IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

1st Appeal No. D – 23 of 2019

M/s Bank Islami Pakistan Limited v. Ch. Abdul Jabbar and others

Before:
Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Zulfiqar Ali Sangi

Date of hearing: **17-02-2022**

Date of decision: **17-02-2022**

Mr. Shahab Sarki, Advocate for the Appellant.
M/s Muhammad Shameem Khan along with A Habib Khan Advocates for the Respondents.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. **–** This Appeal under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 ("**Ordinance**") has been filed against judgment and decree dated 06-09-2019, passed by the learned Judge, Banking Court-I, Sukkur in Suit No.243 of 2014, whereby the Suit of the Appellant has been dismissed.

2. Heard the learned Counsel for the Appellant as well as for Respondents and perused the record.

3. The first objection which has been raised on behalf of the Respondents is that the Appeal is not maintainable as the Appellant has failed to deposit the decretal amount in terms of s.22 of the Ordinance. To that it may be observed that this is an Appeal against dismissal of Suit and not against any money decree in favor of the Respondents; hence, the objection is frivolous and misconceived. The second objection is regarding the status of the Appellant Bank as according to Respondents Counsel loan was obtained from KASB Bank Limited, and not from the present Appellant; hence, the Suit was incompetent. The said objection is also misconceived. The said issue came up before one of us (*Muhammad Junaid Ghaffar, J.*) in the case of ***Habib Bank Limited v M/s DYNASEL Limited (2018 CLD 1256***) and it was repelled as under;

Insofar as the first objection regarding merger of the erstwhile Barclays Bank PLC with the present Plaintiff is concerned, the same appears to be misconceived and unreasonable. It is not that if a bank is merged into another, the entire plaint always ought to be amended. It is only the title which could be permitted to be amended, as mere merger does not even otherwise entitle the Plaintiff to seek amendment in the plaint, barring certain exception(s) which is not the issue in hand. The plaintiff except change in name has not sought any further or additional relief for which plaint might require amendment. In fact it is a novel proposition on behalf of the defendant in this case, and in fact appears to be an attempt to avoid payment of liability which has not been seriously disputed, except objections of purely technical nature, having no basis. If such objection is sustained, then perhaps it will negate the entire law on mergers and amalgamation. Section 48(6) of the Banking Companies Ordinance, 1962, caters to this objection as well, and provides that on the sanctioning of a scheme of amalgamation by the State Bank of Pakistan, the property of the amalgamated banking company shall by virtue of the order of sanction, be transferred to and vest in, and liabilities be transferred to and become the liabilities of the Banking Company which is to acquire the business of the amalgamated Bank. In the present case the claim of the merged bank when filed at the relevant time was competently done so, and it is only that the present Plaintiff has stepped into the shoes of the merged bank, therefore, this objection is hereby repelled. As to the other objection regarding competency and maintainability of the Suit, again the same appears to be misconceived inasmuch as if an employee has left service of a company; the same would not render a Suit as incompetent before the Court. When the Suit was filed, the person was competently doing so on behalf of the bank, and the Suit remained alive. At the most, it is only at the subsequent stage of the proceedings, (if needed), that any other employee would come and proceed further on the basis of a fresh authority. Therefore, this objection is also hereby repelled.

4. As to merits of the Appellants case it appears that the Appellant had filed a Suit for recovery against the Defendants in respect of default of some Running Finance Facility availed by the Defendants against mortgage / lien of crops. The learned Banking Court had allowed the leave to defend application and settled the following issues:

"*Issue No.1.* *Whether the plaintiff has no cause of action?*

Issue No.2. *Whether the suit is not maintainable?*

Issue No.3. *Whether the suit is barred by law?*

Issue No.4. *Whether the defendant has obtained the loan facility from Bank Islami Pakistan Ltd; Nawab Shah amounted to Rs.160,00,000/- (One Crore Sixty lacs)?*

Issue No.5. *Whether plaintiff is entitled for recovery of Rs.17798378/- (one Crore Seventy seven lacs ninety eight thousand three hundred seventy eight only) along with cost of fund as determined by the State Bank of Pakistan U/s 3 of the Financial Institution 2001?*

Issue No.6. *Whether the account of defendant No.1, was de-activated before expiry date of payment i.e. 30.06.2014?*

Issue No.7. *Whether the account of defendant No.1, was de-activated without issuing show cause notice?*

Issue No.8. *What should the decree be? (This issue is framed by invoking the Order 10 Rule 1 CPC on 6/9/2019).***"**

5. Thereafter, through impugned judgment, the learned Banking Court had arrived at the following conclusion and has been pleased to dismiss the Suit of the Appellant. The relevant finding on the aforesaid issues is as under:

"*Issue No.1:-*

The present suit was filed on 15-09-2014 and prior this the suit No.54/2012 was filed on 16.03.2012. It mean that the earlier suit was 54/2012 filed by present defendant No.1, Abdul Jabbar, same cause of action, parties are same bone of contention is also same. It means it is a counter blast and cause of action is manipulated just in order to harass the defendant so that he could withdraw his suit bearing No.54 of 2012 therefore I can safely say that answer to this issue is in affirmative.

Issue No.2:-

While cause of action is manipulated, therefore answer to this issue is affirmative.

Issue No.3:-

The suit bearing No.54/2012 in between the same parties litigating under the same subject matter. Former suit has been decreed therefore present suit hit U/S 11 of CPC being res judicata and is barred by law. Hence answer to this issue is in affirmative.

Issue No.4:-

The defendant No.2 in their written statement has admitted that Rs.16.000.00 (One Crore Sixty lacs) has obtained loan facility from Bank Islami. The facts admitted no need to prove. Hence answer is in affirmative.

Issue No.5:-

In above issue I have given my findings that present suit hit U/S 11 of the CPC therefore no need to discuss. Hence answer of this issue is in negative.

Issue No.6:-

This issue has also been discussed in suit No.54/2012 which has been decreed vide dated 06-09-2019 same findings is in affirmative.

Issue No.7:-

This issue is interconnected with issue No.6, answer is same i.e. in affirmative.

Issue No.8:-

Now coming to the fate of defendant NO.1, Choudhry Abdul Jabbar his application was dismissed by my Predecessor Mr. Abdul Rehman Bhatti, vide order dated 20/06/2016. In above issues I have given my findings that plaintiff has no cause of action, maintainability has also be attack section 10 CPC has also been introduced.

*Keeping in view these ground realities the suit against L.Rs of defendant No.2, is dismissed. After dismissal of suit against defendant No.2, the terminology "JUDGMENT IN REM" is applied to defendant No.1 whose application U/s 10 of the Financial Institution (Recovery of Finances) Ordinance 2001 was dismissed by my predecessor Mr. Abdul Rehman Bhatti, the same terminology "JUDGMENT IN REM" is applied to defendant No.3, who did not file his application U/S 10 of the Financial Institution (Recovery of Finances) Ordinance 2001 and was exparte. Therefore suit against all the defendants is dismissed. The plaintiff is not entitle for any relief.***"***

6. Perusal of the aforesaid observations of the learned Banking Court reflects that the same are not only contradictory; but are also not supported by any law or precedents inasmuch as the same appear to be hearsay and without proper application of mind. We are constrained to observe that the learned Banking Court has miserably failed to deal with the matter in accordance with law as well as on the basis of the record available before the Banking Court, which has resulted in passing of the impugned judgment. It is clear from the finding at Issue No.4 that the finance facility has been admitted. Once the facility has been admitted and a Suit has been filed under the Financial Institutions (Recovery of Finances) Ordinance, 2001, then in absence of any other cogent and strong reasons, which apparently are lacking in this case, the Suit cannot be dismissed notwithstanding the findings of the learned Banking Court in respect of the other issues. In fact, it ought to have been decreed in respect of the admitted amount and so also in respect of cost of funds and markup, if any. We are at a loss to understand the wisdom of the Banking Court behind this strange and absurd findings regarding dismissal of the Suit. Instead, the Banking Court has decided the remaining issues against the Appellant on the basis of some separate judgment passed in another suit filed by the Respondent. This also is out of anything. If that be the case, then the Banking Court ought to have consolidated both Suits, and since it was not done, therefore, reference of

or conclusion in the said Suit cannot be made basis to decide the present Suit.

7. It is also very surprising to note that the Banking Court in respect of Issue No.8, while deciding the case of Defendant No.2, has observed that after dismissal of Suit against Defendant No.2 by invoking the maxim 'judgment in rem' the same must be applied to Defendant No.1 notwithstanding the fact that the leave to defend application of the said Defendant was already dismissed earlier in time. Not only this, even to the extent of Defendant No.3, it has been observed that though the said Defendant has not filed any application under Section 10 for leave to defend, but again the principle of 'judgment in rem' applies and the benefit of dismissal of Suit granted against Defendant No.1 shall also apply in respect of Defendant No.3. These findings of the Banking Court are completely out of context and against the law as there is no concept of '*judgment in rem*' and '*judgment in personam*' in respect of a Civil Suit; either governed by the Ordinance; or for that matter under Specific Relief Act or Civil Procedure Code. This principle is more akin to the Constitutional jurisdiction of the High Court and not in such proceedings as are in hand. The Banking Court has failed to apply its mind and arrived at an erroneous finding not only on facts; but so also in law, which cannot be sustained and is liable to be set-aside.

8. In view of hereinabove facts and circumstances of this case, we do not see any reason as to why after coming to the conclusion that the loan amount has been admitted, the Suit of the Appellant Bank has been dismissed. It could only have been tried as to the repayments, if any, and the quantum of mark-up. Accordingly, the impugned judgment dated 06-09-2019 passed in Suit No.243 of 2014 by the Banking Court-I, Sukkur was set aside and the Suit of the Appellant was decreed in terms of Para 10 of the plaint along with mark-up till the validity of the agreement and thereafter for cost of funds as per State Bank of Pakistan rates till its realization by means of a short order in the earlier part of the day and these are the reasons thereof.

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Abdul Basit