

*Judgment Sheet*

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

First Appeal No. D – 14 of 2010

Present :

1. Mr. Justice Nadeem Akhtar
2. Mr. Justice Shahnawaz Tariq

Appellant : Habib Bank Limited, through Mr. Riazuddin Qureshi  
Advocate.

Respondents : (1) Aijaz Ali Khaskheli, through Mr. Naimatullah  
Soomro Advocate, and  
(2) The Judge, Banking Court No.II, Hyderabad.

Date of Hearing : 12.02.2014.

**J U D G M E N T**

**NADEEM AKHTAR, J.** – Through this appeal filed under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance XLVI of 2001 (**‘the Ordinance’**), the appellant has impugned the order passed on 06.05.2010 by the learned Banking Court No.II Hyderabad in the respondent No.1’s Suit No.22 of 2009 dismissing the appellant’s application for leave to defend ; and, the judgment and decree dated 06.05.2010 passed in pursuance of the said order, whereby the respondent No.1’s said Suit was decreed with costs against the appellant as prayed by respondent No.1.

2. The relevant facts of the case are that respondent No.1, as the customer of the appellant, filed Suit No. 22 of 2009 before the Banking Court No.II Hyderabad for declaration, settlement of account, recovery and damages. The case of respondent No.1, as averred in the plaint, was that he applied to the appellant for a finance facility for purchasing a vehicle, which was sanctioned by the appellant. The parties entered into a Lease Agreement, whereby the vehicle was leased to respondent No.1 by the appellant, and in consideration of such facility, respondent No.1 agreed to repay the amount of the facility to the appellant on the terms and conditions stipulated in the agreement. Some payments were made by respondent No.1, but the appellant committed breach of its obligations under the agreement. In the above background, the Suit was filed by respondent No.1 praying *inter alia* for a declaration that the appellant had committed default in fulfilment of its obligation ; the appellant was liable to

pay Rs.474,000.00 to respondent No.1 towards the cost of the vehicle as well as mark up thereon ; and, respondent No.1 was entitled to Rs.100,000.00 as damages on account of mental torture etc. caused due to the acts of the appellant.

3. After service of summons, the appellant filed its application for leave to defend the Suit under Section 10 of the Ordinance. The allegations raised and the claim made by respondent No.1 in his plaint, were denied by the appellant, and it was asserted that it was respondent No.1 who had failed in fulfilling his obligations under the agreement. The claim of damages was specifically denied by the appellant.

4. Through the impugned order dated 06.05.2010, the application for leave to defend the Suit filed by the appellant was dismissed by the learned Banking Court by holding that the appellant had not raised any substantial question of law or fact requiring evidence in the matter ; and, the appellant's application was hit by the provisions of Sub-Sections (3) and (5) of Section 10 of the Ordinance. Through the impugned judgment and decree dated 06.05.2010 passed in pursuance of the said impugned order, the Suit was decreed by the learned Banking Court against the appellant with costs as prayed by respondent No.1, on the grounds that the plaint was verified on oath and was supported by documents ; the appellant's application for leave to defend the Suit had been dismissed ; there was nothing in rebuttal ; and, there was no reason to disbelieve the version of respondent No.1.

5. Mr. Riazuddin Qureshi, the learned counsel for appellant, submitted that the findings of the learned Banking Court are incorrect and contrary to the material that was on record. He argued that the appellant's application for leave to defend the Suit was compliant of Sub-Sections (3) and (5) of Section 10 of the Ordinance, as the same was in the form of written statement containing a summary of substantial questions of law and fact ; and, the appellant was not obliged to file any document, as the documents on which the appellant was relying were already on record along with the plaint. It was urged that the claim of damages and recovery of money could not be decided or granted without evidence. It was further urged that the appellant has been condemned unheard as no opportunity was provided to it to produce evidence in support of its defence. It was prayed on behalf of appellant that the impugned order, judgment and decree, being contrary to law, be set-aside.

6. On the other hand, Mr. Naimatullah Soomro, the learned counsel for respondent No.1, submitted that the order of dismissal of the application for leave to defend the Suit is not appealable, and after dismissal of the said application, the Banking Court had no other option but to decree the Suit of respondent No.1 against the appellant under Section 10(11) of the Ordinance. He further submitted that proper course was adopted in this case by the learned Banking Court as the appellant's application for leave to defend the Suit had been dismissed, whereafter there was nothing in rebuttal to the claim of respondent No.1. The learned counsel supported the impugned order, judgment and decree, and prayed for the dismissal of this appeal.

7. We have heard the learned counsel and have also perused the material available on record with their assistance. In the impugned order, whereby the appellant's application for leave to defend the Suit was dismissed, it was observed by the learned Banking Court that statement of account had not been filed by the appellant along with its said application, nor was any document filed therewith in support of the pleas raised therein, and further that the said application was not in the form of a written statement. On the basis of above observations, the learned Banking Court came to the conclusion that the appellant had not complied with the provisions of Sub-Sections (3) and (5) of Section 10 of the Ordinance, and as such its application was liable to be rejected under Section 10(6) of the Ordinance. Under Section 10(3) of the Ordinance, the defendant is obliged to file his application for leave to defend the Suit in the form of a written statement containing a summary of substantial questions of law and fact in respect of which, in his opinion, evidence needs to be recorded. A perusal of the appellant's application shows that the same was in the form of a written statement, and the appellant had also given therein a summary of substantial questions of law and fact. Additional pleas were also raised by the appellant in its application. Therefore, the finding of the learned Banking Court that the requirements of Section 10(3) *ibid* were not complied with by the appellant, was not correct.

8. Regarding the filing of a statement of account, it may be noted that there is no provision in the Ordinance which requires that a statement of account should be filed by the defendant along with his application for leave to defend the Suit. In his application for leave to defend in a Suit filed by a financial institution, the defendant is obliged under Section 10(4) of the Ordinance only to disclose the details regarding the finance facility as contemplated in Clauses (a), (b), (c) and (d) of Section 10(4) *ibid*. The requirement of filing a statement of

account is mandatory only when a Suit for recovery is filed by a financial institution against its customer, and in such an event, the plaintiff / financial institution is obliged to file along with the plaint a statement of account duly certified under the Bankers' Books Evidence Act, 1891. The finding of the learned Banking Court that the appellant's application for leave to defend the Suit was liable to be rejected under Section 10(6) of the Ordinance in view of non-filing of statement of account by the appellant, was, therefore, contrary to law.

9. As far as the question of filing documents by the appellant along with its application for leave to defend the Suit in terms of Section 10(5) of the Ordinance is concerned, the contention of the learned counsel for the appellant appears to be correct that the appellant was relying on the documents filed by respondent No.1 along with his plaint, and no other document was required for appreciating the grounds urged by the appellant in its application. The above contention is correct also in view of the fact that both the parties were relying on the lease agreement and other related documents executed by the parties, which were already on record having been filed by respondent No.1 himself. As there was no non-compliance of Sub-Sections (3) or (5) by the appellant, and the appellant was not obliged to file statement of account along with his application for leave to defend, the learned Banking Court was not justified in dismissing the appellant's application by invoking Section 10(6) of the Ordinance. In view of the above discussion, it is our considered view that the application for leave to defend the Suit filed by the appellant ought not to have been dismissed on any of the above grounds.

10. Admittedly the Suit was filed by respondent No.1 seeking two declarations, recovery of money, settlement of account and damages. The most important aspect of this case, which has not been appreciated by the learned Banking Court, is that none of the above prayers could be granted without affording adequate opportunity to the parties to adduce their respective evidence. On this ground alone, leave ought to have been granted to the appellant to defend the Suit. The impugned order, judgment and decree, being bad in law and having been passed contrary to the well-settled principles of law, cannot be allowed to remain in the field, and as such are liable to be set-aside.

11. As a result of the above discussion, this appeal is allowed with costs. Consequently, the impugned order, judgment and decree are set-aside, and the application for leave to defend the Suit filed by the appellant is allowed. The

matter is remanded back to the learned Banking Court with a direction to frame issues in the Suit after notice to the parties within fifteen (15) days from the receipt of this judgment, and thereafter to decide the Suit in accordance with law preferably within a period of three (03) months from the date of framing of issues. The office is directed to communicate this judgment forthwith to the learned Banking Court for compliance.

Foregoing are the reasons of the short order announced by us in this appeal on 12.02.2014.

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