learned trial Court though noted down the facts but did not consider this aspect and as such order dated 5-6-2008 suffers from jurisdictional defect. As the order dated 5-6-2008 suffers from jurisdictional defect, therefore, order dated 30-10-2008, declining the request of petitioner for extension of time for submission of surety bond is also legally not sustainable.

7. Epitome of above discussion is that while setting aside both the orders assailed, application for permission to leave to appear and to defend the suit is allowed un-conditionally.

MH/B-9/L

Revision allowed.