IN THE HIGH COURT OF SINDH, KARACHI

Ist Appeal No.10 of 2009

PRESENT:
MR. JUSTICE ARSHAD HUSSAIN KHAN

Syed Itrat Hussain Rizvi Vs. Tameer Micro Finance Bank Ltd.

Appellant:	Syed Itrat Hussain Rizvi Through Mr.Muhammad Ali Waris Lari, Advocate.
Respondent No.1	Tameer Micro Finance Bank Limited Through Agha Muhammad Saleem Raza, Advocate
Date of hearing:	05.12.2016

JUDGMENT

ARSHAD HUSSAIN KHAN, J: The appellant through instant first appeal has challenged the Judgment dated 22.01.2009 and decree dated 28.01.2009 passed by the learned District Judge, Karachi (Central), in a summary chapter suit filed by respondent No.1 for recovery its amount against the appellant with the following prayers:-

> *"That in view of the foregoing submissions and in the light of the events that have happened it is respectfully prayed on behalf of the appellant, that this Honourable Court may be pleased to admit this F.R.A., and call for the record and proceedings of Suit No.34/2008 (Ref. M/s. Tameer Micro Finance Bank Limited Vs. Syed Itrat Hussain Rizvi and others) from the Court of the learned District Judge Central at Karachi and after examining its legality, correctness and propriety be pleased to set aside the impugned judgment and decree and be further pleased to order that the alleged plaint be presented before concerned Banking Court having jurisdiction."*

2. Brief facts arising for filing the present appeal are that respondent No.1 is a body corporate conducting the business of micro finance under the Micro Finance Ordinance, 2001, under the control and supervision of State Bank of Pakistan, however, it is not covered and amenable by / to the exclusive jurisdiction / provision of Financial Institution (Recovery of Finance) Ordinance, 2001, as described and defined therein. Respondent No.1/plaintiff upon the application of the appellant/defendant No.1 on 13.09.2007 granted him finance/loan of

Rs.30,000/-, on the recommendation and personal guarantee of Muhammad Shahzad son of Zafar Gul and Irfan Ahmed son of Mushtaq Ahmed, defendants No.2 and 3 respectively before the trial court. The said finance/loan was re-payable by the appellant in twelve (12) equal agreed monthly installments with mark-up at the rate of 17%, but the appellant/defendant No.1 failed to pay the above loan/finance in spite of repeated demands by respondents No.1, on due dates, resulting which an amount of Rs.33,287/- in addition to further markup of 17% as well as the late payment charges was accumulated as outstanding against him. Out of the above said outstanding amount, the appellant had only paid Rs.2569/-. Consequently, respondent No.1 filed Suit No.34/2008 before the learned District Judge, Karachi (South) [respondent No.2], under Order XXXVII of CPC for recovery of Rs.33,287/-against the appellant as well as said defendants No.2 and 3, being guarantors of the subject finance/loan accorded to the appellant. Upon notice of the suit, the present appellant/defendant No.1, instead of filing the leave to defend application, on 31.10.2008 filed application under Order VII Rule 10 CPC, challenging the jurisdiction of court [respondent No.2] for return of the plaint on the ground that instead of approaching the Banking Court respondent No.1/plaintiff has filed the suit before the Court of respondent No.2, which had no jurisdiction. On 02.12.2008, learned respondent No.2 [District Judge, Karachi (Central)] after hearing the parties passed the order dismissing the aforesaid application under Order VII Rule 10 read with Section 151, CPC. Relevant portion of the order, for the sake of ready reference, is reproduced as under:

> " I have considered the submissions made by the learned counsel.
>
> Plaintiff is an institution created under Micro Finance Institution Ordinance 2001 and under Section 3(2) it is provided that:
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> "Save as otherwise provided in this Ordinance, the Banking Companies Ordinance and any law for the time being in force relating to banking companies or financial institutions shall not apply to microfinance institutions licensed under this Ordinance and microfinance institutions shall not be deemed to be a banking company for the purposes of the said ordinance, the State Bank of Pakistan Act, 1956 (XXXIII of 1956) or any other law for the time being in force relating to banking companies."
>
> Since Plaintiff is micro finance institution created under the Ordinance as per Section 3(2), the provisions of banking companies Ord. does not apply to the micro finance institutions as such suit is

> filed in proper form and this court has got jurisdiction to entertain the suit of the Plaintiff. Consequently application under Order 7 Rule 10 read with Section 151 of C.P.C. is dismissed."
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> **[Underlining is to add emphasis]**

On 02.12.2008, the learned District Judge, Karachi (Central), passed yet another order whereby the appellant was directed to be proceeded ex-parte. Relevant portion of the said order, for the sake of ready reference, is reproduced as under:-

> "Under Order 37 Rule 3 C.P.C. in the suit Defendant has to seek permission for leave to defend the suit within 10 days of service of the summons but in the present suit defendant No.1 has failed to seek permission for leave to defend the suit and period of about 45 days has been passed but Defendant No.1 has failed to seek permission for leave to defend the suit. Plaintiff has withdrawn the suit against Defendants No.2 & 3.
>
> Since Defendant No.1 has failed to seek leave to defend the suit within stipulated period as provided under Order 37 Rule 3 CPC and service is effected upon Respondents No.1, hence suit to proceed exparte. Plaintiff is directed to produce his evidence in the case."
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> **[Underlining is to add emphasis]**

Thereafter the respondent No.1/plaintiff filed affidavit-in- Ex Parte Proof, which was gone un-rebutted. Consequently, on 22.01.2009, the learned District Judge, Karachi (Central), passed the judgment whereby the suit of respondent No.1/plaintiff was decreed against the appellant as prayed. The appellant preferred present appeal against the said judgment and decree.

3. Upon notice of the present case, respondent No.1/plaintiff filed counter affidavit to the memo of appeal while denying the allegations levelled in the appeal, supported the judgment and decree impugned in the present proceeding.

4. I have the heard learned counsel for the parties as well as learned standing counsel and with their assistance also perused the record and have gone through the relevant law / case law on the point.

5. Learned counsel for the appellant, during the course of arguments, while re-iterating the contents of appeal, has contended that the judgment impugned in this appeal is absolutely without jurisdiction as the suit was not maintainable before the District Judge and the same was to be filed before Banking Court under provisions of Financial

Institution (Recovery of Finances) Ordinance, 2001, and as such respondent No.1 had wrongly approached the court of learned District Judge Karachi (Central). Further contended that learned respondent No.2 [District Judge, Karachi (Central)] has failed to consider the fact that the word 'Bank' has been very widely defined and since the respondent No.1 is Micro Finance Bank, therefore, it is only the Banking Court, which has got jurisdiction to entertain the matter and the remedy of the recovery, if any, in respect thereto and not under the Summary Chapter of Order XXXVII of the CPC. Further contended that respondent No.1 is a financial institution within the meaning of Section 2 of Financial Institution (Recovery of Finance) Ordinance, 2001, which is special law promulgated to provide exclusively to the Banking Companies operating in Pakistan, a speedy procedure for recovery of loan and finances extended by them to their borrowers and customers. Further contended that all suits arising out of cause of action based on commission of default in fulfillment of any obligation with regard to loan or finances would fall within the jurisdiction of a Banking Court. It is also contended that no procedure has been provided in the Micro Finance Institutions Ordinance 2001 for the recovery of loan and finance extended by them. Furthermore, Section 3(2) of Micro Finance Institutions Ordinance, 2001, could not bar the jurisdiction of the banking court as envisaged in Financial Institution (Recovery of Finance) Ordinance 2001, which has provided procedure for recovery of loan/finance. Further contended that since this being special enactment, and therefore, would have an overriding effect over Micro Finance Institutions Ordinance, 2001. Thus, the cognizance, taken by respondent No.2, despite the valid objections on the point of jurisdiction, resulted into serious miscarriage of justice. It is further contended that since the initial order of learned District Judge, Karachi (Central) for not returning the plaint was defective and unjust, therefore, the subsequent orders are also defective and hence the same are liable to set aside.

6. Conversely, learned counsel for respondent No.1, while supporting the judgment impugned in the present proceedings has contended that the judgment passed by the learned District Judge

Central, Karachi is a speaking order, well within its jurisdiction as the suit is maintainable being a summary suit as respondent No.1 is licensee of State Bank as such does not fall within the ambit of provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001, therefore, the question of jurisdiction and maintainability does not arise for recovery of loan and the said recovery was to be made through the Courts of General Jurisdiction as per Section 3 of Micro Finance Institutions Order LV, 2001. Further contended that since the appellant failed to file application for leave to defend before the trial court, therefore, the appellant had lost the locus standi to challenge the very maintainability of suit. Further contended that the appellant has failed to understand the word 'Bank' as per Section 5 of Microfinance Institution Ordinance, 2001, the word is Microfinance Bank and as such the loan/finance given by respondent No.1 (created under the said ordinance), was to be recovered from its defaulted customer under the Summary Chapter suit under Order 37, CPC, hence the order passed by the learned District Judge Central, Karachi, is well within the four corners of law and is liable to be maintained by dismissing the present appeal with special cost. Further contended that since the appellant has failed to file leave to defend application within the time and instead filed application under order VII Rule 10 of CPC, thus the suit was rightly proceeded as ex-parte and learned trial court has passed a well reason order. Furthermore, the present appeal is supported by the affidavit of advocate appearing for the appellant instead of appellant himself and as such the same renders the present appeal as not maintainable as the lawyers are not supposed to file affidavit in relation to facts of the case in which they are engaged. It is also stated that the present appeal is not maintainable as its contents have not been verified on oath, therefore, the same is liable to be dismissed with special cost.

7. From the perusal of record, it appears that respondent No.1/plaintiff filed a summary suit bearing No. 34 of 2008 against the appellant and others for recovery of amount under Order XXXVII, CPC. Under the law, it was incumbent upon the appellant/defendant that soon after receiving the notice of the case within a period of 10 days he had to file application for leave to appear and defend the case.

Whereas in the present case the appellant/defendant, instead of filing the leave to defend application, filed application under Order VII Rule 10 CPC challenging the jurisdiction of Court-[respondent No.2] and sought return of the plaint on the ground that respondent No.2 does not have jurisdiction to entertain the said suit, which ought to have been filed before the Banking Court. It is now a well settled that in a summary suit under Order XXXVII of CPC, in which summons have been issued in Form No.4 Appendix B, the defendant is not entitled to appear or defend the suit as a matter of course unless he obtains leave from the Court so to appear and defend. In default of his obtaining such leave for his appearance and defence in pursuance thereof the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree. Till such time as leave to defend is granted the defendants cannot even file interlocutory application in order to agitate the point of jurisdiction or to question the transactions between the parties or to challenge validity, and legal effect of the promissory note and crossed cheque issued by them in favour of the plaintiffs. In this regard, reliance can be placed on the case of *MESSRS UNITED DISTRIBUTORS PAKISTAN LIMITED v. AHMAD ZARIE SERVICES AND ANOTHER* **(1997 MLD 1835)** wherein this Court has held as under**:**

> **"**5. At the outset it may be observed that in a suit based upon negotiable instrument in which summons have been issued in Form No.4 Appendix B, the defendant is not entitled to appear or defend the suit as a matter of course unless he obtains leave from the Court so to appear and defend. In default of his obtaining such leave for his appearance and defence in pursuance thereof the allegations in the plaint shall be deemed to be admitted and the plaintiffs shall be entitled to a decree. The advantage in adopting the procedure prescribed by Order XXXVII, C.P.C. is that the defendant is not, as a matter of right, entitled to appear or to defend, but if he deserves to be heard he must apply to the Court for permission to appear and defend within 10 days of service of summons as envisaged by Article 159 of the Limitation Act. Till such time as leave to defend is granted the defendants cannot even file interlocutory application in order to agitate the point of jurisdiction or to question the transactions between the parties or to challenge validity, and legal effect of the promissory note and crossed cheque issued by them in favour of the plaintiffs. In my view these issues can be decided at the trial after recording evidence after leave to defend is granted to the defendants on disclosing a sufficient cause."

8. In the present case since the appellant failed to file leave to appear and defend the case in the suit, therefore, the learned trial court

[respondent No.2] had rightly dismissed the application under Order VII rule 10 CPC filed by the appellant/defendant for return of plaint and subsequently after recording evidence of Respondent No.1/ plaintiff decreed the suit.

9. Besides above, a bare perusal of Section 3(2) of Microfinance Institution Ordinance 2001, as reproduced in para No.2 above, clearly reflects that the Banking Companies Ordinance and any law for the time being in force relating to banking companies or financial institutions shall not apply to microfinance institutions licensed under the Ordinance and microfinance institutions shall not be deemed to be a banking company for the purposes of the said ordinance, the State Bank of Pakistan Act, 1956 (XXXIII of 1956) or any other law for the time being in force relating to banking companies.

10. From the above legal position, it appears that the summary suit filed by respondent No.1/plaintiff against the appellant/defendant before respondent No.2 [District Judge, Karachi (Central)] was competent and was rightly decided by the said court.

11. The upshot of the above is that the judgment impugned herein is well reasoned and based on the evidence as well as in accordance with law. Thus, in my view, the same does not call for any interference by this Court. Hence, the instant First Appeal being devoid of any force is dismissed.

JUDGE

Karachi
Dated: 03.03.2017