

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.05 of 2007

[M/s. Noman Abid Co. Limited (Regd.) vs. Naveed Haider]

Date of hearing : 11.02.2019

Date of Decision : 19.07.2019

Plaintiff

*[M/s. Noman Abid Co. Limited
(Regd.)*

: None present for the Plaintiff.

Defendant

[Naveed Haider]

: Through Mr. Mehmood Ali,
Advocate.

Case law cited by learned counsel for Plaintiff

--

Case law relied upon by learned counsel for Defendant.

1. 2015 SCMR page 1401
(Rana Tanveer Khan vs. Naseer-ud-Din and others)
2. 2016 CLC Note 128
(Ijaz Ahmed Khan vs. Jahanzeb Khan and others)
3. 2017 MLD page 2057
(Aamir Ghose Hashmi vs. Nusrat Hussain)
4. 2017 YLR page-337
(Shahzad Aslam and others vs. Province of Punjab and others)

JUDGMENT

Muhammad Faisal Kamal Alam, J: Plaintiff has instituted this Suit under Summary Chapter of the Civil Procedure Code, 1908, with the following prayer clause_

“It is, therefore, prayed that this Hon’ble Court may be pleased to pass Judgment and Decree against the Defendant as under: -

- “A. Decree the suit in the sum of Rs.21 Million in lieu of cheque amount in favour of the Plaintiff against the Defendant with markup / interest at the rate of 19% per annum from the date of filing of suit till the amount is realized.*
- B. Any other relief which this Hon’ble Court may deem fit and proper in the circumstances of the case.”*

2. As per the averments of plaint, the Plaintiff is a Stock Brokerage and Equity Investment Company and is a corporate member of the then Karachi Stock Exchange (*now Pakistan Stock Exchange*). The Defendant in the first week of December, 2006, had opened an Account No.1577 with CDC, Sub Account No.7394 with the Plaintiff, for purchase of 1.5 Million shares of Callmate Telips Telecom Limited against a total value of Rs.151.5 Million. It is the main stance of Plaintiff that as a part consideration of the above amount (*of Rs.151.5 Million*), the Defendant had issued a cheque for a total sum of Rs.21 Million, which was dishonored after its presentment in the Bank.

3. Conversely, the main stance of Defendant as mentioned in his Written Statement and the evidence is that the subject cheque was dishonored due to some internal error of the Bank, besides the fact, that on the next date, that is, 05.12.2006 a Pay Order No.1165939 of the same amount was issued in the name of Plaintiff and was drawn on the same Standard Chartered Bank. The Defendant resisted the claim of Plaintiff in respect of the purported dishonored cheque No.5749297 dated 04.12.2006 [*Subject Cheque*] drawn on Standard Chartered Bank, Karachi (Pakistan) for a sum of Rupees Twenty Million.

4. By the order dated 30.10.2008, the Defendant was granted Leave to Defend the present suit but subject to furnishing of security, which was assailed by the Defendant in the High Court Appeal No.28 of 2009 and after hearing the Advocates for the parties hereto, the learned Division Bench vide its Order dated 20.03.2009, rectified the order of this Court to the extent that the Leave to Defend was granted unconditionally. Subsequently, the last order was challenged by the present Plaintiff before the Hon'ble Supreme Court in a Civil Petition No.396-K of 2009, but without any success.

5. Vide order dated 29.11.2009, following Issues were settled by the Court_

- “1. Whether the present suit is maintainable in its present form?***
- 2. Whether the cheque was issued against the consideration?***
- 3. Whether the cheque was dishonored because of the bank's internal system error?***
- 4. Whether Pay Order No.1165939 issued by the defendant in lieu of cheque is towards consideration of the shares?***
- 5. What should the decree be?”***

6. It is also necessary to mention that in order to expedite the matter, a Commissioner was appointed for recording the evidence, but earlier Commissioner returned the commission because he was given some judicial assignment and later Mr. Ebad-ul-Hasnain, Advocate was appointed as Commissioner. This is mentioned in the order dated 14.11.2011. The above named learned Commissioner has submitted his Report dated 25.08.2016, according to which, although the Plaintiff's representative / witness, namely, Hammad Tahir, has filed his Affidavit-in-Evidence but despite giving him ample opportunities, the said

representative / witness of the Plaintiff did not appear for his cross-examination and eventually on 14.11.2015 at 1:00 PM, the order was passed for closure of side of Plaintiff to lead the evidence. Consequently, the Defendant led the evidence by filing his Affidavit-in-Evidence and was cross-examined by the counsel of the Plaintiff.

7. Findings on the issues are as follows:

FINDINGS

ISSUE NO.1.	In Negative.
ISSUE NO.2.	As under.
ISSUE NO.3.	Redundant.
ISSUE NO.4.	As under.
ISSUE NO.5.	Suit dismissed with costs.

REASONS

ISSUES NO.3 AND 4.

8. The above Issues No.3 and 4 are pivotal and other Issues depend on the findings on these Issues.

Admittedly, the Plaintiff did not lead the evidence in support of his claim that the subject cheque No.5749297 dated 04.12.2006 has been dishonored in such manner that the cause of action has arisen in favour of Plaintiff for filing the present suit.

As against that, the Defendant has examined himself and he was cross-examined by the learned counsel for Plaintiff. He has produced number of documents including the photocopy of the bounced subject cheque along with Bank Advice / Cheque Returned Memo as O/2 and O/6, respectively; the Pay Order No.1165939 dated 05.12.2006 of the same amount of Rs.21 Million, is marked as O/3. A copy of another cheque No.5749300 dated 06.12.2006 for an amount of Rs.6.8 Million has also

been produced in the evidence bearing the Bank Stamp. Regarding these two cheques, the Defendant has stated in his Affidavit-in-Evidence / examination-in-chief that the first instrument-Pay Order dated 05.12.2006 was paid to the Plaintiff in lieu of the subject cheque, whereas, a further payment of Rs.6.8 Million was also made within a short period of two days. The Defendant has also produced a Statement of Account of his Bank, viz. Standard Chartered Bank, as O/7, to substantiate his testimony that on the given date, that is, 05.12.2006, a sufficient balance of Rs.59,965,660/- was available in the Bank Account of the Defendant. On perusal, this Statement of Account also shows the withdrawal of Rs.21 Million under the above Pay Order No.1165939. The above named Defendant in his evidence has also produced another photocopy of the above Pay Order (as D/9) bearing the stamp of the Bank with endorsement "*transfer*".

9. The most crucial instrument / document is the above referred Pay Order, a copy whereof is produced by the Defendant in evidence but under the objection by the learned counsel for the Plaintiff. Defendant has stated on oath and substantiated his claim by other documents, as mentioned hereinabove, that the proceeds of the subject disputed cheque has been paid through the above Pay Order. Obviously, the original Pay Order was in possession of the Plaintiff and then the concerned Bank. The Plaintiff's side despite ample opportunities did not lead the evidence in rebuttal, hence the positive evidential value of the above Pay Order cannot be rejected in these peculiar circumstances.

10. Learned counsel for the Defendant has relied upon case law, which are reproduced in the opening part of decision, relating to the onus to prove and the consequence of not leading the evidence of the Plaintiff despite providing opportunities.

11. I have gone through the reported decision and in my considered view, the rule laid down in the said reported cases is applicable to the present *lis*, because the claim of Plaintiff has been successfully rebutted by the Defendant by leading a positive evidence. In cross-examination, the credibility of Defendant, particularly, relating to the fact that the amount of subject cheque (in dispute) is subsequently paid through the above Pay Order of 05.12.2006, could not be impeached by the Plaintiff's side.

In terms of Articles 117 and 118 of the Qanun-e-Shahadat Order, 1984, the Plaintiff has to lead a positive evidence in support of his claim, particularly, that the subject cheque was issued for consideration and Plaintiff was not compensated subsequently when the subject cheque was dishonored, in which the latter (Plaintiff) failed.

12. It is also one of the pleas / defence of Defendant, that the subject cheque was dishonored due to internal error of the Bank and to substantiate its defence, the Defendant has produced the Statement of Account of his Bank (as already referred above), which shows balance of Rs.59,965,660/- in the Bank Account of Defendant at the relevant date, which means that sufficient funds was available in the Bank Account (of Defendant); but, in the evidence, the learned counsel for Plaintiff has raised the objection on this Document-O/7, Statement of Account, that the same is not duly certified, but contents / entries of the above documents were not questioned during evidence; and in view of Explanations 3 and 4 to Article 73 of the Qanun-e-Shahadat Order, 1984 (relating to the primary evidence), this document / Statement of Account (O/7), cannot be discarded completely, but can be considered in the present peculiar circumstances. Applying the rule of preponderance, as applicable to the evaluation of the evidence in civil matters, it can be held, that, Bank Cheque Return Memo (O/6) attached with the subject cheque was issued erroneously, though *bona fide*,

by the Standard Chartered Bank. Notwithstanding this, in view of positive finding on Issue No.4 in favour of present Defendant, this Issue of internal error committed by the Bank is even otherwise of little significance.

13. It has come on record in the evidence that another Suit No.20 of 2007 is also *sub judice* between the parties hereto and Callmate Telips Telecom Limited, regarding whose shares, the subject cheque was issued. Hence, **the Issue No.4 is answered in Affirmative** that vide above Pay Order No.1165939 dated 05.12.2006, the amount under the subject cheque was duly paid to Plaintiff. After a finding on Issue No.4, this Issue No.3 has become redundant.

ISSUES NO.1, 2 and 5.

14. The above discussion leads to the conclusion that even though the subject cheque was issued under consideration for purchase of shares in the above named listed Company, but at the same time when the subject cheque could not be cleared, it was replaced by the afore-referred Pay Order. Hence, the **Issue No.1 is answered in Negative** and **Issue No.2 is answered accordingly.**

15. The upshot of the above is that since the Plaintiff has already received the amount of disputed cheque, therefore, the present suit was filed with *mala fide* intention and is not maintainable. Not only this, the overall conduct of the Plaintiff Company, from the time of granting Leave to Defend Application was not of a *bona fide* litigant.

16. In view of the above, the present suit is dismissed with costs.

Dated: _____

JUDGE