IN THE HIGH COURT OF SINDH AT KARACHI

**Special HCA No. 98 of 2012**

Irfan Nawab

Versus

Soneri Bank Limited

**BEFORE:**

**Mr. Justice Mushir Alam, CJ**

**Mr. Justice Muhammad Shafi Siddiqui,J**

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| Date of Hearing: | 19.12.2012 |
| Appellant: | Through Mr. Raza Rabbani Advocate along with M/s. Saalim Salam Ansari and Muhammad Zeshan Abdullah Advocates. |
| Respondent: | Through Mr. Ijaz Ahmed, Advocate. |

# O R D E R

**Muhammad Shafi Siddiqui, J.-** This appeal arising out of an order passed on CMA No. 10220/2011 on 22.05.2012 in terms whereof the injunction application in respect of one of the two mortgaged properties was dismissed.

2. Brief facts leading to filing of this case are that the appellant being a sole proprietor of Nawab & Sons having banking relationship with the respondent availed certain financial facilities and pursuant to such financial facility mortgaged two properties with the respondent. The properties are Faran Cooperative Housing society Property and Jinnah Cooperative Housing Society property hereinafter referred to as "Faran Property" & "Jinnah Property" respectively. The mortgage in respect of Faran property was created by way of Mortgage Deed and deposit of title deed whereas the mortgage in respect of Jinnah property was created only by way of deposit of title deed.

3. The appellant substantially submitted that in fact they have paid the entire amount that was due and payable to the respondent and hence he filed a suit for settlement of account and for redemption of the mortgaged properties referred above. The suit was instituted under Financial Institutions (Recovery of Finances) Ordinance, 2001 in response to a notice purported to be 1st notice under section 15(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Subsequently in the month of October, 2011 appellant also preferred an application being CMA No.10220/2011 in response to auction notices appearing in "Dawn" and Jang" dated 08.10.2011. It is contended that on issuance of the first notice dated 29.6.2011 the appellant have filed a suit in the month of July 2011 without wasting any time. The appellant has raised many grounds in their injunction application however for the purpose of deciding this appeal, the main grievances of the appellant as raised by them at the time of arguments are as under:-

*(i) Non compliance of subsection (2) of Section 15 of the Financial Institutions (Recovery of Finances) Ordinance, 2001.*

*(ii) The criteria laid down by the learned single Judge in the test for considering injunction application, itself is flawed and in*

*violation of the provisions of subsection (1) of Section 10 of the Ordinance, 2001 or in the alternative non application of the test prescribed in the impugned order to evaluate whether a case in facts or law is made out by the appellant for the grant of interim injunction.*

*(iii) Non reading of documents and statement of accounts to ascertain that no mortgaged money is due and payable.*

4. Learned Counsel for the appellant in response to aforesaid points, stated that the recovery option can be initiated under section 15(4) of the Ordinance 2001 without intervention of the Court provided the strict compliance of subsection (2) of Section 15 of the Ordinance, 2001 is adhered. In this regard learned Counsel submits that the respondent by sending first notice of demand dated 29.6.2011 initiated proceedings for the alleged mortgaged money to be paid within 14 days of the service of notice. On receipt of such notice it was not only replied by the appellant but also instituted a suit for the accounts, declaration, redemption and recovery etc. The mechanism of section 15(2) of the Ordinance, 2001 is such that in case of failure to respond on the due date given in the 1st notice, the second notice to follow and then lastly the financial institution shall serve a final notice to the mortgager for payment of the mortgaged money. Learned Counsel submits that after filing of the suit the notices and summons were issued and served upon the respondents who filed an application for leave to defend and accordingly they filed leave to defend application in the month of September, 2011. However, such application is devoid of containing any fact of issuing second and third notices as they were purported to have been issued on 16.7.2011 and 01.08.2011 respectively. Learned Counsel for the appellant submitted that the provision of subsection (2) of Section 15 of the Ordinance 2001 are to be strictly complied with as being mandatory and relied upon the cases of *Izhar Alam Farooqi v Sheikh Abdul Sattar Lasi* (2008 SCMR 240), *Mst. Shamim Akhtar v Muhammad* Riaz (2008 CLD 186), *Haji Muhammad Yaqoob Akhtar v. Habib Bank Ltd.* (2009 CLD 1699), *Iftikhar Ahmed v. My Bank Ltd. through President* (2009 CLD 374).

5. It is contended that the first notice of demand was replied vide legal notice dated 01.8.2011 denying that any amount was due and outstanding and called for rendition of accounts. It is contended that the respondent allegedly issued second and third notices under section 15 of the Ordinance, 2001 which notices were not served upon the appellant and it came to his knowledge only when counter affidavit to injunction application was filed. He contended that in the impugned order it is said about these two disputed notices that they were issued on or about 16.7.2011 and 01.8.2011. Thus it appears that pursuant to the impugned order the said second and

third notices were issued on 16.7.2011 and 01.8.2011 i.e. prior to the filing of the leave to defend application and after filing of the suit.

6. Learned Counsel submitted that the word "on or about" used by the respondent creates clear ambiguity in the said dates as in the normal course a clear assertion with regard to the dates on which the notices have been issued, should have been made. Learned Counsel adding to the above submission contended that since leave to defend application was filed in September 2011 yet it did not disclose the fact of issuance of second and third notices on the above referred dates and consequently the auction notices were published in newspapers daily Jang and Dawn dated 08.10.2011 for the auction of the above referred two mortgaged properties.

7. Learned Counsel for the appellant submits that the reasoning assigned in declining the relief with regard to one of the property pursuant to the provision of subsection (2) of section 15 of the Ordinance, 2001 are not valid and lawful. Learned Counsel submitted that the observation of the learned single Judge that the distinction is too fine to be drawn for the purpose for which subsection (2) has been enacted (i.e. financial institution) for whom notices are to be sent. Learned Counsel for the appellant submitted that since it is a special law therefore, its provision to be construed and implemented in the strictest possible terms. Learned Counsel for the appellant submitted that the learned single Judge in view of the close similarity in the signatures of recipients of the first and third notices, as relied upon by the respondents went on to conclude that the third notice was also received by the appellant as the recipients prima facie, appears to be the same person and since the receipt of the first notice was not denied therefore, prima facie the third notice was also said to be served.

8. It is contended that the learned signal Judge did not discuss the issue in the impugned order that the address on the receipt of the first notice was of an address in Jinnah Cooperative Housing Society Karachi and the address of third notice was of PECHS Karachi. Learned Counsel submits that this went on to prove that the third notice which is disputed by the appellant was sent to a wrong address and the conclusion of the learned signal Judge on the basis of close similarity in the signatures is on the basis of photocopies available on record, which is a presumptive conclusion. He argued that such conclusion is too fine to be drawn and it ought to have been referred to the handwriting expert if at all signatures are required to be verified.

9. As regards the second notice learned Counsel for the appellant submitted that the learned single Judge observed that the respondent candidly stated that the receipt for this notice has been misplaced and that the onus of establishing such fact that the second notice has been issued rests upon the financial institution which it must discharged should an objection be taken. Learned Counsel further submitted that the courier receipts of the second notice has not been provided which has been allegedly lost by the respondent therefore, in view of such fact the presumption ought to have been drawn that no second notice has been sent. Learned Counsel for the appellant submitted that the learned signal Judge in the same breath concluded that prima facie the second notice was also sent to the appellant as he can see no reason why the respondent would go through the exercise of recourse and skipped issuing one of the required notices. Ultimately the learned single Judge concludes that all the three notices were sent and received by the appellant. Learned Counsel submitted that the notices are a mandatory provision and holding service good on mere presumption is not correct. He submitted that the word "presumption" has been defined in Black's Law Dictionary, Ninth Edition at page 1304 as under:-

i. *A legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.*

ii. *Most presumption are rules of evidence calling for a certain result in a given case unless the adversely effected party over comes it with other evidence.*

10. Learned Counsel further submitted that in subsection (2) of section 15 of the Ordinance, 2001 for the first and second notices the legislature used the word "send" whereas for the third notice the word "serve has been used. Learned Counsel submits that the observation of the learned single Judge that in the impugned order these two words have interchangeably been used, is not correct appreciation as there is a deliberate intent on the part of the legislature that the third and final notices should be served on the mortgager for the reason that the word "serve" is also used in subsection (5) of section 9 of the Ordinance, 2001 wherein the intent of the legislature was initially that the service effected and the defendant therein should be made aware that the case has been filed against him/them as within the stipulated time a leave to defend application is to be filed. Thus in terms of subsection (5) of Section 9 the intent is to ensure that opportunity is provided to file his defence after taking all possible efforts to effect service.

11. Similarly the word used in subsection (2) of section 15 of the Ordinance, 2001 for third notice is "serve" with the same intensity to ensure that the mortgagor

should be aware that the proceeding under section 15 has been initiated against him and that the financial institution which is acting without interfering of the Court does not act arbitrarily and deny the mortgagor's due remedies in the Financial Institutions (Recovery of Finances) Ordinance, 2001 as admittedly there is no absolute bar in refusing to grant injunction against the banking companies pursuant to subsection (12) of Section 15. Learned Counsel submitted that the word "serve" according to Black Law' Dictionary, Ninth Edition at page 1491, is stated to be a verb while the word "service" according Black Law' Dictionary, Ninth Edition at page 1491, is stated to be a noun, hence both are interchangeable and thus have been used accordingly in subsection (5) of section 9 and subsection (2) of Section 15 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Learned Counsel submitted that the ingredients of Order V of CPC have not been met in terms of third notice for effecting valid service as envisaged by Rules 12 & 14 and another case on the male member of the family as provided in Rule 5 of Order V CPC. Learned Counsel has relied upon the cases of *Shakoor Hussain v. Muhammad Sadiq* (1991 MLD 67) and *Amin Khan v. University Of Sind* (PLD 1968 Karachi 899).

12. The second point which has been argued by the learned Counsel for the appellant is that the criteria that has been made to test the appellants case, which could pass the appellant in order to avail the relief as claimed. Learned Counsel submitted that the test prescribed is flawed and the same is in violation of subsection (1) of Section 10 of the Ordinance, 2001. He submitted that the yardstick, which is applied by the learned single Judge is not in consonance with the principles of injunction on which consideration the subject application is to be considered. Learned Counsel for the appellant submitted that the leave to defend application is governed by the provisions of Section 10(1) of the Ordinance, 2001 and in normal flow it is for the financial institution, which seeks leave to defend to show the substantial question of fact, which requires evidence to be led in response to the said question. Learned Counsel for the appellant submitted that the learned single Judge has placed the shoe on the other foot while laying down criteria of the test prescribed by him in para-8 wherein it is suggested that in order to engage subsection (12)(b) of section 15 of the Ordinance 2001, the appellant's (customer's) claim in plaint should be examined as if it was a leave to defend application filed in a suit by the financial institution. Learned Counsel submitted that this proposition is in violation of Section 10(1) CPC and that the burden in the instant suit is on the financial institution who had filed leave to defend application. Learned Counsel in the alternative also argued that the application of a test prescribed in the impugned order dated 22.5.2012 to evaluate whether a case in facts or law is made out by the appellant for the grant of interim injunction is also vioaltive of law.

13. Learned Counsel argued that the non-reading of various documents and statement of account which are on record to ascertain contention that more money is

due and in fact the appellant has paid in excess to the respondent is apparent. Learned Counsel submitted that said ledger of account reflects transaction between the respondent and the appellants as there are total 305 Murabaha transaction out of which 278 Murabaha transactions have been settled and as far as 27 Murabaha transactions are concerned, reference No. MR/NA/279 to MR/NA/291 are reflected in the ledger accounts and the remaining 14 Murabaha transactions are not reflected in the ledger accounts and these transactions are denied by the appellant in para-7 of the counter affidavit/replication to the leave to defend application.

14. On the other hand learned Counsel for the respondent in reply to the issue of non-compliance of subsection (2) of Section 15 of the Ordinance 2001, which relates to issuance of three notices submits that the stance of appellant in terms of para-3 of the rejoinder filed in relation to the injunction application is totally evasive as there is no specific denial of receipt of the second notice. In the same way, the appellant's denial of the service of notice dated 01.8.2011 which is designated as 3rd notice is also completely evasive in terms of para-3 of the rejoinder filed in response to the injunction application. Learned Counsel submits that the denial has to be specific U/O 8 Rules 3 and 4 CPC and an evasive denial amounts to an admission. Learned Counsel submits that it was only a futile attempt to deny the service of notice in an evasive manner.

15. He argued that the it is *common practice* of the courier companies that they do not state complete addresses and names on receipts as these addresses and names are attached to packages and the address shown on the packages is in fact used for making deliveries, hence any short-fall in the address and name on the receipts are irrelevant for the purpose of effecting deliveries of such packages. He submits that even the first notice which is admittedly served upon the appellant issued by the same courier service as was used and engaged for 2nd and 3rd notices. He contended that the original receipts of first and third notices were examined by the learned signal Judge during the hearing. Learned Counsel submits that the insistence of appellant that the learned signal Judge ought to have referred the signatures on receipts to the handwriting expert instead of examining the same himself, is also not tenable under the law. Learned signal Judge has all the powers in view of the provisions of Article 84 of the Qanoon-e-Shahadat Order, 1984 to compare the signatures, writing or seal. In this regard learned Counsel has relied upon (i) M/s Waqas Electronics & others v. Allied Bank of Pakistan & others ( 1999 SCMR 85), (ii) Ghulam Rasool & others v. Sardarul Hassan & another (1997 SCMR 976), (iii) Muslim Commercial Bank Limited & another v. Aamir Hussain & another (1996 SCMR 464) and S.M. Zahir v. Pirzada Fazal Ali Ajmari (1974 SCMR 490).

16. Learned Counsel submitted that the arguments of the learned Counsel for the appellant that the learned single Judge held the signatures to be similar and not identical are also not tenable under the law since no signature of the same person can be identical as in normal course each signature slightly varies from the other and it is on this yardstick the learned signal Judge held that there is a close similarity in both the signatures which can be adjudged by naked eye.

17. Learned Counsel submitted that the purpose of Section 15 of the Ordinance 2001 is to inform the mortgagor that there has been default in payment of his obligations and to enable him to pay dues, settle the matter in order to avoid sale of the mortgaged property and seek remedy available under the law. Hence this is not a case in which subsection (2) of Section 15 of the Ordinance 2001 has not been complied with. Learned Counsel submits that section 15 of the Ordinance does not specify any particular form of a subject notice and a simple notice would be sufficient as long as it identifies the default and financial institution's intention to follow the process under Section 15 of the Ordinance 2001. The service of notice dated 04.6.2011 available at page 665 and the letter dated 15.7.2011 available at page 2826 if read along with the notice dated 29.6.2011 available at page 673 and 2847 which are clearly served upon the appellant, made compliance of Section 15 of the Ordinance 2001 even if the two notices, which are under alleged dispute are excluded from consideration.

18. Learned Counsel further submitted that the appellant also unsuccessfully argued that an attempt is made to create ambiguity with regard to the dates of notices by attributing the words "on or about". He submitted that the learned signal Judge used these words as a manner of speech while recording submissions of the respondent. Learned Counsel for the respondent further relied upon subsection (12) of Section 15 of the Ordinance 2001 which deals with the powers of the Banking Court and the High Court in relation to passing injunctive order restraining sale or proposed sale of the mortgaged property.

19. Learned Counsel submitted that the creation of mortgage on the mortgaged properties is admitted and accordingly the provision of clause (a) of subsection (12) of Section 15 of the Ordinance, 2001 is not applicable. .Similarly appellant claims that no amounts are payable by the appellant and hence relied on clause (b) of subsection (12) of Section 15 of the Ordinance, 2001, is misconceived and untenable. Learned Counsel submitted that a complete statement of account is filed and the appellant failed to question the entries in the said account. Learned Counsel submitted that in terms of subsection (12) of Section 15 of the Ordinance, 2001 the appellant is required to show positive evidence that all amounts secured by mortgaged

properties have been paid. He submitted that a large number of receipts have been attached twice and sometime thrice and as such the calculation is based on these misconceptions. Even these receipts have no relevance with the Murabaha transaction and some receipts even do not pertain to the branch of respondent from where the facilities were availed.

20. Learned Counsel further submitted that the test with regard to the threshold that the mortgagor needs to cross in order to secure injunction on the basis of clause (b) of Subsection (12) of Section 15 of the Ordinance, 2001 is justified and lawful. He submitted that the test prescribed by the learned single Judge is lighter than the one he was required to cross to obtain injunction. Learned Counsel submitted that the injunction is a discretionary remedy and the exercise of such discretion cannot be set aside in appeal, unless it is found to be arbitrary and fanciful.

21. We have heard the learned Counsel and perused the record. Before we discuss the first contention with regard to the compliance of Section 15(2) of the Ordinance, 2001, we may discuss second and third point as raised by the learned Counsel for the appellant.

22. With regard to the application of subsection (12)(b) of Section 15 the learned single Judge observed that in order to engage subsection 12(b) of Section 15 of Ordinance 2001 the customers claim (in this case plaint) should be examined as a leave to defend application filed in a suit for recovery of amount by the financial institution. Therefore, the minimum test that was prescribed by the learned single Judge is whether a substantial question of fact and law is raised by the borrower or not. Certainly there has to be some criteria in this special law, which is required to be passed by the borrower/customer in his suit to succeed as far as the injunction application is concerned and we feel that perhaps a lighter test is prescribed by the learned single Judge as compare to the one, which is required normally in considering injunction applications i.e. prima facie case, balance of inconvenience and irreparable loss. If this would not be the criteria to be crossed by borrower in his suit for accounts, then it would be very convenient for every borrower to file suit for accounts and object recovery process. While applying the test, the appellant has only to show the substantial question of law and fact or to prima facie show that due money has been paid and since the appellant has failed to come up to the mark of this test, therefore, there is no question of him passing a test, which is meant for injunction application, which in the present case is difficult than the one prescribed by the learned single Judge. Rightly said by the learned single Judge that mere statement that all money secured to the mortgage has been paid is not sufficient for the purpose of the clause (b) of subsection (12) of Section 15 of the Ordinance, 2001.

In terms of subsection (12) of Section 15 of the Ordinance, 2001 the appellant is required to show a positive evidence that all amounts secured by the mortgaged property has been paid. With the assistance of the learned Counsel we have minutely perused the receipts, which were available on record filed by the appellant as well as the statement of account filed by the respondent and there is no cavil to the proposition that many receipts of repayment have been filed in duplicate and triplicate.

23. From the statement of account it is prima facie clear that apart from the settled Murabaha transaction there are certain outstanding Murabaha transaction. Respondent filed of complete statement of account of all outstanding 27 Murabaha transaction and out of the 27 outstanding Murabaha transaction, the appellant has raised a dispute with regard to a total sum of Rs.1,109,531 in four Murabaha transactions which dispute itself is baseless as each Murabaha transaction has been signed by the appellant and thus he was barred from even producing any evidence contrary to the contents of written documents in terms of Article 102 and 103 of Qanoon-e-Shahdat Order, 1984. Out of the total outstanding of aforesaid 27 Murabaha transaction which comes to 127,040,570, the appellant disputed only 1,109,531 which is insignificant as far as the outstanding amount is concerned. In view of above submissions we, therefore, conclude that the appellant have failed to establish their case for application of proviso (b) of subsection 12 of Section 15 of the Ordinance, 2001 and the findings of the learned single Judge are not required to be interfered as far as these two points are concerned.

24. Now we would deal with the first argument of the learned Counsel for the appellant which is the compliance of subsection (2) of Section 15 of the Ordinance, 2001.

25. In order to appreciate the contentions of the learned counsels it would be appropriate to first take up Section 15 of the FIO 2001, particularly subsection 2 of section 15 which for the sake of assistance is reproduced as under:-

> *"15. Sale of mortgaged property. (1) ……*
>
> *(a) ……*
>
> *(b) ….*
>
> *(c) ….*
>
> *(2) In case of default in payment by a customer, the financial institution may send a notice on the mortgagor demanding payment of*

*the mortgage money outstanding within fourteen days from service of the notice, and failing payment of the amount within due date, it shall send a second notice of demand for payment of the amount within fourteen days. In case the customer on the due date given in the second notice sent, continues to default in payment, financial institution shall serve a final notice on the mortgager demanding the payment of the mortgage money outstanding within thirty days from service of the final notice on the customer.*

*(3) …*

*Provided …..*

*(4) Where a mortgagor fails to pay the amount s demanded within the period prescribed under sub-section (2), and after the due date given in the final notice has expired, the financial institution may, without the intervention of any 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;*

*Provided that before exercise of its powers under this subsection, the financial institution shall cause to be published a notice in one reputable English daily newspaper with wide circulation and one Urdu daily newspaper in the Province in which the mortgaged property is situated, specifying particulars of the mortgaged property, including name and address of the mortgagor, details of the mortgaged property, amount of outstanding mortgage money, and indicating the intention of the financial institution to sell the mortgaged property. The financial institution shall also send such notices to all persons who, to the knowledge of the financial institution, have an interest in the mortgaged property as mortgagees."*

26. The subsection 2 of section 15 ibid deals with the issuance of three notices to assume the powers in terms of subsection 4 of section 15 ibid, empowers the financial institution to sell the mortgaged property or any part thereof without intervention of any Court by way of public auction and to appropriate the proceeds thereof towards total and or partial satisfaction of the outstanding mortgaged money as the case may be. It is settled law that when an act is required to be done in a particular way, it is to be performed in the manner provided under special law. If an act provided to be performed in a particular way is followed by some consequence, then it no more remains mere procedural requirement, but assumes mandatory requirement. Now this subsection (4) of section 15 ibid confirms that the provisions of subsection (2) of section 15 ibid are mandatory and its strict compliance is inevitable.

27. Before discussing the presumptive assessment of learned single Judge, the issue to be resolved on plain understanding of law as to whether the stage of making a decision or passing an order on presumption has arisen. The production and availability of receipt of courier is a significant question. A question arises whether in the absence of such courier receipt regarding 2nd notice can it be presumed that the respondent did send or serve the second notice. The Ordinance 2001 is a special law and every provision has to be strictly construed.

28. In the case of Izhar Alam Farooqui v. Shaikh Abdul Sattar Lasi (2006 SCMR 240) the Hon'ble Supreme Court held that the sale of mortgaged property through auction without compliance of the requirement of the law in their letter and spirit certainly invalidates the transaction as a whole. It was further observed that the financial institutions subject to the compliance of mandatory requirement of law are empowered to sell the mortgaged property under section 15(4) of the Ordinance without intervention of the Court.

29. Similarly in the case of Shamim Akhtar v. Muhammad Riaz (2008 CLD 186) the Division Bench of Lahore High Court held that non-compliance of the statutory requirement would render the transaction questionable and vitiate the entire proceeding of sale. Para 5 of the said judgment is relevant and reproduced as under:-

> *"5. The Financial Institutions (Recovery of Finances) Ordinance, 2001 is a special law, therefore, every provision contained therein has to be strictly construed and meticulously adhered to. The manner and mode of auction without intervention of Court has been clearly spelt out in section 15 of the Ordinance, 2001. It is initiated by resorting to the provisions as contained in section 15(2) by serving notice upon the mortgagor, calling for payment. It clearly envisages service upon "customer" as defined in the Ordinance. Thereafter another notice demanding payment has to be issued within 14 days of service and lastly, in case, of contumacious default in payment, the Financial Institution is required to serve a final notice within 30 days. The proviso to section 15(4) of the Ordinance makes it imperative that before venturing upon the exercise of sale by auction of mortgaged property, a notice is required to be published in an English and Urdu daily "Newspaper", in the province where the mortgaged property is located. The proclamation is required to contain the name, and address of the mortgagor, the details of the mortgaged property, the amount of*

*outstanding mortgage money and intention of sale of mortgaged property. This exercise also entails a requirement of sending notice to all persons, who, to the knowledge of Financial Institution, have an interest in the mortgaged property as mortgagees. After fulfilling these requirements the Financial Institution, has power to sell the mortgaged property and thereafter, file proper accounts of sale proceeds, with the Banking Court, within 30 days of sale."*

30. The ratio of the impugned order on the point of second and third notices lays heavily on the presumption. The learned single Judge in para-17 of the order held that prima facie the 2nd notice was also sent to the appellant and that there was no reason why the respondent would go through the exercise of taking recourse of Section 15 and skip issuance of one of the required notices. Ultimately the learned single Judge in view of the present facts and circumstances of the case presumed that all the three notices were sent to and received by the appellant and relied on Article 129 (illustration 'f') of the Qanoon-e-Shahdat Order, 1984, which talks about presumption.

31. It is difficult to accept such presumption particularly when the law which is under discussion is a special law and the wordings of subsection (2) of Section 15 of the Ordinance, 2001 is such that notice and its service is inevitable before the financial institution could assume powers to sell the mortgaged property under subsection (4) of Section 15 of the Ordinance, 2001. The assumption of powers under subsection (4) of Section 15 of the Ordinance, 2001 are of such nature that it takes away certain valuable rights of the borrower/mortgagor and hence the compliance of the provisions of subsection (2) of Section 15 of the Ordinance, 2001 becomes mandatory. The articulation and the purpose behind the scheme of subsection (2) of Section 15 of the Ordinance, 2001 appears to be unambiguous and nothing was left in doubt. A similar question was faced by the Hon'ble Supreme Court in the case of E.A. Evans v. Muhammad Ashraf (PLD 1964 SC 536). The relevant part is as under:-

*"It is difficult to accept upon the wording of this section that such a notice could even be implied notice or information received allunde. In face of the language of the proviso, which requires that the notice should be served "by registered post (acknowledgement due)" such an interpretation is not possible. To hold that, notwithstanding such clear and unambiguous words, even implied notice would be sufficient to render the words "by registered post (acknowledgement due)" in the provisio redundant, which cannot be done. Every word in a statute has to has to be given a meaning and the only meaning that these words are capable of bearing is that express notice in writing must be given in the manner prescribed.*

*The scheme of the section, furthermore, appears to be to leave nothing to doubt; hence even the manner of the service of the notice is clearly provided for and the extent of the protection accurately defined. Even the circumstances in which the tenant would be deprived of this protection have been specified and not left in doubt. Furthermore, Subsection (3) firstly provides that a tenant must pay or tender rents payable under the said section to the transferee within three months from the date of the receipt of a notice of demand sent to him again "by registered post (acknowledgement due)". Secondly, since the protection is a personal protection, the tenant must not sublet or otherwise part with possession of the premises and thirdly, he must not commit acts of waste and must not be in possession of similar premises in the same town or city. It is thus clear from the language of the section that the notices contemplated thereunder must be of two kinds(1)giving intimation of the transfer and (2)containing a demand. It is, of course, possible that both these notices may be combined into one, as, for example the same notice while giving intimation of the transfer might also demand the rent and/or intimation of the transfer might also demand the rent and/or arrears of rent, if any, due for any period after the transfer. But where no such combined notice has been issued, it would, in order to take a tenant out of the protection from eviction granted to him by proviso (b) be contemplated by clause (i) of subsection (3). It may not be necessary to serve such a notice of demand each time there is a default but, at any rate, at least one notice of demand has of necessity to be served to deprive the tenant of the protection. The decision of the Karachi Bench of the High Court of West Pakistan in the case of Jiando Khan v. Hakim Muhammad Ishaq (1), cited by the learned counsel for the respondent does not lay down any different principle. In that case the notice actually served was a combined notice and, therefore, satisfied the requirements of section 30. If this decision intended to lay down that the service merely of the first notice under proviso (b) would be sufficient to deprive the tenant of the protection. If thereafter he did not pay rent regularly, then it cannot be held to have laid down the law correctly. One notice of demand is at least necessary for the protection to be lost and that too from the expiry of the period of three months from the date of receipt of such a notice of demand. Unless such a notice of demand is given, the commencement of the period of three months cannot be fixed."*

32. The Hon'ble Supreme Court dealt with the question of presumption of service on many occasions. However, all these judgments which we may discuss subsequently rely heavily on the availability of postal receipt of the correct address. These questions have come across before the Hon'ble Supreme Court in the case of Anjum

Hayat Mirza v. Rehmat Khan (!996 SCMR 1230) wherein it was observed by the Hon'ble Supreme Court as under:

> *5. Before institution of ejectment case, landlord served upon tenant notice at his residence through registered post A/D on 26-9-1985. This service is supported by Exhs.G and H which are postal and A/D receipts respectively. Both these documents show that notice is received by Imran. Tenant denied service but took no further steps to show that Imran was not member of his family or inmate of the house. There is nothing wrong with the reasoning of the High Court that under section 114 of the Evidence Act, there is presumption that in such circumstances letter has been delivered at the address at which it was sent unless addressee proves that notice was not delivered at his address.*

33. Similarly in the case of Fakhar Mahmood Gillani v. Abdul Ghafoor (1995 SCMR 96) it is observed as under:-

> *The exhibits are the copies of different money orders showing the amount remitted and the payee's name along with sender's name and address. In some of the receipts the address of the payee is also mentioned and in the coupons the month for which the rent was remitted are specifically described. Presumption of occurrence is attached to every official act done in the discharge of duty and the burden had shifted to the landlord/petitioner to prove the alleged forgery or that the postman concerned deliberately derelicted his duty to tender the amount to him. Both the Rent Controller and the learned High Court have concurrently held that the rent was duly tendered by the tenant to the landlord through its remission by money orders and that he was not a defaulter within the meaning of section 12(2)(i) for the Cantonments Rent Restriction Act, 1963. Nevertheless, the learned Counsel for the petitioner stressed that the mere remission of the rent through money order was not due compliance with the mandatory provision of the Cantonments Rent Restriction Act and that it was legally required of him to prove that the amount remitted through money order was offered to the landlord and that he refused to receive the same. We are afraid, this was never the intention of the law-makers while providing for the remission of rent through money order under section 17 of the Act ibid nor it is practically possible. Under explanation appended to section 17 it is provided that the rent remitted by money order to the landlord, or, in case the landlord refuses to accept the rent, deposited in the office of the Controller having jurisdiction in the area where the building is situate, shall be deemed to have been duly tendered. This explanation clearly implies that the rent remitted by*

*money order to the landlord albeit on his correct address shall be deemed to be a valid tender and it has nexus with the refusal of the landlord to accept the rent. The responsibility of the tenant is only that he remits the rent through money order and it is not expected of him to follow the postman to its destination*

*Resultantly, we do not find any legal flaw in the impugned judgment of High Court and decline leave to appeal and, in consequence, this petition stands dismissed.*

34. Similarly in the case of Messers M.A. Khan & Company v. Messers Pakistan Railway Employees Cooperative Housing Society Ltd. (1996 CLC 45) relying on a number of judgment of this Court as well as of the Hon'ble Supreme Court the learned single Judge observed as under:

*As stated earlier after filing of the award the Additional Registrar (O.S) issued notice to the defendants through bailiff as well as through registered post A/D for filing objection, if any. Both the notices were served on the defendants and the second observation of the Honourable Supreme Court was that the appellant was not served with any notice by the Arbitrators whereas in this case as per record the defendants were issued notices by the learned Arbitrator not only for once but the defendants were issued three notices through registered post A/D on the address of the defendants, postal receipt along with it's A/D receipt has been filed with the R&P of the award. Three registered post A/D letters were issued by the learned Arbitrator but even then they had not participated in the arbitration proceedings- By now it is settled law that a letter which is properly addressed, must be deemed to be received by the addressee unless it is proved to be contrary.*

35. This observation was relied upon in the judgment of this Court reported in (PLD 1997 Karachi 37) which discussed Article 114 of the Evidence Act (Article 129 of Qanoon-e-Shahdat Order and Section 27 of the General Clauses Act).

36. Similarly the learned single Judge of this Court in the case of Syed Riazul Hassan v. Zamirul Haque (PLJ 1982 Karachi 400) observed as under:-

*8. The main contention of the appellant is that the statutory notices of two months as required by section 14 of the said Ordinance, was not served upon him. He has denied his signatures on the A.D. Receipt and the Postal Receipt produced by the respondent. However, this A.D. Receipt would show that the appellant's name and address were properly written thereon, hence the presumption shall be that in the normal course it was duly served upon the appellant. Moreover the Postman Zamir Ali has also been examined by the respondent who has given sworn testimony to the effect that he had delivered the registered envelope to the appellant himself and obtained his signatures on the A.D. Receipt and the Postal Receipt. In view of this evidence, the learned Rent Controller rightly came to the conclusion that the statutory notice was duly served upon the appellant/opponent*

37. Similarly in the case of Mrs. Parveen Chaodhry v. Vith Senior Civil Judge, Karachi 1st class & another (PLD 1976 Karachi 416) it is observed as under:-

*Initially, it must be stated that this statement of fact in the impugned order is factually wrong. An affidavit was filed by respondent Dr. Choudhry in the Court of the respondent Civil Judge wherein it was specifically stated that on 16-12-1973 he had not only written a letter to the petitioner intimating about a divorce but also sent a copy of the divorce deed to her. We also find that a postal receipt was placed on the record of the respondent Civil Judge showing that a letter was sent by the respondent husband to the petitioner-wife from New Jersey and along with this postal receipt a photostat copy of the divorce-deed was attached. We had invited Mr. Khalid Anwar to explain the significance of this postal receipt but the learned Advocate was not able to make any satisfactory answer. A postal receipt is an official document which carries a presumption of genuineness with it, and therefore, for this reason alone we have no difficulty in repelling this contention that the divorce was not communicated to the petitioner.*

38. One thing which is significant in all aforesaid cases is that the Court was obliged to presume service of notice on the fact that the official registry receipt and A/D of government post office was under consideration whereas in this case a private courier was engaged to serve the notice and the presumption was drawn by the learned Single Judge even without availability of such receipt of private courier. This suit was filed in the month of July 2011 after the receipt of 1st notice under section 15(2) of the FIO 2001 whereas the 2nd and 3rd notices were allegedly issued

subsequent to the filing of the suit and prior to the filing of leave to defend application by the respondent. Despite the fact that the leave to defend application is devoid and does not make any assertion of issuance of 2nd and 3rd notices and that the appellants have challenged the recovery process which was taken up by the respondent without intervention of the Court, yet the bank/respondent was not vigilant in retaining the disputed receipt of such courier company. In such circumstances, the respondent should have been more vigilant in retaining the receipt of such courier company through which 2nd disputed notice was sent, more particularly when assumption of powers under subsection (4) of Section 15 of the FIO 2001 depended on fulfillment of subsection (2) of section 15 ibid. The loss of such receipts in the above circumstances could only yield to establish a presumption which is contrary to the presumption drawn by the learned single Judge.

39. In addition to this subsection (2) of Section 15 of the Ordinance, 2001 the *service* of 3rd notice on appellant is also unambiguous and even under the plain dictionary meaning the word "sent" and "serve" are not interchangeable. This word serve in the entire scheme of Financial Institutions (Recovery of Finances) Ordinance, 2001 is used in subsection (2) of Section 15 and in subsection (5) of Section 9. Thus the legislative intent was on service which is quite different and distinct from the meaning of the word "sent". In our view where the statute has provided an act to be done in a particular manner, it ought to have been done in the same manner and any departure from such scheme would render the subsequent proceedings as null and void. Particularly when in a special statute a manner has been prescribed for issuance and service of notice then the room of law of presumption is very restricted in such circumstances.

40. In terms of Article 129 illustration 'f' as referred to by the learned Single Judge, is subject to a letter put into a post office. Once such fact is established, the presumption could be drawn that prima facie, of course until contrary is proved, the letter is sent and served. Here the situation is different. The respondent has not presented the postal receipt or courier receipt to enable the Court to apply Article 129 of Qanun-e-Shahadat Order, 1984 to presume that such letter was posted, therefore, the presumption drawn on assumption and hypothesis and that too in respect of special law i.e. Financial Institutions (Recovery of Finances) Ordinance 2001, the provisions of which are mandatory and any departure from such mode would render all subsequent event a nullity as observed by Hon'ble Supreme Court.

41. In this special statute the legislature is taking away certain substantial rights from some individuals, therefore, the compliance of subsection (2) of Section 15 ibid

is sine-qua-non to exercise and assume jurisdiction by the Bank to sell mortgaged property in terms of subsection (4) of section 15 ibid procedure required to acquire such rights under special law must be adhered to in its letter and spirit. If presumptions are to be drawn in such a situation when general and special provisions are in consideration before the Court then the general provisions must yield place to the presumption arising under the special provision.

42. This question came across before a Division Bench of Mysore in the case of Shankareppa v. Shivarudrappa reported in AIR 1963 Mysore 115 and the Bench held as under:-

> *"Presumptions arising under section 114, which is a general section, if they come into conflict with presumptions arising from provisions which can be called special provisions then presumptions arising under the general provisions must yield place to the presumptions arising under the special provisions."*

43. The provisions of Article 129 of Qanun-e-Shahadat Order, 1984 are pari material to section 114 of the Evidence Act, 1872 which stood replaced on promulgation of Qanun-e-Shahadat Order.

44. Hence, in our view since prima facie the question of 2nd and 3rd notices were not established at least at this interlocutory stage, therefore, the powers under subsection (4) of Section 15 of the Ordinance, 2001 were not passed on to respondent/Bank and hence are not available to the financial institution to proceed in terms thereof. Since we have reached to the conclusion that the question of 2nd notice has not been satisfactorily discharged by the respondents and the 3rd notice was also not established to be served on appellant beyond reasonable doubt, therefore, the auction of the property under consideration is uncalled for and on this score alone the appeal is liable to be allowed.

45. Upshot of the above discussion is that the appeal is allowed and the impugned order is set aside to the extent it is challenged in this appeal as we do not agree with the findings of the learned Single Judge recorded in relation to Section 15(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Resultantly, in our opinion two course now remain available to the respondent Bank. One to serve second and third notice in terms of subsection (2) of section 15 of Ordinance 2001 before taking recourse and assuming authority under subsection (4) of section 15 of Ordinance 2001 and/or alternatively establish at trial that the second and third notices were in fact sent and served on the appellant.

**Judge**

**Chief Justice**