

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Ind. Appeal No.20 of 2012

Khayyam Ahmed Khattani

Versus

Orix Leasing Pakistan Limited

Date: Order with signature of Judge

Date of hearing: 23.02.2018

Mr. S. Yasir Ahmed Shah for appellant.

Mr. Mukhtar Ahmed, Assistant Manager, Oriz Leasing Pakistan Limited in person.

Mr. Ijaz Ahmed, Amicus Curiae.

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This Second Appeal is against the concurrent findings of two Courts below. The trial Court returned plaint of the plaintiff/appellant in Suit No.613 of 2010 under order VII rule 10 CPC for its presentation before the Court having jurisdiction (Banking Court) which order was maintained by the appellate Court while dismissing Civil Appeal No.423 of 2010.

I have heard the learned counsel for appellant and representative of the respondent who appeared in person and so also Mr. Ijaz Ahmed, Amicus Curiae, appointed in the case for assistance of the Court.

The appellant filed suit for declaration, injunction and damages before the Court of V-Senior Civil Judge Karachi South in respect of trade transaction through an account maintained by appellant with Oriz Investment Bank Pakistan Limited. The transaction, as claimed to have been carried out by the respondent and the manner the respondent conducted itself, was challenged in the subject suit. The two subject terms and conditions of the account opening form for carrying out the

aforesaid object of trading, as entered into between appellant and respondent, are reproduced as under:-

“1. All transactions between the parties shall be subject to the Articles, Rules and Regulations of the Exchange, revised policies, Board Directions and new regulations to be framed in pursuance of Section 34 of the Securities & Exchange Ordinance 1969. Moreover, all applicable provisions of the Securities and Exchange Ordinance 1969 read with the Securities and Exchange Commission of Pakistan Act 1997, Brokers and Agents Registration Rules 2001, Securities and Exchanges Rules 1971 and all directions/directives passed from time to time to regulate the trades between the parties and to regulate Brokers conduct and the Central Depository Companies of Pakistan Act 1997, Rules framed there under and the National Clearing and Settlement System Regulations and any other law for the time being in force. The broker shall ensure provision of copies of all the above laws, rules and regulations at his office for access to the Account Holder (s) during working hours.

2. The amount deposited as security margin by the Account Holder(s) with the Broker shall only be used for the purposes of dealings in securities, such as trading and/or settlement of deliveries of securities on behalf of the Account Holder(s). The Broker shall not use such amounts for his own use.”

Perusal of the terms, highlighted above, discloses that it is not a normal term of a financial institution and customer. The term “Finance” is defined as Section 2(c) while the term customer is defined as Section 2(d) of Financial Institutions (Recovery of Finances) Ordinance, 2001, which are reproduced as under:-

“(c) “Customer” means;

(i) A person to whom finance has been extended by a Financial Institution within or outside Pakistan 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.

(d) “Finance” includes

(i) any accommodation or facility provided on the basis of participation in profit and loss, mark-up or markdown 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, trademarks and copy-rights, bills of exchange, promissory notes or other instruments with or without By-back arrangements by a seller, participation term certificate,

musharika, morabaha, musawama, istisnah or modarba 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;

(vii) 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;

(viii) any amount of loan or facility availed by a person from a financial institution outside Pakistan who is for the time being resident in Pakistan.

(ix) any other facility availed by a customer from a financial institution.”

What escaped from the attention of the two Courts below is that a relationship of broker with his client does not fall within the definition of ‘customer’ and ‘finance’, as stated above. In pursuit of the obligation the respondent herein acted as a broker while dealing with the sale and purchase of shares and making a decision in respect thereof. Thus, in the absence of a relationship as of a financial institution and a customer, as claimed, the suit for declaration and injunction ought to have been filed in a Court of ordinary civil jurisdiction as the Financial Institutions (Recovery of Finances) Ordinance, 2001, being a special law, is governed between the parties having special relationship as defined therein i.e. “financial institution” and “customer”. The nature of the said account does not show that any financial facility being provided or granted and

that business of trading, as carried out between them in terms of account opening form is beyond frame of Financial Institutions (Recovery of Finances) Ordinance, 2001.

Mr. Ijaz Ahmed, learned Amicus Curiae appointed in this matter, has very ably assisted the Court. He has taken me to the subject terms and the text mentioned in the account opening form and so also the Broker Registration No.BRK 175, which only constitute to be the ingredients other than required under Financial Institutions (Recovery of Finances) Ordinance, 2001 for a relationship between a bank (financial institution) and its customer, prerequisites of which are provided in Financial Institutions (Recovery of Finances) Ordinance, 2001. Mr. Ijaz submitted that opening of account with the respondent Orix Investment Bank Pakistan Limited itself is not sufficient for the purpose of invoking the provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001. He has highlighted the margin deposit which is one of the salient features of the account opening form to conduct and carry out transaction thereunder.

In view of the above it appears that the suit was rightly instituted before the Court of Senior Civil Judge, the two impugned orders suffer from material irregularity and illegality and hence the appeal is allowed, the impugned orders passed by the two Courts below are set aside and the case is remanded to the trial Court to decide the controversy on merits. The trial Court is directed to proceed with the matter expeditiously and dispose it of preferably within six months.

Above are the reasons of short order dated 23.02.2018.

Dated:

Judge