

Judgment Sheet

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

1st Civil Appeal No. D – 05 of 2013

Before :

Mr. Justice Nadeem Akhtar

Mr. Justice Muhammad Faisal Kamal Alam

Appellants : Javed ur Rehman, Muhammad Farukh & Bashir Ahmed,
through Mr. Ashok Kumar K. Jamba Advocate.

Respondent : National Bank of Pakistan, Main Branch, Sukkur,
through Mr. Shewak Ram Valeecha Advocate.

Date of hearing : 15.11.2017.

J U D G M E N T

NADEEM AKHTAR, J. – Through this appeal under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance 2001 (**‘the Ordinance’**), the appellants have impugned the judgment delivered on 25.09.2013 and the decree drawn in pursuance thereof on 10.10.2013 by the learned Banking Court-I Sukkur in Suit No. 29 of 2011, whereby the said Suit filed by the respondent was decreed against the appellants jointly and severally in the sum of Rs.1,150,565.00 with cost of funds thereon and costs of the Suit. Final decree for sale of the mortgaged property was also passed in the above Suit. It may be noted that the Suit had proceeded ex-parte against appellants / defendants 2 and 3 as they did not file any application for leave to defend, and such application filed by appellant / defendant No.1 was dismissed on merits.

2. It was contended by the learned counsel for the appellants that the purported statement of account filed and relied upon in its Suit by the respondent was not in accordance with the Banker’s Books Evidence Act, 1891, as required under Sub-Section (2) of Section 9 of the Ordinance, and the details of finance as required under Sub-Section (3) of Section 9 of the Ordinance were also not disclosed by the respondent in its plaint. He submitted that in view of non-compliance of the above mandatory provisions, the Suit was not maintainable and was liable to be dismissed. He further submitted that by entertaining and decreeing the said Suit, the learned Banking Court has committed a grave error in law which is liable to be corrected by this Court by dismissing the Suit. In support of his submissions, learned counsel relied upon *Bankers Equity Ltd. VS M/s Bentonite Pakistan Limited and 7 others*, **2003 CLD 931**.

3. On the other hand, learned counsel for the respondent submitted that the provisions of Sub-Sections (2) and (3) *ibid* are not mandatory or penal in nature and as such the respondent could not be non-suited due to non-compliance thereof, especially in view of the default / breach of obligation committed by the appellants. He further submitted that the legitimate claim of the respondent was rightly entertained and granted by the learned Banking Court. No other submission was made by the learned counsel.

4. We have heard learned counsel for the parties and have carefully perused the material available on record with their assistance. Since we have to see the effect of non-compliance of Sub-Sections (2) and (3) of Section 9 of the Ordinance by the respondent / financial institution, it would be advantageous to discuss the said provisions briefly. Sub-Section (2) *ibid* provides that the plaint in a Suit under the Ordinance shall be supported by a statement of account which in the case of a financial institution shall be duly certified under the Banker's Books Evidence Act, 1891, and all other relevant documents relating to the grant of finance ; and, Sub-Sections (3) *ibid* requires that the plaint in a Suit for recovery instituted by a financial institution shall specifically state (a) the amount of finance availed by the defendant from the financial institution, (b) the amounts paid by the defendant to the financial institution and the dates of payment, and (c) the amount of finance and other amounts relating to the finance payable by the defendant to the financial institution up to the date of institution of the Suit.

5. Perusal of the plaint shows that compliance of Sub-Sections (2) and (3) *ibid* was not made by the respondent, and this position was not disputed before us by the respondent. The only defence put up by the respondent is that the said provisions are not mandatory or penal in nature. We do not agree with this proposition, and in this context would like to refer to the case of *Apollo Textile Mills Ltd. and others V/S Soneri Bank Ltd.*, **PLD 2012 S.C. 268 = 2012 CLD 337**. In the cited authority, the Honourable Supreme Court was pleased to hold not only that the provisions of Sections 9 and 10 of the Ordinance are mandatory, but also that they require strict compliance ; and, similarity of the provisions legislated in Sections 9 and 10 *ibid* leads to identical consequences, that is, in the absence of the demanded accounts and documents, Suit of the plaintiff institution will be rejectable while the defendant's application for leave to defend will be rejected followed by a decree against him. It was also held that because of the Ordinance being a special law, its provisions shall override all other laws by virtue of Section 4 thereof. As to compliance of Sub-Section (2) *ibid*, it was held by the Honourable Supreme Court that upon the compliance of the provisions of Sub-Section (2) of Section 9 *ibid* by a financial institution

depends the right of defence of a defendant in a summary Suit as visualized under the Ordinance, therefore, filing of duly certified statements of account by a financial institution along with its plaint cannot be taken to be a mere formality or a technicality ; this provision can only be held to be mandatory ; and, without its strict compliance the plaint would be incomplete and cannot become basis of a Suit under the Ordinance.

6. Regarding the accounts and documents stipulated in the above Sections, it was held in *Apollo Textile Mills Ltd.* (supra) that the plaintiff institution and the defending customer have identical statutory responsibility respectively under Sections 9(3) and 10(4) of the Ordinance to plead and state clearly and particularly the finances availed by a defendant, repayments made by him, the dates thereof, and the amounts of finance repayable by such defendant, who is saddled with an additional responsibility to also specify the amounts disputed by him ; a defending customer is obliged to put in a definite response to the bank's accounting and has under Sub-Sections (3) and (4) of Section 10 *ibid* to compulsorily plead and answer in the application for leave to defend his accounts as well as the facts and amounts disputed by him as repayable to the plaintiff ; a banking Suit is normally a Suit on accounts which are duly ledgered and maintained compulsorily in the books of accounts under the prescribed principles / standards of Accounting in terms of the laws, rules and banking practices ; as such instead of leaving it to the option of the parties to make general assertions on accounts, the Ordinance binds both the sides to be absolutely specific on accounts ; and, the parties to a Suit have been obligated equally to definitely plead and to specifically state their respective accounts.

7. As to the consequences of non-compliance of the above provisions, it was held in *Apollo Textile Mills Ltd.* (supra) that absence or non-impleading of accounts and documents by the plaintiff in terms of Sub-Section (3) of Section 9 and/or by the defendant in terms of Sub-Sections (3) and (4) of Section 10 of the Ordinance, entails identical legal consequences ; namely, rejection of the plaintiff-institution's Suit or rejection of the defendant's application for leave to defend followed by a decree against him, as the case may be. It was also held that the Court, therefore, in performance of its duty must itself examine the plaint and documents to decide as to whether the Suit complied with the mandatory provisions of Section 9 or not and as to the nature of the order, judgment or decree to be passed by the Court ; and, the Court was not expected to proceed blind folded.

8. It may be noted that Sub-Section (1) of Section 10 provides that in any case in which summons have been served on the defendant as provided for in Sub-Section (5) of Section 9 of the Ordinance, the defendant shall not be

entitled to defend the Suit unless he obtains leave from the Banking Court to defend the same and in default of his doing so, the allegations of fact in the plaint shall be deemed to be admitted and the Banking Court may pass a decree in favour of the plaintiff on the basis thereof or such other material as the Banking Court may require in the interest of justice. Under Sub-Section (11) of Section 10, where the application for leave to defend is rejected or where the defendant fails to fulfill the conditions attached to the grant of leave to defend, the Banking Court shall forthwith proceed to pass judgment and decree in favour of the plaintiff against the defendant. The above provisions show that a decree can be passed by the Banking Court in a banking Suit against the defendant either under Sub-Section (1) or under Sub-Section (11) of Section 10 of the Ordinance, that is to say only when the defendant fails to file an application for leave to defend, or his application is rejected, or after the grant of leave to defend to him and after appreciation of evidence led by the parties, the Banking Court comes to the conclusion that the plaintiff is entitled to a decree.

9. It is important to note that the Banking Court can exercise jurisdiction under Sub-Section (1) or under Sub-Section (11) of Section 10 and pass a decree thereunder in favour of the plaintiff and against the defendant only when summons in the prescribed form are issued and served on the defendant as provided in Sub-Section (5) of Section 9 ; the plaint is compliant with the mandatory requirements of Sub-Sections (2) and (3) of Section 9 ; the allegations of fact in the plaint disclose a subsisting cause of action against the defendant ; the Suit is maintainable by all standards and is not barred by any law ; and, the plaintiff is able to show that he is entitled to the relief prayed for against the defendant. If any one of the above conditions precedent for a competent Suit are lacking, the plaintiff shall not be entitled to a decree either under Sub-Section (1) or under Sub-Section (11) of Section 10. It must be kept in mind that absence of application for leave to defend or its dismissal does not mean that the entire claim of the plaintiff in a Suit under the Ordinance should be accepted and granted straightaway without examining the claim made in the plaint. In such an event, no doubt the plaintiff becomes entitled to a decree, but only to the extent of such amount which is permissible in law. Thus, the foremost duty of the Banking Court is to examine whether the Suit is maintainable or not, and if it is maintainable, only then the Banking Court should proceed with the Suit in accordance with law and examine the claim of the plaintiff.

10. Coming back to the present case, the respondent had the full opportunity at the time of filing the Suit to comply with the mandatory requirements of Sub-

Sections (2) and (3) of Section 9 *ibid*, but it admittedly failed in availing such opportunity. Thus, the respondent is bound to face the consequence of its non-compliance in view of the law laid down by the Honourable Supreme Court in *Apollo Textile Mills Ltd.* (*supra*). The plaint of the respondent's Suit was liable to be rejected as the Suit was barred under the above Sub-Sections. This aspect was not appreciated by the learned Banking Court which proceeded to decide the Suit in a mechanical manner without applying a judicial mind. The impugned judgment and decree are, therefore, liable to be set aside, and the plaint is liable to be rejected.

11. Before parting with this case, it may be observed that upon rejection of the plaint the respondent will be entitled to the benefit of Rule 13 of Order VII CPC if it chooses to file a fresh Suit against the appellants on the same cause of action, provided the law otherwise so permits.

12. Foregoing are the reasons of the short order announced by us on 15.11.2017 whereby this appeal was allowed with no order as to costs, the impugned judgment and decree were set aside and the plaint of Suit No. 29 of 2011 filed by the respondent against the appellants before the learned Banking Court-I Sukkur was rejected.

JUDGE

JUDGE