

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Omar Sial

First Appeal No. 61 of 2016

United Bank Limited
Versus
Ghulam Nabi Sheikh

Date of Hearing: 03.04.2024

Appellant: Through Mr. Ghulam Rasool Korai Advocate

Respondent: None present.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Appellant in this appeal has impugned judgment dated 19.01.2016 whereby their Criminal Complaint No.56 of 2008 against respondent filed under section 20(4) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 was dismissed and resultantly the respondent was acquitted.

2. A Murabaha Agreement was executed somewhere in October/ November 2006 between appellant and respondent for a finance facility for purchase of vehicle, ordered by the respondent/ customer, on behalf of the Bank. The vehicle, on completion/conclusion of agreement potentially, was to be sold back to the customer/respondent on Morabaha basis. A letter of hypothecation was also executed by the respondent in favour of the appellant/bank separately. Through such finance a Toyota Corolla (Saloon) bearing registration No.AMK 189, Model 2006, Color white, Chassis No.6045944, Engine No.X4870408 was acquired. Respondent defaulted in repayment, as cheques were bounced and complainant then moved a complaint under section 20(4) of Financial Institutions (Recovery of Finances) Ordinance, 2001, which was dismissed via impugned judgment, referred above.

3. We have heard learned counsel for the appellant and perused material available on record whereas no one has appeared on behalf of the respondent despite service through all modes including publication.

4. The prime concern agitated in complaint was that the accused/respondent while acting dishonestly defaulted in the fulfillments of his obligations and has thus made himself liable to pay sum of Rs.1,441,125.52 to the appellant complainant as per statement attached with the complaint. Complainant also demanded possession/custody of the said vehicle from the respondent/accused which was declined to it. The statement under section 200 Cr.P.C. of complainant's attorney was recorded and cognizance was then taken as it being a prima facie case and bailable warrants against accused/respondent were issued in execution of which he put appearance. Charge was framed on 02.12.2009 under section 20(1)(a) of Financial Institutions (Recovery of Finances) Ordinance, 2001 and respondent/accused pleaded not guilty and the trial then commenced. The Charge framed on 02.12.2009 is reproduced as under:-

"I, Syed Pir Ali Shah Judge, Banking Court No.II at Karachi, do hereby charge you:-

Ghulam Nabi Sh: s/o Ali M. Sheikh

As under:-

That on 16.10.2006 you obtained Finance facility of Rs.703,200 from the complainant Bank i.e. U.B.L. for purchase of Motor Vehicle and you had executed relevant security documents in favour of the complainant bank including Murabaha Agreement, Letter of hypothecation of Motor Vehicle. Authorization to take possession. Power of Attorney etc. and fully availed and utilized the facility for purchase of motor vehicle but intentionally failed to repay the outstanding dues of the complainant as per terms and conditions of the Agreement and other security documents. Allegedly, you defaulted in fulfillment of your obligation and failed to repay the loan as per terms and conditions. It is further alleged that you dishonestly sold out the vehicle in question and committed breach of the terms of letter of hypothecation, Murabaha, Agreement and as such, committed an offence under section 20(1)(a) of Financial Institutions (Recovery of Finances) Ordinance, 2001 within a cognizable of this Court and as such, you are required to be tried for the said offence.

And I hereby direct that you accused be tried by this Court on the aforesaid charge.”

5. Complainant examined its witness/attorney Rizwan-ul-Haq who produced copies of the documents respectively and was also cross examined by learned counsel for the respondent. Respondent/accused was then examined under section 342 Cr.P.C. as Ex.16 in which he denied the allegations and submitted that he had not availed any financial facility from the complainant bank. He also denied execution of agreement and that signatures were forged. According to him two of his friends involved him by playing fraud with the Bank. He stated that he has never seen the vehicle in question or was ever involved in purchase of the vehicle with the complainant bank.

6. Following two points were framed by Court:-

- i) Whether the accused had obtained finance facility from the complainant bank for purchase of motor vehicle and defaulted in fulfillment of his obligations, if so, whether the said facility was availed or not?
- ii) What offence, if any, has been committed by the accused?

7. Counsel argued that the only consideration which seems to have impressed the banking Court when complaint was dismissed was that the intention of dishonesty in issuing cheques was not established. It is complainant's case now before us that dishonesty is not the issue in complaint rather it was default which contributes the essence for initiating complaint.

8. The argument of appellant is not impressive. He should be mindful of the fact that complaint was filed under section 20(4) of Financial Institutions (Recovery of Finances) Ordinance, 2001, and its prerequisite is dishonesty in issuing cheques. The provision reads as under:-

“20. Provisions relating to certain offences.-

(1)

(2)

(3)

(4) *Whoever dishonestly issues a cheque towards repayment of a finance or fulfillment of an obligation which is dishonoured on presentation, shall be punishable with imprisonment which may extend to one year, or with fine or with both, unless he can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the cheque.*

(5)”

9. When the complaint was filed somewhere in June 2008 it was absolutely silent as far as accusation under section 20(4) of Financial Institutions (Recovery of Finances) Ordinance, 2001 is concerned. Complaint ought to have been filed attributing offence within the frame of relevant law which in the instant case is Section 20(4) of Financial Institutions (Recovery of Finances) Ordinance, 2001 and that is to establish “dishonest intention”. Only in case the complaint sinks into the offence, set out in the provisions prescribing exact allegations required under the definition of offence, the charge is to be framed exactly in consideration thereof¹. When the complaint itself does not demonstrate the very offence, there is no question of framing such charge. More importantly the statement under section 200 Cr.P.C. was recorded on 01.11.2008, which is totally devoid of such accusation forming offence under section 20(4) of Financial Institutions (Recovery of Finances) Ordinance, 2001, followed by statement recorded on oath.

10. The emphasis of this provision i.e. 20(4) of Financial Institutions (Recovery of Finances) Ordinance, 2001 is on the “dishonest intention” in issuance of cheque towards repayment of a finance or fulfillment of obligation. This is not a case of recovery of amount but a criminal

¹ Zain Shahid v. The State & another (Not yet reported judgment, though approved for reporting, of Supreme Court in Cr. Petition No.29-K of 2023) [Relevant paragraphs 4 and 5]

complaint based on “dishonest intention” neither does the charge framed by Court would lead to resolution of allegation of complaints based on “dishonest intention” while issuing cheques. This burden to prove “dishonest intention” is heavier and different than in recovering defaulted amount.

11. Complaint simply suggests that accused acting dishonestly defaulted in fulfillment of his obligation under the agreement and does not talk about dishonest intention in issuing cheques. Relevant paragraph 6 is reproduced as under:-

“6. That the Accused acting in a dishonest manner, defaulted in fulfillment of his obligation and is now liable to pay a sum of Rs.1,441,125.52 to the complainant as per statement of account (Annexure ‘F’)”

12. Section 20(4)’s requirement is different than the gist of complaint; *ibid* provision only enabled the Court to frame punishment if the customer/whosoever, breached the terms by “dishonestly issuing cheques” towards repayment of finance or fulfillment of such obligation which was/were dishonored.

13. So the prime consideration for Court is to see whether element of dishonesty is involved or not; later part is only consequential. Burden to prove such element of dishonesty is upon complainant and in the instant complaint it lacks. There is not an iota of evidence to demonstrate such “dishonest intention” of alleged accused, even if the charge is to be altered².

14. This is not a civil case of recovery under banking jurisdiction that preponderance or cumulative effect be given for recovery proceedings; the process here is the criminal intent which lead to punishment and hence intent of dishonesty is inevitable. This is without prejudice to any

² Same as before.

recovery proceeding if initiated and/or pending, which may be dealt with in accordance with law.

15. In view of above, we are of the view that the impugned order does not call for any interference hence this First Appeal is dismissed.

Dated:

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