IN THE HIGH COURT OF SINDH AT KARACHI

First Appeal No. 133 of 2010

Present:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Omar Sial

ARIF KAPADIA **……….Appellant**

through Mr. Muhammad Farooq Hashim, Advocate

vs

KASB BANK LTD. & OTHERS **……….Respondents**

through Mr. Muhammad Ali, Advocate for the Respondent No.1

Date of hearing : 10th January, 2024
Date of short order : 10th January, 2024
Date of reasons : 11th January, 2024

JUDGMENT

OMAR SIAL, J.: In 2006, KASB Bank Limited extended a finance facility of Rs. 216 million to Kapadia Bela Textile Mills (Private) Limited. The facility was secured, among other things, by guarantees furnished by the directors of the company, who were four brothers, Arif Kapadia (the appellant in these proceedings), Shafi Kapadia, Salim Kapadia and Asif Kapadia (the latter three being respondents in these proceedings).

2. The record reflects that the company defaulted upon its obligations towards the Bank and to settle the dispute between them, entered into a Settlement Agreement on 08.03.2008. The terms of the Agreement show that the company and its directors admitted that they were under an obligation to pay an aggregate of approximately Rs. 203 million. It was also agreed between the parties that in consideration of the amount being paid in full, a property owned by the company, that had been mortgaged as

security would be transferred in the name of the Bank and that the Bank would initially bear the expenses incurred in such a transfer; however, half of those expenses would be re-paid to the Bank by the company and its directors, within ninety days of the transfer, which was by or before 06.06.2008.

3. The company and its directors defaulted upon their obligation to pay half of the transfer expenses, which prompted the Bank to file Suit No. 1053 of 2008 in the Banking Court No. 1 at Karachi seeking recovery of Rs. 8,111,762, being half of the expenses incurred in the transfer. Arif Kapadia, Shafi Kapadia and Salim Kapadia filed leave to defend applications. On 17.08.2010, the learned trial court observed in its order that all other money except payment of the transfer expenses had been settled between the parties. The learned trial court noted in its order that the Bank had sought re-payment of the following transfer expenses:

Nature of Expenses	**Amount Paid**	**50% amount payable by the Defendants**
Transfer Fee	10,796,391	5,398,196
2% Tax	4,074,137	2,037,068
Patwari Expenses	1,000,000	500,000
Cost of Funds		176,498
TOTAL	15,870,528	**8,111,762**

4. While dismissing the leave to defend applications, the learned trial court rejected the Bank's claim under all the heads given above, except for Rs. 5,398,196. On 27.08.2010, a decree for that amount was made.

5. Arif Kapadia, aggrieved by the order dated 17.08.2010 (the leave to defend dismissal order) and 27.08.2010 (the decree), has filed this Appeal, praying that both orders should be set aside. We have heard the learned counsels and perused the record. The arguments of the learned counsels are not being reproduced for brevity but are reflected in our observations and findings below.

6. The gist of the learned counsel of the appellant's argument is that the trial court did not appreciate the fact that once the entire money obligation towards the Bank was satisfied and the property in question was handed over and transferred in the name of the Bank, as per the terms of the Settlement Agreement, there was no finance facility in the field nor was there any mortgage subsisting in favour of the Bank hence the learned Banking Court did not have jurisdiction to adjudicate upon the dispute between the parties, as there was no relationship between a financial institution and customer, as required by the Financial Institution (Recovery of Finance) Ordinance, 2001 ("**FIO**"). According to the counsel, that relationship ended when the Settlement Agreement was entered, i.e., on 08.03.2008.

7. The impugned order dated 17.08.2010 shows that when the leave to defend application was argued, the only objection raised by the company and its directors was that they were not liable to reimburse the Bank for the expenses incurred by it with regard to the Patwari (Rs. 500,000) or the Rs. 176,498 on account of the cost of funds. The order reflects that no objection regarding the Rs. 5,398,196 (half of the transfer expenses) was raised, nor was an objection regarding jurisdiction raised. Learned counsel says that the trial court had erroneously made the observation. While what was argued in court is unknown to us, we believe that the learned counsel may be correct in his assertion, as we notice from the Leave to Defend application, which was filed, that the company and its directors took an objection to jurisdiction.

8. It is an admitted position that the appellants availed a finance facility and that it was to secure that facility that the appellants had mortgaged property in favour of the Bank. The Settlement Agreement executed, in essence, re-negotiated and re-structured some of the terms and conditions of the facility – the appellant would pay back a certain amount and transfer the mortgaged property to the Bank and would also pay half the 'transfer expenses'. This payment of half of the transfer expenses was a liability upon the company and its directors per the Settlement Agreement. The

terms of the Agreement have to be read as a whole and cannot be segregated into pieces. The Bank had agreed to receive a lesser amount than what was due only if the appellants transferred the mortgaged property in its name and paid half of the expenses in this exercise. The appellant not fulfilling their obligation under the Settlement Agreement would potentially make the entire Settlement Agreement void and revert the relationship between the parties to its original position as it existed before the execution of the Settlement Agreement. It is also pertinent to mention that there is no clause in the Settlement Agreement that stipulates that that Agreement supersedes any earlier agreement or arrangement entered into between the parties. We have observed that the Settlement Agreement is not happily worded or well drafted; however, the intent of the agreement is clear; there were specific steps to be taken by the company and its directors as a condition precedent before they would cease to be 'customers' as defined in the FIO 2001. One of those conditions was that the appellants would reimburse half of the transfer expenses to the Bank. It is equally pertinent to mention that under Article 4 of the Settlement Agreement, only "after the abovementioned transfer, the customer and the mortgagors shall cease to have any obligation or liability towards KASB."

9. Section 9 of the FIO provides that where a customer or a financial institution commits <u>a default in fulfilment of any obligation about any finance</u>, the financial institution or, as the case may be, the customer may institute a suit in the Banking Court by presenting a plaint. The word "obligation" is defined in section 2(d) to mean (i) any agreement for the repayment or extension of time in repayment of a finance or its restructuring or renewal or for payment or extension of time in payment of any other amounts relating to a finance or liquidated damages; and (ii) <u>any representations, warranties and covenants made by or on behalf of the customer to a financial institution at any stage, including representations, warranties and covenants about the ownership, mortgage, pledge, hypothecation or assignment of, or other charges on, assets or properties</u>

or repayment of finance or payment of any other amounts relating to finance or performance of an undertaking or fulfilment of a promise; and (iii) all duties imposed on the customer under the Ordinance. When the Settlement Agreement was executed, the appellants were admittedly customers of the Bank, and the representations and warranties made by the appellants in the Agreement would, therefore, fall within the ambit of the word “obligation”. Under section 9, a Banking Court would have jurisdiction to entertain the case on the ground that the default in fulfilment of any obligation about finance had occurred. We find no reason to interfere with the order of the learned trial court.

10. Above are the reasons for our short order dated 10.01.2024 pursuant to which the appeal was dismissed.

JUDGE

JUDGE