

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Shafi Siddiqui
& Jawad Akbar Sarwana JJ

Abdul Karim Momnani and Another v. Habib Bank Ltd.

First Appeal No.76 of 2021

Appellants: Abdul Karim Momnani s/o Abdul Aziz Momnani and Mst. Sultana Abdul Karim w/o Abdul Karim Momnani through Abdul Shakoor, Advocate

Respondent: Habib Bank Ltd., Aijaz Hussain Shirazi, Advocate

Date of hearing: 20.11.2023

Date of decision: 15.12.2023

J U D G M E N T

Jawad A. Sarwana, J: The Appellants/Defendants, Abdul Karim Momnani and his spouse, Mst. Sultana Abdul Karim (hereinafter referred to jointly as “the Momnanis”), both customers of the Respondent/Plaintiff-Bank (“Habib Bank Ltd.”)(hereinafter referred to as “HBL”), have filed this First Appeal No.76 of 2021 under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as “the FIO, 2001”) against the Order dated 05.08.2021 passed by the Banking Court No.III at Karachi in Suit No.155/2020 on Momnanis Application under Section 12(2) CPC.

2. The brief facts leading to the Appeal are that Abdul Karim Momnani (“AKM”) and his spouse availed running finance facility for Rs.14,963,532.31 from HBL. When HBL demanded repayment of the outstanding amount from the Momnanis they failed to fulfil their

payment obligations. On 14.10.2020, HBL filed Banking Suit No.155/2020 against them. Service was affected upon them, inter alia, by publication in an English and Urdu daily newspaper on 6.11.2020 and 7.11.2020, respectively, but they (the Momnani) did not file their Leave to Defend Application. Instead, on 7.12.2020, a Counsel entered an appearance on their behalf and filed Vakalatnama. On 30.01.2021, Abdul Karim Momnani appeared in person before the Banking Court No.III and filed a Statement. The Banking Court Judge, after hearing the parties, passed Judgment dated 30.01.2021 and Decree dated 22.02.2021 in the sum of Rs.12,897,829.15 along with the cost of funds and costs of suit from the date of default till realisation. The Momnani's did not challenge the Banking Court No.III's Judgment and Decree by way of an appeal and elected to file an Application under Section 12(2) CPC against HBL. They claimed that HBL's Branch Manager, Sameer Sadruddin Valliani, had played fraud upon them, and this fact, which was material to the case, was known to HBL and suppressed by it from the Banking Court.

3. The Counsel for Momnani has argued that the appellants were operating jointly two accounts: first, they operated a saving account no.1089-79005018-01 with HBL wherein between 15.12.2017 and 29.03.2018 they remitted from Nairobi, Kenya to HBL a sum of Rs,8,000,000. During this period, the Momnani jointly also opened a running finance account no.1089-79005023-03 to avail running finance facility of Rs.13,000,000 against the pledge of Defence Saving Certificate ("DSC"). The Counsel has further contended that after the opening of the running finance account, Abdul Karim Momnani ("AKM") was making frequent trips to and from Nairobi and HBL's Branch Manager, Sameer Sadruddin Valliani, without any lawful authority, fraudulently from 06.10.2017 to 09.10.2017 withdrew an amount of Rs.13,000,000 from the running finance account and transferred this sum to one Syed Danish Feroz Rizvi. The learned Counsel has further alleged that the said branch manager had also

illegally withdrawn from the running finance account a sum of Rs.8,000,000 in cash by forging cheques from 21.12.2017 to 30.03.2018. Therefore, nothing was due and outstanding. He added that the Appellants did not utilise a single penny of the finance. Their investments were embezzled by the Branch Manager, who is responsible for the losses faced by the bank and not the Momnanis. The Counsel further submitted that HBL played fraud upon the Court and misrepresented when the bank did not disclose these facts to the Court. The learned Counsel added that AKM had filed FIR No.210/2019 against the branch manager of HBL, Sameer Sadruddin Valliani, who defrauded the bank and the Momnanis. Additionally, he submitted that the Federal Investigation Agency ("FIA") on a complaint filed by HBL had registered an FIR No.17/2020 concerning the actions of HBL's Branch Manager, Sameer Sadruddin Valliani. For these reasons, Momnanis' Counsel pleaded that the Application under Section 12(2) CPC should be allowed and that the Judgment and Decree passed by the Banking Court should be set aside.

4. The learned Counsel for HBL has pleaded that the Momnani's have availed the finance and the Branch Manager was a close relative of the Momnanis. He added that as per the copy of the FIR No.21/2019, the Momnanis had a personal dispute with the Branch Manager of HBL, which they settled in 2018. The settlement terms involved recovering a money amount from the branch manager through cheques. If the Branch Manager had defrauded the Momnanis, they would have raised objections against HB, but they did not. Instead, they filed criminal proceedings against the Branch Manager in person. Further, the Momnanis did not file any suit for recovery against HBL. Finally, the Momnanis claimed in the FIR filed against the Branch Manager that certain cheques issued by the Branch Manager had bounced, yet they did not initiate any recovery proceedings against the Branch Manager. They could have filed a summary suit against him, but they did not. This HBL's Counsel

argued suggested that Momnanis' Application under Section 12(2) CPC was unfounded and not maintainable.

5. We have heard the learned Counsels, reviewed the record as available in the Appeal and read the Impugned Order and the Judgment and Decree.

6. Neither the Momnanis in person nor any Counsel appeared on their behalf to defend the Banking Suit No.155/2020. The Momnanis did not file a leave to defend application under Section 10 of the FIO, 2001. Instead, AKM submitted a letter dated 13.11.2020 to HBL, undertaking to settle the bank's claim. Their lawyer appeared in Court on 07.12.2020 and filed a Vakalatnama but filed no reply. AKM's spouse, also impleaded in the Banking Suit, made no submissions at all. The Momnanis have not argued at any stage that service of summons was not effected on them as provided in S. 9(5) of the FIO, 2001 and in the manner prescribed by the Appendix to the C.P.C. This was/is not their challenge to the Judgment and Decree, which Momnanis have not appealed. This First Appeal although filed under Section 22 of FIO, 2001 is against the dismissal order of their Application under Section 12(2) CPC only. On 30.01.2021, AKM submitted a Statement, which was taken on record that referred to the criminal actions between the Momnanis and HBL's Branch Manager and FIA's criminal action, which the learned Banking Judge discussed in detail in the Judgment dated 30.01.2021 (Paragraphs 11, 12 and 16 of the Judgment). With reference to the said discussion by the learned Banking Court Judge, the Momnani's brought neither any fresh plea nor anything persuasive in their Application under Section 12(2) CPC to set aside the Judgment on the grounds of fraud and misrepresentation, particularly as the matter involving HBL's branch manager had been considered in the Banking Court's Judgment. Neither fraud nor misrepresentation by HBL or its Branch Manager appears to have been played upon the Court, requiring the setting

aside of the Banking Court's Judgment and Decree against the Momnanis.

7. AKM Application under Section 12(2) CPC and their appeal challenges the entries in the statement of account, which they ought to have done in this leave to defend application. AKM claims he could not file his defence because of his frequent trips between Kenya and Pakistan. Frequent travel cannot be a legitimate ground for not filing a proper leave to defend application and to challenge accounting entries. Nothing prevented the Momnanis from engaging a Counsel to take steps to safeguard their legal interests. If the Momnanis were serious, they should have extended their stay in Pakistan and safeguarded their interest first. In the instant case, such efforts have yet to be demonstrated. AKM apparently slept over his rights. They must now face the consequences in terms of the judgment and decree and execution proceedings.

8. Another aspect of the matter is that while AKM claimed he had to travel back and forth, his spouse has made no such assertion. AKM set out to travel to meet his ailing mother in Kenya but does not make any assertions about the presence of his spouse in Karachi. This implies that AKM's spouse, also impleaded in HBL's Suit, was present in Karachi at all material times. She could have also safeguarded Momnanis interests in the banking suit.

9. The Momnanis are also silent concerning their private Settlement Agreement with Sameer Sadruddin Valliani in 2018 which is the basis of the criminal case filed by AKM against Valliani (FIR No.201/2019). The Momnanis claim that Valliani withdrew the funds from the running finance account, but no explanation is provided for the Remittance Application signed by them favouring the transfer of funds to one Syed Danish Feroz Rizvi. It is not understood how the Momnanis have contended that they did not avail the running finance when AKM signed the Remittance Applications. The said Remittance Applications duly signed by AKM are denied neither in the Statement

filed on 30.01.2021 nor in the Application under Section 12(2) CPC nor in this Appeal.

10. 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 Momnanis have relied on bank entries in the Account Statements in their Application under Section 12(2) CPC, which calls for examination on merits, not fraud and misrepresentation. The backdrop of a private dispute between the Momnanis and their relative, who happened to be the Branch Manager of HBL (documented by Momnanis FIR filed against him) and discussed in the Judgment, does not constitute fraud under Section 12(2) CPC. When the Judgment passed by the Banking Court has already discussed the points raised by Momnanis against the Bank Manager and decided the suit against the Defendant/Judgment-Debtor, the Appellants herein, the same issues could not be agitated in the Application under Section 12(2) CPC as grounds of fraud and misrepresentation.

11. In this appeal under section 22 of FIO, 2001, wherein the Appellants have not impugned the judgment and decree of the Banking Court. They seek no such relief in their prayer clause. 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, no appeal is preferred against the judgment/decree. There is only a challenge to the Order passed by the Banking Court to the Application under Section 12(2) CPC, which does not mention any particulars arguably constituting fraud or misrepresentation which HBL may have 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 HBL to obtain a decision in its favour, which came into being mainly due to the failure of the Momnanis to put up an appearance

before the Banking Court in pursuance of the notices and summons issued to him and challenge the accounts.¹ Further, the record shows that the Momnanis signed Remittance Applications favouring one Syed Danish Feroz Rizvi and not HBL's branch manager, who was (also) related to them.

12. The conduct of the Momnanis also does not inspire confidence. No valid grounds have been made out to disturb the order of the Banking Court No.III at Karachi. In the present case, the grounds of appeal remain unsubstantiated, general, vague, and not supported with any cogent prima facie evidence or material. The Order passed by the Banking Court on the Application under Section 12(2) CPC is based on reasonable grounds available to the Banking Court for such dismissal. The Banking Court has not erred while passing the impugned judgment/decreed/order. The impugned judgment, decree, and order 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.155/2020 do not suffer from any illegality or material irregularity which calls for any interference. Accordingly, the appeal is dismissed with no order as to costs.

J U D G E

J U D G E

¹ Mohammad Iftikhar v. Messrs. First Dawood Investment Bank Ltd. through Authorized Officer/Attorney and Two Others, 2023 CLD 1124 (DB-Karachi)