

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:

Ghulam Mustafa Mughal, J.

Civil PLA No. 85 of 2019
Civil Misc. No. 49 of 2019

Ali Akram and another.

.... PETITIONERS

VERSUS

M/s Bank of Khyber and others.

..... RESPONDENTS

(On appeal from the judgment & decree of the
High Court dated 11.2.2019 in Civil Appeal No.
87 of 2018)

FOR THE PETITIONERS: Mr. Taimoor Ali
Khan, Advocate.

FOR THE RESPONDENTS: Mr. Javed Najam-
us-Saqib, Advocate.

Date of hearing: 21.5.2019.

ORDER:

Ghulam Mustafa Mughal, J.— The captioned petition for leave to appeal has been directed against the judgment and decree dated 11.2.2019 passed by the Azad Jammu & Kashmir High Court in civil appeal No. 87 of 2019.

2. The precise facts forming the background of the captioned petition for leave to appeal are that M/s Bank of Khyber, respondent No.1, herein, filed a suit for recovery of principal amount Rs. 20,448,668/- along with markup Rs.1884,330/- in all Rs.22,333,018/- before the Banking Court Mirpur on 22.4.2017. It was averred that on the request of defendants the plaintiff-Bank approved and disbursed the (i) Demand Finance-1 of Rs.4.200 million, (ii) Demand Finance -II of Rs..15 million and (iii) Running Finance Facility of Rs.2.5 million respectively on 15.4.2016, 28.4.2016 and 15.4.2016 for the business against the securities

and documents. It was further averred that the defendant also executed certain relevant documents mentioned in the suit. On fulfilling the requisite criteria, the finance was sanctioned against the security of hypothecation of stock. It was alleged that defendant No.2 executed agreement for financing and other documents to pay on demand amount and defendant No.5 executed mortgage deed in respect of property bearing plot No. 52, 53-A, Old Industrial Estate, Sector D-1, Mirpur along with construction, registered with Sub-Registrar Mirpur dated 8.3.2016 and mortgage deed regarding the property bearing plot No. 3-C, Sub Sector F-1, Mirpur Registered with Sub-Registrar Mirpur dated 19.4.2016. It was further alleged that defendant No.3 executed the mortgage deed regarding the property bearing Plot No. 3-B, sub sector F-1 Mirpur registered with Sub Registrar Mirpur dated 19.4.2016. It was averred that as per terms and conditions of the finance agreement, an amount of Rs.22.333 million is

outstanding against the defendants on 19.4.2017 and they are duty bound to pay the same, but they have not performed the duty on their part. It was further averred that the defendants were requested time and again to fulfill their contractual obligations but they failed to do so. It was prayed that a decree for recovery of Rs.22.33 million along with costs of funds/markup from the date of default till realization of the suit amount may be passed. The defendants filed an application for permission to defend the case on 15.7.217 while raising preliminary objections stating therein that expiry date of agreement with plaintiff-bank is 30.9.2017, therefore, before expiry of the period, the suit is liable to be dismissed. It was further stated that the suit has been filed without valid power of attorney, hence, on this score too, it is liable to dismissed. After hearing the parties the Banking Court vide judgment and decree dated 29.6.2018 while refusing the application to defend the suit passed a decree of

Rs.2,23,33,018/- along with the cost of the suit as well as the cost of funds from the date of default till the realization of whole decretal amount in favour of the plaintiff. Feeling aggrieved from the judgment and decree passed by the Banking Court, the petitioners, herein, filed an appeal before the Azad Jammu & Kashmir High Court on 1.8.2018. The learned High Court vide impugned judgment and decree dated 11.2.2019 has dismissed the appeal.

3. Mr. Taimoor Ali Khan the learned Advocate appearing for the petitioners while referring to the power of attorney on the basis of which the suit was filed before the Banking Court argued with vehemence that Mr. Qammer Shahzed Awan, the attorney holder could institute the suit only while associating another attorney as is contemplated in clause (A) 9 of the power of attorney. He further argued that the appeal before this Court has also been filed by associating two other attorney holders as is provided in the relevant law, thus the very

institution of the suit was invalid and the learned Judge Banking Court as well as well as the High court has not properly considered the matter in a legal fashion. The learned Advocate argued that the plaint was also defective because it was not fulfilling the conditions of section 9(3)b of the Financial Institution (Recovery of Finance) Ordinance 2001 because neither the total amount was mentioned in the plaint nor the dates of recovery are listed therein. The learned Advocate further argued that as per agreement the last date of expiry was 30.9.2017, whereas the suit has been filed on 22.4.2017 on earlier date, which was not maintainable. The learned Advocate argued that through the impugned judgment the learned High Court has not attended the legal provisions of sections 9 and 10 of the Financial Institution (Recovery of Finance) Ordinance 2001.

4. Conversely, Mr. Javed Najam-us-Saqib, the learned Advocate appearing for the respondents has argued that the defect, if any,

in the attorney has already been rectified through the same attorney, therefore, this ground is not available to the petitioner and has rightly been rejected by Courts below. The learned Advocate argued that in order to grant the relief to defend the suit, the conditions listed in section 10(3) and (5) of the Financial Institution (Recovery of Finance) Ordinance 2001 had to be fulfilled and the petitioners have not fulfilled the same. He argued that as the necessary particulars were missing in the application, hence, the application has rightly been dismissed. The learned Advocate further argued that the Bank is entitled to file recovery suit as and when default in payment of installment is committed by the party, therefore, it cannot be said that the suit was premature. In support of his submission the learned Advocate has placed reliance on an unreported judgment of this Court delivered in a case titled *Mujahid Hussain Kazmi vs. National Bank of Pakistan*

and another (Civil PLA No. 50 of 2019 decided on 30.4.2019).

5. After hearing the learned Advocates representing the parties and considering the record, I am of the view that the question as to whether the application for leave to defend has rightly been refused and the suit was properly instituted on the basis of valid attorney as has been argued by the learned Advocate for the petitioner, is a legal question of public importance requiring resolution in regular appeal. Leave is, therefore, granted to consider the same. The petitioners are directed to deposit security of Rs.1000/- failing which the leave granting order shall automatically stand rescinded. The office is directed to complete the file and place the same before the Hon'ble Chief Justice for constitution of bench.

6. There is also an application for interim relief. As leave has been granted in the case, therefore, the status quo prevailing at the moment shall be maintained till the disposal of the appeal.

JUDGE

Mirpur.
21.5.2019.