IN THE HIGH COURT OF SINDH KARACHI

Present:
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Adnan Iqbal Chaudhry.

High Court Appeal No. 404 of 2016

[MCB Bank Limited versus Sajida Naqi Riaz and others]

Appellant	:	MCB Bank Limited through Mr. Khalid Mehmood Siddiqui, Advocate.
Respondents 1&2	:	Sajida Naqi Riaz & Adnan Naqi Riaz through Mr. Noman Jamali, Advocate.
Respondents 3-6	:	Nemo.
Respondent No. 7	:	Standard Chartered Bank Ltd. through Mr. Muhammad Khalid Hayat, Advocate.
Respondents 8&9	:	Nemo.
Date of hearing	:	07-08-2018
Date of decision	:	12-10-2018

JUDGMENT

ADNAN IQBAL CHAUDHRY J. – This is an appeal from an order dated 10-11-2016 in Suit No.67/2014 passed on CMA No.3006/2014, which was an application Order VII Rule 11 CPC, whereby though the plaint was not rejected, but some of the defendants were struck out from the plaint.

1. The background of this appeal is that Suit No.67/2014 by the Appellant Bank as plaintiff is pending before the Original side of this Court. By the said suit, the Appellant Bank has *inter alia* impugned the orders dated 04-04-2012 and 24-10-2012 passed under Section 82 Banking Companies Ordinance, 1962 by the Banking Mohtasib and the Governor State Bank of Pakistan (Respondents 8 and 9) respectively. By the first order, the Complaint of the

Respondent No.2 against the Appellant Bank was accepted by the Banking Mohtasib by directing the Appellant Bank to refund the amount of the disputed pay-orders to the drawer (maker). By the second order, the appeal of the Appellant Bank was dismissed.

2. By CMA No.3006/2014 under Order VII Rule 11 CPC filed in the suit, the Respondents 1 and 2, who are the defendants 1 and 2 in the suit, prayed for rejection of the plaint. By order dated 10-11-2016 passed on said application, though the plaint of the suit was not rejected, the learned Single Judge struck out the defendants 1, 2, 7, 8 and 9 from the suit and ordered release of the disputed amount to the defendant No.1, which amount was lying in deposit with the Nazir of this Court pursuant to orders passed in the suit. It is that order that is impugned before us.

3. The facts of the case are that in February 2011, the Respondent No.1 applied to its bank, the Standard Chartered Bank (Respondent No.7), for three (03) pay-orders. The pay-orders did not describe the payee (beneficiary) by name, but as "MCB A/C 0073-3951-2 CAR BID". All three pay-orders described the payee in the same manner although with different accounts number and for different amounts. It appears that the Respondent No.1 authorized the Respondent No.3 to collect the pay-orders from Standard Chartered Bank, and thereafter these pay-orders were deposited at different branches of the Appellant Bank where these were credited to the bank accounts of the Respondents 4, 5 and 6 respectively. Apparently, the bank account numbers of the Respondents 4, 5 and 6 matched with the payee's account number mentioned on the pay-orders, but the 'title' of the bank accounts did not, in that the bank accounts to which the pay-orders were credited were not titled as "CAR BID". The Respondent No.2, who is the son of the Respondent No.1, alleged that he and his mother had been defrauded as the Respondents 4, 5 and 6 were not the intended payees, and he proceeded to lodged an FIR against the Respondent No.3 and officers of the Appellant Bank.

Thereafter, the Respondent No.2 filed a Complaint before the Banking Mohtasib alleging that the pay-orders had been given on the belief that these would be used to bid at a car auction being held by the Appellant Bank; that though the pay-orders were fraudulently deposited in the bank accounts of the Respondents 4, 5 and 6, under Prudential Regulations it was incumbent on the Appellant Bank not to credit the pay-orders to such bank accounts when the description of the payee on the pay-orders did not match exactly with the title of the bank accounts.

4. Before the Banking Mohtasib, it was the case of the Appellant Bank that though there was no bank account maintained with it titled 'CAR BID', the pay-orders were credited in good faith as the bank accounts to which these were credited, matched the account numbers of the payee mentioned on the pay-orders. The Appellant Bank contended that it's inquiry revealed that the Respondent No.3 held himself out as an employee of the State Bank of Pakistan and induced persons to invest with him in the business of bidding at car auctions at banks; that the Respondent No.3 owed money to the Respondents 4, 5 and 6 in such business and it was on that account that the pay-orders were deposited by the Respondent No.3 in the bank accounts of the Respondents 4, 5 and 6; and therefore the Appellant Bank could not be held liable. As mentioned above, it was the complainant who prevailed.

5. Apart from the Appellant Bank, its officers who had been charged with offences pursuant to the FIR lodged by the Respondent No.2, had also filed a review application before the Governor State Bank of Pakistan against the order dated 04-04-2012 passed by the Banking Mohtasib. However, their review application was turned down on 07-01-2013 on the ground they were not party to the complaint before the Banking Mohtasib and nor did the Banking Companies Ordinance, 1962 provide for such a review.

6. After losing the case before the Banking Mohtasib and the appeal before Governor State Bank of Pakistan, the Appellant Bank filed the aforesaid suit with the following prayers:-

> *"A. Declaration that the Pay Orders presented by the Defendant No. 4, 5 and 6 have been correctly deposited by the Plaintiff in the respective accounts.*
>
> *B. Declaration that the Defendants No. 1, 2, 3 and 7 have themselves acted in a collusive and fraudulent malafide manner, and are therefore not entitled to claim any refund from the Plaintiff.*
>
> *C. Declaration that the Plaintiff has no privity of contract or obligation towards the Defendants No. 1, 2, 3 and 7.*
>
> *D. Declaration that the orders dated 04-04-2012 passed by the Defendant No.8 and orders dated 24-10-2012 passed by the Defendant No.9 are not sustainable in law and facts, having been passed without due process of law, without recording and appreciating evidence and being based upon conjectures and surmises.*
>
> *E. Decree the suit against the Defendants jointly and severally, for the sum of Rs. 100,000,000/- (Rupees one hundred million) as compensation and damages on account of losses suffered by the Plaintiff due to the illegal acts of the Defendants.*
>
> *F. Restrain the Defendants from directly or indirectly claiming any amount from the Plaintiff.*
>
> *G. Grant costs of the suit.*
>
> *H. Grant any other relief as deemed appropriate."*

7. CMA No.3006/2014 moved by the defendants 1 and 2 under Order VII Rule 11 CPC shows that rejection of the plaint was sought only under sub-Rule (d) of Order VII Rule 11 CPC, i.e. "where the suit appears from the statement in the plaint to be barred by any law." The barring laws relied upon were *estoppel* under Article 114 Qanoon-e-Shahadat Order, 1984, and Section 18 Federal Ombudsmen Institutional Reforms Act, 2013. The impugned order dated 10-11-2016 shows that while the ground of *estoppel* did not find favor with the learned Single Judge, the other ground that the suit was barred by Section 18 Federal Ombudsmen Institutional

Reforms Act, 2013, was not adverted to at all. Instead, the learned Single Judge tested the plaint on Sub-Section (7) of Section 82-E Banking Companies Ordinance, 1962 inasmuch as, that was the law relied upon by the Appellant Bank in para 29 of the plaint for maintaining the suit. Sub-sections (1) to (3) of Section 82-E Banking Companies Ordinance, 1962 discuss the nature of directions and recommendations that the Banking Mohtasib may give on a complaint. Sub-section (4) provides for an appeal to the Governor State Bank of Pakistan. Sub-section (7) of Section 82-E Banking Companies Ordinance, 1962 states as follows:

> "[7] Nothing contained herein shall prevent a complainant from filing a suit against a bank in the event his compliant is rejected".

8. Mr. Khalid Mehmood Siddiqui, learned counsel for the Appellant Bank contended that the impugned order had been passed by the learned Single Judge without hearing the Appellant Bank's counsel. However, the impugned order shows that the application for rejection of the plaint was partly argued by the bank's counsel on 16-09-2016 before praying for an adjournment. The suit was adjourned to the next day i.e. 17-09-2016 while putting the bank's counsel on notice to address the query of the Court as regards the maintainability of the suit against the defendants 1, 2, 7 to 9. On 17-09-2016, when the matter was taken up by the Court, a counsel held brief for the plaintiff's counsel and sought an adjournment on the ground that the plaintiff's counsel had to leave station on account of an emergency. However, since the counsel holding brief had the case file with him, he was asked by the Court to proceed with the matter though the counsel holding brief had stated that he had no instructions to proceed with the case. But such counsel nonetheless proceeded with the case and even cited case-law to support of the Appellant Bank's case.

9. On examination, the impugned order shows the learned Single Judge has practically decided the entire suit. Not only did he comment on the merits of the plaintiff's case before the Banking Mohtasib, he has also gone on to prejudice the case of the defendants 4, 5 and 6 against the plaintiff by observing that "*the plaintiff has a right to recover the said amount against the account holders as the same was wrongly made.*" Suffice to state that while examining a plaint for rejection under Order VII Rule 11 CPC it is firstly and primarily the averments of the plaint that are to be looked into. Mr. Noman Jamali, learned counsel for the Respondents 1 and 2, and Mr. Muhammad Khalid Hayat, learned counsel for the Respondent No.7, both submitted that substantial justice has been done by way of the impugned order, however, they could not controvert the fact that the parameters for deciding an application under Order VII Rule 11 CPC were not considered by the learned Single Judge.

10. It is apparent from the impugned order that the learned Single Judge found himself at a place where he could not reject the plaint in piecemeal, and therefore to give effect to his findings, the learned Single Judge acting *suo moto* invoked Sub-Rule (2) of Rule 10 of Order I CPC and struck out from the plaint those parties against whom he found the suit not maintainable. That, in our view, is neither the purpose nor the scope of said provision. Under Sub-Rule (2) of Rule 10 of Order I CPC, the power of the Court to strike out parties, be that on an application or *suo moto*, is circumscribed by the words "improperly joined". Therefore, the purpose of an order for striking out parties under Order I Rule 10(2) CPC is primarily to address mis-joinder of parties and that too as a step towards adjudication, and not to be the formal expression of adjudication by itself, which is to be done by way of a decree. In the circumstances of the case, when there was no motion before the Court under Order I Rule 10(2) CPC, nor had the Court put the parties to such notice *suo moto*, once the learned Single Judge concluded that the plaint could

not be rejected, then the application for such rejection should have been put to rest at that.

In the case of *Corporation of Calcutta v. Radha Kirshana Devi*, [AIR (39) 1952 Calcutta 222], it was held that Sub-Rule 2 of Rule 10 of Order I CPC relates to a case where a defendant has been improperly joined, that is to say, where the defendant against whom no relief can be claimed has been made a defendant, and it is said that the name of such person should be struck out. It was further observed that a case involving misjoinder of causes of action is different from a case where a person had been made a defendant against whom no relief is claimed or can be claimed; and that Order I Rule 10(2) CPC can be invoked for misjoinder of defendants and not for misjoinder of causes of action.

In the case of *Manohar Lal v. Roshan Lal* (AIR 1938 Lahore 799), four persons had been sued in the trial court. The trial court came to the conclusion that the claims of two persons should be dismissed, but instead of dismissing of their claim by means of a decree, the trial court proceeded to strike out their names under Order I Rule 10(2) CPC on the ground that they had been improperly joined. It was held that the trial court had misunderstood the purpose of Order I Rule 10 CPC in that, when the said Rule provides that the Court may strike out a party who has been improperly joined, it refers to the suit as framed, and it was not intended that the claim of a necessary party should be first tried and then his name should be struck off on the ground that his claim merited dismissal before any decree has been passed. It was observed that such procedure can only lead to multiplicity of proceedings.

11. Assuming that the conclusions drawn by the learned Single Judge were correct, where he concluded that the relief sought by the Appellant Bank against the Respondents 1, 2, 7, 8 and 9 was barred by law, but the relief for recovery/damages against the Respondents 3 to 6 was not, then the proper course was to see whether a decree for dismissal of the barred relief could be passed; after all the

Explanation clause to the definition of "decree" in section 2(2) CPC states that a decree may be "partly final".

It has been elucidated by the Supreme Court of Pakistan in the case of *Haji Abdul Karim v. Florida Builders* (PLD 2012 SC 247), that though 'rejection of plaint' and 'dismissal of suit' are distinct concepts with different consequences, but while examining the plaint for the former, the Court retains its inherent power for the latter. That discussion in *Florida Builders* is in the following paras of the said judgment:

> "12. After considering the ratio decidendi in the above cases, and bearing in mind the importance of Order VII Rule 11, we think it may be helpful to formulate the guidelines for the interpretation thereof so as to facilitate the task of courts in construing the same.
> Firstly, there can be little doubt that primacy, (but not necessarily exclusivity) is to be given to the contents of the plaint. However, this does not mean that the court is obligated to accept each and every averment contained therein as being true. Indeed, the language of Order VII Rule 11 contains no such provision that the plaint must be deemed to contain the whole truth and nothing but the truth. On the contrary, it leaves the power of the court, which is inherent in every court of justice and equity to decide whether or not a suit is barred by any law for the time being in force completely intact. The only requirement is that the court must examine the statements in the plaint prior to taking a decision."

> "Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaint the court is not denuded of its normal judicial power. It is not obligated to accept as correct any manifestly self-contradictory or wholly absurd statements. The court has been given wide powers under the relevant provisions of the Qanun-e-Shahadat. It has a judicial discretion and it is also entitled to make the presumptions set out, for example in Article 129 which enable it to presume the existence of certain facts. It follows from the above, therefore, that if an averment contained in the plaint is to be rejected, perhaps on the basis of the documents appended to the plaint, or the admitted documents, or the position which is beyond any doubt, this exercise has to be carried out not on the basis of the denials contained in the written statement which are not relevant, but in exercise of the judicial power of appraisal of the plaint."

However, since the impugned order does not reject the plaint, nor does it pass any decree, we do not discuss the aforesaid aspect of the case any further especially when we have noticed that there are other aspects of the case that escaped the attention of the learned Single Judge.

12. For rejection of the plaint, the Respondents 1 and 2 had in fact relied on Section 18 Federal Ombudsmen Institutional Reforms Act, 2013 which was enacted on 20-03-2013. Amongst the legislation that the said Act reformed ("relevant legislation"), is the Banking Companies Ordinance 1962. Sections 18 and 24 of the Federal Ombudsmen Institutional Reforms Act, 2013 read as under:

> "18. Bar of jurisdiction.- No court or authority shall have jurisdiction to entertain a matter which falls within the jurisdiction of an Ombudsman nor any court or authority shall assume jurisdiction in respect of any matter pending with or decided by an Ombudsman.
>
> 24. Overriding effect.- (1) The Provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force.
> (2) In case there is a conflict between the provision of this Act and the relevant legislation, the provisions of this Act to the extent of inconsistency, shall prevail."

Though the orders passed by the Banking Mohtasib and the Governor State Bank of Pakistan under Section 82-E Banking Companies Ordinance, 1962 were passed prior to the Federal Ombudsmen Institutional Reforms Act, 2013, but the suit challenging the said orders was presented in 2014, after the enactment of the Federal Ombudsmen Institutional Reforms Act, 2013. As opposed to the implied ouster of jurisdiction under Section 82-E Banking Companies Ordinance, 1962 (as stated by the trial court, to the extent of a civil suit by a bank), Section 18 Federal Ombudsmen Institutional Reforms Act, 2013 is an express ouster clause that seeks to oust jurisdiction of all Courts, and also for

matters "decided" by the Ombudsman. Though the said Act does not operate retrospectively, it needs to be deliberated whether the maintainability of the reliefs sought against the Respondents 1, 2, 8 and 9 were to be tested on the basis of the Banking Companies Ordinance, 1962 or on the basis of the Federal Ombudsmen Institutional Reforms Act, 2013 while keeping in mind the power of judicial review vested in a High Court in its constitutional jurisdiction. It is another matter that if any of the said bars were attracted to the suit, the consequence may be the same.

13. Sub-section 4(a) of Section 82B Banking Companies Ordinance, 1962 reads :

> "(4) The Banking Mohtasib shall have the power and responsibility—
> (a) to entertain complaints from customers, borrowers, banks or from any concerned body or organization;"

The complainant before the Banking Mohtasib was admittedly not a 'customer' nor a 'borrower' of the Appellant Bank, nor can he be termed as a 'concerned body or organization' within the meaning of Sub-section 4(a) of Section 82B Banking Companies Ordinance, 1962. Therefore, the foremost inquiry by the learned Single Judge ought to have been whether a Complaint by a person not covered by Sub-section 4(a) of Section 82B Banking Companies Ordinance, 1962 was within the jurisdiction of the Banking Mohtasib; because if not, then it could well be argued that neither Section 82-E Banking Companies Ordinance, 1962 nor Section 18 Federal Ombudsmen Institutional Reforms Act, 2013 could be construed as barring jurisdiction of a civil court, and then the argument of the Appellant Bank that it could not be held liable to the Respondents 1 and 2 by virtue of Section 131 Negotiable Instruments Act, 1881, required a deeper appreciation.

14. In para 30 of the plaint it is pleaded:

"That neither the Defendant No.1 nor the Defendant No.2 is the account holder of the Plaintiff Bank. As such, the Plaintiff had no privity of contract with the Defendants No.1 & 2 and owes no obligation, whatsoever to the Defendant No.1 & 2 who are pursuing an absolutely illegal and dishonest claim against the Plaintiff."

Prayer clause C of the plaint is:

"Declaration that the Plaintiff has no privity of contract or obligation towards the Defendants No.1, 2, 3 and 7'.

The aforesaid pleading, though not articulated ideally, essentially assailed the jurisdiction of the Banking Mohtasib to entertain the Complaint. Therefore, the finding of the learned Single Judge that the Appellant Bank had not assailed the jurisdiction of the Banking Mohtasib, was erroneous.

15. Therefore, for the reasons discussed above, the appeal is allowed; the order dated 10-11-2016 passed in Suit No.67/2014 is set-aside; and we remand the matter with the direction to the learned Single Judge to decide afresh CMA No.3006/2014 moved under Order VII Rule 11 CPC by the Respondents 1 and 2.

J U D G E

J U D G E

Karachi

Dated: 12-10-2018