

HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD

M.A No.03 of 2021

[Telenor Microfinance Bank Limited vs. Shamim Bano]

M.A No.04 of 2021

[Telenor Microfinance Bank Limited vs. Rehana Sabir]

M.A No.05 of 2021

[Telenor Microfinance Bank Limited vs. Asma & Ors]

M.A No.06 of 2021

[Telenor Microfinance Bank Limited vs. Komal & another]

M.A No.07 of 2021

[Telenor Microfinance Bank Limited vs. Farha Unar & Ors]

M.A No.08 of 2021

[Telenor Microfinance Bank Limited vs. Rani & Ors]

M.A No.09 of 2021

[Telenor Microfinance Bank Limited vs. Shakeela & Ors]

M.A No.10 of 2021

[Telenor Microfinance Bank Limited vs. Shumaila & Ors]

M.A No.11 of 2021

[Telenor Microfinance Bank Limited vs. Aneesa & Ors]

M.A No.12 of 2021

[Telenor Microfinance Bank Limited vs. Nisho Manghar]

Appellant : Through Mr. Waheed Ali Ghumro advocate
Respondents : Nemo
Date of hearing : 22.11.2021
Date of decision : 03.12.2021

ORDER

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

2. Facts of all these matters, in nutshell, are that appellant being *Financial Institution*/banking company entered into financial agreements with respondents and in result thereof paid loans to them and on failure of respondents to re-pay the said loan, appellant filed Summary Suits before the MCAC-II / VIth Additional District Judge, Hyderabad; however, complaints whereof were returned to the appellant U/O VII Rule 10 CPC for presenting the same before the court having jurisdiction vide common order dated 21.12.2020, which has been impugned by the appellant through captioned miscellaneous appeals. For the sake of convenience concluding paragraph of the impugned order is reproduced below:-

“5. First of all, there is no cavil to observe that Telenor Micro Finance Bank Limited is not a Bank but it is a Financial Institution. This is what which is reported in the first two case laws (supra) relied upon by the learned counsel. Needless to mention that a summary suit is to be filed and maintained on the basis of the bills of exchange, Hundis or promissory notes. The promissory note or Negotiable Instrument is one which is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking signed by the maker to pay certain sum of money while the above 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 instant suit U/O XXXVII Rule 1 & 2 CPC is beyond the jurisdiction of this court. In the given circumstances, this court has no jurisdiction to proceed with the matter U/O XXXVII Rule 1 & 2 CPC. Accordingly complaints of above suits along with annexures respectively are returned to the plaintiff as provided U/O VII Rule 10 CPC for presenting the same before the court having jurisdiction. The office to comply.”

3. Despite notice respondents failed to effect appearance. On the other hand, learned counsel in respect of the aforesaid conclusion of the learned Additional District Judge contends that learned Judge has 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 28.2.2018 in MA No. 03 of 2021 is reproduced as under:-

A. “At the request of the Customer / through application dated 28.2.2018 (Schedule A to this agreement) the Bank has agreed to finance of Rs. 50,000/- (Fifty thousand only)

to the Customer/s for a period of 24 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.69000 (Rupees in words) Sixty Nine thousand Rupees) only and resale of the same to the Customer/s by the Bank for Rs. 69000 (Rupees in words) Sixty Nine Thousand only being the “purchase price” including the service charge @ 38% of the Sale Price in 38 months / installments of Rs. 2875 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 109013042449 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 Ghumro, learned counsel tried to impress this Court to the effect that appellant’s case is based on ‘promissory note’ attached with the finance agreement, hence summary suit is very much maintainable. In support of his case, he relied upon the cases of Muhammad Shakeel v. Sheikh Hafiz Muhammad Aslam (2014 SCMR 1562) and the judgment dated 3.3.2017 passed by this Court in the case of Syed Itrat Hussain Rizvi Vs. Tameer Micro Finance Bank Ltd (2018 CLD 116).

5. I have heard learned counsel for the appellant on the subject issue and perused the material available on record.

6. The important question involved in the present proceedings is 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 jurisdiction.

7. 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.

8. 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.

9. 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.

10. To dilate upon the aforesaid proposition, I have noticed that this court in similar matters has based its findings on the analogy that the appellant is not a Bank but it is a Financial Institution. It is further noticed that a summary suit could 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 trial court to proceed with the matter under Order 37 Rule 1 & 2 CPC. The appellant's case is also akin to the case decided by this court in Misc. Appeal No. 31 of 2021 & other connected Appeals, 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.

11. When confronted with this position of the case to the appellant, learned counsel for the appellant has attempted to clarify the position and submitted that summary suit is easy-going for the appellant/plaintiff 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.

12. 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.

13. 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.

14. In this case, the plaint of suits has been returned to the appellant on the premise that the case of the appellant 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 appellant under Order VII Rule 10 C.P.C., for presentation before the competent forum.

15. 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.

16. Prima-facie, the suits filed by the appellant are not based on any negotiable instrument as discussed supra nor the appellant/plaintiff

has demonstrated that any cheque which was issued by the respondents in favor of the appellant was dishonored rather the appellant has 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 appellant/ plaintiff, the respondents agreed to pay off certain amounts but due to noncompliance 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.

17. 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 to place 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.

18. In my view the impugned Order dated 21.12.2020 passed by the learned Model Civil Appellate Court-II / 6th Additional District Judge, Hyderabad in Summary Suit No. 117 of 2020 and other connected suits is fair enough, does not require interference at my end as the same is within the parameters of law, therefore, the same is hereby maintained. Consequently, the listed Misc. Appeals being meritless are dismissed.

JUDGE

Sajjad Ali Jessar