JUDGMENT SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Ist Appeal No. D — 78 of 2021
Ist Appeal No. D — 79 of 2021

BEFORE :
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Arshad Hussain Khan

Date of Hearing: 12.09.2023.
Date of Judgment: 28.09.2023.

Appellant: M/s Qalandri Filling & CNG Station Through Mr. Parkash Kumar Advocate.

Respondent: The Manager SME Leasing Limited Through M/s Faiz Durrani, Siraj Ali and Salahuddin Advocates.

J U D G M E N T

MUHAMMAD SHAFI SIDDIQUI, J.- These two appeals having been filed by common appellant/borrower arising out of a consolidated judgment purportedly passed in Suit No.31 of 2010 and Suit No.195 of 2014.

2. Brief facts which are very essential for the purpose of deciding the controversy in hand are as under:-

(i) Originally a Suit for declaration, permanent injunction, rendition of accounts and damages was filed as Suit No.31 of 2010 by borrower / appellant. This was without any prayer clause of damages. The Suit was dismissed by the Banking Court which judgment was challenged by the same appellant/borrower in Civil Appeal No.D-39 of 2010 along with the action taken by the Leasing Company / respondent for auction, in terms of Section 15 of the Financial Institutions (Recovery of Finances) Ordinance 2001. (hereinafter referred to as the Ordinance, 2001).

(ii) Bench of this Court while deciding the above appeal of the appellant maintained the order of the dismissal of the Suit for rendition of accounts referred above whereas partly allowed the appeal to the extent of action taken

by the Leasing Company under section 15 of the Ordinance, 2001. The order of the Division Bench was passed on 31.05.2011 setting aside only a part of the Judgment and Decree of the Banking Court dated 03.09.2010.

(iii) As a consequence of it the sale and taking over possession of property was reversed and it was left to the Leasing Company / Respondent to pursue its claim for the recovery of rental dues against the appellant in accordance with law.

(iv) Aggrieved of it both the lessee / borrower and the Leasing Company filed their respective petitions for leave to appeal before Honourable Supreme Court. Appellant's counsel perhaps was not aware when he addressed the Court on 12.09.2023 that his client too filed an appeal which was disposed of.

(v) The appeal filed by the Leasing Company was assigned Civil Appeal No.84-K of 2011 which was dismissed as infructuous after providing him an opportunity of going through a Judgment of ***NATIONAL BANK V SAF TEXTILE MILLS LTD***[1].

(vi) The other Appeal / Civil Petition No.737-K of 2011 of the Lessee / Borrower was also disposed of since the appellant was satisfied per order, that in view of the Judgment of the Honourable Supreme Court referred above, it may be left open for the Banking Court to decide afresh the fate of the Suit instituted by the appellant before it. The petition was accordingly disposed of. The text of the two orders are reproduced as under:-

Civil Petition No.84-K of 2011. [Leasing Company's Appeal]

(on appeal from judgment of High Court of Sindh, Karachi
Dated 31.5.2011 passed in Banking Appeal No.39/2010).

O R D E R

On 1.1.2014, learned ASC for the appellant was allowed time to go through a recent judgment of this Court dated 10.12.2013, passed in Civil Appeal No.146/2009 (Re: National Bank of Pakistan v. SAF Textile Mills Ltd, etc) and other connected matters, to see its application/effect on the present appeal. Today, Mr. Tasawur Ali Hashmi, learned ASC has candidly stated that in view of this judgment, striking down the provisions of section 15 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, this appeal has become infructuous, therefore, it may be disposed of as such, leaving it open for the appellant to follow any other appropriate remedy to pursue his claim against the respondents. Order accordingly.

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[1] National Bank of Pakistan and 117 others vs.
SAF Textile Mills Ltd & another
(PLD 2014 Supreme Court 283)

Civil Petition No.737-K of 2011. [Borrower's Appeal]
(on appeal from judgment of High Court of Sindh, Karachi
Dated 31.5.2011 passed in Banking Appeal No.39/2010).

O R D E R

Learned ASC for the petitioner submits that he will be satisfied with the disposal of this petition with the observation that in view of the judgment of this Court dated 10.12.2013, passed in Civil Appeal No.146 of 2009 (Re:National Bank of Pakistan v. SAF Textile Mills Ltd. Etc) and other connected matters, it is left open for the Banking Court to decide afresh the fate of suit instituted by the petitioner before it. This petition is disposed of accordingly.

2. Any other party aggrieved in this regard may also approach the Banking Court.

3. It appears that on the interpretation and understanding of the order of the Honourable Supreme Court specially borrower's appeal, the Banking Court, in a disposed of suit of borrower, proceeded to decide two applications filed by the plaintiff / borrower under order VI Rule 17. The application dated 05.06.2014 was allowed vide order dated 10.05.2016, and the other application which does not have a filing date but notices were issued on 29.07.2021, was dismissed vide order dated 30.08.2021. That the disposed of Suit of the appellant was yet again dismissed, whereas the Suit of the Leasing Company / Financial Institution, filed as Suit No.195 of 2014, after the orders of Honourable Supreme Court, was decreed and consequently these two appeals have been preferred.

4. We have heard the learned counsel and perused the material available on record.

5. The Division Bench of this Court in the first round of litigation dealt with the questions regarding the scope of the Suit of borrower (Suit No.31 of 2010) and the purpose behind filing the Suit i.e. the rendition of account. This was explained by the Bench in typed page 13 of the Judgment of Ist Appeal No.D-39 of 2010. The last 04 paras of the Judgment in *ibid* appeal are reproduced as under:-

> *"Minute perusal of the plaint reflects that neither the appellant has valued its suit for damages nor has claimed any actual damages and, therefore, suit in fact was only for rendition of accounts, declaration and permanent injunction.*
>
> *As to rendition of accounts, since the Appellant itself has in Para-10 of the plaint stated to have made payment of Rs.4062357/- including lease key money of Rs.905000/-, which always is retained by the*

Financial Institution before disbursement therefore, the question of making payment of lease key money does not arise. Even otherwise the deduction of lease key money is accepted by the Financial Institution Respondent No.1. If this amount is separated the payment made by the Appellant as detailed in Para-10 of the plaint tallies with the payment acknowledged by the Respondent No.1 in its statement of accounts therefore, there was no question of rendering accounts and judgment of the Banking Court denying rendition by observing that the statement of accounts has been placed on record is without exception and does not require any interference.

As to seeking declaration regarding notice U/s 15 of the Ordinance, 2001 and the consequent sale of the mortgaged property by exercising power U/s 15 of the Ordinance 2001 suffice it would be to observe that the Appellant was a defaulter and therefore, no declaration and injunction could be issued restraining the Financial Institution from adopting a statutory remedy available under Ordinance, 2001 and lastly the prayer of writing off the markup as rightly observed by the Banking Court was out of the ambit of its jurisdiction and therefore was rightly rejected. In the circumstances, we do not see any reason to interfere with the judgment and decree, whereby the suit of the Appellant was dismissed.

In view of what has been discussed above, the appeal is partly allowed by setting aside order dated 03.09.2010 U/s 15 of the Ordinance 2001 and the consequential sale and taking over of possession whereas the appeal challenging the judgment and decree dated 03.09.2010 stands dismissed. However, it will be open for the Respondent No.1 Leasing Company to pursue its claim for recovery of rentals/dues against the Appellant in accordance with law."

This concludes that an amount of Rs.9,05,000/- and another amount of Rs.55,000/- was retained by the Financial Institution and there was no question of making payment of lease key money and the amount was accounted for. All other receipts which claimed to have been in respect of the amount repaid towards lease rentals, have been disclosed, discussed and shown in the statement of account. The two above amounts have been excluded for a legitimate cause explained with reasons.

6. After the dismissal of suit, yet again, in the appeal we have minutely perused the statement of account and the credit entries disclosed and all amounts allegedly paid through the receipts. The first 02 receipts cannot form

part of statement of account in view of the reasons explained in the earlier order, some part of it was even for excise and other related account.

7. Apart from these two receipts, all receipts claimed by the appellant are disclosed in the Credit Column of the Statement of Account and hence all such amounts paid was adjusted which has been excluded from the amount so claimed, the late payment surcharge has been admitted in terms of the arrangement and cannot be questioned. The amount of overdue rentals outstanding from October 2007 to September 2011 includes the surcharge whereas financial losses have neither been explained through the pleadings including evidence nor could be legitimized in view of the late payment surcharge being claimed. Hence for the financial losses no satisfactory assistance was provided and hence Mr. Durrani was reluctant to claim this amount. This amount of financial losses as included in the decree is thus not sustainable which may be excluded as being part of the decree. As far as rests of the amount is concerned such as cost of funds no interference is required since it is governed by operation of law.

8. The Division Bench in the earlier appeal, also minutely perused the plaint which reflected that the Suit was neither valued for the purpose of claiming damages nor actual damages were claimed.

9. The Appeal of the Appellant in the first round was partly allowed to the extent of action initiated under Section 15 of the Ordinance, 2001. The Banking Court in its order “impugned in this appeal” has relied upon the order of the Honourable Supreme Court by reproducing it in typed page-16.

10. The appellant’s appeal before Honourable Supreme Court was disposed of in view whereof the Banking Court was obliged to decide afresh the fate of the Suit instituted by the appellant before it in the light of the SAF Textile Mills.

11. At that time there was no suit pending as rendition of account case was dismissed and damages were never formed part of Suit’s prayer whereas effects of Section 15 of the Ordinance 2001 were reversed by Division Bench.

Now the ratio of the SAF Textile Mills is only to the extent of vires of Section 15 of the Ordinance 2001, and from para-29 onward the Honourable Supreme Court in the said case laid down an authoritative observation in relation to entire Section 15 of the Ordinance, 2001.

12. Para-29 of the SAF Judgment dilates upon Article 8 and 10-A of the Constitution for its effect on Section 15 of the Ordinance, 2001. Para-30 and 31 reproduces Article 10-A of the Constitution and Section 15 of the Ordinance, 2001 whereas para-32 contextualized Section 15 of the Ordinance, 2001 with regard to banking functions. Para-33 apparently deals with the determination of liability of the borrower and the steps in relation to the disposal of the property in Execution of a Decree. Para-34 and 35 deals with the objections that could have been initiated in terms of Order XXI Rule 66 and Order XXI Rule 90 while the properties being put to auction for the recovery of the outstanding amount. Para-36 and 37 of the Judgment with the above background oversee Section 15 of the Ordinance, 2001 and its all sub-sections which also deals with the resolution of disputes. Para-39 is with regard to the understanding reached in para-36, 37 & 38 which concludes that the elementary principle of law is that the denial of a remedy is in fact a destruction of a right. Para-40 to 45 in essence concludes that Section 15 of the Ordinance, 2001 are ultra vires to the Constitution and the rump of the sections that remains is incapable to serve and its presence in the Statute would at best be ineffective and cause adverse for further mischief, therefore, the entire Section 15 of the Ordinance, 2001 was held to be ultra vires to the Constitution. This is the gist and ratio of the Judgment to be taken into consideration by the Banking Court.

13. The Order of the Honourable Supreme Court in Civil Petition No.737-K of 2011, of the borrower / petitioner, did not set-aside the order of the Banking Court and neither of the Division Bench which maintained the order of dismissal of the Suit of the appellant. The ratio of the SAF case has already been applied whereby the effects of Section 15 of the Ordinance, 2001 were nullified by the Division Bench and possession restored. It is respondent’s arguments that

within the frame of pleading of suit of borrower and applying SAF case, there was no occasion for yet another recourse.

14. Nonetheless despite allowing the first application for amendment which introduced a prayer clause for damages whereas the other application seeking amendment in the schedule was dismissed. There was no occasion to introduce a claim of damages in the light of SAF case which is only in relation to Section 15 of the Ordinance 2001, which effects have been provided. Nonetheless the suit of the appellant was yet again dismissed firstly; the appellant was unable to establish any damage that was caused; the action initiated under Section 15 of the Ordinance, 2001 was at the relevant time initiated under the law that existed on the Statute. It was later in time when the law declared ultra vires. Any action on the basis of the law existing cannot be said to be unlawful if performed under four corners of law. Secondly; the appellant was declared as defaulter by the Banking Court as well as by the Division Bench of this Court in Ist Appeal No.D-39 of 2010 whereas damages were claimed under the action triggered through Section 15 of the Ordinance 2001, as it then was, which is not sustainable. The appellant defaulted in the payment of outstanding installments and for its recovery, process initiated under the existing laws. It was a recovery procedure adopted in terms of Section 15 as available at the relevant time which only later declared ultra vires.

15. Insofar as the respondents' Suit No.195 of 2014, is concerned that was initiated once the matter was set at rest by the Honourable Supreme Court for recovery under section 15 of the Ordinance 2001, hence in time. We also do not see any ambiguity or error in the findings of Banking Court's Judgment. The statement of account has been discussed earlier and two of the receipts cannot form part of account of lease rentals.

16. Last but not least the objection to the extent of Leasing Company having exhausted the remedy before the Banking Court, we may say that the definition of Section 2 of the Ordinance, 2001 includes the Leasing Companies for the

purposes of defining Financial Institution to invoke the jurisdiction of Banking Court.

17. The appeal to the extent of the decree that concern with the rendition of accounts and damages is dismissed and the order of the Banking Court only to the extent of dismissal of the claim and not the procedure followed, is maintained whereas the decree passed in Suit No.195 of 2014, is maintained in the above terms after excluding the amount of Financial Losses claimed by Leasing Company, in the above terms.

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