

Judgment Sheet

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

First Civil Appeal No. D – 05 of 2015

Before :

Mr. Justice Nadeem Akhtar

Mr. Justice Muhammad Faisal Kamal Alam

Appellants : Abdul Samad, Mohammed Ashraf, Sanaulah and
Mst. Qadul, all legal heirs of late Muhammad Haroon
Mahar, through Mr. M. A. Hakeem Advocate.

Respondents : Habib Bank Limited and
Branch Manager, Habib Bank Limited,
Sangi Branch, Taluqa Pano Aqil, Sukkur,
through Mr. Fayyaz Ahmed Soomro Advocate.

Date of hearing : 19.12.2017.

J U D G M E N T

NADEEM AKHTAR, J. – The appellants have impugned order dated 29.01.2015 passed by learned Banking Court No.I Sukkur in Suit No.792/2000 (Execution Application No.517/2002), whereby application filed by them for setting aside the ex-parte decree passed in the said Suit against their deceased predecessor-in-interest was dismissed.

2. Relevant facts of the case are that respondent No.1-bank filed Suit No.792/2000 in Banking Court No.I Sukkur against Muhammad Haroon Mahar, Ghulam Hussain and Abdul Sattar for recovery of Rs.254,300.00. Defendant No.1 Muhammad Haroon Mahar was sued as the principal borrower, whereas the above named other two defendants were sued as guarantors of defendant No.1. As the defendants did not file any application for leave to defend, it was ordered on 23.01.2002 that the Suit shall proceed ex-parte against them. Thereafter, vide judgment dated 26.01.2002 and decree dated 13.04.2002, the Suit was decreed with costs against all the above named three defendants jointly and severally in the sum of Rs.254,300.00 with markup thereon from the date of institution of the Suit [instead of from the date of default as provided in Section 3(2) of the Financial Institutions (Recovery of Finances) Ordinance of 2001] till realization and markup for cushion period of 210 days. After obtaining the decree in the above terms, the respondent No.1-bank filed Execution Application No.517/2002 for execution of the decree against judgment debtors.

3. On 16.06.2012, appellant No.4 Mst. Qadul Begum, widow of defendant / judgment debtor No.1 late Muhammad Haroon Mahar (**'the deceased'**), filed an

application before the learned Banking Court for setting aside the ex-parte decree on the ground that the Suit was filed in the year 2000 against a dead person as the deceased passed away on 11.12.1998. In her said application, she had also prayed that legal heirs of the deceased may be allowed to defend the Suit on merits. Through the impugned order dated 29.01.2015, the above application filed by her was dismissed by the learned Banking Court by holding that if it is admitted for the sake of argument that the Suit was filed against a dead person (judgment debtor No.1), the remaining defendants / judgment debtors 2 and 3 were shown as guarantors, and in such circumstances there was no defect in the Suit as it was properly filed against two persons who were alive, whereas the Suit filed against the dead person was "*invalid*". It was further held that all judgment debtors were duly served and as they had failed to contest the matter, the ex-parte decree against them was fully justified.

4. The first three appellants before us are the real children and appellant No.4 is the widow of the deceased. The relationship of the appellants with the deceased has not been disputed by the respondents. The appellants have filed copy of the death certificate of the deceased issued by Government of Sindh, duly attested by Secretary, Union Council 38, Sangi, District Sukkur, according to which he passed away on 11.12.1998. Record shows that the Suit was instituted in May 2000. In their objections to the above application, the respondents had stated in a vague and evasive manner that the Suit was decreed during the lifetime of the deceased. However, they did not file any document, correspondence or acknowledgement before the learned Banking Court to show that the deceased was alive when the Suit was filed, nor was any such document / proof was produced before us despite adequate opportunity. On the other hand, death certificate of the deceased, issued and attested by the competent authorities, was filed by his widow along with her application in support of her assertion, which has also been filed in this appeal. In such circumstances, the learned Banking Court ought to have held a proper inquiry or should have directed the parties to lead evidence in support of their respective assertions instead of rejecting the application in a summary manner which was filed on the sole ground that the Suit was filed against a dead person. The learned Banking Court failed to realize the repercussions of the decree against a dead person which is now under execution against his legal heirs. The learned Banking Court also failed to appreciate that a Suit could be filed only against a living person, and Suit against a dead person as well as any order, judgment or decree passed against a dead person in such Suit, is a nullity.

5. In view of the above discussion, the Suit filed by the respondent No.1-bank against deceased defendant No.1 / principal borrower was a nullity, and as such the ex-parte decree passed against him in the said Suit, being null and

void, is liable to be set aside. Accordingly, the impugned order and the ex-parte judgment and decree passed in Suit No.792/2000 by learned Banking Court No.I Sukkur against defendant No.1 late Muhammad Haroon Mahar, are hereby set aside, and resultantly the said Suit is dismissed against the said defendant No.1 late Muhammad Haroon Mahar.

Foregoing are the reasons of the short order announced by us on 19.12.2017 whereby this appeal was allowed with costs.

J U D G E

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