

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, **ISLAMABAD**

FAO NO. 116 OF 2020

Ali Raza
Vs.
MCB Bank Ltd., etc

Appellant by : Mr. Muhammad Arif, Advocate.

Respondents by : Ms. Javeria Rehman, Advocate

Date of hearing : 25.05.2021.

LUBNA SALEEM PERVEZ, J. Instant first appeal has been filed u/s 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (*hereinafter referred to as the Ordinance, 2001*), to assail the Order dated 09.10.2020, passed by learned Judge Banking Court, Islamabad, whereby the Suit for Declaration and Mandatory Injunction filed by the appellant was rejected under Order VII Rule 11 CPC. Following prayer has been made before this Court in the appeal:-

“It is therefore, respectfully prayed that upon acceptance of instant appeal, the impugned order dated 09.10.2020 may kindly be set-aside and the respondents No. 1 and 2 be directed to release the confiscated car of the appellant.”.

2. Brief facts of the case are that the appellant availed auto loan finance facility offered by respondent bank and purchased Toyota Corolla, Model 2018, Registration No. LE-18-A3908, (*hereinafter referred to as the subject vehicle*) on 26.07.2018. Due to non-payment of monthly installment for the month of April, May and June of 2020, the respondent re-possessed the vehicle of the appellant on 18.06.2020, and as a consequence thereof the appellant filed Suit for Declaration and Mandatory Injunction before the

learned Judge/Presiding Officer, Banking Court, Islamabad (*hereinafter referred to as **Banking Court***). The learned Banking Court, vide Order dated 09.10.2020, impugned herein, considering the suit filed by the appellant to be incompetent and not maintainable, rejected the plaint under Order VII Rule 11 CPC. The appellant through instant appeal prayed for acceptance of instant appeal and for setting aside of the impugned Order dated 09.10.2020.

3. Learned counsel for the appellant submitted that the appellant has purchased the subject vehicle after availing finance facility from the bank and was paying the schedule installments regularly, however, due to Covid-19 pandemic and lockdown in the country, the appellant unfortunately could not pay the installment for the month of April, May and June of 2020, and as a result thereof the respondent took a harsh, unlawful and arbitrary step by confiscating his vehicle on 18.06.2020; that the appellant before filing the suit, requested the respondent bank that the subject vehicle be released to the appellant as he is ready to make payment of the outstanding installments which request was declined, therefore, the appellant filed suit seeking declaration to return his vehicle and revival of the schedule of payment. He relied on the judgment reported as ***Shaukat Ali v. State Bank of Pakistan (2007 CLD 1352)*** whereby, the Hon'ble Court while disposing of the writ petition filed by the petitioner directed the bank to release the car on payment of four outstanding installments within two days and observed that *the bank has a right to confiscate the car in case the petitioner may default in future*. Appellant, therefore, prayed for similar relief.

4. Learned counsel for the respondent bank countered the arguments of the learned counsel for the appellant and submitted that the appellant was under obligation to pay the installments as per schedule under the agreement, however, the appellant was never a regular and prompt payer of the scheduled installments; that the vehicle was confiscated for non-payment of the scheduled installments of three consecutive months; that the plea of the appellant for default in payment of installments is unjustified and absurd as the city was never in a lockdown for a period of three months; that the learned Banking Court has rightly rejected the plaint of the appellant under Order VII Rule 11 CPC as in terms of section 16(3) of the Ordinance, 2001, the appellant can only claim for compensation of the subject vehicle. She placed reliance on the unreported judgments in case of *FAO No. 76 / 2015 dated 28.01.2020* titled as *Ch. Saeed Tahir versus The Bank Al-Falah Ltd.* and *RFA No. 25/2016, dated 15.01.2018* in the case titled as *Umer Farooq v. Bank Al-Falah*.

5. Arguments heard, record perused.

6. The appellant in this case is aggrieved with the order dated 09.10.2020, passed by learned Judge, Banking Court, Islamabad, whereby his plaint was rejected under Order VII Rule 11 CPC, while observing that the option available to the appellant for redressal of his grievance was through application under Section 16(3) of the Ordinance, 2001, for compensation of the wrongful act taken by the respondent Bank.

7. The default of payment of installments for the month of April, May and June 2020, has been admitted by the appellant on the plea of lockdown of the city on account of covid-19 pandemic. This reason given by the

learned counsel for the appellant has no force as despite the pandemic, entire city has never been closed for the consecutive three months in April, May and June, 2020. Admittedly, for non-payment of installments schedule as per terms of agreement between the appellant and the respondent/Bank, the subject vehicle purchased on the basis of Auto Finance Facility availed by the appellant, was taken into custody by the Bank as per agreed terms and conditions. The appellant, therefore, filed Suit for Declaration and Permanent Injunction before the learned Judge, Banking Court, Islamabad, against the respondent/Bank under Section 9 of the Ordinance, 2001 which reads as under:

“9. Procedure of Banking Courts.(1) Where a customer or a financial institution commits a default in fulfillment of any obligation with regard to any finance, the financial institution or, as the case may be, the customer, may institute a suit in the Banking Court by presenting a plaint which shall be verified on oath, in the case of a financial institution by the Branch Manager or such other officer of the financial institution as may be duly authorized in this behalf by power of attorney or otherwise.

(2) The plaint shall be supported by a statement of account which in the case of a financial institution shall be duly certified under the Bankers Books Evidence Act, 1891 (XVII of 1891), and all other relevant documents relating to the grant of finance. Copies 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 upto the date of institution of the suit.

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

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

8. Plain reading of the above provision reveals that the provision of the Ordinance, 2001, is invoked for non-fulfillment of the obligation with regard to finance by or against any financial institution. Whereas, the suit filed by the appellant invoking provision of Section 9 of the Ordinance, 2001, revealed that he had sought declaration for revival of the schedule of payment and mandatory injunctions for restoring the possession of the subject vehicle and permanent injunction and directions for the respondents/Bank from auctioning the subject car which declaration in view of the mandate and purpose of the Ordinance is outside the scope of the Ordinance, 2001. Learned Judge, Banking Court, Islamabad, has rightly referred section 16(3) of the Ordinance, 2001, whereby the *proviso* entitles the appellant/the customer for compensation in case the leased vehicle has been wrongly and unjustifiably repossessed by the financial institutions. Section 16(3) of the Ordinance, 2001 and its *proviso* is reproduced hereunder for reference:-

"16. Attachment before judgment, injunction and appointment of Receivers.

(3) In cases where a customer has obtained property or financing through a finance lease, or has executed an agreement in connection with a mortgage, charge or pledge in terms whereof the financial

institution is authorized to recover or take over possession of the property without filing a suit, the financial institution may, at its option:

(a) directly recover the same if the property is movable; or

(b) file a suit hereunder and the Banking Court may pass an order at any time, either authorising the financial institution to recover the property directly or with the assistance of the court:

Provided that in the event the financial institution wrongly or unjustifiably exercises the direct power of recovery hereunder it shall be liable to pay such compensation to the customer as may be adjudged by the Banking Court in summary proceedings to be initiated on the application of the customer and concluded in thirty days.”.

9. Hon’ble Lahore High Court Rawalpindi Bench in a case having similar facts and circumstances bearing FAO No. 76/2015 titled as *Ch. Saeed Tahir v. The Bank Al-Falah Ltd. and others* has observed as under:-

“6. Bare perusal of the above provision of law will make it manifest that the bank has been authorized in case of finances, lease or agreement to recover or take over possession of the mortgage/leased property without filing a suit. At the same time right of customer has been protected by adding proviso to sub Section 3 of Section 16 of the F.I.O. through which the legislature has authorized him to pray for compensation against the bank if the financial institution/bank has wrongly or unjustifiably exercised the direct power of recovery.

7. The appellant claimed that the action taken by the respondent-bank for re-capturing his car was unauthorized as he was regularly paying instalments and was not at default and no notice was issued to him before aforesaid illegal action. However, while entering witness box as AW.1 he conceded during cross-examination that he was withholding payment of three instalments towards “finance facility for motor vehicle on Modharba basis” and that as per terms and conditions of said agreement in such eventuality the bank had a power to recapture the car.”.

10. In another case bearing RFA No. 25 of 2016, titled as *Umar Farooq v. Bank Al-Falah* dated 15.01.2018, the Hon’ble Lahore High Court has observed as under:-

*“Even otherwise, it is settled law that where the parties are in a contractual relationship, any declaration in respect thereto cannot be granted by the courts. Reliance in this regard is placed on judgments reported as *Alavi Sons Ltd. v. The Government of East**

Pakistan and two others PLD 1968 Karachi 222 Buro Distributors Establishment, Lugano Switzerland v. Bank of Credit and Commerce International London and other 1982 CLC 2369. The parties hereto were in contractual relationship and, therefore, the appellant could not have filed the suit for declaration. Be that as it may, the appellant sought the declaration that he was the absolute owner of the vehicle in question, which prayer was in negation of the contents of the plaint. Similarly, the relief permanent and mandatory injunction could also not been granted as the vehicle in question had already been auctioned by the respondent bank prior to the filing of the suit.”.

11. In view of the above judgments, I am of the considered opinion that the learned Judge Banking Court, Islamabad, has rightly rejected the plaint under Order VII Rule 11 CPC as the suit filed by the appellant was not maintainable in its present form in terms of Section 9 of the Ordinance, 2001. Hence, the impugned order calls for no interference. The instant FAO is, being devoid of any merit, hereby dismissed.

(LUBNA SALEEM PERVEZ)
JUDGE

Approved for Reporting
Blue Slip added.