

## IN THE HIGH COURT OF SINDH AT KARACHI

Banking Suit No.B-45 of 2022

The Bank of Punjab v. HASCOL Petroleum Limited

Plaintiff Bank : Mr Behzad Haider and Mehmood Ali,  
Advocates

Defendant Customer : Ms Alizeh Bashir, Advocate

Dates of Hearing : 22.05.2023, 23.05.2023

Date of Order : 21.08.2023

### **ORDER**

Jawad Akbar Sarwana, J.: This is a Banking Suit filed by the Plaintiff Bank against the Defendant Customer for recovery of Rs.1,088,188,268 along with costs of funds, etc., under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance (“FIO”), 2001. This order decides CMA No.18906/2022 filed by the Defendant Customer under Section 151 Civil Procedure Code, 1908 (“CPC”) for condonation of delay (if any) in filing the application for leave to defend (hereinafter referred to as the “Leave to Defend”) under Section 10 of FIO, 2001.

2. Learned Counsel for Defendant has contended that Defendant is a publicly listed limited liability company incorporated under the laws of Pakistan whose shares are quoted and traded on the Pakistan Stock Exchange (“PSX”). Defendant’s Counsel urged that no proper service was affected upon Defendant as the summons was issued at the wrong address, which was not the registered address of the Defendant Company. According to the learned Counsel, the Plaintiff Bank was aware of the correct and changed address of the Defendant Company but notwithstanding this fact, they chose to mention the previous and incorrect address in the title of the Plaint, and therefore, no proper service could be affected on the Defendant. Per learned Counsel, the Court issued summons dated 19.10.2022. The Registered Post receipt dated 22.10.2022 is available on record but without the Acknowledgment Due. Further, a Courier Service Receipt dated 26.10.2022 is available without a delivery report issued by the Courier Service Company. Counsel contended that both modes of service remained unserved as the summons was issued by post and courier to the incorrect address of Defendant Company. Therefore, no proper service of summons was affected through registered post and courier within the contemplation of Section 9(5) of the FIO 2001. Per Counsel, the court summons issued to the incorrect address was effected on Defendant on 10.11.2022 when Bailiff, on his own

volition, even though the address of the Defendant was incorrect, got to the registered address of Defendant Company to serve the summons on the said date. Accordingly, Defendant filed Leave to Defend on 09.12.2022 along with the instant Interlocutory Application. Learned Counsel contended that the publication of summons only came to the knowledge of the Defendant after entering the appearance when the Counsel perused the Court file and discovered that summons was published in daily newspapers, “**JANG**” Karachi and “**The News**” English Karachi on 21.10.2022. Counsel argued that as the Defendant was not served properly, they did not have knowledge of the publication of the summons. Per learned Counsel, the service cannot be held good on the basis of publication alone if it is not affected through any other modes specified in Section 9(5) of FIO, 2001, which in the instant case has not been done, therefore, the delay, if any, may be condoned and the leave to defend application be heard and decided on merits. In support learned Counsel relied upon Combine Products and 3 Others v. SME Leasing Limited, 2015 CLD 1188, J.S. Bank Ltd. v. Landhi Steel Mill and 4 Others, 2018 CLD 1016, Haji Muhammad Yaqoob Akhtar v. Habib Bank Ltd. and Others, 2009 CLD 1699, Aamer Enterprises (Pvt.) Ltd. and 3 Others v. United Bank Limited and Another, 2009 CLD 342, and Deutsche Bank v. Fateh Textile Mills Ltd., 2019 CLD 285.

2. On the other hand, learned Counsel for the Plaintiff Bank has vehemently opposed the request for condonation of delay and contended that the proper address was disclosed in the Plaint, whereas notice was properly served on the given address as per Bailiff’s report. According to the learned Counsel, Defendant had prior knowledge of the filing of the suit as the summons had been published in the two daily Urdu and English newspapers, and even otherwise, Defendant Counsel filed Vakalatnama on 18.11.2022 thus, they knew that the publication had taken place on 21.10.2022. Defendant Counsel could have filed Leave to Defend within time, i.e. 30 days from the date of knowledge of publication, i.e. on or before 20.11.2022, but they did not choose to do so. Instead, Defendant Counsel merely filed Vakalatnama dated 18.11.2022 on 21.11.2022. Learned Counsel referred to the documents on record and contended that in the finance facility itself, the Musharaka Agreement, the same address of the Defendant Company, is mentioned, on which the summons was issued. Additionally, according to the Musharaka Agreement, the Defendant Customer was required to intimate a change of address to the Plaintiff Bank, which they did not do. Therefore, the plea on behalf of Defendant of change of address of the registered office is misconceived. Learned Counsel contended that even otherwise, the publication was published in two newspapers as required by law, whereby the requirement of Section 9(5) of FIO 2001 stands fulfilled,

therefore, no case is made out for condonation of delay. Therefore, for all the reasons submitted by Plaintiff Bank, the plea now taken for the condonation application is an afterthought and is not supported by the facts available on record. In support learned Counsel relied upon Habib Bank Limited v. Mahmood Alam Sherani and Another, CLD 2014 1499 Sindh; Apollo Textile Mills Ltd. v. Soneri Bank Ltd., PLD 2012 SC 288; Abdul Rasheed and Another v. Bank of Punjab through Branch Manager, 2004 CLD Lahore 800; and Industrial Development Bank of Pakistan v. Rehmania Textile Mills (Pvt.) Ltd., 2006 CLD Lahore 81.

3. I have heard both the learned Counsel and perused the record. Plaintiff filed the instant Suit against Defendant for recovery of Rs.1,088,188,268 with costs, etc. on 15.10.2022. On 19.10.2022, the summons was issued by the Assistant Registrar (D-1) through Registered Post Receipt dated 22.10.2022 and Courier Receipt dated 26.10.2022. Newspaper clipping of summons published in two daily newspapers on 21.10.2022 is available on record. Finally, another summons was served through Bailiff on Defendant on 10.11.2022 and is also available on record. Defendant's Counsel filed Vakalatnama dated 18.11.2022 on 21.11.2022. On 02.12.2022, the Additional Registrar (O.S.) observed that Leave to Defend had not been filed by Defendant, although Vakalatnama was filed on 21.11.2022. Defendant filed Objections dated 02.12.2022 before the Addl. Registrar (O.S.), who passed directions to fix the matter in Court for Final Disposal as the statutory period (30 days) for filing Leave to Defend the suit application had expired. On 09.12.2022, Defendant filed the instant CMA No.18906/2022 and Defendant's Leave to Defend application, CMA No.18907/2022.

4. It is common ground between the parties that (a) no intimation/acknowledgement of service by post and courier is available on record, (b) the address for service mentioned in the title of the Plaint is not the current registered address of the Defendant Company, and (c) neither the registered post, nor the courier, nor the physical summons through bailiff, were ever sent to the Defendant's current registered address. Parties admit that the Bailiff affected service on the registered address of the Defendant Company of his own volition even though the address on the pleading did not match with the address where he served the summons, i.e. the registered address of the Defendant Company. Finally, both parties agree that in so far as the service is affected by the Bailiff on Defendant Company is concerned that it was served on Defendant on 10.11.2022. Thus, this Court will first decide the question of service in light of these facts.

5. 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 states 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.”

9. In the case of *Deutsche Bank AG v. Fateh Textile Mills Ltd.*, 2019, CLC 285, the learned Single Judge of this Court has pointed out that except for publication in newspapers, all the first three modes of service of summons under section 9(5) of FIO, 2001, have one distinctive and common feature that a written report/confirmation must come on record before the Banking Court to ascertain service or non-service of summons on the defendant, either through the bailiff or courier service or by registered post acknowledgement due. From the above, the lawmakers' intention is clear that before proceeding further in a Banking Suit, there must be sufficient and reliable evidence before the Banking Court to ascertain whether the summons was duly served upon the Defendant or not or if he had refused to receive the same. In the present case, it is admitted that no such acknowledgement due card or delivery report is available on record to evidence that the summons was delivered.

10. In the *Deutsche Bank* case (supra), the summons was not issued by registered post acknowledgement due. Thus strict compliance with the

mandatory statutory provisions of Section 9(5) was missing. In the present case, although the postal receipt is attached without indication of whether it is simply registered post or registered post acknowledgement due, there is still no acknowledgement due from the postal authorities (even if it's at the allegedly incorrect address). The case with the courier company is no different. No delivery report from the courier company is available on record. Therefore, the Deutsche Bank case is relevant here because both cases, involve missing acknowledgement due and delivery reports.

11. The learned single Judge in the Deutsche Bank case held on this aspect as follows:

“7. The other significant feature of Section 9(5) *ibid* is that the provision of service of summons on the defendant simultaneously through the four modes prescribed therein, is mandatory because of the word “shall” used therein. Section 9(5) *ibid* further provides that service duly effected through any of the said four modes, shall be deemed to be valid service for the purposes of the Ordinance. I am of the firm view that this principle shall apply only in cases where strict compliance of Section 9(5) *ibid* is made as provided therein, and not where all the prescribed modes are not adopted simultaneously or where any one or more of them is found to be defective or incomplete. My above view is fortified by the case of Asif Kudia v, Messrs KASB Bank Limited, 2014 CLD 1548 = 2015 CLC 1734, decided by a Division Bench of this Court, of which I was incidentally a member. It was held *inter alia* in the above-cited case that by not sending the summons through registered post acknowledgement due as specifically provided in Section 9(5) *ibid*, mandatory compliance thereof was not made and as such summons were not issued in accordance thereof ;the bailiff's report was not available on record to confirm service or non-service of summons on the defendant ; and therefore, the defendant was not served in a valid and proper manner.

8. . . .Summons were issued through registered post and courier service, and were also published in Urdu daily 'Jang' and English daily 'Dawn' on 27.10.2010. . .It is important to note that the postal receipts available on record show that the summons were sent through ordinary registered post and not through registered post acknowledgement due, as required under Section 9(5) *ibid*. As such, the acknowledgement that should have been obtained by postal authorities from the defendant is not available on record. Similarly, no delivery confirmation from the courier service is available on record. Thus, there is no evidence on record to establish whether the summons purportedly issued through postal and courier service were actually sent or not at the addresses of the defendant, particularly at its registered office in Hyderabad, or the same were received at the said addresses.”

12. Accordingly, in the absence of evidence obtained from postal authorities and from the courier company to confirm service or non-service of summons on Defendant (apart from the fact that the address of Defendant was not the current registered address, which point is discussed herein below); this Court is of the opinion that Defendant was not served in a valid and proper manner under the FIO, 2001.

13. The Defendant Customer is a public limited company. A 'corporation' for the purposes of Order 29 CPC requires that service be made at its registered address in order to be deemed valid and effective. This provision of the CPC applies to banking suits by virtue of section 7(2) of the FIO, 2001, which states as follows:

"Section 7(2). A Banking Court shall, in all matters with respect to which the procedure has not been provided for in this Ordinance, follow the procedure laid down in the Code of Civil Procedure, 1908 (Act V of 1908), and the Code of Criminal Procedure, 1898 (Act V of 1898)."

14. In the present case, it is common ground that the address of the Defendant Company mentioned in the pleadings is not the current registered address of the Company. Plaintiff Bank claims that as per the Finance Facility extended by the Bank to the Defendant Company under the Musharaka Agreement dated 22.06.2020, the address for notice on the Defendant was: The Forum, Suite No.105-106, First Floor, Khayaban-e-Jami, Clifton Block 9, Karachi. According to the Muksharaka Agreement, the onus was on Defendant to notify the change in address of the Defendant Company. Plaintiff contended that it received no such intimation. Defendant argued that the Defendant Company's change in registered address was notified as early as April 2021, on the Pakistan Stock Exchange ("PSX"), the Defendant company's own website, and through requisite forms duly filed on behalf of Defendant before the Securities and Exchange Commission of Pakistan ("SECP") in accordance with applicable law. The Defendant Company's new registered office as of 01.04.2021 was 20th Floor, Sky Tower, West Wing (Tower A), Dolman City, Abdul Sattar Edhi Avenue, Block-4, Clifton, Karachi. As notifications were published on the PSX, the same constituted dissemination of information to the public, akin to public notice and wide disclosure. As a prudent bank, Plaintiff was, in fact, notified of the change or should be deemed to have knowledge of the registered address as a prudent bank.

15. In the Deutsche Bank case (supra), the learned Single Judge, observed as follows regarding the statutory requirement of service of summons on corporations in the context of FIO, 2001.

“ . . .In this context, I may refer to Rule 2 of Order XXIX CPC which specifically relates to service on corporation. It provides that subject to any statutory provision regulating service of process, where the Suit is against a corporation, the summons may be served (a) on the secretary, or on any director or other principal officer of the corporation, or (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business. Needless to say that by virtue of Section 7(2) of the Ordinance, the provisions of Order XXIX Rule 2 CPC are fully applicable to the proceedings in Suits filed under the Ordinance.

10. It is an admitted position that the defendant, being a public limited company, falls within the definition of corporation, its registered office is in Hyderabad and it has only a branch office in Karachi as disclosed in the title and stated in paragraph 2 of the plaint, and the summons received on 25.10.2010 were not received at the registered office of the defendant or by any of its secretary, director or other principal officer. In view of the admitted position noted above and also as the mandatory requirements of Section 9(5) *ibid* of sending the summons at the registered office of the defendant through bailiff and by registered post acknowledgement due were not fulfilled, I am of the considered view that summons in the instant matter were not issued in the modes and manner prescribed in Section 9(5) *ibid*, and service on the defendant was not effected in a valid and proper manner as provided therein, or in terms of Order XXIX Rule 2 CPC. This opinion formed by me is supported by the case of Mubarak Ali v. First Prudential Modaraba, 2011 SCMR 1496, wherein the Hon'ble Supreme Court was pleased to hold that “*It is only when the summons are duly served and service is held to be satisfactory by the Court, further proceedings in the suit could be taken, but in the instant case in our view the service upon the petitioner was not at all duly effected, therefore all the proceedings initiated or taken thereafter cannot have sanction of law hence are liable to be struck down / set-aside*”. The case of Mubarak Ali supra decided on 04.01.2007 was followed by the Hon'ble Supreme Court in Civil Petition No.19-K/2009 (M/S Axle Products Limited V/S M/S Allied Bank of Pakistan Ltd.) decided on 10.02.2009.”

16. The upshot of the Deutsche Bank case (supra), read in the light of the Supreme Court of Pakistan's Judgment in the Mubarak Ali case, is that even though, as a matter of contract, Defendant ought to have notified Plaintiff Bank of the change in the registered address of Defendant Company; yet, this oversight as a matter of contract, does not assist Plaintiff to wriggle out of its statutory duty under the CPC to mention the up-to-date registered address of the corporation in the title of the Plaint. Plaintiff cannot simply raise the defence of ignorance to plead non-

compliance with the statutory provisions of CPC. Plaintiff was expected at all times to be diligent and not simply draft its title of plaint with the registered address of Defendant as per whatever was available in its record. A private agreement setting out the particular obligations of parties arising out of such agreement, and the mode and manner of service of notices and communications to be made thereunder, is altogether distinct from the mode and manner of service on corporations as prescribed in Order 29 CPC and does not supersede its mandate. The mandatory requirements of section 9(5), FIO cannot be said to be inconsequential, redundant, or reduced to a cipher, merely because Plaintiff did not complete its due diligence before filing the banking suit. The Bank ought to have obtained from the SECP a certified copy of the latest Statutory Company Form filed by Defendant Company mentioning its Registered Office address. Therefore, service on the Defendant Customer, i.e. at the address, not the company's registered address, cannot be deemed to be proper service under Section 9(5) of FIO, 2001. In the circumstances, this Court is minded to proceed further in the matter until issuance of summons is made, in compliance with mandatory requirements of law.

17. The next question to decide in this matter is whether, in the facts and circumstances of the instant suit, where the form and content of the summons is defective, the service of summons by publication alone on Defendant is valid.

18. Under the FIO, 2001, where service upon a party has been affected through normal modes of service, except substituted service through publication in the newspaper, it is incumbent upon such party to file an application under Section 10(2) of FIO, 2001 with the Banking Court within a period of 30 days from the date of service asking for leave to defend the suit. To this end, Section 10(2) of FIO states as follows:

**10. Leave to defend. : -- (1) . . .**

(2) The defendant shall file the application for leave to defend within thirty days of the date of first service by any one of the modes laid down in sub-section (5) of section 9:-

Provided that where service has been validly effected only through publication in the newspapers, the Banking Court may extend the time for filing an application for leave to defend if satisfied that the defendant did not have knowledge thereof.

19. It is apparent from a plain reading of the proviso of Section 10(2) of FIO, 2001, that where service is affected only through publication on such party in the newspaper, the Banking Court has power in terms of proviso to Section 10(2) of FIO, 2001, to extend the time for filing an application for leave to defend the suit upon being satisfied that the defendant requesting for condonation of delay in filing

leave to defend application, did not have any knowledge about the pendency of proceedings against him before the Banking Court. While this Court recognizes the well-established jurisprudence that service of summons through any one of the modes is deemed to be valid service for the purpose of Sections 9(5) and 10(2) of FIO, 2001, yet in order for this principle to become applicable the summons must have been issued in Form-IV Appendix B of the CPC through all such modes as are prescribed in law. Admittedly in this matter, summons were issued through registered post and courier service but not in alignment with Order 29 CPC, which required that the summons be addressed to the Defendant's registered company address. Thus the form and content of the summons were not in sync with Order 29 CPC, and hence defective. There is an argument to be made that publication which mention an incorrect address of the Defendant may not also constitute good and proper service. The closest authority in support of this proposition may be found in the case of Khyber Textile Mills Ltd. and Others v. Investment Corporation of Pakistan and others, 2010 CLD 1529, however, the point made is not so evident and more so deductive from the observations of the learned single Judge who was later elevated to the status of a Judge of the Supreme Court of Pakistan. In these circumstances, I am of the opinion that it would be very harsh to penalize the Defendant in relation to the publication of defective summons when it is an admitted position that the summons served by registered post acknowledgement due and courier were defective plus no evidence of their acknowledgment and delivery report is available on record. I am also fortified by the learned Division Bench cases reported in Hassan Ara v. Bank of Punjab, 2006 CLD 1502, and Nazir Hussain v. Bank of Punjab, 2007 CLC 687, and relied upon by the learned Single Judge in the J.S. Bank case (supra) in support of the proposition that if the summons have not been issued properly, the Defendant has fully justified its case for condonation.

20. The Plaintiff has relied on several Judgments of the Lahore High Court, namely, Abdul Rasheed and Another v. Bank of Punjab through Branch Manager, 2004 CLD Lahore 800; and Industrial Development Bank of Pakistan v. Rehmania Textile Mills (Pvt.) Ltd., 2006 CLD Lahore 81 in support of his contention that no grounds for any condonation and applicability of the Limitation Act, 1908 are made out. However, a more relevant authority and one which is also binding on this Court is the Division Bench Judgment with a contra view reported in Combine Products and 3 Others v. SME Leasing Limited, 2015 CLD 1188. In this case the Appellate Court had to decide a banking appeal wherein summons in a banking suit was held to be valid by publication only and summons had not been served upon the appellants through any one of the remaining modes of service, i.e, through personal service by the bailiff, registered post/courier, or way of pasting on the given address. The learned Division Bench held as follows:

“14. The object and intention of the legislature by insertion of proviso to Section 10(2) of the Financial Institutions (Recovery of Finances), Ordinance, 2001 is that a concession with respect to limitation be provided inasmuch as there is a possibility that an aggrieved party might not have read such publication in the Newspaper and would have genuinely acquired knowledge through some other source, after the publication of the notice, when the period of limitation for filing an application under Section 10(2) of the Financial Institutions (Recovery of Finances), Ordinance, 2001 had already elapsed.

15. These provisions with regard to service upon the defendant as contemplated by Section 9(5) and 10(2) of the Financial Institutions (Recovery of Finances), Ordinance, 2001 are not to be read disjunctively from the rule of natural justice “*audi alterm partem*” which is to be read into every statute regardless of whether or not the same is contemplated in the statute. The Courts are required to interpret every provision of a statute in such a manner that it should suppress mischief and advance remedy and not the other way around. A similar view has been taken by the learned Single Judge of the Hon'ble High Court in the case of Khuda Bux Vs. Banking Court No.2 Multan reported in 2000 CLC 1013 in a case of Banking jurisdiction.

...

17. Moreover, after insertion of Article 10-A into the Constitution of the Islamic Republic of Pakistan by 18<sup>th</sup> Amendment to the Constitution and which is to be read into every law of the land, every individual of the state is entitled to fair trial and due process. Under Article 4 of the Constitution, every individual of state is entitled to be dealt with in accordance with law as well.

18. We have come across similar situation, as prevailing in the instant case, when the Banking Court without making an effort to get the defendant(s) served through ordinary modes of service as provided even in the Banking Law, in a haste, or at the instance of the plaintiff directly resort to substitute mode of service through publication and also hold such service as valid and good service upon defendant, once the citation is published in the Newspaper, and if no leave to defend application is filed within prescribed period of limitation starting from the date of publication, it proceeds to decree the suit. We may observe that the learned Banking Courts shall always endeavour to first exhaust all possibilities of service on the defendant through first three modes of service while resorting to substitute mode of service through publication so that service through other modes should not totally become redundant, and shall as a last resort, publish the citation in the Newspaper, if service could not be effected on the defendant by first three modes. This will not only reduce multiplicity of litigation and delay in disposal of case(s), but will also meet the requirements of principle of natural justice and right of fair trial as enshrined under the Constitution of Islamic Republic of Pakistan.”

11. Thus, it would appear that even before this Court will consider the point of limitation, Plaintiff would first have to show proper service by all of the first three modes simultaneously has been completed, first.

12. In view of the above facts, discussion and cases cited, it appears the limitation for filing the application for leave to defend by the Defendant has not yet begun in view of non-service of summons and non-compliance of Section 9(5) *ibid*. Therefore, the question of condoning the delay in filing the application for leave to defend by Defendant does not arise. However, in the circumstances, the period of limitation for filing of leave to defend may be computed from the date of delivery of the summons by the Bailiff on Defendant Company, i.e. on 10.11.2022. Hence this Court finds that the Leave to Defend (CMA No.18907/2022) filed on 09.12.2022 is within time. Consequently, the Condonation Application, CMA 18906/2022, is allowed. The leave to defend, CMA No.18907/2022, is taken on record, which is to be heard and decided in accordance with law, wherein Plaintiff may file its replication if so desired.

Order accordingly.

Karachi;

Dated: 21.08.2023

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