

Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

1st Civil Appeal No.D-34 of 2023

Appellant : Ahmed Nawaz, through
Mr. Shahid Ali Panhwar, Advocate

Respondent : M/s Zarai Tarakiyati Bank Limited
Through Mr. Zahid Mehmood Mughal,
Advocate

Date of hearing : 12.12.2023

Date of Decision : 21.12.2023

JUDGMENT

ARBAB ALI HAKRO, J.- Through this First Appeal under Section 22 of Financial Institutions (Recovery of Finance) Ordinance, 2001 (“F.I.O.”), the appellant has impugned judgment dated 15.6.2023 and Decree dated 20.6.2023, passed by Banking Court-II, Sukkur (“Banking Court”), in Suit No.313 of 2022, whereby the said suit filed by Zarai Tarakiyati Bank Ltd (**respondent bank**) against Ahmed Nawaz (**appellant herein**) was decreed.

2. The relevant facts of the case are that the respondent bank filed a recovery suit for Rs.255,298/- against the appellant before the Banking Court. In the plaint, it was stated that the appellant applied for the finance facility, and accordingly, an agricultural loan was extended to the tune of Rs.165,000/- under L.C. No.118917 through pass books No.0012838 on 09.01.2018. In order to secure the repayment of the loan amount, the appellant executed and delivered to the respondent bank the following charged documents: -

- i) Loan Agreement for Trade-Related Modes of Finance;
- ii) Receipt;
- iii) Charge Creation Certificate and
- iv) Pass Book No.0012838

The appellant availed the finance facility, failed to repay the same along with markup and thereafter, the suit in question was filed on 13.5.2022.

3. Upon receiving the notice, the appellant filed an application for leave to defend, asserting that he applied for the loan on 16.01.2017, not on 09.01.2018. He received a loan amount of Rs.113,000/-, which he repaid in two instalments: one of Rs.11,300/- on 09.01.2018 and the second of Rs.130,000/- on 03.11.2021, totaling Rs.141,300/- paid to the respondent bank. He also claimed that the respondent bank issued him two receipts. However, when he approached the respondent bank for the return of the Pass Book and the issuance of a letter to the concerned Mukhtiarkar for the removal of the mortgage, the respondent bank refused and filed a suit falsely claiming that the appellant obtained the loan amount of Rs.165,000/- on 09.01.2018. The aforementioned application was dismissed by the Banking Court vide order dated 15.6.2023. Consequently, the respondent bank's suit was decreed as prayed for, hence this appeal.

4. At the very outset, learned counsel representing the appellant contended that the impugned judgment and Decree passed by the learned Banking Court is illegal and unlawful without mentioning proper reasons for decreeing the suit and without discussing or elaborating on the points of facts and law raised in the application for leave to defend. He urged that appellant obtained a loan facility amounting to Rs.113,000/- on 16.01.2017 instead of Rs.165,000/- on 09.01.2018 and he had repaid this facility in two instalments: Rs. 11,300/- paid on 09.01.2018 and Rs.130,000/- paid on 03.11.2021, totaling Rs.141,300/- paid to the respondent bank and respondent

bank filed a suit by managing false and fabricated loan receipts of the same date. He further submitted that the impugned judgment and Decree and the order dated 15.06.2023 dismissing the application for leave to defend were passed without considering the documents available on record, and it appears to have been done in hasty manner without applying a judicial mind to the facts and circumstances of the case; besides, learned Banking Court gave undue favour to the respondent bank by passing impugned judgment, which lacks detailed explanation, indicating failure to deliver a speaking judgment and the impugned order passed on application for leave to defend the suit under Section 10 (3) (4) & (5) of the Financial Institutions (Recovery of Finance) Ordinance, 2001. It was further argued that if the judgment and Decree is not set aside, the appellant shall be deprived of their valuable rights involved in the matter.

5. Learned Counsel representing the respondent, while supporting the impugned judgment and Decree passed by the learned trial Court, contended that the same is legal, lawful and warranted by law. So far, the contention of learned counsel for the appellant for declining leave to defend the suit; he stated that the appellant had failed to fulfil conditions specified in the order granting leave to defend the suit; the trial Court was justified in passing the Decree against the appellant; hence, such argument of learned counsel is not tenable in law. In the end, he submitted that instant 1st Civil Appeal, devoid of merit, may be dismissed with costs and direct the appellant to deposit the outstanding amount as directed by the learned trial Court.

6. We have heard the arguments advanced by learned counsel for the parties and minutely perused the material available on record.

7. In his application for leave to defend, the appellant claimed that he had obtained a loan facility amounting to Rs.113,000/- on 16.01.2017 instead of Rs.165,000/- on 09.01.2018. He mentioned

that he had repaid this facility in two instalments: Rs. 11,300/- paid on 09.01.2018 and Rs.130,000/- paid on 03.11.2021, totaling Rs.141,300/- paid to the respondent bank. Receipts for these payments were issued to the appellant by the respondent bank. However, the respondent bank did not return his passbook or issue a redemption letter. The appellant further claimed that the respondent bank filed a suit by managing false and fabricated loan receipts of the same date. Based on these circumstances, the appellant argued that leave to defend should have been granted. For ready reference, some excerpts of relevant portions of the application for leave to defend are reproduced below: -

“3. That the plaintiff have filed false case against me, as I applied for loan on 16.01.2017 and I received payment Rs.1,13000- which was paid by the defendant on shape of two installment paid one installment Rs.113,00/- on dated 09.01.2018 paid second installment Rs.1,30,000/- on dated 03.11.2021. Total paid Rs.1,41300/- to the concerned bank and concerned Bank has issued two receipts along with stamp paper and signature, then the defendant went to concerned Bank after paid all the expenses for getting Pass book, but the concerned Bank has not given such receipts and also not grant the letter to concern Mukhtiarkar. Hence I want to defend the same by filing written statement. Hence such permission may kindly be accorded to me to defend the suit.

4. That, the plaintiff has filed this false and fabricated suit, as the defendant has paid first installment of Rs.11,00/- to the concerned Bank on 09.01.2018 and the plaintiff has mentioned in the suit that the defendant has issued false loan on dated 09.01.2018, so therefore it clearly that the plaintiff has filed this suit on the plea of false, fabricated and managed loan receipt on the same date, and filed this false suit against the defendant, only to pressurized the defendant.”

8. The Banking Court disagreed with the appellant’s position as presented in his application for leave to defend and consequently dismissed it. It would be beneficial to reproduce a portion of the order below:-

“Having heard the learned counsel for the parties and after perusal of the record, it transpires that the learned counsel for the plaintiff bank submitted all the necessary finance documents alongwith plaint, he has also submitted the detailed statement of account, the property of the

applicant is still mortgaged with the plaintiff bank, no substantial question of law or fact has been raised by the applicant in his leave to defend application. So far as the Photostat copy of the sanctioned letter is concerned, the same pertain to the year 2017, where the instant finance pertains to the year, 2018, but so far as two repayment receipts are concerned, relevancy of the same has not been made in the leave to defend application, nor he has agitated any point, which relates the relevancy of these receipts with the instant case, even otherwise perusal these repayment receipts, it transpires that the same not legible. Under these circumstances, I do not find any merit in the instant application, the same is hereby rejected.”

9. Upon examining the alleged receipts attached by the appellant to the application for leave to defend, it is evident that there is no mention of the L.C. number under which the appellant deposited the amount. One of the receipts is a blank Debit Cash Voucher with an affixed stamp, but it lacks specific details. It does not indicate the purpose for which the amount was deposited. The respondent bank has attached certified copies of documents to the plaint, including a receipt of the loan payment and a Loan Account Statement. The receipt shows a loan payment of Rs.165,000/-, and the Loan Account Statement indicates that the amount was disbursed to the appellant via cheque. The appellant has not specifically denied this fact in his application for leave to defend.

10. Even otherwise, the application for leave to defend does not confirm to the provisions of Section 10(3) of the F.I.O. This Section requires that the application for leave to defend should be in the form of a written statement and should contain a summary of the substantial question of law, as well as facts for which any evidence needs to be recorded. The application is neither in the form of a written statement nor does it raise any substantial question of law or facts that would require any evidence to be recorded. Here, it would be imperative to reproduce the provision of Section 10(3) of the F.I.O. as follows: -

"10. Leave to defend.---(1) In any case in which the summons has been served on the defendant as provided for in subsection (5) of section 9, the defendant shall not be entitled to defend the suit unless he obtains leave from the Banking Court as hereinafter provided 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 interests of justice.

(3) The application for leave to defend shall be in the form of a written statement, and shall contain a summary of the substantial questions of law as well as fact in respect of which, in the opinion of the defendant, evidence needs to be recorded.

11. The requirement of above Sections 10 of the F.I.O. has been declared to be mandatory by the Supreme Court of Pakistan in the case of Apollo Textile Mills Ltd. and others v. Soneri Bank Ltd (PLD 2012 SC 268). The relevant portion of the judgment is reproduced below:-

"18. The Financial Institutions (Recovery of Finances) Ordinance, 2001 i.e. is a special law. It provides a special procedure for the banking suits. The provisions of the Ordinance 2001 under section 4 thereof override all other laws. The provisions contained in the said Sections require strict compliance. Non-compliance therewith attract as above referred, consequences of rejection of leave petition along with Decree etc. etc.

Applying all the settled and well known principles to determine the mandatory construction of a provision of law, the said provisions cannot but be held to be mandatory. This Court in the case of 'Niaz Muhammad v. Fazal Raqib' (PLD 1974 SC 134), held that:--

"It is true that no universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of the Courts to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed. As a general rule however, a statute is understood to be directory when it contains matter merely of direction, but not when those directions are followed up by an express provision that, in default of following them, the facts shall be null and void. To put it differently, if the Act is directory, its disobedience does not

entail any invalidity; if the Act is mandatory disobedience entails serious legal consequences amounting to the invalidity of the act done in disobedience to the provision"."

19. In this case, the application for leave to defend the suit filed by the petitioners did not fulfil the requirements of sections 10(3), (4) and (5) of the Financial Institutions (Recovery of Finances) Ordinance XLVI of 2001. It was admittedly not in conformity with the said mandatory provisions. No cause or the reason for the inability to comply with said requirements was shown."

[emphasis supplied]

12. We hold the view that the F.I.O. is a special statute, and the Banking Courts are obligated to follow a summary procedure, which is otherwise supported by the time-tested Order XXXVII of the C.P.C. The leave to defend cannot be granted mechanically in every case. Even if the leave to defend is granted, it must be restricted to the specific issue raised by the defendant in his application for leave to defend. The Negotiable Instruments Act of 1881 specifies certain special rules of evidence, including certain presumptions in favour of the plaintiffs and estoppels against the defendants. The concept of leave to defend necessitates that the defendant presents a positive defence of a particular fact, which must be supported by certain documentary evidence to convince the Court that there is sufficient ground for granting leave to defend. The mere denial of the date of disbursement of the loan, in the presence of documentary evidence (i.e., receipt of payment through cheque to the appellant), will not be sufficient for the Court to exercise such discretion. If there had been any positive fact alleged in the application for leave to defend, the Court would have required the defendant to prove such a fact. However, mere denial requires negative evidence, and proof of such fact is difficult. The verbal denial of the documentary evidence was disproved by the documentary evidence produced by the Bank. Thus, the documentary evidence negated and nullified the oral negative assertion.

13. The Banking Court thus rightly dismissed the application for leave to defend and, in consequence thereof, decreed the suit of respondent bank vide impugned Judgment and Decree as envisaged under the provision of Section 10(11) of the F.I.O., which provides the word 'forthwith' proceeded by 'shall', which hardly leaves any discretion with the Court but to pass a judgment and Decree on the material that is available on record. This proposition has already been discussed in various cases, including the cases titled "Mrs. Jawahar Afzal v. Messrs United Bank Limited" (2003 CLD 119), "Messrs United Bank Limited through Authorized Attorney v. Banking Court No. II and 2 others" (2012 CLD 1556) and "Khurram Farooq v. Bank Al-Falah Limited and another" (2018 CLD 1417).

14. The learned counsel for the appellant is unable to point out even a single instance of irregularity in the impugned judgment and Decree. In fact, the learned counsel for the appellant could not hint at anything plausible to convince us to take exception to the impugned judgment, which has been validly passed by the Banking Court after reviewing all the material available on record. Such findings do not suffer from any illegality, misreading, or non-reading of the record that would, in turn, call for the indulgence of this Court through the present appeal.

15. The upshot of the discussion is that the appeal in hand is devoid of any force hereby **dismissed**. Parties to bear their costs.

JUDGE

Faisal Mumtaz/PS

JUDGE