

IN THE HIGH COURT OF SINDH AT KARACHI

First Appeal 07 of 2017

Present: **Muhammad Ali Mazhar** and **Agha Faisal, JJ.**

United Bank Limited
vs.
Ghulam Rafiq

For the Appellant: Mr. Ghulam Rasool Korai
Advocate

For the Respondent: In person

Date of Hearing: 16.01.2019

Date of Announcement: 16.01.2019

JUDGMENT

Agha Faisal, J. The present appeal was filed assailing the order dated 01.12.2016 ("**Impugned Order**"), delivered by the learned Banking Court II, Karachi in Suit 192 of 2016 ("**Suit**"), whereby the appellant's suit for recovery was dismissed on account of having been filed post expiration of the prescribed limitation period. It may be pertinent to reproduce the relevant constituent of the Impugned Order herein below:

"The instant case is a suit for simple recovery, without mortgage of any property, and the plaintiff Bank all along and unnecessarily kept the matter with them for more than 7 years and filed the suit on 24.02.2016 i.e. after the statutory period of 3 years from the date of alleged default. The Plaintiff Bank failed to give any plausible explanation for such inordinate delay in filing of the suit after expiry of limitation as provided under the law, therefore, under the facts and circumstances, the suit of the Plaintiff Bank is barred by law, hence dismissed with no order as to costs".

2. Mr. Ghulam Rasool Korai, learned counsel for the appellant, submitted that the Suit was preferred against the present respondent and the same was required to be considered and adjudicated by the learned Banking Court on its merit, however, the same was dismissed on hyper technicalities. It was submitted that the period of limitation applicable to the Suit was six (6) years, as prescribed by Article 120 of the Limitation Act ("**Act**"), and not three (3) years as erroneously recorded in the Impugned Order. Learned counsel stated that the purported finance advanced to the respondent was *inter-alia* secured by the execution of letter of hypothecation attracting the afore-cited provision of the Act and the same was applicable to the exclusion of any other conflicting provision of the law for the time being in force. Per learned counsel, the Court was required to consider the issue of the leave to defend application and post adjudication thereof proceed with the Suit in the manner prescribed under the Financial Institutions (Recovery of Finances) Ordinance, 2001 ("**Ordinance**"), however, the learned Banking Court dismissed the Suit on mere technicalities while ignoring the substantive provisions of the law. Learned counsel relied upon the judgment of a Single Bench of the honorable Lahore High Court in *Allied Bank of Pakistan vs. Karsaz Corporation & Others* reported as 1987 CLC 947 ("**Allied Bank**") and prayed that the present appeal may be allowed and the Impugned Order be set aside.

3. Mr. Ghulam Rafiq, the respondent appearing in person, controverted the arguments advanced by the learned counsel for the appellant. It was argued that a cash finance facility of Rs.200,000/- (Rupees Two Hundred Thousand Only) was extended by the

appellant to the respondent and in respect thereof the appellant had already received Rs.671,000/- (Rupees Six Hundred Seventy One Thousand Only) from the respondent. It was contended that the Suit filed there against was barred by law and merited dismissal even upon the merits thereof. It was argued that the Suit was hopelessly time barred and hence the Impugned Order had been delivered by the learned Banking Court in due conformity with the law.

4. We have considered the respective arguments and have perused the record arrayed before us. The question for this Court to consider is whether the learned Banking Court was justified in dismissing the Suit filed there before on account of the same being barred by limitation.

5. Prior to initiating this discussion, in order to consider the date from which the limitation was required to run, it may be prudent to reproduce the relevant paragraph of the plaint wherein the relevant dates, upon which the cause of action was stated to have been accrued, have been pleaded:

“That the cause of action for this suit arose on 13-05-2005 when the Plaintiff sanctioned the finance to the Defendant, on all subsequent dates when the Defendant availed the finance but defaulted in repayment on 17-11-2009 when the Defendant made last part payment to the Plaintiff on 12-05-2010 when the agreement was expired and continues to arise each day when the Defendant fails to pay the outstanding amount.”

6. Learned counsel for the appellant had referred to Article 120 of the Act, in which it is stated that in a suit for which no period of limitation is provided elsewhere in the schedule the period of limitation is six (6) years from when the right to sue accrues. On the contrary

the Impugned Order observes that the matter was unnecessarily kept from being instituted in Court for more than seven (7) years, when in fact it was required to be filed within the three (3) year prescribed period.

7. Section 24 of the Ordinance stipulates that save as otherwise provided, the provisions of the Act shall apply to all cases instituted or filed in a Banking Court after the coming into force of this Ordinance. In matters pertaining to suits for recovery pursuant to running finance facilities the judgment in *MCB Bank Limited vs. Messrs Tila Frontier Fruit Company & Others* reported as 2011 CLD 938 ("**MCB**"), it has been maintained that the applicable limitation period is three (3) years. Article 120 of the Act is inapplicable in the present circumstances as the mere presence of a letter of hypothecation, as a constituent of the collective finance and security documentation, does not alter the nature of the underlying agreement in the Suit.

8. There is a further provision in Section 24 of the Ordinance which stipulates that a suit under Section 9 of the Ordinance may be entertained by the Banking Court after the period of limitation prescribed therefore, if the plaintiff satisfies the Banking Court that he had sufficient cause for not filing the suit within time. The record reflects that no application for seeking such discretionary relief was preferred by the appellant before the learned Banking Court and further that the learned Banking Court did not consider the delay in filing of the suit to be justified, as is apparent from the Impugned Order. Without prejudice to the foregoing, even if the contention of the learned counsel for the appellant was considered, with respect to the

applicability of article 120 of the Act, even then the Suit would have been time barred as the right to sue would accrue upon default, which occurred in 2009, whereas the Suit was instituted on 25-02-2016.

9. It is the considered opinion of the Court that the prescriptions of limitation are not technical and ignoring the same would render entire law of limitation as redundant. It has been maintained by the superior Courts consistently that it is incumbent upon the Courts to first determine whether the suit filed there before was within time and the Courts are mandated to conduct such an exercise regardless of whether or not an objection has been taken in such regard. A similar view was observed in *Awan Apparels (Private) Limited & Others vs. United Bank Limited & Others* reported as 2004 CLD 732 and it was also maintained therein that it was obligatory upon a Court to decide the issue of limitation prior to deciding the suit. Therefore, it follows that the learned Banking Court had rightly entered into the determination of limitation at the first instance. In the present case the appellant had the opportunity to seek condonation of delay from the learned Banking Court, under Section 24(2) of the Ordinance, however, it demonstrably failed to do so.

10. The reliance of the learned counsel of the appellant upon *Allied Bank* appears to be misconceived. The said judgment reiterates the principle, in so far as limitation is concerned, as enunciated by *MCB*, however, adds that limitation in cases of hypothecation and pledge would raise the limitation period to six (years). With utmost respect to the learned Single Judge we are unable to concur with the said observation as a finance agreement can be bulwarked by variant

security relationships, neither of which can alter the nature of the finance relationship to merit consigning the arrangement to the residual article of the Act.

11. It is the considered view of this Court that the Impugned Order is elaborative of the reasoning relied upon to arrive at the conclusion stipulated therein and the learned counsel for the appellant has been unable to demonstrate any infirmity in respect thereof. Therefore, the present appeal, being devoid of merit, was dismissed vide our short order dated 16.01.2019. These are the reasons for our afore-stated short order.

J U D G E

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Karachi.

Dated 08th February 2019.

Shaban Ali/PA