IN THE HIGH COURT OF SINDH AT KARACHI

First Appeal No. **51** of **1999**

Present:
Mr. Justice Irfan Saadat Khan
Mr. Justice Zafar Ahmed Rajput

Appellants	:	A. Habib Ahmed & another in person
Respondent	:	Meezan Bank Limited (Former Hongkong and Shanghai Banking Corporation, through Mr. Ghulam Mustafa, advocate
Date of hearing	:	27.01.2016
Date of order	:	27.01.2016

J U D G M E N T

ZAFAR AHMED RAJPUT, J : By this appeal, under section 21 (1) of the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1979, the appellants/defendants have challenged the legality and validity of the judgment and decree dated 04.12.1998 and 14.01.1999 respectively, passed by the Banking Court No. III, at Karachi, whereby Suit bearing No. 947 of 1992, filed by the respondent-Bank/ plaintiff, was decreed against the appellants in the sum of Rs. 63,32,900/- with costs and future mark-up from the date of filing of the suit at the rate of 10% p.a.

2. Respondent-Bank initially instituted the suit against the appellants being No. 733 of 1987 in this High Court on 29.09.1987; later on, at the request of learned counsel for the respondent-Bank, the plaint in the suit was returned to respondent-Bank by the Court for want of jurisdiction, vide order dated 05.09.1991 and it was; thereafter, the plaint was presented before the Banking Tribunal-1, Karachi, where a new number as Suit No. 947 of 1992 was assigned to it.

3. Briefly stated facts of the case, as narrated in the memo of plaint, are that the respondent is a banking company within the meaning of section 2(a) of the Banking Companies (Recovery of Loans) Ordinance, 1979, while the appellant/ defendant No. 1 is a stock broker and deals in shares and securities, and the appellant/defendant No. 2 is a proprietary concern, owned by the appellant No. 1. It was averred that the appellant No. 1, who was maintaining one account in his name and another account in the name of appellant No. 2 with the respondent-Bank, availed running finance facilities of Rs.10 million in each of two accounts, totaling Rs.20 million and in this regard, on 18.02.1986, he executed agreement for finance on mark-up basis, demand promissory notes, personal guarantees, agreement for pledge of securities and thereby, pledged 298600 shares of the Boots Company (Pakistan) Limited of the face value of Rs.10/- each. It was also averred that under the terms and conditions of the finance facilities the appellants undertook to pay to the respondent-Bank, in case of default, a sum equivalent to 20% of the amount demanded by the respondent-Bank as liquidated damages. It was the case of the respondent that the appellants committed default in payment of markup and even in maintaining the margin of the current market value of the shares with the outstanding amount and made only one payment in the sum of Rs.8,21,150/- which was received as an endorsement to the respondent-Bank of dividend payment accrued on the shares pledged with the bank; therefore, respondent-Bank after informing the appellants started selling the pledged shares from 10.05.1987 onwards till 18.05.1987, through the Stock Exchange Brokers and a sum of Rs.1,66,67,100/- was realized out of said sale proceeds; however, after adjustment of said sale proceeds, a sum of Rs.70,97,535/- still remained

payable by the appellants in both the accounts. Hence, the afore-mentioned suit was filed by the respondent-Bank for the recovery of Rs.70,79,535/-, liquidated damages of Rs.14,19,507/-, and all other costs, charges, commissions and expenses.

4. The appellants resisted the suit by filing their joint written statement in which they admitted availing of finance facilities, but asserted that besides 2,98,600 shares of Boot Company Limited, other 25,500 shares of the said company, 12800 shares of M/s. Pak Davis and 7,700 shares of M/s. Abbot Laboratory which were in the name of appellant No.1 and his family members, were also pledged as security, which fact the respondent-Bank did not disclose in its plaint. It was further asserted that whatever amount was due against them, has been recovered by the respondent-Bank by sale of the pledged shares. It was also asserted that the markup charged by the respondent-Bank was contrary to law and it was illegal. It was further asserted that the respondent-Bank filed the suit as a counter blast of their Suit bearing No. 428/1987, pending adjudication before High Court for declaration and damages of Rs.5,00,00,000/- in respect of the same transaction. It was pleaded by the appellants that after receiving the letters from respondent-Bank for the adjustment of outstanding liabilities, appellant No.1 made contact with the manager of the respondent-bank and requested for 30 days' time, which time was allowed to him; subsequently, time was again extended by assuring the appellant No. 1 that no adverse action would be taken by the respondent-Bank detrimental to his interest; however on 18.05.1987, he came to know that the respondent-Bank had secretly and surreptitiously sold out the pledged shares, which were purchased by share brokers themselves, who then offered the same for resale in the Stock

Exchange; therefore, he issued a legal notice to the Boots Company requesting them not to transfer the shares, but the company did not meet the terms. It was further pleaded that the shares were sold out by the respondent-Bank on a low price then the price of stock market, as the prevailing market price of the shares on the particular date was Rs.65/-per share but the same were sold out in the price of Rs.55/-, for that he raised objections and if the shares had been sold out on a proper price, the outstanding liability of the respondent-Bank would have adequately met and even some amount would have remained in balance, but the shares were sold out in a fraudulent way with the collusion of the bank officials, who earned the amount for themselves and; therefore, the respondent-Bank was not entitled to the amount claimed, as no amount was outstanding against them.

5. On the pleadings of the parties the then Banking Tribunal adopted the following consented issues:

1. *Whether the plaintiff's letter dated 28th January, 1987 (annexure-J and J/1 to the plaint) constitute reasonable notice in terms of section 167 of the Contract Act? If so, to what effect?*

2. *Whether apart from 2,98,600 shares any other shares were also pledged as additional securities in the account of Habib Ahmed and Habib & Habib (defendants No. 1 and 2) maintained with the plaintiff bank ? If so, to what effect?*

3. *Whether the price at which the pledged shares were sold by the plaintiff bank was reasonable in the circumstances? If so, to what effect?*

4. *Whether the amount of markup has correctly been charged?*

5. *What should the decree be?*

6. The learned Banking Judge after assessing the evidence on record, adduced by the parties, dropped the Issue No.3 and decided Issues No. 1 & 2 in favour of respondent-Bank and, while declining the mark-up beyond limit period, decided the Issue No.4 in favour of appellants and decreed the suit of the respondent-Bank, vide judgment and decree dated 04.12.1998 and 14.01.1999, respectively. Aggrieved by the same the appellants have preferred this appeal.

7. The appellant mainly contended that the impugned judgment is contrary to the facts on record and in violation of relevant laws; that the learned trial Court failed to take notice of the fact that no notice for the sale of pledged shares, as required under section 176 of the Contract Act, 1872 **("the Act of 1872")** was given by the respondent-Bank to the appellants, which renders the sale of the pledged shares as illegal and void; that the learned Banking Court failed to take notice of the fact that the purported sale of the pledged shares was also illegal as the provisions of section 62 of the Companies Ordinance, 1984 **("the Ordinance of 1984")** was not complied with by the respondent, which makes it mandatory to obtain the prior approval of the Securities and Exchange Commission of Pakistan **(SECP)** before effecting sale of more than ten per cent of the shares of the companies; that the impugned judgment is violative of and contrary to the provisions of Order XX, Rule 5 C.P.C., as the learned Presiding Officer of the trial Court did not adjudicate Issue No. 3; that the amount of Rs.8,21,150/- received by the respondent towards the dividend of appellants deposited shares has not been adjusted in the decretal amount, so also the bank received an amount of Rs.1,84,90,600/- from the sale of appellants deposited Boots shares but in the impugned judgment only Rs.1,66,67,100/-

has been shown as sale amount and the difference amount of Rs.18,23,500/- has not been adjusted in the case.

8. On the other hand, the learned counsel for the respondent while supporting the impugned judgment and decree contended that the learned trial Court while passing the impugned judgment and decree had considered the pleadings of the parties and evidence on recorded. He further contended that the provisions of section 176 of the Act of 1872 and 62 of the Ordinance of 1984 are not applicable in this case, as the notice, required under section 176 (ibid) was duly served upon the appellants and the respondent-Bank being a Financial Institution is not required to comply with the provisions of section 62 of the Ordinance of 1984. He also contended that since the issue No. 3 was the subject matter of the Suit No. 428 of 1987, filed by the appellants for injunction, declaration and damages against the respondent on the original side of this Court, the learned Banking Judge deemed it appropriate not to discuss the said issue and dropped the issue for the decision of learned Single Judge of this Court. He added that the learned Single Judge of this Court vide judgment dated 08.08.2007 dismissed the said suit of the appellants and against that, the appellants preferred Special High Court Appeal bearing No. 22 of 2008, which was also dismissed by the Division Bench of this Court, vide judgment dated 21.09.2015, therefore, the appellants cannot agitate said issue again in this appeal. He maintained that neither the decree passed by the Banking Court suffers from any miscalculation nor any amount other than the amount received from the sale proceeds of pledged shares and dividend was liable for the adjustment against the liabilities of the appellants.

9. We have heard the appellant No. 1 in person, learned counsel for the respondent-Bank and perused the material available on record.

10. In order to appreciate the contentions of the appellant No.1 and the learned counsel for the respondent-Bank, we deem it appropriate to reproduce the provisions of sections 176 of the Contract Act, 1872 and 62 of the Companies Ordinance, 1984, as under:

Sections 176 of the Contract Act, 1872:

"***176***. Pawnee's ***right where makes default***.___ *If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice to the sale.*

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor."

Section 62 of the Companies Ordinance, 1984:

62. Offer of shares or debentures for sale by certain persons. __ *(1) No person who holds more than ten per cent of the shares or debentures of a company shall offer for sale to the public any share or debenture of the company held by him except with the approval of the Commission.*

(2) Any document by which an offer for sale to the public is made by any such person as is referred to in sub-section (1) shall, for all purposes, be deemed to be a prospectus issued by a company, and all enactments and rules of law as to the contents, filing and registration of a prospectus and as to the liability in respect of statements in and omissions from a prospectus, or otherwise relating to a prospectus, shall apply with the modifications specified in sub-sections (3) and (4), and have effect accordingly, but without prejudice to the liability, if any, of the

persons by whom the offer is made in respect of mis-statement contained in the document or otherwise in respect thereof.

(3) For the purposes of this section, section 57 shall have effect as if the person making the offer were a person named in a prospectus as director of a company.

(4) Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document referred to in sub-section (2) is signed on behalf of the company or firm by two directors of the company or not less than on-half of the partners in the firm, as the case may be; and any such director or partner may sign by his agent authorized in writing.

(5) A notice, circular, advertisement or other document soliciting bids, offers, proposals or tenders for sale of shares or other securities acquired in the course of normal business or for negotiating sale thereof or expressing an intention to disinvest such shares or other securities issued by a scheduled bank or a financial institution shall not be deemed to be a prospectus or an offer for sale to the public for the purposes of sections 61 and 62."

11. So far the contention of appellant No.1 with reference to compliance of section 176 of the Act of 1872, which makes the pawnee's power of sale the thing pledged conditional on the reasonable notice being given to the pawnor, is concerned, it is an admitted position that the respondent-Bank had sent letters to both the appellants separately for the sale of pledged share on 28.01.1987.For the convenience sake one letter, out of two, is reproduced herein below:

"Mr. Habib Ahmed
722/723 Stock Exchange Building,
I.I. Chundrigar Road, *28 January, 1987*
K A R A C H I.

Our Ref: CDT870266

Dear Sirs,

RUNNING FINANCE FACILITIES AVAILABLE TO YOU UNDER A/C No. 01-030899-01

> Further to our letter No. *CDT861531 dated 10 AUG 86 we regret to note that you have not responded to our demand for adjustment of excess appearing under your above account.*
>
> *You would appreciate that as a commercial bank, we cannot permit the present position to linger on. As such we demand immediate adjustment of all the outstanding under the above account alongwith update mark-up accrued thereupon.*
>
> *Please be advised, if our above demand is not complied with within 10 days from the date of issue of this letter we will be constrained to start selling off securities' pledged by you with us to eliminate the said outstanding.*
>
> *Please arrange to contact either the undersigned or Mr. M.K.G. Scott as a matter of some urgency in this connection.*
>
> *Yours faithfully,*
>
> *G.F.BOYD*
> *DEPUTY MANAGER"*

12. These letters were not only duly acknowledged by the appellants but the appellant No.1 made an endorsement also to the effect that "*I accept the letter on condition if you allow me thirty days from today"*. From a plain reading of the above letter, it transpires that the respondent-Bank in clear terms demanded from the appellants for the adjustment of outstanding debt within 10 days from the date of issue of the letter, by intimating the intention that in case of non-compliance, the bank would be constrained to start selling off securities pledged by them to eliminate the outstanding debt. It may be relevant to observe here that a notice does not become invalid merely on failure to refer the relevant provision of law. It would be sufficient compliance of the requirement of section 176 (ibid) if the notice by the pawnee to the pawnor states that in case of default of payment of the debt within time stipulated, the pledged shares would be sold out by the

pawnee. We are; therefore, of the view that in the instant case the respondent-Bank duly made the compliance of section 176 (ibid) before exercising its right to sell the pledged shares of the appellant No.1.

13. It was the next contention of the appellant No.1 that the respondent-Bank did not comply with the provision of section 62 (1) of the Ordinance of 1984, which makes it mandatory to obtain prior approval of the SECP before effecting sale of more than ten per cent of the shares of the companies. It may be examined that sub-section (1) of the Section 62 of the Ordinance of 1984 refers to offer for sale to the public of ten per cent of the shares of a company held by a person except with the approval of the Commission. Any document by which an offer for sale to the public is made by any such person is deemed to be a "prospectus" in view of sub-section (2) of Section 62 (ibid). "Prospectus" is governed by the sections 52 to 66 of the Ordinance and is defined under section 2 (29) of the Ordinance, as under;

> *"prospectus" means any document described or issued as prospectus, and includes any notice, circular, advertisement, or other communication, inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate, or inviting deposits from the public, other than deposits invited by a banking company or a financial institution approved by the Federal Government, whether described as prospectus or otherwise.*

14. Hence, it may be examined that if any such prospectus is issued by the schedule bank or a Banking company/financial institution, bearing in mind section 62(5) of the Ordinance of 1984, it would not be construed a prospectus or an offer for sale to the public in terms of section 61 and 62 of the Ordinance. It may; therefore, in the instant case further be examined that the provisions of sub-section (1) of the section 62 of the Ordinance are not

applicable in the case of appellants, as the respondent-Bank is a "scheduled bank" in terms of section 2(32) of the Ordinance and it had obtained the shares from the appellant No.1, as security to the finance facilities availed by him, in the normal course of its banking business. As such, the requirement of seeking approval from the SECP is not applicable on the respondent-Bank in view of section 62(5) of the Ordinance of 1984.

15. As regards, non-adjudication of the Issue No. 3 by the learned Banking Judge, it may be seen that the said issue was dropped by the learned Banking Judge by observing that the appellants had already filed a suit (Suit No. 428 of 1987) in High Court against the respondent-Bank challenging the alleged sale of the pledged shares by the respondent-Bank at inadequate price; hence, the matter was directly in issue before the High Court in the said suit. In our view, no prejudice has been caused to the appellants if, for the said reasons, the learned Banking Judge did not adjudicate the Issue No.3, which was framed by the Banking Court from the pleadings of the appellants. It is an admitted position that subsequently, vide judgment dated 08.08.2007 the appellants' said suit was dismissed by the learned Single Judge of this Court, so also, the special High Court Appeal No. 22 of 2008, arising out of the said judgment, was dismissed by the Division Bench of this High Court, vide judgment dated 21.09.2015. The Issue No. 3, therefore, cannot be agitated before this Court. The impugned judgment, in our view, otherwise deals with all points raised and, thus, fulfills the requirements of law.

16. We also do not find any weight in the argument of appellant No. 1 with regard to the non-adjustment of amount of dividend i.e. Rs.8,21,150/-

and Rs.1,84,90,600/- received by the respondent-Bank from the sale proceeds of pledged shares of the appellants. As the appellants neither in their written statement nor even in their evidence have pleaded that the said amount of dividend was not adjusted by the respondent-Bank against their liabilities. On the contrary, in cross-examination, the appellant No. 1 has admitted that besides the one cash dividend payment of Rs.8,21,150/- he has not paid any amount toward markup and the respondent-Bank in paragraph No. 9 of the plaint has acknowledged the receiving of the said amount of dividend. Similarly, nowhere in the pleadings the appellants have claimed that the respondent-Bank, instead of Rs.1,66,67,100/-, had received an amount of Rs.1,84,90,600/- from the sale proceeds of pledged shares. Apparently, the appellants have taken this plea for opening a new case in this High Court Appeal, which was nevertheless the case of the appellants in their pleadings before the trial Court. It is settled principal of law that the parties are bound by their pleadings.

17. We do not find any infirmity in the impugned judgment and decree. This appeal is; therefore, dismissed with no order as to costs.

18. Above the reasons of our short order dated 27.01.2016, whereby the instant First Appeal was dismissed.

JUDGE

JUDGE

HANIF