IN THE HIGH COURT OF SINDH, KARACHI

Ist Appeal No. 11 of 2017
[Mrs. Nasreen Asghar & another *Vs. HBFC and another*]

PRESENT:
Mr. Justice Arshad Hussain Khan
Mr. Justice Amjad Ali Sahito

***

Appellant-2	Masroor Asghar in person.
Respondent	Through Mr. M. Aslam Advocate
Date of Hearing:	30.04.2026
Date of Decision:	30.04.2026

JUDGMENT

ARSHAD HUSSAIN KHAN, J.- The instant First Appeal, filed under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (FIO 2001), assails the judgment and decree dated 25.02.2017, passed by Banking Court No.II, Karachi, in Suit No.01 of 2015, whereby the suit instituted by the respondent under Section 9 of FIO 2001 was decreed against the appellants/defendants jointly and severally in the sum of Rs.1,727,273/-, along with agreed rent, appreciation value, GIP/PIP up to the date of default, and cost of funds from the date of default till realization of the entire decretal amount.

2. Briefly stated, the facts of the case are that on 27.09.2005, appellant/defendant No.1 availed a finance facility from the respondent, while appellant/defendant No.2 stood as guarantor thereof. At the request of the appellants, the respondent sanctioned a facility of Rs.2,000,000/-, for which the appellants executed various charge and security documents in favour of the respondent. The facility was fully availed and utilized; however, despite repeated assurances and written commitments, the appellants failed to discharge their repayment obligations. Thereafter, appellant No.1 filed Constitution Petition No.D-2165 of 2011 before this Court against the respondent, which was disposed of vide order dated 08.04.2013, whereby the appellant was permitted to purchase the subject property at a price of Rs.4,700,000/-, with an obligation to share profit in agreed proportions and to clear rent and/or other outstanding due within one month. It was,

however, expressly provided that the said purchase price would remain valid only for a period of three months. The respondent complied with the said directions and intimated the payable amount to the appellants, who, nonetheless, failed to make the requisite payment. Consequently, the respondent instituted the subject suit for recovery of Rs.3,936,929/- along with markup. Upon service, the appellants filed an application for leave to defend, which was dismissed on 23.06.2015. Thereafter, vide judgment and decree dated 25.02.2017, the suit was decreed. Being aggrieved, the appellants have preferred the present appeal.

3. Appellant No.2, appearing in person on his own behalf as well as on behalf of appellant No.1 in his capacity as attorney and son, while reiterating the grounds set forth in the memo of appeal, contended that the impugned judgment and decree are unsustainable in law, having been passed on the basis of misreading and non-reading of the material on record and misapplication of the law. It is primarily argued that the learned Banking Court failed to properly appreciate the import of the order dated 08.04.2013, passed by this Court in C.P. No.D-2165 of 2011, whereby the appellants were permitted to purchase the subject property for a sum of Rs.4,700,000/-. It is contended that, instead of acting in terms of the said order, the respondent proceeded to institute the recovery suit, which, according to the appellants, was unwarranted. It is further argued that the suit was filed during the pendency of contempt proceedings arising out of the said order, and therefore was not maintainable, a fact which, according to learned counsel, was not considered by the learned Banking Court. It is also contended that the dispute between the parties was not with regard to default per se, but related to the quantum of the amount claimed by the respondent, which aspect was allegedly not examined by the learned Banking Court. It is urged that the finance facility availed by the appellants was based on Shariah-compliant modes and not on a conventional markup-based system; hence, the appellants could not be burdened with amounts in the nature of appreciation or capital gains beyond the rental income earned by the respondent. Lastly, it is contended that the decree passed exceeds the admitted liability, resulting in unjust enrichment. On these premises, it is prayed that the impugned judgment and decree be set

aside and the matter be remanded to the learned Banking Court for fresh adjudication on merits.

4. On the other hand, learned counsel for the respondent, while supporting the impugned judgment and decree, contended that the same has been passed strictly in accordance with law and does not warrant any interference by this Court. It was submitted that the appellants failed to avail the concession granted by this Court in C.P. No.D-2165 of 2011 within the stipulated time, and, as a consequence thereof, the respondent was constrained to institute the underlying suit for recovery. The said suit was duly decreed by the learned Banking Court after examining the executed security documents, the unrebutted statement of account, and the admitted fact that the appellants had availed the finance facility. Lastly, it is contended that the present First Appeal is devoid of merit and is liable to be dismissed with costs.

5. We have heard the appellants, learned counsel for the respondent and perused the material available on the record.

From the record, it transpires that the respondent–HBFC sanctioned a finance facility of Rs.2,000,000/- to the defendants, repayable over a period of 24 years. Against the said facility, as per the statement of account, the appellants paid a total sum of Rs.1,116,097/- towards principal, markup/profit and GIP/PIP up to 27.03.2013, leaving an outstanding principal balance of Rs.1,727,273/- as of the date of default, i.e., 27.03.2013. The learned Banking Court, after examining the record, decreed the suit against the appellants jointly and severally in the sum of Rs.1,727,273/-, along with agreed rent, appreciation value, and GIP/PIP up to the date of default, and further awarded cost of funds from 27.04.2013 till realization of the entire decretal amount. The prayers of the plaintiff regarding costs of the suit and sale of the mortgaged property were also allowed.

6. The appellants have assailed the impugned judgment primarily on the grounds that: (i) the impugned judgment is based on misreading and non-reading of the material available on record as well as misapplication of law; (ii) the learned Banking Court failed to consider the order dated 08.04.2013, passed by this Court in C.P. No.D-2165 of 2011; (iii) the suit was not maintainable in view of the pendency of contempt proceedings; (iv) the dispute is with regard to quantum of

amount claimed and not default in payment; (v) the learned Banking Court did not properly appreciate that the finance facility was Shariah-compliant and not markup-based; and (vi) the decretal amount exceeds the admitted liability, thereby resulting in unjust enrichment.

7. Insofar as the first ground is concerned, we have examined the record and find that the learned Banking Court has duly considered the executed finance documents, statement of account, and the admitted availing of the facility by the appellants. No material illegality or perversity has been pointed out which would warrant interference. The contention is, therefore, without substance.

8. As regards the second ground, the record reflects that this Court, vide order dated 08.04.2013, while disposing of Constitutional Petition (C.P. No.D-2165 of 2011) filed by appellant No.1, granted liberty to the appellant to purchase the subject property at a price of Rs.4,700,000/-, with an obligation to share profit in agreed proportions and to clear rent and/or any other outstanding dues. It was further observed that the said price would remain valid for a period of three months only, keeping in view the possible fluctuation in the value of the property, and that it would not be equitable to bind the respondent to the said price beyond the stipulated period. The record further shows that, despite the said concession, the appellant, instead of demonstrating bona fide willingness to purchase the property by arranging payment through pay order or cheque, engaged in unnecessary correspondence with the respondent, resulting in the lapse of the time granted by the Court. Consequently, the respondent instituted the underlying suit for recovery on 12.12.2014.

In view of the above, it is evident that the permission granted by this Court was conditional and time-bound. The appellants having admittedly failed to comply with the terms within the stipulated period, the respondent was well within its rights to initiate recovery proceedings. The said order cannot be construed as creating any perpetual embargo against such recovery; hence, the contention raised in this regard is misconceived and without substance.

9. Insofar as the third ground is concerned, firstly, the pendency of contempt proceedings does not operate as a bar to the institution or

continuation of independent recovery proceedings, particularly where the appellants have failed to comply with the order giving rise to such proceedings. No legal embargo has been pointed out which could render the suit incompetent on this account. Secondly, it is noted that the said contempt application, along with other connected applications, was dismissed by this Court with the following observation:

> "Attorney of the petitioner is present in person. He states that he does not wish to press any of these applications and undertakes not to file such frivolous and misconceived applications in future. In case any such application is repeated in future, exemplary cost shall be imposed upon him and action shall be taken against him. All these applications are dismissed."

10. As regards the contention of the appellants that the dispute pertains only to the quantum of the amount claimed and not to default in payment, we are not persuaded to agree. The record unequivocally reflects that the appellants had availed the finance facility and were under a contractual obligation to repay the same in terms of the agreed schedule. The statement of account placed on record demonstrates that the appellants committed default in repayment, resulting in an outstanding liability. Mere assertion that the dispute is confined to the quantum, without any substantiated challenge to the statement of account or the underlying calculation, does not absolve the appellants of their admitted default. It is also pertinent to note that the application for leave to defend was dismissed, and the statement of account remained unrebutted, thereby attaining evidentiary value under the law. In these circumstances, the contention that there was no default and that the dispute is limited to quantum is misconceived and devoid of merit, and is accordingly rejected.

11. As regards the contention that the learned Banking Court failed to appreciate that the finance facility was Shariah-compliant and not markup-based, we find the same to be without merit. The record reflects that the terms and conditions governing the facility, including the mode of return, were duly embodied in the executed agreements and accepted by the appellants. Whether the facility was structured as Shariah-compliant or otherwise, the appellants remained bound by the contractual obligations undertaken by them. It is well-settled that once a party has voluntarily entered into a financial arrangement and availed the facility thereunder, it cannot subsequently resile from the agreed

terms on the pretext of its nomenclature or characterization. The learned Banking Court has rightly relied upon the executed documents and the statement of account to determine the liability, and no illegality or misapplication of law has been pointed out in this regard.

12. As regards the contention that the decretal amount exceeds the admitted liability and results in unjust enrichment, we find the same to be devoid of substance. The decretal amount has been determined on the basis of the contractual terms agreed between the parties, duly supported by the statement of account placed on record. The appellants have neither specifically challenged the correctness of the said statement of account nor produced any material to demonstrate that the amount decreed is in excess of what is lawfully due. It is well-settled that where a statement of account is duly maintained in the ordinary course of business and remains unrebutted, it carries evidentiary value and can safely be relied upon. In the present case, the appellants failed to effectively controvert the computation of liability, and mere bald assertions regarding excess claim do not suffice to establish unjust enrichment.

13. In view of the foregoing discussion, we find that none of the grounds urged by the appellants merits acceptance. The impugned judgment and decree have been passed after due consideration of the material available on record and in accordance with the settled principles of law. No illegality, material irregularity, or jurisdictional infirmity has been pointed out so as to warrant interference by this Court in exercise of its appellate jurisdiction. Accordingly, the instant First Appeal is dismissed, and the judgment and decree dated **25.02.2017,** passed by the learned Banking Court No.II, Karachi, are maintained. There shall be no order as to costs.

JUDGE

JUDGE

*Jamil**