

Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

First Appeal No. D – 40 of 2021

Date	Order with signature of Judge
------	-------------------------------

Before :
Mr. Justice Nadeem Akhtar
Mr. Justice Adnan-ul-Karim Memon

Appellants : Syed Zafar Ali Shah and Syed Ameer Ali,
through Mr. Imran Ali Borano Advocate.

Respondent : National Bank of Pakistan,
through Mr. Yasir Tahseen Talpur Advocate.

Date of hearing : 06.11.2021.

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 appellants have impugned the judgment and decree dated 06.05.2021 passed by the learned Banking Court–I Hyderabad in Suit No.65/2020 filed by the respondent, whereby the said Suit was decreed against them, jointly and severally, in the sum of Rs.542,661.00 with costs and cost of funds from the date of default till realization of the decretal amount, and a final decree for the sale of the mortgaged property was also passed.

2. It was the case of the respondent before the Banking Court that an agricultural finance facility of Rs.380,000.00 was sanctioned by the respondent in favour of appellant No.1 on 17.03.2012 at a markup of 15.50% per annum which facility was to be repaid / adjusted by appellant No.1 by 31.12.2014. In order to secure the repayment of the said facility, appellant No.1 mortgaged his agricultural land in favour of the respondent ; and, appellant No.2 stood as guarantor of appellant No.1 as he executed his personal guarantee in favour of the respondent. It was alleged by the respondent that the appellants failed in fulfilling their obligations, and in this background, the above mentioned Suit was filed by the respondent. The appellants filed their application for leave to defend which was allowed by the learned Banking Court vide order dated 17.04.2021 subject to their furnishing a bank guarantee in the sum of Rs.600,000.00 within fifteen (15) days, and eight (08) issues were settled. As the bank guarantee was not furnished by the appellants, their defense was struck off on 03.05.2021 and thereafter the Suit was decreed against all the appellants, jointly and severally, in the terms noted above.

3. It was contended by learned counsel for the appellants that the Suit was based on fabricated and forged documents ; the documents filed and relied upon by the respondent were never executed by the appellants and the subject facility was never availed by them ; appellant No.1 did not mortgage his agricultural land in favour of the respondent ; the pass book of his said land was collected from him by the Mukhtiarkar concerned for assessing the damage caused to his land due to flood and to pay him compensation on behalf of the Government ; the said pass book was not returned to appellant No.1 by the revenue authorities despite his repeated requests ; appellant No.1 came to know through the respondent's Suit that the said pass book was in the custody of the respondent ; these important questions raised by appellant No.1 required evidence ; the learned Banking Court was also of the view that appellant No.1 had raised substantial questions of fact and law ; in such circumstances, leave to defend ought to have been granted to appellant No.1 unconditionally and the condition of furnishing the bank guarantee was not justified ; and, the Suit ought to have been decided on merits rather than non-suiting the appellants on a mere technicality of non-fulfillment of the condition of furnishing the bank guarantee.

4. On the other hand, learned counsel for the respondent supported the impugned judgment and decree by submitting that the Banking Court was fully justified in imposing the condition of furnishing surety ; such discretion exercised by the Banking Court cannot be called in question ; and, the Suit was rightly decreed as appellant No.1 had failed to fulfill the said condition.

5. We have heard learned counsel for the parties and have examined the material available on record. Perusal of the leave granting order passed by the learned Banking Court on 17.04.2021 shows that it was observed therein that appellant No.1 had denied to have mortgaged his land in favour of the respondent, and had also denied availing the subject finance facility. The aforesaid order further shows that in view of the above observations, the learned Banking Court had come to the conclusion that appellant No.1 had raised substantial issues that required evidence ; he was entitled to a fair chance to contest the Suit ; and, he was not to be condemned unheard. As issues had already been settled by the learned Banking Court while granting the leave to defend to the appellants, the parties were required to lead their respective evidence. However, appellant No.1 was deprived from such opportunity merely because he could not furnish the surety ordered by the learned Banking Court.

6. In Abdul Karim Jaffarani V/S United Bank Limited and 2 others, **1984 SCMR 568**, it was held by the Hon'ble Supreme Court that no hard and fast rule can be laid down for determining the question as to how the discretion vesting in the Court to subject the order for grant of leave to defend to conditions ought

to be exercised as this question depends on the facts and circumstances of each case ; it would be improper to lay down a rule of thumb for the exercise of power in matters of discretion vesting in a Court, when even the statute has left it unfettered ; the overall object of summary proceedings was to provide for expeditious disposal of litigation involving commercial transactions of a particular nature by a summary procedure so that the defendant does not have the means open to exploitation in the ordinary procedure for trial of Suits to prolong the litigation and prevent the plaintiff from obtaining an early decision by raising untenable and frivolous defenses ; it is in this context that the discretion to impose conditions is to be exercised ; if, therefore, the Court is of the opinion that the defendant is trying to prolong the litigation and impeding a speedy trial, although on the allegations made in the application a triable issue has been raised, then the Court would be justified to impose conditions ; but it will be improper exercise of discretion to impose conditions simply because the defendant is unable at the leave granting stage to adduce his evidence on the pleas raised in the defense ; and, the imposition of the condition requiring the petitioner to furnish security to the extent of the entire claim of the contesting respondent would amount to rendering the grant of leave to defend illusory.

7. In the light of the above-cited authority, it may be noted that it was not the case of the respondent before the learned Banking Court that the appellants were trying to prolong the litigation by raising untenable and frivolous defenses in order to prevent the respondent from obtaining an early decision, or they were trying to prolong the litigation and impeding a speedy trial, nor was any such observation made by the learned Banking Court in the leave granting order. On the contrary, the learned Banking Court was convinced that the questions raised by them, being substantial, required evidence. Section 10(9) of the Ordinance of 2001 provides that if on consideration of the contents of the plaint, the application for leave to defend and the reply thereto, the Banking Court is of the view that substantial questions of law or fact have been raised by the defendant in respect of which evidence needs to be recorded, it shall grant the defendant leave to defend the Suit ; and, under Section 10(10) of the Ordinance of 2001, the Banking Court, while granting leave to the defendant to defend the Suit, may impose such conditions as it may deem appropriate in the circumstances of the case, including the condition to deposit cash or to furnish security. The words “shall” and “may” used in sub-sections (9) and (10), respectively, are significant. While the grant of leave to defend the Suit is mandatory for the Banking Court in case the defendant succeeds in raising substantial questions of law or fact requiring recording of evidence, the imposition of condition by the Banking Court at the time of granting the leave to defend the Suit is directory and discretionary. The object of imposition of a condition upon the defendant at the time of the grant of leave to defend the Suit

is to only secure the claim of the plaintiff and not to penalize the defendant before the trial.

8. In our view, after observing that appellant No.1 had denied to have mortgaged his land in favour of the respondent and concluding that the questions raised by the appellants were substantial that required evidence, the learned Banking Court was not justified in imposing the condition of furnishing a bank guarantee for an amount exceeding the amount claimed in the Suit. We are also of the view that the discretion exercised by the learned Banking Court was improper and such condition appears to be harsh in the facts and circumstances of the instant case as, according to the respondent's own case, appellant No.1 had allegedly mortgaged his agricultural land with the respondent as security. It is to be noted that the impugned decree was passed only as a consequence of the non-fulfillment of such harsh condition by the appellants. It is well-settled that at the time of the grant of leave to defend the Suit, imposition of condition is the discretion of the Court, but such discretion should be exercised judiciously according to the facts and circumstances of the case and the condition, if any, should not be harsh.

9. It may be observed that the principle discussed above shall not apply as a rule of thumb in every case where the mortgage of immovable property, hypothecation of assets or pledge of stocks / goods is denied by the customer / mortgagor. The Banking Court would be competent to decide such questions / objections according to the facts and circumstances of each case. If such objection, on the face of it, is frivolous, misleading or malafide, or the Banking Court is of the opinion that evidence is not required to decide such question, the Banking Court may reject the same straightaway by following the summary procedure prescribed by the Ordinance of 2001.

10. Foregoing are the reasons of the short order announced by us on 16.11.2021 whereby the appeal was allowed with no order as to costs, and the impugned judgment and decree were set aside with direction to the learned Banking Court to decide the Suit expeditiously.

J U D G E

J U D G E