

ORDER SHEET
IN THE HIGH COURT OF SINDH KARACHI

I.A. No. 68 of 2015

DATE	ORDER WITH SIGNATURE OF JUDGES
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Before:-
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Agha Faisal

Mohammad Altaf Madraswala
and another Appellants

Versus

Standard Chartered Bank Ltd..... Respondent

Hearing/Priority Case.
1. For hearing of Main Case.
2. For hearing of CMA No. 2794 of 2015.

Date of hearing: 29.01.2019

Mr. Zeeshan Abdullah, Advocate for the Appellants.
Mr. Ghulam Rasool, Advocate for the Respondent.

Muhammad Ali Mazhar, J: This first appeal is arising from the judgment and decree passed in Suit No. 163 of 2013 by the Banking Court No. V, Karachi. The brief facts of the case are that the respondent filed a banking suit under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 for recovery of Rs.5,619,759.62 on the ground that the defendants/appellants applied for finance facility, under mortgage loan and Islamic home finance, to the plaintiff who is respondent and upon such application the respondent had advanced a finance facility of the aforesaid amount on 31.08.2006 against the property of defendant No. 2/appellant No. 2. The said facility was granted for a period of 19 years, however, the defendants/appellants committed default. It is further alleged that time and again the plaintiff/respondent made various requests to the appellants/defendants for the payment of outstanding amount but nothing was paid hence the

recovery suit was filed. The defendants/appellants filed leave to defend application under Section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. The appellants raised the ground in the leave to defend application that no cause of action remained against them as subsequent to the suit the plaintiff have accepted Rs.38,02,139.28 in respect of the loan granting Diminishing Musharika Agreement till July 2011. It was further alleged that the plaintiff failed to comply with the mandatory provisions as stipulated in Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Learned counsel for the appellants elaborated this ground on the plea that no statement of account was certified in accordance with the Banker's Books Evidence Act, 1891. It was also alleged in the leave to defend application that the claim of liquidated damages at 20% per annum is uncalled for and unwarranted as it is tantamount to economic coercion, not permissible under the doctrine of equity as well as it is opposed to the Islamic tenets.

2. Besides that in the leave to defend application other legal and factual issues were also raised and finally the appellants prayed to the court to grant leave to defend unconditionally and allow the defendants to adduce evidence. The replication was filed by the respondent in which they denied all the allegations and the grounds raised by the appellants in their leave to defend application.

3. Learned counsel for the appellants argued that in the Judgment neither the leave to defend application was allowed nor dismissed. Without appreciating any ground raised by the appellants in the leave to defend application, the Judgment has been passed and the suit was converted into execution proceedings after expiry of appeal period.

4. Learned counsel for the respondent at the one moment defended the impugned Judgment, but at the same time he submits that the Banking Court failed to mention whether the leave to defend application has been rejected or not.

5. Heard the arguments. Vide judgment dated 02.07.2015 the Judge Banking Court No.V, Karachi allowed the suit and in paragraph No. 6 of the Judgment contentions raised by the defendants in their leave to defend application are reflected, whereas in paragraphs Nos. 7 and 8, the Judge Banking Court No.V, Karachi observed as under: -

“7. I have perused the record and considered the arguments. Finance facility is an admitted fact. Quantum of payment as shown in the statement of accounts is not disputed. There are only two issues for which the defendant is disputing; firstly, the quantum of charged markup is quite high and most of the instalment amount has been adjusted towards it. Secondly the plaintiff has calculated and demanded huge amount on account of past markup and liquidated charges. The plaintiff is not entitled for liquidation charges and the future markup. Out of total finance facility Rs.3,94,000/- has been recovered on account of principal and therefore total outstanding on account of principal comes to Rs.48,58,000.00 (52,50,000.00 – 3,94,000.00). The plaintiff is also entitled for cost of suit and cost of fund from the date of default viz. August 2011.

8. According to section 19 of the Ordinance this suit will be converted into execution proceedings after expiry of appeal period. The decree holder is directed to file particulars of the mortgaged, pledged or hypothecated property and other assets of the judgment debtor if any for consideration of the court within 30 days. The execution of the decree will be heard on the expiry of 30 days from the date of pronouncement of this judgment and decree”.

6. Under Section 10 of Financial Institutions (Recovery of Finances) Ordinance, 2001, it is clearly provided under sub-section 9 that in granting leave under sub-section (8), the Banking Court may impose such conditions as it may deem appropriate in the circumstances of the case, including conditions as to deposit of cash or furnishing of security. Whereas under sub-section 10 it is provided that where the application for leave to defend is accepted, the Banking Court shall treat the application as a written statement,

and in its order granting leave shall frame issues relating to the substantial questions of law or fact, and, subject to fulfillment of any conditions attached to grant of leave, fix a date for recording of evidence thereon and disposal of the suit. Whereas under subsection 11 it is further provided that where the application for leave to defend is rejected or where a defendant fails to fulfill the conditions attached to the grant of leave to defend, the Banking Court shall forthwith proceed to pass judgment and decree in favour of the plaintiff against the defendant. It is clear from the Judgment passed by the Banking Court that here is no specific order has been passed for rejecting the leave to defend application nor the grounds raised in the leave to defend application have been addressed by the Banking Court. The purpose for granting an opportunity to leave to defend meant under the law is to provide a fair opportunity, which is also one of the basic fundamental rights envisaged under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. We have also examined the leave to defend application in which various grounds were raised by the appellants which were to be addressed by the Banking Court, but without addressing leave to defend application, the Judgment has been passed directly. It is also apparent from the Judgment that the Banking Court omitted to pass an order for decreeing the suit however, a decree was prepared subsequently. The determination of a leave to defend application is an onerous responsibility statutorily placed upon a Court and the discharge of such obligation may only be taken after having given due consideration to the issues raised. This matter was considered at length by an earlier Division Bench of this Court in the case of *Messrs. Shaz Packages and 03 others versus Bank Al-Falah Limited* (2011 CLD 790), and the Judgment therein, authored by one of us [Muhammad Ali Mazhar-J] observes as follows:-

“18. The Financial Institutions (Recovery of Finances) Ordinance, 2001 is a special law, which regulates the relationship between the financial institutions and the customers and also imposes certain

mandatory requirements and obligations upon the financial institution then on the customer before and after the institution of suit in the Banking Court. The intention of imposing strict conditions under sections 9 and 10 of the Ordinance by the legislature is to expedite the banking cases, therefore, a detailed and explicit procedure has already been provided for filing the suit and or leave to defend. Under section 4, it has been stated that the Ordinance shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Under section 7, a Banking Court in exercise of its civil jurisdiction shall have all the powers vested in a civil court under the Code of Civil Procedure Code and in exercise of criminal jurisdiction shall have the same powers as are vested in a court of session under Cr.P.C. The Banking Court in all matters with respect to which the procedure has not been provided for in the Ordinance, follow the procedure laid down in the C.P.C. and Cr.P.C. in accordance with exercise of its civil and criminal jurisdiction.

19. The minute screening of the various sections of the Ordinance lead us to a right and proper conclusion that while deciding a leave to defend application, heavy responsibility rests upon the Banking Court to appreciate not only the contents of the plaint but also leave to defend application and replication, if any filed and in order to pass a speaking order with sound reasoning, it is necessary to look into the facts of the case and also consider the documents attached with the plaint, leave to defend application and the replication. After going through the entire pleadings of the parties, it is obligatory upon the Banking Court to decide the question of law raised in the leave to defend application and not to dismiss or reject the leave to defend application in perfunctory and cursory manner. It is time and again seen in numerous cases that the banking court decides the leave to defend application in a slipshod manner without adverting to the questions of law and facts raised in the leave to defend and thereafter, judgment is delivered with simple reproduction of the contents of plaint which is against the spirit of law. If the banking court deems fit that no case of leave is made out, then it must be a sense of duty to give rational findings for its agreement or disagreement on the questions of law and facts raised in the application for leave to defend. Simple finding that leave to defend application does not reflect any substantial questions of law and facts without adverting to the questions and give specific findings amounts to nullifying and or negating the very spirit of Ordinance. In the banking suit, this is a sole opportunity for the defendant to apply for the leave to defend and its entire future rests upon its decision, therefore, in all fairness the defendant has legitimate right to be heard and all questions of law and facts raised in the leave to defend application should be answered by the Banking Court for the reason that on rejection of leave to defend, the defendant goes out of arena without any further opportunity to defend”.

7. Both learned counsel agreed to argue the case for disposal at Katcha Peshi stage. After hearing the parties and going through the impugned Judgment, we have arrived at the conclusion that the

Banking Court passed the order in slipshod manner without discussing the grounds raised in the leave to defend application, therefore, the Judgment and the decree both are set-aside and the matter is remanded to the Banking Court to decide the leave to defend application afresh in accordance with the law within a period of 45 days.

JUDGE

JUDGE

*SHUIBAN/PA**