

# HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD

**M.A No.31 of 2021**

*[Telenor Microfinance Bank Limited vs. Kirshan & another]*

**M.A No.32 of 2021**

*[Telenor Microfinance Bank Limited vs. Hajab & Ors]*

**M.A No.33 of 2021**

*[Telenor Microfinance Bank Limited vs. M. Rahim & Ors]*

**M.A No.34 of 2021**

*[Telenor Microfinance Bank Limited vs. Malook & Ors]*

**M.A No.35 of 2021**

*[Telenor Microfinance Bank Limited vs. Ameer Hassan & Ors]*

**M.A No.36 of 2021**

*[Telenor Microfinance Bank Limited vs. Dilsher & Ors]*

**M.A No.37 of 2021**

*[Telenor Microfinance Bank Limited vs. Taro & Ors]*

**M.A No.38 of 2021**

*[Telenor Microfinance Bank Limited vs. Sahib & Ors]*

**M.A No.39 of 2021**

*[Telenor Microfinance Bank Limited vs. Ab. Rahim & Ors]*

**M.A No.40 of 2021**

*[Telenor Microfinance Bank Limited vs. Punhoon & Ors]*

**M.A No.41 of 2021**

*[Telenor Microfinance Bank Limited vs. Khan Muhammad & Ors]*

**M.A No.42 of 2021**

*[Telenor Microfinance Bank Limited vs. Ramesh Kumar & Ors]*

**M.A No.43 of 2021**

*[Telenor Microfinance Bank Limited vs. Dahu Mal & Ors]*

**M.A No.44 of 2021**

*[Telenor Microfinance Bank Limited vs. Mavji & Ors]*

**M.A No.45 of 2021**

*[Telenor Microfinance Bank Limited vs. Imam Bux & Ors]*

**M.A No.46 of 2021**

*[Telenor Microfinance Bank Limited vs. Rano & Ors]*

**M.A No.47 of 2021**

*[Telenor Microfinance Bank Limited vs. Dhevji Mal & Ors]*

**M.A No.48 of 2021**

*[Telenor Microfinance Bank Limited vs. Jeebo & Ors]*

**M.A No.49 of 2021**

*[Telenor Microfinance Bank Limited vs. Ab. Hafeez & Ors]*

**M.A No.50 of 2021**

*[Telenor Microfinance Bank Limited vs. Dhanji & Ors]*

**M.A No.51 of 2021**

*[Telenor Microfinance Bank Limited vs. Saman & Ors]*

**M.A No.52 of 2021**

*[Telenor Microfinance Bank Limited vs. Ameen Muhammad & Ors]*

**M.A No.53 of 2021**

*[Telenor Microfinance Bank Limited vs. Gulab & Ors]*

**M.A No.54 of 2021**

*[Telenor Microfinance Bank Limited vs. M. Hassan & Ors]*

**M.A No.55 of 2021**

*[Telenor Microfinance Bank Limited vs. Hakeem & Ors]*

**M.A No.56 of 2021**

*[Telenor Microfinance Bank Limited vs. Jamal & Ors]*

**M.A No.57 of 2021**

*[Telenor Microfinance Bank Limited vs. Pehlaj & Ors]*

**M.A No.58 of 2021**

*[Telenor Microfinance Bank Limited vs. Mansingh & Ors]*

**M.A No.59 of 2021**

*[Telenor Microfinance Bank Limited vs. Prem & another]*

**M.A No.60 of 2021**

*[Telenor Microfinance Bank Limited vs. Jumoon & another]*

**M.A No.61 of 2021**

*[Telenor Microfinance Bank Limited vs. Sher Muhammad & another]*

**M.A No.62 of 2021**

*[Telenor Microfinance Bank Limited vs. Ghamoon & another]*

**M.A No.63 of 2021**

*[Telenor Microfinance Bank Limited vs. Jetho & another]*

**M.A No.64 of 2021**

*[Telenor Microfinance Bank Limited vs. Tukho & another]*

**M.A No.65 of 2021**

*[Telenor Microfinance Bank Limited vs. Chahnoo & another]*

**M.A No.66 of 2021**

*[Telenor Microfinance Bank Limited vs. Kirshan & another]*

**M.A No.67 of 2021**

*[Telenor Microfinance Bank Limited vs. Photo Mal & another]*

**M.A No.68 of 2021**

*[Telenor Microfinance Bank Limited vs. Pirsoo & another]*

**M.A No.69 of 2021***[Telenor Microfinance Bank Limited vs. Ali Muhammad & another]***M.A No.70 of 2021***[Telenor Microfinance Bank Limited vs. Ali Bux & another]***M.A No.71 of 2021***[Telenor Microfinance Bank Limited vs. Meer Muhammad & another]***M.A No.72 of 2021***[Telenor Microfinance Bank Limited vs. Gaagan Das & Ors]***M.A No.73 of 2021***[Telenor Microfinance Bank Limited vs. Asghar Khan & another]***M.A No.74 of 2021***[Telenor Microfinance Bank Limited vs. Dhevji Mal & another]***M.A No.75 of 2021***[Telenor Microfinance Bank Limited vs. Abdul Rauf & another]***M.A No.76 of 2021***[Telenor Microfinance Bank Limited vs. Muhammad Mithan & another]***M.A No.77 of 2021***[Telenor Microfinance Bank Limited vs. Partab & another]***M.A No.78 of 2021***[Telenor Microfinance Bank Limited vs. Ranjho & another]***M.A No.79 of 2021***[Telenor Microfinance Bank Limited vs. Allah Warayo & another]***M.A No.80 of 2021***[Telenor Microfinance Bank Limited vs. Muhammad Aslam & another]***M.A No.81 of 2021***[Telenor Microfinance Bank Limited vs. Partab & another]***M.A No.82 of 2021***[Telenor Microfinance Bank Limited vs. Ali Ghulam & another]***M.A No.83 of 2021***[Telenor Microfinance Bank Limited vs. Amanullah & Ors]***Date of hearing : 22.11.2021****Date of decision : 03.12.2021**

Mr. Waheed Ali Ghumro, advocate for appellants  
None present for respondents.

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## **ORDER**

**ADNAN-UL-KARIM MEMON, J.-** This common order will decide the fate of all captioned miscellaneous appeals, as a similar law point of jurisdiction is involved in these matters.

2. Facts of all these matters, in bird's eye view, are that appellant being a financial institution/banking company entered into financial agreements with respondents and in result thereof paid loans to them and on the alleged failure of respondents to repay the said loan, appellant filed Summary Suits under Order 37 Rule 2 CPC before learned Additional District Judge-I, Tharparkar @ Mithi; however, complaints whereof were returned to the appellant under Order VI1 Rule 10 CPC for presenting the same before the court having jurisdiction vide common orders dated 30.08.2021 on the premise that appellant / Telenor Microfinance Bank Limited is a financial Institution, who gave loans to its borrowers under the terms and conditions of State Bank of Pakistan, as such the jurisdiction lies with Banking Court instead of Court of plenary jurisdiction.

3. Despite notice respondents failed to effect appearance. On the other hand, learned counsel submits that learned Additional District Judge failed to appreciate that finance agreements also contain the promissory note, whereby respondents unconditionally agreed to pay certain amount with the following conditions. The conditions of one of the agreements dated 12.9.2018 in MA No. 31 of 2021 is reproduced as under:-

- A. "At the request of the Customer / through application dated 12.9.2018 (Schedule A to this agreement) the Bank has agreed to finance of Rs. 75,000/- (Seventy Five thousand only) to the Customer/s for a period of 12 months, for the purpose mentioned in Schedule A.
- B. The finance facility will be provided through purchase of the moveable property, offered by the Customer/s hereinafter referred to as "the assets" and so described in Schedule B to this agreement by the Bank for a "sale price" of Rs.93,000 (Rupees in words) Ninety Three Thousand Rupees) only and resale of the same to the Customer/s by the Bank for Rs. 93000 (Rupees in words) Ninety Three Thousand only being the "purchase price" including the service charge @ 24% of the Sale Price in 12 months / installments of Rs. \_ each OR by minimum

monthly payments OR by lump purchase price payable at maturity as prescribed in schedule 'C' to this agreement.

- C. This Customer/s has / have opened an account no 115112010317-001 with the LTF branch of Bank in which the sale price will be transferred for subsequent disbursal through ATM, cash withdrawals by the Customer/s or payments by the Bank to any person(s) at the instructions of the Customer/s all sums allowed by the Bank to be withdrawn from such account by are at the instance of the Customer/s shall be deemed to represent payment by the Bank towards the sale price in accordance with clause B above.

Now, therefore, this agreement witnesses as under:-

**Customer/s                      Covenants**  
 -----  
**Statement of Hyptothecated Goods**  
 -----  
**Customer(s)                      Guarantor(s)                      Witnesses**

**Promissory Note**

4. Mr. Waheed Ali Ghumro learned Counsel for the appellant has submitted that Appellant-Telenor Micro Finance Bank Limited is not a Bank but it is a Financial Institution, thus banking court has no jurisdiction to try the suits filed by the appellant; that a summary suit is to be filed and maintained based on promissory note; that filing of suit U/O XXXVII Rule 1 & 2 CPC before the learned trial court is within the jurisdiction of it. Learned counsel emphasized that under section 4 of the Negotiable Instruments Act, learned District Court has jurisdiction to proceed with the matter U/O XXXVII Rule 1 & 2 CPC; and, not to the Banking Court, thus returning of plaints by the trial court for presenting the same before the court having jurisdiction was an erroneous decision; and, was not called for. He prayed for setting aside the impugned common orders dated 30.08.2021.

5. Heard learned counsel for the appellants and perused the material available on record and the case law cited at the bar.

6. There are three law points involved in the present appeals.

- (i) Whether the appellant -Telenor Microfinance Bank Limited is a financial institution/ bank or otherwise &
- (ii) Whether the matter arising out of the financial agreement, can be sued before Banking Court; and/or District Court in

Summary suit as provided under Order XXXVII Rule 1 & 2 CPC &

- (iii) Whether suits filed by the appellant before the learned District Court under Order XXXVII Rule 1 & 2 CPC has jurisdiction based on simple financial agreement and not under section 4 of the Negotiable Instruments Act.

7. To thrash out these questions, we will first refer to section 2(a) of the Financial Institutions (Recovery of Finances) Ordinance, 2001, an excerpt whereof is reproduced as under:

- “a) "Financial institution" means and includes
  - (i) any company whether incorporated within or outside Pakistan which transacts the business of banking or any associated or ancillary business in Pakistan through its branches within or outside Pakistan and includes a government savings bank, but excludes the State Bank of Pakistan;
  - (ii) (ii) a modaraba or modaraba management company, leasing company, investment bank, venture capital company, financing company, unit trust or mutual fund of any kind and credit or investment institution, corporation or company; and
  - (iii) any company authorized by law to carry on any similar business, as the Federal Government may by notification in the official Gazette, specify;”
- b) "Banking Court" means
  - (i) in respect of a case in which the claim does not exceed fifty million rupees or for the trial of offences under this Ordinance, the Court established under section 5; and
  - (ii) in respect of any other case, the High Court.
- (c) "customer" means a person to whom finance has been extended by a financial institution and includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution as well as a surety or an indemnifier;
- (d) "finance" includes
  - (i) an accommodation or facility provided on the basis of participation in profit and loss, mark-up or mark-down in price, hire-purchase, equity support, lease, rent-sharing, licensing charge or fee of any kind, purchase and sale of any property including commodities, patents, designs, trademarks and copy-rights, bills of exchange, promissory notes or other instruments with or without buy-back arrangement by a seller, participation term certificate, musharika, morabaha, musawama, istisnah or modaraba certificate, term finance certificate;
  - (ii) facility of credit or charge cards;

- (iv) facility of guarantees, indemnities, letters of credit or any other financial engagement which a financial institution may give, issue or undertake on behalf of a customer, with a corresponding obligation by the customer to the financial institution;
  - (v) a loan, advance, cash credit, overdraft, packing credit, a bill discounted and purchased or any other financial accommodation provided by a financial institution to a customer;
  - (vi) a benami loan or facility that is, a loan or facility the real beneficiary or recipient whereof is a person other than the person in whose name the loan or facility is advanced or granted;
  - (vii) any amount due from a customer to a financial institution under a decree passed by a Civil Court or an award given by an arbitrator;
  - (viii) any amount due from a customer to a financial institution which is the subject matter of any pending suit, appeal or revision before any Court;
  - (ix) any other facility availed by a customer from a financial institution.
- (e) “obligation” includes
- (i) any agreement for the repayment or extension of time in repayment of a finance or for its restructuring or renewal or for payment or extension of time in payment of any other amounts relating to a finance or liquidated damages; and
  - (ii) any and all representations, warranties and covenants made by or on behalf of the customer to a financial institution at any stage, including representations, warranties and covenants with regard to the ownership, mortgage, pledge, hypothecation or assignment of, or other charge on, assets or properties or repayment of a finance or payment of any other amounts relating to a finance or performance of an undertaking or fulfillment of a promise; and
  - (iii) all duties imposed on the customer under this Ordinance; and”

8. Going ahead, section 9 (1) of the Financial Institutions (Recovery of Finances) Ordinance, 2001, is the main section, wherein all the above referred terms have been used and under this section customer or financial institution can file a suit in the Banking Court in case of non-fulfillment of any obligation with regard to any finance, which is reproduced below:-

“Procedure of Banking Courts.- (1) Where a customer or a financial institution commits a default in fulfillment of any obligation with

regard to any finance, the financial institution or, as the case may be, the customer, may institute a suit in the Banking Court by presenting a plaint which shall be verified on oath, in the case of a financial institution by de the Branch Manager or such other office of the financial institution as may be duly authorized in this behalf by power of attorney or otherwise.

- (2).....
- (3).....
- (4).....
- (5).....”

9. The combined study of section 2(a) and section 9 of the Ordinance, *ibid*, would reveal the term finance which includes accommodation or facility provided based on participation in profit and loss; whereas, this is not the situation in the present case, as the appellant-institution has not granted the finance to the respondents on the aforesaid analogy, thus the section 9 of the Ordinance will not be attracted in the present case, which even otherwise speaks about procedure where a customer or a financial institution fails to fulfill any of obligations about any finance, they, as the case may be, can sue by presenting plaint duly verified on oath, to the Banking Court. Here the appellant has invoked the jurisdiction of the learned District Court under Order XXXVII Rule 1 & 2 CPC which has a different connotation, thus the observation of the learned trial court about presenting the suits before the learned Banking court is based on erroneous guidelines, so far as the jurisdiction of Banking Court is concerned.

10. Besides above, a bare perusal of Section 3(2) of Microfinance Institution Ordinance 2001, explicitly provides that the Banking Companies Ordinance and any law for the time being in force relating to banking companies or financial institutions shall not apply to microfinance institutions licensed under the Ordinance and microfinance institutions shall not be deemed to be a banking company for the said ordinance, the State Bank of Pakistan Act, 1956 (XXXIII of 1956) or any other law for the time being in force relating to banking companies. For convenience sake an excerpt whereof is as under:

"Save as otherwise provided in this Ordinance, the Banking Companies Ordinance and any law for the time being in force relating to banking companies or financial institutions shall not apply to



microfinance institutions licensed under this Ordinance and microfinance institutions shall not be deemed to be a banking company for the purposes of the said ordinance, the State Bank of Pakistan Act, 1956 (XXXIII of 1956) or any other law for the time being in force relating to banking companies."

11. Second and third question, whether suit based on financial agreement with certain conditions could be termed as Negotiable Instrument in terms of section 4 of the Negotiable Instruments Act and the summary suit could be filed under Order XXXVII Rule 1 & 2 CPC & / or before the Court of plenary and / or banking court's jurisdiction.

12. To appreciate the aforesaid proposition, we have gone through the various sections of Microfinance Institutions Ordinance, 2001 whereby certain restrictions have been imposed. Section 7 of the Ordinance, 2001, provides as under:-

1. A microfinance institution shall not undertake or transact any kind of business other than authorized by, or under, this Ordinance.
2. In performance of its functions under this Ordinance, a microfinance institution shall have proper regard to the economic and commercial merits of any or the transactions or activities it plans to undertake or assist.
3. Where a microfinance institution is required by any authority to undertake or assist a micro enterprise or other such activities which it considers economically or otherwise unsound, the microfinance institution shall not undertake or assist such activity until and unless the said authority has provided adequate guarantee to the microfinance institution or indemnify any losses that it may incur in the undertaking of such activity.
4. No microfinance institution shall create a floating charge on the undertaking or any of its assets or part thereof, unless the creation of such floating charge is certified in writing by the State Bank as not being detrimental to the interest of the depositors of such institution.
5. Any such charge created without obtaining the certificate of the State Bank shall be invalid.

13. Primarily, under section 4 of the Negotiable Instruments Act a Promissory Note is required to contain the following ingredients:--

- i. An unconditional undertaking to pay,
- ii. the sum should be the sum of money and should be certain
- iii. the payment should be to or to the order of a person who is certain, or to the bearer, of the instrument,

iv. and the maker should sign it.

14. From the above definition, it is clear that if an instrument fulfills the above four conditions, it will be termed as Promissory Note within the meaning of section 4 of the Act and not otherwise; whereas the appellant institution while entering into the Finance Agreement imposed certain conditions upon the customers as discussed supra thus the question arises as to whether the finance agreement fell within the ambit of Negotiable Instrument. Prima facie the answer is not in affirmative.

15. To dilate upon the aforesaid proposition, I have noticed that the learned trial court in similar matters has based its findings on the analogy that the appellant is not a Bank but it is a Financial Institution. Further that a summary suit is to be filed and maintained based on the bills of exchange, hundis, or promissory notes. The promissory note or Negotiable Instrument is an instrument in writing (not being a banknote or a currency note) containing an unconditional undertaking signed by the maker to pay a certain sum of money while the suits are based upon a conditional agreement of loan having been executed by the defendant No.1 and remaining defendants became guarantors which, at no cost, can be termed as pronote or otherwise and if it is so; filing of the suit under Order 37 Rule 1 & 2 CPC is beyond the jurisdiction of the court and the In the court has no jurisdiction to proceed with the matter under Order 37 Rule 1 & 2 CPC. The appellant's case is also akin to the case decided by the learned trial court, which is also based upon conditional finance agreement entered into between the parties, prima facie which could not be termed as a pronote under the negotiable instruments Act.

16. When confronted with this position of the case to the appellants, learned counsel for the appellants has attempted to clarify the position and submitted that summary suit is easy-going for the appellants/ plaintiffs in the recovery of the huge loan amount. I am not impressed by this analogy put forward by the learned counsel, for the simple reason that law cannot be changed for the sake of convenience of a party; further neither the Court can assume the jurisdiction not conferred by law nor the jurisdiction can be assumed or entertained by consent of parties, but the doctrine of assuming the jurisdiction by the

Courts is strictly based on the law conferring that particular jurisdiction.

17. To go further a minute examination of pleadings of the appellants leads to the conclusion that they have pleaded genuine triable issues in terms of specific provisions of Order 37 of CPC. In this regard, the well-known judgment of Haji Ali Khan & Co. V/s. M/s. Allied Bank of Pakistan Limited reported as PLD 1995 Supreme Court 362, is of relevance, wherein a complete procedure has been laid down by the Hon'ble Supreme Court.

18. The C.P.C is consolidatory and procedural law nevertheless it encompasses substantive stipulations as to the branch of law for dispensing the process of litigation. According to Section 9 C.P.C., the courts have jurisdiction to try all suits of civil nature except suits of which their cognizance is expressly or impliedly barred. The word and expression jurisdiction refers to the legal authority to administer justice under the methods and avenues provided subject to limitations imposed by law. Whenever any jurisdiction is conferred to any court of law subject to several prerequisites, then such prerequisites should be complied with.

19. In this case, the plaint of suits has been returned to the appellants on the premise that the case of the appellants does not fall within the realm and sphere of Order XXXVII C.P.C and reached the conclusion that it had no jurisdiction to entertain or try the summary suit; the plaint was returned to the appellants under Order VII Rule 10 C.P.C., for presentation before the competent forum i.e. Banking Court.

20. The makers of law make it obvious without any ambiguity that under Order XXXVII Rule 1, C.P.C, the suit can be entertained to deal the cases based on negotiable instruments which trigger on presentation of the plaint and in case the defendant fails to appear or defend and in default, the allegation in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree.

21. Prima-facie, the suits filed by the appellants are not based on any negotiable instrument as discussed supra, nor the appellants / plaintiffs have demonstrated that any cheque which was issued by the respondents in favor of the appellants was dishonored rather the appellants have framed the suit on the premise that loan was obtained by the respondents and amount was deposited in their account as discussed supra. Learned counsel austerely hinged on the finance/loan agreement based on certain conditions as discussed supra in which as per appellants / plaintiffs, the respondents agreed to pay off certain amounts but due to non-compliance of agreement, the summary suit was instituted under summary chapter. The trial court returned the plaint for presentation before the court having jurisdiction which order is assailed before this court.

22. The learned trial court has given findings and held that the Finance/loan Agreement, the nucleus of the case was not a negotiable instrument; and, it is not covered in the sphere of any other negotiable instrument, therefore at the very beginning, the trial court rightly returned the plaint to the appellant, however with the wrong notion to place before the Banking Court, rather than before the Court of plenary jurisdiction. In addition, according to section 15 C.P.C., every suit is required to be instituted in the court of lowest grade competent to try it with the exception provided under Order XXXVII Rules 1 & 2 C.P.C., which is not the case in hand.

23. In view of above the listed Misc. Appeals are disposed of in the terms that impugned Order dated 30.8.2021 passed by learned Additional District Judge-I, Tharparkar at Mithi is modified to the extent that the plaint be filed before the court of plenary jurisdiction instead of Banking Court.

JUDGE