

## IN THE HIGH COURT OF SINDH AT KARACHI

1<sup>st</sup> Appeal No.62 of 2001

Before:

**Mr. Justice Nadeem Akhtar &**

**Mr. Justice Muhammad Iqbal Kalhoro**

Allied Bank of Pakistan Limited..... Appellant.

Versus

Sultan Ali J.Lilani..... Respondent.

Date of hearing : 18.12.2014.

Date of Decision : 18.12.2014.

Appellant : Through Ms. Fauzia Rasheed Advocate.

Respondents : Through Mr. Naveed Ahmed Advocate.

### **J U D G M E N T**

**MUHAMMAD IQBAL KALHORO, J:** - This judgment shall dispose of the instant appeal filed by the appellant against the judgment and decree dated 9.7.2001 passed by the learned Banking Court No.1 Karachi, whereby the Suit No.3932/2000 filed the respondent for recovery of Rs.2,000,500/- was decreed to the extent of Rs. 15,00,500/- along with cost and 14% mark up from filing of the suit till its realization.

2. The relevant facts in brief are that the respondent filed the above suit pleading wherein that on persuasion of his relative namely Imran Ali working in appellant bank he opened a joint account with his wife there bearing PLS account No. 6193-6 on 23.6.1999 by making an initial cash deposit of Rs.500. On the same day, he deposited Rs.15 lacs through a cross cheque No. 689675

drawn on HBL Foreign Exchange Branch, Karachi dated 22.6.1999. He then made an enquiry in respect of his account position on 27.11.1999 but was informed that no amount of Rs.15 lacs was transferred to his account, which surprised him hence he made an application to the appellant Bank to probe into the matter and was given assurance the matter would be properly looked into. The respondent then presented a cheque of Rs.3 lacs on 29.11.1999, but that was dishonored with the remarks "Not arranged for". The respondent verbally lodged such complaint with the manager of appellant bank and subsequently in writing to the President appellant Bank and an application to the FIA crime Branch to probe into the matter. The appellant instead of considering the respondent's request for probing into the matter and paying back his amount of Rs.15 lacs filed a criminal complaint with a concocted story to malign him under sections 403, 406, 409, 420 and 109 PPC in the Special Court for the Offences in respect of Banks at Karachi. Due to such proceedings, the respondent suffered a great mental shock/torture for no fault of his hence he filed above stated suit seeking following relief(s).

- "a) A judgment and decree in the sum of Rs.1,500,500/- amount deposited with the Defendant by the plaintiff in PLS Account No.6193-6 plus 20% mark up on the said amount w.e.f. June, 99 till realization.*
- b) A judgment and decree in the sum of Rs.500,000/- towards damages, mental torture and malicious prosecution by defaming the prestige of the plaintiff and expenses incurred on defending the said proceedings.*
- c) Costs of the proceedings may also be awarded.*
- d) Any further other relief, which this Honourable Court may deem fit and proper under the circumstances of the case".*

3. The appellant was served, in pursuance of which it filed an application under Section 10 of the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 (hereinafter referred as the Act, 1997)

coupled with an application under section 5 of the Limitation Act. The application under Section 5 of the Limitation Act was dismissed by the learned Banking Court vide order dated 6.4.2001, whereas the application under Section 10 of the Act, 1997 was dismissed being time barred through the impugned judgment and decree.

4. The appellant feeling aggrieved by and dissatisfied with the impugned judgment and decree has preferred the instant appeal.

5. Ms. Fauzia Rasheed, learned counsel for the appellant mainly argued that learned Banking Court did not properly attend to the facts of the suit, which was bad and liable to be dismissed for misjoinder, and non-joinder of the necessary party. She further argued that the application for leave to defend was filed within time keeping in view the supply of a copy of plaint to the appellant but the learned Banking Court erred by holding that the application was time barred which in fact led to decreeing the suit filed malafidely by the respondent. She referred to the dates of publication for service upon the appellant, filing power on behalf of the appellant by its counsel, application made by the appellant for supply of the copy of plaint and application for leave to defend the suit, in order to shore up her above contention. At the fag end of her arguments, she prayed for setting aside the impugned judgment and decree.

6. On the other hand, Mr. Naveed Ahmed advocate representing the respondent argued, that the appellant was served with the notice properly through the publication in the two newspapers viz. daily Dawn and Jung dated 28.9.2000 having wide circulation. Nonetheless, the appellant failed to file application for leave to defend within stipulated time provided under the law that warranted passing of the impugned judgment and decree against it. He,

while referring the case laws reported in PLD 1990 SC 497, 1999 SCMR 2353, 2002 SCMR 476, 2004 SCMR 836, prayed for dismissal of the instant appeal.

7. We heard the learned counsel for parties and perused the material available on record. The instant appeal has been preferred under section 12 of the Act, 1997 that was in the field at the relevant time. Section 12 *ibid* deals with the situation arising out of a decree passed against the defendant under sub-section (4) of section 9 the Act, 1997. In terms whereof the defendant would be entitled to apply for an order setting aside the decree if he satisfied the Banking Court that he was prevented by sufficient cause from making an application under section 9 of the Act, 1997 or that the summons was not duly served upon him. Instead of filing such application before the Banking Court, the appellant has filed the appeal before this Court that obviously in view of the scheme enunciated under section 12 of the Act, 1997 is not maintainable here. The right to an aggrieved person to file an appeal against a decree, or an order refusing to set aside a decree, or an order permitting or preventing the sale of property, or a sentence passed by Banking Court is provided under section 21 of the Act, 1997. The act of preferring an appeal under section 12 of the Act, 1997 (which has a particular connotation) by the appellant cannot be construed to be mere a bona fide lapse on its part in presence of a specific provision regulating the matters concerning the appeal.

8. Since we heard the learned counsel for the parties on the above point at length, the examination of record and the applicable law in the given context would be relevant. The appellant was served through publication in dally Jung and Dawn dated 28.09.2000, which in view of sub-section (3) to section 9 of the Act, 1997 is considered to be valid service . The appellant in terms of section 10 of the Act, 1997 was required to make an application for leave to

defend the suit within 21 (twenty one days) of the publication. The record reflects that the counsel for the appellant filed his power in the Court on 7.10.2000 (which must have been in response to the publication appearing in two newspapers) and an application for supplying the copy of the plaint on 11.10.2000 that he received on 13.10.2000. However, he moved the application for leave to defend under section 10 of the Act on 26.10.2000, which admittedly was beyond the prescribed period of 21 days. The argument of the learned counsel that period to file an application for leave to defend the suit ought to have been computed by the trial Court from the date of receiving the copy of plaint by the appellant cannot be subscribed to. Service by publication is one of the modes of service provided under section 9 of the Act, 1997 which is not rendered useless or invalid merely because it does not carry a copy of the plaint. The fact that a copy of the plaint cannot be attached for effecting service upon the defendant would not imply or mean invalidity of service. The defendant would be deemed to be on notice through the publication to acquire the copy of plaint from office of the Court. His failure to do so however does not put up any barrier before him to make an application for leave to defend the suit within the statutory period as the grounds in support of such application could be submitted at a later stage after obtaining the copy of plaint. Such would be an approach in consonance with the dictum laid down by the Honorable Supreme Court in the case of Messrs Ahmed Autos and another versus Allied Bank of Pakistan limited (PLD 1990 SC 497). The Honorable Apex Court again in the case of Messrs Simnwa Polypropylene (PVT.) Ltd. and others versus Messrs National Bank of Pakistan (2002 SCMR 476) has held the same view in Para No.5, which for ready reference is respectfully reproduced herewith:

*“5. Learned counsel for the petitioners submitted that since in this case, the petitioners were served through three modes in the following*

*manner (1) through publication in the newspaper on 2-6-2000, (2) allegedly through registered post acknowledgement due on 1-6-2000 and (3) through bailiff of the Court on 15-6-2000, therefore, for the purpose of computing the period of limitation, the service effected through Bailiff of the Court should be taken into consideration and not the other as the same is comparatively more valid having been made in the prescribed mode by delivery of copy of the plaint in such suit whereas through other modes, the copies of the plaints were not delivered. The argument has no force. It has been declared under section 9(3) of the Ordinance that service in any of the modes shall be deemed to be valid service for the purpose of the Ordinance, therefore, the petitioners could not argue that the latest service modes of the three modes should be taken into consideration for computing the period of limitation and not the other. The view finds support from the judgments reported as Messrs Qureshi Salt and Spices Industries, Khushab and another v. Muslim Commercial Bank Limited, Karachi through President and 3 others (1999 SCMR 2353) and Messrs Ahmad Autos and another v. Allied Bank of Pakistan Limited (PLD 1990 SC 497).”*

9. The record further reveals that the learned Banking Court while passing judgment on the application filed by the appellant under Section 5 of the Limitation Act has observed, *“The defendant was served through publication in daily ‘Jang’ and ‘Dawn’ both dated 28.09.2000. There is also confirmation slips on record, revealing that the defendant was served on 26.09.2000. The Bailiff had served the defendant on 13.10.2000 and the defendant advocate had received the copy”*. The appellant despite service through the publication did not approach the trial Court to obtain the copy of plaint enabling it to file the application for leave to defend the suit within stipulated period. Its failure to obtain leave to defend the suit as required under the law left no option with the trial Court but to decree the suit based on the averments made in the plaint in terms of subsection (4) to Section 9 of the Act, 1997. There appears no illegality committed by the learned Banking Court, which could be taken care of by this Court. Under the circumstances, we find no merits in the appeal in hand, which is dismissed accordingly with no order as to costs.

Above are the reasons of our short order dated 18.12.2014.

JUDGE

JUDGE