IN THE HIGH COURT OF SINDH AT KARACHI

Ist Appeal No.46 of 2017

[Mohammad Iftikhar Vs. M/s. First Dawood Investment Bank Ltd., & others]

Date	Order with signature of Judge(s)

PRESENT:
Mr. Justice Irfan Saadat Khan
Mr. Justice Arshad Hussain Khan

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Appellant — Through Mr. Shaikh Adnan Usman, Advocate

Respondents — Through Mr. Khalil Ahmed Siddiqui, Advocate as well as Mr. Mehran Khan AAG.

Date of Hearing: 24.02.2023

Date of Decision: 13.03.2023

JUDGMENT

ARSHAD HUSSAIN KHAN, J: By means of this First Appeal under section 22 of the Financial Institutions (Recovery of Finances) Ordinance 2001, the appellant has assailed the order dated 04.05.2017 passed by the Banking Court No.II, Karachi, in suit No.45/2014, whereby application under section 12 (2) CPC, filed by present appellant for setting aside the judgment and decree passed in the said suit was dismissed.

2. Briefly, the facts giving rise to the present appeal are that respondent No.1-M/s. First Dawood Investment Bank Ltd., filed suit No.45/2014 under Section 9 of the Financial Institution [Recovery of Finances] Ordinance, 2001 (FIO 2001), before the Banking Court No.II, at Karachi, for recovery of outstanding amount of Rs.48,011,795.00 against the present appellant and respondent No.2. Pursuant to the notices and summons issued in the said case, only respondent No.2 appeared before the court and entered into a compromise with the bank, thereafter, compromise decree in respect of respondent No.2 was passed. However, since the appellant / defendant No.1 failed to file application for leave to appear and defend within the statutory period, the suit was proceeded ex-parte against the appellant and subsequently, vide judgment dated 26.01.2016, it was decreed against the appellant in the sum of Rs.14,622,500/- alongwith cost of funds from the date of default till realization of the entire decretal amount. Thereafter, appellant by filing application under Section 12(2) and under Order IX rule 13 of CPC read

with Section 151 of CPC challenged the above said judgment stating therein that the judgment against him has been obtained by concealment of facts, misrepresentation and by committing fraud upon the court. The said application was contested by the respondent-bank. Banking Court after hearing learned counsel of the parties dismissed the application, vide order dated 04.05.2017, which is impugned in the present appeal.

3. Upon notice of the present appeal counsel for the respondent-bank filed Vakalatnama and contested the appeal.

4. Learned counsel for the appellant, during his arguments while reiterating the contents of the memo of appeal, contended that the order impugned in the present proceeding is bad in law and facts as such not sustainable and is liable to be set-aside. It is further contended that banking court while passing the impugned order has failed to take into consideration that the respondent-bank by concealing and misrepresenting the facts has obtained the judgment and decree against the appellant. It is also contended that respondent-bank has failed to apprise the court that the dispute between the appellant and respondent-bank in respect of outstanding loan was settled in the year 2013 wherein it was agreed that the present appellant will transfer the ownership of three mortgaged shops situated in Korangi No.5, Karachi. Learned counsel has further contended that after full and final settlement, filing of the suit by respondent-bank before the banking court and thereafter entering into a compromise with respondent No.2 would amount to cheating and fraud as such the said judgment as well as impugned order are untenable in law. It is also contended that banking court failed to take into consideration the material fact that there is an arbitration clause in the Musharika Investment Agreement dated 25.03.2006, entered into between the parties, and in pursuance thereof the dispute, if any, had to be resolved through arbitration proceedings instead of filing the suit. Next, learned counsel contended that the notices and summons of the case have never been served upon the appellant on the address where he is residing as such the service cannot be held good and the judgment obtained on the basis of said service is not sustainable in law. It is also contended that learned court while decreeing the suit of respondent-bank has failed to consider the fact that the appellant did not receive any loan nor the respondent-bank filed any proof in respect thereof. It is also contended that the

appellant is still ready to settle the matter with the respondent-bank. Lastly, he has argued that the impugned order suffers from material illegality, irregularity and infirmity, hence liable to be set aside as it has resulted in miscarriage of justice. He has prayed that instant appeal may be allowed and the impugned order may be set aside. In support of his arguments learned counsel for the appellant has placed reliance on the cases of *Messrs Watan Construction Company Government Contractor v. Government of Khyber Pakhtunkhwa through Secretary Public Health Engineering Department and 4 others* [2013 CLC 1028], *Progressive Engineers Alliance Limited v. Pakistan Steel Mills Corporation Ltd., Bin Qasim (PIPRI) Karachi* [NLR 1990 UC 730] and *Messrs Dadabhoy Cement Industries Limited and others v. Messrs National Development Finance Corporation* [2002 CLC 166].

5. Conversely, learned counsel for the respondent has contended that the impugned order is well within the four corners of law and equity, hence does not warrant any interference by this Court. It is contended that the appellant despite notices served through all modes including publication did not appear and participate in the suit proceedings whereupon the said judgment and decree were passed in favour of respondent-bank. He has further contended that no appeal against the judgment and decree has been preferred by the present appellant as such the same has attended finality. It is also contended that there was no concealment of facts and/or any misrepresentation as alleged by the present appellant. As regards the settlement with the appellant, the respondent-bank has specifically mentioned in the plaint that the appellant had paid Rs.50,000/- and also executed affidavit and promised to settle all the liabilities, thereafter, he had never taken any step to fulfil his promise. Resultantly, the respondent-bank had no alternative but to file the suit for recovery. The fact about the said settlement has also been reflected from the judgment passed against the appellant by the banking court. It is also contended that insofar as the arbitration clause is concerned, it is now well settled position that the arbitration clause of any agreement with the financial institution will not create any bar to the financial institution to seek its recovery from the banking court. He has further argued that the present appellant initially failed to appear before the court despite notices and when the said judgment and decree were passed against him he came

up with frivolous plea that he had no notice of the case and the judgment has been obtained through fraud and misrepresentation. It is lastly contended that neither the judgment and decree against the present appellant nor order impugned in the present proceeding suffer from any illegality and infirmity as such present appeal is liable to be dismissed with cost.

6. Heard the arguments and perused the material available on the record carefully.

From perusal of record, it appears that respondent No.1 filed Suit No.45 of 2014 before the Banking Court for recovery of amount, which was availed and utilized by the appellant under Musharika Investment agreement dated 25.03.2006. Record also transpires that in order to secure the facility, present appellant (Principal Debtor) and respondent No.2 (Mortgagor) deposited all the original documents of their immovable properties and executed mortgaged deed and memorandum of deposit of title deed creating first charge in favour of the respondent bank. Record further reflects that when the present appellant and respondent No.2 refused to repay the outstanding amount the respondent-bank filed above suit for recovery of Rs.48,011,795.00 along with costs of funds. Upon filing of the suit, the notices were issued to the present appellant and respondent No.2 through all modes including bailiff, registered A/D, courier service and by way of publication. After expiry of statutory period in filing leave to appear and defend application the suit was ordered to be proceeded ex-parte against the defendants [appellant and respondent No.2] by the Banking Court, vide order dated 18.03.2014. Thereafter, respondent No.2 appeared before the court and filed application under Order XXIII Rule 3 CPC stating therein that the matter has been settled between respondent No.2 and the Bank. Resultantly, with the consent of the respondent-bank a compromise decree was passed in respect of respondent No.2, however, since present appellant / defendant No.1 despite service failed to appear before the court, the matter proceeded ex-parte against him. Consequently, banking court after taking into consideration all the material facts passed the judgment and decree in the sum of Rs.14,622,500/- alongwith cost of funds from the date of default, till realization of the entire decretal amount. The appellant challenged the said order on 28.10.2016 by filing application under Section 12(2) and

under order IX Rule 13 of CPC read with Section 151 of CPC before the banking court for setting aside the judgment and decree dated 26.01.2016 and 09.02.2016 respectively on the ground that the same have been obtained through fraud and misrepresentation. Banking court dismissed the appellant's said application, vide its order dated 04.05.2017, which is impugned in the present proceedings.

7. Precisely, the case of the appellant hinges upon three points; firstly, that the service was not effected upon the appellant, secondly, in presence of an arbitration clause in the Musharaka Investment Agreement entered into between the parties, the banking court had no jurisdiction to try the suit and lastly, the judgment and decree obtained by respondent-bank against the appellant through fraud and misrepresentation.

8. Insofar as the first point is concerned, from the record it appears that Musharika Investment Agreement dated 25.03.2006, entered into between the appellant and respondent-bank, reflects the appellant's same address, that is, *Suite No. 9 & 11, 4th & 5th Floor , Shahzada Terrace, Vision Saddar, Karachi,* on which notices of the case have been issued to him through all moods including publications. Besides this, there are various letters available on the record, which show that the same were sent to the appellant on the above address and were duly received by him. Moreover, there is nothing available on the record, which could show that at any point in time the appellant has informed/intimated the respondent-bank that his address has been changed and he may be contacted to on his residential address instead of office address. Record further reflects that notices of the case were issued in terms of banking law through all modes including bailiff, registered A/D, courier service and by way of publication, as such, we are of the view that the service was effected and rightly held good upon the defendants (appellant and respondent No.2) by banking court and subsequently proceeded the case ex-parte against them as they despite service had chosen to remain absent.

9. In so far as the second point is concerned, it may be observed that despite existence of an arbitration clause in the Musharaka Investment Agreement, the banking court was well within its jurisdiction to adjudicate upon the dispute between a Financial Institution and Customer[s] as it related to the grant and availment of the finance facility,

granted to and availed by the appellant/Defendant No.1. Since the dispute pertains to the recovery of the outstanding amount on account of 'Finance Facility' granted to and availed by the appellant, thus exclusively fall within the jurisdiction of banking court. Moreover, the Musharika Investment Agreement was entered into between the appellant and the respondent-bank only whereas the suit was filed against respondent No.2 (mortgagor) as well who was not party to the said agreement as such the banking court can adjudicate upon the lis notwithstanding the existence of an arbitration clause 23 in the Musharika Investment Agreement dated 25.03.2006. In this regard, reference can be made to the cases of *Messrs First Dawood Investment Bank Limited through Authorized officers/attorney v. Mrs. Anjum Saleem and 3 others* **[2016 CLD Sindh 920]**, *Messrs Allied Bank Limited v. Messrs Golden Eagle Enterprises and 9 others* **[1999 MLD 64].**

10. Insofar as third and last point is concerned, a bare perusal of Section 12(2) CPC shows that an application under Section 12(2) CPC would lie to challenge the validity of the judgment, decree or order of a court only on the grounds of fraud, misrepresentation or want of jurisdiction. The said provision is neither in nature of an alternate remedy nor is substitute of an appeal. In the application under Section 12(2) CPC, filed by the appellant, the ground mainly expounded for misrepresentation and concealment was that the respondent-bank did not inform the court about the settlement reached between the bank and the appellant, therefore, the judgment and decree would be said to have been obtained by practicing fraud and misrepresentation. As we have already held that the service of the case was effected upon the appellant and he had chosen to remain absent, as such, respondent-bank could not be held responsible for any apathy and carelessness demonstrated by the appellant to his cause pending before the trial/banking court. Simply by moving an application on the grounds of fraud and misrepresentation to cover his negligence to pursue the matter and to make an attempt to neutralize the vires of the judgment subsisting against them, would not protect them from the repercussion, which are bound to follow them. As a matter of fact in absence of any convincing evidence, which in the present case is lacking, no misrepresentation or fraud could be alleged to have been contrived by the respondent-bank to obtain a decision in its favour, which came into

being mainly due to failure of the appellant to put up appearance before the court in pursuance of the notices and summons issued to him. Moreover, a perusal of Judgment dated 26.01.2016, shows that banking court has considered the material facts including the settlement between the parties so much so the amount, which has been paid by the Appellant, was deducted from the amount claimed by the respondent-bank. More so, there is nothing available on the record, which could show that the appellant while acting upon the settlement reached between him and the bank in the year 2013 had either fulfilled the terms of the said settlement and/or paid the outstanding amount due against him to respondent-bank. In absence any proof in respect thereof, filing of application under section 12 (2) of CPC lacks bonafide on the part of the appellant. In the circumstances, there appears no concealment of facts and/ or misrepresentation on the part of the respondent-bank as alleged by the appellant. The case law relied upon by learned counsel for the appellant have been gone through and found distinguishable from the facts of the present case as such the same are not applicable to the present case.

11. The upshot of the above discussion is that we do not find any illegality and/or infirmity in the impugned order as such present appeal being devoid of any merit is dismissed with no order as to cost.

JUDGE

JUDGE

*Jamil**