

# IN THE HIGH COURT OF SINDH AT KARACHI

## I<sup>st</sup> Appeal No. 103 of 2018

Present:

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Muhammad Osman Ali Hadi

[Muhammad Anis V. M/s. Pak Gulf Leasing Company Limited & others]

Date of hearing : 11.02.2025  
Date of decision : 26.02.2025  
Appellant : Through M/s Abdul Shakoor and Fahad Ali,  
Advocates  
Respondent : Nemo.

## JUDGMENT

**Muhammad Osman Ali Hadi, J:** The instant Appeal arises from Judgment dated 26.09.2018 (“**Impugned Judgment**”) passed by Banking Court No. V at Karachi in Suit No.578/2007. The facts pertaining to the matter are as follow:

2. The Appellant was / is owner of the Property being Residential Quarter No.B-644 situated in Sector 61-A, Korangi Township, Karachi measuring 120 sq. yards (“**the Property**”), which he obtained vide indenture of lease granted in the year 1994.

3. In the year 2004, the Appellant provided the Property (through original papers) to be furnished as a surety in Criminal Case No.164 of 2003 before VI<sup>th</sup> Judicial Magistrate, Karachi (Central), on behalf of two accused persons namely, Tahir and Salman Aslam Tariq, (“**the Accused**”) pursuant to their bail order dated 29.05.2003. Subsequently, the Accused were released and surety was discharged by order dated 27.08.2003 (it is relevant to mention the Accused persons have no bearing on the instant matter at hand but are mentioned for narrational purposes). However, the Appellant’s Property papers were not released at such time.

4. The Appellant then filed an application for release of surety, i.e. return of his original Property papers, before the Court of the Judicial Magistrate, whereafter an order was passed for the In-charge of the Record Room to send the R & P, so appropriate orders could be passed. However, the matter

remained stagnant and kept lingering, on one pretext or another. The Appellant did not receive any final outcome.

5. The Appellant then received a notice dated 25.05.2007 from Respondent No. 1 (a non-banking finance leasing company) with whom the Appellant admittedly has no relationship, which stated that the Property was mortgaged to them, and they intended to auction the same. It remains unclear as to how Respondent No. 1 got hold of the Property and had it mortgaged.

6. The Appellant then filed a Civil Suit before the High Court of Sindh at Karachi in its Original Civil Jurisdiction seeking a declaration, cancellation, damages and permanent injunction, *inter alia*, also seeking to restrain Respondent No.1 from auction / sale of the Property. Vide order dated 25.06.2007 the learned Single Judge returned the Plaint, with an observation to approach the court of proper jurisdiction, which the Appellant was (verbally) informed was the relevant Banking Court.

7. Pursuant to the order dated 25.06.2007, the Appellant then approached the Banking Court (No. V) and filed Suit No.578/2007 (“**the Suit**”) seeking redressal of his grievance (above-stated). In the said Suit pleadings were filed by the Parties, issues were then framed and evidence was led. The matter then proceeded to the Final Arguments stage, at which juncture the learned Judge framed an additional issue seeking whether the Banking Court had jurisdiction to entertain the Suit, and then proceeded to decide the matter solely on the additional issue. The learned Single Judge passed the Impugned Judgement, holding that the Banking Court did not have jurisdiction to adjudicate the matter, was without jurisdiction and *quoram-non-judice*, as the Appellant did not fall within the definition of ‘*customer*’ under section 2(C) the Financial Institution (Recovery of Finance) Ordinance, 2001. Accordingly, the learned Single Judge returned the Plaint under Order VII Rule 10 Code of the Civil Procedure, 1908, with the direction to file the same before the (civil) court of competent jurisdiction.

8. The Appellant being aggrieved has filed the instant Appeal against the Impugned Judgment, on which we opine as follows:

9. The Appellant has been pursuing the Property since the year 2006, and was initially faced with hurdles by the Criminal Court of the Judicial Magistrate, after which he was constrained to file a civil suit before the Civil Court. When the Civil Court became cognizant of the matter, it directed the plaint be returned and filed before a court of proper jurisdiction, which the Appellant was led to believe was the Banking Court.

10. The Appellant then filed his plaint before the Banking Court, after which the Respondents filed their Leave to Defend Application. The same was heard and allowed vide order dated 11.12.2010, following which a full trial ensued.

11. The following Issues were accordingly framed:

- i. *Whether the Plaintiff has no cause of action and the Plaint is liable to be dismissed under Order VII, Rule 11, CPC?*
- ii. *Whether the Plaintiff has not mortgaged the property in Suit with the Defendant No.1 as security for the Defendant No.2?*
- iii. *Whether no guarantee was furnished by the Plaintiff?*
- iv. *Whether no relationship as customer or borrower or mortgager exist between the Plaintiff and the Defendants?*
- v. *To what claim the Plaintiff is entitled?*

12. After evidence was recorded and the matter was fixed for Final Arguments, the learned Single Judge of the Banking Court at this advanced stage framed an additional issue being ***“Whether this court has jurisdiction to entertain suit filed by the plaintiff?”*** After hearing the additional issue, the Banking Court held (in the Impugned Judgement) it did not hold jurisdiction to entertain the Suit, and the plaint was returned. The Impugned Judgment held that the Appellant did not fall within the ambit Section 2 (c) Financial Institutions of (Recovery of Finance) Ordinance, 2001 (**“FIO 2001”**) of being a *‘customer’*, and hence could not invoke the banking jurisdiction. The learned Single Judge returned the Plaint under Order VII Rule 10 CPC with an observation for the Appellant to present the same before a competent court.

13. It is pertinent to note the learned Single Judge in the Impugned Judgment had noted observations of alleged injustice having been committed against the Appellant, but no directions were passed due to her observation for lack of jurisdiction.

14. Counsel for the Appellant has mainly contended that the Property was being auctioned by Respondent No. 1 which was a leasing company, and hence the matter fell within the remit of the FIO 2001, and the Impugned Judgement has erred by returning the plaint for want of jurisdiction. The Appellant has relied on the case of *Arifa Shams* cited as 2012 CLD 483, which he states is on all fours with the matter at hand.

15. None appeared on behalf of the Respondents.

16. We have heard the Counsel for the Appellant. There is no cavil with the proposition that the Banking Court has authority to decide its own jurisdiction

as provided in Section 7(4) FIO 2001<sup>1</sup>. There also remains no dispute the Banking Court, is created under a special law, i.e. FIO 2001, the jurisdiction of which is only invoked when there is dispute between a financial institution and a customer, as defined under the FIO 2001.<sup>2</sup> It is an accepted position the Appellant does not fall into either category, which forms the basis of the Impugned Judgement and return of the plaint.

17. Though we do not disagree entirely with certain observations in the Impugned Judgment, we do find that certain relevant factors were not properly adjudicated by the learned Single Judge, which are hereby addressed. The Appellant had been following due process under guidance of the various mentioned courts below. The Appellant first filed a civil suit before the Civil Court, from where the plaint was returned and the Appellant was led to approach the Banking Court. The Banking Court then framed issues and led evidence, after which it (itself) framed the additional issue (*abovementioned*), and returned the plaint under the provisions of Order VII Rule 11, CPC 1908. Both these Courts (at separate times) have returned the plaint to the Appellant, in essence leaving the Appellant non-suited. This is contrary to the provisions of law and natural justice, i.e. *ubi jus ibi remedium*, meaning where there is a right, there is a remedy. At this stage, it remains undisputed that the Appellant's Property papers were used as surety for an unrelated bail matter, after which the same were never returned to him. This has in essence left the Appellant without remedy, through no fault of his own. We further observe if the Banking Court had thought the Appellant lacked jurisdiction, this issue should have been framed by it at the earliest and decided before the matter was at a conclusive stage. Such act of the Banking Court has no doubt caused great loss of time and resources to the Appellant, as well as to the judicial system.

18. The legal maxim "*actus curiae neminem gravabit*" meaning an act of court should prejudice no man, which has repeatedly been enshrined by the Supreme Court of Pakistan<sup>3</sup> would be called into effect to the aid of the Appellant. Reliance can be placed on the recent case *Dr. Asma Noreen Syed V. Government of the Punjab & others* [2022 SCMR 1546], where the Supreme Court held:

*"9. A patent and obvious error or oversight on the part of Court in any order or decision may be reviewed sanguine to the renowned legal maxim "actus curiae neminem gravabit" which is a well-settled enunciation and articulation of law expressing that no man should suffer because of the fault of the court or delay in the procedure. The maxim 'actus curiae neminem gravabit' means an*

<sup>1</sup> Reference is also placed on 2016 CLD 461

<sup>2</sup> 2003 CLD 1026, 2003 CLD 1843, 2007 CLD 1532, 2004 CLD 689.

<sup>3</sup> Reference: 2023 SCMR 1451; 2022 SCMR 1546; 2024 CLD 1099.

*act of the Court shall prejudice no one. It is interrelated and intertwined with the state of affairs where the court is under an obligation to reverse the wrong done to a party by the act of Court which is an elementary doctrine and tenet to the system of administration of justice beyond doubt that no person should suffer because of the delay in procedure or the fault of the court. This is a de rigeur sense of duty in the administration of justice that the Court and Tribunal should become conscious and cognizant that as a consequence of their mistake, nobody should become victim of injustice and in the event of any injustice or harm suffered by mistake of the court, it should be remedied by making necessary correction forthwith. If the Court is satisfied that it has committed a mistake, then such person should be restored to the position which he would have acquired if the mistake did not happen. This expression is established on the astuteness and clear-sightedness that a wrong order should not be perpetuated by preserving it full of life or stand in the way under the guiding principle of justice and good conscience. So in all fairness, it is an inescapable and inevitable duty that if any such patent error on the face of it committed as in this case, the same must be undone without shifting blame to the parties and without further ado being solemn duty of the Court to rectify the mistake. In the judicial conscience and sense of right and wrong, the foremost duty in the dispensation of justice is to apply the correct law. In the case of *State v. Asif Adil and others* (1997 SCMR 209), this Court recapped the well-settled proposition of law that parties should not be made to suffer on account of an act or omission on the part of Court.” (emphasis supplied).*

**19.** This view was reiterated by the Apex Court in the case of *Abid Jan V. Ministry of Defence & others* [2023 SCMR 1451] (relevant Para 9).

The above cited ratios establish support to the Appellant in the matter-at-hand. It is abundantly clear that distress has been caused to the Appellant, due to the various courts below sending him from pillar to post in an attempt to safeguard his own Property. Furthermore, these actions also appear violative to Appellants’ rights under the Constitution of Pakistan, 1973.<sup>4</sup>

**20.** After going through the record and proceedings below, we find that the Appellant has now been left in a situation whereby his Property appears to be lost in an abyss, not through any fault of his own, but due to actions of the courts below in returning his plaint. It is trite law that mere technicalities cannot forgo justice, nor can technicalities be allowed to operate as tyrant masters so as to frustrate genuine claims<sup>5</sup>.

**22.** As per dictum established by the Apex Court (*Supra*), it remains incumbent upon a court to remedy any wrong suffered by a litigant. In this

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<sup>4</sup> Particular reference can be made under Articles 4, 8, 10-A, 23, 24 & 25

<sup>5</sup> 2010 CLC 22

regard further reliance is placed on *Abdul Qudoos V. Commandant Frontier Constabulary KPK, Peshawar & another* [2023 SCMR 334], the relevant portion of which reads:

*11. (Reiterated Dr. Asma Noreen Syed's Judgement 2022 SCMR 1546 Supra.).*

*“12. It is also quite significant to note that before the learned High Court, the parties agreed by consent that the matter be remitted to the Tribunal. According to the Corpus Juris Secundum, Volume LXXVI (at Page 905), the word "Remit" is defined as meaning to send back; to forward, transmit, or send, while in Black's Law Dictionary, Sixth Edition (page 1294), "Remit" means to send or transmit or refer a case back to a lower court for further consideration. The doctrine of Ex debito justitiae refers to the remedies to which a person is entitled as a matter of right as opposed to a remedy which is discretionary. Every court has the power to rectify ex debito justitiae its judgment and order to prevent abuse of process and severe and patent oversights and mistakes. This Court in the case of *Government of the Punjab, through Secretary, Schools Education Department, Lahore and others v. Abdur Rehman and others* (2022 SCMR 25), held that the lexicons of law provide the definition of the legal maxim "Ex Debito Justitiae" (Latin) "as a matter of right or what a person is entitled to as of right". This maxim applies to the remedies that the court is bound to give when they are claimed as distinct from those that it has discretion to grant and no doubt the power of a court to act ex debito justitiae is an inherent power of courts to fix the procedural errors if arising from courts own omission or oversight which resulted violation of the principle of natural justice or due process." (emphasis supplied).*

**23.** Additionally, this Court holds inherent jurisdiction and power, the Court remains duty-bound to ensure complete justice is done and technicalities are avoided. Such power has been granted vide statute, i.e. under section 151 as well as Order 41 Rule 33 Code of Civil Procedure, 1908; as well as through establishment of legal precedent. In the case of *Messrs Grain Systems V. Agricultural Development Bank* [1993 SCMR 1996] the Supreme Court of Pakistan held that transfer of cases from one court to another in certain circumstances was a more suited remedy than returning a plaint, if the same enhanced the cause of justice. It also held the courts maintain inherent jurisdiction to do the same. A relevant portion of the judgement reads<sup>6</sup>:

*“9. The learned counsel for the petitioners then submitted that the proper course for the High Court would have been to transfer these matters to the Special Court instead of returning the plaint*

<sup>6</sup> Similar views were followed in 2004 SCMR 108, 2010 CLD 981, 2009 CLD 172.

*to the petitioners for presentation to the proper forum. Section 6 (4) of Ordinance 1979 contemplates that "any matter pending in any Court immediately before the commencing day shall stand transferred to the Special Court. Though this provision relates to those matters which were pending in any Court before the commencing day but the technicalities in such matters are to be avoided. The Court has inherent jurisdiction to do complete justice and avoid as far as possible technicalities of procedure. There should be rational approach to the matter. Principle of justice demanded for transfer of case to a competent forum." (emphasis supplied).*

**24.** Additionally, the Appellate Court can also act *ex delicto justitiae* and supply for an omission in any procedure. The Appellate Court exercises powers to make such orders to cover ostensibly impossible situations for complete dispensation of justice.<sup>7</sup>

**25.** The Appellant has been in pursuit of his Property, which has eluded him for nearly 20 years, and the matter to-date remains in limbo. The Appellant is no better off today than he was 20 years ago, despite pursuing his matter before the courts of law. It would by any standard be unjust, if the Appellant was not aided to conclude his claim. In light of the foregoing and due to the facts and circumstances aforementioned, and duly fortified by law & precedent, we dispose of the instant Appeal in the following terms:

- a. As at this stage it would serve a more reasonable and justiciable purpose, so we invoke our inherent powers and transfer the Suit (No. 578 of 2007 decided by Banking Court No. V at Karachi) from the Banking Court to the relevant Civil Court holding pecuniary and territorial jurisdiction over the Property, where the Plaint shall be processed and numbered / registered accordingly.
- b. The matter shall commence at such Civil Court from the stage of Final Arguments. Since issues have already been framed and evidence recorded, it would be contrary to justice to unduly burden the Appellant and the justice system by restarting a *trial de novo*. The Court / Evidence files shall be transferred by the Banking Court No. V at Karachi (or whichever Banking Court the case documents / files are located) to the relevant Civil Court (without delay), and the evidence already concluded before the Banking Court No V in Suit No. 578/2007 shall be utilized. There will no requirement to record any evidence again, and the matter should be decided only based on documents & evidence already on record.
- c. It is observed that due to such immense delay already suffered by the Appellant, the Civil Court should endeavor to conclude the matter by

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<sup>7</sup> 2022 SCMR 870

hearing Final Arguments based on the material already available on File, and pass judgement / decree within a period of three (3) months from the date the Suit is transferred / shifted to the Civil Court.

**26.** Accordingly, the instant Appeal is allowed to the extent and subject to the conditions stated above.

JUDGE

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