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Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT

Case No. R.F.A. No.221 /2013

Marahaba Pakistan International Bashir Designs Furniture and another	**Versus**	Habib Bank Limited and another

JUDGMENT

Date of Decision:	08.03.2017
Appellants by:	Mr. Saleem Akram Chaudhry, Advocate
Respondents by:	Mr. Hassan Iqbal Warraich, Advocate.

JAWAD HASSAN, J.- Through the instant appeal the Appellants have called in question the legality of impugned judgment and decree dated 16.01.2003 passed by the Respondent No.2-Banking Court No.1, Gujranwala whereby suit filed by the Respondents was decreed against the Appellants to the tune of Rs.13,34,828.74/- with costs of the suits and costs of the funds from the date of default till the full and final satisfaction of the decree.

2. The succinct facts of the case are that the Respondent-Bank instituted a suit for the recovery of Rs.13,34,828.74/- against the Appellants alleging therein that the Appellant No.2 deposited a cheque bearing No.1267 dated 05.06.2010 with the Respondent-Bank

for encashment and the same was credited in favour of the Appellant No.2 after its clearance from the Bank of New York, USA (the "Foreign Bank"). Subsequently, the said-cheque was allegedly found to be altered/fictitious by the Foreign Bank and the amount of said cheque ($.15,500), on demand was paid by the Respondent-Bank to the Foreign Bank. The Appellants filed an application for leave to appear and defend the suit but the Respondent No.2 dismissed the said application of the Appellants and decreed the suit vide the impugned judgment and decree. Hence, the instant appeal.

3. Learned counsel for the Appellants submitted that the impugned judgment and decree is against the law and facts, as such liable to be set aside on the grounds that the Respondent No.2, while dismissing the application for leave to appear and defend the suit filed by the Appellants, has not taken into consideration the contents of the same; that factual dispute is involved in the matter and the same cannot be resolved without recording of evidence; that the Respondent No.2 while passing the impugned judgment and decree has ignored this fact that the Respondent-Bank has not appended anything with the plaint to show that it has made payment to the foreign Bank; that the Respondent No.2 has not appreciated the fact that the foreign Bank was responsible for giving clearance without properly verifying the authenticity of the cheque deposited by the Appellant; that the Respondent No.2 passed the impugned judgment and decree without any jurisdiction as such all the proceedings before it were coram-non-

judice; that the impugned judgment is result of non-application of judicial mind by the Respondent No.2.

4. On the other hand learned counsel for the Respondent No.1-Bank vehemently contested the arguments advanced by the learned counsel for the Appellants and submitted that the impugned judgment and decree has rightly been passed by taking into consideration all the facts and circumstances of the case and therefore, does not call for any interference by this Court.

5. We have heard the arguments of the learned counsels for the parties and perused the record.

6. From the perusal of record it reveals that the crux of the matter is that the Appellant No.2 deposited a cheque with the Respondent No.1 for encashment which after due clearance from the Foreign Bank was credited in his favour but subsequently, the said cheque was allegedly found to be fictitious by the Foreign Bank and the amount (USD.15,500) was allegedly paid to the Foreign Bank by the Respondent No.1. For the recovery of the said-amount, Respondent No.1 filed a suit under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the "**Ordinance**") against the Appellants.

7. The term 'customer' is defined in section 2(c) of the Ordinance, which is reproduced herein below:

> *(c) "customer" means a person to whom finance has been extended by a financial institution and includes a person on whose behalf a guarantee or letter of credit has been*

issued by a financial institution as well as a surety or an indemnifier;

Whereas, the word 'finance' has been defined in section 2(d) of the Ordinance, which is reproduced herein below for ease of reference:

"(d) "finance" includes-

(1) an accommodation or facility provided on the basis of participation in profit and loss, mark-up or mark-down in price, hire-purchase, equity support, lease, rent-sharing, licensing charge of fee of any kind, purchase and sale of any property including commodities patents, designs trade marks and copy-rights, bills of exchange, promissory notes or other instruments with, or without buyback arrangement by a seller, participation term certificate, musharika, morabaha, musawama, istisnah or modaraba certificate, term finance certificate;

(ii) facility of credit or charge cards;

(iii) facility of guarantees, indemnities, letters of credit or any other financial engagement which a financial institution may give, issue or undertake on behalf of a customer with a corresponding obligation by the customer to the financial institution;

(iv) a loan, advance, cash credit, overdraft, packing credit, a bill discounted and purchased or any other financial accommodation provided by a financial institution to a customer;

(v) a benami loan or facility that is, a loan or facility the real beneficiary or recipient whereof is a person other than the person in whose name the loan or facility is advanced or granted;

(vi) any amount due from a customer to a financial institution under a decree passed by a Civil Court or an award given by an arbitrator; any amount due from a customer to a financial institution which is the subject matter of any pending suit, appeal or revision before any Court; any other facility availed by a customer from a financial institution."

8. In the above definitions, the word "customer" is limited to a person to whom finance has been extended and includes a person on

whose behalf a guarantee or letter of assurance has been issued by a financial institution. It means, any persons, other than defined in section 2(c) of the Ordinance, do not come within the definition of a "customer". Merely being account-holders of the Respondent-Bank, the Appellants cannot be considered as customers. And the amount allegedly credited in the account of the Appellants on deposit of a cheque also does not come within the purview of "finance". Similarly, any facility defined in the definition provided by a financial institution covers within the ambit of "finance". Hence, opening of an account and deposition of amount by an account holder would not be considered as finance.

9. The Hon'ble Supreme Court of Pakistan in ***Summitt Bank vs Qasim and Co*** **(2015 S C M R 1341)** held as under:

> *"as regards the appellant's contention that only the Banking Court, established under the Act had jurisdiction in the matter, it may be noted that, as is now clear from the above discussion, neither there was any question pertaining to "finance" as defined by section 9 of the Act, nor the question as to whether the Respondents were "customers" in the context of the Act involved in the matter, and no documents were executed by the Respondent securing re-payment of the alleged liability. The suit for recovery was filed by the Respondents for the amount that was deducted out of their monies lying in their account, illegally and unauthorizedly and thus the Banking Court had no jurisdiction in the matter as the same was constituted to adjudicate upon the matter pertaining to "finance" between bank and its customer, we therefore, did not find any jurisdictional error in the matter."*

10. Similarly, in case titled ***Haji Dad vs. MCB*** **(2011 C L D 7 8 5)** the division Bench has held that in the present, case, the Appellants have claimed that they had deposited their amount with the

respondent-Bank, but has not been credited in their account. Their claim of recovery of amount and damage do not come within the jurisdiction of the Banking Court in the light of above discussion. Having regard to the facts and considering the law, we find no illegality or irregularity in the impugned orders.

Moreover, recently this Court in ***Amitex vs. Bankislami Pakistan*** **(2016 C L D 2007)** held that any alleged default in fulfillment of any obligation regarding any representation, warranties and covenants by a financial institution is not enforceable in the special jurisdiction under the Ordinance. This construction also lends credence to the scheme and policy of the Ordinance which has been enacted primarily to act as an engine of recovery of defaulted finance by the financial institutions and not vice versa. The customers may have a cause of action but that is limited to and enforceable in the Courts of general jurisdiction only. The definition of the term 'obligation' in fact restricts the meaning of the term within a certain periphery. Rather than expanding it, the meaning is exhausted and limited. It is limited to only two facets of obligation. A contextualist approach will be employed here. It is equally true that rules of interpretation are merely tools employed by Courts to ascertain the true meaning of a provision in a statute in case of ambiguity. These rules are not immutable and are subject to exception. Every rule, in a given situation, is capable of being administered differently and according to context, with necessary variations.

In the case of ***Avari Hotel vs. ICP*** (**2000 Y L R 2407)** the Court held as under:

> *"that again from a bare reading of the above section it is clear that the jurisdiction of a Banking Court is only attracted where a' borrower/customer or a Bank commits a default in fulfilling any obligation with regard to any loan or finance. Only then could they institute a suit in the Banking Company by presenting a plaint duly supported by statement of account etc. So also it would be seen that the definition of the word "borrower" as per section 2(c) means a person who has obtained a loan under a system based on interest from a Banking Company and "customer" as per section 2(d) means a person who has obtained finance under a system which is not based on interest from a Banking Company. Of course, the definitions of the terms "Finance" and "loan" as given in section 2(e) and (f) of the Act are very wide and include not only an outright loan of money but involve numerous financial instruments as well including bills of exchange, promissory notes etc., the purpose of which is to cover all possible forms of banking and financial transactions. In view of all the above provisions of the Act, in my opinion, in order that a Banking Court may assume jurisdiction in any particular matter it first must be established that there is a present relationship of borrower/customer and banker between the C parties and further that some default has been committed by either party with regard to any loan or finance, obtained by the borrower/customer from the Bank as a consequence of such relationship. In the present matter it is admitted by all concerned that although it may be that in the past there was a relationship of borrower/customer and banker between the parties but at present there is none as all the amounts owed by the plaintiff to the defendants have been fully paid back. In fact, the suit has not been filed by the plaintiff against the defendants for any alleged default in fulfilling any obligation by the defendant with regard to any loan or finance. On the other hand, the suit has been filed by the plaintiff for the purpose of redeeming securities deposited with the defendants as consideration for the loans extended by the defendants to the plaintiff. An ancillary prayer of the plaintiff is that the propriety audit proposed to be conducted by the defendants into the financial affairs of the plaintiff be injucted against. Such propriety audit is referred to in clause 21 of the Restructuring Agreement dated 30-12-1989 the purpose of which is to give some financial control over the affairs*

> *of the plaintiffCompany to the defendants. Such purpose is manifest in the letter addressed to the plaintiff by ICP (defendant No. l) a copy of which has been filed as Annexure J1-1. to the plaint, which is critical of the financial affairs of the plaintiff-Company as regards its indebtedness to various banks/financial institutions, its debt servicing, failure to pay dividents, huge accumulated losses and unpaid tax demands etc. However, again the fact is that the said letter does not refer to any overdue loans at all as far as the defendants are concerned. In my view, therefore, the letter under reference addresses the defendants rights as shareholders in the plaintiff Company and not as their Bankers and does not at all concern the rights and obligations between the parties as to any financial engagement in their capacity as banker and customer respectively.*

Furthermore, in ***Muhammad Khalid vs. Prime Bank*** **(2001 Y L R 905)** this Court held that:

"the Banking Court has no jurisdiction to try a suit between an account holder and the Banking Company by holding that the customer could only file a suit under the provisions of Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 if there was some dispute with the banking company in fulfilling any obligation with regard to any loan or finance. Sections 7(4) and 9(1) of aforesaid Act provide that any dispute with regard to fulfilment of conditions of loan and liability arising out of the contract executed by the bank and the customer can be agitated in Banking Court but in the instant case the defendants availed no financial facility from the plaintiff-bank and was merely an account holder".

In addition**,** in ***Atlantic Carpets through Partner v. Messrs Emirates Bank International*** **(2000 MLD 1850),** the court held that the

customer can only file a suit under the applicable Act if there is some dispute with the banking company in fulfilling any obligation with regard to any loan or finance. Plaintiff in his entire suit has not stated a single word that the defendant-bank has committed default of this nature.

11. Recently the Sindh High Court in ***Pakistan General Insurance vs. MCB*** **(2015 C L D 600)** held that the question that has to be decided in these appeals is whether or not the appellant, which is an insurance company and which may have provided an insurance coverage to the goods imported against letters of credit opened by respondent No.1 on behalf of Respondent No.2, falls within the definition of "customer" as given in section 2(c) of the Ordinance of 2001 in relation to any "finance" as defined in section 2(d) of the Ordinance. It is, therefore, necessary to appreciate, examine and decide this elementary and important question first, which goes to the root of these cases in our opinion. In order to do so, the definitions of "customer" and "finance" envisaged in clauses (c) and (d), respectively, of section 2 ibid will have to be understood. It is an admitted position that no finance facility was granted by respondent No.1 to the appellant, and the facility of letters of credit was granted by Respondent No.1 to Respondent No.2/importer. It was the case of respondent No.1 before the Banking Court that the appellant was their customer in view of the insurance coverage provided by the appellant against letters of credit opened by them on behalf of respondent No.2. The impugned judgments are completely silent whether the appellant was held to be a customer of respondent No.1 or not as no issue to this

effect was framed, although Issue No.1 was specifically framed as to whether Respondents 3 and 4 fall within the definition of ‘customers’ under the Ordinance . It appears that the suits were decreed against the appellant because of the words "as well as a surety or an indemnifier" included in the definition of customer given in section 2(c) ibid. We have already established that the Appellant is not a customer of Respondent No.1 within the meaning of section 2(c) ibid in relation to any finance as defined in section 2(d) ibid. After giving due consideration to all the aspects of these cases, we have no hesitation in holding further that there is no relationship of financial institution and customer between Respondent No.1 and the Appellant; the Banking Court had no jurisdiction to entertain or adjudicate upon the Suits against the Appellant; and, all the impugned judgments and decrees against the Appellant are *coram non judice*. As such, the same cannot be allowed to remain in the field and are liable to be set aside.

12. In view of what has been discussed above, the Banking Court had no jurisdiction to try the suit between an account holder and the Banking Company when there was no dispute with the banking company in fulfilling any obligation with regard to any loan or finance. Sections 7(4) and 9(1) of aforesaid Ordinance provides that any dispute with regard to fulfilment of conditions of loan and liability arising out of the contract executed by the bank and the customer can be agitated in Banking Court but in the instant case the Appellants availed no financial facility from the Respondent No.1-Bank and was merely an account holder.

13. We, therefore, suffice to hold that the impugned judgment and decree passed by the Respondent No.2-Banking Court is without jurisdiction and as such, is liable to be set aside. Consequently, the instant appeal is hereby accepted and the impugned judgment decree dated 16.01.2013 is hereby set aside.

(ABID AZIZ SHEIKH)
JUDGE

(JAWAD HASSAN)
JUDGE

Approved for reporting.

JUDGE JUDGE

M.NAVEED