

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Muhammad Ali Mazhar
Mr. Justice Syed Hasan Azhar Rizvi

Civil Petitions No. 329-K to 391-K of 2022

(On appeal from Order dated 03.12.2021 of the High Court of Sindh Circuit Court, Hyderabad in M.As. No. 3-12/2021 and 31-83/2021)

Telenor Microfinance Bank Limited

(In all cases)
...Petitioner

Versus

Shamim Bano & others	C.P.329-K/21
Rehana Sabir & others	C.P.330-K/21
Asma & others	C.P.331-K/21
Komal & another	C.P.332-K/21
Farah Unnar & others	C.P.333-K/21
Rani & others	C.P.334-K/21
Shakeel & others	C.P.335-K/21
Shumaila & others	C.P.336-K/21
Aneesa & others	C.P.337-K/21
Nisho Manghar & others	C.P.338-K/21
Kirshan & another	C.P.339-K/21
Hajab & another	C.P.340-K/21
Muhammad Raheem & another	C.P.341-K/21
Malook & another	C.P.342-K/21
Ameer Hassan & another	C.P.343-K/21
Dil Sher & another	C.P.344-K/21
Taro & another	C.P.345-K/21
Shahib & another	C.P.346-K/21
Abdul Raheem & another	C.P.347-K/21
Punhoon & another	C.P.348-K/21
Khan Muhammad & another	C.P.349-K/21
Ramesh Kumar & another	C.P.350-K/21
Dahu Mal & another	C.P.351-K/21
Mavji & another	C.P.352-K/21
Imam Bux & another	C.P.353-K/21
Rano & another	C.P.354-K/21
Dhevji Mal & another	C.P.355-K/21
Jeebo & another	C.P.356-K/21
Abdul Hafeez & another	C.P.357-K/21
Dhanji & another	C.P.358-K/21
Saman & another	C.P.359-K/21
Ameen Muhammad & another	C.P.360-K/21
Gulab & another	C.P.361-K/21
Muhammad Hassan & another	C.P.362-K/21
Hakim & another	C.P.363-K/21
Jaimal & another	C.P.364-K/21
Pehlaj & another	C.P.365-K/21
Mansingh & another	C.P.366-K/21
Prem & another	C.P.367-K/21
Jumoon & another	C.P.368-K/21
Sher Muhammad & another	C.P.369-K/21

Ghamoon & another	C.P.370-K/21
Jetho & another	C.P.371-K/21
Tulcho & another	C.P.372-K/21
Chahnoo & another	C.P.373-K/21
Kirshan & another	C.P.374-K/21
Photo Mal & another	C.P.375-K/21
Pirsoo & another	C.P.376-K/21
Ali Muhammad & another	C.P.377-K/21
Ali Bux & another	C.P.378-K/21
Meer Muhammad & another	C.P.379-K/21
Gaagan Das & another	C.P.380-K/21
Asghar Khan & another	C.P.381-K/21
Dhevji Mal & another	C.P.382-K/21
Abdul Rauf & another	C.P.383-K/21
Muhammad Mithan & another	C.P.384-K/21
Partab & another	C.P.385-K/21
Ranjho & another	C.P.386-K/21
Allah Warayo & another	C.P.387-K/21
Muhammad Aslam & another	C.P.388-K/21
Partab & another	C.P.399-K/21
Ali Ghulam & another	C.P.390-K/21
Amanullah & others	C.P.391-K/21
	...Respondents

For the Petitioner: Mr. Jahanzeb Awan, ASC
Assisted by M/s. Rasheed Mehar
& Subhan Tasleem, Advocates
Mr. Muhammad Iqbal Chaudhry, AOR

For the Respondents: N.R.

Date of Hearing: 28.04.2023

JUDGMENT

MUHAMMAD ALI MAZHAR, J. These Civil Petitions for leave to appeal are directed against the impugned consolidated judgment dated 03.12.2021 passed by the Sindh High Court ("**High Court**") in M.A. No.03 to M.A. No.12 of 2021 (subject matter of C.P. Nos.329-K to 338-K/2021) whereby the order passed by the Model Civil Appellate Court-II/VIth Additional District Judge, Hyderabad in Summary Suit No. 117 of 2020 and connected suits was maintained and the Miscellaneous Appeals were dismissed, and another impugned consolidated judgment dated 03.12.2021, passed by the High Court in M.A. No.31 to M.A. No.83 of 2021 (subject matter of C.P. Nos.339-K to 391-K/2021) whereby the order dated 30.08.2021 passed by the Additional District Judge-I, Tharparkar at Mithi was modified to the extent that the plaint was to be filed before the court of plenary jurisdiction rather than the Banking Court.

2. The factual matrix of the *lis* are that the petitioner is a Microfinance Institution incorporated under the Companies Act, 2017 which is engaged in the business of providing microfinance and related financial services under the provisions of the Microfinance Institution Ordinance, 2001 ("**MIO 2001**") to the less privileged segment of the society with an aim to contribute towards poverty eradication. The respondents individually applied for loans and entered into finance agreements. The loan was approved as per the Schedule annexed to each finance agreement and was to be repaid within 24 months. As per the finance agreements, the guarantors had co-extensive liability with the principal borrower for the repayment of the loan. Since the respondents breached the terms of the finance agreement and committed default, hence the petitioner filed a summary suit under Order XXXVII of the Civil Procedure Code, 1908 ("**CPC**") against the respondents on the strength of promissory notes but the Trial Court returned the complaints without considering the Promissory Notes attached with the finance agreement and erroneously held that the suits are not maintainable under the summary chapter. The High Court in its appellate jurisdiction also failed to consider that the summary suits were filed on the basis of the promissory note which was a vital fragment of the each finance agreement, but the appeals were dismissed in a perfunctory manner.

3. The record reflects that in the aforesaid civil petitions this Court issued notices to 135 respondents with the bifurcation that the respondents at Serial Nos. 107 to 135 were to be served through the District and Sessions Judge, Hyderabad, as well as through the Mukhtarkar Hyderabad, whereas the respondents at Serial Nos. 1 to 106 were to be served through the District and Sessions Judge, Tharparkar as well as through the concerned Mukhtarkar. The service report dated 26.04.2023 transmitted by the Senior Civil Judge, Mithi, discloses the names of the respondents who were duly served and also the names of those respondents who refused to receive the notices; similarly in the report dated 27.04.2023 forwarded by the District and Sessions Judge, Hyderabad, the names of those respondents who were served, as well as those who refused to receive the notices are highlighted. Out of an abundance of caution, substituted service was also made by means of publication in the newspapers Daily Jang and Daily Dawn, but nobody appeared to contest the matter. Even the

impugned judgments of the High Court make it obvious that, despite notices being issued to the respondents, they failed to appear before the High Court. In the aforesaid situation, this Court had no other option but to hold the service good and proceed against the respondents ex-parte.

4. The learned counsel for the petitioner argued that the High Court failed to appreciate the material placed on record and passed the impugned judgments without proper application of mind. It was further contended that the High Court erroneously drew a distinction between the finance agreement and promissory note and wrongly held that the Suit under Order XXXVII, Rules 1 and 2 was filed due to non-compliance of the Finance Agreement when, on the contrary, the summary suit was filed on the basis of the promissory note which contained all the essential ingredients as envisaged under Section 4 of the Negotiable Instruments Act, 1881 which is always considered independent of other dealings between the parties and, therefore, the finance agreement had no direct bearing on the issue at hand other than to establish that the borrower had taken money and subsequently defaulted on their obligation. It was further averred that a microfinance institution cannot institute proceedings under the Financial Institutions (Recovery of Finances) Ordinance, 2001 but can file a summary suit under Order XXXVII of the CPC.

5. Heard the arguments. According to Clause (i) of Section (2) (definition clause) of the MIO 2001, "microfinance institution" means a company that accepts deposits from the public for the purpose of providing microfinance services, and under clause (j) "microfinance services" means the financial and other related services specified in Section 6, the value of which does not exceed such amount as the State Bank may, from time to time, determine. Whereas Section 3 of the MIO 2001 provides that the provisions of the Ordinance shall be in addition to and, save as hereinafter provided, not in derogation of any other law for the time being in force, and Sub-section (2) explicates that, save as otherwise provided in the Ordinance, the Banking Companies Ordinance and any other law for the time being in force relating to banking companies or financial institutions shall not apply to microfinance institutions licensed under the Ordinance and a microfinance institution shall not be deemed to be a banking company for the purposes of the said Ordinance, the State Bank of Pakistan Act,

1956 (XXXIII of 1956), or any other law for the time being in force relating to banking companies. Sub-section (3) further emphasizes that, save as expressly provided in the Ordinance, the provisions of the Ordinance shall have effect notwithstanding anything contained in any rules, regulations, memoranda or articles of association of a microfinance institution or in any resolution passed by such institution in its general meeting or by its Board of Directors, whether the same be applied, executed or passed before or after the commencement of the Ordinance, and any provision contained in any rules, regulations, memoranda, articles or resolutions aforesaid shall, to the extent of its inconsistency become or be void and of no legal effect. In line with the above provision, it is not a correct exposition of law to call upon the petitioner to institute the suit for recovery against the respondents in the banking court, and to this extent the findings of the High Court in one of the impugned judgments is correct, however, the remainder, whereby the petitioner was called upon to file civil suits for recovery in the plenary jurisdiction of the civil court instead of summary suits under Order XXXVII is actually under challenge.

6. According to Rule 1 of Order XXXVII, CPC, summary procedure on Negotiable Instruments is meant for the High Court, District Courts and any other Civil Court specially notified in this behalf by the High Court. Under this Order, all summary suits are instituted upon bills of exchange, hundies or promissory notes on presentation of plaint in the form prescribed. The defendant cannot defend the suit unless he obtains leave to defend and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree.

7. Compliant with Section 13 of the Negotiable Instruments Act, 1881, a "negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer with the *Explanation* (i) A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable; *Explanation* (ii) A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last indorsement is an indorsement in blank; and *Explanation* (iii) Where a

promissory note, bill of exchange or cheque, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option. While Section 4 of the Negotiable Instruments Act, 1881 articulates that a "promissory note" is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay on demand or at a fixed or determinable future time a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument. The quintessence of negotiable instruments has been defined in Halsbury's laws of England and Corpus Juris Secundum in the following manner:

Halsbury's Laws of England, Volume 49 (Pages 167, 173 & 174)

189. Bill of exchange, cheque, promissory note. A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

An instrument which does not comply with one or other of these definitions (such as a deposit receipt or an irrevocable undertaking to pay contained in a letter) is not a bill of exchange or a cheque, or a promissory note.

When an instrument is so ambiguous in form as to be capable of being treated either as a bill of exchange or as a promissory note, it is in the option of the holder to treat it as either.

197. Necessary parties to promissory note. The necessary parties to a promissory note are: (1) the person who makes the promise, and who is called the maker; (2) the person to whom the promise is made, and who is called the payee. Where the same person fills the position of both parties, for example, where the instrument is expressed 'pay to my order', the instrument is not a note unless and until it is indorsed by the maker. In the application of the statutory provisions relating to bills of exchange to a promissory note, the maker of a note is deemed to correspond with the acceptors of a bill and the first indorser of a note is deemed to correspond with the drawer of an accepted bill payable to drawer's order.

198. Wording. It is not necessary to adhere to any form of words so long as the conditions of the definition are observed, in which case the language in which the instrument is written is immaterial.

363. Persons liable as indorsers. Where a person signs an instrument otherwise than as a maker, drawer or acceptor, he incurs the liabilities of an indorser to a holder in due course. However, if there is ambiguity as to the capacity in which a party signed an instrument, the whole facts and circumstances attendant upon the making, issue and transfer of the instrument may be legitimately referred to for the purpose of ascertaining the true relation of the parties to each other; and reasonable

inferences, derived from these facts and circumstances are admitted to the effect of qualifying, altering or even inverting the relative liabilities which the law merchant would otherwise assign to them.

Corpus Juris Secundum, Volume X (Pages 479 and 520-521)

c. Negotiability

The negotiability of an instrument is determined by a construction of its terms at the time of its execution and delivery and not subsequently. In general, the tendency of the courts in construing the instrument is to favor its negotiability.

The determination of the negotiability of an instrument must depend on a construction of its terms as of the time of its execution and delivery, and not as of some subsequent time. Since the enactment of the Negotiable Instruments Act, the tendency of the courts is to exercise, within the bounds of reason, liberality of construction in favor of negotiability of the instrument, and to resolve all doubts accordingly. Thus it has been stated, in construing the instrument with reference to the requirements of certainty of amount and certainty of time for payment, that that is certain which may be rendered certain, the certainty required being a commercial, and not a mathematical, certainty.

§83. Immaterial Omissions or Irregularities

Where the intention and meaning are clear, omission of words readily supplied, or immaterial errors, or the use of meaningless or usual abbreviations, will not affect validity or negotiability.

The law looks at effect and substance rather than at nicety of form, and, where the intention and meaning are clear, a bill or a note will not be rendered invalid by reason of the omission of some word easily supplied, or on account of errors in grammar or orthography.

8. 'Negotiability' can be attached to the documents by mercantile usage. According to Section 3, the interpretation clause of the Negotiable Instruments Act, "issue" means the first delivery of a promissory note, bill of exchange or cheque complete in form to a person who takes it as a holder; "delivery" means transfer of possession, actual or constructive, from one person to another; "bearer" means a person who by negotiation comes into possession of a negotiable instrument, which is payable to bearer; and "banker" means a person transacting the business of accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, and includes any Post Office Savings Bank. The promissory note contains an unconditional undertaking, signed by the maker, to pay on demand or at a fixed or determinable future time a certain sum of money only to, or to the

order of, a certain person, or the bearer of the instrument. To determine the nature of an instrument where there is a promise to pay, the best way is to see what is the intention of the parties and what is the instrument in the common acceptance of men of business or persons among whom it is commonly used. The true import of the words 'on demand' is that the debt is due and payable immediately. The indorsement does not mean that it is not payable immediately or without any demand. In fact, a negotiable instrument is a document guaranteeing the payment of a specific amount of money, either on demand, or at a set time, with the payer usually named on the document. It can serve to convey value constituting at least part of the performance of a contract, albeit perhaps not obvious in contract formation, in terms inherent in and arising from the requisite offer and acceptance and conveyance of consideration. It typically contains all the terms pertaining to the debt, such as the principal amount, interest rate, maturity date, date and place of issuance, and issuer's signature. The difference between a promissory note and a bill of exchange is that the latter is transferable and can bind one party to pay a third party that was not involved in its creation.

9. The Trial Court and the Appellate Court have both ignored that the promissory note was an integral part of the finance agreement and a specific condition was incorporated in the finance agreement which expounds that the borrowers of the loan, being the customers and guarantors, solemnly declared that their signatures and thumb impression shall be deemed as the whole agreement or acceptance for all documents including but not limited to the finance agreement, promissory note, hypothecated goods, letter of pledge, MODT, authority of encashment, marking of lien and all relevant affidavits with regard to loan and authorized the bank to use each of them as part of the agreement under their relationship. The promissory note was in support of the finance agreement along with other documents mentioned and attached with the agreement and the petitioner rightly invoked the jurisdiction of the Court under the summary chapter on the strength of the promissory note which was printed in the finance agreement in a separate head, therefore, the concurrent finding recorded by the Courts below that the suits for recovery should have been filed in the plenary jurisdiction of the civil court rather than summary jurisdiction is misconceived and erroneous.

The Courts below only relied upon the finance agreement without advertent to its terms and conditions and the integral documents appended thereto and returned the plaint in a slipshod and injudicious manner. We have minutely examined the finance agreements and promissory notes and in our resolute and unyielding view, all the prerequisites required to be followed were fulfilled at the time of issuing the promissory notes and the suits were rightly filed under the summary chapter.

10. As a result of the above discussion, the aforementioned Civil Petitions are converted into appeals and allowed in the following terms:

1. C.P. Nos.329-K to 338-K/2021

The impugned order of the Trial Court as well as the High Court are set aside and the matter is remanded to the Trial Court to proceed the suits under Order XXXVII Rule 1 & 2 (summary chapter) of the Code of Civil Procedure, 1908 and decide the same in accordance with law.

2. C.P. Nos.339-K to 391-K/2021

The impugned order of the Trial Court is set aside and the judgment of the High Court is also set aside to the extent of upholding the judgment of the Trial Court that the case should have been filed in the plenary jurisdiction of the civil court. The matter is remanded to the Trial Court to proceed the suits under Order XXXVII Rule 1 & 2 (summary chapter) of the Code of Civil Procedure, 1908 and decide the same in accordance with law.

Judge

Judge

KARACHI

28th April, 2023

Khalid

Approved for reporting