2010 C L D 896

[Karachi]

Before Gulzar Ahmed and Irfan Saadat Khan, JJ

Messrs SPEEDWAY FONDMETALL, PAKISTAN LTD.---Appellant

Versus

NIB BANK LTD.(Formerly PICIC)---Respondent

First Appeal No.27 of 2009, decided on 9th June, 2010.

(a) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss.9, 10 & 22---Suit for recovery of finance---Plaint finding mention filing of statement of accounts---Suit decreed by Banking Court after dismissing leave application---Plea of defendant in appeal that no statement of accounts was filed with plaint---Validity---Defendant along with appeal had filed copy of plaint, which found mention filing of certified statement of accounts---Defendant had neither filed copies of statement of accounts with appeal nor requested to court for calling of record of suit so as to enable court to examine as to whether such statement did comply with requirements of S.9(2) of Financial Institutions (Recovery of Finance) Ordinance, 2001--Presumption would be that plaint finding mention filing of certified statement of account was so and not otherwise---High Court 'repelled such plea in circumstances.

PLD 1985 SC 405; PLD 2005 SC 842; PLD 2000 Lah.232 and 2008 CLD 449 ref.

(b) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----S.2(d)---Negotiable Instruments Act (XXVI of 1881), S.5---Pakistan Investment Bond (PIB) sold by Bank---Validity---Such bond being a bill of exchange would be a finance under Financial Institutions (Recovery of Finances) Ordinance, 2001.

(c) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss.9, 10 & 22---Civil Procedure Code (V of 1908), O.XX, R.5---Suit for recovery of finance---Suit decreed by Banking Court after dismissing leave application---Defendant's plea in appeal that Banking Court had not considered in its judgment issues raised by him in leave application---Validity---Provisions of O.XX, R.5, C.P.C., would apply to a suit wherein issues had been framed and only then court would be required to state its finding with reasons on each issue---Questions of framing of issues and then deciding matter as per O.XX, R.5, C.P.C., by Banking Court would have arisen, if defendant's leave application had been granted and suit put to trial---Suit had never went to trial due to dismissal of defendant's leave application, thus, no occasion had arisen to frame issue and make compliance of O.XX R.5, C.P.C.---High Court repelled such plea in circumstances.

Emmadul Hassan for Appellant.

Syed Mamnoon Hasan for Respondent.

Dates of hearing: 3rd and 9th February, 2010.

JUDGMENT

GULZAR AHMED, J.---By this appeal, the appellant has challenged the judgment and decree dated 11-7-2009 passed by the learned Banking Court-I at Karachi, by which the suit filed by the respondent against the appellant was decreed in the sum of Rs.25,455,981 with mark up at the rate of 11% per annum from the date of suit till payment and cost of suit.

Mr. Emmadul Hassan, learned counsel for appellant has contended that no statement of account was filed with the plaint but the documents filed with the plaint merely contain calculation and the statement of account filed by the appellant shows amount is receivable from the respondent. He further argued that appellant was not allowed to record evidence and no mark up was to be paid and the appellant is not a customer as there was no transaction of finance between the parties and although substantial point was raised in defence, the Banking Court failed to grant leave to defend the suit and that the documents of purchase of bond of Rs. 100 million were not filed. He has contended that Banking Court has failed to consider in its judgment the issues raised by the appellant and that the judgment was not in accordance with Rules 5 of Order XX, C.P.C.

Syed Mamnoon Hassan, learned counsel for the respondent contended that the appellant has not denied the execution of any of document filed with the plaint and that the appellant was sold bond only for 185 days which was to be returned with 11% profit and as the appellant failed to return the bond and failed to pay the profit, the appellant violated the master repo agreement and thus incurred the liability for which the suit was filed. He contended that the transaction between appellant and the respondent was that of purchase and sale of security instrument in terms of section 2(d) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 which is an obligation in terms of section 2(e) of the same Ordinance. He contended that the respondent did file statement of account with the plaint and that in the application for leave to defend the only plea raised by the appellant was against charging of mark up on mark up. He further contended that the appellant has admitted its liability and that there was no provision in the master repo agreement for charging market price and interest and that appellant has not challenged in the appeal the order by which the leave to defend the suit was refused. He has further contended that no notice in terms of section 22(2) of the Ordinance was given by the appellant to respondent. In support of his submissions he has relied upon the cases of PLD 1985 SC 405, PLD 2005 SC 842, PLD 2000 Lah.232 and 2008 CLD 449.

In rebuttal the counsel for the appellant argued that the bonds were legally transferable and it was the appellant who has extended finance to respondent and that there was a repurchase agreement between the parties.

We have considered the submission made by learned counsel and have gone through the record.

Brief facts of the matter are that the appellant and respondent have entered into the master repurchase agreement dated 28-11-2000 which provides that from time to time parties may enter into transactions in which one party through a designated office (Seller) agrees to sell to other acting through a designated office (Buyer) securities and financial instruments (securities) against the payment of the purchase price by buyer to seller 'with a simultaneous agreement by buyer to sell to seller securities equivalent to such securities at a date certain against the payment of purchase in money by seller to buyer. It appears that pursuant to such agreement the respondent and appellant entered into a reverse repo contract dated 2-7-2004 whereby the appellant was required to sell to the respondent Pakistan Investment Bond (PIB) 10 years date of issue 24-10-2002 maturity date 24-10-2012 for an amount of Rs. 100,000,000.00 (Rs.100 million) for settled price of Rs.101,140,400.00 settlement date of 3-1-2005. The said PIB was carrying interest rate of 11% which was to be paid to the respondent on furnishing of its coupon and that on the date of transaction the market value of said PIB was Rs. 119 million. The appellant, however, defaulted in complying with its obligation under reverse repo contract as the appellant seems to have delivered/handed over the said PIB of Rs. 100 million to Messrs Pak. Oman Investment Company Ltd. (POICL) against a repo facility and on failure of the appellant to meet its obligation to POICL, the said company sold the said PIB in market. On adjustment of its dues, POICL is alleged to have returned a substantial surplus amount to the appellant which the appellant diverted to its own account instead of passing it to respondent. The respondent gave legal notice dated 25-4-2006 to the appellant claiming an amount of Rs.25,455,981 which was replied by the appellant through its letter dated 22-5-2006 in which it, inter alia, stated that it was stanch of fulfill its commitment on due date with the respondent according to contract but on account of respondent reporting to financial market association on 4-12-2004, resulted in cancellation of its credit lines in financial market. The appellant also attached factual statement of account as on date and stated that it has requested the Chairman Local Credit Advisory Committee of State Bank of Pakistan for resolution of the matter. As the amount claimed by the respondent was not paid by the appellant, the respondent filed the suit for recovery of Rs.25,455,981 in the Banking Court against the appellant. The appellant filed application for leave to defend the suit to which the respondent filed replication. After hearing the counsel for the parties, the Banking Court through order dated 28-5-2008 rejected the appellant's application for leave to defend the suit and put off the matter of for filing of respective breakup of account with supporting documents. The breakup was filed by the parties and after hearing the counsel for the parties, the impugned judgment and decree was passed by the Banking
Court.

As regards the first submission of learned counsel for the appellant that no statement of account was filed with the plaint, it may be noted that with the memo of appeal the appellant has filed copy of plaint, para 8 of which refers to filing of copies of true and certified summary of respondent's claim/account statements showing amount receivable (coupon) and statement showing the amount payable against repo borrowing as annexures 1(i), 1-(ii) and 1-(iii). Such copies of statement of account have not been filed by the appellant with the memo of appeal nor the appellant counsel made any request to the Court for calling of R & P of the suit so as to enable the Court to examine as to whether

statement of account filed by the respondent with the plaint did comply with the conditions as provided in subsection (2) of section 9 of the Ordinance. The appellant having filed copy of plaint with appeal which itself mentions filing certified statement of account, the presumption would be that it was so and not otherwise.

As regards next argument of counsel for the appellant that no opportunity was allowed by the Banking Court to record evidence, it may be noted that the question of recording of evidence would have arisen, had the Banking Court allowed the appellants application for leave to defend the suit. The admitted position on the record is that the Banking Court after hearing the counsel for the parties through order dated 25-5-2008 rejected the appellant's application for leave to defend the suit as it found that there is only dispute between the parties regarding charging of markup and transaction itself was not disputed and therefore directed the parties to file their respective breakup of account with supporting document and on considering these documents proceeded to pass the impugned judgment and decree. Learned counsel for the appellant has not settled before us as to what were the substantial questions of law and facts on the basis of which the appellant was entitled to grant of its application for leave to defend the suit and suit ought to have put on trial. In the absence of such argument, we are afraid that we cannot subscribe to the submission of the appellant counsel.

As regards the next submission of the counsel for the appellant that there was no relationship of customer and that the transaction was not that of finance in the terms of Ordinance, it may be noted that it is not disputed that respondent is a financial institution with which the appellant has entered into master repurchase agreement dated 28-11-2000 pursuant to which the reverse repo contract was made between the respondent and appellant. The term "finance" is defined in section 2(d) of the Ordinance clause (i) of it reads as follows:

> (d) "finance" includes.--
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> (i) an accommodation or facility provided on the basis of participation in profit and loss, markup or mark-down in price, hire-purchase, equity support, lease, rent-sharing, licensing charge or 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 buy-back arrangement by a seller, participation term certificate, musharika, morabaha, musawama, istisnah or modaraba certificate, term finance certificate;

The above definition includes bill of exchange as finance. The PIB as admitted by the appellant in para 6 of its leave to defend application, was a negotiable instrument and it is also admitted by the appellant in its letters dated 22-12-2004 so also in its letter dated 1-1-2005 filed as annexures `F' and 'G' with the counter affidavit of the respondent that such bonds belonged to respondent. By virtue of section 5 of the Negotiable Instruments Act, 1881 bill of exchange is a negotiable instrument. Thus the transaction between respondent and appellant of PIB will be a finance under the Ordinance for that the PIB is a bill of exchange.

As regards the further submission of learned counsel for the appellant that the documents on the basis of which Rs. 100 million PIB was purchased by the appellant from the

respondent were not filed, suffice to note that fact of purchasing of the PIB of Rs.100 million from the respondent by the appellant was not disputed at all rather such fact was specifically admitted by the appellant in para 3 of its application for leave to defend the suit in which the market value of PIB being of Rs. 119 million was also specifically admitted and there was admittedly a reverse repo contract dated 2-7-2004 for selling the said PIB by the appellant to the respondent. In the same para, the appellant has admitted the fact that the respondent was entitled to the payment of interest amount upon coupon at the rate of 11% per annum. In view of such admitted material on the record, there is no basis to argue that the documents regarding purchase of PIB of Rs.100 million were not filed by the respondent as this fact, stood specifically admitted by the appellant.

It was further argued by the learned counsel for appellant that the Banking Court has failed to consider in its judgment the issues raised by the appellant in accordance with rule 5 of Order XX, C.P.C. Talking in strict terms, the provision of rule 5 of Order XX, C.P.C. applies to a suit in which issues have been framed and it requires the Court to state its finding or decision with reasons on each separate issue. The questions of framing of issues and then deciding the matter as per rule 5 of Order XX, C.P.C. by the Banking Court would have arisen where the appellant's application for leave to defend the suit had been granted and the suit put to trial. The appellant's application for leave to defend the suit was dismissed and the suit never went on trial and no occasion arose to frame issues or to make compliance of rule 5 of Order XX, C.P.C.

Having discussed all the objections and arguments of the counsel for appellant and finding no force in them, we have proceeded to consider the amount of decree that has been passed by the Banking Court. The summary of account was examined and it was found that besides charging 11% coupon amount of PIB, the respondent has also added market value of PIB and thereafter deducted the amount of expenses less the amount received (Repo). The respondent counsel was unable to show as on what basis the market value of PIB was added in the summary. We have, therefore, excluded the amount of market value and on such exclusion the amount due from the appellant to the respondent comes to Rs. 17,358,981. We have, therefore, modified the amount of decree by reducing the same from Rs.25,455,981 to Rs.17,358,981 and maintained the other reliefs. The appeal with the above modification in the decretal amount was dismissed by short order dated 9-2-2010. Above are the reasons for the same.

S.A.K./S-44/K Appeal dismissed.

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