2024 C L D 397

[Islamabad]

Before Miangul Hassan Aurangzeb and Saman Rafat Imtiaz, JJ

ALI WAQAR AZEEM---Appellant

Versus

STANDARD CHARTERED BANK PAKISTAN LIMITED---Respondent

R.F.A. No. 224 of 2023, decided on 13th December, 2023.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 9, 10 & 22---Suit for recovery of finance---Leave to defend the suit---Limitation, non-consideration of---Effect---Application for leave to defend the suit filed by appellant/defendant was dismissed due to non-prosecution resultantly Banking Court decreed the suit in favour of respondent/plaintiff---Validity---It was not mandatory for Banking Court to decree the suit in favour of respondent/plaintiff upon default of appellant/defendant due to his absence---Even if appellant/defendant failed to file application for leave to defend or had failed to file it in a timely manner leading to its dismissal unless delay was condoned, it was bounden duty of Banking Court to apply its mind to see if respondent/plaintiff had made out a case for decree of the matter---Appellant/defendant's leave application was dismissed by Banking Court simply on account of non-prosecution without considering whether any substantial question of law or fact had arisen therefrom---Banking Court failed to discharge its duty under the law and had adopted procedure alien to the one envisaged in S. 10 of Financial Institutions (Recovery of Finances) Ordinance, 2001---It was the Banking Court which while considering petition for leave to appear and defend the suit should have considered and rendered its findings as to whether it was timely filed---High Court in appellate jurisdiction declined to determine whether petition for leave to appear and defend the suit was time barred or not, as Banking Court failed to consider petition filed by appellant/defendant---High Court set aside judgment and decree passed by Banking Court as it suffered from legal infirmity and the matter was remanded to Banking Court to decide petition for leave to appear and defend the suit afresh---Appeal was allowed accordingly.

Messrs Bahawalpur Cotton Company v. United Bank Limited 2023 CLD 1116; Oil and Gas Development Company Limited v. Muhammad Ilyas Mian 2018 CLC 1666; Pakistan Telecommunication Company Limited (PTCL) v. Mst. Naima Ayub 2013 CLC 1191; Abid Aziz Khan v. Bank of Punjab 2007 CLD 997; Syed Asad Abbas v. Allied Bank of Pakistan 2006 CLD 79; Syed Rashid Hussain v. Bank of Punjab 2005 CLD 1823; National Bank of Pakistan v. Messrs ARK Messrs Ark Garments Industry (Pvt.) Ltd. through Managing Director 2015 CLD 179; Ghulistan Textile Limited v. Askari Bank Ltd. 2013 CLD 2005; Messrs United Bank Limited v. Banking Court No. II 2012 CLD 1556; National Bank of Pakistan v. Pakistan Textile City Limited 2021 CLD 194; Soneri Bank Limited v. Classic

Denim Mills (Pvt.) Limited 2011 CLD 408; United Bank Limited v. Mehmood Ilyas Khan 2012 CLD 1372; Admore Gas (Pvt.) Limited v. Standard Chartered Bank (Pakistan) Limited 2013 CLD 423; Dr. Jamil Masood Usmani v. Messrs Askari Bank Limited 2016 CLD 387; Askari Leasing Limited v. Sher Bahadur 2011 CLD 1186; Ghulam Rasool v. Zarai Taraqiati Bank Limited (ZTBL) through Bank Manager 2005 CLD 1740; Syed Rashid Hussain v. Bank of Punjab through Managing Director 2005 CLD 1823; Asim Hussain Qadri v. Deuteche Bank 2006 CLD 1129 and Messrs Mumtaz Traders v. Messrs Habib Bank Limited 2009 CLD 169 ref.

Ghulam Qasim Bhatti for Appellant.

Ms. Aaliya Zareen Abbasi for Respondent.

Date of hearing: 21st November, 2023.

JUDGMENT

SAMAN RAFAT IMTIAZ, J.---

1. Through the instant Regular First Appeal, the Appellant [Ali Waqar Azeem] impugns the Judgment and Decree dated 08.02.2023 ("Impugned Judgment and Decree") passed by the learned Judge Banking Court ("Banking Court") whereby the suit for recovery of Rs.1,128,429.24 filed by the Respondent [Standard Chartered Bank Pakistan] was decreed.

2. The facts of the case as per the Memo of Appeal briefly stated are that the Respondent/Plaintiff filed a Suit for Recovery of Rs.1,128,429.24 along with cost of funds, etc. till realization of the amount ("Subject Suit") in respect of a loan facility was availed by the Appellant. On 21-09-2022, the Appellant filed a petition for leave to appear and defend the Subject Suit but the same was dismissed for non-prosecution and the Subject Suit was decreed against the Appellant vide the Impugned Judgment and Decree. Being aggrieved of the Impugned Judgment and Decree the Appellant preferred the instant appeal.

3. The learned counsel for the Appellant/Defendant submitted that the learned Banking Court has no jurisdiction to dismiss a petition for leave to appear and defend the suit for non-prosecution; that even if the petition for leave to appear and defend the suit is dismissed the learned Banking Court has to proceed for recording of evidence as the Respondent/Plaintiff has to prove its case; that dismissal for non-prosecution is a penal action and before taking any penal action the learned Banking Court was bound to comply with the pre-requisite which are missing in this case; and that the word 'forthwith' appearing in section 10(12) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 ("FIO, 2001") means to forthwith proceed with the case without any adjournment not forthwith decree the suit. The learned counsel relied upon Messrs Bahawalpur Cotton Company v. United Bank Limited, 2023 CLD 1116, Oil and Gas Development Company Limited v. Muhammad Ilyas Mian, 2018 CLC 1666, Pakistan Telecommunication Company Limited (PTCL) v. Mst. Naima Ayub, 2013 CLC 1191, Abid Aziz Khan v. Bank of Punjab, 2007 CLD 997, Syed Asad Abbas v. Allied Bank of Pakistan, 2006 CLD 79 and Syed Rashid Hussain v. Bank of Punjab, 2005 CLD 1823.

4. On the other hand, the learned counsel for the Respondent/Plaintiff submitted that the Impugned Judgment and Decree is as per the law and do not suffer from any illegality or infirmity and as such the instant appeal is liable to be dismissed and that even otherwise the application for leave to defend filed by the Appellant/Defendant was hopelessly time barred.

5. Arguments advanced by the learned counsel for the parties have been heard and record examined with their assistance.

6. According to the Impugned Judgment despite opportunities granted to the Appellant/Defendant none appeared to argue the petition for leave to appear and defend the Subject Suit and as such the learned Banking Court dismissed the Appellant/Defendant's petition for leave to appear and defend for non-prosecution. Vide the same Impugned Judgment and Decree the learned Banking Court proceeded to decree the Subject Suit without discussing the merits of the leave application filed by the Appellant/Defendant and without recording the Respondent/ Plaintiff's evidence.

Section 10 of the FIO, 2001

7. Before going further it is important to reproduce Section 10 of the FIO, 2001 as it exists today given that it has undergone certain amendments since the initial promulgation of the FIO, 2001:

"10. Leave to defend.---(1) In any case in which the summons has been served on the defendant as provided for in subsection (5) of section 9, the defendant shall not be entitled to defend the suit unless he obtains leave from the Banking Court as hereinafter provided to defend the same; and in default of his doing so, the allegations of fact in the plaint shall be deemed to be admitted and the Banking Court may pass a decree in favour of the plaintiff on the basis thereof or such other material as the Banking Court may require in the interests of justice.

(2) The defendant shall file the application for leave to defend within thirty days of the date of first service by any one of the modes laid down in subsection (5) of Section 9:

Provided that where service has been validly effected only through publication in the newspapers, the Banking Court may extend the time for filing an application for leave to defend if satisfied that the defendant did not have knowledge thereof.

(3) The application for leave to defend shall be in the form of a written statement, and shall contain a summary of the substantial questions of law as well as fact in respect of which, in the opinion of the defendant, evidence needs to be recorded.

(4) In the case of a suit for recovery instituted by financial institution the application for leave to defend shall also specifically state the following:-

(a) the amount of finance availed by the defendant from the financial institution; the amount paid by the defendant to the financial institution and the dates of payments;

(b) 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;

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

(d) the amount if any which the defendant disputes as payable to the financial institution and facts in support thereof.

Explanation:---For the purposes of clause (b) any payment made to a financial institution by a customer in respect of a finance shall be appropriated first against other amounts relating to the finance and the balance, if any, against the principal amount of the finance.

(5) Where application for leave to defend submitted under the preceding subsection is found to be materially incorrect at any stage of the proceedings, the defendant shall lose the right to defence and shall also be liable to pay penalty of not less than five percent of the amount of the claim, unless the defendant can establish that incorrect information was submitted as a result of a bona fide.

(6) The application for leave to defend shall be accompanied by all the documents which, in the opinion of the defendant, support the substantial questions of law or fact raised by him,

(7) An application for leave to defend which does not comply with the requirements of subsections (3), (4) where applicable and (5) shall be rejected, unless the defendant discloses therein sufficient cause for his inability to comply with any such requirement.

(8) The plaintiff shall be given an opportunity of filing a reply to the application for leave to defend, in the form of a replication.

(9) Subject to section 11, the Banking Court shall grant the defendant leave to defend the suit if on consideration of the contents of the plaint, the application for leave to defend and the reply thereto it is of the view that substantial questions of law or fact have been raised in respect of which evidence needs to be recorded.

(10) In granting leave under subsection (8), the Banking Court may impose such conditions as it may deem appropriate in the circumstances of the case, including conditions as to deposit of cash or furnishing of security.

(11) Where the application for leave to defend is accepted, the Banking Court shall treat the application as a written statement, and in its order granting leave shall frame issues relating to the substantial questions of law or fact, and subject to fulfillment of any conditions attached to grant of leave fix a date for recording of evidence thereon and disposal of the suit.

(12) Where the applications leave to defend is rejected or where a defendant fails to fulfill the conditions attached to the grant of leave to defend, the Banking Court shall forthwith proceed to pass judgment and decree in favour of the plaintiff against the defendant.

(13) Where an application for leave to defend has been filed before the coming into force of this Ordinance, the defendant shall be allowed a period of twenty-one days from the date of coming into force of this Ordinance, or from the date of first hearing thereafter, whichever is later, for filing an amended application for leave to defend in accordance with the provisions of this Ordinance." [Emphasis added].

8. In a nutshell, where summons have been duly served, the defendant is not entitled to defend the suit under subsection (1) of section 10 of the FIO, 2001 unless he obtains leave from the Banking Court in the manner provided in the subsequent subsections of section 10. Where he defaults in obtaining leave as such, the allegations of fact in the plaint are deemed admitted. Moreover, in such eventuality, the Banking Court is empowered to pass a decree in favour of the plaintiff on the basis of the plaint or such other material as the Banking Court may require in the interest of justice however it is not mandatory to do so. For the purpose of obtaining leave to defend the defendant is required to file an application within the limitation period as stipulated in section 2 of the FIO, 2001. The requirements that an application for leave to defend must comply with are provided in subsections (3), (4), (5) and (6). The consequence of failure to comply with subsections (3), (4), and (5) is given in subsection (7). The circumstances in which leave to defend may be granted to the defendant is given in subsection (9) and the procedure to follow in case the application leave to defend is accepted is provided in subsection (11) whereas the procedure to follow in case it is rejected is provided in subsection (12). The remaining subsections are not relevant for our discussion.

Banking Court power to decree suit under section 10 of the FIO, 2001

9. It may be noted that there are two provisions that empower the Banking Court to decree the suit against a defendant under section 10 i.e., subsection (1) and subsection (12) thereof. It bears mention that the power of the Banking Court to decree the suit in favour of the plaintiff upon the defendant's default in obtaining leave to defend in subsection (1) is discretionary given the use of the word 'may' therein. Whereas, under subsection (12) it is mandatory upon the Banking Court to forthwith proceed to pass decree in favour of the plaintiff against the defendant in the circumstances stipulated thereunder by the use of the word 'shall' therein. It is therefore important for us to understand the circumstances in which it is discretionary for the Banking Court to decree the suit in the plaintiff's favour and when it is mandatory to do so under section 10 of the FIO, 2001. To this end, we will first consider subsection (12) as it explicitly provides the conditions in which it is attracted.

When must the Banking Court decree suit under subsection (12) of section 10 of the FIO, 2001

10. Subsection (12) of section 10 of the FIO, 2001 expressly provides that it is applicable where the application for leave to defend has been rejected or where the defendant fails to fulfill the conditions attached to the grant of leave to defend. Thus, it is mandatory upon the Banking Court to forthwith proceed to pass judgment in favour of the plaintiff pursuant to subsection (12) ibid:

(a) in case of rejection of the leave to defend application under subsection (7) for non-compliance of subsections (3), (4) and (5); or

(b) in case of rejection of the application for leave to defend where the Banking Court is of the view that no substantial question of law or fact has been raised which requires recording to evidence pursuant to subsection (9); or

(c) where the conditions attached to the grant of leave to defend under subsection (10) have not been fulfilled.

When may the Banking Court decree suit under subsection (1) of section 10 of the FIO, 2001

11. The case of default in obtaining leave to defend on account of failure to file an application for leave to defend or to file it within the time stipulated in subsection (2) of section 10 of the FIO, 2001 falls within the ambit of subsection (1).

12. The reason why it is not mandatory for the Banking Court to decree the suit in favour of the plaintiff upon such default of the defendant is because even if the defendant fails to file an application for leave to defend or fails to file it in a timely manner leading to its dismissal unless delay is condoned, it is the Banking Court's bounden duty to apply its mind to see if the plaintiff has made out a case for decree of the matter.

13. Notwithstanding the defendant's default in obtaining leave for the aforesaid reasons, it is not mandatory upon the Banking Court in such case to decree the suit in favour of the plaintiff as the Banking Court retains the power to return or to reject the plaint/dismiss the suit for want of jurisdiction or for failure to disclose cause of action or as time barred or on account of non-compliance of the provisions of section 9 of the FIO, 2001, etc. We are fortified in our view by the judgment of the Honorable Sindh High Court at Karachi in National Bank of Pakistan v. Messrs ARK Messrs Ark Garments Industry (Pvt.) Ltd. through Managing Director, 2015 CLD 179:

"11. Subsection (1) of section 10 of the Ordinance provides that in the event of the defendant's default in obtaining leave from the Banking Court to defend the Suit in which summons has been served on him, the allegations of fact in the plaint shall be deemed to be admitted, and the Banking Court may pass a decree in favour of the plaintiff on the basis thereof, or such other material as the Banking Court may require in the interest of justice. The consequences mentioned in subsection (1) ibid are penal in nature, therefore, it must be construed strictly. The words underlined by me for emphasis, appearing in subsection (1) ibid, are of great importance. The said words undoubtedly indicate that, if the defendant fails in obtaining leave to defend the Suit, his admission shall be deemed only to the extent of the allegations of fact in the plaint, and a decree in favour of the plaintiff may be passed only because of such admission of the allegations of fact in the plaint, or such other material as the Banking Court may require in the interest of justice. The reason for highlighting the above aspect is that before passing a decree in favour of the plaintiff in a blindfolded fashion because of the defendant's failure in obtaining leave to defend the Suit, allegations of fact in the plaint must be examined critically and minutely by the Banking Court so as to corroborate as to whether or not the same constitute a cause of action in favour of the plaintiff. In such a situation, it must be kept in mind by the Banking Court that cause of action arises only and only out of the facts pleaded/alleged in the plaint. Another significant aspect in subsection (1) ibid is that, it is directory and not mandatory in nature because of the use of the word "may" therein.

12. Subsection (11) of section 10 of the Ordinance provides that where the application for leave to defend is rejected, or where the defendant fails to fulfill the conditions attached to the grant of leave to defend, the Banking Court shall forthwith proceed to pass judgment and decree in favour of the plaintiff against the defendant. However, this does not mean that a Suit, which does not disclose a cause of action or is otherwise not maintainable being barred by any law, and which ought to be dismissed or the plaint ought to be rejected, should be decreed simply because the defendant did not file the application for leave to defend, or he was unable to obtain leave to defend the Suit on account of dismissal of his application for leave to defend, or he failed in fulfilling the conditions attached to the grant of leave to defend. For instance, if a Suit is barred by limitation, or is based on illegal or void claim, the Banking Court is certainly not expected to decree the same either under subsection (1) or under subsection (11) of section 10 of the Ordinance. I can say with conviction that this surely must not have been the intention of the lawmakers. It is, therefore, held that the Banking Court can exercise jurisdiction under subsection (1) or under subsection (11) of section 10 ibid and pass a decree thereunder in favour of the plaintiff, only when summons in the prescribed form are issued and served on the defendant as provided in subsection (5) of section 9 of the Ordinance; the plaint is compliant of the mandatory requirements of subsection (3) of section 9 of the Ordinance; the allegations of fact in the plaint disclose a cause of action against the defendant; the Suit is maintainable by all standards; and, the plaintiff is able to show that he is entitled to the relief prayed for against the defendant. If any one of the above conditions precedent for a competent Suit are lacking, the plaintiff shall not be entitled to a decree either under subsection (1) or under subsection (11) of section 10 of the Ordinance. It is also held that irrespective of the defense set up by the defendants, and in Suits filed under the Ordinance, whether or not the defendant files the application for leave to defend, or whether his

> application for leave to defend is maintainable or not, or even if his application for leave to defend is dismissed, the Banking Court is duty-bound to first apply its mind and confirm as to whether or not the plaint discloses a cause of action against the defendant; whether the Suit, as framed, is maintainable or not; and, whether or not the plaintiff is entitled to the relief prayed for, whether the defendant is before the Court or not." [Emphasis added].

Consideration of application for leave to defend prior to rejection

14. On the other hand, suit is liable to be decreed in favour of the plaintiff under subsection (12) of the FIO, 2001 only after the application for leave to defend has either been rejected pursuant to subsection (7) or because it does not merit acceptance under subsection (9) or where the defendant has failed to fulfill the conditions upon which such leave was granted. In any case, consideration of the application for leave to defend precedes rejection.

15. Moreover, consideration of the plaint and reply to the leave to defend is also necessary under subsection (9). Although subsection (7) of the section 10 does not expressly require consideration of the plaint, the effect of failure of the plaint to comply with mandatory provisions of the law is to be examined independently of the defense set up[1] as well as whether it discloses a cause of action or is barred by any other law or whether the suit has been filed before a court of competent jurisdiction etc.

16. Therefore, the scheme that emerges is that upon filing of the application for leave to defend, the Banking Court considers such application along with the plaint and reply to the leave to defend application. If upon such consideration it appears that the plaint merits return/rejection, the Banking Court can do so in exercise of its powers under Order VII, Rules 10 and/or 11, C.P.C., either suo motu or on application by the defendant even before filing of the leave to defend application as held in the celebrated judgment reported as Ghulistan Textile Mills Limited v. Askari Bank Ltd., 2013 CLD 2005. Alternatively leave to defend may be granted to the defendant where questions regarding the maintainability of the suit have been raised.

17. In any event, rejection or grant of the application for leave to defend presupposes consideration of the said application as well as the plaint. Therefore, if the application for leave to defend is rejected for non-compliance of mandatory provisions or for failure to raise any substantial question of law or fact or failure to fulfill the conditions attached with the grant of leave the underlying premise is that the Banking Court is satisfied that the plaint does not merit return or rejection nor is the suit otherwise liable to be dismissed. In such case, the only course of action available would be to decree the suit in favour of the plaintiff. Reference may be made to Messrs United Bank Limited v. Banking Court No.II, 2012 CLD 1556 whereby it has been held:

> "11. After carefully examining the entire section 10 of the Ordinance and particularly its subsection (11), we have come to the conclusion that the word "forthwith" specifically mentioned in section 10(11) of the Ordinance

> was introduced by the legislature for the first time with a clear and specific object, that is, for expeditious disposal of a banking Suit whether filed by a financial institution or by a customer. The word "forthwith" is not meaningless and it cannot be ignored or interpreted casually. The word "forthwith" along with the word "shall" used in section 10(11) casts a duty upon the Banking Court to decree the Suit in favour of the plaintiff against the defendant immediately when defendant's application for leave to defend is rejected or where a defendant fails to fulfill the conditions attached to the grant of leave to defend. In our opinion the object of inserting this new provision was not to cause prejudice to any party, but was to provide an expeditious and equitable relief in banking Suits to the plaintiff after dismissal of defendant's application for leave to defend. We have said so because of the reason that if a defendant successfully makes out a case for grant of leave to defend by raising substantial question(s) of law or fact, leave would be granted to him and the suit will proceed further. In such an event, obviously the implications of section 10(11) shall not follow. On the other hand, if defendant's application for leave to defend is rejected for where a defendant fails to fulfill the conditions attached to the grant of leave to defend, the plaintiff should not be compelled to wait any longer or to suffer further, and the decree must follow forthwith in his favour." [Emphasis added].

Case law on whether or not an application for leave to defend a banking suit may be dismissed for non-prosecution

18. The above discussion regarding the difference between the powers of the Banking Court under subsections (1) and (12) of section 10 of the FIO, 2001 highlights the importance and indeed necessity of consideration of inter alia the application for leave to defend before rejection thereof and proceeding forthwith to decree the suit under subsection (12) ibid. This brings us back to the question raised in the instant case i.e., as to whether or not an application for leave to defend a banking suit may be dismissed for non-prosecution.

19. This question has been the subject of debate in a number of cases before the Honorable Lahore High Court and the Honorable Sindh High Court. A learned Division Bench of the Honourable Lahore High Court in Abid Aziz Khan (Supra) after considering various provisions of section 10 of the FIO, 2001 held as follows:

> "8. The position, therefore, which emerges from reading section 10 (ibid) is clear and unambiguous, the defendant is required to file PLA, in accordance with the conditions enumerated in section 10 of the Ordinance, the Banking Court is required to examine it and if it fulfills the requirements set there to place it on record. But once PLA is part of record, it is the cardinal duty of the Banking Court, to consider the plaint, the PLA and the replication filed, and thereafter proceed to grant leave conditional or unconditional or reject the application under section 10(11) of the Ordinance. The Banking Court, therefore, is required to consider and decide the application on merits, it has been left with no other choice in this context. The Ordinance does not visualize the dismissal of application for non-prosecution, no such powers

have been conferred upon the Banking Court, proceeding otherwise, amounts to defeating the legislative intent, thus, the dismissal for non-prosecution of the appellants PLA, was without jurisdiction and patently illegal." [Emphasis added].

20. This view was adopted by a learned Single Bench of the Honourable Sindh High Court at Karachi in United Bank Limited v. Mehmood Ilyas Khan, 2012 CLD 1372 as follows:

"10. After having considered the matter, I find myself in respectful agreement with the reasoning of, and conclusion arrived at, by the Lahore High Court. It appears to me that the provisions of subsection (8) of section 10 have been intentionally cast in mandatory terms by using the word "shall". Therefore, once a leave to defend application has been filed, it is the statutory duty of the court to consider the same regardless of whether the defendant concerned or learned counsel appearing on his behalf is present or not. If the court is satisfied that there is even a single substantial question of law or fact that has been raised, then leave to defend must be granted (of course in terms, and subject to the other relevant provisions of, the 2001 Ordinance). In other words, the order disposing of a leave to defend application must show on the face of it that there has been some application of mind to the application and the contents thereof. If the order shows that there has been no application of mind at all then in my view, as concluded by the Lahore High Court, the order dismissing the application is without jurisdiction. In the present case, a perusal of the first order, and indeed the order of 18-8-2011 in its entirety, leaves no doubt that there was no application of mind at all to the leave application and it was simply dismissed for non-prosecution. I would therefore conclude, with respect, that the order made in this regard (i.e. the first order) is not sustainable in law and suffers from want of jurisdiction and hence is liable to be set aside in terms of section 12(2), C.P.C. It necessarily follows from this that the second order, whereby the suit was decreed, must also be set aside or in other words, that the order dated 18-8-2011 fails in its entirety.

11. In my view, the alternative submission put forward by learned counsel for the plaintiff, namely that dismissal of the leave application for non-prosecution was merely an incorrect or irregular exercise of jurisdiction cannot be accepted. That would be the case if, for example, the impugned order had shown on the face of it that there had been some application of mind to the leave application and the grievance was that on such consideration it had been wrongly dismissed. But this is not such a case. Here the leave application was not considered at all. For the reasons stated above, I have concluded that the court exercising jurisdiction under the 2001 Ordinance lacks the jurisdiction not to consider the leave application at all, which is what dismissal for non-prosecution simpliciter is tantamount to. Had this been a case of an incorrect or irregular exercise of jurisdiction, then of course such an objection could only have been taken up in an appeal under section 22. But the case at hand is of a different nature, and with the utmost respect, the Court has here purported to do something which it did

not the jurisdiction to do. The alternative submission by learned counsel cannot therefore be accepted." [Emphasis added].

21. The judgment in Abid Aziz Khan (Supra) was also relied upon by the defendant in the case before the Honourable Sindh High Court at Karachi reported as Admore Gas (Pvt.) Limited v. Standard Chartered Bank (Pakistan) Limited, 2013 CLD 423. However, the counsel for the plaintiff therein argued that it is necessary, in terms of subsection (8) (now subsection (9) of section 10 of the FIO, 2001, that the defendant must be before the court to pursue the leave to defend application to convince the court that substantial questions of law or facts are involved that require recording of evidence. The learned Division Bench of the Honorable Sindh High Court at Karachi disagreed with the opinion expressed in Abid Aziz Khan (Supra) and held as follows:

"14. On examining the scheme of section 10 of FIO, 2001 it becomes clear that obtaining leave to defend is sine qua non or condition precedent to defend a banking suit. The defendant is obligated to obtain leave to defend, without obtaining leave, FIO, 2001 does not permit defaulting defendant to contest the claim set up in a banking suit. Banking Court at two stages has the jurisdiction to pass judgment and decree against the defaulting defendant. Firstly, in terms of subsection (1) of section 10 ibid, when the defendant defaults in obtaining leave to defend the suit, either for the reason of non-service of summons, and secondly where the service is effected under subsection (5) of section 9 ibid; but the defendant either altogether do not appear and fails to file leave to defend application and or where the defendant after service though appears and files the leave to defend application but neglects, fails to pursue the same, thus defaults to obtain leave, the Banking Court by virtue of deeming clause, treats default in obtaining leave to defend as admission of facts as pleaded in the Plaint and, proceeds to pass judgment and decree on facts so pleaded in the plaint and or any other material as the Banking Court may require in the interest of justice. Therefore, contention of Mr. Bilal A. Khawaja, cannot be sustained that Banking Court has no jurisdiction to dismiss the leave to defend application for non-prosecution or for that matter Banking Court is obliged to take into consideration the contents of leave to defend application. It may be observed that where the defendant(s) despite ample opportunity, fails and or neglects to appear and satisfy the court that substantial question of law and facts have been raised in the leave to defend application that necessitate recording of evidence, in default of his doing so, the Banking Court terms of subsection (1) of section 10 ibid; read with provisions of C.P.C., may in such a situation dismiss the application for non-prosecution and or ignore the same, result in either of the eventuality is same and by virtue of deeming clause, the allegation of fact in the plaint shall be deemed to be admitted and the Banking Court may pass a decree in favour of the plaintiff on the basis thereof or such other material as the Banking Court may require in the interests of justice (one may also see Sahara Trading International (Pvt.) Ltd. v. Bank Alfalah 2004 CLD 1522).

15. Second stage or circumstances in which the banking court could decree the suit, is provided for is subsection (11) of section 10, FIO, 2001. Subsections (3), (4) and or (5), inter alia require that the leave to defend application to be in the form of written statement, containing summary of question of law and facts, which need to be thrashed out at regular trial after evidence is recorded. The defendant is also required to state with clarity detail of finance availed, amount of finance and other amount related to finance repaid with dates, and the amount payable at the time of suit and the disputed amount if any, with supporting material. Leave to defend application, deficient in any of the material particulars, as noted herein, is liable to be rejected (see section 10(6) ibid); unless where defendant is able to demonstrate his inability to comply with such requirement. In cases where the leave to defend application is rejected in terms of subsection (6) for failure to comply with requirement of subsections (3), (4) and (5) of section 10 ibid; and or where the defendant failed to comply with the conditions imposed while granting such leave, the Banking Court exercises power under subsection (11) of section 10 of the FIO, 2001 to forthwith proceed to pass judgment and decree in favour of the plaintiff. Thus it could be seen that the Banking Court has power to pass judgment under subsection (1) and subsection (11) under different situation. With utmost reverence, it may be noted that Judgment emphatically relied upon by Mr. Bilal Khawaja (Messrs Noor Flour Mills v. Judge Banking Court Balochistan, Quetta and another (2011 CLD 1263) deals with the situation to proceed to pronounce judgment under subsection (11) of section 10, FIO, 2001. It appears that the attention of the learned bench was not drawn toward the provisions of subsection (1) ibid, which empowers the Banking Court to pass decree in favour of the plaintiff for default of the defendant to obtain leave. Failure to prosecute the leave to defend application amount to default in obtaining leave, such default is met by the consequences of passing of decree in favour of plaintiff, as discussed above. Therefore no exception could be taken for dismissal of leave to defend application for non-prosecution. In the instant case no doubt the defendants did file a leave to defend application but, from the record it is also evident that defendants neglected, failed and defaulted to pursue the leave application thus failed to obtain leave within the contemplation of subsection (1) of section 10 ibid; despite several and last opportunity given, consequently the application was dismissed and the suit on the basis of facts pleaded and material placed along with the in the Plaint, was considered and suit was decreed." [Emphasis added].

22. The question came up before yet another learned Division Bench of the Honourable Sindh High Court at Karachi in the case of Dr. Jamil Masood Usmani v. Messrs Askari Bank Limited, 2016 CLD 387 wherein it was observed that by virtue of section 7(2) of the FIO, 2001 the provisions of C.P.C. are applicable only where the FIO, 2001 is silent and no procedure has been laid down. Consequently it was held that the Banking Court is fully competent and empowered to dismiss the application for leave to defend for non-prosecution if the defendant deliberately fails to appear and comply with the direction of the Banking Court by relying upon the provisions of the C.P.C. Be that as it may, it is interesting to note that the

contents of the application for leave to defend were considered nevertheless and the Court found such application not to be in compliance with the provisions of section 10(3), (4), and (5) of the FIO, 2001 and that too without showing sufficient cause for non-compliance and as such the application for leave to defend was found to be not maintainable under the law. Similarly, in the case of Askari Leasing Limited v. Sher Bahadur, 2011 CLD 1186 a learned Single Bench of the Honourable Sindh High Court at Karachi noted that the application for leave to defend was dismissed for non-prosecution but still perused the defendants' application for leave to defend which was found not to reveal any substantial defense and in such circumstances, the plaintiffs' suit was decreed as prayed.

23. We have also come across various judgments of both the Lahore High Court as well as the Sindh High Court whereby applications for leave to defend have been restored after dismissal for non-prosecution on account of circumstantial reasons instead of holding such orders ultra vires the FIO, 2001[2].

24. Recently, the Honorable Lahore High Court in the cases of Messrs Bahawalpur Cotton Company (Supra) and Faysal Bank Limited v. National Electric Company Pakistan and others, 2023 CLD 879 while echoing the verdict of Abid Aziz Khan (Supra) has categorically held that the FIO, 2001 does not envisage dismissal of leave application for non-prosecution. The view espoused is that regardless of non-appearance of the defendant and/or his counsel the Banking Court is required to read the contents of the plaint, the petition for leave to appear and defend the suit and the replication and to determine whether any question arises for recording of evidence.

No express language in section 10 of the FIO empowering Banking Court to dismiss application for leave to defend for non-prosecution

25. We have considered the conflicting viewpoints expressed in the above judgments based on which along with our analysis as detailed herein above there is no doubt in our minds that of section 10 of the FIO, 2001 does not empower the Banking Court to dismiss an application for leave to defend for non-prosecution. Firstly, it may be seen that no such language has been used in the said provision. Secondly, subsection (9) of the FIO, 2001 unambiguously requires the Banking Court to grant the defendant leave to defend the suit if on consideration of the contents of the plaint, the application for leave to defend and the reply thereto it is of the view that substantial questions of law or fact have been raised in respect of which evidence needs to be recorded. The plain reading of subsection (9) of section 10 ibid does not reveal any language that allows the Banking Court to ignore the application for leave to defend if the defendant fails or neglects to appear and satisfy the court that substantial questions of law or facts have been raised in the leave to defend application.

26. With utmost respect, we do not agree with the interpretation of subsection (1) section 10 of the FIO, 2001 as rendered in the judgment of Admore Gas (Private) Limited (Supra) which led the Court to hold that failure to appear and satisfy the court that substantial questions of law or facts have been raised in the application for leave to defend after filing the same amounts to failure to obtain

leave under subsection (1) of section 10. No such interpretation can be given to subsection (1) section 10 of the FIO, 2001 which would defeat the explicit mandate of subsection (9) thereof.

27. We are therefore in agreement with the judgments passed in Abid Aziz Khan (Supra), United Bank Limited (Supra), Faysal Bank Limited (Supra) and Messrs Bahawalpur Cotton Company through Partners and others (Supra) that when the application for leave to defend has been filed within time it is the cardinal duty of the learned Banking Court to consider its contents along with the plaint and the replication for purposes of deciding whether to grant or reject the application for leave to defend irrespective of whether the defendant appears before the Banking Court or not in support thereof.

28. To hold otherwise would require reading into the statute words which it does not contain. However, it is settled law that reading into the statute is not permissible where the plain language is clear and unambiguous. It is reiterated that there is no ambiguity that the defendant is entitled to the grant of leave to defend the suit under subsection (9) if the Banking court is of the view that substantial questions of law or fact requiring recording of evidence have been raised upon consideration of the plaint, the application to defend, and reply thereto without any caveat in any provision of Section 10 that the application to defend shall not be considered where the defendant despite ample opportunity fails or neglects to appear to submit oral arguments in relation thereto.

29. Even otherwise it does not stand to reason for the Banking Court to shut its eyes to the contents of the application for leave to defend which is available on the record simply because oral arguments have not been submitted in support thereof and to forthwith decree the plaintiff's suit despite substantial questions of law or fact requiring the evidence having been raised by the defendant in the said application. We also agree with the Lahore High Court that the Banking Court may proceed under Order XVII, Rule 3, C.P.C. in case the defendant fails to argue its application for leave to defend despite opportunity as held in Faysal Bank Limited (Supra). That would however mean deciding the leave application on merits not dismissing the same for non-prosecution without consideration or application of mind.

30. In the instant case, the Appellant/Defendant's leave application has been dismissed by the learned Banking Court simply on account of non-prosecution and without considering whether any substantial question of law or fact arises therefrom. As such, the Banking Court failed to discharge its duty under the provisions of the FIO, 2001 and adopted a procedure alien to the one envisaged in section 10 thereof.

31. So far as contention of the learned counsel for the Respondent/ Plaintiff is concerned that the Appellant/Defendant's petition for leave to appear and defend the Subject Suit was time barred, it is the Banking Court who while considering the petition for leave to appear and defend the Subject Suit should have considered and rendered its findings as to whether it was timely filed. However, since the learned Banking Court failed to consider the petition for leave to appear and defend the Subject Suit filed by the Appellant/Defendant all together we cannot in appeal

determine whether the petition for leave to appear and defend the Subject Suit was time barred or not.

32. There is a force in the Appellant's/Defendant's contention that the learned Banking Court did not proceed as per the law and as such the Impugned Judgment and Decree suffers from legal infirmity is liable to be set-aside. In view of the above discussion, the instant appeal is allowed and the Impugned Judgment and Decree is set-aside. The matter is remanded to the learned Banking Court and consequently petition for leave to appear and defend the Subject Suit filed by the Appellant/Defendant shall be deemed pending and shall be decided afresh strictly in accordance with law within a period of 30-days. The parties are directed to appear before the learned Banking Court positively on 23.12.2023. No adjournment request shall be entertained by the learned Banking Court.

33. The office is directed to send a copy of this judgment to both parties as well as the learned Banking Court.

MH/136/Isl. Case remanded.

;