

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Arshad Hussain Khan

Mr. Justice Amjad Ali Sahito

First Appeal No.43 of 2020

Appellants : M/s. New Allied Electronic Industries
(Pvt.) Ltd. and other through Mr. Abdul
Qayoom Abbasi, Advocate

Respondents : Pak Libya Holding Company (Pvt.) Ltd. and
other through Syed Aijaz Hussain Shirazi,
Advocate representing Respondent No.1

Date of Hearing : 24.08.2026

Date of Order : 24.08.2026

J U D G M E N T

Amjad Ali Sahito, J.- Through the instant First Appeal, preferred under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (“FIO”), the appellants have called into question the Order dated 11.02.2020 passed by the learned Judge, Banking Court No.III at Karachi, whereby their application under Section 12(2), read with Section 151, CPC, seeking recall and setting aside of the Judgment dated 28.11.2017 and Decree dated 11.01.2018, was dismissed.

2. Briefly stated, the facts giving rise to the present appeal are that, in the year 2007, Defendant No.1/present appellant No.1, with a view to restructuring its capital structure, passed a Board Resolution dated 20.03.2007 whereby it proposed to raise a sum of Rs.900 million as redeemable capital under Section 120 of the Companies Ordinance, 1984, through the issuance of Term Finance Certificates (“TFCs”). Defendant No.3/present respondent No.2 agreed to act as Trustee and, pursuant to the Trust Deed dated 20.04.2007, invited various financial institutions to participate in the Issue. The Issue was secured by various securities, guarantees and charge documents, while the

existing charge-holder banks and financial institutions also furnished their respective no-objections. Subsequently, the TFCs were electronically credited to the CDC Account No.2659 of the plaintiff/present respondent No.1, as reflected in the CDC Share Holding Report dated 10.05.2011.

3. Thereafter, the plaintiff/present respondent No.1 instituted Suit No.67 of 2017, originally numbered as B-67 of 2017, for recovery of Rs.51,100,962/- along with cost of funds against the appellants. The suit was initially instituted before this Court on 22.09.2012 and was subsequently transferred to the Banking Court, being the Administrative Court. Summons were issued to the defendants/present appellants through all prescribed modes, including publication. However, only Defendant No.3/present respondent No.2 entered appearance and filed an application for leave to defend, which was allowed. Defendants No.1 and 2/present appellants, despite service, failed to appear and file applications for leave to defend within the statutory period of thirty days. Subsequently, on 21.12.2012, they filed applications for leave to defend along with applications for condonation of delay. The said applications were dismissed for non-prosecution on 28.02.2014. Their subsequent application seeking recall of the said order was also dismissed on 04.08.2015, albeit with liberty to file a breakup of the alleged liability. Although the plaintiff/present respondent No.1 thereafter furnished the breakup of liability, Defendants No.1 and 2/present appellants, despite having been granted such liberty, failed to avail the same. Consequently, the suit was decreed on 28.11.2017 for a sum of Rs.36,615,530/- along with cost of funds, followed by the formal Decree dated 11.01.2018.

4. Subsequently, the appellants moved an application under Section 12(2) CPC, alleging that Respondent No.1 had concealed certain payments allegedly received during the pendency of the suit. Initially, the amount was stated to be Rs.10.2 million, which was subsequently asserted to be approximately Rs.9.8 million. Respondent No.1, in response, explained that an amount of Rs.8.8 million had been received from M/s. MSA Industries (Pvt.)

Limited, a distinct legal entity, pursuant to a Securities Sale Agreement dated 03.03.2014, under which the agreed consideration was Rs.24.757 million. It was further explained that the said amount was subsequently forfeited on account of default in terms of Clause 12(i) of the Agreement. On 27.05.2019, the learned Banking Court directed Respondent No.1 to disclose the receipt in question, whereupon Respondent No.1 submitted its statement dated 24.07.2019, duly disclosing the receipt and explaining the nature and circumstances of the underlying transaction. After considering the material available on record and the respective submissions of the parties, the learned Banking Court, vide Order dated 11.02.2020, dismissed the application under Section 12(2) CPC, giving rise to the present appeal.

5. Learned counsel for the appellants contends that the impugned order is contrary to law and the facts available on record and has been passed without proper appreciation of the material brought before the learned Banking Court. He submits that, during the pendency of the suit, Respondent No.1 received substantial amounts on account of the appellants' liability but deliberately withheld and concealed the same from the Court and, consequently, procured the Judgment and Decree through fraud, misrepresentation and suppression of material facts. According to learned counsel, apart from the sum of Rs.38,527,059/- admittedly paid prior to institution of the suit, a further amount of approximately Rs.9.8 million, alternatively stated in the application as Rs.10.2 million, was received during the pendency of the proceedings and ought to have been duly adjusted against the appellants' outstanding liability.

6. Learned counsel further submits that the aforesaid amount was duly supported by cheques, pay orders, payment slips and other documentary material, yet Respondent No.1 failed to furnish any plausible or legally tenable explanation as to why the said amount was not reflected or adjusted in the statement of account and the breakup of liability. It is argued that the non-disclosure and non-adjustment of the payment materially

affected not only the principal amount claimed but also the profit/markup calculated thereon, thereby resulting in the passing of an excessive decree. Learned counsel submits that the fact that the Banking Court itself directed Respondent No.1 to furnish details regarding the amount received from M/s. MSA Industries (Pvt.) Limited demonstrates the materiality and relevance of the transaction to the appellants' alleged liability.

7. Learned counsel for the appellants further contends that the learned Banking Court exceeded the scope of the pleadings and the permissible jurisdiction in proceedings under Section 12(2) CPC by holding that the amount of Rs.8.8 million received from M/s. MSA Industries (Pvt.) Limited had stood forfeited under Clause 12(i) of the Securities Sale Agreement dated 03.03.2014. According to him, the said Agreement did not form part of the subject matter of the original suit, nor was any issue relating to its forfeiture framed or adjudicated upon after recording evidence. He submits that M/s. MSA Industries (Pvt.) Limited was owned or controlled by appellant No.2 and that the payment made through the said entity was, in substance and effect, a payment towards the appellants' outstanding liability, which could not lawfully have been disregarded. Learned counsel has also assailed the original Judgment and Decree on the ground that the statement of account was neither properly certified nor duly proved in accordance with the Bankers' Books Evidence Act, 1891. He further submits that the learned Banking Court ought to have framed appropriate issues and afforded the appellants an opportunity to lead evidence on the allegations of fraud and misrepresentation, and that its failure to do so has occasioned a miscarriage of justice.

8. Conversely, learned counsel appearing for Respondent No.1, Pak Libya Holding Company (Pvt.) Limited, vehemently opposes the instant appeal and supports the impugned order. He submits that the appellants have failed to establish the existence of any fraud, misrepresentation or concealment of a nature capable of attracting the provisions of Section 12(2) CPC. According to learned counsel, the appellants are, in substance,

seeking to invoke Section 12(2) CPC as a substitute for the statutory remedy of appeal and, having failed to diligently pursue their applications for leave to defend, are now attempting to reopen and re-litigate the entire original banking suit on grounds which were available to them during the pendency of the said proceedings.

9. Learned counsel for Respondent No.1 further submits that the amount of Rs.38,527,059/- relied upon by the appellants had already been duly reflected in the statement of account and taken into consideration while determining the outstanding liability. He submits that the amount of Rs.8.8 million was not paid by the appellants towards discharge or reduction of their liability. Rather, the said amount was received from M/s. MSA Industries (Pvt.) Limited, a separate and distinct corporate entity, pursuant to the Securities Sale Agreement dated 03.03.2014, whereby MSA Industries had agreed to purchase the TFCs for a total consideration of Rs.24.757 million. Only an amount of Rs.8.8 million was received under the Agreement and, upon the subsequent default of MSA Industries, the Agreement stood terminated and the amount already received was forfeited in accordance with Clause 12(i) thereof.

10. Learned counsel for Respondent No.1 further submits that the receipt of the amount from M/s. MSA Industries (Pvt.) Limited was duly disclosed before the learned Banking Court once the Court specifically directed Respondent No.1 to furnish a statement in respect thereof. Accordingly, a statement accompanied by a summary of account was filed on 24.07.2019, expressly setting out and explaining the nature of the transaction. It is, therefore, contended that there was neither concealment nor deception on the part of Respondent No.1. Learned counsel submits that the appellants have failed to produce any documentary evidence establishing that the amount of Rs.8.8 million was deposited by them towards repayment or adjustment of the TFC liability, or that Respondent No.1 made any false or misleading representation before the Court. On these premises, it is argued that the appellants cannot, under the

guise of allegations of fraud and misrepresentation, seek to reopen, re-try or otherwise circumvent the finality of the original banking proceedings.

11. We have heard learned counsel for the parties and have carefully examined the record and considered the material available before us.

12. The principal question requiring determination is whether the appellants have succeeded in establishing fraud or misrepresentation of such a nature as would warrant setting aside the Judgment and Decree under Section 12(2) CPC. It is well settled that Section 12(2) CPC provides a remedial mechanism where a judgment, decree or order is assailed on the grounds of fraud, misrepresentation or want of jurisdiction. However, the said provision does not confer an unrestricted or appellate power of review whereby a party may reopen and re-agitate every finding of fact or law recorded in the original proceedings.

13. In the present case, the allegation of fraud principally rests upon the receipt of an amount of Rs.8.8 million by Respondent No.1 from M/s. MSA Industries (Pvt.) Limited. The learned Banking Court examined the Securities Sale Agreement dated 03.03.2014 and found that the same had been executed between Respondent No.1 and M/s. MSA Industries (Pvt.) Limited, a separate corporate entity, for the purchase of TFCs against an agreed consideration of Rs.24.757 million. The learned Court further found that only Rs.8.8 million had actually been received and that, upon the subsequent default of M/s. MSA Industries, the transaction was terminated and the amount stood forfeited in terms of Clause 12(i) of the Agreement. The appellants have not placed before us any cogent, credible or convincing material demonstrating that the said amount was, in fact, paid by them towards discharge or adjustment of their decretal liability.

14. The mere fact that Appellant No.2 may have had some association, connection or relationship with M/s. MSA Industries does not, in law, render the latter and the appellants identical

legal entities. The separate corporate personality of M/s. MSA Industries cannot be disregarded in the absence of legally sufficient grounds. Consequently, a payment made by M/s. MSA Industries pursuant to an independent contractual arrangement cannot, merely by reason of such alleged connection, be treated as a payment made by the appellants towards their outstanding liability. The burden lay upon the appellants to establish the factual and legal foundation for treating the amount received from M/s. MSA Industries as repayment of the liability of Appellant No.1. No such foundation has been satisfactorily established from the record.

15. We also find considerable force in the observation of the learned Banking Court regarding the inconsistency in the appellants' own assertion concerning the amount allegedly concealed by Respondent No.1. Although the application under Section 12(2) CPC initially alleged concealment of an amount of Rs.10.2 million, their learned counsel subsequently stated before the Banking Court that the actual amount was Rs.9.8 million and that the figure of Rs.10.2 million had been mentioned inadvertently. Such inconsistency assumes significance in proceedings founded upon an allegation of deliberate fraud and materially undermines the credibility of the appellants' assertion. Fraud cannot be established on the basis of conjecture, mere allegation or uncertain computation; rather, it must be proved by clear, cogent and convincing evidence.

16. The contention that the learned Banking Court was necessarily required to frame issues and record evidence before deciding the application under Section 12(2) CPC is equally devoid of merit in the circumstances of the present case. The relevant documentary material was available before the Court, the parties were afforded an opportunity of hearing, and the explanation furnished by Respondent No.1 was duly considered. The appellants have failed to identify any specific piece of evidence which they were prevented from producing and which, if brought on record, could establish that Respondent No.1 had deliberately deceived or misled the Court for the purpose of

procuring the Judgment and Decree. A mere assertion that a full-fledged trial ought to have been conducted cannot, by itself, furnish a foundation for an allegation of fraud.

17. The remaining objections raised by the appellants, relating to the statement of account, alleged non-proof of disbursement, authority of the person instituting the suit, certification of the statement of account under the Bankers' Books Evidence Act, 1891, and computation of profit, essentially pertain to the merits of the original banking claim. Such objections were matters which the appellants could and ought to have raised in the original proceedings by duly pursuing their applications for leave to defend. Having failed to avail themselves of the statutory opportunity available to them, the appellants cannot, in the absence of proof of fraud or misrepresentation, employ proceedings under Section 12(2) CPC as a means to reopen and re-examine the merits of the original decree.

18. The record further establishes that the appellants were not deprived of an opportunity to contest the original proceedings. Summonses were issued through the prescribed modes of service, whereafter the appellants entered appearance through counsel and filed applications before the learned Banking Court. Those applications were subsequently dismissed for non-prosecution after adequate opportunity had been afforded. Thereafter, the appellants were specifically granted liberty to furnish a breakup of the alleged liability. Despite such opportunities, they failed to avail themselves of the remedies available to them. In these circumstances, the subsequent absence or non-appearance of their counsel cannot, by itself, constitute proof that Respondent No.1 procured the Judgment and Decree through fraud or misrepresentation.

19. We are likewise unable to subscribe to the contention that the learned Banking Court acted beyond its jurisdiction merely because it examined the Securities Sale Agreement dated 03.03.2014 and considered the question of forfeiture of the amount of Rs.8.8 million. The said transaction was relied upon by the appellants themselves as the very basis of their allegation

that Respondent No.1 had concealed a payment received towards their liability. The learned Banking Court was, therefore, competent to examine the relevant document and the explanation furnished by Respondent No.1 for the limited purpose of determining whether the amount in question constituted payment towards the appellants' liability and whether the allegation of fraud or concealment was substantiated. Mere disagreement with the conclusion drawn by the learned Banking Court from the document does not, in itself, constitute a jurisdictional error.

20. Upon a cumulative consideration of the material available on record, we are of the considered view that the appellants have failed to establish any deliberate deception, material concealment or false representation on the part of Respondent No.1 which operated upon the learned Banking Court in procuring the Judgment and Decree. The objections relating to accounts, payments, disbursement and the underlying banking claim, in substance, seek reconsideration of matters going to the merits of the original decree and do not satisfy the essential requirements for invoking Section 12(2) CPC. The learned Banking Court duly considered the relevant material and rightly concluded that the allegations of fraud and misrepresentation had not been established. The impugned Order, therefore, suffers from no illegality, perversity or jurisdictional defect warranting interference by this Court in its appellate jurisdiction.

21. For the foregoing reasons, we find no merit in the instant First Appeal, which is accordingly **dismissed**. The impugned Order dated 11.02.2020 passed by the learned Judge, Banking Court No.III at Karachi is hereby **maintained**. Consequently, the Judgment dated 28.11.2017 and Decree dated 11.01.2018 shall remain **intact**.

JUDGE

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