

IN THE HIGH COURT OF SINDH AT KARACHI

1st APPEAL NO.100 of 2012

Present:-

Mr. Justice Sajjad Ali Shah.

Mr. Justice Muhammad Junaid Ghaffar.

Agha Abdul Khaliq ----- **Appellant**

Versus

Habib Bank AG Zurich and others----- **Respondents**

Date of hearing: **21.10.2015.**

Date of judgment: **12.11.2015**

Appellant: **In person along with Mr. Irshad Ahmed
holding brief for Mr. Shafqat Ali Shah
Masoomi Advocate for Appellant.**

Respondent: **Through Mr. Hassan Akbar Advocate.**

J U D G M E N T

Muhammad Junaid Ghaffar, J. Through instant appeal, the appellant has impugned judgment dated 15.10.2012, passed by the Banking Court-III, at Karachi, in Suit No. 211 of 2003, whereby, the plaint has been ordered to be returned to the appellant under Order VII Rule 10 CPC, for want of jurisdiction.

2. Briefly the facts as stated are, that the appellant used to work in the department of Police, UAE, and upon his resignation an amount of UAE Dirham 123,090/- was credited in his Account No. 106065 being maintained with respondent No.2, at Abu Dhabi, UAE. It is further stated that somewhere in the year 2000, the appellant made a request to respondent No.2, for transfer of his amount lying in the Bank to a Bank in Pakistan, which request was declined vide letter dated 19.6.2000, whereby, the appellant was informed that since he had stood as a guarantor of M/s Abu Zubair General Maintenance Company (AZGMC) Abu Dhabi, UAE, in connection with some loan and an amount of UAE Dirham 16372/-, whereas, the remaining balance cannot be transferred as requested until final adjustment of loan of replacement of guarantor. It is further stated that subsequently, the

appellant served legal Notices dated 20.6.2002, 27.2.2002 and 6.2.2003, whereafter, the appellant filed Suit before Banking Court No.III, at Karachi, seeking the following relief(s):-

“a. A permanent Injunction against Defendants No.1, 2 and 3, to revert the deducted amount of AED 16372.00 and restore his account No.106065 with Defendants No.2 in its original position, and transfer the same to their branch office at Plaza Square branch (defendant No.5) at Karachi in the plaintiff's current account NO.103902, within the jurisdiction of the Banking Court of Pakistan at Karachi.

b. A mandatory Injunction against the Defendants No.1,2 and 3, directing them not to detain the Bank account of the Plaintiff against the so-called guarantee in favor of M/s Abu Zubair General Maintenance Company LLC, which was illegal.

c. Such other relief as may be deemed fit under the circumstances of the case.

d. The costs of the suit.”

3. On issuance of summons and notices, objections / written statement were filed on behalf of the respondents and after grant of unconditional leave to defend, following issues were framed vide order dated 20.7.2005:-

- “1. Whether the plaintiff is liable to make payment of AED 16,372/- to the Defendant?
2. Whether the Guarantee taken by the plaintiff was for the Personal Loan or for a Limited Liability Company for running business?
3. Whether Abu Zubair Gen Maint Co. LLC is different from Abu Zubair Gen Maint Co or Zubair Gen Maint?
4. Whether without establishing the exact amount of default the Defendant can deduct the amount from the Account of Plaintiff without consent/Debit Voucher?
5. Whether the loan in question is issued in the name of Ghost Company amounting to AED 70,000/- (Approx) which was issued in favour of M/s Abu Zubair General Maintenance Co. LLC?
6. Whether this Court has jurisdiction to adjudicate upon the present suit?
7. Whether the suit is properly valued and proper Court fee has been affixed with the plaint?
8. Whether the guarantee in question and all other documents were executed and invoked at Karachi?
9. The guarantee in question was encashed at Karachi?
10. Whether permanent injunction without seeking declaration can be sought?
11. Whether any cause of action has arisen against Defendant No.4?
12. Whether the suit is maintainable against defendant No.4 and other branches carrying on banking business at Karachi.
13. What should the decree be?”

4. The appellant filed its affidavit in evidence with certain photo copies of the documents, whereas, Mr. Asif Raza Officer / attorney of respondents No. 1, 2 & 3 filed his affidavit in evidence and similarly Mr. Mudassir Kalim and Syed Muhammad Fareed Hashmi also filed their affidavit in evidences on behalf of respondents No. 4 & 5. After recording of the evidence and hearing the arguments, the learned Banking Court has been pleased to decide issue No.6, regarding jurisdiction of the Banking Court to try the Suit before it and has come to the conclusion that it had no jurisdiction in the matter and has ordered to return the plaint to the appellant under Order VII Rule 10 CPC for further proceedings.

5. Appellant present in person has contended that the learned Banking Court has failed to appreciate that since the appellant was a Pakistani National and is presently residing in Pakistan, the Banking Court had the jurisdiction to decide the Suit filed by the appellant. The appellant has further contended that he had not signed any letter of guarantee as alleged by respondent No.2, and, even otherwise, respondent No.2 is a branch / subsidiary of respondent No. 4 & 5, which operates through Head office in Pakistan, therefore, the learned Banking Court ought to have decided the Suit on merits. Appellant has finally contended that since he has resigned from the job and is not in a position to go and visit UAE for redressal of his grievance, therefore, the Banking Court at Karachi had the jurisdiction to decide the issue.

6. Conversely, Counsel for the respondents has contended that instant appeal at the very outset is not maintainable for the reason that neither any Court fee has been annexed with the Memo of Appeal nor the decree passed in the instant matter has been filed along with the appeal. Counsel has further contended that the learned Banking Court has passed a very reasoned and justifiable order, as admittedly the cause of action, if any, had accrued to the appellant in UAE, therefore, the Banking Court lacked jurisdiction under the Financial Institution (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as the "Ordinance, 2001").

7. We have heard the appellant as well as Counsel for respondents and perused the record. At the request of the appellant instant appeal has been taken up for final disposal at Katcha peshi stage.

8. Perusal of the record reflects that the entire transaction in question as well as the prayer sought by the appellant pertains to the act of commission or omission on the part of respondent No.2, which is a Bank operating at Abu Dhabi UAE. The appellant's account was maintained with respondent No.2, whereas, according to the appellant's own averments, the service benefits were credited in his account being maintained with respondent No.2. The appellant through instant proceedings seeks directions against respondent No.2 to transfer the amount lying in his account at Abu Dhabi, UAE, to a Bank in Karachi, and so also to declare that the deduction of Dirham 16372/- by respondent No.2 is unlawful, which should be credited to his account. It is not the case of the appellant that any loan was either advanced within the territorial jurisdiction of the Banking Court at Karachi, nor any letter of guarantee or any other banking instrument was ever issued or executed within the territorial jurisdiction of the Banking Court at Karachi. In such circumstances, in our view, the order impugned has been correctly passed by the learned Banking Court, and is in accordance with law and as per the settled position in respect of territorial jurisdiction specially in Banking matters, as apparently the Suit of the appellant cannot be tried by the Banking Court at Karachi as it lacks jurisdiction in the instant matter for the reason that the cause of action has accrued at UAE. Merely for the fact that some branch or zonal offices of the same Bank are being run and operated within the Banking Court's jurisdiction, a Suit would not be competent, as apparently the cause of action in the instant matter has accrued outside the territorial limits and jurisdiction of the Banking Court.

9. This issue of Banking Court's (territorial) jurisdiction came up before a learned Single Judge of this Court in the case of ***Nadeem Ghani Vs. United Bank Limited and others (2001 CLC 1904)*** under the repealed Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997, and while interpreting Section 2(a)(i) of the said Act, which provided definition of a Banking Company, (which was though worded somewhat differently as against the Ordinance, 2001), the Court came to the following conclusion:

22. It is universally accepted that according to the comity of nations all legislation of a country is territorial, all exercise of jurisdiction is territorial in nature and the laws of a country apply to all its subjects, things and acts within its territory. Section 1(2) of the Banking Act, 1997, clearly states that its provisions extend to Pakistani territory and prima facie, the Act does not envisage extra-territorial application.

Therefore, the provisions of the Act would not apply to banking transaction conducted beyond the territories of Pakistan in another country under the laws of that country where the branch of a banking company incorporated or operating in Pakistan may be doing business.

To understand it properly, let us take an example. Suppose A.B.C Bank which is incorporated in New York also has a branch among others in Karachi and Tokyo. It enters into a loan transaction in New York or Tokyo with its customer who commits a default in payment of the debt, leaves New York or Tokyo and settles in Karachi, A.B.C. Bank can file the suit against its customer in Karachi because the defendant resides in Karachi as permitted by section 20, CPC but the question is whether A.B.C Bank can file a claim in the Banking Court established under section 4 of the Banking Act, 1997, which provides a speedy remedy or would it have to file the claim in the ordinary Court of Civil jurisdiction. The answer is simple; even though A.B.C Bank has a branch in Karachi, it cannot file the above-referred claim in the Banking Court because the transaction did not take place under the terms and conditions enforced by the State Bank of Pakistan for the business of banking in Pakistan but under the laws of New York or Tokyo and does not come within the definition of finance as defined in the Banking Act, 1997. However, it can file the claim in the ordinary Court exercising civil jurisdiction in accordance with the provisions of CPC. In the present case, the transaction between the parties took place beyond the territories of Pakistan i.e. in England where it was subject to English Law and not subject to Pakistan Law or the present banking system enforced by the State Bank of Pakistan. It is, therefore, apparent that the transaction between the parties cannot be said to be covered under the provisions of the Banking Act, 1997. After reading the provisions of the said Act, which is a special law enacted to meet the special situation prevailing in the country and the fact that the transaction in dispute took place in England under English Law between the parties who were domiciled in England at the time of the transaction. I am of the opinion that the dispute between the parties is not covered by the provisions of the Banking Companies (Recovery of Loans Advances, Credits and Finances) Act, 1997. Consequently, exercising the power under section 7(4) of the said Act, I hold that the plaintiffs' claim is not a loan or finance as defined in the Banking Act, 1997 and the High Court exercising jurisdiction to decide the said dispute between the plaintiff and the defendants herein and accordingly under Order VII, Rule 10 CPC, the plaint is ordered to be returned to the plaintiff for presentation in the competent Court of ordinary civil jurisdiction. However, as the Head office of U.B.L is in Karachi and respondents Nos.2 and 3 are residing and working with UBL in Karachi and the plaintiff's claim which is in excess of Rs.500,000/- will be adjudicated in the original civil jurisdiction of this High Court; the Superintendent of the "D" Branch is directed to treat this suit as an ordinary suit filed in the original civil jurisdiction of the High Court. (Emphasis supplied)

10. Subsequently another learned Single Judge of this Court in the case of **Habib Bank Limited Vs. Highway General Trading CO. (2014 CLD 491)** while interpreting the provision of Section 2(a)(i) of the Ordinance 2001, has relied upon the aforesaid judgment and has recorded a detailed finding and reasoning in respect of territorial jurisdiction of the Banking Court and the relevant observation is as under:

15. After having considered the matter, it appears to me that the crucial point is that the definition in the 2001 Ordinance uses the definition in the 1997 Act in its entirety and merely adds certain words to it. In particular, the specific limiting words "in Pakistan" have not been omitted and the new words, "through its branches within or outside Pakistan" have simply been added at the end. In my view, these words are clarificatory in nature. They give recognition to the fact that the bank concerned may be transacting banking business in Pakistan not merely through branches located here, but also abroad. In other words, it is

clarified that while the cause of action sued upon must relate to or arise out of banking business transacted in Pakistan, it is immaterial whether such business originates from within or outside Pakistan. In either case, a suit under the 2001 Ordinance would be maintainable. This point was not clear in the 1997 Act. It could plausibly have been concluded on the basis of the definition therein contained that the limiting basis of the definition therein contained that the limiting words “in Pakistan” localized both the substance of the banking business as well as its origination. In other words, the banking business had to both arise and be transacted in Pakistan. The additional words used in the 2001 Ordinance now make clear that this is not so. *The banking business may originate anywhere i.e. either from a branch inside the country or abroad; all that is required that the business be transacted in Pakistan.* Project financing can provide an illustration of what the additional words seek to achieve. A foreign bank (and even, though perhaps less realistically, a Pakistani Bank) may provide financing for a project in Pakistan either through its local branch or from a branch outside Pakistan. Under the 1997 Act, it could plausibly have been argued that any financing providing through a foreign branch would not be within the definition and therefore a suit to recover such financing would not lie under that Act. Any such ambiguity or doubt has now been laid to rest and the additional words used in the 2001 Ordinance clarify the matter by making the point explicit.(emphasis supplied)

16. In passing, one point may be made obiter, in relation to the “transaction” of banking business. How can such business be said to be transacted for purposes of the definition? To use the illustration just given, suppose a branch. The project is in Pakistan. However, suppose that all the documentation in respect of the financing is executed abroad and (as is not unusual) the drawdowns of the loan also take place outside Pakistan. Can it be said in such a case that the banking business has been transacted outside Pakistan and hence a suit would not lie under the 2001 Ordinance? It would appear that what has to be considered is the effect of the banking business that has been transacted i.e., the purpose or object sought to be achieved by it. If that is in Pakistan, then a suit would lie under the 2001 Ordinance. This is of course not to say that the converse situation would be outside the purview of the 2001 Ordinance. In other words, suppose a Pakistani bank provides financing for a project situated outside the country but the documentation in respect of the loan is executed here and the drawdowns also take place in Pakistan. Clearly, a suit would lie under the 2001 Ordinance in respect of such a loan.

17. Reverting to the actual controversy before me, the finances and facilities sued upon were provided and availed outside Pakistan and the banking business was not transacted here. In view of the foregoing discussion, I am of the view that in relation to, and for, the facts and circumstances of the present case, the plaintiff bank is not a financial institution” within the meaning of section 2(a)(i). The suit is therefore not maintainable under the 2001 Ordinance. Accordingly, the office is directed to number and register the suit as an ordinary suit on the original side. Since an ordinary suit may be defended as of right, the defendants are entitled to file their written statements, which may be done within six weeks from today. The leave applications stand disposed off in the foregoing terms.

11. Since in the instant matter admittedly the business has not been transacted in Pakistan, the Suit filed by the appellant under the Banking jurisdiction as provided under Ordinance 2001 could not have been proceeded before the Banking Court and while approving the view taken by the learned Single Judge in the case of Habib Bank Limited (Supra), we are of the view that the plaint has been correctly returned to the appellant under Order 7 Rule 10 through the impugned order.

12. Even otherwise, though not required, but at the insistence of the appellant present in person, we have even examined the merits of his case and have noted that it appears to be an admitted position that the appellant stood as a guarantor in respect of the loan granted to M/s Abu Zubair General Maintenance Company LLC, Abu Dhabi, UAE, and therefore, the argument of the appellant that he had no knowledge of such guarantee being executed is belied by the record placed before us. In this regard we may refer to the legal notice issued by the Counsel for the appellant dated 20.6.2002 to respondent No.2 wherein at Para 5 it has been stated as follows:-

“5. That, it is a matter of surprise that at the time when the actual loan was taken by the two beneficiaries of the above company the Habib Bank Ltd. AG Zurich at Hamdan Road Branch did not take any guarantee from anybody for the loan but got a guarantee from four guarantors, including our client prior to the actual loan, which on the face of it was uncalled for, unwarranted and repugnant to the banking laws and was no guarantee at all.”
(emphasis supplied)

13. Perusal of the aforesaid legal notice reflects that it has been admitted on behalf of the appellant, that though a guarantee was obtained from him, but the same was prior to the actual disbursement of the loan and therefore, was unwarranted and repugnant to the Banking laws. We are afraid that this very admission on the part of the appellant leaves nothing insofar as the merits of his case are concerned, as it appears that though he is denying such fact, but he stood as a guarantor in respect of the alleged amount of loan advanced to M/s Abu Zubair General Maintenance Company LLC, Abu Dhabi, UAE. In addition to this we may observe that there cannot be any doubt about the fact that letter of guarantee is always obtained / procured before disbursement of the loan and not thereafter. It is also pertinent to observe that neither a certified copy of decree has been annexed with the memo of appeal nor any Court fee has been affixed, and while replying to the office objection in this regard, it has been stated that a pauper application has been filed, whereas, the Counsel then appearing for the appellant had undertaken to satisfy maintainability of instant appeal on 27.5.2014, which has been admittedly filed without any certified copy of decree. Today nothing has been adduced in response to such objections, nor, the Court fee has been paid till date.

14. In view of hereinabove facts and circumstances of the instant case, we are of the view that the appellant has failed to point out any error or illegality in the impugned order which appears to have been passed in accordance with law and we do not see any reason to upset the findings recorded by the learned Banking Court while passing the impugned order. Accordingly, instant appeal being misconceived is hereby dismissed along with all pending applications on merits and so also on account of maintainability for want of certified copy of decree and failure to deposit Court fee. However, since the plaint has been returned under Order 7 Rule 11 CPC, and not rejected, the appellant is at liberty to present the same either before the Civil Court having jurisdiction in the matter under its ordinary jurisdiction or before the Court in UAE, however, strictly, if otherwise maintainable in law and without prejudice to the case of respondents.

JUDGE

JUDGE

ARSHAD/