IN THE HIGH COURT OF SINDH AT KARACHI

First Appeal 60 of 2015

Present: **Muhammad Ali Mazhar** and **Agha Faisal**, **JJ.**

P.M. Packages & Others
vs.
Silk Bank Limited

For the Appellants : Mr. Khaleeq Ahmed, Advocate.

For the Respondent : Mr. Taimoor Mirza, Advocate.

Date of Hearing : 30.01.2019

Date of Announcement: 12.02.2019

JUDGMENT

Agha Faisal, **J**.: The present appeal was filed assailing the Judgment dated 07.05.2015 delivered by the learned Banking Court No. III, Karachi ("**Impugned Judgment**") and decree prepared in pursuance thereof. The basic premise of the appellants was that the questions of law, raised in the leave to defend application, were prima facie not addressed in the order dated 03.05.2015 ("**Leave Dismissal Order**") by which the said application was dismissed, hence, the Impugned Judgment, delivered in continuation of the Leave Dismissal Order and in perpetuation of the infirmities contained therein, was otherwise than in compliance with prescriptions of the Financial Institutions (Recovery of Finances) Ordinance, 2001 ("**Ordinance**").

2. The case of the appellants was advocated by Mr. Khaleeq Ahmed and it was submitted that a condition precedent to the grant of the facility to the appellants was the obtainment of insurance, wherein

the beneficiary / loss payee / insured was required to be the respondent bank. It was further submitted that due to riots occasioned on the eve of 27.12.2007 all across the country, the premises of the appellants and all items kept thereat were set on fire by arsonists, however, the loss so occasioned was duly covered by insurance policies, premium in respect whereof was demonstrably paid by the appellants. Per learned counsel, the insurance policies were required to be called upon by the respondent bank to mitigate and / or settle the loss occasioned, however, instead of availing the said recourse, the respondent opted to file a recovery suit against the appellants. Learned counsel also sought to demonstrate that the plaint filed by the respondent bank was otherwise within in conformity with the prescriptions of Section 9 of the Ordinance and, therefore, in relying upon the ratio of case of *Apollo Textile Mills Limited and Others vs. Soneri Bank Limited* reported as *2012 CLD 337* ("***Apollo Textiles***"), the suit ought not to have been entertained in the first instance. Learned counsel relied upon an order of the Honorable Supreme Court dated 04.02.2014 passed in the case of *Jan Sher Khan Petroleum Service versus Allied bank Limited* ("***Jan Sher Khan***") and submitted that the observations made therein were squarely applicable to the facts and circumstances of the present case. It was argued in conclusion that the unmerited dismissal of the leave to defend application, vide the Leave Dismissal Order, irrevocably prejudiced the case of the appellants and without due credence or consideration having been given to the questions of law / facts raised by the appellants, the Impugned Judgment could not be sustained.

3. Mr. Taimoor Mirza, Advocate appeared on behalf of the respondent bank and controverted the arguments advanced on behalf of the appellants. It was submitted at the very outset that the reference to the insurance policy made by the learned counsel for the appellants was in respect of an earlier policy and that the said policy was not in effect at the time upon which the loss, admittedly caused during the riots, was so occasioned. It was further argued that the provisions of insurance do not override the remaining constituents of a finance agreement and / or security documentation, and that it was specifically stated in the said documentation that the obligation of the customer to repay its financial obligation shall subsist notwithstanding the presence of any insurance provisions. Learned counsel relied upon the case of *United bank Limited versus Adamjee Insurance Company Limited* reported as *1988 CLC 1660* ("***UBL***") and *Muhammad Naeem Bhatti versus United bank Limited* reported as *2005 CLD 643* ("***Naeem Bhatti***") in order to bulwark his argument that the obligation to repay the financial obligation is notwithstanding the presence of any insurance arrangements. It was also argued that reliance upon *Jan Sher Khan* was unmerited as it was merely a leave granting order, hence, the same could not be treated as binding precedent upon a Division Bench of this Court.

4. We have heard the arguments of the respective learned counsel and have also appreciated the documentation and case law arrayed before us. For the purposes of this appeal, we considered it appropriate to confine ourselves to the issue of whether the dismissal of the leave to defend application by the learned Banking Court, in the

manner manifest vide the Leave Dismissal Order, was in consonance with the law or otherwise.

5. The text of the leave to defend application, filed by the applicants before the learned Banking Court, has been subjected to our consideration and it clearly *inter alia* raises the issue of the insurance arrangement, favoring the respondent, and also the issue of non-compliance of Section 9 of the Ordinance.

6. In so far as the issue of insurance is concerned, we have noted from the initial sanction advice dated 27.10.2006 that all assets charged, hypothecated and mortgaged to the bank were required to be fully insured against all applicable risks; naming the bank as mortgagee; with original insurance policy from approved companies along with premium payment receipt to be held in bank's possession. It is noted that the grant / disbursement of the facility was predicated *inter alia* upon satisfaction of such a condition. We have also noted from the agreement of finance dated 04.11.2006 that the requirement of insurance stipulated in the sanction advice was also mirrored in the said agreement and it was categorically stated that such insurance was to be obtained in the name of the bank. The relevant insurance policy was demonstratively obtained and the premium bill thereof was also available on file. This premium bill designated the predecessor-in-interest of the respondent as the insured, in compliance of the conditions precedent to the finance relationship; and it was also demonstrated that the said policy that it was effective from 23.02.2007 till 23.02.2008. It is also clear from the aforesaid document that sum insured was in excess of Rs.100 Million and it was

also not controverted that the premium due in respect thereof was paid by the appellants at the applicable time. The contentions of the learned counsel for the respondent that the policy under consideration was an older policy and not applicable to when the incident of burning down of the appellants' premises took place is bellied from the record as the incident of arson / rioting took place on 27.12.2007, whereas the said policy was stated to subsist until 23.07.2008.

7. In so far as the question as to whether the existence of such a policy had any material effect upon the relationship between the parties, in view of the stipulation contained in the finance agreement that the obligation to repay shall be notwithstanding any insurance arrangements, it is observed that such a question was required to be addressed by the learned Banking Court seized of the matter prior to rendering a final determination upon the case. In any event since the said question was raised in the leave to defend application, it was required to be addressed in the Leave Dismissal Order. We are also cognizant of the law in relation to a leave granting orders of the honorable Supreme Court, however, it is observed that *Jan Sher Khan* was demonstrative of the fact that the honorable Supreme Court had granted leave to consider an issue identical to that which were pending before the learned Banking Court. At this juncture, it may be illustrative to reproduce the observations in *Jan Sher Khan*:

> *"Admittedly, the petitioner availed a running finance facility from the respondent-bank by executing a buyback agreement (IB-6); and as a security for the repayment of the finance, hypothecated certain goods; executed personal guarantee(s) of the proprietor; mortgaged some property(ies). Besides the above, as a further security, perhaps on the requirement of the respondent-bank, the petitioner also insured the hypothecated goods and according to the learned counsel for the petitioner the beneficiary of this policy in case of loss*

was the bank. As the petitioner could not discharge its finance obligation, therefore, the respondent instituted a suit for the recovery in terms of provisions of the Finance Institutions (Recovery of Finances) Ordinance, 2001, in which the petitioner moved an application seeking leave of the court, but the same was declined and the suit was decreed by the Banking Court. Aggrieved of the above, the petitioner preferred an appeal before the learned Division Bench of the High Court, which has been dismissed vide impugned judgment. It may be pertinent to mention here that according to the learned counsel for the petitioner, the petitioner had lodged a claim before the Insurance Tribunal on the basis of the insurance policy prior to even the institution of the suit by the respondent. Be that as it may, petitioner sought the leave primarily, on the ground that the respondent-bank as a beneficiary of the policy should satisfy its claim from the insurance claim as beneficiary of the policy and cannot enforce against any other security. This stance of the petitioner has been declined by the forums below. Leave is granted to consider if on account of the insurance of the hypothecated goods on the insistence of the bank and the loss thereof, the bank is obliged to first satisfy its outstanding due from the insurance claim and till then other securities cannot be resorted to".

8. The other major argument of the appellants was the nonconformity of the plaint, filed by the respondent before the learned Banking Court, with the prescription of Section 9 of the Ordinance. It is observed from paragraph 8 of the plaint that the amount of finance availed is shown to be Rs.35 Million, whereas, the amount repaid by the appellants has been shown as Rs.0.001 Million. The statement of account available on record, contents whereof were not denied by the learned counsel for the respondent, records numerous repayments having been made by the respondent. While no determination of any sort in such regard is being preferred herein, it is reasonably expected that the learned Banking Court should have at least addressed the issue and reconciled the same one way or another while determining the leave to defend application filed by the appellants.

9. We have considered the Leave Dismissal Order and observe that it reproduces the contentions of the appellants with regard to the issue of insurance and also records the appellants' challenge to the

irreconcilability of the statement of the account filed with the constituents of the plaint. The said order also refers to the judgments relied upon by the appellants including *Jan Sher Khan*, however, without dealing with any of the objections raised, the learned Banking Court proceeded to dismiss the same. The relevant constituent of the Leave Dismissal Order is reproduced herein below:

> *"11. I have considered arguments advanced by learned counsel for parties, perused record and gone through the contents of application for leave to defend the suit and Replication filed by the plaintiff against said application. I have also gone through the case laws referred by both parties. The facts of case laws relied upon by learned counsel for defendants are distinct and distinguishable than the facts of this case.*
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> *12. Learned counsel for defendants while advancing arguments and in their application for leave to defend suit filed under Section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 have not denied the availing of finance facility and execution of various security documents creating charge. No serious and bonafide issue has been raised, which require recording of evidence of the parties. However, outstanding amount, if any, can be determined at the time of explanation of breakup. In this regard, both the parties can file their respective breakup / statement of account before the Court to determine the actual payable amount.*
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> *13. In absence of substantial questions of law raised by defendants, it would be futile exercise and unjustified to allow application as prayed. I, therefore, dismiss application for leave to defend suit. Parties are directed to file their detailed breakup and deposit slips, if any".*

10. The law with respect to appreciation of a leave to defend application is very clear and has been opined upon by the superior Courts time and time again. A comprehensive pronouncement in such regard is the case of *Shaz Packages & Others vs. Bank Alfalah Limited* reported as *2011 CLD 790* ("***Shaz Packages***"), authored by one of us [Muhammad Ali Mazhar, J], wherein it was observed 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".

11. The manner in which the leave to defend application was decided by the learned Banking Court does not fall within the parameters delineated for such determination by the Superior Courts.

The learned Banking Court has disregarded *Jan Sher Khan* by merely stating that the facts of the case, relied upon by the learned counsel, are distinct and distinguishable from the facts of this case. This statement itself appears to be incorrect at least in so far the issue of insurance is concerned as the grounds upon which leave was sought before the learned Banking Court and the honorable Supreme Court were similar and the learned Banking Court ought to have considered that if such circumstances were sufficient for the honorable Supreme Court to grant leave then the learned Banking Court may in the least have issued a determination there upon. The honorable Supreme Court had declared the provisions of Section 9 of the Ordinance to be mandatory in the case of *Apollo Textiles* and it was incumbent upon the learned Banking Court to at least consider the objections of the appellants in such regard and then issue a determination in such regard as well.

12. *UBL* and *Naeem Bhatti* had been cited by the learned counsel for the respondent to bolster the argument that the stipulations of insurance contained in finance and security documentation could not preclude the obligation to repay the finance facility. In *Naeem Bhatti*, where *UBL* was also considered, it was observed that because of an act of God, in the subsistence of an insurance policy, a customer is not exonerated from his liability to repay the loan particularly when there is doubt about the incident and benefit of the claim causing loss. In the present circumstances, there is no cavil to the fact that on 27.12.2007 there was widespread rioting and arson all across the country and at no point was it doubted by the respondent that the

facilities premises and / or assets of the appellants were not damaged in the said riots. Regardless of the competing contentions of the parties, one thing is apparent that the issue ought to have been discussed and addressed by the learned Banking Court prior to deciding the fate of the leave to defend application. It is prima facie manifest from the Leave Dismissal Order that the questions raised in the leave to defend application have not been addressed.

13. The Leave Dismissal Order appears to have been rendered in haste and such conduct has been deprecated in the pronouncement of *Kinza Fashion (Private) Limited and Others VS. Habib Bank Limited & Another* reported as *2009 CLD 1440*. The said order is also prima facie incongruent with the mandates of *Shaz Packages*, wherein the onerous responsibility placed upon a learned Banking Court to consider the defendants' pleas comprehensively was recognized and it was determined that a learned Banking Court ought not to reject the contentions in a perfunctory and / or cursory manner.

14. In view of the reasoning and rationale stated hereinabove we are of the considered view that the Leave Dismissal Order and consequently the Impugned Judgment cannot be sustained in law. We, therefore, allow this appeal and set aside the Leave Dismissal Order and the Impugned Judgment and remand the matter back to the learned Banking Court for *de novo* determination of the leave to defend application in due conformity with the applicable provisions of the law, preferably within a period of thirty days. This appeal is allowed in terms herein contained.

15. It is pertinent to record that the observations made hereinabove shall cause no prejudice to the fresh adjudication of the proceedings before the learned Banking Court.

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SHABAN ALI/PA*