

ORDER-SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA
First Civil Appeal No. D-02 of 2010.

Date of hearing	Order with signature of Judge
06.05.2015.	

Present:

Mr. Justice Nadeem Akhtar.
Mr. Justice Nazar Akbar.

Mr. Faiz Muhammad M. Larik, Advocate for appellant.

ORDER

Nazar Akbar J- The appellant is aggrieved by the judgment dated 30.6.2010 and decree dated 01.7.2010 of Banking Court-II, Larkana, whereby the appellant's Suit No.17/2004 was dismissed for want of jurisdiction.

2. The notices were issued to the respondents and they have filed their reply/objections through Mr. Abdul Razak Bhutto advocate. This first appeal was filed on 19.7.2010 and the counsel for the respondents after filing objections remained absent almost on every date, therefore, on 10.3.2015 after marking the counsel for the respondents absent it was observed that if none appeared on behalf of the respondents on the next date, this case will be decided with the assistance of appellant's counsel and on the basis of material available on record. Today this case was taken up before the tea-break and again none was present for the respondents. The position was same even after the tea-break.

3. Very briefly, the facts of this case are that the appellant by a registered sale deed dated 24.11.1994 purchased an immovable property, namely, Sikni plot admeasuring 2441 sq. feet, situated in Mohalla Murad Wahan, Larkana. The respondents on or about 07.6.1997 sent a notice addressed to one Hidayatullah for recovery of outstanding amount of Rs.183,375/- claiming that the said plot was mortgaged with the House Building Finance Corporation against the loan of Rs.99,000/-. The appellant approached the respondents and after explaining his position and examining the so-called record of the House Building Finance Corporation found that there had been some forgery and fraud in the process of loan and even the fake signature and seal of Mukhtiarkar were found on the documents. The plot

allegedly mortgaged was measuring 2230 sq. feet, therefore, the appellant filed a civil suit before the Senior Civil Judge-I, Larkana for declaration and injunction with the following prayer(s) :-

- “
- (i) *That this Honourable court be pleased to declare that plaintiff's plot/house measuring 2441 sq. ft. is situated in Mohalla Murad Wahan, Larkana boundaries shown in para No.1 of the plaint is not mortgaged property, and the site plan produced by the defendant No.2 is false, fabricated, managed and manipulated one. This Honourable court be further pleased to declare that the plaintiff or his predecessors in interest are not loanees of the defendants Nos.1 to 3 and the threatened action for arrest, dispossession from the suit property forcible recovery against the afore said plot is illegal, malafide, unwarranted by law.*
 - (ii) *That this Honourable court be further pleased to grant injunction and restraining the defendants No.1 and 2 not to dispossess and recover the loan amount from the plaintiff or auction the suit property of the plaintiff against the defendants No.1 to 3 except due course of law.*
 - (iii) *Award costs of the suit.*
 - (iv) *Any other relief available under the circumstances of the suit be granted to the plaintiff.”*

4. The learned First Senior Civil Judge, Larkana in terms of Order VII, Rule 10, CPC returned the plaint by holding that the remedy for the plaintiff was before the Banking Court since the respondents are banking institution. The appellant preferred Civil Appeal No.17/2001 against the order of return of his plaint and the learned V-Additional District Judge, Larkana by order dated 17.11.2002 dismissed the said appeal. Following the dismissal of appeal, the appellant filed a Civil Revision Application No.53/2002 before this Court and by order dated 08.3.2004 this Court also endorsed the two judgments of the trial Court and the appellate Court holding that the jurisdiction in the matter lies with the Banking Court. The operative part of the judgment from Civil Revision No.53/2002 is as follows :-

“On perusal of contents of plaint it is clear that in essence the controversy is to be adjudicated upon by the Banking Court constituted under the aforesaid Ordinance and if at all there is a serious question about jurisdiction of the court a preliminary issue can be framed, after filing of written statement by the defendants. However, by consent it is ordered that the suit be admitted by the

Banking Court concerned and further proceedings may be taken on accordance with the law. The application stands disposed of.”

5. The appellant thereafter filed suit in Banking Court No.II, Larkana bearing Banking Suit No.17/2004. Strangely enough, despite their consent in High Court in Civil Revision No.53/2002 respondents No.1, 2 and 3 filed an application under Order VII, Rule 11, CPC challenging the jurisdiction of Banking Court. However, the said application was dismissed by order dated 15.2.2006 and ultimately the Banking Court proceeded with the suit by framing the following issues :-

“Issue No.1: Whether this Court has no jurisdiction to entertain the suit?

Issue No.2: Whether the plaintiff is owner of Sikni plot an area of 2441 sq. feet and is in its possession situated in Mohalla Murad Wahan purchased through Registered Sale Deed dated 24.11.94?

Issue No.3: Whether the property’s possession was mortgaged as security against the loan obtained from the HBFC by defendant No.4?

Issue No.4: Whether suit is hit by Section 24(3) of the HBFC Act 1952?

Issue No.5: Whether the plaintiff is liable to pay the Court fee stamp according to the amount mentioned in the notice given by defendants No.1 & 2?

Issue No.6: Whether the Cause of Action has accrued to the plaintiff for filing the present suit?

Issue No.7: Whether the plaintiff is entitled to any relief?

Issue No.8: What should the decree be?”

6. The appellant and respondents led their evidence in support of their respective claim. However, instead of deciding the suit on merit by detailed reasoned judgment on each issue, the learned Banking Court again dismissed the suit after accepting the offer of appellant that he would not press prayer “A” and would be pressing prayer “B” regarding injunction against the respondents that appellant “may not be dispossessed except in due process of law”. The Banking Court on the pretext of the said statement even after recording

evidence declared that the plaintiff has chosen the wrong forum. Said judgment and decree has been impugned in this appeal.

7. We have heard learned Counsel for the appellant and perused the record.

8. Learned counsel for the appellant when confronted with the observation in the impugned order whereby the learned Banking Court has relied upon the statement given by him regarding non-pressing of prayer (a) contended that the statement was not given to render the jurisdiction of court null and void. It may be appreciated from the record that till date except sending notice the respondent bank has not taken any action pursuant to the notice, therefore, by passage of time the grievance of the appellant was diluted and it appears that such statement was given to the Court on persuasion of the court to dispose of the suit by consent without touching merits. However, defendant and their counsel did not attend the Court nor filed objection and on one fine morning the impugned order was announced. He drew our attention to the following observation of the trial Court :

“This court has also given notice of the statement of plaintiff advocate to learned advocate for defendants but he did not attend the Court nor filed any objection. The matter was then adjourned for passing final order.”

9. The perusal of order shows that even before last paragraph in the impugned order starting from “moreover”, the learned trial court had made up his mind and concluded that the Banking court has no jurisdiction to try the suit. The following observations from the impugned order:-

“I perused the relevant portion in the Ordinance 2001 it is clear that the present suit does not fall in any of the category shown above as such this court has no jurisdiction to try this suit”.

10. We have also perused the record and we find that the question of jurisdiction of Banking court had already been decided twice in favor of the appellant. Firstly, when this court by order dated 08.03.20040 in Civil Revision No. 53/2002 by consent of the respondents has held that the suit be admitted by Banking Court. The said order has been reproduced in Para-4 above of this judgment.

Again even the Banking court on the application under Order VII Rule 11 CPC by an earlier order dated 15.12.2006 has held as follows:

“Section 24(3) of the H.B.F.C, Act 1952, relates to the property which is mortgaged. Here in the instant case question of mortgage, loan and the property is disputed and therefore taking into consideration the contents of the plaint, as they are, the plaint does not seem to be hit by provision of Section 24(3) of the H.B.F.C, Act 1952, as the evidence has to be led by the parties do decide the disputed question of facts”

11. The Banking court has drawn eight issues in which keeping in view the history of the case starting from civil suit before civil court and going through the appeal and revision before High Court as well as crossing the hurdle of jurisdiction again in the Banking Court on the application under Order VII Rule 11 CPC, only issues No. 3 & 5 were relevant issues on which the Banking court should have given its findings. The learned trial court even otherwise was not supposed to abdicate the authority conferred upon the court in terms of Banking Companies (Recovery of Finances) Ordinance, 2001.

In view of its findings on the application under Order VII Rule 11 CPC reproduced above the Banking Court had no authority to dismiss the suit on the question of jurisdiction. It amounts to setting aside earlier findings of the same Court by a subsequent order. **Issue No. 1 & 4** had already been answered by the same Banking Court, therefore, the court was not supposed to frame the same issue again. Even otherwise by now it is settled law that instead of dismissing the suit on technicalities, the court should have decided the same on merit.

In view of the above discussion It is ordered that on remand the Banking Court on the basis of evidence available on record after hearing both the parties should decide **issues No. 2, 3, 5, 6, 7 & 8** within sixty (60) days. This First Civil Appeal was allowed by a short order dated 06.05.2015 and case was remanded to the Banking Court for decision afresh strictly on merit. The above are reasons for the said short order dated 06.05.2015.

Judge

Judge