

2010 C L D 651

[Lahore]

Before Nasir Saeed Sheikh and Ch. Muhammad Tariq, JJ

BANKERS EQUITY LIMITED and 5 others---Appellants

Versus

**MESSRS BENTONITE PAKISTAN LIMITED through Chief Executive and 7 others---
Respondents**

Regular First Appeal Case No.579 of 2002, heard on 24th February, 2010.

(a) Financial Institutions (Recovery of Finances) Ordinance (LXVI of 2001)---

---Ss.9 & 10---Bankers' Books Evidence Act (XVIII of 1891), S.2(8)---Civil Procedure Code (V of 1908), O.VII, R.11---Rejection of plaint---Statement of account, non filing of---After refusal of leave to appear in suit, Banking Court rejected the plaint for not filing statement of accounts as per provisions of S. 9(2) of Financial Institutions (Recovery of Finances) Ordinance, 2001--contention of plaintiffs was that after dismissal of petition for leave to appear by Banking Court, suit of plaintiffs should have been decreed automatically---Validity--Contention of plaintiffs was not correct and Courts of law were under legal obligation to apply their mind and correct law, notwithstanding the fact that defendant in the suit had appeared or not before the Courts during proceedings---Statement of facts narrating accounts given in plaint and reflected in documents annexed with plaint was not a statement of account as visualized by the provisions of Bankers' Books Evidence Act, 1891, therefore, plaint in the suit was not supported by statement of accounts as per provisions of S.9 (2) of Financial Institutions (Recovery of Finances) Ordinance, 2001---Plaint was rightly rejected by Banking Court---High Court declined to interfere in the order passed by Single Judge--Appeal was dismissed in circumstances.

Bela Automotives Ltd. v. Habib Bank Ltd. 2008 CLD 778; Messrs Haseeb Waqar Sugar Mills Limited's case 2008 CLD 786; Bela Automotives Limited v. Habib Bank Limited 2005 CLD 893 and Messrs ICEPAC Limited and 2 others v. Messrs Pakistan Industrial Leasing Corporation Ltd. 2005 1186 disting.

Messrs C.M. Textiles (Pvt.) Limited through Chairman and 5 others v. Investment Corporation of Pakistan 2004 CLD 587; Multiline Associate v. Ardeshir Cowasjee and others 1995 SCMR 362; Province of East Pakistan v. Dr. Azizul Islam PLD 1963 SC 296 and Sindheswar Ganguly v. Stgate of West Bengal PLD 1958 SC (Ind.) 337 ref.

(b) Civil Procedure Code (V of 1908)---

---O.VII, Rr.11 & 13---Rejection of plaint---Filing of fresh suit---Scope---Rejection of plaint under O.VII, R.11, C.P.C. does not preclude plaintiff from instituting a subsequent suit on the basis of same cause of action.

Hamid Shabbir Azar for Appellants.

Nemo for the Respondents.

Date of hearing: 24th February, 2010.

JUDGMENT

NASIR SAEED SHEIKH, J.---The appellants Nos. 1 to 6 instituted a suit for recovery of Rs. 183,757,756.00 along with other charges etc. against the respondents Nos. 1 to 8 before the Banking Court, Lahore High Court, Lahore, which was registered as Civil Original Suit. No.44 of 2000 and came up for hearing before a learned Single Judge of this Court.

2. The defendants/respondents appeared in the suit in pursuance to the process issued by the Court and moved an application for leave to defend the suit. The suit was originally instituted under Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997. Later on, after the promulgation of the Financial Institutions (Recovery of Finances) Ordinance, 2001, an amended petition No.115-B of 2006 for leave to appear was filed by the defendants on 20-12-2001 in compliance with the provisions contained in section 10(12) of the Ordinance, 2001. The appellants/plaintiffs submitted a reply thereto and vide judgment dated 13-3-2002, the petition for leave to appear moved by the respondents/ defendants was rejected on the following grounds:

- (i) Non-compliance with the mandatory provisions of subsections (3) and (4) of section 10 ibid;
- (ii) Non-disclosure of any plausible, reasonable and serious ground to defend the suit; and
- (iii) Non-substantiating the accounts stated above.

3. The main Civil Original Suit No.44 of 2000 was also taken up by the learned Single Judge of this Court exercising powers of Banking Court and vide judgment dated 13-3-2002, the plaint of the suit was rejected on the ground that the plaintiff-Banks have failed to comply with the strict provisions of sections 9(1) and (2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 to support the plaint with a statement of accounts duly certified as per provisions of Bankers Books Evidence Act, 1891. The learned Single Judge/Banking Court in paragraph No.21 of the judgment dated 13-3-2002 has observed as under:--

"21. Since the Certificates or Schedules of Accounts filed by the plaintiff-Banks purportedly to support the plaint, containing entries, which cannot and do not truly reflect the entries in the Banker's Books of Accounts, therefore, the same cannot be held to be Statements of Accounts. Furthermore, plaintiff-Banks did not produce any Books of

Accounts to support the contents of the above-stated Certificates of Balances or the amounts of claim pleaded in the plaint. I, therefore have no option but to hold that the plaintiff-Banks have failed to comply with the strict provisions of sections 9(1) and (2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 to support the plaint with Statements of Accounts duly certified as per the provisions of Banker's Books Evidence Act. Such a plaint cannot initiate a civil suit in terms of section 9 *ibid* to be legally proceeded with. As such the suit so filed is not only barred by law but also fails to disclose a cause of action in terms of subsection (2) of section 9 *ibid*. the plaint, therefore is rejectable under the provisions of Order VII, rule 11, C.P.C. read with section 151, C.P.C."

4. The appellants/plaintiffs have assailed the judgment and decree dated 13-3-2002 rejecting the plaint of Civil Original Suit No.44 of 2000 through the instant RFA.

5. The RFA was admitted to regular hearing vide order dated 5-11-2002 by a learned Division Bench of this Court.

6. The respondents were served through a publication to appear in the daily "Pakistan" and daily "Dawn" for 17-6-2008, which publication was directed by a learned Division Bench of this Court vide order dated 28-4-2008. On the failure of the respondents to enter appearance, they were proceeded *ex parte* vide order dated 17-6-2008 by this Court.

7. The arguments of the learned counsel for the appellants are thus heard today.

8. It is contended by the learned counsel for the appellants that the order of rejecting the plaint of the suit of the appellants is illegal and unsustainable in the eye of law. The learned counsel argued that the provisions contained in - sections 9(2) and section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 cannot be termed as mandatory. It was further argued by the learned counsel for the appellants that a statement of accounts has been specifically detailed in paragraph No.18 of the plaint and that a statement was in fact annexed with the plaint reflecting the financial liability of the respondents, therefore, it cannot be said that the plaint was not supported by the statement of accounts as per requirement of sections 9(1) and (2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001. The learned counsel relied upon the case-law reported as *Bela Automotives Ltd. v. Habib Bank Ltd.* 2008 CLD 778 (Karachi), *Messrs Haseeb Waqar Sugar Mills Limited* 2008 CLD 786 (Karachi), *Bela Automotives Limited v. Habib Bank Limited* 2005 CLD 893 (Karachi and *Messrs. ICEPAC Limited and 2 others v. Messrs Pakistan Industrial Leasing Corporation Ltd.* 2005 1186(Lahore) in support of his contentions that sections 9(1) and (2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 are not applicable to the facts of the case. The learned counsel further argued that once a petition for leave to appear moved by the respondent/defendant was dismissed, it was obligatory upon the Banking Court/learned Single Judge of this Court to have passed the decree in favour of the appellant-Banks.

9. We have considered the arguments of the learned counsel for the appellants and have perused the record.

10. The learned Banking Court/Single Judge of this Court in paragraphs Nos. 12 to 21 of the impugned judgment dated 13-3-2002 has concentrated fully upon the controversy ' regarding the requirement of section 9(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 reads as follows:-

"9. **Procedure of Banking Courts**.--(1) Where a customer or a financial institution commits a default in fulfilment 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 of 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 dates of payment; and

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

(4)

(5)

11. The learned Judge Banking Court/Single Judge of this Court in the impugned judgment dated 13-3-2002 dilated upon the plea taken by the appellant-Bank with respect to the details of accounts given in para. 18 of the plaint and after detailed discussion of the contents of the plaint and documents annexed therewith, the following finding was recorded in paragraph No.19 of the impugned judgment:-

"19. Examination of purported Statements of balances as filed and relied upon by the plaintiff-Banks and as reproduced above, clearly show that the plaintiff-Banks have filed and relied upon Certificates or Schedules of Balances and not Statements of Accounts. The above-said Schedules and Certificates of Balances show that the plaintiff-Banks have charged mark-up at a fixed rate from 12% or 15% or 17% (like interest), mark-up in advance, return on mark-up, liquidated damages 20%, expenses, costs, fees and penal

interest. These debits have been made in general in a consolidated form to reach the total amount of claim of each plaintiff-Bank. Such method/form of accounts or mark-up at fixed rate or mark-up in advance or liquidated damages or expenses and fees are not debitable under the law in a Statement of Account.

The above-stated Certificates or Schedules of Balances, though contain certification or verification close to the prescribed certification under Bankers Books Evidence Act, yet such Certificates or Schedules can in no way be true and faithful copies of the entries of Books of Accounts maintained in the "usual and ordinary course of business" by a Bank in accordance with the requirements of Banker's Books Evidence Act (Section 2(8) referred). No presumption of truth or correctness can possibly be attached to the above-stated Schedules or Certificates of Balances containing unauthorized entries to be admissible in evidence and to become basis of a suit or a decree as prescribed in sections 9(1) and (2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001."

In paragraph No.21, the learned Single Judge/Banking Court observed as follows:--

"21. Since the Certificates or Schedules of Accounts filed by the plaintiff Banks purportedly to support the plaint, containing entries, which cannot and do not truly reflect the entries in the Banker's Books of Accounts, therefore, the same cannot be held to be Statements of Accounts. Furthermore, plaintiff-Banks did not produce any Books of Accounts to support the contents of the above-stated Certificates of Balances or the amounts of claim pleaded in the plaint. I, therefore, have no option but to hold that the plaintiff-Banks have failed to comply with the strict provisions of sections 9(1) and (2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 to support the plaint with Statements of Accounts duly certified as per the provisions of Banker's Books Evidence Act. Such a plaint cannot initiate a civil suit in terms of section 9 *ibid* to be legally proceeded with. As such the suit so filed is not only barred by law but also fails to disclose a cause of action in terms of subsection (2) of section 9 *ibid*. The plaint, therefore is rejectable under the provisions of Order VII rule 11 C.P.C. read with section 151, C.P.C."

12. The view expressed by the learned Judge Banking Court in the impugned judgment is supported by another judgment passed by a Division Bench of this Court reported as Messrs C.M. Textiles (Pvt.) Limited through Chairman and 5 others v. Investment Corporation of Pakistan 2004 CLD 587 (Lahore). In this reported judgment, a learned Division Bench laid down the following principle of law in paragraph No.14, which reads as under: --

"14. As per settled "Banking Practices", every amount/sum advanced or paid to a customer or sum expended/incurred for and on behalf of a customer by a Banking Company is entered as 'debit' in the 'ledger' of the Bank. Simultaneously, the money received from or on behalf of customer is entered as a customer's "credit". The net result so arrived at is shown in the ledger as a credit or debit balance. On the basis of these entries in the ledger a Statement of Account truly, faithfully and duly reflecting date-wise entries is prepared by the bank for each account for all practical purposes. Such Statement of Account bearing true and complete account profile is required to be

regularly conveyed to the customers informing them of their account position and obligations towards the bank or vice versa. Such "Statement of Account" containing true copies of entries in the books of a bank, when certified as per section 2 of the Banker's Books Evidence Act, 1891, attains the status of prima facie evidence of the existence of such entries in the banker's books as per section 4 ibid. The Statement of Account so certified becomes admissible in evidence of the matters, transactions and accounts therein recorded like the original entry unless otherwise disputed."

13. Paragraphs Nos.16 and 17 of the reported judgment are also relevant for resolving the controversy in question:-

"16. In absence of a Statement of Account showing all debits and credits and dates thereof as entered by I.C.P. in the ledgers and books of accounts from the disbursement to the date of the suit, no presumption of admissibility in terms of Banker's Books Evidence Act (XVIII of 1891) can be given to the above-said Certificate of Balances (Annexure 'N').

17. The above-stated Certificate or Schedule of Balances, though contains certification or verification close to the prescribed certification under Banker's Books Evidence Act, yet such Certificate or Schedule can in no way be true and faithful copy of the entries of Books of Accounts maintained in the "usual and, ordinary course of business" by a bank in terms of the Banker's Books Evidence Act (section 2(8) referred). No presumption of truth or correctness can be attached to the above-stated Schedule or Certificate of Balances to be admissible in evidence and to become basis of a suit or a decree."

14. The same view was upheld by another Division Bench of this Court in a case reported as Messrs ICEPAC Limited and 2 others v. Messrs Pakistan Industrial Leasing corporation Ltd. 2005 CLD 1186 (Lahore.).

15. The case-law relied upon by the learned counsel for the appellants Bela Automotives Ltd. v. Habib Bank Ltd. 2008 CLD 778 (Karachi) and Bela Automotives Limited v. Habib Bank Limited 2005 CLD 893 (Karachi) has been passed by a learned Single Judge of the Karachi High Court. The judgment reported as Messrs Haseeb Waqar Sugar Mills Limited 2008 CLD 786 (Karachi) has no bearing on the question raised in the instant RFA.

16. The honourable Supreme Court of Pakistan has laid down in the judgments reported as Multiline Associate v. Ardeshir Cowasjee and others 1995 SCMR 362 that if a Division Bench of High Court has decided a matter and has expressed an opinion on a particular point of law, then the said statement of law has to be followed by the other Benches of the same Court and if a different opinion is to be expressed then a Larger Bench is to be requested to be constituted for revisiting or reconsideration of the earlier judgment passed by the Division Bench of the same Court. The honourable Supreme Court of Pakistan in the judgment 1995 SCMR 362 laid down the following law after relying upon two earlier judgments reported as Province of East Pakistan v. Dr. Azizul Islam PLD 1963 SC 296 and Sindheswar Ganguly v. State of West Bengal PLD 1958 SC (Ind.)337:--

"--Earlier judgment of equal Bench in the High Court on the same point is binding upon the second Bench---If, however, a contrary view has to be taken, then request for constitution of a larger Bench should be made."

17. No convincing arguments have been addressed by the learned counsel for the appellants to persuade this Court to differ with the opinion already expressed in the two reported judgments referred to above.

18. The contention of the learned counsel for the appellants that after the dismissal of the petition for leave to appear by the Judge Banking Court, the suit of the plaintiffs should have been decreed automatically is not correct. The Courts of law are under a legal obligation to apply their mind and correct law notwithstanding the fact that defendant in the suit has appeared or not before the Courts during the proceedings. Reliance is placed upon judgment reported as Haji Ali Khan and Company, Abbottabad v. Messrs Allied Bank of Pakistan Limited, Abbotabad PLD 1995 SC 362.

19. Respectfully following the case-law already holding the field, this Court is of the confirmed opinion that the statement of facts narrating the accounts given in paragraph No.18 of the plaint and reflected in the documents annexed with the plaint have been held to be not a statement of account as visualized by the provisions of Banker's Books Evidence Act, 1891 and therefore the plaint in the suit instituted by the appellants was not supported by the statement of accounts as per provisions of section 9(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001, which provisions are held in the earlier judgments passed by the two Division Benches of this Court to be mandatory. The plaint has, therefore been rightly rejected by the learned Judge Banking Court/Single Judge of this Court vide impugned judgment dated 13-3-2002.

20. It shall be further important to submit that a rejection of plaint under Order VII, rule 11 of C.P.C. does not preclude a plaintiff from instituting a subsequent suit on the basis of same cause of action and which provision is contained in Order VII, rule, 13 of C.P.C., which is reproduced as under:-

"Order VII Rule 13 of C.P.C. When rejection of plaint does not preclude presentation of fresh plaint--The rejection of the plaint on any of the grounds herein-before mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action."

21. The plaintiffs in this case could have instituted a subsequent suit by supporting the plaint with a detailed and lawfully prepared statement of accounts fulfilling the requirements of section 9(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and this Court is unable to understand as to why the above course has not been adopted by the appellants/plaintiffs immediately after the announcement of judgment dated 13-3-2002.

22. In the light of all the above circumstances, this RFA has no merits and is dismissed, without any orders as to costs.

M.H./B-3/L

Appeal dismissed.

