Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

1st Civil Appeal No.D-05 of 2022

Appellant	:	Hazoor Bux s/o Allan Khan Khoso Through Mr. Muhammad Qayyum Arain, advocate
Respondent	:	M/s. Zarai Tarkiyati Bnk Limited Through Mr. Faheem Majeed Memon, advocate
Date of hearing	:	17.10.2023
Date of Decision	:	07.11.2023

JUDGMENT

ARBAB ALI HAKRO, J.- Through this First Appeal under Section 22 of Financial Institutions (Recovery of Finance) Ordinance, 2001 (**'the Ordinance'**), the appellant has impugned *exparte* Judgment and Decree dated 02.3.2021, passed by Banking Court-II, Sukkur (**'the trial Court'),** in Suit No.651 of 2019, whereby the said Suit filed by Zarai Taraqiati Bank Ltd (**respondent herein**) against Hazoor Bux (**appellant herein**) was decreed.

2. As per actualities accumulated from the record, the respondent Bank filed a recovery suit for a sum of Rs.13,61,890/- against the appellant before the Banking Court-II, Sukkur. On account of his failure to file an application for leave to defend as provided under Section 10 of the Ordinance, he was made *exparte.* After that, appellant submitted two applications, one for leave to defend and other for recalling the *exparte* Order dated 20.3.2020, which were dismissed through the impugned judgment and Order dated 02.3.2021, and that is how the appellant has preferred the instant appeal.

3. At the very outset, learned Counsel representing the appellant contended that ex-parte impugned judgment and

decree passed by trial Court is illegal, unlawful and unsustainable under the law; that two applications, one for leave to defend and another under Order IX Rule 7 CPC for recalling the order dated 02.03.2021 were declined on the same date in a hasty manner without affording fair opportunity of hearing to the Appellant; that it is settled law that when application come on record, the matter should be decided on merits rather than technical grounds. It is next argued that the right of fair trial has not been provided, which is a fundamental right under Article 10-A of the Constitution, and in presence of such constitutional obligation, the courts are required to decide the matter on merits. In the end, he submits that ex-parte impugned judgment and decree dated 02.03.2021 along with order dated 02.03.2021 passed by learned trial Court may be set-aside by granting unconditional leave to appear and defend the suit so that matter may be adjudicated afresh on merits.

4. Learned Counsel representing the Respondent, while supporting the impugned judgment and decree passed by learned trial Court, contended that the same is legal, lawful and warranted by law. It is argued that Appellant failed to repay outstanding amount, hence, Respondent Bank filed a recovery suit wherein summons were issued through all modes, including publication. Pursuant to the summons, Appellant appeared and filed an application for adjournment on the ground that he has sustained a loss in the produce of agriculture, therefore, he may be granted time of one year to pay his remaining liabilities of instalments. Appellant, up to 02.03.2021, failed to file an application for leave to defend; hence he was ordered to be proceeded *exparte,* He further contends that the appellant filed two applications, one for leave to defend and another application under Order IX Rule 7 CPC for recalling of order dated 02.03.2021, which were dismissed after hearing the parties through a single order dated 02.03.2021, hence such argument of learned Counsel is not tenable in law. In

the end, he submits that instant 1st Civil Appeal, being devoid of merit, may be dismissed with costs and the Appellant may be directed to deposit the amount in light of the decree passed by the learned trial Court.

5. We have heard the arguments advanced by learned Counsel for the parties and minutely perused the material available on record.

6. As per record, the respondent bank filed a recovery suit for a sum of Rs.13,61,890/- against the appellant before the trial Court on 20.11.2019. The record suggests that the appellant had applied to the respondent Bank for the loan of Rs.617,000/- and Rs.690,000/- for agricultural purposes under L.C Nos.147673 and 154882 on a markup basis. The appellant only paid Rs.385,835/- including markup on 30.12.2016; thereafter, he failed to adjust the loan amount of Rs.1,361,890/- including markup, which was outstanding against the appellant. On failure of the appellant to pay off his liability, the respondent bank filed a recovery suit against him. The trial Court issued directions for procurement of the appellant's attendance through summons through bailiff, registered post AD, Courier and publication in daily National and Nawa-e-Waqt for the date of hearing on 15.01.2020. However, on 21.02.2020, the appellant appeared in person and filed an application for adjournment on the ground that he had sustained a loss in the produce of agriculture; therefore, he may be granted time for one year to pay his remaining liabilities of instalments. Whereafter, the appellant, up to 20.3.2020, failed to file an application for leave to defend; hence, he was ordered to be proceeded *exparte.* Afterwards, the appellant filed two applications, one for leave to defend and the other under Order IX Rule 7 C.P.C for recalling the Order dated 20.3.2020. After hearing the parties by a single Order, the trial Court dismissed both applications vide Order dated 02.3.2021, followed by the *exparte*

Judgment and Decree on the even date in favour of the respondent bank.

7. The appellant, in his application for leave to defend, raised legal and factual objections, mainly that he had obtained a loan amount of Rs.150,000/- as refundable and he had paid one instalment of Rs.59,000/- on 02.3.2009 and two other instalments were also deposited by him before filing of Suit by the respondent-bank. However, they did not issue him receipts and kept him in false hopes. In this regard, the contents of the plaint reveal that the respondent bank had claimed that the appellant had availed the finance facility for agricultural purposes on 11.8.2015 and 30.12.2016, respectively, under L.C No.147673 and 154882; therefore, the objection of the appellant that he has paid an instalment of Rs.59,000/- on 02.3.2009 seems to be misconceived. Even otherwise, the appellant failed to meet the requirements of Section 10(1), (3), (4), (5), and (6) of the Ordinance, which deals with the procedure for filing leave to defend and the consequences of its non-compliance. At this stage, it would be more apt to reproduce the same, which reads as under: -

> ***(1)*** *In any case in which the summons has been served on the defendant as provided for in subsection (5) of section 9, the defendant shall not be entitled to defend the Suit unless he obtains leave from the Banking Court as hereinafter provided to defend the same; and, in default of his doing so, the allegations of fact in the plaint shall be deemed to be admitted and the Banking Court may pass a decree in favour of the plaintiff on the basis thereof or such other material as the Banking Court may require in the interests of justice.*
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> ***(3)*** *The application for leave to defend shall be in the form of a written statement, and shall contain a summary of the substantial questions of law as well as fact in respect of which, in the opinion of the defendant, evidence needs to be recorded.*
>
> ***(4)*** *In the case of a suit for recovery instituted by a financial institution the application for leave*

to defend shall also specifically state the following:

(a) the amount of finance availed by the defendant from the financial institution; the amounts paid by the defendant to the financial institution and the dates of payments;

(b) the amount of finance and other amounts relating to the finance payable by the defendant to the financial institution upto the date of institution of the Suit;

(c) the amount if any which the defendant disputes as payable to the financial institution and facts in support thereof.

(5) *Where application for leave to defend submitted under the preceding subsection is found to be materially incorrect at any stage of the proceedings, the defendant shall lose the right to defence and shall also be liable to pay penalty of not less than five percent of the amount of the claim, unless the defendant can establish that incorrect information was submitted as a result of a bona fide mistake.*

(6) *The application for leave to defend shall be accompanied by all the documents which, in the opinion of the defendant, support the substantial questions of law or fact raised by him.*

(7) *An application for leave to defend which does not comply with the requirements of sub-sections (3), (4) where applicable and (5) shall be rejected, unless the defendant discloses therein sufficient cause for his inability to comply with any such requirement.*

8. On a bare reading of above, such provision of law enjoins upon the borrower to file leave to defend application in such form which contains a summary of the substantial questions of law as well as fact in respect of which evidence needs to be recorded, and to show in all fairness as to what amount he had availed from a financial institution, the payment so made by him to the financial institution and the amount which is accepted to be his liability to be finally paid to the Bank. It is by now a settled principle of law that when the application for leave to defend the Suit filed by the appellant did not fulfil the requirements of Section 10(3)(4)(5) and (6) of the Ordinance, such application was liable to be rejected as per the provisions so contemplated under

Section 10(7) of the Ordinance and in consequence whereof, the allegation of facts so contained in the plaint were deemed to have been admitted as per the provisions of Section 10(1) of the Ordinance. In this context, reliance may safely be placed on the case of Apollo Textile Mills Ltd and others v. Soneri Bank Ltd (2012 CLD 337), wherein Apex Court, while interpreting the above provisions of the Ordinance, has elaborated the responsibilities of the parties (customer and financial institution) vis-à-vis pleading and stating particulars of finance in definitive and clear manners. The consequence of non-compliance of Sections 9 and 10 of the Ordinance has also been elaborated, and complete guideline is given with the direction to the Banking Courts to remain within the parametrical scope of claimed and disputed accounts, as follows: -

> *"To scope of the Suit thus becomes well defined. The controversies are confined to the claimed and/or the disputed numbers, facts and reasons thereof. Unnecessary controversial details, the evidence thereto and the time of the trial, are curtailed. The trial would remain within the laid out parametrical scope of the claimed and the disputed accounts".*

9. The consequence of accepting or rejecting the leave application is explicitly given in the provisions of Section 10(11) and (12) of the Ordinance; therefore, it would be conducive to reproduce the same here as under: -

> ***10(11)*** *Where the application for leave to defend is accepted, the Banking Court shall treat the application as a written statement, and in its order granting leave shall frame issues relating to the substantial questions of law or fact, and, subject to fulfilment of any conditions attached to grant of leave, fix a date for recording of evidence thereon and disposal of the Suit.*
> ***10(12)*** *Where the application for leave to defend is rejected or where a defendant fails to fulfill the conditions attached to the grant of leave to defend, the Banking Court shall forthwith proceed to pass judgment and decree in favour of the plaintiff against the defendant.*

10. The above provisions reflect that acceptance of applications of leave to defend results in treating the same as a written statement, framing of issues as substantial questions of law and facts, followed by recording of evidence. When the leave application is rejected, the Banking Court is required to pass judgment and decree. Section 10(12) above, provides that upon rejection of leave application, the Banking Court shall forthwith pass judgment and decree. This proposition has elaborately been discussed by the Divisional bench of this Court in the case of Messrs United Bank Limited through Authorized Attorney vs. Banking Court No. II and 2 others (2012 CLD 1556), wherein it has been held as under: -

> *"11. After carefully examining the entire section 10 of the Ordinance and particularly its subsection (11), we have come to the conclusion that the word "forthwith" specifically mentioned in section 10(11) of the Ordinance was introduced by the legislature for the first time with a clear and specific object, that is, for expeditious disposal of a banking Suit whether filed by a financial institution or by a customer. The word "forthwith" is not meaningless and it cannot be ignored or interpreted casually. The word "forthwith" along with the word "shall" used in section 10(11) casts a duty upon the Banking Court to decree the Suit in favour of the plaintiff against the defendant immediately when defendant's application for leave to defend is rejected or where a defendant fails to fulfil the conditions attached to the grant of leave to defend. In our opinion the object of inserting this new provision was not to cause prejudice to any party, but was to provide an expeditious and equitable relief in banking Suits to the plaintiff after dismissal of defendant's application for leave to defend. We have said so because of the reason that if a defendant successfully makes out a case for grant of leave to defend by raising substantial question(s) of law or fact, leave would be granted to him and the Suit will proceed further. In such an event, obviously the implications of section 10(11) shall not follow. On the other hand, if defendant's application for leave to defend is rejected for where a defendant fails to fulfil the conditions attached to the grant of leave to defend, the plaintiff should not be compelled to wait any longer or to suffer further, and the decree must follow forthwith in his favour. In order to further understand the reason and*

object for using the word "forthwith" in section 10(11) of the Ordinance, we consulted the following well known and authentic legal dictionaries wherein this word has been defined as under:--
Black's Law Dictionary (Seventh Edition) :
Forthwith - Immediately; without delay; directly; promptly; within a reasonable time under the circumstances.
Chambers 21st Century Dictionary (1996 Edition):
Forthwith - Immediately ; at once.
K J Aryer's Judicial Dictionary
(A complete Law Lexicon) Thirteenth Edition:
"When a statute require that something shall be done 'forthwith' or 'immediately' or even 'instantly' it should probably be understood as allowing a reasonable time for doing it."
"Expression 'forthwith' should be construed to mean 'within reasonable period'."
P. Ramanatha Aiyar's Advanced Law Lexicon
(3rd Edition, Volume 2) D-I 2005:
"Occasionally the worth "forthwith" means as soon as possible after the occurrence of some specific intervening event expressed or implied from the context. For example, the making of an application."
"Forthwith means immediately or without delay".
"Forthwith means "as soon as possible ; without any delay".
Words and Phrases (Permanent Edition) Volume 17:
"Forthwith" is convertible with "at once" and 'prompt," and, in its ordinary acceptation, means "at the same point of time; immediately; without delay; at one and the same time; simultaneously; directly."

11. The trial Court thus rightly dismissed the application for leave to defend and application under Order IX Rule 7 C.P.C. in, consequences thereof, decreed the Suit of respondent-bank vide impugned Judgment and Decree as envisaged under the provision of Section 10(11) of the Ordinance which provides the word 'forthwith' preceded by 'shall', which hardly leaves any discretion with the Court but to pass judgment and decree on the material that is available on record. This proposition has already been discussed in various cases including the cases titled "Mrs. Jawahar Afzal v. Messrs United Bank Limited" (2003 CLD 119), "Messrs United Bank Limited through Authorized

Attorney v. Banking Court No. II and 2 others" (2012 CLD 1556) and "Khurram Farooq v. Bank Al-Falah Limited and another" (2018 CLD 1417).

12. Learned Counsel for the appellant is unable to point out even a single instance of any irregularity in the impugned judgment and decree. In fact, nothing plausible could be hinted at by learned Counsel for the appellant to convince us to take any exception to the impugned judgment, which has been validly passed by the trial Court after going through the whole material available on the record. Such findings do not suffer from any illegality, misreading or non-reading of record, so as to, in turn, call for the indulgence of this Court through the present appeal.

13. The upshot of the discussion is that the appeal in hand is devoid of any force hereby **dismissed.** Parties to bear their costs.

JUDGE

Faisal Mumtaz/PS

JUDGE