IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.B-43 of 2016

DATE	ORDER WITH SIGNATURE OF JUDGE

Plaintiff:	**J.S. Bank through Mr. Khawaja Shamsul Islam, Advocate.**
Defendant No.1 to 5:	**M/s. Landhi Steel Mill and others Through Ms. Naheed A. Shahid, Advocate.**
Intervener:	**United Bank Limited Through Mr. Naveed-ul-Haq, Advocate.**
Intervener:	**Premier Extractions Through Mr. Shaikh F.M. Javed, Advocate.**

1. For hearing of CMA No.13092/17.
2. For hearing of CMA No.3417/17.
3. For hearing of CMA No.3418/17.
4. For hearing of CMA No.17514/16.
5. For hearing of CMA No.15767/16.

Dates of Hearing: **19.03.2018.**
Date of Order: **09.04.2018**

O R D E R

Muhammad Junaid Ghaffar J. These are various application filed on behalf of plaintiff, defendants as well as Applicant(s) / Intervener(s) and are being dealt with through this common order. Application at Serial No.1 i.e. **CMA No.13092/2017** has been filed under Order 1 Rule 10 CPC on behalf of an Applicant for its impleadment as a Defendant. Application at Serial No.2 i.e. **CMA No.3417/2017** has been filed by the Defendants under Section 10 of Financial Institution (Recovery of Finances) Ordinance, 2001 **("FIO 2001")** for leave to defend. Application at Serial No.3 i.e. **CMA No.3418/2017,** is under Section 5 of the Limitation Act, 1908, for condonation of delay in filing of leave to defend. Application at

Serial No.4 i.e. **CMA No.17514/2016** is filed by a Bank for its impleadment as a Defendant and finally application at Serial No.5 i.e. **CMA No.15767/2016** has been filed by the Plaintiff under Section 16 of the **FIO 2001**, for appointment of Nazir to take possession and prepare inventory of the pledged goods.

2. This is a Suit filed by the Plaintiff Bank for recovery of Rs.12,08,25,086.06 along with cost of funds under Section 9 of the **FIO 2001** with future markup, liquidated damages, cost of Suit etc.

3. Insofar as the Application at Serial No.1 bearing CMA No. **13092/2017** is concerned, it is the case of the Applicant that the premises in question i.e. Plot No.LX-1 measuring 3.6 Acres Landhi Industrial Area, Karachi is owned by it, whereas, the Muccadam of the Bank has posted its guards at the entrance being custodian of the pledged goods and is not allowing the applicant and its employees to enter into its property. At the very outset, I may observe that this is a Suit under a Special law i.e. **FIO 2001** between a Bank/Financial Institution and the Customer, wherein, the applicant cannot be joined as a party. If the applicant has any grievance, it is against the Defendants to whom the property was rented out, if any, and for that the applicant is at liberty to seek appropriate remedy in accordance with law. Once the property is let out and goods have been pledged / hypothecated by the tenant ("Customer/ Defendant"), then it is but natural that Bank / Financial Institution will be handing over the same to its Mucaddam for proper security and monitoring of said goods. After filing of a Suit for recovery, any effort by the landlord / Applicant for seeking access to its let out property, in these proceedings is an

afterthought. The Mucaddam was very much there when finance facility was availed and enjoyed. Hence, such application cannot be entertained in Banking Suits, which is accordingly dismissed and for this reliance may be placed on the case of *National Bank of Pakistan v Rajby International (Private) Limited* (**2016 CLD 2190**).

4. Insofar as Application at Serial No.4 (CMA No.17514/2016), filed by United Bank Limited is concerned, again the same also appears to be misconceived inasmuch as it is only apprehensive in nature as according to UBL the Defendant No.5 had executed a personal guarantee in some other transaction, whereas, property bearing Plot No.D-60, Block-7, KDA Scheme-5, Clifton, Karachi owned by Defendant No.5 is mortgaged with the Plaintiff Bank and the Applicant has some interest in the mortgaged property. It may be observed that not only this application is premature in that the applicant has not come at the stage, wherein, some judgment and decree has been passed in its favour against Defendant No.5. Moreover, admittedly, the property in question as referred in the application is mortgaged with Plaintiff Bank, and therefore, even otherwise it is the Plaintiff Bank, which is entitled for its claim, if any, in respect of the said property, therefore, this application is misconceived in facts and law is liable to be dismissed. Notwithstanding this it may be observed, that even if the Applicants case was that the said property is also mortgaged with them, it has now been settled by the Hon'ble Supreme Court that where two mortgages had been lawfully created in respect of same assets of the judgment debtor, unless the decree of the first charge was fully satisfied by its sale proceeds, the decree from the second charge, even if created with consent of first mortgagor, would not be executable as it would be only subject to the satisfaction of the

first decree / charge. [See ***Industrial Development Bank of Pakistan v United Bank Limited*** (**2017 CLD 1707**)]. The case of the Applicant in this matter is even worse in that, firstly there is no decree as yet in its favor, and secondly, neither the property in question is mortgaged with it. Hence, the application bearing CMA No.17514 of 2016 is hereby dismissed.

5. Insofar as Applications at Serial No.2 & 3 are concerned, learned Counsel for the Defendants has contended that no proper service was affected upon the Defendant as the summons were issued on a wrong address on which the Defendants were not residing. According to the learned Counsel, the Plaintiff Bank was aware of the correct and changed address of the Defendants but notwithstanding this fact, they chose to mention the previous and wrong address, and therefore, no proper service was affected. Per learned Counsel the Bailiff's report reflects that the notice on the given address was received by some Nelofer with whom the defendants have no relation, and therefore, no proper service was affected within the contemplation of Section 9(5) of the FIO 2001. According to the learned Counsel though publication was made in daily **"JANG"** and **"DAWN"** but for the reasons that the Defendants were outside the country, it cannot be presumed that service was properly affected even through publication. Learned Counsel has further contended that filing of this Suit only came to the knowledge of the present Defendants when the Associate of the Defendants' Counsel Mr. Zahid Husain was perusing Court files of some other cases of the Defendants being Suit No.B-45/2016 when such fact came to the knowledge that present Suit has been filed against the same Defendants, and thereafter immediately leave to defend was filed, hence the delay, if any, may be

condoned. Learned Counsel has further contended that the representative of the Plaintiff Bank was always in touch through Email with the Defendants, and therefore, despite this knowledge, no effort was made to get the Defendants served on their foreign address. Per learned Counsel such act is intentional and based on malafide so as to obtain Judgment and Decree without proper service of notice depriving the Defendants to contest instant Suit. According to the learned Counsel the service cannot be held good, if it is no served through any one of the modes, which in the instant case has not been done, therefore, the delay, if any, may be condoned and the leave to defend application be heard and decided on merits. In support learned Counsel has relied upon **2002 CLD 1259** ***(Mahboob Ahmed v. Citibank)***, **2002 CLD 1739** ***(Mst. Saeeda v. Habib Bank Limited and 3 others)***, **2003 CLD 254** ***(Messrs Quetta Silk Center through Sole Proprietor and 2 others v. Muslim Commercial Bank Limited through Branch Manager/General Attorney).***

6. On the other hand, learned Counsel for the Plaintiff Bank has vehemently opposed the request for condonation of delay and has contended that the proper addresses were disclosed in the Plaint, whereas, notice was properly served on the given address as per Bailiff's report. According to the learned Counsel instant Suit was being regularly fixed with Suit No.B-25/2016 of which the Defendants' Counsel had prior knowledge, and therefore, the plea now taken in the condonation application is an afterthought and is not supported by the facts available on record. Learned Counsel has contended that on 11.11.2016, inspection was ordered and as per Nazir's Report, the inspection was carried out, which is enough evidence for establishing the fact that a Suit was filed against the

Defendants and even if they were abroad, as alleged, they cannot deny such fact of inspection by the Nazir of this Court. Learned Counsel has referred to the documents on record and has contended that in various correspondences, the same address of the Factory is mentioned, on which summons were issued, and therefore, the plea now taken on behalf of the Defendants is incorrect. Learned Counsel has contended that even otherwise, publication was carried out in two newspapers as required in law, whereas, the requirement of Section 9(5) of FIO 2001 stands fulfilled, therefore, no case is made out for condonation of delay, as prayed. Learned Counsel has also referred to Section 27 of the General Clauses Act as well as Section 29(2) of the Limitation Act and has contended that in view of such provisions, even otherwise, no case of condonation of delay is made out. In response to the arguments that the Defendants were residing abroad, the learned Counsel has contended that it is not for the Plaintiff Bank to chase its customers, who are in default and they are only required to proceed in accordance with the provision of FIO 2001, which they have done, and therefore, this argument is also misconceived. According to the learned Counsel the plea that the Defendants had no knowledge regarding this Suit does not fall within the definition of sufficient cause so as to seek condonation in terms of Section 5 of the Limitation Act as they are required to maintain due diligence. In support he has relied upon **2010 CLC 485** ***(Mirza Musharraf Baig through L.Rs. v. Vth Additional District Judge (South), Karachi and 4 others),*** **2015 CLD 637** ***(Messrs Pangrio Sugar Mills Ltd. v. Bankers Equity Ltd. and 5 others),*** **2014 CLD 658,** ***IGI Investment Bank Limited v Admore Gas (Private) Limited,*** **2014 CLD 1499** ***(Messrs Habib Bank Ltd. v. Mahmood***

Alam Sherani and another) and **2011 CLD 1721** ***(My Bank Limited v. Messrs Muslim Cotton Mills (Pvt.) Ltd. through Chief Executive and 3 others***.

7. I have heard both the learned Counsel and perused the record. Instant Suit has been filed on 10.11.2016 for recovery of the amount, as above against the Defendants and the record reflects that immediately on 11.11.2016, this matter was placed before the Court on an urgent application filed on behalf of the Plaintiff and certain orders were passed on the application under S.16 of FIO 2001 in respect of pledged goods. It appears that since the matter was placed before the Court immediately on the same date it was filed in Court, no proper procedure regarding service on the defendants was followed. Thereafter, on 03.05.2017 the following order was passed:-

> "From perusal of file, it reveals that requisite report of the Addl. Registrar is not available on record to ascertain as to when the process as required in terms of Section 9(5) of the Financial Institution (Recovery of Finances) Ordinance, 2001, was issued/service held good and as to whether any Leave-to-Defend Application was filed within the prescribed period of 30 days or the position remained otherwise. Let such report of Addl. Registrar [O.S.] be submitted within 10 days.
> Adjourned. Interim order passed earlier to continue till next date."

8. Perusal of the entire record does not reflect that whether the directions as contained in the above order were complied with, as there is no report of the Additional Registrar to this effect. Record further reflects that though summons have been issued in this matter, but only through Bailiff of the Court, and through publication, and not through two other modes i.e. courier and registered post A.D. These proceedings are not ordinary proceedings under the Code of Civil Procedure but under a Special law i.e. **FIO 2001**, and therefore, they are to be governed within

the contemplation of the relevant provisions of **FIO 2001**. For that it would be advantageous to refer Section 9(5) of the FIO 2001, which reads as under:-

> 9. Procedure of Banking Courts.-
>
> (1) ……
>
> (2) ……..
>
> (3) ……
>
> (4) ……..
>
> (5) On a plaint being presented to the Banking Court, a summons in Form No. 4 in Appendix 'B' to the Code of Civil Procedure, 1908 (Act V of 1908) or in such other form as may, from time to time, be prescribed by rules, shall be served on the defendant through the bailiff or process-server of the Banking Court, by registered post acknowledgement due, by courier and by publication in one English language and one Urdu language daily newspaper, and service duly effected in any one of the aforesaid modes shall be deemed to be valid service for purposes of this Ordinance. In the case of service of the summons through the bailiff or process-server, a copy of the plaint shall be attached therewith and in all other cases the defendant shall be entitled to obtain a copy of the plaint from the office of the Banking Court without making a written application but against due acknowledgement. The Banking Court shall ensure that the publication of summons takes place in newspapers with a wide circulation within its territorial limits."

9. The aforesaid provisions provides that when a plaint is presented to the Banking Court, summons in the prescribed Form, as prescribed by Rules shall be served on the Defendants *through bailiff or process server of the Banking Court, by registered post A/D, by courier and by publication in one English language and one Urdu language daily newspapers* and *service duly affected in any one of the aforesaid modes shall be deemed to be valid service for the purposes of this Ordinance*. It further provides that in case of service of summons through Bailiff or Process Server, a copy of the Plaint shall be attached therewith and in all other cases, Defendants shall be entitled to obtain a copy of the Plaint from the office of the Banking Court without making a written application but against due acknowledgement, whereas, the Banking Court

shall ensure that the publication of summons takes place in newspapers with a wide circulation within its territorial limits. It is to be appreciated that the Ordinance itself provides the mechanism for service and its effect. And this provision is somewhat different and is not akin to the provision of Order 5 CPC, which deals with service of summons and its substituted service. It is an admitted position that in this case the summons have not been issued through registered A/D and Courier service, nor there is any report from the Additional Registrar that service has been effected in line with the provisions of Section 9(5) of the FIO 2001, and that no leave to defend has been filed in time and matter is being listed for final disposal. It appears that in this case there is serious lacking on the part of the office and for that at least the defendants must not be penalized, rather, the benefit if any, must go to the defendants.

10. I am also mindful of the fact though in terms of the above provisions of Section 9(5) ibid, service through any one of the modes is deemed to be valid service for the purposes of this Ordinance in view of the dicta laid down in the cases reported as ***Ahmed Autos v Allied Bank of Pakistan Limited*** (**PLD 1990 SC 497**), ***Qureshi Salt & Spice Industries v Muslim Commercial Bank Limited*** (**1999 SCMR 2353**), ***Union Bank of Middle East Limited v Zubna Limited*** (**PLD 1987 Karachi 206**), ***Khwaja Muhammad Bilal v Union Bank Limited*** (**2004 CLD 1545**), ***Simnwa Polypropylene (Private) Limited v National Bank of Pakistan*** (**2002 SCMR 476**), ***Allied Bank of Pakistan v Sultan Ali. J. Lilani*** (**2015 CLD 759**), ***Dr. Javed Iqbal v Askari Bank Limited*** (**2017 CLD 1140**), ***Abdul Sattar v Bank of Punjab*** (**2017 CLD 1247**); however, it is to be appreciated

that this could only be invoked and or applied once the summons have been issued in Form-IV Appendix-B to the Code of Civil Procedure through all such modes as are prescribed in law. Admittedly, in this matter, summons were never issued through registered post and courier service, therefore, it would be too harsh to penalize the Defendant for failing to file the leave to defend application within time. Though detailed arguments were made by the Counsel for the Defendant in support of the application for condonation and simultaneously by the Counsel for the Plaintiff opposing such application, however, in view of the above facts that the provision of Section 9(5) of the FIO 2001 was not fully complied, for reasons which are not relevant for the present purposes, I am of the view that no further adjudication is to be made in respect of such arguments, as apparently the summons have not been issued properly, hence the Defendant has fully justified its case for condonation on this ground. In the case reported as ***Hussan Ara v Bank of Punjab*** (**2006 CLD 1502**) a learned Division Bench has been pleased to hold as under;

> A perusal of all the proceedings conducted by the learned trial Court before passing the ex parte decree against the appellants, clearly indicates that on 17-6-2004 the learned Judge Banking Court-III, Multan issued on a stereotyped order-sheet, without mentioning the service of the appellant through other modes as prescribed in section 9(5) of the said Ordinance i.e. service through bailiff, Process Server, courier as well as registered post acknowledgment due. We are therefore, satisfied that before passing the impugned ex parte decree all the modes prescribed under the abovementioned provision of law were not complied with and ex parte decree was passed either without notice to the appellants or without making any genuine effort for effecting service on the appellants as prescribed in the said Ordinance, thus the ex parte decree was passed in violation of principles of natural justice as well as mandatory provisions of section 9(5) of Financial Institutions (Recovery of Finances) Ordinance, 2001, hence the said decree was a void document and liable to be set aside even without recording evidence. Therefore, the application filed by the appellants for setting aside ex parte decree could not have been dismissed on the ground that same was barred by law, as no

limitation is prescribed for a void decree or document or order as held by the Honorable Supreme Court of Pakistan in PLD 2002 SC 101 and PLJ 2005 SC 709.

8. At this stage we would also like to observe that instead of passing the order under his own writing the learned Judge Banking Court in almost all the recovery suits filed before them, uses stereotype pro forma for summoning the defendants for the first date and just fill the blank column, which is neither lawful nor can be appreciated with legal sanctity. Further the said pro forma does not contain all the modes for effecting service of the defendants as prescribed under section 9(5) of Financial Institutions (Recovery of Finances) Ordinance, 2001. We therefore, disapprove this practice and direct the learned Judges Banking Courts that they should record the order regarding summoning of the defendants, with their own handwriting and shall also ensure that service of the defendant is ordered through all the modes as prescribed in section 9(5) of the above Ordinance because unless all the modes of service as prescribed in section 9(5) above are not adopted, no valid service can be deemed to have been effected on the defendants.

Another learned Division Bench of the same Court in the case reported as ***Nazir Hussain v Bank of Punjab*** (**2007 CLD 687**) has been pleased to hold as under;

4-A. Section 9(5) of the Ordinance, 2001 envisages that when a plaint is presented to the Banking Court, it shall issue summons, which shall be served on the defendant through the bailiff or process server of the Banking Court, by registered post acknowledgement due, by courier and by publication in one English language and one Urdu language daily newspaper, and service duly effected in anyone of the aforesaid modes shall be deemed to be valid service for purposes of the Ordinance. In this case, as noted above, the Banking Court, on 27-10-2003, issued summons to the appellants only through registered envelopes and by proclamation in two newspapers., Placing the provision of section 9(5) of the Ordinance in juxtaposition with order dated 27-10-2003, it leads to the irresistible conclusion that the learned Judge Banking Court issued summons to the appellants contrary to the said provision of law. As noted above, section 9(5) of the Ordinance provides that the summons shall be issued to a defendant through four modes of service, viz. bailiff or process server, by registered post acknowledgement due, by courier service and by publication in two newspapers, while the learned Judge Banking Court thought it fit in his own wisdom to issue summons only through two modes. It may be noted that the learned Banking Judge has no jurisdiction to deviate from the procedure laid down in section 9(5), ibid, and adopt his own procedure. The learned Court, thus, failed to resort to the procedure prescribed in the special statute (Financial institutions (Recovery of Finances) Ordinance, 2001) and has unnecessarily bypassed the procedure of

> service prescribed therein, while the learned Judge Banking Court, who is the creature of the said statute, is bound to adopt and obey the said procedure. In view whereof, we feel that the procedure adopted for service of the appellants was defective, violative of law and had definitely caused prejudice to the appellants. Although postal receipts, which were on record, showed that the summons were sent by registered post, yet no acknowledgment is on record showing that the appellants were served through postal service. To our mind, the learned Judge Banking Court failed to issue summons as prescribed under the law and the appellants were not served in accordance with law, therefore, it would have been in the fitness of things and interest of justice if the learned Judge Banking Court would have set aside the ex parte decree.

11. In these circumstances I am of the view that for the present purposes, it would be a futile exercise to respond to the objection of the learned Counsel for the Plaintiff in respect of implication of Section 29(2) of the Limitation Act, 1908, and non-applicability of section 5 *ibid* to these proceedings under FIO 2001, in that, even otherwise, this Court cannot remain oblivious of the provisions of Section 10(2) read with proviso thereto, and Section 24 of FIO 2001, by virtue of which the provisions of the Limitation Act, 1908, shall apply to all cases instituted or filed in a Banking Court after coming into force of this Ordinance, and even provides that a Suit under Section 9 may be entertained by a Banking Court after the period of limitation prescribed therefor, if the plaintiff satisfies the Banking Court that he had sufficient cause for not filing the Suit within such period. For the peculiar facts as above read with these enabling provisions such objection would be dealt with in an appropriate case, if needed, in accordance with law.

12. In view of hereinabove peculiar facts and circumstances, of this case, I am of the view that the Defendant has made out a case for accepting the condonation application, therefore, CMA 3418 of 2017 is allowed. The leave to defend is taken on record, which is to

be heard and decided in accordance with law, whereas, the Plaintiff may file its replication, if so needed.

13. Accordingly, applications at Serial No. 1 and 4 stands dismissed, whereas, application at Serial No.3 is allowed. To come up after four weeks for hearing of leave to defend application as per Roster. Office to list CMA 3417 of 2017 and CMA 15767 of 2016 on the next date.

Dated: 09.04.2018

Judge