

# IN THE HIGH COURT OF SINDH AT KARACHI

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

1<sup>st</sup> Appeal 01 of 2018 : Syed Wajahat Hussain Zaidi vs. Bank Islami Pakistan Limited

1<sup>st</sup> Appeal 08 of 2018 : Syed Wajahat Hussain Zaidi vs. Bank Islami Pakistan Limited

For the Appellant : Mr. Sami Ahsan, Advocate

For the

Respondent : Mr. Ishaq Ali, Advocate

Date of Hearing : 04.09.2019

Date of

Announcement : 04.09.2019

## JUDGMENT

**Agha Faisal, J:** Briefly stated, the respondent bank had filed a recovery suit, being Suit 266 of 2013 before the learned Banking Court V at Karachi (“Suit”), wherein the appellant’s leave to defend application was dismissed vide order dated 13.11.2017 (“Leave Dismissal Order”). Subsequent thereto the learned Banking Court was pleased to render a judgment and decree against the appellant dated 13.11.2017 (“Impugned Judgment”). The present appellant filed two subsequent applications, under section 12(2) CPC and section 151 CPC seeking to set aside the Impugned Judgment and restore of the leave to defend application respectively, and the said applications were dismissed by the learned Banking Court vide order dated 06.01.2018 (“12(2) Order”). The appellant filed First Appeal No.1 of 2018 assailing the Leave Dismissal Order and the Impugned Judgment and also filed First Appeal No.8 of 2018 assailing the 12(2) Order. Since the controversy in the two appeals arises out of the same

facts, hence, the two appeals were heard conjunctively and shall be decided vide this common judgment.

2. Prior to proceeding further in this matter, it may be appropriate to reproduce the relevant constituents of the pronouncements under scrutiny herein:

#### Leave Dismissal Order

“Today the matter is fixed for hearing of the application for leave to defend the suit filed on behalf of the defendant, which is pending since 30.08.2013, but the same is being linger on, on one pretext or other. On the last date of hearing time was fixed at 11:30 A.M. However, from the apparent conduct of the defendant it appears that nobody has bothered to go through the said case diary. Today the position remains same now 11:45 A.M., the learned counsel for the plaintiff is present, whereas no intimation yet received on behalf of the defendant. The instant matter is oldest one pertaining to the year 2013 and after lapse of four years, counsel for the defendant reluctant to argue the said application. Looking to such avoiding/neglecting conduct on the part of the defendant; this court has left no option but to dismiss the application for leave to defend the suit for non-prosecution. The application is dismissed in default of non-prosecution. Order accordingly.”

#### Impugned Judgment

“3. it is vehemently contended by the learned counsel for the plaintiff that the finance facility availed by the defendant is not denied by the defendant in his application for leave to defend the suit, in as much as he had sold out 10 drums of the chemical from the pledge goods and sale proceed was deposited with the plaintiff, which amounts to a clear admission on the part of the defendant. The learned counsel has vehemently contended that the instant suit is pending since 2013 and being linger on, by the defendant on one pretext or other. Notwithstanding since beginning this court has provided ample opportunities to the defendant to bring a perspective buyer to sale the pledge stock in the market under the normal business practice in order to adjust the outstanding finance facilities of the plaintiff availed by him but, he taken such leniency for granted and ultimately tried to linger on the matter at his wish and whim just to deprive the plaintiff from the recovery of outstanding dues availed and enjoyed by the defendant. It is further contended that since the defendant has categorically admitted the finance facility; the application for leave to defend the suit may be dismissed in this sole ground, it is a well settled principle of law that no question of grant of application for leave to defend the suit arise on admission. He further contended that since the defendant is not

interested in the proceedings and intends to linger on the matter for an indefinite period as usual the learned counsel for the defendant called absent today instead of fixing the matter at 11:30 A.M., therefore, in view of apparent conduct of the defendant his leave to defend the suit may be dismissed and the suit may be decreed in favor of the plaintiff.

None is present on behalf of the defendant.

4. I have given my due consideration to the arguments advanced at length by the learned counsel for the plaintiff and minutely perused the record available before me. It is a matter of fact that the application for leave to defend the suit is pending since 30.08.2013 and after filing said application, the defendant and his counsel chosen to remain absent from 17.09.2013 to 03.07.2015. Suddenly on 31.07.2015, the defendant alongwith his counsel appeared before the court and in presence of his counsel verbally proposed that he may be allowed to sale pledge goods and the sale proceeds may directly be deposited in his bank account as per normal banking practice. However, on subsequent date i.e. on 03.08.2015; the learned counsel for the defendant filed an application under section 151, CPC with the same proposal/prayer. In result thereto vide Order dated 05.08.2015 the defendant namely Syed Wajahat Hussain Zaidi was permitted to bring the prospective buyer of the stock and negotiate the price, whereas, sale proceeds shall directly be deposited in the Bank Account No.02-122918-001. In compliance of the said order 10 drums of chemical from the pledge goods were sold out for the purpose of sampling to the prospective buyer with the understanding that once the prospective buyer approved the quality, subsequent transactions would take place. On the contrary, it is a matter of record that after selling out 10 drums of chemical from the pledge goods, the defendant did not show any sincere efforts till to-date as the status of the proceeding remains same. Looking to the avoiding/neglecting conduct on the part of the defendant on the last date of hearing, time was fixed today at 11:30 A.M. However, today the position also remains same, seems no one on behalf of the defendant bother to go through the previous case diaries. The negligent conduct of the defendant and his counsel speaks high volume that they remained absent on the most dates of hearing and if so, the learned counsel for the defendant used to attend the court in late hours mostly after 02:00 P.M. In such circumstances the application for leave to defend the suit was dismissed in default of non-prosecution vide separate Order dated 13.11.2017.

5. Apart from the above, it is an admitted fact of record that the financial facility was disbursed to the defendant, who admitted availing the same in full and also admitted execution of the documents, amount paid in this regard by the defendant reflected in the statement of account did not denied too, as such I am of considered view that the application for leave to defend the suit should have to be dismissed on very initial stage i.e. on 31.07.2015 when the defendant appeared before this court with

the proposal that he may be allowed to sale the pledge goods lying with the plaintiff/bank. The above act of the defendant was/is amount to an admission and it is a well settled principle law that no question of grant of application for leave to defend the suit arise on the basis of admission.

6. Keeping in view of the above discussed reasons the suit of the plaintiff is decreed for Rs.42,051,101/- after adjustment of the amount of Rs.306,000/- recovered by the plaintiff through sale of pledge stock of 10 drums of chemical with cost of suit and cost of funds from the date of his default till realization of the cost of funds of the financial institution as certified by the State Bank of Pakistan from time to time, apart from such other civil and criminal liabilities that he may incur under the contract or rules or any other law for the time being in force....”

#### 14.12.2017 Order

“The judgment in the above matter was announced by this Court on 13.11.2017, which was followed by the decree dated 1.11.2017. The same is converted into execution proceedings as thirty (30) days’ time has already been expired. The decree holder/bank is directed to file particulars of mortgaged, pledged or hypothecated property or other assets of judgment debtor(s) for the consideration of the court and produce the schedule of current recoverable amount in detail in this court as prescribed under section 19(1) of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Let the matter be fixed on 31.01.2018 for filing complete particulars along with current statement of account.”

#### 12(2) Order

“So far as the restoration of the application for leave to defend the suit dismissed on 13.11.2017 in default of non-prosecution is concerned; it is suffice to say that the above suit was filed on 20.05.2013, application on behalf of the defendant for leave to appear and defend the suit under section 10(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 was filed on 30.08.2013. Replication to the said application was filed on 20.12.2013, however, surprisingly, it is a matter of record that the learned counsel for the defendant received the copy of the replication on 17.08.2017 after the lapse of about four (4) years; without any justification. Record further shows that the defendant and his counsel chosen to remain absent on the dates of hearing when the matter was fixed for hearing of leave to defend the suit application. Obviously, at the whim and wish of the parties matter cannot be hanged on for indefinite period. As such finally looking to the previous conduct of the defendant and his counsel, the application for leave to defend the suit was dismissed for non-prosecution on 13.11.2017. the learned counsel for the defendant although, has annexed the copy of the cause list dated 13.11.2017 with restoration application but

he failed to establish that whether he had appeared in those cases or not, as no case diary in support of his contention has been placed on record till to-date. Since the defendant and his counsel are habitual to remain absent on the dates of hearing without showing any sufficient cause regarding their absent, therefore, this court left no option but to dismiss the application for leave to defend the suit in default of non-prosecution.

Apart from the above instant application is filed under section 12(2) CPC which categorically provides three ingredients for challenging the validity of judgment and decree i.e. on the ground of fraud, misrepresentation or for want of jurisdiction of the court, plea taken on behalf of the defendant did not attract any of three (3) ingredients in the light of the apparent conduct of the defendant and his counsel as discussed above. It is evident from the record that the delay was purely on the part of the defendant, therefore, no violation of natural justice, Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 and Principle of administration of Justice is on record. On the contrary, due to the conduct of the defendant and his counsel without any justification, the above suit is pending since 2013 in the file of this court in violation of principle of administration of justice "Justice Delayed Justice Denied.". No provision is provided under the Financial Institutions (Recovery of Finances) Ordinance, 2001 to file any breakup at belated stage. So much so section 27 of the Financial Institutions (Recovery of Finance) Ordinance, 2001 also bars this Court to recall its judgment and decree in the circumstances hence, I do not find any substance in the applications in hand.

With all fairness to the above discussion, I am of the humble view that no fraud or misrepresentation has been established on record.

Keeping in view of the foregoing facts and circumstance the application under section 151 CPC for restoration of the leave to defend the suit application and application under section 12(2) CPC are hereby dismissed, accordingly, being devoid of merits with no order as to cost."

3. Mr. Sami Ahsan, Advocate appeared on behalf of the appellant and submitted that his primary ground for appeal was that copies of documents sought by the appellant were not provided thereto within time, hence, the orders / judgment impugned were without foundation. The second ground for appeal articulated, also pleaded in paragraph 7 of the grounds in the memorandum of appeal, was that the appellant was engaged in a number of proceedings including the matters initiated by the National Accountability Bureau and therefore his (and his counsel's) absence from the proceedings before the learned

Banking Court was duly exceptionable. Lastly it was argued that the impugned orders / judgment violated the principles of natural justice and also Article 10-A of the Constitution.

4. Mr. Ishaq Ali, Advocate appeared on behalf of the respondent and controverted the arguments advanced on behalf of the appellant. It was submitted that the Suit was filed in the year 2013 and the leave to defend application was eventually dismissed for non-prosecution in the year 2017, demonstrating that four years has lapsed on account of the appellant's reluctance to proceed with the matter. Per learned counsel the Impugned Judgment had taken all the facts and circumstances into account, therefore, no interference was merited therewith. Learned counsel submitted that the acceptance and utilization of the finance facilities stood duly admitted by the appellant and the entire effort vide the present appeals was to absolve the appellant of his obligations and to subvert the due process of law. Learned counsel submitted that the leave to defend application was even otherwise discrepant as the mandatory provisions of Section 10(4) of the Financial Institutions (Recovery of Finance) Ordinance, 2001 ("Ordinance") had not been complied with. Learned counsel drew attention to numerous entries in the diary sheets of the Suit to demonstrate that the proceedings in the Suit had been delayed time and again at the behest of the appellant. In conclusion it was submitted that the present appeals are demonstrably devoid of merit, hence, ought to be dismissed forthwith.

5. We have heard the arguments of the respective learned counsel and have also considered the documents to which our surveillance was solicited. At the very onset we drew the attention of the appellant's counsel to CMA 1291 of 2019 and asked whether the appellant would seek an order for realization of the purported pledged stock in mitigation of his liability, prior to conclusion of the proceedings in the present appeal. The learned counsel answered in the negative and submitted that the same would only be considered if the Impugned Judgment was set to naught. Consequently we proceeded with the matter on its merit and the primary point framed for determination, in pursuance of Order XLI Rule 31 CPC, is whether

there is any infirmity in the orders/judgment impugned herein that merits interference in appeal.

6. We have observed from the pleadings filed by the appellant that the grant and utilization of the finance facilities has never been denied. This observation is also bulwarked by a legal notice served by the legal counsel of the appellant to the respondent bank dated 28<sup>th</sup> August, 2013, in paragraphs 1 to 6 whereof the finance facilities and their utilization stand recorded. We have also noted that the appellant had preferred an application before the learned Banking Court, available at page 411 of the Court file, wherein permission was sought for the sale of the pledged stock for onward remittance to the respondent. This application, filed on 03.08.2015, demonstrates that even after institution of the Suit there against, the obligation to repay the finance facility stood uncontroverted by the present appellant. The Impugned Judgment categorically stipulates that it is an admitted fact of record that the finance facility was disbursed to the appellant, who had admitted the same in full and also admitted execution of the finance and security documentation. The Impugned Judgment further records that in view of the admissions of the appellant with regard to the documentation and disbursement there was every reason for the leave to defend application to be dismissed at an initial stage. The Impugned Judgment goes on to record that the application of the appellant seeking realization of the pledged goods in mitigation of its liability further cements the case set-forth by the respondent bank. It is imperative to record at this juncture that the learned counsel for the appellant never denied the acceptance and utilization of the finance extended thereto and further that there was no argument advanced before us to controvert the recognition hereof in the Impugned Judgment.

The record before us appears to substantiate the conclusion drawn vide the Impugned Judgment that finance facilities were in fact extended to the appellant, by the respondent, and that the same were availed by the appellant, however, the appellant failed to discharge his obligation to repay his liability to the respondent.

7. The leave dismissal order expressly catalogs that the appellant had failed to proceed with the leave to defend application on one pretext or another, for almost four years and in such regard the learned Banking Court was constrained to dismiss the said application for non-prosecution. We have perused the diary sheets culminating into the Leave Dismissal Order and observe that the findings of the learned Judge are duly borne from the record. While we have not been shown any reason why the appellant's leave to defend application should not have been dismissed for non-prosecution, the record also demonstrates that the said application failed to comply with the mandatory prescription of section 10(4) of the Ordinance.

8. Learned counsel for the appellant has not raised any challenge to the quantification of his liability, vide the Impugned Judgment, and in addition thereto no argument was advanced assailing any constituent of the statement of account, and / or any contributory to the quantification contained in the Impugned Judgment.

The R&P of the Suit was placed before us and the learned counsel for the appellant made no attempt to identify any infirmity with regard to the procedure followed by the learned Judge in proceeding with the Suit. It is considered appropriate to record that no infringement of the principles of natural justice, Article 10-A of the Constitution is manifest from the record.

9. The Impugned Judgment is well reasoned, carefully catalogs the facts and circumstances leading to the conclusion drawn therein and appears to have adequately addressed the controversy seized of by the learned Banking Court. The argument of the learned counsel for the appellant, in addition to the grounds taken in the memorandum of appeal, have been unable to point out any infirmity with respect to the Impugned Judgment.

The 12(2) Order, and the order dated 14.12.2017, manifestly conform to the precepts of the law where under they were rendered and no infirmity in respect thereof has been demonstrated before us.



10. It is our deliberated view that the appellant was provided every opportunity, permissible thereto under the law, to substantiate his case in the Suit and that no infirmity has been demonstrated in the proceedings conducted by the learned Judge. In view of the reasoning and rationale contained herein we are of the considered view that the appellant has failed to demonstrate any entitlement for the grant of the present appeals, therefore, the subject appeals, including pending applications, are hereby dismissed with no orders as to costs.

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