

IN THE HIGH COURT OF SINDH AT KARACHI

1st Appeal No.113 of 2011

Al-Baraka Bank (Pakistan) Limited ----- Appellant

Versus

Mr. Raja Ashfaq Hussain ----- Respondent

BEFORE:

Mr. Justice Mushir Alam, Chief Justice

Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing: 22.11.2012

Appellant: Through Mr. Arshad Tayab Ali Advocate

Respondent Ms. Rizwana Ismail Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- The appellant has impugned the judgment and decree passed by the Banking Court in Suit No. 265/2009 instituted under section 15(11) of the Financial Institutions (Recovery of Finances) Ordinance 2001.

2. The main grounds as raised by the learned Counsel for appellant in assailing judgment and decree are that the Banking Court is not vested with the powers and jurisdiction to entertain the suit filed by the respondent who was a bidder and who had defaulted in payment of the auction price pursuant to a public notice under Section 15 of the Financial Institutions (Recovery of Finances) Ordinance 2001.

3. The brief facts of the case, as submitted, are that in an attempt to sell one of the mortgaged property, the appellant through public auction invited bids by placing advertisement in two newspapers. In pursuance thereof M/s Noorani Traders who came out as highest bidder was accepted by the appellant and subsequently the said bidder appointed respondent as his nominee to make payment and complete all formalities of the sale/auction. In terms of the public notice as per the terms of auction the auction purchaser deposited 15% of the bid amount on 17.02.2005 leaving balance 85% to be deposited within 30 days failing which the 15% deposited amount would be liable to be forfeited.

4. Learned Counsel for the appellant contended that despite notice dated 09.04.2005 sent to the respondent on behalf of the appellant the respondent failed to

pay the remaining 85% of the bid amount and on 25.4.2005 the appellant informed the respondent that the 15% deposited amount stood forfeited and the sale of the industrial plot also cancelled.

5. It is submitted by the learned Counsel that the respondent not being consumer of the appellant as defined by the Financial Institutions (Recovery of Finances) Ordinance 2001 and that too after a period of four years filed a suit for declaration and recovery of forfeited amount along with damages which cannot be maintained under section 15 of the Ordinance, 2001 before the Banking Court. It is contended by the learned Counsel that pursuant to the summons the appellant filed leave to defend application under Section 10 of the Financial Institutions (Recovery of Finances) Ordinance 2001 with the preliminary objection that the suit was not maintainable since there is no relationship under the Financial Institutions (Recovery of Finances) Ordinance 2001 between the appellant and the respondent and no finances were produced to the respondent by the appellant. Learned Counsel submitted that section 15(11) of the Ordinance 2001 does not allow filing of recovery suits as same can only be filed under section 9 of the Ordinance 2001 besides the same being time barred. The said application for leave to defend was dismissed by the Banking Court on 23.11.2010. In terms of the order of dismissal of leave to defend application it was held that the appellant (Bank) availed loan facility and that the maintainability of the suit can be decided at the time of decision of the suit.

6. Subsequently, the appellant filed an application U/O VII Rule 11 CPC for the rejection of the plaint which too met the same fate and the statement of break-up of the liabilities was ordered to be filed by both the parties. Thus conclusively learned Counsel contended that the Banking Court has failed to decide basic jurisdictional objection which is taken by the appellant. Learned Counsel submits that admittedly and avowedly the respondent was outside bidder in the sale of the mortgaged property and had failed to deposit the balance sale consideration within the requisite period and filed suit after 4 years for the refund of the forfeited amount. In terms of his arguments the impugned judgment and decree is a coram-non-judice having been passed by the Banking Court lacking jurisdiction to entertain such matters. Learned Counsel further submits that the Banking Court's jurisdiction to entertain such matters is spelt out in Financial Institutions (Recovery of Finances) Ordinance 2001 which can be considered as to jurisdictional clause. Learned Counsel further submitted that the alleged transaction was not completed and therefore, no dispute can be considered to be pending in respect of the sale of mortgaged property and even otherwise an independent suit cannot be entertained in the Banking Court for the recovery of the forfeited amount.

7. As against this the learned Counsel for the respondent submitted that in terms of subsection (11) of Section 15 all disputes arising out of sale of the mortgaged properties are to be dealt with by the Banking Court and since this is a dispute arising

out of the sale of mortgaged property therefore, the respondent has rightly filed suit for recovery of damages before the Banking Court under section 15(11) of the Financial Institutions (Recovery of Finances) Ordinance 2001. Learned Counsel further submitted that the appellate Court is the same Court in continuation of the original jurisdiction and relied upon the cases of Muhammad Yusuf v. Mst. Kharian Bibi (1995 SCMR 784), Abdul Aziz v. Sheikh Abdur Rahim (PLD 1984 SC 164) and Mian Rashid Ahmad v. Syed Azeem Shah (1991 SCMR 94). Learned Counsel further submitted that there is no nexus of subsections (9), (10) with subsection (11) of Section 15 of the Financial Institutions (Recovery of Finances) Ordinance 2001 as Subsection (11) speaks of sale whereas subsections (9) and (10) of Section 15 FIO is in respect of the property sold and not sell. Learned Counsel in support has further relied upon the cases of Mst. Sardar Begum v. Malik Khalid Mehmood & others (1986 CLC 2342), Ameer Umar v. Additional District Judge, Dera Ghazi Khan (2010 SCMR 780) and Anwar Khan v. Fazal Manan (2010 SCMR 973).

8. We have heard the learned Counsel for the parties and perused the record. We also have the benefit of going through the suit that has been filed by the respondent before the Banking Court for recovery of the amount paid by the respondent to the appellant. This is an admitted fact that pursuant to a public auction one M/s. Noorani Traders offered to purchase the subject property which rights were delegated to the respondent as its nominee to make the balance payment and complete all formalities

of sale which offer was accepted by the appellant. In terms of the Contract Act 1872 such transaction constituted a contract. From the terms of definition of “proposal” and “promise” when applied it reveals that the financial institution asked for an offer which was responded by a proposal which was accepted and hence it becomes binding contract. The definition of proposal, promise, promisor and promisee in terms of Section 2 of the Contract Act are as under:-

- “2(a) **“Proposal”**. When one person signifies to another his willingness to do or to obtain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.
- (b) **“Promise”**. When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.
- (c) **“Promisor” and “promise”**. The person making the proposal is called the promisor, and the person accepting the proposal is called the promisee.”

9. It is admitted fact that there is no dispute with regard to the sale of the subject property pending before the Banking Court. Every statute has a jurisdictional clause which determine its scope. In order to understand the theme of the Banking Ordinance, we reproduce Section 9 of the Financial Institutions (Recovery of Finances) Ordinance 2001.

“9. *Procedure of Banking Courts.* (1) Where a customer or financial institution commits a default in fulfillment of any obligation with regard to any finance, the financial institution or, as the case may be, the

customer, may institute a suit in the Banking Court by presenting a plaint which shall be verified on oath, in the case of a financial institution by the Branch Manager or such other officer of the financial institution as may be duly authorized in this behalf by power of attorney or otherwise.

(2) The plaint shall be supported by a statement of account which in the case of a financial institution shall be duly certified under the Bankers Books Evidence Act, 1891 (XVII of 1891) and all other relevant documents relating to the grant of finance. Copies for the plaint, statement of account and other relevant documents shall be filed with the Banking Court in sufficient numbers so that there is one set of copies for each defendant and one extra copy.

(3) The plaint, in the case of a suit for recovery instituted by a financial institution, shall specifically state-

(a) the amount of finance availed by the defendant from the financial institution,

(b) the amounts paid by the defendant to the financial institution and the date of payment; and

(c) the amount of finance and other amounts relating to the finance payable by the defendant to the financial institution upto the date of institution of the suit.

(4) The provisions of section 10 for the Code of Civil Procedure 1908 (Act V of 1908), shall have no application for and in relation to suits filed hereunder.

(5) On a plaint being presented to the Banking Court, a summons in Form No.4 in Appendix 'B' to the Code of Civil Procedure, 1908 (Act V of 1908) or in such other form as may, from time to time, be prescribed by rules, shall be served on the defendant through the bailiff or process-server of the Banking Court, by registered post acknowledgment due, by courier and by publication in one English language and one Urdu language daily newspaper, and service duly effected in any one of the aforesaid modes shall be deemed to be valid service for purposes of this Ordinance. In the case of service of the summons through the bailiff or process-server, a copy of the plaint shall be attached therewith and in all other cases the defendant shall be entitled to obtain a copy of the plaint from the office of the Banking Court without making a written

application but against due acknowledgement. The Banking Court shall ensure that the publication of summons takes place in newspapers with a wide circulation within its territorial limits.”

10. In terms of the above, it is established that a suit can be maintained by the customer and the financial institution as the case may be in terms of Section 9 referred above. The word customer and the Financial Institutions have been defined in terms of 2(a) and 2(c) of the Financial Institutions (Recovery of Finances) Ordinance 2001 which reads as under:-

“2. *Definition.* In this Ordinance, unless there is anything repugnant in the subject or context-

- (a) “financial institution” means and includes
 - (i) Any company whether incorporated within or outside Pakistan which transacts the business of banking or any associated or ancillary business in Pakistan through its branches within or outside Pakistan and includes a Government savings bank, but excludes the State Bank of Pakistan.
 - (ii) A modaraba or modraba management company, leasing company, investment bank, venture capital company, financing company, unit trust or mutual fund of any kind and credit or investment institution corporation or company; and
 - (iii) Any company authorized by law to carry on any similar business, as the Federal Government may by notification in the official Gazette, specify.

- (c) “customer” means a person to whom finance has been extended by a financial institution and includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution as well as a surety or an indemnifier.”

11. However, in addition to the above Section 9 of the Financial Institutions (Recovery of Finances) Ordinance 2001 there is another provision i.e. Section 15 of the Ordinance 2001 which deals with the sale of the mortgaged properties. The terms of Section 15(4) suggests that where the mortgagor fails to pay the amount as demanded within the period prescribed the financial institution may without intervention of the Court sell the mortgaged property or any part thereof by public auction and appropriate the proceeds thereof towards total or partial satisfaction of the outstanding mortgage money. It is from this subsection (4) of Section 15 of the Ordinance, 2001 that the cause of action may accrue to any aggrieved party when invitation may be called through public auction. Section 15 of the Ordinance, 2001 is a provision which deals with the mortgaged properties and its sale in ascending order, as we read, contains a procedure of the sale of mortgaged property. Subsection (4) of Section 15 Ordinance, 2001 deals with the failure of the customer to make payment which empowers financial institution to sell mortgaged property without intervention of the Court subject to the proviso attached to subsection (4). In terms of subsection (5) of Section 15 of the Ordinance, 2001 financial institution was made entitled to participate in the public auction and to purchase the mortgaged property at the

highest bid obtained in the public auction. Subsection (6) of section 15 of the Ordinance, 2001 deals with the handing over of the possession of the mortgaged property subject to proviso attached thereto. Subsection (7) deals with the execution and registration of the sale deed in respect of the mortgaged property. Subsection (8) of Section 15 of the Ordinance, 2001 deals with the registration of the sale deed whereafter all rights in mortgaged property shall then be deemed to be vested to the purchaser free from all encumbrances and mortgagor shall be divested of any right, title and interest in the mortgaged property. Subsection (9) of section 15 of the Ordinance, 2001 deals with the net sale proceeds of the mortgaged property and its distribution. Subsection (10) of Section 15 of the Ordinance, 2001 deals with the affairs after the mortgaged property is sold whereas subsection (11) of Section 15 of the Ordinance, 2001 which has been relied upon by the learned Counsel for the respondents deals with all disputes relating to the sale of the mortgaged property including disputes amongst mortgagees in respect of distribution of the sale proceeds which is claimed to be decided by the Banking Court.

12. It is apparent that subsection (11) of Section 15 of the Ordinance, 2001 deals “all disputes”. No doubt that by this section another jurisdiction also vest with the Banking Court which is different from that in Section 9 of the Ordinance 2001. However, perusal of the plaint, available at page-43, annexure-D, shows that the respondent does not at all dispute the sale or subsequent sale of the subject property

which is admittedly sold at a much lesser price than what was proposed by the respondent in the year 2004. We may not like to comment with regard to the alleged loss which may or may not have been sustained by the appellant but the fact remains that the respondent filed simple suit for recovery of amount that is claimed to be forfeited by the appellant which cannot be equated with “dispute of sale of property”. In such eventuality when the respondent do not dispute the subsequent sale of the mortgaged property the subject provision of law i.e. Subsection (11) of Section 15 of the Ordinance, 2001 would not come into force. It is pleaded in the plaint that in terms of section 16 of the Ordinance, 2001, the appellant compromised with the borrower and therefore, there was no reason left to the appellant to misappropriate the amount paid by the respondent and it was the duty of the appellant to pay the money back to the respondent with profits thereon. Thus, the respondent seems to have surrendered with the decision taken by the appellant. The dispute with regard to the compromise or the rights and entitlement of the respondent as regards to the offer they have made pursuant to the public auction is not before us nor pleaded by respondent in suit. We are only constrained to focus as to whether in the circumstances mentioned above the respondent can maintain the suit in terms of Subsection (11) of Section 15 of the Ordinance, 2001 for recovery of amount only. We are afraid that a perusal of plaint shows that the cause was independent arising out of a contract which was created pursuant to the public auction notice dated 07.4.2004 against which an offer was made which ripened into a contract which was approved

by the appellant thus constituted independent contract irrespective of any provision of the Financial Institutions (Recovery of Finances) Ordinance 2001. Secondly the respondent do not have a dispute relating to the sale of the mortgaged property as they have not come out with their rights and entitlement in the public auction whereby they could asserted their rights to purchase the subject property. It appears that they have surrendered and ultimately in the year 2009 a suit was filed for recovery of the forfeited amount only which cause do not come within the jurisdiction of the Banking Court.

13. An issue of close similarity to the issue involved in this appeal was taken up by a Division Bench of this Court comprising Mr. Justice Shabbir Ahmed and Mr. Justice Ata-ur-Rehman, (as they then were) in case of Pakistan Industrial & Credit Investment Corporation Ltd. Vs. M/s. Jugnu Enterprises in Special High Appeal No. 100/2001, being unreported, wherein while dealing with the transaction of sale and purchase it was discussed that the jurisdiction of the Banking Court could not be stretched to bring it under the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 and also that the breach of any guarantee could not be ended up in exercising or invoking banking jurisdiction. Relevant paragraphs are reproduced as under:-

“13. It is a fact that the transaction of sale and purchase of the property took place between the appellant and the respondent No.1 in the normal course of business without invoking any provisions of the said Act. The transaction between the

appellants and Respondent No.1 cannot be stretched to bring it under the scheme of the said Act. There is no dispute between Respondent No.1, and Respondent No.2 in respect of the bank guarantee and even the impugned judgment had not disclosed any controversy between the parties. In the given facts and circumstances of the case, we are not satisfied with the finding of the trial Court. As observed above, there were absolutely no transaction between Respondent No.1 and appellants, which would fall under any of the clauses of Section 2 of the said Act. The counsel for the appellants agreed that in case of any breach or any grievance against Respondent No.1 the appellant likewise could not have invoked the provisions of act XV of 1997. In our view this is the correct position and none of the two parties in the present circumstances could have approached the banking Court for the redress of the grievance. When the facts and circumstances are put to the test of the definitions of the said Act it is found that there was neither a customer or borrower which could attract the provisions supra. We are afraid that the case law placed by the counsel for the Respondent No.1 is not relevant to the present facts and circumstances of the case.

14. It is, therefore, held that the trial Court, which is constituted under the said Act had no jurisdiction to entertain and try suit No.73/1998.

15. The value of the suit is more than Rs.500,000/- (Rupees five lacs) and is triable by the High Court on the original side, we direct the office to treat this matter as a suit on the original side and take appropriate steps in that regard.”

14. In another case reported in 2006 CLD 167 (Mehr Ashiq Hussain Vs. Citi Bank NA) the Division Bench of Lahore High Court observed that “He neither falls within the definition of ‘borrower’ and ‘customer’ nor he obtained any ‘finance’ or ‘loan’ as defined under the provisions of Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997. Such suit filed by the plaintiff was simple suit for recovery of damages on the basis of torts”.

15. Likewise in the case of United Bank Limited Vs. Adamjee Insurance Company reported in (1988 CLC 1608) similar view was also taken. All these cases appear to have been decided on the basis of Act of 1997.

16. We may observe that the aforesaid provision of Section 9 of the Financial Institutions (Recovery of Finances) Ordinance 2001 is not comprehensive and exhaustive in deriving conclusion regarding the jurisdiction of the Court as the recourse in terms of Section 15 have to be made to discover as to what is the precise jurisdiction vested on the Banking Court under the Ordinance in terms of Section 15. No doubt that the preamble/title of the Ordinance provides that it has been primarily for the purpose of recovery of finance. The other recourse that is available under section 15 of the Ordinance, 2001 is off-course is the mechanism which provides for the recovery of the loan by way of sale of the mortgaged property with or without intervention of the Court and the jurisdiction in terms of Section 15 of the Ordinance, 2001 is also open and extended as far as the disputes of the sale of the mortgaged property is concerned. Such disputes if at all, raised are to be dealt with in terms of Section 15 of the Ordinance, 2001. There is no cavil to this proposition and perhaps to this extent the jurisdiction of the Banking Court extends so far as it relates to a dispute for the sale of the mortgaged property, which is not the case here.

17. We are, therefore, of the view that the Banking Court wrongly assumed the jurisdiction and proceeded with the case. In all fairness the learned Banking Court

ought to have decided the jurisdiction at the earliest which he failed. It is also mind boggling that the Banking Court in its order dated 23.11.2010, while deciding leave to defend application observed for the appellant (Bank) as under:---

“----This application has simply been filed as leave to defend application in the formal manner. Obviously defendant availed loan facility provided by the plaintiff side.---“

18. Such observations of the Presiding Officer of the Banking Court clearly demonstrate the non-application of mind and his intellectual level. We are, therefore, of the view that the Banking Court had no jurisdiction in the matter and the learned Presiding Officer ought to have returned the suit Under Order VII Rule 10 CPC to a Court having jurisdiction.

19. The judgments/case law cited by the learned counsel for the respondents are not relevant to the facts and circumstances of the case in hand and as such are not applicable.

20. We therefore, set aside the impugned judgment dated 29.08.2011 and decree dated 07.09.2011 and the order dated 23.11.2010 passed on leave to defend application and in pursuance of Order VII Rule 10 CPC return the plaint to the respondent for filing it before the Court having jurisdiction to decide the same in accordance with law. This is of course subject to law and limitation, if any.

21. The appeal stands disposed of in the above terms.

Judge

Chief Justice