IN THE HIGH COURT OF SINDH AT KARACHI

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

First Appeal 221 of 2017	:	Khurram Shehzad vs. United Bank Limited
For the Appellant	:	Mr. Khaleeq Ahmed, Advocate
For the Respondent	:	Mr. Khadim Ali, Advocate
Date of Hearing	:	23.04.2019
Date of Announcement	:	31.05.2019

JUDGMENT

Agha Faisal, **J**: The present appeal assails the leave dismissal order dated 17.10.2017 ("**Impugned Order**"), judgment dated 17.10.2017 ("**Impugned Judgment**") and decree dated 17.10.2017 rendered by the learned Banking Court V at Karachi in Suit 618 of 2011("**Suit**"). The Impugned Order had dismissed an application for leave to defend filed by the appellant and pursuant thereto the Impugned Judgment and Decree had been rendered in favour of the respondent bank and against the present appellant. The crux of the present judgment is the determination whether the learned Banking Court's reliance upon a report of a handwriting expert was justified to predicate the dismissal of the leave to defend application, without the appellant having been given an opportunity to cross examine the said handwriting expert.

2. Mr. Khaleeq Ahmed, Advocate presented the case for the appellant and submitted that there was no nexus between the appellant and the respondent bank and that the appellant had never obtained any finance facility from the respondent bank. Learned counsel submitted that the signatures appearing upon the purported finance and security documentation were forged and fictitious, thus, the learned Banking Court decreed the Suit there against without appreciating the facts and after having precluded the appellant from presenting his case in evidence. Learned counsel submitted that the dismissal of the leave to defend application was entirely predicated on the rationale that a handwriting expert had opined that the signatures appearing on the relevant documentation were those of the appellant. Learned counsel

argued that while the Court was duly empowered to undertake the exercise of comparing signatures on its own, reliance upon the opinion of handwriting expert could not be resorted to unless the said expert was subjected to cross examination. In this regard it was contended that the dismissal of the leave to defend application was unmerited and consequently the rendering of the Impugned Judgment and Decree was also discrepant as the appellant had been unjustifiably deprived of the right to prove his case.

3. Mr. Khadim Ali, Advocate appeared for the respondent bank and supported the Impugned Order, Impugned Judgment and decree. Learned counsel adverted to the copies of the finance and security documentation available on file and submitted that the same were executed by the appellant and the signatures appearing could be compared to the signatures of the appellant appended to documents in the present proceedings. Learned counsel painstakingly took the Court through the relevant documents available on file to demonstrate that each signature was that of the appellant. It was argued that the arguments of the present appellant were a ruse to subvert the due process of law and to circumvent the obligation of the appellant to pay his outstanding liability.

4. We have considered the arguments of the respective learned counsel advanced before us and have also appraised the record to which our surveillance was solicited. The primary point of determination of this Court, in consonance with the prescription of Order XLI rule 31 CPC, is whether the learned Banking Court was justified in dismissing the leave to defend application while relying upon the opinion of a handwriting expert, while having denied the appellant the right to cross examine the said person upon whose opinion the Impugned Order was predicated.

5. The law with regard to the duty of a Court while determining a leave to defend application has been the subject of scrutiny by our Superior Courts and an illumining pronouncement in such regard is the judgment in *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:

"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."

6. It is for this Court to determine whether the learned Banking Court was justified in rendering the Impugned Order without the opinion of the handwriting expert having been proven in evidence. Article 84 of the Qanun-e-Shahadat Order 1984 duly enables a Court to compare signatures with others admitted or proved, however, admittedly the said process was not employed by the learned Banking Court in the circumstances under scrutiny. The learned Banking Court relied upon the opinion of an expert, without the said opinion having been proven in evidence. The honorable Supreme Court has maintained in *Muhammad Ishaque Qureshi vs. Sajid Ali Khan & Another* reported as *2016 SCMR 192* that the issue of signatures cannot be determined merely upon the opinion of an expert and that too without framing of issues and leading of evidence. It is thus our deliberated view that rendering of the Impugned Order on the basis of an opinion, while denying the right to cross examine the maker of the opinion, is not sustainable in law.

The Impugned Order appears to have been rendered in haste and such conduct has been deprecated in the *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.

7. In view of the reasoning and rationale stated hereinabove we are of the considered view that the Impugned Order, and consequently the Impugned Judgment and decree, cannot be sustained in law. We, therefore, allow this appeal and set aside the Impugned Order, the Impugned Judgment & decree 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.

8. 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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