

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.563 of 2007
(Ordinary Civil Jurisdiction)

MCB Bank Limited v. Emadul Hassan

Plaintiff : MCB Bank Ltd. through its duly
authorized Attorney through Syed
Danish Ghazi and Rameez Adnan
Ansari, Advocates

Defendant : Emadul Hassan, Advocate for Self

Dates of Hearing : 28.08.2023, 08.09.2023, 22.09.2023,
06.10.2023, 13.10.2023, 13.10.2023
28.10.2023, 04.11.2023

Date of Order : 01.02.2023

ORDER

Jawad Akbar Sarwana, J.: This Order arises out of High Court Appeal No.393/2018, which was disposed of on 12.11.2018 with directions to the trial court to decide primarily two issues in respect of maintainability of the suit, which the learned Division Bench as per its final order and the learned Single Judge on the trial side as on 18.12.2018 framed as follows:

- (a) *Whether or not finance granted to an employee of a financial institution would change the nature of the transaction which otherwise falls within the definition of 'finance' under the above Ordinance?*
- (b) *Whether the suit would have been filed at the original side of this Court or in the Banking jurisdiction under the Financial Institutions (Recovery of Finance) Ordinance, 2001, ought to have been decided in the suit before proceeding further?*

2. A brief summary of this civil suit so far is that the Plaintiff is a financial institution licensed by the State Bank of Pakistan to carry on banking business under the Banking Companies Ordinance, 1962. The Plaintiff is hereafter referred to as “the Plaintiff-Bank”. The Plaintiff-Bank falls within the meaning of a “Financial Institution” defined in Section 2(a) of the Financial Institutions (Recovery of Finances) Ordinance (“FIO”), 2001. The Defendant, Emaad-ul-Hassan (“Emaad Hassan”), was a former employee of the Plaintiff-Bank. On 28.04.2007, the Plaintiff-Bank, instead of filing a banking suit under the banking jurisdiction of the FIO, 2001, elected to file this civil suit under the ordinary civil jurisdiction of the High Court of Sindh at Karachi against its former employee for recovery of house loan of Rs.9,196,729/=.

3. The titled suit remained pending in the ordinary civil jurisdiction of the High Court of Sindh at Karachi for almost eleven (11) years. During this period, the Court settled issues, the parties led evidence, and the matter was pending final arguments. When aggrieved by an Order dated 01.11.2018 passed by the trial court, the Plaintiff-Bank preferred an appeal to the learned Division Bench, which was disposed of on 12.11.2018. In the final order disposing of the appeal, the appellate Court framed the above-mentioned two issues (a) and (b) to be decided by the trial court to facilitate further proceedings. The parties further agreed that the impugned Order dated 01.11.2018 passed by the trial court would remain suspended till the question of jurisdiction is decided in this suit.

4. At the outset, this bench first took up the issue of maintainability as framed by the appellate Court.

5. The learned counsels for the Plaintiff-Bank and Emaad Hassan in person were at ad idem regarding their response to issues (a) and (b) framed by the appellate Court. Both Counsels agreed that the way that the appellate Court framed the question was a generic

abstract question and not related to any particular case, for example, to Emaad Hassan's case. Thus, Counsels agreed that the "finance" granted to an employee of a financial institution would not change the nature of the transaction, which otherwise falls within the definition of Financial Institutions (Recovery of Finances) Ordinance, 2001. Therefore, the issue (a) framed by the appellate court is decided in the negative.

6. With regard to issue (b) both Counsels also agreed that the question of whether or not the suit should have been filed on the original side of this Court or in the Banking jurisdiction under the Financial Institutions (Recovery of Finance) Ordinance, 2001 should have been decided before proceeding further. Therefore, the issue (b) framed by the appellate court is decided in the affirmative.

7. After responding to the two questions (a) and (b) framed by the appellate forum, both Counsels contended that deciding the issues (a) and (b) above, as framed by the appellate forum, did not conclusively settle the question of jurisdiction and urged that this bench decides the question of jurisdiction as to whether the plaint filed in the civil suit pending before the High Court exercising its original civil jurisdiction should be returned to the Banking Court or the trial court exercising its original civil jurisdiction should continue hearing the matter. Accordingly, this bench will now decide the question of jurisdiction in terms agreed by the parties as set out in this paragraph.

8. During the course of arguments, it also came to light that on 08.02.2019, the Plaintiff-Bank had filed an Application under Order 23 Rule 1(b) for withdrawal of the Suit with permission to institute a fresh suit in the Banking Court (CMA No.2034/2019). Although the Office had yet to list CMA No.2034/2019 for Orders, Emaad Hassan, had proceeded to file his Counter-Affidavit to CMA No.2034/2019. On 31.05.2023, this bench heard arguments on the said CMA No.2034/2019, but subsequently, parties agreed to defer the hearing

of CMA No.2034/2019 until after this bench decided the question of jurisdiction. If this Court lacked jurisdiction, CMA No.2034/2019 would fall on the whey side as the Plaint would be returned. However, if this Court concluded it had competent jurisdiction to hear the lis, the bench proposed to issue notice of CMA No.2034/2019, whereafter it may be listed for hearing.

9. The learned counsel for the Plaintiff-Bank submitted that the staff loan falls within the definition of “finance” and ought to be decided by a Banking Court and that the Plaintiff-Bank is willing not to press the relief of (i) furnishing limit, (ii) advance bonus, (iii) excess water charges, and, (iv) travelling advance, claimed in the civil suit. Plaintiff-Bank’s Counsel argued that after removing the said components from the claim, the matter is purely a dispute over “finance” and “obligations” between Plaintiff-Bank and its Customer, Emaad Hassan. Accordingly, the plaint filed in the suit should be returned whereafter the Plaintiff-Bank will pursue only the finance facility availed by Emaad Hassan before the Banking Court. He relied on 2012 CLD 483, 2008 CLC 759 and 2016 CLD 461.

10. Emaad Hassan vehemently opposed the contentions raised by the Plaintiff-Bank’s Counsel. He argued that the statement of claim filed by Plaintiff-Bank against him, apart from the reliefs which Plaintiff-Bank has allegedly undertaken to remove (which he opposes), also included the adjustment of provident fund and security. Thus, the claim agitated before the High Court exercising its ordinary civil jurisdiction did not entirely fall within the definition of “finance” under the FIO, 2001. He contended that the Plaintiff-Bank always had a choice of filing a suit under the FIO, 2001, or a civil suit in the original civil jurisdiction of this Court. He argued that the Plaintiff-Bank could have filed the suit regarding the finance without including the reliefs, which they now contended to abandon at the final stages and are attempting to abuse the process of law by claiming to file a Banking suit. All this time, he had not been able to redeem his

mortgaged property from the Plaintiff-Bank. The Court did not settle the issue of jurisdiction and maintainability at any stage until the year 2018. The parties have recorded evidence, and none has deposed on the question of jurisdiction. As a matter of record, they recorded statements before this Court that the Plaintiff had never challenged the jurisdiction. The issue of jurisdiction was taken up not by the trial court but by the learned Division Bench suo-moto and was never part of the appeal. He submitted that the High Court, exercising its original civil jurisdiction, was competent to hear the matter. Emaad Hassan relied on the following authorities: PLD 2010 Supreme Court 878, 1995 CLC 1982 (Supreme Court AJ&K), 2014 CLD 729, 2019 CLD 1350, PLD 2022 Supreme Court 716, 2001 YLR 2259, 2015 CLD 600, 2019 CLD 1350, 2002 CLD 1466, PLD 2007 Karachi 362, PLD 2010 Supreme Court 878 and PLD 2009 Lahore 494.

11. I have heard the learned Counsels and reviewed the record in the suit file. It appears that the question of jurisdiction raised in this matter pertains to subject-matter jurisdiction, i.e. a determination of whether the lis involves a dispute between a “financial institution” and its “customer” concerning an “obligation” arising from a “finance,” which may be amiable to settlement by a Banking Court only established and exercising banking jurisdiction under the FIO, 2001.

12. As already accepted by the parties, when dealing with the two issues (a) and (b) above as framed by the appellate Court vide its Order dated 12.11.2018 in HCA No.393/2018, the Plaintiff-Bank falls within the definition of a “financial institution” and the Defendant, although a former employee of the Plaintiff-Bank, on account of having availed a loan/advance from his former employer, a financial institution, falls within the definition of a “Customer” within the FIO, 2001. The only moot point remaining is whether the claim filed by the Plaintiff-Bank falls within the meaning of “finance” and can only be decided by a Banking Court under the FIO, 2001. To this end, the Counsel for the Plaintiff-Bank admitted that the claim raised in the Plaintiff is based on a Statement of Final Statement (Annexure “Q’

available on page 105 of Part-I of the suit file), which involves several heads of claim that a banking court may not grant. The several components of the Plaintiff-Bank's claims as set out in the Plaint are as follows:

- (i) Provident Fund (set-off)
- (ii) House Building Finance
- (iii) Return on House Building Finance
- (iv) Furnishing Limit
- (v) Advance Bonus
- (vi) Insurance on PF
- (vii) Excess Water Charges
- (viii) Travelling Allowance
- (ix) C & HF Loan

13. The learned Counsel for the Plaintiff argued that even if some of the heads of claims do not fall squarely within the definition of a "finance" under the FIO, 2001, at worst, the banking court may not grant these heads of claim. However, if the Plaintiff-Bank can establish that a "finance" was availed by the Defendant Customer, there is no reason why the Plaintiff-Bank cannot succeed in its claim filed in a Banking Court. Even otherwise, and notwithstanding that the Plaintiff-Bank has not moved any application for amendment to the Plaint, their Counsel undertook to withdraw those heads of claims not covered by the definition of "finance" in their suit for recovery against the Defendant Customer in order to bring the Plaint within the four corners of the FIO, 2001.

14. The court's jurisdiction is based on the relief claimed. The Court has the power to pass all such orders as may be required for the satisfaction of the decree unless any such order by express or by necessary implication is barred by law. An order without jurisdiction is a nullity in the eyes of the law. Hence this Court must examine if, in the present facts and circumstances of the case, the High Court exercising its ordinary civil jurisdiction, should proceed further with

this lis. The provisions of Section 9 CPC vest jurisdiction in Civil Courts to try all cases of a civil nature except those barred expressly or impliedly. To this end, Section 7(4) of the FIO, 2001 clearly states that no Court other than a Banking Court shall have or exercise any jurisdiction concerning any matter to which the jurisdiction of the Banking Court extends under this Ordinance, including a decision as to the exercise or otherwise of a “finance” and the execution of a decree passed by a Banking Court. Accordingly, the loan advanced by the Plaintiff-Bank to the Defendant and such “finance” having availed by the Defendant lends such “finance” to fall within the statutory definition of “finance” under the FIO, 2001. It is the prerogative of the Banking Court to determine whether or not the heads of claims which the Defendant Customer alleges fall outside the scope of finance actually do. This judicial determination of what heads of claim constitute “finance” has been mandated by the Legislature to be determined by a Banking Court (special forum) alone and not the High Court exercising its original civil jurisdiction (under the general civil law). The consequence of the foregoing is that the Plaint in Suit 563/2007 is liable to be returned to the Plaintiff-Bank.

15. Before parting with this lis, it would be pertinent to address the formidable burden which has weighed heavily in the mind of this bench when determining jurisdiction, i.e. the tremendous delay which has occurred in deciding this question of jurisdiction, particularly when the Plaintiff-Bank itself elected to opt-out of the banking jurisdiction, and whether such delay is to be considered as one of the factors when determining the question of jurisdiction by this Court. In an unreported Judgement dated 11.01.2024 in High Court Appeal No. 129 of 2017, Nooruddin & others Versus M/s Sindh Industrial Trading Estate & others, the learned Division Bench held that the consequence of delay in raising an issue of jurisdiction arises only in cases wherein jurisdiction has been challenged on grounds of want of territorial jurisdiction or pecuniary jurisdiction. In such cases (of

territorial and pecuniary jurisdiction), the Court may be minded that the issue of jurisdiction has not been raised promptly. Further, the Court may also look into the consequential failure of justice when there is a delay in taking up the question of pecuniary and territorial jurisdiction. However, when it comes to subject-matter jurisdiction, delay in identifying such jurisdiction may not have any consequence. The learned Division Bench, citing Judgments of the Indian Supreme Court, observed that subject-matter jurisdiction, if overlooked, can make a decree unenforceable. Therefore, regardless of its timing (i.e. when subject-matter jurisdiction is raised) or time consumed/spent in the wrong forum, no question of failure of justice arises because of such delay in its identification in the case of subject-matter jurisdiction. In the present case, the question of jurisdiction arose after several years of litigation, i.e. after the Written Statement was filed, the issues had been settled, the evidence had been recorded, and the matter was proceeding in Court for final arguments. A lot of water had flown under the bridge. Hence, Defendant Emaad Hassan pleaded that given the delay in raising the question of jurisdiction, if the matter is decided against the Defendant at this late stage, such a decision would tantamount to a miscarriage of justice. Yet, as per the above-cited Judgment of the learned Division Bench, the matter in hand, before this bench, involves the determination of subject-matter jurisdiction, and as such, the consequence of delay in raising such subject-matter jurisdiction cannot be factored as one of the grounds for this Court in deciding the question of jurisdiction, i.e. subject-matter jurisdiction. In other words, the High Court cannot accept jurisdiction simply because the case has been languishing on the trial side for more than 11 years, and it would not be equitable to return the Plaintiff when the claim is so close to the finish line of potential announcement of judgment. It appears, based on the discussion of the several authorities cited in the Judgment of the Division Bench, that when dealing with subject-matter jurisdiction, neither equity nor justice can come to the rescue of the Defendant.

16. There is another aspect regarding subject-matter jurisdiction discussed in the above-mentioned Judgment of the Division Bench, i.e., parties cannot, by consent, confer or waive subject-matter jurisdiction. Therefore, subject-matter jurisdiction cannot be acquiesced. In other words, if this Court concludes that it does not have subject-matter jurisdiction, then the parties cannot trump such Order by way of a waiver or consent on their part and insist on proceeding before a court which does not have subject-matter jurisdiction.

9. In view of the above discussion, the Plaint filed in Suit No563/2007 is returned to the Plaintiff-Bank to enable them to avail the jurisdiction of the Banking Court under the FIO, 2001.

Order accordingly.

J U D G E
(31.01.2024)

Announced by me on 01.02.2024

J U D G E