

Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

First Appeal No. D – 29 of 2022

Before :

Mr. Justice Nadeem Akhtar
Mr. Justice Khadim Hussain Tunio

Appellant : Ameer ul Hussain Kazi,
through Ms. Aisha Kapri Advocate.

Respondent : National Bank of Pakistan, Nasarpur Branch,
Tando Allahyar, through Mr. Kaleem Ahmed Mirza
Advocate.

Mr. Ghulam Abbas Sangi, Assistant Attorney General.

Date of hearing : 12.01.2023.

J U D G M E N T

NADEEM AKHTAR, J. – Through this first appeal under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance 2001 ('the Ordinance'), the appellant has impugned the judgment delivered on 24.03.2022 and the decree drawn in pursuance thereof on the same day by the learned Banking Court-II Hyderabad in Suit No. 50 of 2013, whereby the said Suit filed by the respondent-bank was decreed jointly and severally against the appellant and three others in the sum of Rs.924,942.00 with cost of funds thereon and costs of the Suit. Final decree for sale of the mortgaged immovable properties was also passed in the above Suit.

2. Relevant facts of the case are that the above Suit was filed by the respondent against the appellant and three others for recovery of Rs.2,324,940.00, including markup, with cost of funds thereon, and liquidated damages equivalent to 20% of the said amount. It was the case of the respondent that at the request of the appellant, a finance facility of Rs.2,500,000.00 with markup thereon at the rate of 12% per annum was sanctioned in his favour by the respondent vide Sanction Letter dated 02.04.2007 ; the said facility was to be settled by the appellant in sixty (60) installments ending on 31.01.2012 ; in consideration of the said facility and as security for its repayment, the appellant and his brothers and son executed promissory notes and mortgaged their immovable properties and hypothecated their movable assets in favour of the respondent ; and, the appellant and his guarantors failed to settle the liability and as such they

committed a deliberate and willful breach of their obligations under the agreement.

3. Pursuant to the summons issued by the learned Banking Court, the appellant filed an application under Section 10 of the Ordinance seeking unconditional leave to defend the Suit, which was dismissed for non-prosecution. Thereafter, the learned Banking Court proceeded to examine the claim of the respondent and decreed the Suit in the terms noted above.

4. At the outset, it is contended by learned counsel for the appellant that the details of the subject finance facility, as required under Sub-Section (3) of Section 9 of the Ordinance, were not disclosed by the respondent in its plaint. She submits that in view of non-compliance of the above mandatory provision, the Suit was not maintainable and was liable to be dismissed. She further submits that by entertaining and decreeing the Suit, the learned Banking Court has committed a grave error in law which is liable to be corrected by this Court by dismissing the Suit.

5. Conversely, learned counsel for the respondent submits that the provisions of Sub-Section (3) *ibid* are not mandatory or penal in nature and as such the respondent could not be non-suited due to the non-compliance thereof, especially in view of the default / breach of obligation committed by the appellant. He further submits that the legitimate claim of the respondent was rightly entertained and granted by the learned Banking Court.

6. We have heard learned counsel for the parties and have carefully examined the material available on record with their assistance. Since we have to see the effect of non-compliance of Sub-Section (3) of Section 9 of the Ordinance by the respondent / financial institution, as argued on behalf of the appellant, it would be advantageous to discuss the said provision briefly. Sub-Sections (3) *ibid* requires that the plaint in a Suit for recovery instituted by a financial institution shall specifically state (a) the amount of finance availed by the defendant from the financial institution, (b) the amounts paid by the amount of finance and other amounts relating to the finance payable by the defendant to the financial institution and the dates of payment, and (c) the Perusal of the plaint shows that compliance of Sub-Section (3) *ibid* was not made by the respondent, and this position was not disputed before us by the respondent. The only defense put up by the respondent is that the said provision is not mandatory or penal in nature. We do not agree with this proposition, and in this context would like to refer to the case of Apollo Textile Mills Ltd. and others V/S Soneri Bank Ltd., *PLD 2012 S.C. 268 = 2012 CLD 337*. In the cited authority,

the Honourable Supreme Court was pleased to hold not only that the provisions of Sections 9 of the Ordinance are mandatory, but also that they require strict compliance ; in the absence of the demanded accounts and documents, Suit of the plaintiff institution is liable to be rejected ; and, in performance of its duty, the Court must itself examine the plaint and documents to decide as to whether the Suit is compliant of the mandatory provisions of Section 9 or not and as to the nature of the order, judgment or decree to be passed by the Court ; and, the Court was not expected to proceed blind folded. It was also held that because of the Ordinance being a special law, its provisions shall override all other laws by virtue of Section 4 thereof.

7. It is important to note that the Banking Court can exercise jurisdiction under Sub-Section (1) or under Sub-Section (11) of Section 10 and pass a decree thereunder in favour of the plaintiff and against the defendant only when the plaint is compliant with the mandatory requirements of Section 9 of the Ordinance ; the allegations of fact in the plaint disclose a subsisting cause of action against the defendant ; the Suit is maintainable by all standards and is not barred by any law ; and, the plaintiff is able to show that he is entitled to the relief prayed for against the defendant. If any one of the above conditions precedent for a competent Suit are lacking, the plaintiff shall not be entitled to a decree either under Sub-Section (1) or under Sub-Section (11) of Section 10. It must be kept in mind that absence of application for leave to defend or its dismissal does not mean that the entire claim of the plaintiff in a Suit under the Ordinance should be accepted and granted straightaway without examining the claim made in the plaint. In such an event, no doubt the plaintiff becomes entitled to a decree, but only to the extent of such amount which is permissible in law. Thus, the foremost duty of the Banking Court is to examine whether the Suit is maintainable or not, and if it is maintainable, only then the Banking Court should proceed with the Suit in accordance with law and examine the claim of the plaintiff.

8. Coming back to the present case, the respondent had the full opportunity at the time of filing the Suit to comply with the mandatory requirements of Sub-Section (3) of Section 9, but it failed in availing such opportunity. Thus, the respondent is bound to face the consequence of its noncompliance in view of the law laid down by the Honourable Supreme Court in Apollo Textile Mills Ltd. (supra). The plaint of the respondent's Suit was liable to be rejected as the Suit was barred under the above Sub-Section. This aspect was not appreciated by the learned Banking Court which proceeded to decide the Suit in a mechanical manner without applying a judicial mind. The impugned judgment and decree are, therefore, liable to be set aside, and the plaint is liable to be rejected.

9. Before parting with this case, it may be observed that upon rejection of the plaint the respondent will be entitled to the benefit of Rule 13 of Order VII

CPC if it chooses to file a fresh Suit against the appellant on the same cause of action, provided the law otherwise so permits.

10. Foregoing are the reasons of the short order announced by us on 12.01.2023 whereby this appeal was allowed with no order as to costs, the impugned judgment and decree were set aside and the plaint of Suit No. 50 of 2013 filed by the respondent against the appellant before the learned Banking Court-II Hyderabad was rejected.