IN THE HIGH COURT OF SINDH, AT KARACHI

Present:
Muhammad Ali Mazhar and
Yousuf Ali Sayeed, JJ

1st Appeal No. 25 of 2014

Appellant	:	Farnaz Ahmed, through Muhammad Haseeb Jamali, Advocate.
Respondent No.1	:	Faysal Bank Limited, through, Waqar Ahmed, Advocate.
Respondent No.4	:	Nadeem Ahmed Malik, through Muhammad Saleem Thepdawala, Advocate.
Date of hearing	:	23.09.2020

JUDGMENT

YOUSUF ALI SAYEED, J - This Appeal under S.22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the "**Ordinance**") stems from Suit Number 437 of 2010 (the "**Suit**") instituted by the Respondent under Section 9 of the Ordinance, seeking recovery of amounts said to be due from the Appellant in respect of a Murabaha Financing Facility of Rs.43,000,000/- (the "**Facility**") extended by the former and availed by the latter under a Murabaha Financing Agreement dated 20.11.2007 (the "**Agreement**"), under the account of 'M/s. Image Embroidered Fabric' - a proprietary concern of the Appellant.

2. The Application filed by the Appellant in the Suit under Section 10 of the Ordinance, seeking leave to defend, was dismissed by the learned Judge of the Banking Court No. II at Karachi (the "**Banking Court**") vide an Order dated 30.10.2013, with Judgment then being entered in favour of the Respondent on 17.01.2014 in the sum of Rs.43,085,037/-, along with cost of funds from the date of institution till realization.

3. The Banking Court also allowed the prayers made by the Respondent as to the costs of the Suit as well as the sale of two immovable properties, viz - (i) Plot No. D-44, Block-2 Clifton, Karachi, measuring 1000 square yards and (ii) Shop No.2 measuring 402 square ft. situated at 15/C, 3rd Zamzama Commercial Lane, Phase V, DHA, Karachi (the "**Subject Properties**"), which were said to have been mortgaged in its favour for purpose of securing repayment of the Facility, with a Decree then being drawn up on 21.01.2014 in the aforementioned terms.

4. Being aggrieved, the Appellant instituted the captioned Appeal, with it being pleaded that the Appellant had made all the payments that had accrued under the Agreement, hence the Respondent had no claim thereunder, and that the Subject Properties were not mentioned in Exhibit "E" of the Finance Agreement, where the securities/collateral to be furnished for purpose of the Facility was to be specified, hence had not been mortgaged in favour of the Respondent. The relevant excerpts from the Memo of Appeal, reflecting the fluctuating submissions of the Appellant in exposition of this stance, are as follows:

   - "The Appellant has no obligation outstanding towards the Respondent Bank having cleared the amounts due to the Respondent Bank in accordance with the Murabaha Financing Agreement dated 20.11.2007 executed between the Respondent Bank and Defendant."

   - "The Respondent is seeking payment of amounts which are not part of the obligations of the Appellant in terms of the Agreement entered into between the Respondent Bank and the Appellant/Defendant. The Appellant did not mortgage any of her properties with the bank to secure the Agreement amount. The Appellant did not obtain any loan from the Respondent bank. No mortgage was created."

   - "The Agreement dated 20.11.2007 did not provide for any mortgage and as already mentioned above the Exhibit E of the same did not provide for any security."

- "The truth of the matter is that at the time of executing Agreement dated 20.11.2007, the Plaintiff bank coerced the Defendant to sign various blank documents. One of such blank documents was Memorandum of Deposit of title deeds."

- "That in the year 2009, the Appellant with the bonafide intention to clear its outstanding approached the Respondent bank and discussed various options of settlement."

- "The Appellant made an offer to sell her property bearing Plot No. D-44, Block-2, Scheme 5, Clifton, Karachi to the Respondent. In this regard the Respondent asked the Appellant to submit the original title documents so that the same can be scrutinized. It was only in year 2009 that the Appellant handed over the title documents of Plot No. D-44, Block2, Scheme 5, Clifton, Karachi to the Respondent. Later on upon the insistence of the Respondent that the amount outstanding in much less than the value of the above said plot, the Appellant was asked to give another property of a lower value. Hence original property documents were given of the Shop # 2, 15/C, 3rd Zamzama Commercial Lane, DHA, Phase V, Karachi. However, the settlement talks did not materialize and the Appellant made payments of the balance outstanding which was remaining under the Murabaha (Purchase & Resale) Agreement."

5. Upon the matter coming up in Court on 20.03.2014, while issuing notice to the Respondents, it was ordered that the operation of the impugned Judgment stood suspended. The Respondents then entered appearance through counsel, and thereafter the matter was repeatedly fixed over numerous dates with statements being made from date to date by learned counsel for the Appellant as to the prospect of a compromise between the parties and time being sought for obtaining instructions as to settlement/discharge of the liability. Whilst it would serve no useful purpose to unnecessarily burden this Judgment through reproduction of those Orders, suffice it to say that the stance of the Appellant overtly remained that of repayment/settlement towards discharge of her liability.

6. The much-vaunted settlement failed to materialise and in the wake of categoric statements repeatedly forthcoming from the side of the Respondent over several dates that the matter was deliberately being protracted with there being no real intent in that regard on the part of the Appellant, counsel for the Appellant finally came to be confronted with the reality that no further adjournment would be granted on that pretext. At that juncture, a further overture was initially nonetheless made to seek six months further time for settlement, but upon the Respondent's refusal to accede to such a request, counsel for the Appellant then proceeded with his submissions, regurgitating the very grounds as had initially been taken in the Appeal, albeit the subsequent conduct and statements of the Appellant over the course of the proceedings having run in stark contradiction thereto and being tantamount to a virtual capitulation of that earlier stance. Learned counsel nonetheless argued at length along those very lines, and contended that the Banking Court had failed to properly consider such aspects when passing the Order of 30.10.2013 and also when rendering Judgment. He further contended that the Suit had not been properly instituted as the persons signing and verifying the plaint on behalf of the Respondent had not been properly authorized.

7. Conversely, learned counsel for the Respondent submitted that the Appeal had been filed belatedly, after lapse of the prescribed period of 30 days, and was liable to be dismissed accordingly. To demonstrate the delay, learned counsel pointed out with reference to the certified copies of the Judgment and Decree filed along with the Memo of Appeal that while the same had been applied for on the date of judgment (i.e. 17.01.2014) with the fees being estimated on the same day, the requisite costs were not paid till 24.01.2014, with the copy then being made ready on 29.01.2014 and the Appeal being presented on 28.02.2014. It was argued that while the Appeal

appeared to be within time when the period of 30 days was reckoned simply from the date of the certified copy being made ready, the intervening days between the estimation of fees and payment of costs also had to be counted against the Appellant for computing limitation, ergo the Appeal was barred by that number of days.

8. Turning to the arguments raised on behalf of the Appellant, he submitted that the Order of 30.10.2013 and subsequent Judgment ensuing in the wake thereof had been correctly made with proper application of mind while considering the entire parcel of facts circumscribing the dispute, and contended that the stance raised vide the Appeal was duplicitous, as reflected by the Appellant's own conduct. He drew attention to the Order of 30.10.2013, the operative part of which reads as follows:

> "Heard the arguments of learned counsels of both the parties, gone through the entire record of the case and material placed thereon. From perusal of the record, narration of the plaint and execution of documents as well as statement of accounts annexures 'F' and 'F/1' annexed with the plaint indicate that loan was disbursed and then availed by the defendant with objection that now she is no more customer of the plaintiff bank as she had paid all the amounts accrued under agreement dated 20.11.2007. However, the defendant has failed to produce any documentary evidence in support of her contentions that she has made all the payments accrued under agreement dated 20.11.2007 and the plaintiff bank has no claim against the defendant. The memorandum of deposit of title deeds concern with the facility availed by the defendant i.e. Rs. 4,300,000/- dated 30.11.2007, shows that intentionally equitable mortgage was created as security in favour of the plaintiff bank mentioned in schedule-II of the title deed. Therefore, whatever argued that the plaintiff bank coerced/forced the defendant to sign on various blank documents in which one of the blank document was memorandum of deposit of title deeds has found no force, the question which arises there at the juncture would be that why the defendant was signed on the blank documents. Record shows that due to non-payment a notice dated 10.11.2008 'annexure D/1, and, thereafter a final notice annexure D/2 dated 01.12.2008 were issued to the defendant with instruction to pay Rs.46,351,128/-, which was duly replied dated 17.06.2009 in which defendant assured to adjust the balance amount of loan from their business also shown her willingness for selling

> the property bearing Plot No. D/44, Block-2, Clifton, Karachi to FBL at a cost of Rs.35 million. Therefore whatever arguments made that she is not concerned with the three loan accounts and that she never entered into any loan agreement with the plaintiff bank, has found no force. As stated that she has repaid all the loan amounts. Meaning thereby, the dispute, if any is with regard to the quantum of the amount claimed in the suit, can be resolved on the basis of update statement of account/breakup."

9. He submitted that the Facility had been fully availed and utilized by the Appellant from time to time. However, the Appellant, in breach of the terms and conditions stated in the Agreement and security documents, had failed to repay the outstanding amounts as and when the same fell due, but in response to a Notices under Section 15 of the Ordinance, 2001 for sale of the Subject Properties, had admitted her outstanding liability vide letter dated 17.06.2009 and proposed a settlement in respect thereof, however, no workable offer had been extended, therefore the Respondent had been constrained to file the Suit.

10. Learned counsel for the Respondent then also drew attention to the Statement mentioned in the Order of 18.10.2019, as reproduced herein above, which had been filed in Court on that date under the signature of counsel for the Appellant for placing certain documents on record, including the letter dated 17.12.2018 issued by the Respondent to the Appellant, setting out the terms of the settlement arrangement devised by the Respondent in respect of the outstanding liability owed by the Appellant. Attention was then invited to that letter, bearing the signature of the Appellant in acceptance of the terms of settlement offered by the Respondent, with such terms reading as follows:-

> "With reference to your application and consequent to your meeting at our office regarding the settlement of the default finance facility of the captioned account.
>
> After considering your request, following arrangements are offered:

1. The account will be settled at a total consideration of Rs.45,000,000/- (Rupees Forty-Five Million only) as full and final payment against the entire liability. The statement amount includes Principal payment of Rs.37,893,568/- and payment of partial Cost of funds of Rs.7,106,432/-.

2. The payments of settlement amount will be made through a down payment of Rs.5,000.000/- by or before December 27th 2018 and balance in 02 two equal quarterly installments of Rs.20,000,000/- each payable on April 16th and July 16th 2019.

3. Upon compliance of above repayments terms in timely manner and regular repayment of Rs.45,000,000/- (Rupees Forty-Five Million only) in terms of clause-2 above, FBL will waive off all the remaining amount which includes overdue profit, other charges, late payment penalties etc. accrued or to be accrued till complete settlement over Image Embroidered Fabric.

4. FBL will release its charge alongwith delivery of original property documents of Mortgage properties bearing Plot No. D-44, Block-2 Clifton, Karachi, measuring 1000 square yards and Shop No.2 measuring 402 square ft. situated at 15/C, 3rd Zamzama Commercial Lane, Phase V, DHA, Karachi upon receipt of full settlement amount of Rs.45,000,000/- (Rupees Forty-Five Million only).

5. Delay in payment of installments of 30 days will trigger COF (penalty) at 5% from the original due date, on the outstanding amount. Overdue installment has to be repaid within 90 days from the due date falling which event of default will be triggered and all the remissions/waivers/reliefs allowed under above arrangements will stand withdrawn/cancelled.

6. The Settlement arrangement offered and agreed above will be filed at Sindh High Court in First Appeal No.25 of 2014 and Execution No.44 of 2014 in Suit No.437 of 2010 before Banking Court-II Karachi to dispose-off the all pending litigation(s) and legal proceeding (or if cases are in process) by Image Embroidered Fabric.

7. Image Embroidered Fabric hereby undertakes that they have not created other business interests and assets out of the non-performing loans against which mark-up is being waived/written off.

8. All waivers/write-offs in markup allowed under the above settlement arrangement will be reported to SBP (Credit Information Bureau) as per the SBP guideline.

9. By accepting the above settlement, you will undertake that in case of non-payment of settlement amount as per the offered arrangement and within the stipulated time, FBL will have the right to cancel the proposed offer and withdraw the allowed remission/write off/waiver/ concession as mentioned above and will recover the entire amount with outstanding accrued profits thereon.

The above arrangement shall remain open for a period of two (2) working days from the date of this letter. You are therefore advised to convey as your acceptance of the terms and conditions of settlement within the above mentioned timeframe enabling us to proceed further in the matter."

11. However, as it transpires, that offer of settlement, albeit accepted, was also apparently not complied with as the Appellant is said to have defaulted in repayment of its obligation in terms thereof, and a Statement was filed on behalf of the Respondent to that effect. It was submitted that the conduct of the Appellant itself thus belied the contention raised vide the Appeal that the Appellant had not obtained any loan from the Respondent and had not mortgaged any of her properties, and demonstrated that such stance was false and contumacious, hence the Appeal was liable to be dismissed.

12. As to the point of authorisation of the signatories to the plaint, learned counsel placed on record the certified copy of Annexures "A" and "A/1" to the plaint, being the Special Power of Attorney in favour of the officers of the Respondent through whom the suit had been instituted, on its behalf, reflecting the authorisation conferred in that regard.

13. Having heard the arguments advanced in light of the material on record, we would firstly turn to the question of limitation. In support of the plea as to the Appeal being barred, learned counsel had placed reliance on a judgment of a learned Division Bench of this Court (of which one us, namely Muhammad Ali Mazhar, J, was a member) in the case reported as Pak Leather Crafts Limited and others v. Al-Baraka Bank Limited 2019 CLD 659, where in the very context of an appeal under S.22 of the Ordinance it was held that the intervening period between estimation of costs for obtaining the certified copy and the depositing of such costs would be counted for purpose of computing the period of limitation. The relevant excerpts from that judgment read as follows:

> "Coming to the facts of the instant case, the cost for certified copy was estimated by the copyist the same day the application was made i.e. on 05.12.2017. Thus there was no delay on the part of the court copyist in estimating the cost. Needless to state that once the costs for certified copy had been estimated by the copyist, the onus of depositing the cost came upon the Appellants. Assuming that the Appellants remained unaware that the cost was estimated the same day, admittedly there was no rule that made it obligatory on the copyist to communicate to the Appellants that cost had been estimated. Therefore, as laid down in the cases of Fateh Muhammad and Jamila Khatoon, it is for the Appellants to demonstrate that they acted diligently and that they had no control over the time requisite for obtaining certified copies.
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> In the circumstances of the case where it was the Appellants who committed delay in depositing the cost for certified copy, they cannot take shelter under subsection (5) of section 12, Limitation Act, 1908 as such delay on their part cannot be termed as "time requisite" for obtaining certified copies within the meaning of section 12 of the Limitation Act, 1908. The Appellants should have acted with reasonable promptitude and diligence and should have followed-up on their application for certified copy within a reasonable time instead of waiting for 38 days. It has been held by the Honourable Supreme Court of Pakistan in the case of Ghulam Qadir v. Sh. Abdul Wadood (PLD 2016 SC 712) that limitation is not a mere technicality, but positive law that is to be given due effect."

14. As such, in light of the circumstances marking the obtainment of the certified copy of the Judgment and Decree, as previously noted, the contention of learned counsel for the Respondent as to the Appeal having been filed beyond the prescribed period of 30 days appears to be correct.

15. Even otherwise, it is apparent that, the Appellant has taken divergent stances and raised contradictory pleas from time to time, which clearly offends the principle *allegans contraria non est audiendus* and completely undermines the very foundations of the defence sought to be raised during the course of arguments. In the face of the requests made from date to date seeking time for settlement of the liability as well as the contents of the Appellant's aforementioned letter dated 17.06.2009 and Statement dated 18.10.2019, it does not then remain open to her to disavow either the Agreement, or availing the Facility or mortgaging the Subject Properties, and it is manifest that recourse to such a stance is duplicitous.

16. As such, we are of the view that the Banking Court was correct in dismissing the Appellant's Application under Section 10 of the Ordinance and rightly decreed the Suit. That being so, no case for interference stands made out. The Appeal fails and stands dismissed accordingly, along with all pending miscellaneous applications.

JUDGE

JUDGE

Karachi
Dated _____