

**IN THE HIGH COURT OF SINDH,
AT KARACHI**

I.A No.33 of 2018

Present:

Yousuf Ali Sayeed and
Arbab Ali Hakro, JJ

Citibank N.AAppellant

Versus

Muhammad Tasleem & others.....Respondents

Nabeel Ahmed Kolachi, Advocate, for the Appellant.
Noor Muhammad Dayo, Advocate, for the Respondents.

Date of hearing : 18.09.2024

ORDER

YOUSUF ALI SAYEED, J. The Appellant, a financial institution, has preferred this Appeal under Section 22 (1) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the “**Ordinance**”), impugning the Judgment rendered by the Banking Court No. V at Karachi (the “**Banking Court**”) on 16.01.2018 in Suit No. 605 of 2007 (the “**Suit**”) instituted by the Respondent No.1, its customer, for Declaration, Possession, Recovery of Damages, Rendition of Account and Permanent Injunction stemming from the repossession of one of two motor vehicles obtained by way of a car finance facility.

2. Through the impugned Judgment, the Suit was decreed as against the Appellant and its functionaries jointly and severally as per prayer clauses, A, C, E, F and G, with the relief thereby elicited being:

- "a. Declaration that act of defendants for taking forcible possession of the vehicle without serving any notice in advance is illegal, void and malafide.
- c. Direct the defendants to pay jointly and severally a sum of Rs. 5 million to the plaintiff towards compensation of damages for the insult, humiliation mental torture and agony caused by the defendants through illegal and malafide act of taking possession of vehicle.
- e. To declared that the plaintiff is entitled for the proper maintenance of his Account No. 1001557951 by the defendant and also for its inspection
- f. To direct the defendant to rendition of account from the period of March 2005 to March 2007 and supply its copies to the plaintiff.
- g. to direct the defendant to restore that Account of the plaintiff immediately."

3. As is apparent from those prayers, the claim of the Respondent No.1 for damages was grounded in tort; predicated on the assertion that the act of repossession undertaken at the behest of the Appellant had been wrongful and had caused him mental suffering and loss of reputation in the sum claimed. That much is further borne out by paragraph 8,9 and 11 of the Plaint, through which the claim was cast as follows:

"8. That is so happened on 19-02-2007 that the Plaintiff/Respondent No. 1 alongwith his wife and guests had come for shopping at Mansfield Street, Saddar, Karachi in the vehicle when he got down of the vehicle alongwith his wife and guests the officials of the Defendants came from behind and forcibly snatched the key of the vehicle. The Plaintiff/Respondent No. 1 made every effort to

pacify the officials of the Defendants while explaining the situation and also attempted to paint the fact that such illegal removal of the vehicle will cause him irreparable injury towards reputation before his guests and those present. The officials of the Defendants did not pay any heed to such situation and remained shouting that Plaintiff/Respondent No. 1 is a defaulter of the Defendants and they forcibly took away the vehicle They also issued abuses to the Plaintiff/Respondent No. 1 without considering the fact that he is a respectable person and a customer of the defendants have certain privileges.

9. That the manner in which the officials of the Defendants took the forcible possession of the vehicle b snatching the key and shouting declaring the Plaintiff/Respondent No. 1 a wilful defaulter caused a very bad impression towards the reputation of the Plaintiff/Respondent No. 1. Such situation caused a great mental shock to the Plaintiff/Respondent No. 1 and Plaintiff / Respondent No.1 had to leave the place immediately with down eyes. The Plaintiff/ Respondent No.1 became rather ashamed when his colleagues and business fellows inquired him about the vehicle and its such forcible removal.”

“11. That the mental suffering, harassment and loss towards reputation caused by the Defendants by their illegal and mala fide act of removing the vehicle in an insulting manner cannot be compensated in shape of money but the Plaintiff/Respondent No. 1 claims damages against such act of Defendants to tune of rupees five million only as token money in the following manner:

- i. Mental suffering Rs.10,00,000/-
- ii. Loss towards reputation Rs.40,00,000/-”

4. Over the course of proceedings that ensued in, the Banking Court was pleased to grant the Appellant leave to defend the Suit unconditionally upon consideration of the application filed under Section 10 the Ordinance, whereby the claim was denied *in toto*, with the following issues then being framed:

- 1. Whether the suit is not maintainable?
- 2. Whether the suit is file within the jurisdiction of the Banking Courts?
- 3. Whether the plaintiff has committed the default?

4. Whether the defendant has the legal right to repossess the vehicle?
 5. What relief is plaintiff the entitled?
 6. What should the decree be?
5. Thereafter, the Respondent No.1 and the Appellants witness filed their respective Affidavits-in-Evidence and were cross examined, culminating in findings on the aforementioned issues against the Appellant in terms of the impugned Judgment, as aforementioned, hence this Appeal.
6. Proceeding with his submissions, learned counsel for the Appellant argued that the learned Banking Judge had erred in failing to appreciate that as the claim of the Respondent No.1 was one for damages, based on an allegation of a tortuous act, the matter did not fall within the ambit and purview of the Ordinance and did not fall within its jurisdiction. He argued further that the Respondent No.1 had even otherwise failed to lead any evidence so as to prove such loss. He submitted that repossession of the vehicle had ensued validly, for cause, within the scope of Section 16 (3) of the Ordinance and underlying agreements entered into between the parties in relation to the finance, as the Respondent No.1 had defaulted in its repayment obligations. He placed reliance on the judgments in the cases reported as Nasimuddin Siddiqui vs. United Bank Limited 1998 CLC 1718, Abdul Rehman Allana vs. Citibank 2003 CLD 1843, M. Nujeebullah Qureshi vs. Messrs. Citibank N.A. 2009 CLD 49, and Messrs. M.M.K Rice Mills vs. Grays Leasing & others 2006 CLD 1147.

7. For his part, learned counsel for the Respondent No.1 stood by the case set up through the plaint and simply argued that repossession had ensued without valid cause arising from default and issuance a written notice in that regard prior thereto.

8. Under the given circumstances, the matter falls to be considered from a jurisdictional and evidentiary standpoint, entailing a determination as to competence of the Banking Court and whether the Respondent No.1 had satisfactorily established his claim.

9. Looking to the caselaw on the jurisdictional plane, it merits consideration that the case of Nasimuddin Siddiqui (Supra), the provisions of the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 (since replaced by the Ordinance) had been examined by a learned Single Judge of this Court whilst seized of a Suit under Section 9 CPC, and it was held that whilst a Suit for damages arising out of a breach of contract executed in respect of a loan or finance between the Banking Company on the one hand and the borrower or customer on the other could be entertained by the Banking Court, a Suit based on tort did not fell within the competence of that forum. That judgment was followed in the judgment reported at 2003 CLD 1843 and 2009 CLD 49, the latter being that of a learned Division Bench of this Court. Similarly, in the case of Messrs. M.M.K Rice Mills (Supra), being a judgment emanating from the Lahore High Court judgment, where with reference to certain other judgments of that Court, a claim for damages in tort was struck out.

10. Furthermore, in the case reported as Citibank N.A v. Syed Shahanshah Hussain SBLR 2009 Sindh 1290, it was observed by a learned Division Bench of this Court as follows:

“Now advertent to the argument of Appellant’s counsel that the Banking Court is not empowered under the Financial Institutions (Recovery of Finances) Ordinance, 2001 to award compensatory cost on account of Personal injury, we do not agree with this argument as well. No doubt, the scope of Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 is limited only to such suits where a default in the fulfillment of any obligation in relation to a finance has been committed but this does not mean that no claim at all for damages which is based on personal injury could be agitated before a Banking Court. A personal injury could arise on account of default in fulfillment of any obligation in relation to finance and an aggrieved party may claim damages as well. A claim for damages i.e. a claim for seeking pecuniary compensation is a relative term. Such a claim may arise on account of injury or loss caused by one to the other by commission of tort or by breach of a contractual obligation. The claim for damages caused on account of commission of tort or by breach of a contract which has nothing to do with the default in the fulfillment of an obligation arising from a financial facility and covered under the definition of “finance” as provided in Section 2 (d) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 obviously cannot be agitated before a Banking Court. However, a claim for damages, on account of any injury or loss caused by a Financial Institution to its customer, which has resulted from any default committed by the Financial Institution in the fulfillment of its obligation in relation to finance, can certainly be taken to the Banking Court for adjudication. Hence, a claim for pecuniary compensation could either arise from a tortuous act i.e. not based on any contract or a breach of a contractual obligation not pertaining to an accommodation or facility of finance as defined under Section 2 (d) of the Financial Institutions Recovery of Finances) Ordinance, 2001 and for these two categories of

claims obviously the Banking Court is not the appropriate forum. However, a claim for pecuniary compensation could also arise on account of the failure of a Financial Institution to fulfill its obligation in relation to any financial accommodation or facility. It is this category of claim which certainly comes within the scope of Section 9 of the Ordinance and a suit relating thereto is always maintainable before a Banking Court. Therefore, there is no force in the first argument of Appellant's counsel."

[Underlining added for emphasis]

11. Turning to the evidentiary aspect on the point of damages, in the case of Messrs. Klb-e-Hyder and Company (PVT.) LTD vs National Bank of Pakistan and 3 others 2008 CLD 576, it was held in that regard that:

“Damages are usually considered under two heads viz. general or non-pecuniary loss or damages, that is physical injury, pain and suffering, impaired capacity for the enjoyment of life or lessened capacity and special or pecuniary damages that are actual, incidental and direct expense, capable of calculation in terms of monetary value may it be on account of medical treatment, loss in business profit earning or otherwise, in an action for damages either general or special, burden to prove is always on the plaintiff. In absence of authentic oral and documentary supporting evidence, mere statement of party is not sufficient to establish amount of damages allegedly suffered by him. A person claiming special damages must prove each item of his loss on the basis of evidence. Where a person claims special damages then it is incumbent upon him to show as to under which head of account and how such damages have been sustained. In absence of such proof, special damages cannot be allowed. Reliance is placed on authority of 1992 CLC 1561 (Kar.) relevant page 1566(B)

12. However, a perusal of the Affidavit-in-Evidence filed by the Respondent No.1 reflects the same to be bereft of any assertion whatsoever regarding the mental suffering or loss of reputation alleged in the plaint, failing even to incorporate the averments set out in the paragraphs thereof reproduced hereinabove. As such, the burden of proof as to damage remained completely undischarged.

13. Under the circumstances, where the damages claimed are not alleged to represent economic loss associated with a breach of contract but are based purely in tort, and also remain unproven to any degree, we are of the view that the determination of the Banking Court in the Suit cannot stand on either the jurisdictional or evidentiary plane, hence the Appeal is allowed with the impugned Judgment being set aside.

JUDGE

JUDGE