IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Present:
Mr. Justice Muhammad Saleem Jessar
Mr. Justice Jawad Akbar Sarwana

First Appeal No.D-01 of 2024

Ali Raza Mugheri

v.

Ghulam Rasool and 2 Others

Appellant	:	Ali Raza Mugheri through Mr. Atta Hussain Chandio, Advocate.
Respondent No.1.	:	Ghulam Rasool, Ex-Manager, HBFC Larkana;
Respondent No.2.	:	Naveed Ahmed, Manager, HBFC Larkana. Nemo; and,
Respondent No.3.	:	Managing Director and CEO, HBFC Shahrah-e-Faisal, Karachi; through Ghulam Ali Abbasi, Advocate
		Mr. Oshaq Ali Sangi, Assistant Attorney General for Pakistan.
Date of Hearing	:	28.02.2024
Date of Judgment	:	13.03.2024

J U D G M E N T

JAWAD AKBAR SARWANA-J.: The learned Judge of the Banking Court No.II at Larkana, instead of deciding the leave to defend application filed by the Defendant-Respondent Bank, HBFC (hereinafter referred to as “the Respondent-Bank”), under Section 10 of the Financial Institution (Recovery of Finances), Ordinance (“FIO”), 2001, proceeded to reject the Appellant-Customer’s plaint under Order 7 Rule 11 CPC for want of disclosing a cause of action and disposed of the leave to defend application holding that as the Plaint

did not lie, therefore the application for leave to defend had become infructuous. The Appellant-Customer, aggrieved by this Order dated 12.12.2023 passed by the Banking Court, has preferred this appeal.

2. The brief facts of the case are that in 2017, the Appellant-Customer applied to the Respondent-Bank for finance under ‘’Ghar Asan Flexi Scheme Loan” with a tenure of ten (10) years. The Appellant-Customer claimed that he made several payments to the Respondent-Bank, but when he sought settlement of accounts from the Respondent-Bank, and there was allegedly no response, he stopped making further payments of the disbursed finance. Thereafter, he filed a suit against the Respondent-Bank for Declaration, Settlement of Account and Permanent Injunction (“Suit No.188/2022”) The impugned Order states that the Respondent-Bank filed two applications for leave to defend [1], and the Appellant-Customer had filed an application under Order 39 Rules 1 and 2 CPC. It appears that the learned Banking Court Judge suo moto examined the Plaint under Order 7 Rule 11 CPC, and after hearing the parties, rejected the Plaint and dismissed the pending applications, including the Respondent-Bank’s leave to defend application on the ground that they had become infructuous, once the Plaint was rejected.

3. The learned Counsel for the Appellant urged that the impugned Order suffered from serious infirmity and could not be sustained. He contended that the Banking Court could not apply the provisions of Order 7 Rule 11 CPC and avoid the mandatory statutory requirement of the procedure laid down under FIO, 2001. He submitted that Banking Courts are “special courts” exercising powers under “special law” and operating as per “special procedure” provided for expeditious disposal of disputes involving “finance” under the FIO, 2001. As such, Banking Courts are constrained from deviating from the procedure expressly provided and prescribed under the FIO,

[1] Page 2, Paragraph 2 of the impugned Order available at page 89 of the Appeal file.

2001. The learned Counsel argued that if the Banking Court believed that the Plaint was bad for want of cause of action, it would still have to decide the application for leave to defend, which was a statutory requirement. The Banking Court could not reject the Plaint, and consequently hold that all pending miscellaneous applications stand disposed of, including the leave to defend application. He urged that such a modus operandi would conflict with FIO, 2001, which required, as a matter of statute, that the Banking Court, in the first instance, mandatorily decide the application for leave to defend based on substantial questions of fact and law raised by the Defendant. He further submitted that the Banking Court had no choice but to decide the application for leave to defend on merits, i.e., allow or dismiss the leave to defend application. The Banking Court was not competent to reject the Plaint straightaway. He argued that the main suit was not fixed for hearing therefore, the Banking Court could not reject the plaint at the stage of the leave of defend application. He further submitted that the Banking Court could reject the Plaint, but this could be done only after granting the application for leave to defend, and treating such leave application as a Written Statement, concluding thereafter either on its own motion or on an application filed by the Defendant, that the case was hit by Order 7 Rule 11 CPC. In other words, the Banking Court had to decide the application for leave to defend, and could not reject the Plaint under Order 7 Rule 11 CPC without deciding the leave to defend application.

4. The learned Counsel for the Respondent-Bank argued that the impugned Order passed by the Banking Court is in accordance with the law and requires no interference. He contended that frivolous litigation, as he alleged was the case in hand, should be nipped in the bud. Hence, the Plaint was rightly rejected as the Appellant-Customer could show no cause of action. He urged the Court to confirm the impugned Order.

5. Heard the learned Counsels and examined the documents available in the appeal file.

6. In *Gulistan Textile Mills Ltd. v. Askari Bank Ltd. and Others*, 2013 CLC 2005 (decided by Justice Syed Mansoor Ali Shah, as his lordship then was and is now a Judge of the Supreme Court),[2] it was held that a Banking Court exercising special jurisdiction under the FIO, 2001 has inherent powers to suo moto examine a plaint under Order 7 Rule 11 CPC. The *Gulistan Textile* case held that this power under Order 7 Rule 11 CPC may be exercised at any stage of the suit and "it is. . .obligatory on the Court to judicially assess (ideally at the very beginning) if the plaint discloses a "cause of action" and if it doesn't to reject the same without further ado". Therefore, it would matter little if the defendant had filed an application for leave to defend or such application was pending hearing when the Banking Court, upon examination of the Plaint found it to be devoid of "cause of action." The principles enunciated in the Gulistan Textile case have been approvingly cited by a Division Bench of the High Court of Sindh in *Imran Hussain v. Banker's Equity Limited*, 2019 CLC 272. Thus, the learned Counsel for the Appellant-Customer's arguments to the extent that the Banking Court should have first decided the application for leave to defend before it could have suo moto examined the Plaint under Order 7 Rule 11 carries no weight. The learned Judge of the Banking Court No.II at Larkana could always (at any stage) suo moto examine the Plaint filed by the Appellant-Customer under Order 7 Rule 11 CPC. There was nothing wrong with the exercise of jurisdiction in this context. However, another aspect of the matter merits discussion and is also discussed in the *Gulistan Textile* case, which we must address, i.e. the application of the test of cause of action by the Banking Court and the result thereto.

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[2] Weightage of Judgments by a Single Bench of the High Courts. Cases decided by High Court Judges who were subsequently elevated to the Supreme Court, which was neither approved nor disapproved by the Supreme Court, were entitled to the highest consideration and respect as and when such cases come up for consideration before the Supreme Court. *Agricultural Workers Union v. The Registrar of Trade Unions*, 1997 SCMR 66, 81

7. The standard of examination of the Plaint under Order 7 Rule 11 CPC to be carried out by the learned Judge of the Banking Court had to be made within the context of the “special jurisdiction” and not the ordinary civil jurisdiction. The Plaint filed by the Appellant-Customer under the FIO, 2001 having a special format, mandatory statutory contours and contents specified under the “special law” i.e. FIO, 2001, required a higher standard of precision.[3] The examination of the Plaint under Order 7 Rule 11 CPC raised suo moto by the learned judge had to be carried out within the context of the banking jurisdiction of FIO, 2001. This meant that the standard of examination of the Plaint under Order 7 Rule 11 CPC applied by a Banking Court could not be that of a civil court exercising ordinary civil jurisdiction, examining “cause of action” applying the usual principles of “cause of action” under the civil law, i.e. the civil procedure code, associated with carrying on such exercise in the general law. Therefore, when the learned Judge concluded that the Plaint filed by the Appellant-Customer did not disclose a “cause of action”, he should have examined the Plaint within the contours and context of the examination of a Plaint filed in a Banking Suit under the Banking Jurisdiction of the FIO, 2001. The Hon’ble Single Judge in the *Gulistan Textile* case made the following observations on this aspect:

> “16. What is then the nature of the "cause of action" in a plaint filed under section 9 of the Ordinance? A plaint under section 9 must disclose a cause of action which spells out the "default in fulfillment of any obligation with regard to any finance." It is for this reason that section 9(2) of the Ordinance prescribes that the plaint must be supported by statement of account, which is applicable to both the parties i.e., customer and the financial institution.
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> There is an additional requirement for the financial institution to get their statement of account certified under the Bankers' Books Evidence Act, 1891. The requirement of the Statement of

[3] Paragraph 12 of the *Gulistan Textile* case.

> Account is to quantify the default complained of under the Finance Agreement(s) entered between the parties. The default or breach, arising out of the contract between the parties or in fulfillment of any obligation with regard to any finance, must be numerically quantified and reflected through the Statement of Account. Section 9(2) further states that the plaint shall be supported by all other relevant documents relating to the grant of finance."

8. With the above standard of Plaint required under the FIO, 2001, we find that as a matter of form, the ingredients of a Plaint as to such "form of the Plaint" under section 9 of the FIO, 2001 were present and met by the Applicant-Customer. This meant that as per Section 9(1) and (2) of the FIO, 2001, the Plaint presented to the Banking Court was duly verified on oath, and it was supported by a statement of account and other documents being relied upon by the Appellant-Customer. Of course, as the Appellant-Customer filed the Plaint and not the financial institution, Respondent-Bank, it was not possible to meet the requirement of Section 9(2) pertaining to the Statement of Account being duly verified under the Banker's Book Evidence, Act, 1891. With regard to the contents of the Plaint as specified under Section 9(3) of the FIO, 2001, the Appellant-Customer's Plaint specified (a) the amount of finance disbursed by the financial institution, Respondent-Bank; (b) the amounts paid by the Appellant-Customer to the financial institution, Respondent-Bank and the date of payment; and (c) the amount of finance and other amounts relating to the finance payable by the Appellant-Customer to the financial institution, Respondent-Bank up the date of institution of the banking suit. Thus, Appellant-Customer also met the "content" thresholds specified under Section 9(3) of the FIO, 2001.

9. The "cause of action" set up by the Appellant-Customer in the Plaint, after having been examined by the learned Banking Judge under the special jurisdiction, also had to be examined from another angle. If the learned Judge of the Banking Court intended to examine the Plaint on the point of cause of action at the preliminary stage of

the Banking Suit, then the Banking Court had to examine if a cause of action was missing from the Plaint without examination of the application for leave to defend. The Banking Court had to assess the Plaint alone without referencing any factual or legal matter being averred by the opposing party. In other words, the Banking Court had to apply the test of determining cause of action only on the reading of the Plaint. The test of cause of action being that if what the Plaintiff states is taken to be correct does it entitle him to a relief or not in law.[4] In this regard, it is evident from the reading of the impugned Order that the learned Judge of the Banking Court took into account the oral submissions of the Respondent-Bank and the documents filed by the latter. Therefore, the examination of the issue of whether or not there was any cause of action was not carried out on the assessment of the Plaint. In such an event, it would have been efficient and expedient for the Banking Court, if it had decided that it would make its determination on the existence of the cause of action in a holistic manner after examining the documents available in the pleadings, noting the averments of the parties and after consideration of the oral submissions of the Counsels, then the Banking Court should have decided the application for leave to defend, and the issue of cause of action simultaneously. The document in question, i.e. the application for leave to defend should have been decided along with the legal points, which would have included a discussion on the cause of action. When the Banking Court found itself going beyond the examination of the Plaint to determine if there was a “cause of action”, it should have avoided an approach to pick and choose from the application for leave to defend and not to decide the application from which it had selected the facts relied upon to decide the issue of “cause of action.”. Under the FIO, 2001, the application for leave to defend is decided on consideration of the contents of the plaint, the leave to defend application and the replication, if any. A Banking Court shall grant the application for leave to defend if it is of the view that substantial questions of law or

[4] Paragraph 14 of the *Gulistan Textile* case.

fact have been raised in respect of which evidence needs to be recorded. To this end, depending on the facts and circumstances of each case, the issue of cause of action present may be one of the substantial questions of law or fact which have been raised in the pleading or taken up suo moto by the Banking Court in deciding the leave to defend under the FIO, 2001. Therefore, when the learned Judge of the Banking Court found himself overreaching, i.e., relying on material beyond the Plaint, to decide the cause of action, he should have changed gears and proceeded to decide the issue of cause of action within the context of the leave to defend.

10. We are cognizant that the parties have a right of appeal available to them arising from a decision on the application for leave to defend. As such, we are not inclined to decide whether or not the Plaint filed by the Appellant-Customer was devoid of “cause of action” in this appeal. We would much rather defer this matter to the Banking Court and retain the parties right of appeal against the Order of the Banking Court on the leave to defend application as per the provisions of FIO, 2001. Therefore, it appears proper to remand the case to the Banking Court to decide the application for leave to defend, including any and all legal grounds available to the parties, and, including the cause of action, etc.

11. In view of the above facts and circumstances, the appeal is allowed, and the impugned Order dated 12.12.2023 in Suit No.188/2022 is set aside, with the application for leave to defend filed by the Respondent-Defendant-Bank, HBFC, deemed to be still pending before the Banking Court, which shall be decided first. The legal arguments discussed in the impugned Order may be re-agitated by the parties and considered afresh in the context of deciding the application for leave to defend by the learned Banking Judge. The Banking Court, in the context of the leave to defend application or at any stage, remains at liberty to decide the fate of the Plaint, including, inter alia, the finding on the essential ingredient of a Plaint, i.e.

whether it is devoid of any cause of action. The Banking Court shall decide the application for leave to defend after hearing the parties within three (3) months from the receipt of the certified copy of this Judgment through the parties or otherwise. Office is directed to issue notice to the Banking Court No.II at Larkana, along with a certified copy of the Judgment to re-commence proceedings in Suit No.188/2022, from the stage of hearing of the application for leave to defend.

12. It is clarified that the observations made herein pertaining to the Banking Court's impugned Order of 12.12.2023 are confined to providing a background for deciding this Banking Appeal and are without prejudice to parties' claims and defences in the banking suit and/or any future litigation between them.

13. During arguments, the Appellant conceded before us that the Appellant had wrongfully impleaded the officers of the Financial Institutions as Defendants in the banking suit instead of the Financial Institution itself. Accordingly, service of notice by the banking court on the Bank at its registered address will be deemed to be effective service on Defendant Nos.1, 2 and 3.

14. There shall be no order as to costs.

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