

IN THE HIGH COURT OF SINDH AT KARACHI

1st Appeal No.92 of 2011

Anwar Mehmood ----- Appellant

Versus

M/s. Askari Bank Limited ----- Respondent

BEFORE:

Mr. Justice Mushir Alam, Chief Justice

Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing: 28.11.2012

Appellant: Through Mr. Khaleeq Ahmed Advocate

Respondent Mr. Khalid Mehmood Siddiqui Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This appeal is arising out of the order dated 22.2.2011 passed in Suit No. 567/2009 decreed on 13.11.2010 by the Banking Court-III at Karachi.

2. The brief facts of the case are that the respondent filed a suit under banking jurisdiction against the appellant. The appellant contested the said suit by filing leave to defend application, however, the same was dismissed and on 10.11.2010 the Banking Court-III passed the judgment and decree on 13.11.2010 in favour of the respondent and against the appellant in the sum of Rs.67,490/-.

3. Aggrieved with this judgment and decree the respondent's counsel filed an application under section 152 CPC read with section 151 CPC supported by affidavit of his associate Counsel. It is contended by the learned Counsel for the appellant that it is pleaded in the application that due to "accidental slip" the service charges amounting to Rs..5,33,656.40 were left out and were not made part of the judgment and decree. The application was resisted by the appellant who filed detailed counter affidavit and after hearing the parties the application was allowed to the extent of Rs,2,89,117/- instead of Rs.5,33,656.40.

4. Learned Counsel for the appellant aggrieved with this order filed the instant appeal and contends that there was no privity of contract between the appellant and the respondent. It is stated that the claim of service charges was @ 3% of the amount

utilized. Learned Counsel for the appellant submitted that in terms of Section 27 of the Ordinance, 2001 the amount of service charges cannot be included which have been left out by the Banking Court and it is not an error which can be rectified either in terms of Section 152 CPC or under Section 27 of the Ordinance, 2001. Learned Counsel submitted that the appellant was paying annual fee yearly and through the statement of account it could not be ascertained as to on what percent the service charges is being levied and it is also inconceivable as to how the learned Banking Court reached to a figure of Rs.2,89,117/- as service charges. Such figure 2,89,117/- was not available either in the plaint or in the statement of account, hence it cannot be taken as accidental slip.

5. As against this the learned Counsel for the respondent argued that the claim of service charges was very much pleaded by the respondent inasmuch as in para 4(iii) of plaint the amount of service charges was shown. However, it was not included in the judgment and decree and this is an accidental slip. Learned Counsel further submitted that the application signed by the appellant to acquire the credit card is in fact constitute an agreement which entitled the respondent to recover the service charges and hence the application was granted in accordance with law.

6. We have heard the learned Counsels and perused the record. It is an admitted position that the judgment and decree was passed to the tune of Rs.67,490/- despite the fact that in the plaint the amount claimed as service charges was discussed and

shown in the break up. It is quite apparent that in the last two concluding paras it has been categorically observed by the learned Judge that the appellant has utilized an amount of Rs.1,752,228/- and has deposited Rs.1,684,738/- leaving a balance amount of Rs.67,490/-.

7. In order to understand the application of Section 152 CPC it is very essential that the same is reproduced:

“152. Amendment of judgments, decrees or orders, Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the party.”

8. This provision of Section 152 CPC deals with the clerical or arithmetical mistakes in the judgments, decrees or orders arises from the accidental slip or omission. This general provision of law can only be applied to a special statute if the later does not provide any recourse. A deeper look at the Ordinance, 2001 reveals that in terms of Section 27 no Court or other authority was empowered to revise or review or call or permit to be called, into question any proceedings, judgment, decree, sentence or order of the Banking Court or the legality or propriety of anything done or intended to be done by the Banking Court in exercise of jurisdiction; provided that the Banking Court may on its own accord or on application of any party and with

notice to other party or, as the case may be, to both the parties, correct any clerical or typographical mistake in any judgment, decree, sentence or order passed by it.

9. Section 27 of the Ordinance 2001 is reproduced as under:-

“27. Finality of order. Subject to the provisions of section 22, no Court or other authority shall revise or review or call, or permit to be called, into question any proceeding, judgment, decree, sentence or order of a Banking Court or the legality or propriety of anything done or intended to be done by the Banking Court in exercise of jurisdiction under this Ordinance.

Provided that the Banking Court may, on its own accord or on application of any party, and with notice to the other party or, as the case may be, to both the parties, correct any clerical or typographical mistake in any judgment, decree, sentence or order passed by it.”

Thus, it is very clear that in the special statute i.e. Ordinance 2001 a parallel provision to obtain remedy as claimed has been provided which special provision in law would exclude the application of general principle of law i.e. Section 152 CPC.

10. The Financial Institutions (Recovery of Finances) Ordinance 2001 is a special law and the special provisions of law have precedence over general provisions of law. Such special provisions of law in terms of Section 4 of the Ordinance, 2001, shall have effect notwithstanding anything inconsistent therewith contained in other law for the time being enforce. It thus appears to have an overriding effect on any other law enforced. Even error of law or non-consideration of any particular revision of the Banking Court while rendering any decision, order or sentence cannot be revisited by

the Banking Court in view of the limitation prescribed by Section 27 of the Ordinance, 2001 which jurisdiction is to be exercised by the Banking Court.

11. It is paramount principle of interpretation of law that the special law excludes application of general law in the context in which formal provision has been enacted. If any reference is needed one may look at the case of Captain (Rtd.) Nayyar Islam Vs. Judge Accountability Court No.III & others (2012 SCMR 669).

12. Thus as far as the application of Section 152 CPC is concerned, we are of the confirmed view that it has no application in presence of special provision of law which deals with such situation.

13. Now while applying section 27 of the Ordinance, 2001 we would see as to whether the correction which is sought by the respondents in the nature as claimed in terms of application under section 152 CPC could in fact be lawfully granted under the provisions of Section 27 of the Financial Institutions (Recovery of Finances) Ordinance 2001 or not. We observed that the legislature in its wisdom has narrowed down the powers of the Banking Court in comparison to the powers given under section 152 CPC. Section 152 deals with the clerical or arithmetical mistakes in the judgments, decrees or orders arises therein from the accidental slip or omission

whereas the provision of Section 27 of the Ordinance, 2001 deals with only clerical or typographical mistakes in the judgment.

14. Arithmetical mistake is considered to be a mistake of calculation; a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake of the Court. Thus the legislatures' intent is very visible and clear while incorporating the provisions of the Ordinance 2001 and only includes clerical and typographical mistakes.

15. The scope of Section 27 of the Ordinance thus is narrower as compare to Section 152 CPC. This off course does not mean that since the nature of remedy claimed for by the respondent could not be available under section 27 therefore resort was made to section 152 CPC as the legislature purposely narrowed down the powers otherwise the language of both the provisions could have been the same. In the Banking suit which involves calculation and accounting, this provision of clerical and arithmetical mistakes were excluded from purview of section 27 of Ordinance 2001 and it only made applicable for clerical and typographical mistakes in the judgment otherwise there would be no end in filing such applications in suits based on account and calculation. Thus the provision of Section 152 CPC cannot be resorted to. The Banking Court had not at all discussed the claim of service charges or mentioned any

figure thereof in the judgment. This has been subsequently brought through an application under section 152 CPC by the respondent. Apparently by no stretch of imagination of interpretation this can be construed as a clerical or typographical mistake in the judgment. If the judgment and decree would have discussed the service charges and was granted to the respondent, then perhaps it could be seen whether correct figure was incorporated or not and only then it could have come within the purview of clerical or typographical mistake, but this is not the case here.

16. Even in the application itself the respondent Counsel pleaded that it is only an accident slip and omission, which is not the scope of Section 27 of the Ordinance, 2001.

17. In a judgment of Zarai Tarqyati Bank Vs. Hassan Aftab Fatima (2009 CLD 36) the learned Division Bench of Lahore High Court held as under:-

“---6.From the plain reading of the noted provision, it is conspicuously clear that the cases pertaining to any error in the judgment and decree etc. of the Court shall only be regulated by the proviso, rather the general and inherent power under section 152 CPC which shall not be applicable in the presence of the specific provisions. However, the proviso is restricted in empowering the Court to correct the typographical error etc. and unlike the section ibid, it does not provide for supplying any accidental slip or omission. The question therefore, for the consideration and determination shall be, if the omission of the Court to mention the date of default is the one falling within the purview.

7. *Admittedly in the judgment and decree, the date of default has not been specified, however, by no stretch of interpretation, this lapse can be construed as a typographical error etc. rather it is simple case of slip/ omission of the Court and had it been the judgment decree of the Civil Court, the provisions of section 152 CPC could be validly invoked. But for the supply of such an omission/slip, the Court had no jurisdiction under the said proviso, therefore, the impugned order being beyond the scope of the noted law cannot sustain.---*”

18. In another judgment of M/s. Agro Care & 3others Vs. Zarai Tarqyati Bank reported in 2011 CLD 990, it is observed that according to Section 27 of the Ordinance, 2001 the provisions of CPC are applicable only to those cases where the act is silent and no procedure is laid down.

19. It is also observed that the alleged claim of the service charges was Rs.5,33,656-40 whereas the Banking Court while deciding the application under section 152 CPC comes to the conclusion that in fact it was Rs.2,89,117/-. Thus, it could not be an accidental slip, as claimed. This figure of Rs.2,89,117/- could only be achieved after discussion, deliberation and arguments and not merely by a clerical or typographical mistake which in fact is the mandate of Section 27 of the Ordinance 2001.

20. In view of the aforesaid facts and circumstances, we are of the clear view that the Banking Court mis-applied Section 152 CPC and while applying the provision of Section 27 of the Ordinance, 2001, it provides no room for the accident slips as claimed in the application and as such the application which was granted in terms of the impugned order could not have been done.

21. The result of the above discussion is that the appeal is allowed and the impugned order dated 22.2.2011 is set aside.

Judge

Chief Justice