

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Shafi Siddiqui
& Jawad Akbar Sarwana JJ

**Muhammad Shahzad v. Faisal Bank Ltd. and Another
(Appellate Banking Jurisdiction)**

First Appeal No.80 of 2023

Appellant: Muhammad Shahzad through
Zulfiqar Ali Khan, Advocate

Respondent: Faisal Bank Ltd., Nemo

Date of hearing: 25.10.2023

Date of decision: 25.10.2023

J U D G M E N T

Jawad A. Sarwana, J: The Appellant/Defendant, Muhammad Shahzad, a customer of the Respondent/Plaintiff-Bank (Faisal Bank Ltd.), has filed this First Appeal No.80 of 2023 under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as “the FIO, 2001”) aggrieved by the Banking Court No.II at Karachi Judgment dated 21.12.2017, and Decree dated 23.12.2017 and Orders passed in Suit No.258/2017 dated 01.11.2021, 31.10.2022, 01.11.2022 and 11.07.2023.

2. The brief facts leading to this Appeal are that in May 2004, the Appellant-Customer, doing business as “Ali Apparels”, availed finance in the sum of Euros.30,800 from the Respondent-Bank under a short-term finance facility known as “Export Bill Purchase Facility”. At this time, the predecessor of the Respondent-Bank was doing banking business as Prime Commercial Bank, whose business was subsequently acquired by ABN-AMRO (Pakistan) Ltd., and thereafter

by the present Respondent-Bank. The finance agreement involved the Respondent-Bank purchasing from the Appellant-Customer Euro bills at sight of Euro.30,800/- (available on page 165 of the appeal file), and as and when the Respondent-Bank would present the original shipping documents to the German Buyer's bank, Dresdner Bank AG Dusseldorf Germany, the latter would remit to the Respondent-Bank the sum of Euros.30,800. On 10.05.2004, the Respondent-Bank disbursed to the Appellant-Customer finance of Rupees Three Million Six Hundred Eighty-Five Thousand Five Hundred and Thirty-seven only (Rs.3,685,537). Subsequently, on 22.05.2004, Dresdner Bank AG Dusseldorf returned the shipping documents to Respondent-Bank without payment. This constituted a default on the part of the Appellant-Customer, who had already availed the finance facility from the Bank. Communications followed between the parties without any resolution. On 15.04.2005, the Legal Counsel of Appellant-Customer claimed a total loss and declined to fulfil his payment obligation to Respondent-Bank. (Pages 213, 215 and 223-233 of the appeal file). In 2016, when the State Bank of Pakistan once again followed up with Respondent-Bank regarding the non-realization of Export Proceeds of Euros.30,800 by the Appellant-Customer, the Respondent-Bank sent a letter dated 11.04.2016 to the Appellant-Customer asking him to fulfil his payment obligation. When no response followed, the Respondent-Bank filed in August 2017, Banking Suit No.258/2017, against the Appellant-Customer.

3. Neither the Appellant-Customer nor any Counsel appeared on his behalf to defend the Banking Suit No.258/2017. The Appellant-Customer did not file a leave to defend application under Section 10 of the FIO, 2001. As such, the Banking Court ordered to proceed with the suit *ex parte*. Ultimately, the Respondent-Bank obtained Judgment dated 21.12.2017 and Decree dated 23.12.2017 in the sum of Rs.3,685,537 along with the cost of funds and costs of suit from the date of default, i.e. 22.05.2004, till realisation. The Respondent-Bank, decree-holder, initiated execution proceedings against the Appellant-

Customer before the Banking Court No.II at Karachi (Execution No.09/2018). The Appellant-Customer appeared in the execution proceedings before the Banking Court and filed an application under Section 12(2) CPC seeking to set aside the Judgment and Decree. The said 12(2) CPC application was not pursued diligently and was dismissed for non-prosecution, and thereafter, the application to set aside the said dismissal order was also dismissed for non-prosecution twice. All the Orders of dismissals have been impugned in this appeal, including the Banking Court's judgement and decree.

4. The Appellant-Customer's Counsel submitted that a fraud had been played on the Banking Court. He contended that the Respondent-Bank deliberately and with malafide intent did not mention the correct, up-to-date address of the Appellant-Customer in the title of the Plaint. Consequently, no valid service was affected on his client. Hence, the Appellant Customer has valid grounds to challenge the Banking Court's Judgment and Decree based on fraud under Section 12(2) CPC.

5. The Appellant-Customer's Counsel's submissions do not carry any weight. Section 9(5) of FIO, 2001, provides the procedure and modes of service of summons in a Suit filed under Section 9 of FIO, 2001. The said section reads as follows:

“Section 9. Procedure of Banking Courts.- . .

(1) . . .

(2) . . .

(3) . . .

(4) On a plaint being presented to the Banking Court, a summons in Form No. 4 in Appendix 'B' to the Code of Civil Procedure, 1908 (Act V of 1908) or in such other form as may, from time to time, be prescribed by rules, shall be served on the defendant through the bailiff or process server of the Banking Court, by registered post

acknowledgement due, by courier and by publication in one English language and one Urdu language daily newspaper, and service duly effected in any one of the aforesaid modes shall be deemed to be valid service for purposes of this Ordinance. In the case of service of the summons through the bailiff or process-server, a copy of the plaint shall be attached therewith and in all other cases the defendant shall be entitled to obtain a copy of the plaint from the office of the Banking Court without making a written application but against due acknowledgement. The Banking Court shall ensure that the publication of summons takes place in newspapers with a wide circulation within its territorial limits.”

6. Accordingly, service may be effected under the FIO, 2001, by any one of the modes mentioned above. In the present case, according to the judgment of the Banking Court, service was effected through all modes on the Appellant-Customer, and he was bound to file his Leave to Defend Application within 30 days from service of summons. Section 9 already states that any one of the modes is a valid service provided such service is effected in the manner prescribed by the Appendix to the CPC.¹ The Appellant Customer’s Counsel did not argue that service was not effected as provided for in S. 9(5) of the FIO, 2001, in the manner prescribed by the Appendix to the C.P.C. This was not his challenge. He merely claimed that he did not receive a copy of the summons as the address mentioned in the title of the plaint was incorrect. As mentioned earlier, the Appellant-Customer did not file leave to defend application, and consequently, the Banking Court passed Judgment dated 21.12.2017 and Decree dated 23.12.2017. The Appellant-Customer did not prefer any appeal against the said Judgment and Decree under section 22 of the FIO, 2001.

7. In the year 2021, almost four (4) years after the passing of the judgment and decree by the Banking Court, the Appellant-

¹ Muhammad Amir Safdar v. The Bank AL Falah Limited through Manager and Two Others, 2021 CLC 428 (DB – Peshawar).

Customer filed an Application under Section 12(2) CPC in the Banking Suit No.258/2017, alleging that fraud had been played on the Court. It is a trite principle of law now that under Section 12(2) CPC fraud must be shown by the Applicant to have been played upon the Court during the proceedings of the lis. The Respondent-Bank sending notices to the last known address of the Appellant-Customer does not constitute fraud under Section 12(2) CPC.

8. After filing the Application under Section 12(2) CPC, the Appellant-Customer did not pursue the same diligently, and it was dismissed for non-prosecution on 01.11.2021. Thereafter, the Appellant-Customer filed a Restoration Application, which was also dismissed for non-prosecution on 31.10.2022, and thereafter, when the Restoration Application was restored, it was again dismissed for non-prosecution on 01.11.2022, which was eventually restored, but the Restoration Application was yet again dismissed on 11.07.2023. All the Orders mentioned above have been impugned in this appeal, including the Banking Court's judgement and decree.

9. The Appellant-Customer has now filed this appeal under section 22 of FIO, 2001, wherein he has belatedly impugned the judgment of the Banking Court. The FIO, 2001 is a special law Section 22 whereof provides that any person aggrieved by any judgment and decree passed by a Banking Court can file an appeal within 30 days from the date of passing of the judgment/decree/final order. In the present case, the banking appeal was filed in the High Court on 04.09.2023 against the Banking Court's impugned judgment dated 21.12.2017. According to Judgments of the Superior Courts of Pakistan, the time for calculation for filing a banking appeal begins to run from the date of passing of the judgment/decree/final order and not (as pleaded in paragraph 4 of the banking appeal) from the date of knowledge of the judgment/decree. As such, when the Appellant-Customer filed this appeal on 04.09.2023, he was about five and half years late. Neither section 5 of the Limitation Act, 1908, which is inapplicable to appeals filed under FIO, 2001, nor section 24 of FIO,

2001 can come to the aid of the Appellant-Customer and rescue him from his current predicament - a hopelessly time-barred banking appeal from the judgment/decree of the Banking Court.

10. The Appellant-Customer filed an Application under section 12(2) CPC, which does not mention any particulars arguably constituting fraud or misrepresentation which may have been played upon the Banking Court in obtaining judgment and decree from the Banking Court. In the absence of any convincing evidence, no misrepresentation or fraud could be alleged to have been contrived by Respondent-Bank to obtain a decision in its favour, which came into being mainly due to the failure of the Appellant-Customer to put up an appearance before the Banking Court in pursuance of the notices and summons issued to him.² Notwithstanding that, the appeals to the impugned orders dated 01.11.2021, 31.10.2022, 01.11.2022 and 11.07.2023 are also time-barred.

11. The conduct of the Appellant-Customer also does not inspire confidence. No valid grounds have been made out to disturb the orders of the Banking Court No.II at Karachi. No valid grounds have been made out to hear a time-barred appeal. In the present case, the grounds of appeal remain unsubstantiated, general, vague and bald accusations not supported with any cogent prima facie evidence or material, which may require the issuance of notice to the decree-holder/respondent-bank or summoning entire record or admit present appeal in whole or in part. Retaining the present appeal on the docket of the Court shall only burden the Court, postpone the inevitable writing on the wall and bring misery for the contesting parties, at least for the decree-holder who is prosecuting execution proceedings against the Appellant-Customer.³ No exceptional circumstances have been made out to set aside the judgment/decree/orders passed by the Banking Court, which challenge as discussed hereinabove is

² Mohammad Iftikhar v. Messrs. First Dawood Investment Bank Ltd. through Authorized Officer/Attorney and Two Others, 2023 CLD 1124 (DB-Karachi)

³ Colony Textile Mills Ltd. and Another v. First Punjab Modarba, 2021 CLD 1212 (DB-Lahore)

hopelessly time barred. The subsequent orders passed by the Banking Court in relation to the Appellant-Customer's Application under Section 12(2) CPC are based on reasonable grounds available to the Banking Court for such dismissal. The learned Banking Court has not erred while passing the impugned judgment/decrees/orders. The impugned judgment, decree, and orders are well-grounded and no interference is required.

12. In view of the above, the impugned judgment and decree and orders passed by the Banking Court in Suit No.258/2017 do not suffer from any illegality or material irregularity which calls for any interference. Accordingly, the appeal was dismissed in limine along with all listed applications vide our short order dated 25.10.2023. These are the reasons for our above-mentioned short order.

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