IN THE HIGH COURT OF SINDH AT KARACHI

First Appeal 16 of 2014

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

Syed Najamuddin Hussain and Another
vs.
Askari Bank Limited

For the Appellants: Mr. Khaleeq Ahmed, Advocate

For the Respondent: Mr. Behzad Haider, Advocate

Date of Hearing: 17.01.2019

Date of Announcement: 12.02.2019

JUDGMENT

Agha Faisal, **J**: Present appeal has been filed assailing the judgment dated 03.01.2013 ("**Impugned Judgment**") delivered by the learned Banking Court No. II at Karachi in Suit 80 of 2012 ("**Suit**") and the decree passed in respect thereof dated 19.12.2013. The operative constituent of the Impugned Judgment is reproduced herein below:

> "I have heard the learned counsel for the parties and have also perused the entire material available on record including the statement of account, which shows that the defendants had availed and utilized the finance facilities to the extent of Rs.23,000,000/-, against which the defendants paid a sum of Rs.4,781,377/- towards principal, leaving principal balance of Rs.18,218,623/- plus markup of Rs.5,300,928.40 till 30.09.2011. The total of which comes to Rs.23,519,551.40, which is due and payable by the defendants to the plaintiff bank. Accordingly the suit of the plaintiff is decreed against the defendants jointly and severally in the sum of Rs.23,519,551.40. inclusive of markup till 30.09.2011, and thereafter cost of funds till realization of the entire decretal amount. The prayers of the plaintiff with regard to the cost of suit and sale of the mortgaged properties are also allowed."

2. Mr. Khaleeq Ahmed, Advocate set forth case of the appellants and submitted that the Impugned Judgment was not rendered in accordance with the law. It was submitted that the finance agreement was executed on 3rd August, 2004 and it required that the proceeds of the finance be credited to a specified account number. It was submitted that the statement of account filed by the respondent along with the Suit did not pertain to the said account number. Per learned counsel the requirement of Section 9 of the Financial Institutions Recovery of Finance Ordinance, 2001 ("**Ordinance**") had not been complied with by the respondent when the Suit was instituted before the learned Banking Court and the said fact was not appreciated while delivering the Impugned Judgment. It was further argued that the submissions made by the appellants in the Suit were not appreciated in their true perspective by the learned Banking Court and, hence, it is just and proper for the Impugned Judgment to be set aside and the matter remanded back to the learned Banking Court for determination in accordance with law. Learned counsel relied upon the ratio of *Warrior Chemical (Private) Limited & Others vs. National Bank of Pakistan* reported as *2012 CLD 1222* ("***Warrior Chemical***"), *Apollo Textile Mills Limited and Others vs. Soneri Bank Limited* reported as *2012 CLD 337* ("***Apollo Textile***"), *Shaz Packages & Others vs. Bank Alfalah Limited* reported as *2011 CLD 790* ("***Shaz Packages***") and *Kinza Fashion (Private) Limited and Others VS. Habib Bank Limited & Another* ("***Kinza Fashion***") reported as *2009 CLD 1440* in support of his contentions.

3. Mr. Behzad Haider, Advocate appeared on behalf of the respondent bank and at the very outset pointed out that the present appeal was time barred. It was submitted that the present appeal is

predicated upon frivolous grounds, including the premise that the disbursement of the finance amount did not take place in the designated account. Per learned counsel the finance agreement dated 3rd August, 2004 expired and thereafter the appellant obtained a new facility from the respondent which was granted vide finance agreement dated 10.09.2008. Learned counsel demonstrated from the record that the disbursement made thereunder was to the account number designated therein and that the statement of account in respect hereof was available on the record. Learned counsel demonstrated from the record that the amount in respect whereof the Suit was filed was duly recognized by the appellant in correspondence which was available on the record. It was thus prayed that the present appeal be dismissed forthwith.

4. We have considered the arguments advanced by the respective learned counsel and have also had the occasion to consider the documentation arrayed before us. It is to be determined whether any infirmity has been pointed out with respect to the Impugned Judgment which would necessitate the interference by this Court in exercise of its appellate jurisdiction.

5. It is observed from the record that the Impugned Judgment is dated 03.12.2013 and that an application to obtain a certified copy of the said judgment was also preferred on the said date. The record reflects that cost for certified copy were paid on 06.01.2014 and on the same date the requisite copy was available / ready for collection. The period for filing an appeal in this context is 30 days and in such regard the present appeal was required to be filed latest by 05.02.2014. It is within our contemplation that the said date was a public holiday, on

account of Kashmir Day, and thus the last date for fling the present appeal was 06.02.2014. The record reflects that the present appeal was filed on 07.02.2014, hence, after a delay of one day. The issue of condonation of delay is predicated upon an application in such regard, however, it is a matter of record that no such application has been preferred. The learned counsel for the appellant had referred to Section 12 of the Limitation Act, 1908 which deals with the exclusion of time in legal proceedings. Per learned counsel the time from which limitation begins to run is the time at which the relevant judgment/order is ready for collection and not the time at which it may be collected by the relevant persons. Learned counsel relied upon the judgment of *Fateh Mohammad and others vs. Malik Qadir Bakhsh reported as 1975 SCMR 157* ("***Fateh Mohammad***") and drew our attention to the following observations delivered therein by the Honourable Supreme Court:

> "Explanation for the delay is that petitioners were not informed of the date when the copy would be ready, and it is submitted that time-lag between 13th December 1973 when the copy was ready and 26th January 1974, on which day petitioners received it, "be exempted in calculating the period of filing the petition for Special Leave to appeal". In other words, that period be computed as the time requisite for obtaining copy within the meaning of section 12(2) of the Limitation Act.
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> *In Pramatha Nath Roy v. Lee* (1) their Lordship of the Privy Council observed that in determining what is the requisite time referred to in section 12, subsection (2) of the Limitation Act, the conduct of the appellant must be considered, and "no period can be regarded as requisite under the Act, which need not have lapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order".
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> In *Jeli Bhoy N. Surty v. T.S. Chetyar* (2) their Lordships again emphasized as follows:-
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>> "the word "requisite" is a strong word; it may be regarded as meaning something more than the word 'required'. It means 'properly required'. It means 'properly required' and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond he

> prescribed period is due to his default. But for that time which is taken up by his opponent in drawing up the decree, or by the officials of the Court in preparing and issuing the two documents, he is no responsible."

> It is well settled that the time requisite for obtaining copy of order within the meaning of section 12 of the Limitation Act, 1908 means only the interval between the date of application for supply of copy and the date when it is ready for delivery. Even during this interval, due diligence on the part of the litigant is required by law, and no delay, unless such as was caused by circumstances over which he had no control and which he could not by due diligence be avoided, can form part of time "requisite" for obtaining the copy. The time between the date on which the copy is ready for delivery and the date on which the applicant chooses to take delivery thereof is not a portion of the time "requisite" for obtaining a copy."

6. We confronted the learned counsel for the appellants with this issue and he did not dispute the law as interpreted and articulated by *Fateh Mohammad* nor did he controvert the applicability of the said law to the present facts and circumstances. On the contrary, the view taken by the learned counsel for the appellants was that the date reflected upon the certified copy of the Impugned Judgment wherein it was stated to have been readied is 08.01.2014 and not 06.01.2014 as being argued by the learned counsel for the respondent. We have considered the arguments of the learned counsel for the appellants and have carefully considered the annotations with respect to the dates on the certified copy of the Impugned Judgment and are unable to concur with the observation of the learned counsel for the appellant.

7. It is observed that the appellants had obtained the finance facility from the respondent and the same was documented vide the finance agreement dated 3rd August, 2004. It is noted that the receipt of the finance has not been denied by the appellant and it is noted form the order dated 03.07.2013 passed in the Suit, wherein the leave to defend application of the appellant was dismissed as the same had failed to

disclose any plausible defense and had taken only vague objections. It was further recoded in the said order that the dispute, inter see, if any is with regard to the quantum of the amount claimed in the Suit and confinement of the controversy to merely that issue did not necessitate the grant of the leave to defend application. It is further observed that a fresh finance agreement was executed between the parties, in supersession of previous agreement/s, on 10.09.2008. The account number to which the proceeds of the said facility were required to be disbursed was also designated in the said agreement. The said agreement was also accompanied by a periodic repayment schedule, general financing and collateral agreement, promissory note, letters of guarantee and agreements to mortgage. This shows that the entire finance and security documentation was executed between the parties, inter se, and the same has not been denied or dispelled by or on behalf of the appellants. The schedule attached to the aforesaid finance agreement, in alia, required the repayment of the entire amount by September, 2011, however, the record shows that the same did not materialize. On 23.11.2011, the appellants wrote a letter to the respondent demarcating the principal and mark up outstanding and requesting for a concession/waiver in mark up. It may be pertinent to reproduce the relevant constituents of the aforesaid letter:

> “This is with reference to subject as discussed with our recent meeting with your RGM and Area Manager, we inform you that we will adjust our TF facility by December 30, 2013, in quarterly installments. As our outstanding principal and mark-up are as follows.

Principal	18,218,623/-
Mark-up	7,077,243/-

	25,295,866/-

> We request you to please waive our 50% mark-up. The remaining outstanding will be repaid to you in eight quarterly installment."

8. It is apparent form the said letter that there was no dispute as to the existence of the finance facility nor there was any challenge to the fact that the principal and markup was due and payable by the appellants to the respondent. A perusal of the plaint filed by the respondent in the Suit clearly shows that the aforesaid letter was relied upon by the respondent and that the claim filed against the appellant was predicated thereupon. We have also considered the statement of account filed by the respondent before the learned Banking Court in the Suit and observed that the account number stated therein is commensurate with that which was delineated in the finance agreement, executed inter se. It is thus, our considered view that the controversy in the Suit has been duly elaborated upon by the learned Banking Court in the Impugned Judgment and that cogent reasoning has been employed to arrive at the conclusion therein.

9. The judgments cited by the learned counsel for the appellants do not support the case thereof. *Warrior Chemicals*, a judgment of the honorable Lahore High Court, made observations in regard to a situation where the execution of any documents was denied, disbursement was denied and the relevant statements of account were not filed. In the present case the execution of documentation and disbursement is not controverted and the relevant statement of account was available. *Apollo Textile* was relied upon to demonstrate the importance of the mandatory prescriptions of Section 9 of the Ordinance. In the present facts no infringement thereof has been demonstrated before us. *Kinza Fashion* deprecated the dismissal of a

leave to defend application in a hasty manner. In the present case a speaking order is available on record and the same is in due consonance with the law. *Shaz Packages*, authored by one of us (Muhammad Ali Mazhar, J), demarcated the responsibility placed upon a learned Banking Court to consider the pleas raised by the defendants comprehensively and not to reject the contentions in a perfunctory and cursory manner. The said ratio is also distinguishable in the present facts and circumstances as the Impugned Judgment appears to have been delivered upon due consideration of the facts and the law applicable in respect thereof.

10. The learned counsel for the appellants has been unable to identify any infirmity in the Impugned Judgment and thus we hereby maintain and uphold the Impugned Judgment as delivered. In view of the reasoning and rational contained herein we find the present appeal to be devoid of merit, hence, the same, alongwith pending applications, is hereby dismissed with no order as to costs.

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*Farooq PS/**