Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

1st Civil Appeal No.D-20 of 2019

Appellants	:	Messer Muhammad Bux Abro & Co, Through his legal heirs Through Syed Zafar Ali Shah Bukhari, Advocate
Respondent No.1	:	Messers Askri Bank Ltd, Ghotki Branch Through Mr. Mukesh Kumar G. Karara, Advocate
Date of hearing	:	14.11.2023
Date of Decision	:	05.12.2023

JUDGMENT

ARBAB ALI HAKRO, J.- Through this First Appeal under Section 22 of Financial Institutions (Recovery of Finance) Ordinance, 2001 ("F.I.O"), the appellants have impugned Judgment and Decree dated 26.6.2019 and Order dated 26.6.2019, passed by Banking Court-I, Sukkur (" Banking Court"), in Suit No.71 of 2017, whereby the said suit filed by M/S Askari Bank Ltd ("respondent-bank") was decreed against the appellants the legal heirs of deceased Muhammad Bux Abro the proprietor of M/s Muhammad Bux Abro & Co. Ghotki.

2. The relevant facts of the case are that the above suit was filed by the respondent-bank against the father of appellants before the Banking Court for recovery of Rs.1,113,457.08/- along with markup and liquidated damages thereon at the rate of 20% and cost of funds from the date of default till realization of the entire amount. It is averred in the plaint that the respondent-bank extended running finance to the tune of Rs.1,000,000/-(renewal) on markup @ three-month KIBOR rate + 4.50% per annum to the M/s Muhammad Bux Abro & Co. Ghotki. In order to secure the

repayment of the loan amount, the borrower executed and delivered to the Respondent-Bank the following charged documents:-

i) Demand Promissory note dated 08.7.2014;
ii) Financing Agreement dated 08.7.2014;
iii) Letter of Hypothecation;
iv) Letter of continuity;
v) Letter of Guarantee;
vi) Letter of memorandum of deposit of title Deeds and
vii) Disbursement Authorization Certificate

The borrower agreed and undertook that he would pay the above finance facility quarterly based on markup. However, he failed to repay the finance amount along with markup; hence, the respondent-bank filed the suit.

3. Upon service of notice, one of the legal heirs, Hashmat Ali (appellant No.1 herein), filed an application under Sections 10 (3) and 5 of FIO and an application under Order VII Rule 11 CPC. He took the main plea that a suit was filed against the dead person; thus, no cause of action accrued to the respondent-bank to file the suit. Above, both the applications were dismissed by the Banking Court vide Order dated 26.6.2019 and, in consequence, whereof suit was decreed as prayed for, hence this appeal.

4. At the very outset, learned Counsel representing the Appellant contended that the impugned judgment and decree passed by the trial Court is illegal, unlawful and unsustainable under the law. It is next argued that suit filed by the Respondent-Bank was not maintainable as the same was hit by Section 9 (2) (3) of the Financial Institutions (Recovery of Finances) Ordinance, 2001; that appellant expired on 13.08.2014; however, after lapse of three years, Respondent-Bank filed the suit, which is not maintainable against a dead person; that the condition imposed by learned trial Court with regard to payment of principal amount of Rs.11,13,457/- together

with cost and cost of funds till realization of the decreetal amount or in case of failure, the mortgage property be sold by public auction and decreetal amount be adjusted from the sale proceeds thereof after deduction of cost of sale is concerned, the same is punitive as there is no any procedure provided by the law for payment of decreetal amount as set by learned trial Court. He further submits that the impugned judgment & decree and the order dated 26.06.2019 dismissing the application for leave to defend were passed without considering the documents available on record, and it appears to have been done in hasty manner without applying a judicial mind to the facts and circumstances of the case; besides, learned trial Court gave undue favour to the respondent-bank by passing impugned judgment, which lacks detailed explanation, indicating failure to deliver a speaking judgment and the impugned order passed on application for leave to defend the suit under Section 10 (3) (4) & (5) of the Financial Institutions (Recovery of Finance) Ordinance, 2001. In the end, he submits that the impugned judgment and decree passed by the learned trial Court may be set aside by granting unconditional leave to appear and defend the suit so that the matter may be adjudicated afresh on merits.

5. Learned Counsel representing the Respondent, while supporting the impugned judgment and decree passed by the learned trial Court, contended that the same is legal, lawful and warranted by law. So far, the contention of learned Counsel for the Appellants in respect of declining leave to defend the suit, he stated that the Appellants had failed to fulfil conditions specified in the order granting leave to defend suit, and the trial Court was justified in passing the decree against the Appellants; 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 direct the Appellants to deposit the outstanding amount as directed by the learned trial Court.

6. We have heard the arguments advanced by learned Counsel for the parties and minutely perused the material available on record. The main legal question in the present case arises as follows: What is the legal position and effect of a suit that has been filed against a sole defendant who was deceased at the time of the suit's institution? Can the defect regarding the suit's institution be cured by bringing the legal representatives of the sole deceased defendant on record?

7. To answer the first part of the question, it may be stated that according to settled law, any suit or legal proceedings instituted against a deceased person are considered null in law. In this regard, it is imperative to see the judgments of the Supreme Court on the question of what the effect is of filing a suit against a sole deceased person. In the case of Muhammad Yar (Deceased), through L.Rs. and others vs Muhammad Amin (Deceased) through L.Rs. and others (2013 SCMR 464), wherein it has been held as under: -

> *"Heard. Attending to the first question, the legal position by now is quite settled and explicit, in that, where a suit/lis is against only one defendant/respondent of the case, undoubtedly it shall be invalidly instituted being against a sole dead person (defendant)and shall be a nullity in the eyes of the law as a whole; it shall be a still born suit/lis; an altogether dead matter, which cannot be revived; it shall, thus not merely be a defect which can be cured, rather fatal blow to the cause. However, the position shall be different where the lis is initiated against more than one defendants/respondents and out of them only one or few are dead, while the other(s) is/are alive. In such a situation, it shall be a validly initiated suit/lis in respect of the respondent(s), who are alive, but invalid qua those, who are dead."*

Similarly, in the case of Hafiz Brothers (Pvt.) Ltd. and others v. Messrs Pakistan Industrial Credit and Investment Corporation Ltd. (2001 SCMR 1), the Supreme Court has held hereunder: -

> *"There is no cavil with the proposition that the institution of legal proceedings against dead person is of no avail to the concerned litigant. The learned High Court rightly came to the conclusion that the suit of PICIC against*

> *deceased-Mst. Inayat Begum was incompetent and, therefore, nullity in law."*

8. Taking guidance from the preceding rulings of Supreme Court, our perspective is that a suit instituted against a sole defendant who had passed away prior to the filing of the suit would be considered as nonviable, void, and legally invalid. It is a matter of record that the defendant was dead from the very inception of the Suit, and the entire proceedings, including the issuance of the summons, were against the dead person. As such, it couldn't be simply flawed and, hence, couldn't be resuscitated by impleading the legal heirs of the deceased debtor. In this scenario, the respondent-bank, in accordance with the law, could have opted to institute a new suit against the legal heirs, predicated on the identical cause of action. It is well-settled principle of law that the suit filed against a dead person is a nullity and no substitution can be allowed in place of the original defendant who was dead on the date of institution of the suit. It was thus a case where the plaintiff wanted to bring the legal representatives of the deceased on record by filing an application for substitution in a suit filed against a dead person. The suit being a nullity from its inception, substitution of the legal representatives of the deceased would also amount to a nullity. In similar circumstances in Case of Ch. Muhammad Altaf and another v. Muhammad Sadiq and 9 others (PLD 2004 SC (AJ&K)), it was observed that:

> *"From the survey of the reports of the aforementioned authorities it is clear that under the Code of Civil Procedure no suit can be filed on behalf of a dead person or against a dead person. Moreover the substitute service through proclamation is the last resort which can be adopted in the light of the reports submitted by process server while effecting service upon the defendants. In this case the plaintiff-appellants had admitted the death of Ahmed Din in their plaint but still they impleaded him as defendant No.2, therefore, the decree obtained against this defendant was nullity in the eye of law. The notice issued to Muhammad Sadiq, the other defendant, was not received back after due service when on the request made in the plaint he was also summoned through proclamation and just within 15 days, a*

> *decree was allowed in favour of the appellants, herein. The whole procedure adopted by the trial Court, which culminated in the ex parte decree in favour of the appellants, herein, was bad in law".*

9. Considering the circumstances, we conclude that the suit filed against a sole defendant, who was deceased when the suit was instituted, is invalid, non-existent and nullity in law. This is not a mere flaw that can be rectified by involving the deceased defendant's legal heirs. Rather, such a suit cannot proceed further and must be dismissed by the Banking Court as if it was never validly filed. In this situation, the only course of action available to the respondent-bank is to file a new lawsuit against the deceased borrower's legal heirs, provided the cause of action persists against them, and they are the legal successors of the deceased.

10. For the foregoing reasons and discussion, the instant appeal is allowed, and the impugned Judgment and Decree dated 26.6.2019 and Order dated 26.6.2019, passed by the Banking Court, are set aside. Resultantly, the suit filed by the respondent-bank is dismissed, leaving them at liberty to institute a fresh suit against the appellants/legal heirs of the deceased borrower, subject to all the limitations and defences available to the legal representatives under the law.

JUDGE

JUDGE