IN THE HIGH COURT OF SINDH, KARACHI

SUIT NO.B-114 / 2013

BEFORE
MR. JUSTICE ARSHAD HUSSAIN KHAN

FOR HEARING OF CMA 16209/2017
[u/s 151 CPC]

Date of Hg:16.05.2019

Mr. Sarfaraz Ali Metlo, Advocate for the Plaintiff.
Mr.Naveed ul Haq, Advocate for the Defendants.

ARSHAD HUSSAIN KHAN, J. This is an application [C.M.A. 16209/2017] under Section 151 CPC, filed by the Plaintiff praying therein that instant suit may be treated and proceeded as ordinary civil suit on the original side of this Court.

2. Upon notice, legal objections to the aforesaid application have been filed on behalf of the Defendants stating therein that the application is not maintainable being frivolous and misconceived in nature as, for return of plaint, there is already a provision in the Civil Procedure Code under Order 7 Rule 10 CPC. It has also been stated that the meritless application has been filed with an ulterior motive to pressurize the answering Defendants and as such the same is liable to be dismissed. It has been further stated that by order dated 24.01.2017, passed in the instant matter, an unconditional leave to defend the suit has been granted to the Defendants and once the leave to defend the suit is granted, the Plaintiff cannot request to treat the instant suit as ordinary civil suit on the original side. It has also been stated that the motive of the plaintiff to file the instant application under section 151 CPC is to deprive the Defendants from putting up a proper defence against the supposed claim made by the Plaintiff in the instant suit. It has been further stated that in case the application is allowed, the suit is treated as an ordinary civil suit, and if the leave to Defend Application are treated as Written Statements, then the Defendants would not be able to put up right defence in the light of the pleas taken therein. Whereas, if the Plaint is returned under Order 7 Rule 10 CPC, then the

Defendants can have a proper defence, otherwise, unfair prejudice and inconvenience will be caused to the Defendants as their current defence in the suit is focused on the maintainability of the suit, which was accepted by the Banking Court. It has also been stated that this Court has both; banking and civil jurisdictions, and as such there is no need to treat the matter to have been filed on the original side. It has been further stated that the Defendants shall be seriously prejudiced and will suffer from irreparable loss and damages if instant application is allowed, therefore, the Application filed by the Plaintiff for treating instant suit as ordinary civil suit may be dismissed with heavy costs.

3. Briefly stated the facts of the matter are that instant suit has been filed by the Plaintiff for recovery of Rs.251,680,000/- against the Defendants under Banking jurisdiction of this Court. Plaintiff claims to be a banking company / financial institution within the meaning as prescribed in Financial Institution [Recovery of Finances] Ordinance, 2001. Whereas Defendant No.1 is a company limited by shares, organized and existed under the laws of Mauritius, being a group company of Defendant No.2 and the Defendant No.2 is a company duly established and existing under the laws of United Arab Emirates [UAE] having its registered office at UAE Sharjah. It is stated that presently the majority shareholding of the Plaintiff is held by Albaraka Islamic Bank BSC. Pursuant to a Merger Agreement dated 17th August, 2010, inter alia amongst Al-Baraka Bahrain, the Plaintiff and the Defendant No.2, the Pakistan operations of Al-Baraka Bahrain were merged with the EGIBL and the resultant merged entity is the Plaintiff. And EGIBL made an investment by way of advance payment for purchase of two floors in the Karachi Financial Towers to be constructed on Chundrigar Road, being a project of Ensha NLC Developers [Pvt] Ltd., a joint venture company of Defendant No.1 and National Logistic Cell amounting to Rs.251,000,000/-. The KFT Project was suspended and Defendant No.2 gave assurance to the Plaintiff and Al-Baraka Bahrain that the KFT Project will be revived shortly and in consideration, A Deed of Indemnity was issued in favour of the Plaintiff by Defendant No.1 for itself and on behalf of Defendant No.2 and its group of the companies as per the undertaking of Defendant No.1 as the indemnifier of record under the Merger Agreement. It is stated that Defendant No.1

has expressly agreed that the amounts payable under the Deed of Indemnity, which are admitted amounts of liability may be recovered by the Plaintiff as financing. The Defendants fall within the definition of "Customer" under the Provisions of the Financial Institutions [Recovery of Finances] Ordinance, 2001.

4. In support of the Application, learned counsel for the Plaintiff has argued that instant suit is still on the preliminary stage and even issues have not been framed and no prejudice or inconvenience will be caused to the defendants if the suit is treated as ordinary civil suit pending on the original civil jurisdiction which will also save any complications or multiplicity of litigation at later stage. Learned counsel has relied upon cases of *National Bank of Pakistan v. S.G. Fibre Ltd and others* **[2004 CLD 689],** *Procter & Gamble Pakistan (Pvt) Ltd Karachi v. Bank Al-Falah Limited Karachi and 2 others* **[2007 CLD 1532],** *Ramzan Ali v. Javed Industries* [**1999 CLC 1294] &** an un-reported judgment of the Supreme Court of Pakistan passed in **Civil Appeal No.1954 of 2002**.

5. On the other hand, learned counsel for the defendant in his arguments while reiterating his legal objections to the aforesaid application, has vehemently opposed the instant application being not maintainable as there is already a provision in the Civil Procedure Code under Order 7 Rule 10 CPC for Return of Plaint. He has further argued that the Application filed by the Plaintiff for treating instant suit as ordinary civil suit may be dismissed with heavy costs and while concluding his arguments he has urged that this Court has both the jurisdiction, then there is no need to treat the matter to have been filed on the original side. In support of his arguments he has relied upon: *Marhaba Textile Ltd v. Industrial Development Bank of Pakistan* **[2003 CLD 1822]**, *National Bank of Pakistan v. Khalid Mehmood* **[2002 CLD 658]**, *Bank Alflah Limited v. Iftikhar A. Malik* **[2003 CLD 363]**, *Amanullah Khan v. Government of NWFP* **[2001 CLC 453]**, *Tahir Tariq Textile Mills (Pvt) Ltd v. NDFC* **[2001 YLR 846]**, *Sherin and 4 others v. Fazal Muhammad and 4 others* **[1995 SCMR 584]** & *Gul Muhammad v. Muhammad Saddique and others* **[2001 MLD 1154]**.

6. I have heard both the learned counsel for the parties, and have gone through the record as well as the case law cited at the bar.

7. From the perusal of record, it appears that the plaintiff filed the present suit on the banking jurisdiction of this Court for recovery of an amount of Rs.251,680,000/- against the defendants with the following prayers:

> "(a) A decree for payment of sum of Rs.251,680,000/- with cost of funds at the rate fixed by the State Bank of Pakistan from the date of default till realization;
>
> (b) Cost of suit may also be awarded;
>
> (c) Any other relief that this Honourable Court may deem fit and proper in the circumstances of the case."

8. Upon notice of the present case the defendants filed applications for leave to defend wherein the defendants sought dismissal of the suit, inter alia, on the grounds that the suit is wrongly filed on the banking jurisdiction of this Court and instead the plaintiff is required to file the suit in the relevant jurisdiction of this Court or any other competent Court of law having jurisdiction to hear the suit. The leave to defendant applications were decided by this Court, vide its order dated 24. 01.2017, whereby unconditional leave to defend the suit were granted to the defendants. Relevant portion of the order for the sake of ready reference is reproduced as under:

> "From a bare reading of the plaint itself would clearly indicate that the plaintiff has paid the subject amount to the defendants as an investment in the project and thereafter alleged to have suffered loss. Neither any date of disbursement and /or default of any finance has been pleaded by the plaintiff nor any supporting document such as finance agreement, sanction advice etc., are placed on record which prima facie makes the amount paid to the defendants as an investment and not a finance in terms of Financial Institutions (Recovery of Finances) Ordinance, 2001. The claim of the plaintiff is based on the losses that it alleged to have suffered but that too without any reasoning and/or documents in support thereof. Such claim and /or assertion cannot be adjudicated upon summarily without recording of evidence which may ultimately define the defendants to be 'customer' in terms of section 2(c) of Financial Institutions (Recovery of Finances) Ordinance, 2001 or otherwise.
>
> In the case of Pakistan General Insurance Company Limited (Supra) learned Division Bench of this Court has held that the relationship between the parties must be that of a financial institution and customer and such relationship must emanate from any finance, as defined in clause (d) of section 2 of Financial Institution (Recovery of Finance) Ordinance, 2001. Such relationship at this prima facie

> stage appears to be missing in the instant case. Similarly in the case of Proctor & Gamble Pakistan (Supra) it has been held that no person, no matter in what other capacity he is connected with a financial facility, if he does not fall within the definition of customer as defined under section 2 (c) of Financial Institution (Recovery of Finances) Ordinances, 2001, can neither sue nor be sued under section 9 of the ibid law.
>
> In view of the above, I am of the view that on the basis of subject matter of this suit prima facie a case for grant of leave to contest the suit has been made out. Accordingly, the leave applications are allowed and the unconditional leave to defend the suit is granted"
>
> [Emphasis supplied]

The Plaintiff keeping in view the objections raised by the defendants in the leave to defend application and the observations made by this Court in the above order, filed the instant application and seeks conversion of the present suit from Banking suit to an ordinary civil suit in order to avoid any complication or multiplicity of litigation at later stage.

9. In order to decide instant application and to bring any transaction within the purview of the Financial Institution (Recovery of Finances) Ordinances, 2001 **[Ordinance, 2001]** and the Banking Court, it would first have to be established that the relationship between the parties to such transaction is either that of a 'borrower' or 'customer' who may have obtained a loan or finance from a Banking Company. These terms have specifically been defined in the Ordinance, 2001. In the present case, from the perusal of the plaint, it appears that the plaintiff, a financial company, paid amount to the defendants, however, this does not mean that all the parties that may be connected in any way to any finance provided by any financial institution could invoke the Banking jurisdiction of this Court. In this regard, Section 9 of the Ordinance 2001 is very clear, wherein parties to a Banking suit are specifically mentioned. Section 9 of the Ordinance, 2001, states that 'Where a customer or a financial institution commits a default in the fulfillment of any obligation with regard to any finance, the financial institution or, as the case may be, the customer may institute a suit in the Banking Court…….'. Financial Institutions (Recovery of Finances) Ordinance, 2001, being a special law, its scope is to be confined to the parties, which are entitled to invoke its jurisdiction and Section 9 clearly mentions that they are only two i.e. a financial institution and its

customer. Other than these two if a person is connected in some way to a transaction falling under the definition of ‘finance’, that person not being a customer of the financial institution could not invoke the jurisdiction provided under Section 9 of the Ordinance, 2001 as Section 9 of the Ordinance, 2001, does not authorize such person to invoke banking jurisdiction. The real test is not that a dispute has arisen in relation to a transaction defined as "finance" under Section 2(d) of the' Ordinance, 2001, but the real test is that dispute should have arisen between a "financial institution" and its ‘customer’. There is no denying the fact that such dispute must relate to a financial facility defined under the term "finance" but it is also necessary that dispute should have arisen between a financial institution and its customer and no one else. A dispute relating to any of the transactions covered by the definition of ‘finance’, if not between a financial institution and its customer, then this is not sufficient to give jurisdiction to the Banking, Court to try such dispute. A party other than a financial institution or a customer can neither sue nor be sued under Section 9 of the Ordinance, 2001 as there is no such room for them in section 9 of the Ordinance, 2001. Hence, the financial institution and or a person, not being related as borrower and customer, if intends to sue against each other, the same can be done under the provisions of general law and not under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Reliance is placed on the case of PROCTER & GAMBLE PAKISTAN [PVT.] LTD., KARACHI V. BANK AL-FALAH LIMITED, KARACHI and 2 others **(2007 CLD 1532).**

10. It is now to be seen whether the facts in issue in the instant case fulfill the requirements as spelt out above or not. Admittedly, it seems that it is only an investment, which was apparently made by erstwhile EGIBL regarding which an indemnity was executed by Defendant for self and on behalf of Defendant No.2. From a bare perusal of the Plaint, it appears that the Plaintiff has paid the certain amount to the defendants as an investment in the Project and thereafter alleged to have suffered loss. In the circumstances, from the subject transactions, there appears no relationship as borrower and customer exits between the plaintiff and defendants, whereby the plaintiff could invoke banking jurisdiction of this Court. In this regard, reliance can be placed

on the case of *RAMZAN ALI v. JAVED INDUSTRIES and others* **[1999 CLC 1294]**, which has also been relied by learned counsel for the Plaintiff.

To strengthen the above observations, there is another case of learned Division Bench of this Court viz. *PAKISTAN GENERAL INSURANCE COMPANY v. MUSLIM COMMERCIAL BANK LIMITED* **[2015 CLD 600]** in which it has been held that the relationship between the parties must be that of a "financial institution" and "customer" and such relationship must emanate from any finance as defined in Clause (d) of Section 2 of Financial Institution [Recovery of Finance] Ordinance, 2001. It is also settled that if no one fall within the definition of a "customer" as defined under Section 2(c) of Financial Institution [Recovery of Finance] Ordinance, 2001, it can neither sue nor be sued under Section 9 of the ibid law. In the present case relationship between the parties to such transaction either that of a "borrower" or "customer" both are missing as has been discussed above.

11. Insofar as objections of the learned counsel for the Defendants that the application is not maintainable as there is already a provisions in the Code under Order 7 Rule 10 CPC for Return of the Plaint; and that this Court has both the jurisdiction, then there is no need to treat the matter to have been filed on the original side, are concerned, it is needless to mention here that indeed this Court has both capacities i.e. having jurisdiction as Banking Court as well as original civil jurisdiction to try the suit on the original side, therefore, no useful purpose would be served if the Plaint of the suit is returned under Order VII Rule 10 CPC to the Plaintiff for its presentation before this Court on the original side. Conversely, the parties will suffer losses as considerable time has been passed after filing the present suit. The position of the case would have been different if the pecuniary jurisdiction of this Court and the banking court was different but in the instant case this Court has both capacities to try and adjudicate the matter. Since the suit is still at the preliminary stage in as much as neither issues have been framed nor evidence has been led, therefore, no prejudice will be caused to the defendants in the event if the present suit is converted into an ordinary civil suit.

12. The case laws cited by learned counsel for the defendants have been perused and considered with due care and caution but are found distinguishable from the facts of the present case and hence the same are not applicable to the present case. Whereas the case laws cited by learned counsel for the plaintiff supports his stance.

13. In view of the above discussion, Application is allowed. Consequently, instant suit is converted from Banking Suit to an ordinary civil suit and the same shall be proceeded as an ordinary civil in accordance with law. The defendant is allowed to file written statement within four (4) weeks' time from the date of this order, failing which leave to defendant applications filed on behalf of the defendants will be treated as their respective written statements. Let the required formalities be completed by the office accordingly.

Application [CMA 16209/2017] is disposed of in the above terms.

JUDGE

*Jamil****