

SUPREME COURT OF AZAD JAMMU AND KASHMIR

(APPELLATE JURISDICTION)

PRESENT:

Ch. Muhammad Ibrahim Zia, C.J.
Raja Saeed Akram Khan, J.

Civil appeal No.43 of 2017
(PLA filed on 23.01.2017)

1. Askari Bank Limited through their Manager Mirpur Branch and Area Manager AK, Jabeer Tower, Allama Iqbal Road, Mirpur.
2. Area Manager AK, Askari Bank Area Office, 1st Floor, Jabeer Tower, Allama Iqbal Road, Mirpur.
3. Branch Manager, Askari Bank Ltd. Jabeer Tower Branch, Allama Iqbal Road, Mirpur.

....APPELLANTS

VERSUS

1. Banking Court/Circuit Bench Mirpur of the High Court of Azad Jammu and Kashmir acting as Banking Court, c/o Deputy Registrar Azad Jammu and Kashmir High Court Circuit, Mirpur.
2. M/S Bukhari Travels Mirpur, Eidgah

Market, Naik Alam Shah Road, Mirpur through their Managing Partner Mr. Muhammad Zameer Khan and Partner Mr. Syed Farhan Haider Shah.

3. Mr. Muhammad Zameer Khan, Managing Partner M/S Bukhari Travels Mirpur, Eidgah Market, Naik Alam Shah Road, Mirpur.
4. Mr. Syed Farhan Haider Shah, Partner M/S Bukhari Travels Mirpur, Eidgah Market, Naik Alam Shah Road, Mirpur.

....RESPONDENTS

(On appeal from the judgment of the High Court dated 13.01.2017 in writ petition No.1215 of 2015)

FOR THE APPELLANTS: Kh.Ansar Ahmed,
Advocate.

FOR THE RESPONDENTS: Mr.Masood A. Sheikh,
Advocate.

Date of hearing: 29.03.2017

JUDGMENT:

Raja Saeed Akram Khan, J.— This appeal by leave of the Court has been directed against the judgment of the High Court dated

13.01.2017, whereby the writ petition filed by the appellants, herein, to the extent of quashment of the condition of security imposed by the Banking Court has been dismissed.

2. The facts necessary for disposal of this appeal are that plaintiff-respondents No. 2 to 4, herein, filed a suit for recovery of Rs.21,82,36,811/- against the defendant-appellants, herein, in Banking Court, Mirpur on 08.02.2014. The appellants, herein, moved an application for grant of permission to defend the suit. The application was allowed by the Banking Court subject to furnishing the security of Rs.21,90,00,000/-, vide order dated 11.06.2015. Feeling dissatisfied from the condition of security imposed by the Banking Court, the appellants, herein, filed a writ petition before the High Court. The learned High Court after necessary

proceedings vide impugned judgment dated 13.01.2017, modified the order of the Banking Court to the extent of furnishing of the security of Rs.21,82,36,811/-, instead of Rs.21,90,00,000/-, however, dismissed the writ petition to the extent of quashment of condition of security. Hence, this appeal by leave of the Court.

3. Kh. Ansar Ahmed, Advocate, the learned counsel for the appellants argued that the impugned judgment is against law and the facts of the case which is not sustainable in the eye of law. He contended that the learned High Court fell in error of law while not taking into consideration that the Banking Court while imposing the condition of furnishing the security has not exercised the discretion in a judicious manner. He added that the scheme of law laid down in Financial Institutions (Recovery of Finances) Ordinance, 2001

(hereinafter to be referred as Ordinance, 2001), does not permit the Court to impose the condition of security upon the banks. He submitted that the learned High Court committed a grave illegality while not attending the important aspect of the case that condition of furnishing the security can only be imposed where prima facie it appears that the decree will not be executed easily. He added that the learned High Court also failed to take into consideration that the powers available to the Court under section 10(9) of the Ordinance, 2001, are discretionary in nature and the same can be exercised only in appropriate circumstances, i.e., where there is an apprehension of abscondance, whereas, no such circumstances are existed in the instant case. He further added that the condition of security is unduly harsh and unreasonable in the instant case as the appellant-Bank is well

known established bank/financial institution of the country and there is no risk of its abscondance. He lastly submitted that the provisions of section 10(9) of Ordinance, 2001 is not applicable to the financial institutions rather the same is applicable to the private parties, but this aspect of the case remained escaped the notice of the High Court while passing the impugned judgment.

4. On the other hand, Mr. Masood A. Sheikh, Advocate, the learned counsel for respondents No.2 to 4, strongly opposed the arguments advanced by the learned counsel for the appellants. He submitted that the impugned judgment is perfect and legal which is not open for interference by this Court. He contended that concurrent findings have been recorded by the Courts below. The learned counsel for the appellants failed to point out any misreading/non-reading of record or any

violation of law, hence, interference by this Court is not warranted under law. He contended that section 10(9) of the Ordinance, 2001 empowers the Court to impose the condition of filing of the security and the learned High Court after appreciating the relevant provision of law passed the well reasoned judgment and has not committed any violation of law. He added that the learned High Court has already shown the leniency while modifying the order passed by the trial Court. He strongly submitted that the appellant-bank does not possess any property in the territory of Azad Jammu and Kashmir and if the decree is passed in favour of the respondents and there is right apprehension of the respondents that the same will not be executed. In this way, the condition imposed by the Banking Court for furnishing the

security is necessary to meet the ends of justice.

5. We have heard the arguments of the learned counsel for the parties and gone through the record along with the impugned judgment. The proposition involved in the matter in hand relates to the interpretation of section 10(9) of Ordinance, 2001. The main argument of the learned counsel for the appellants is that section 10(9) of Ordinance, 2001, is not applicable to the financial institutions rather the same is applicable to the private parties. He emphasized that the banks are working under the guarantee of the State Bank of Pakistan; therefore, there is no apprehension of closing of their business in Azad Jammu and Kashmir or abscondance there from. To appreciate the argument of the learned counsel for the appellants, we have minutely examined the relevant provision, i.e.

section 10(9) of the Ordinance, 2001. The learned High Court in the impugned judgment has already reproduced the same; therefore, we do not feel it necessary to reproduce the same again. The minute study of the relevant provision of law postulates that the language used in the same unambiguously speaks that the Banking Court is fully empowered to grant leave to defend the suit unconditionally or by imposing condition as to deposit of cash or furnishing of a surety as it thinks fit. In a case reported as *Messrs Sara Fashion Garments (PVT) Ltd. v. Al-Baraka Islamic Bank and others* [2010 CLD 1563], section 10(9) of the Ordinance, 2001, has been interpreted in the following manners:-

“5. For better understanding of the matter, section 10(9) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 is relevant to discuss which is reproduced as under:-

'(9) 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.'

6. It is ex facie clear from subsection (9) of section 10 of the Financial Institution (Recovery of Finances) Ordinance, 2001 reproduced above that the learned Judge Banking Court is fully empowered to grant leave to defend keeping in view the circumstances of each case. This section delegates the discretionary powers upon the learned Judge Banking Court that he, if thinks appropriate, may grant leave to defend unconditionally, or by imposing the condition as to deposit of cash or furnishing of a surety."

It may also be observed here that the discretion exercised by the Banking Court under section 10(9) of the Ordinance, 2001, is not to be interfered with unless it is shown that the same was exercised in a fanciful or arbitrary manner. The language of section 10(9) shows that no distinction has been made between the private party and the bank. While

granting the leave to appear and defend the suit conditionally or unconditionally the sole consideration is the satisfaction of the Court. The learned counsel for the respondents during the course of arguments taken the stance that the bank has no property/assets in the territory of Azad Jammu and Kashmir and in case the decree is passed in favour of the respondents its execution may create hardships, is not without substance. The learned counsel for the appellants failed to bring anything on record from where it can be ascertained that the appellants have any property/assets in the territory of Azad Jammu and Kashmir, therefore, the apprehension shown by the respondents seems to be genuine. Keeping in view the circumstances of the case we are of the view that the Banking Court while imposing the condition of furnishing security has exercised the discretion

in a judicious manner and the learned High Court rightly upheld the order passed by the Banking Court. Another aspect of the case is that under section 44 of the Interim Constitution Act, 1974, the writ petition lies only on the violation of law, whereas, in the instant case the Banking Court while passing the order for furnishing the security was not committed any violation of law, hence, the writ petition was not competent. Reference may be made on a case reported as *AJ&K Govt. and 4 others v. Dr. Muhammad Amin* [2014 SCR 258], wherein it has been held that:-

“Writ petition is only competent where there is any violation of law or any statutory provision or celebrated principle of law and justice.”

In another case reported as *Parveen Azam & others v. S.S.P. District Mirpur & 4 others*

[2015 SCR 837], this Court observed as under:-

“7. According to the spirit of constitution, writ jurisdiction can be exercised where there is violation of law or principle of law.”

As we have reached the conclusion that the Banking Court was justified to grant leave to appear and defend the suit subject to furnishing of the security and the learned High Court has not committed any illegality while upholding the order of the Banking Court, therefore, interference by this Court in the findings concurrently recorded by the Courts below is not warranted under law.

6. For the forgoing reasons, this appeal being devoid of any force is hereby dismissed with no order as to costs.

Before parting with the judgment it may be observed here that the suit was filed in

the year 2014, a period of more than 2 years has been elapsed, but no positive result has come out, therefore, the Banking/Trial Court is directed to decide the suit expeditiously within a reasonable time.

Mirpur, **JUDGE** **CHIEF JUSTICE**
_.03.2017

Date of announcement: 01.04.2017