IN THE HIGH COURT OF SINDH, KARACHI
Special H.C.A. No.91 of 2018
[M/s. Bita Textile Mills (Pvt.) Ltd. & others v. First Women Bank Ltd.]

Present:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Muhammad Osman Ali Hadi

20.03.2025.

Mr. Muhammad Arif, advocate for Appellants.
Mr. Khalid Mehmood Siddiqui for respondent
along with Ms. Rabia Mehak, Law Officer of respondent bank.

J U D G M E N T

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MUHAMMAD IQBAL KALHORO J: Respondent/First Women Bank Limited filed a suit under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 for recovery of finance amount Rs.370,383,869/- (Rs.370.484 million) along with cost of funds and sale of mortgaged immovable properties and hypothecated goods/articles.

2. It is stated in the plaint that defendants/appellants, account holders with plaintiff bank, requested for finance facilities, which the bank approved and from time to time renewed/enhanced the same but the defendants/appellants failed to fulfill their contractual obligations. In order to secure the finance facilities, the defendants/appellants created, executed and signed various documents in favour of bank including agreement of finance on markup basis, promissory notes, registered and equitable mortgage of immovable properties, deposited Memorandum of title documents, lease deed, NOC, search certificate, Hypothecation Deed, stock reports of hypothecated goods, registration letters from Securities And Exchange Commission of Pakistan and executed continuing guarantees etc.

3. At the same time, defendants/appellants mortgaged various immovable properties to secure the finance facilities and signed various agreements with the bank to that end. Defendant No.6/appellant No. 6 here, became guarantor/mortgagor, she created, executed, signed and registered equitable mortgage of her immovable property bearing B/II, Sub-Plot No.C/1, Block-B; Flat No. C/10, Fourth Floor, admeasuring 97.58 sq.yds.; Blessing Apartment, Block No. 2, North Karachi.

4. Likewise, defendant No. 7/appellant No. 7 here, also acted as mortgagor/guarantor, she created, executed, signed the charged documents in favour of bank to secure the finance facility granted to defendant No. 1/appellant No. 1.

5. In addition, defendants/appellants availed SWAP arrangement/facilities in the year 2012, the SWAP facilities were adjusted and R/F & D/F facilities were also granted to them on their request. It is further stated in the plaint that defendants/appellants malafidely and fraudulently removed/sold out more than 50% of the hypothecated goods and misappropriated sale proceeds by not depositing them towards repayment of outstanding finances. Hence, legal notices were issued by the bank to the defendants/appellants but to no effect. On the contrary, they filed a suit for rendition of accounts, declaration, injunction and recovery against the bank.

6. In such context, the bank prayed for judgment and decree as under:-

> a) Judgment and decree in favour of plaintiff against all the defendants No.1 to 7 jointly and severally for payment of Rs.370,383,869/- (Rupees 370.384 M).
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> b) A decree be passed for the sale of the mortgaged properties, assets land, building, goods, plant machineries, fixtures, equipments and hypothecated goods lying in the mill premises of the defendant No.1 and to sale the mortgaged property of the defendants No.2 to 7. The details of properties have been mentioned under para No.4 to 8 of the plaint.
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> c) An order may kindly be passed before judgment for the attachment of movable and immovable properties of defendants

No.1 to 7. The details of the properties have been mentioned under Para No.4 to 8 of the plaint.

d) A decree be passed in favour of plaintiff for recovery of any other amount for which the defendants are liable to pay to plaintiff.

e) The decretal amount to order to be realized, both by execution of personal decree against defendants as well as by the sale of immovable and movable property goods mortgaged hypothecated with plaintiff.

f) In case the proceeds are found to be insufficient to satisfy the amount that is due to the plaintiff, the remaining amount may be ordered to be recovered from the defendants through sale of other personal assets of the defendants, principal borrower, mortgagors and guarantors.

g) Cost of funds be awarded in accordance with section 3 of the F.I.R.F. Ordinance 2001 from the date of default till satisfaction of decretal amount be granted.

h) Cost of the suit be awarded

i) Any other relief(s) that this Honourable Court deems fit and proper in the circumstances of the case may also kindly be granted.

7. Defendants/appellants, after service, filed an application for leave to defend the suit under section 10 (2) of Ordinance, 2001 read with Section 151 C.P.C. questioning maintainability of the suit by referring to the suit already filed by them seeking rendition of accounts, declaration, injunction and recovery, on the one hand. And on the other hand, questioning figures of amounts made over to them (appellants) by the bank and amounts shown to have been paid by them in the plaint. Instead, in the application, defendant/appellants substituted the same with their own figures. These figures reflected amounts paid by them to the bank, insurance claim, which was received by the bank, extra amount and maximum amount received by the bank from wrong deduction. The defendants/appellants also pleaded that no cause of action had accrued to the bank to file the suit as the documents filed by the bank in support of the suit were not verified on oath, as required. The application for leave to defend the suit was heard and dismissed

vide impugned order dated 09.03.2018 and consequently the suit was decreed to the extent of prayer clauses a, b c and g. In compliance, the decree was accordingly drawn by the office on 13.03.2018. Hence this appeal.

8. Learned counsel for the appellants has argued that the judgment and decree passed by the learned single Judge is erroneous in law; that learned single Judge has failed to apply his judicial mind and has passed the impugned order and decree arbitrarily without taking into account the defence of the appellants; that the learned single Judge has failed to take note of the fact that respondent bank has not settled the accounts with the appellants and not adjusted the amount which was paid by the appellants to the respondent bank; that in the suit, filed by the appellants for rendition of accounts, damages and injunction, the leave to defend the suit was granted to the bank unconditionally by the learned single Judge, whereas, leave to defend application filed by the appellants in the instant suit has been dismissed; that defence put up by the appellants is material and substantial and unless the evidence is recorded, the issues cannot be sorted out between the parties.

9. He has further argued that learned single Judge has not taken into account the fact that while making readjustment of the amounts paid by the appellants, respondent bank has not considered the amount due on account of insurance; that the respondent bank has failed to justify figures of outstanding amount against the appellants by presenting any evidence; that appellants had obtained insurance policy against the said loan; that after the fire incident, the appellants claimed insurance amount but the amount was given to respondent bank by the insurance company illegally and that amount has not been adjusted by the respondent bank in the

accounts; that the amounts paid by the appellants have not been reflected and adjusted by the respondent bank while calculating the amount outstanding against them; that copies of payment slips, statement of accounts and other documentary evidence filed by the appellants were not considered by the learned single Judge; that there are serious contradictions in the statement of accounts filed by the bank, which show that the respondent bank is not entitled to the judgment and decree. He has relied upon **2014 SCMR 1048** to support his arguments**.**

10. On the other hand, learned counsel for respondent bank has supported the impugned judgment. He has further articulated that during pendency of this appeal, the matter was referred to Chartered Accountant vide order dated 06.03.2024 for examining the figures the parties were at adds with, the Chartered Accountant viz. Junaidy Shoaib Asad has submitted the report dated 30.04.2024 concluding the matter in favour of the bank. He has further submitted that in Para. No. 2 (2) of the report, the Chartered Accountant has stated that the credit vouchers amounting to Rs.665,100/- are not reflected in the statement of account that therefore are not justified. He has stated that the bank is ready to adjust that amount and if the decree is modified to extent of that amount, he would have no objection. Learned counsel has relied upon **2017 CLD 342.**

11. We have heard learned counsel for the parties, perused material available on record including the impugned order. It seems, along with application for leave to defend the suit, the appellants did not file any document to vouch for their counter-claim except a statement reflecting total adjustment from 2013 to 2016, prepared through computer by the appellants themselves. It is important to note that learned counsel for the bank, in his arguments, has not

disputed the outstanding figures calculated in the said statement i.e. Rs.89136340.94. Therefore, we fail to understand as to how this document creates a substantial question of law or fact in favour of the appellants, so much so, that they shall be granted leave to defend the suit unconditionally, as pleaded by them. It is not clear either how by mere filing of this statement, the appellants have discharged obligation under section 10 of the Ordinance, and have succeeded in putting up sufficient material for the Court to form an opinion giving them a chance to present their case. It is a settled proposition that in terms of Section 10 of Ordinance, 2001, the defendant has to mention a summary of substantial questions of law and fact in his application for leave to defend the suit. The said statement fulfills neither of criterion and must fail on such account. Neither any substantial question of law, nor of fact has been raised by the appellants save emphasizing that the statements filed by the respondent bank do not reflect the actual amount outstanding against them, without however explaining it adequately.

12. Further, the appellants have pleaded that the insurance amount received by the respondent bank is not shown to have been adjusted in the statement of account. It is important to note that the entire stock was hypothecated in favour of the bank and any compensation for its loss was to be made over to the bank. That said, with the consent of the parties, the matter was referred to the Chartered Accountant where the appellants raised several pleas to justify their case. Those have been examined by the Chartered Accountant in detail as reflected in the report. All the pleas so raised have been answered by the Chartered Accountant in his report separately and individually in favour of the bank. The overall conclusion drawn in the report reads as under:

> "In view of the above, all the observations raised by the customer except for observation No.02 are of the nature in which the bank either made a wrong entry in the statement of account of the customer which was duly corrected or there was a typographical error in the statement which had no net financial impact. Although the customer has alleged that the bank has overcharged markup in point 01 but has failed to provide documentary evidence in support of its claim.
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> Further the customer has provided a break-up of the overall principal payable by the customer to the bank. However, the same is not supported by any working/calculation."

13. The above conclusion shows that even before the Chartered Accountant, the appellants failed to produce any substantial evidence determining their entitlement to any claim including of insurance, apart from failing to raise enough material requiring a further probe by the Court to determine the outstanding amount against them, with only one exception mentioned in Para. 2 (2). That anomaly too has been opined by the Chartered Accountant to have established only a mistake: vouchers amounting to Rs.665,100/- have not been duly mentioned in the statement of account by the bank. This shows that, barring such amount, all the amounts paid by the appellants have been considered and adjusted by the bank and are reflected in the statements of accounts.

14. Although learned counsel for the appellants has tried to raise objection over the report through a statement and has argued that the Chartered Accountant was on the panel of respondent bank, being its tax consultant, and, therefore, has prepared an obligatory report in favour of the bank but he has failed to substantiate his assertion by producing any evidence that the report is biased one or it is against the record. Neither, at the time of appointment of the said Chartered Accountant, he raised any objection, nor at the time of proceedings before him, he put up any exception and pleaded for

discontinuing the proceedings. On the contrary, the report of the Chartered Accountant postulates that appellants fully participated in the proceedings, submitted all the documents for his examination and raised all the pleas that learned counsel for appellants has reiterated here before this Court. And the Chartered Accountant after considering all the pleas, appreciating all the documents, has concluded that appellants have failed to produce any evidence establishing that the statements of account relied upon by the bank are erroneous or based on extraneous considerations.

15. Be that as it may, learned single Judge has observed in last paragraph of the impugned order that from perusal of the record as well as the arguments of learned counsel for the defendants, it appears that no substantial question of law or fact has been raised, whereas, all such arguments so raised are stereotype and without any substantial material to support the same. It is not in dispute that finance facility was availed for which various agreements were signed and properties were mortgaged and hypothecated.

16. When, we confronted learned counsel for appellants to show us an error in the said findings, or any document to establish that such findings are an outcome of a wrong appreciation of fact or misinterpretation of law, he could not offer any reply. Before us also, he, barring raising general pleas/contentions regarding wrong entries in the statements of accounts or in relation to markup and their impact over the outcome of the case, has not brought up any material proving that the defence put up by the appellants required a deep consideration by the Court, and hence they were entitled to leave to defend the suit. The proposition: substantial question of law and fact in the banking suit would mean ability of the defendant to put up such material so as to convince the Court tentatively about probability of success of the said material as a valid defence, if it is

put to the trial. It would imply that defendant has succeeded in presenting an arguable case, which on a tentative assessment appears to be credence worthy and noteworthy, leaving no option to the Court but to examine it deeply so as to arrive at a just conclusion. That means that if defence is not examined, the Court will not be able to reach a definitive conclusion because there are certain facts in the defence, which if overlook, may lead to incoherence, obscurity and enigma in the pleadings presented by the plaintiff rendering it impossible to adjudicate.

17. In the present case, appellants filed a formal application for leave to defend the suit reiterating the facts and disputing each and every assertion of the plaintiff bank, without raising any substantial question of law and fact as explained above, with an aim to obfuscate claim of the bank. They appear to have attempted to make the figures of amount outstanding against them as disputed without, however, presenting, validly, any evidence to rebut the same. Their efforts seem to only make facts of the case unintelligent without offering any convincing alternate for a consideration.

18. They have tried to dispute the report of the Chartered Accountant appointed with their consent by claiming, unsuccessfully, that the said Chartered Accountant is biased in favour of respondent bank, without pinpointing however that the said report is based on extraneous considerations or is an outcome of misunderstanding of the facts.

19. Failure of the appellants to either establish any material error in the entries reflected in the statements of account filed by the bank, or cite any excuse warranting their escape from fulfilling their obligation under the agreements signed by them with the bank, leave no room for this Court but to uphold the impugned order and

decree passed by the learned single Judge with one exception/ modification i.e. amount of Rs.665,100/- as conceded by the learned counsel for the bank, which should be excluded from the decretal amount.

20. We, therefore, are of the view that instant appeal merits no consideration and is accordingly dismissed along with all pending applications in above terms.

The appeal is accordingly disposed of along with pending applications.

JUDGE

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