

IN THE HIGH COURT OF SINDH KARACHI

I. A. No. 15 of 2018

[Pak Leather Crafts Limited and others v. Al-Baraka Bank Limited]

Dates of hearing : 07-08-2018 and 30-08-2018
Date of decision : 19-10-2018
Appellants : Pak Leather Crafts Limited and others
through Ms. Alizeh Bashir, Advocate.
Respondent : Al-Baraka Bank Limited, through
Syed Aijaz Hussain Shirazi, Advocate.

JUDGMENT

ADNAN IQBAL CHAUDHRY J. -

1. This appeal under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 assails the judgment and decree passed by the Banking Court No.II at Karachi in Suit No.105 of 2017, whereby the claim of the Respondent Bank under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 for recovery of finance was decreed against the Appellants for a sum of Rs.38,129,560/- plus cost of funds and cost of the suit.

2. When this appeal came up for hearing before us, learned counsel for the Respondent Bank at the outset objected to its maintainability on the ground that the same was time-barred by 41 days and no application for condonation of delay had been moved by the Appellants. On the other hand, learned counsel for the Appellants submitted that the time consumed in obtaining certified copy of the judgment and decree is to be excluded for computing limitation under Section 12 of the Limitation Act, 1908, and therefore the appeal was within time and the question of seeking condonation of delay did not arise. Since the question of limitation had not been recorded earlier, we recorded the same on 07-08-2018, and since such objection went to the very maintainability of the appeal, with

the consent of learned counsel we proceeded to first hear and decide only the preliminary objection of limitation.

3. The relevant dates for deciding whether this appeal is barred by limitation are as follows:

- (i) judgment in the suit was announced on 28-11-2017 and the decree was prepared by the Banking Court on 30-11-2017;
- (ii) application for certified copy of judgment and decree was submitted by the Appellants on 05-12-2017;
- (iii) fee for certified copy was estimated by the copyist on the same day i.e. on 05-12-2017;
- (iv) but the fee was paid by the Appellants on 13-01-2018;
- (v) certified copy was made ready for delivery by the copyist on 15-01-2018, and was received on the same day by the Appellants;
- (vi) this appeal was presented on 07-02-2018.

Therefore, from 05-12-2017 when the application for certified copy was filed and fee was estimated, to 13-01-2018 when such fee/cost was deposited by the Appellants, a period of 38 days had lapsed.

4. Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 prescribes a period of thirty (30) days from the judgment and decree to file an appeal. This appeal was presented on 07-02-2018 after the prescribed limitation of 30 days. However, Section 12(2) Limitation Act, 1908 provides that in computing the period of limitation prescribed for an appeal, the time requisite for obtaining a copy of the decree appealed from shall be excluded. Section 12 Limitation Act is applicable to an appeal under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 by virtue of Section 29(2) Limitation Act, 1908.

Section 12 of the Limitation Act, 1908 reads:

“12. Exclusion of time in legal proceedings: (1) In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

(4) In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

(5) For the purposes of subsections (2), (3) and (4), the time requisite for obtaining a copy of the decree, sentence, order judgment or award shall be deemed to be that time intervening between the day on which an application for the copy is made and the day actually intimated to the applicant to be the day on which the copy will be ready for delivery.”

5. Learned counsel for the Appellants submitted that the Appellants were never informed by the copyist that the fee for the copies applied for had been estimated otherwise they would have deposited the fee earlier. Learned counsel pointed to Rule 323 of the Sindh Civil Court Rules and Rule 127 of the Sindh Chief Court Rules (A.S.) which provide that after the application for certified copy is registered, the copyist shall at once but ordinarily not later than the following working day, ascertain the copying fee and “communicate them to the applicant”. Though she accepted that the said Rules did not apply to the Banking Court which in this case was not the High Court, she submitted that the Banking Court should have been guided by such Rules and should have communicated the estimated fee to the Appellants. Her second submission was that in any case, under sub-section (5) of Section 12 Limitation Act, 1908 the copyist was under an obligation to intimate to the Appellants the day on which the certified copies would be ready for delivery, and since no such intimation was given, the entire time intervening between the

day on which the application for certified copy was made, to the day the certified copy was prepared (from 05-12-2017 to 13-01-2018), that is “time requisite” within the meaning of Section 12 Limitation Act and is to be excluded for computing limitation.

To support her submissions, learned counsel for the Appellant cited the cases of *Safderi Begum v. Amir Ali Tabrezi* (1985 CLC 836); *Dr. Ubaidur Raza Khan v. Saghera Bano* (1994 CLC 1302); *Karimullah v. M. Gulzar Butt* (1986 CLC 1653); and *Arshad Naseemuddin Ahmed v. Javed Baloch* (2012 CLC 1293).

6. On the other hand, learned counsel for the Respondent Bank submitted that the time excluded by the words “time requisite” under Section 12 Limitation Act, 1908 means the time consumed by the Court, and not the time consumed by the litigant. He pointed out that the fee for the certified copy was estimated by the copyist on the same day the application was made i.e. on 05-12-2017, however, it was the Appellants who took their sweet time to deposit such fee, and therefore such period cannot be excluded for computing limitation.

To support his submissions, learned counsel for the Respondent Bank cited the cases of *Fateh Muhammad v. Malik Qadir Bakhsh* (1975 SCMR 157) and *Jamila Khatoon v. Tajunnisa* (PLD 1984 SC 208).

7. In the case of *Fateh Muhammad v. Malik Qadir Bakhsh* (1975 SCMR 157), the period in question was the day the copy was made ready for delivery, to the day the petitioners received it. It was the petitioners’ case that they were not informed of the date when the copy would be ready and therefore, such period should be excluded under Section 12(2) of the Limitation Act, 1908 as the time requisite for obtaining a copy. The Honourable Supreme Court held 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 circumstance 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".

In the case of *Jamila Khatoon v. Tajunnisa* (PLD 1984 SC 208), the Honourable Supreme Court while interpreting the words "time requisite" appearing in Section 12 of the Limitation Act, 1908 laid down *inter alia* the following principles:

- (i) that in order to claim exclusion of a period under Section 12(2) Limitation Act, the appellant must satisfy the Court that he acted with reasonable promptitude and diligence, and that the time which he claims to be excluded was properly required in obtaining copies;
- (ii) that the question as to what is the time requisite for obtaining the copy must necessarily depend upon the practice and rules in force, and no general principles on this question can safely be formulated. The question is one of fact to be determined on the circumstances of each case in the light of the rules framed on the subject.

In *Jamila Khatoon's* case *supra*, the period in question was 37 days between the date on which the copy was made ready, and the date on which the stamp was supplied. It was contended for the appellant that the copyist failed to call upon the appellant to supply stamps. The rules applicable in that case were the Sindh Civil Courts Rules and it was noticed that while Rule 323(1) thereof did envisage a notice to the applicant once the copying fee had been estimated, but the following Rule 324 that required the applicant to deposit the copying fee and stamp, did not envisage any further notice to the applicant. Therefore, the appeal was dismissed as time-barred.

8. Sub-section (5) of Section 12 Limitation Act, 1908 states that the words “time requisite for obtaining a copy” as appearing in the foregoing sub-sections “shall be deemed to be that time intervening between the day on which an application for the copy is made and the day actually intimated to the applicant to be the day on which the copy will be ready for delivery”. Sub-section (5) of Section 12 Limitation Act was added by the Limitation (Amendment) Act, 1991 enacted on 06-07-1991. Before such amendment, it had been long settled ever since the case of *Fateh Muhammad (supra)* that the time requisite for obtaining a certified copy within the meaning of Section 12 Limitation Act (as it stood then) was only the interval between the date of application for supply of copy, and the date when it is ready for delivery; and that even during such interval, no delay, unless such was caused by circumstances over which the litigant had no control and which he could not by due diligence avoid, could form part of “time requisite” for obtaining the copy. Therefore the question that arises is whether the addition of sub-section (5) to Section 12 Limitation Act in the year 1991 brought about a change in the law as enunciated in the cases of *Fateh Muhammad* and *Jamila Khatoon*.

9. It will be seen that sub-section (5) of Section 12 Limitation Act, 1908 is a “deeming” provision i.e. a legal fiction. The rule for interpreting a deeming provision is to first attempt to ascertain the purpose for which the legal fiction was created¹. Our research reveals that sub-section (5) was added to Section 12 Limitation Act pursuant to the judgment of the Honourable Supreme Court of Pakistan in the case of *Ahmed Nawaz versus Muhammad Ayub* (PLD 1988 SC 258) decided on 27-02-1988. In that case, though the application for condonation of delay was dismissed, but before parting with the judgment, the Supreme Court observed that the exclusion of the period spent between the date when the copies were

¹ See the case of *State of Travancore-Cochin v. Shanmugha Vilas Chashewnud Factory* (AIR 1953 SC 333).

ready for delivery, and the date of obtaining delivery, has been the subject matter of considerable controversy and it was observed as follows:

“The litigant public expresses uncertainty and suffers considerable expense and inconvenience on account of existing state of law in this behalf. The legislative intervention may have to be considered. One of the various possibilities is that an appropriate explanation in Section 12 of the Limitation Act, 1908, may be added. According to one suggestion, it can be to the effect that the period spent from the date of the application for copy up to the duly intimated date of delivery of the same, to be treated time requisite for obtaining copy. The office shall bring these observations to the notice of the concerned authority”.

The case of *Ahmed Nawaz v. Muhammad Ayub* establishes that the purpose of adding sub-section (5) to Section 12 Limitation Act, 1908 was to address the ambiguity that existed on the cut-off day of the “time requisite” to obtain a copy, and therefore it was stipulated that such cut-off day shall be deemed to be the day intimated to the applicant as the day when the copy will be ready for delivery. The purpose was not to make the entire period spent in obtaining a copy as “time requisite”. Therefore, the enunciation of law by the cases of *Fateh Muhammad* and *Jamila Khatoon* remained unaffected by the addition of sub-section (5) to Section 12 Limitation Act. In other words, even during from the day the application for copy is made, to the day the copy is made ready for delivery, the applicant/litigant has to demonstrate that he acted diligently and that he had no control over the time requisite for obtaining the certified copy.

10. The case of *Mian Muhammad Sabir versus Malik Muhammad Sadiq* (PLD 2008 SC 577) is a case decided by the Honourable Supreme Court after the addition of sub-section (5) in Section 12 of the Limitation Act, 1908. In that case the delay was from the day the certified copy had been prepared, to the day the copy was received by the appellant. It was contended by the appellant that since the copying agency did not notify the appellant about the readiness of the certified copy (as required by sub-section (5) of Section 12

Limitation Act), the “time requisite” under Section 12 Limitation Act would include the entire period from the day the application for the copy was made, to the day of taking delivery of the certified copy. The Honourable Supreme Court held that since the appellant did not produce the receipt issued by the copyist to show that the copy was not ready on the day communicated in the receipt, the appellant could not take shelter under sub-section (5) of Section 12 Limitation Act. The Supreme Court held that even if it was assumed that no receipt was issued by the copyist, the appellant as a prudent person should have acted with reasonable promptitude and diligence and should have approached the copyist to enquire about the certified copy within a reasonable time instead of waiting for nearly eight months. The appeal was dismissed as time-barred.

11. The case of *Mian Muhammad Sabir* discussed above is binding precedent for the proposition that sub-section (5) of Section 12 Limitation Act, 1908 is not to be construed as excluding limitation for the entire period from the day the application for certified copy is made, to the day the copy is made ready for delivery. The cases of *Arshad Naseemuddin Ahmed* and *Dr. Ubaidur Raza Khan* relied upon by the Appellants’ counsel are distinguishable in that, in those cases the delay was on the part of the court-copyist in estimating the cost for which the appellant could not be penalized. The case of *Safderi Begum* and the case of *Karimullah* relied upon by the Appellants’ counsel are also not relevant in that, the findings therein are premised on the Sindh Civil Court Rules, which are not applicable to here, and which categorically require a communication to the applicant (under Rule 323) that cost for copies has been estimated. The case of *Safderi Begum* (by a Single Judge of the High Court) is also at variance with the ruling of the Supreme Court in the case of *Jamila Khatoon*.

12. Coming to the facts of the instant case, the cost for certified copy was estimated by the copyist the same day the application was

made i.e. on 05-12-2017. Thus there was no delay on the part of the court copyist in estimating the cost. Needless to state that once the cost for certified copy had been estimated by the copyist, the onus of depositing the cost came upon the Appellants. Assuming that the Appellants remained unaware that the cost was estimated the same day, admittedly there was no rule that made it obligatory on the copyist to communicate to the Appellants that cost had been estimated. Therefore, as laid down in the cases of *Fateh Muhammad* and *Jamila Khatoon*, it is for the Appellants to demonstrate that they acted diligently and that they had no control over the time requisite for obtaining certified copies. But there is no explanation by the Appellants as to why they waited for 38 days (from 05-12-2017 to 13-01-2018) to follow-up on their application for certified copy, especially when Section 19(1) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 stipulates that upon pronouncement of judgment and decree by a Banking Court, the suit shall automatically stand converted into execution proceedings without further notice and that such execution will be heard on the expiry of 30 days from the date of judgment and decree.

The argument advanced by the Appellants' counsel that sub-section (5) of Section 12 Limitation Act, 1908 required the court-copyist to intimate to the Appellants the day on which the certified copy will be ready for delivery even though the Appellants had not deposited the cost for the copy, is not only misconceived but also absurd. By that token the Appellants could have waited indefinitely before depositing cost for the copies and limitation would never run out. Therefore, in the circumstances of the case where it was the Appellants who committed delay in depositing the cost for certified copy, they cannot take shelter under sub-section (5) of Section 12 Limitation Act, 1908 as such delay on their part cannot be termed as "time requisite" for obtaining certified copies within the meaning of Section 12 of the Limitation Act, 1908. The Appellants should have acted with reasonable promptitude and diligence and should have followed-up on their application for certified copy within a

reasonable time instead of waiting for 38 days. It has been held by the Honorable Supreme Court of Pakistan in the case of *Ghulam Qadir v. Sh. Abdul Wadood* (PLD 2016 SC 712) that limitation is not a mere technicality, but positive law that is to be given due effect.

13. As a result of the above discussion, the appeal is time-barred and is dismissed accordingly.

JUDGE

JUDGE

Karachi

Dated: 19-10-2018