IN THE HIGH COURT OF SINDH, KARACHI.

Special High Court Appeal No. 279 of 2010

Present :
1. Mr. Justice Faisal Arab
2. Mr. Justice Nadeem Akhtar

Date of hearing : 05.04.2012

For the Appellant : M/S S. Mazhar-ul-Haque and S. Sammad-ul-Haque, Advocates.

For Respondent No.1: Mr. S. Mamnoon Hassan, Advocate.

None for Respondent No.2.

JUDGMENT

NADEEM AKHTAR, J. **-** By a short order announced by us on 05.04.2012, this appeal was allowed for the reasons to be recorded later and the judgment and decree passed against the appellant in Suit No.B-111 of 2010 by a learned single Judge of this Court was set aside. Following are the reasons for allowing this appeal :

1. Through this appeal, the appellant has challenged the judgment delivered and decree passed on 01.11.2010 by a learned single Judge of this Court in the banking jurisdiction in Suit No.B-111 of 2010, filed by respondent No.1 bank against respondent No.2 and the appellant. By the impugned judgment and decree, respondent No.1's said suit was decreed against respondent No.2 in the sum of Rs.50,824,777.68 with cost of funds thereon, and against the appellant in the sum of Rs.35,739,530.00 with cost of funds thereon from the date of default till realization. Costs of the suit were also awarded to respondent No.1 bank against the appellant and respondent No.2.

2. Brief facts of this case are that respondent No.1, as a financial institution, filed the above suit against respondent No.2 and the appellant under the banking jurisdiction of this Court. It was the case of respondent No.1 that respondent No.2 was the customer / principal

borrower to whom several finance facilities were granted by respondent No.1, and in consideration of the said finance facilities, respondent No.2 executed several documents in favour of respondent No.1 including agreements for financing on mark-up basis, promissory notes, letters of continuity, letters of arrangement, letters of pledge, trust receipts. As against the appellant, the case of respondent No.1 was that the appellant was appointed by respondent No.1 as the *Muccaddam* vide Agreement of *Muccaddam* dated 11.05.2009 (inadvertently mentioned as 18.05.2008 and 18.05.2009 in paragraphs 17 & 3, respectively, of the plaint) in respect of such stocks / goods which were pledged with respondent No.1 by respondent No.2. It was further alleged by respondent No.1 that respondent No.2 (customer / principal borrower) in clear breach / violation of the terms and conditions of Letter of Pledge and Trust Receipt illegally removed all the pledged stocks causing loss to respondent No.1. Finally, it was alleged that respondent No.1 was entitled to the amounts claimed in the suit from respondent No.2 as well as from the appellant (*Muccaddam*). In view of the above allegations, decrees for separate amounts were sought by respondent No.1, that is, a decree for Rs.50,824,777.68 against respondent No.2, and a decree for Rs.35,739,530.00 against the appellant. Decree against the appellant was sought by respondent No.1 on the ground that, by virtue of the aforesaid agreement for appointment of *Muccaddam*, the appellant was liable for all losses etc. as an indemnifier.

3. Summons were issued in the suit through all modes, but no application for leave to defend was filed by respondent No.2 (customer / principal borrower). Therefore, the suit was decreed *ex-parte* against him for the amount stated above. The said decree against respondent No.2 attained finality as the same was never challenged by him.

4. The appellant filed an application bearing C.M.A. No.8265/2010 under Section 10 of the Financial Institutions (Recovery of Finances) Ordinance of 2001 (hereinafter referred to as "**THE ORDINANCE**"), praying that leave to defend may be granted to him and the suit against him be dismissed. In his said application, the

appellant took specific pleas that he had no concern whatsoever with the alleged removal of the pledged stock ; and that the alleged removal of the pledged stocks was not only reported by him to respondent No.1, but was also reported by him to police by lodging FIR No.230/2010 on the instructions of respondent No.1. The alleged liability was denied by the appellant. The impugned judgment and decree have been passed on appellant's aforesaid application, whereby the said application has been dismissed and a decree has been passed against him in the sum of Rs.35,739,530.00 with costs of the suit and cost of funds from the date of default till realization.

5. While making their submissions, the learned counsel for the appellant contended that the impugned judgment and decree against the appellant suffer from several serious and major legal defects, and that the same are not at all sustainable in law. First contention of the learned counsel was that the appellant was/is not a customer of respondent No.1 and there was no relationship of financial institution and customer between respondent No.1 and the appellant. As such, the suit against the appellant was not maintainable under the Ordinance. In continuation of the above contention, the learned counsel further argued that, since the suit against the appellant could not be filed under the Ordinance, the learned single Judge of this Court acting under the banking jurisdiction had no jurisdiction to entertain and/or to adjudicate the suit. The learned counsel also urged that in view of the above, the impugned judgment and decree are *coram non judice*. In support of his above contentions, the learned counsel invited our attention to the definition of "customer" contained in Section 2(c) of the Ordinance, and also relied upon the case of Procter & Gamble Pakistan (Pvt) Ltd. Karachi V/S Bank Al-Falah Ltd. Karachi & 2 others, reported as **2007 CLD 1532**. The learned counsel vehemently challenged the impugned judgment and decree also on the ground that appellant's application should not have been dismissed on the ground that the requirement of Section 10(3) of the Ordinance was not complied with. In addition to the above, a number of other cases were cited by learned counsel for respondent No.1 in support of his

submissions, however, we feel that only following cases are relevant for the purposes of questions involved in this appeal :-

(i) **2007 CLD 571** (DB) (LHC) – M. Manzoor Ahmed Paracha V/S Habib Bank Ltd. : Appellants in this case (defendants in a banking suit) were not customers nor any finance was availed by them. Plaint in the banking suit was returned.

(ii) **2009 CLD 1564** (DB) (SHC) – Citibank N.A. V/S Syed Shahenshah Hussain : In this case it was held that claim of pecuniary compensation could either arise from tortuous act i.e. not based on any contract or a breach of contractual obligation not pertaining to accommodation or facility of finance, and for such two categories of claim, banking Court was not the appropriate forum.

(iii) **2006 CLD 167** (DB) (LHC) – Mehr Ashiq Hussain V/S Citibank N.A. : Suit for recovery of damages for torts was filed before banking Court, which suit was returned to the plaintiff. It was held in this case that the plaintiff neither fell within the definition of customer nor any finance was availed by him, and that suit filed by him was a simple suit for recovery of damages on the basis of torts which was excluded from the jurisdiction of banking Court. The plaint was returned.

(iv) **2003 CLD 1685** (LHC) – M/S Grace Textile Mills (Pvt.) Ltd. V/S Habib Bank Ltd. : Plaintiffs' claim for damages and compensation had not arisen out of finance and no default under the insurance law had been committed by the bank to indemnify the plaintiffs or to pay their insurance claim or otherwise any damages on that basis. It was held in this case that, since insurance companies cannot be said to be guarantors or indemnifiers to fall within the definition of customer under Section 2(c) of the Ordinance of 2001, banking Court had no jurisdiction in the matter.

(v) **2002 CLD 1462** (LHC) – Mst. Saloomi Rana V/S First Leasing Corporation Ltd. : Appellant's contention was that she was not a customer, therefore, decree against her was liable to be set aside. It was held in this case that banking Court could not have passed a decree against the appellant who was neither a customer nor a guarantor as defined under the Ordinance of 2001. Judgment and decree passed by the banking Court were set aside.

(vi) **SBLR 2004 Sindh 51** (SHC) – Abdul Rahman V/S Citibank N.A. : Banking Court had jurisdiction over matters arising out of non-fulfilment of obligation with regard to finance between customer and financial institution, excluding suit for damages based on tort. It was held in this case that damages based on tort is a civil matter and is triable by a civil Court in terms of Section 9 CPC.

6. On the other hand, Mr. S. Mamnoon Hassan learned counsel for respondent No.1 made submissions in support of the impugned judgment and decree and prayed for dismissal of this appeal. The submissions of the learned counsel are discussed in the following paragraphs :

7. At the very outset, Mr. S. Mamnoon Hassan attacked the maintainability of this appeal on a very peculiar ground that this appeal should not have been registered and entertained as a Special High Court Appeal under Section 22 of the Ordinance as the same has been filed against the final judgment and decree of a learned single Judge of this Court. According to him, final judgment and decree passed by a learned single Judge of this Court can be challenged only by way of First Appeal under Section 96 CPC, whether the same is passed under the original civil jurisdiction or under the banking jurisdiction, and that such appeal is registered as a High Court Appeal under the Law Reforms Ordinance, 1972 (XII of 1972). He further contended that a single Judge of any High Court acting under the banking jurisdiction acts as a banking Court under the Ordinance, therefore, the appellant should have filed First Appeal instead of this Special High Court Appeal. In support of this contention, the learned counsel relied upon the case of Larkana Sugar Mills (Pvt) Ltd & another V/S United Bank Ltd, reported as **1993 MLD 1154**. Interestingly, the above cited case does not support respondent No.1, but in fact supports the appellant. In the said case it was held by a learned Division Bench of this Court that an appeal against the judgment or decree passed by a single Judge of this Court under Section 12 of the Banking Companies (Recovery of Loans) Ordinance, 1979, can be filed only before a bench of two or more Judges of this Court.

8. Section 22 of the Ordinance provides remedy of appeal to any person who is aggrieved by any judgment, decree, sentence, or final order passed by a Banking Court. Under Sub-Section (1) of this Section, the appeal has to be filed directly before High Court within 30 days of such judgment, decree, sentence, or final order. Sub-Section

(4) of this Section specifically provides that an appeal under this Section shall be heard by a bench of not less than two Judges of High Court. Under Section 2(b)(ii) of the Ordinance, "Banking Court" means High Court when the amount claimed in suit exceeds Rupees fifty million. This legal position regarding the jurisdiction of the learned single Judge of this Court as the Banking Court is not disputed by Mr. S. Mamnoon Hassan who himself has argued that a single Judge of any High Court acting under the banking jurisdiction acts as the Banking Court under the Ordinance. We have noticed that no distinction has been provided in Section 22 of the Ordinance for filing an appeal against the judgment, decree, sentence or final order passed by a banking Court or by a single Judge of High Court acting under the banking jurisdiction. In either case, appeal shall have to be heard by a bench of not less than two Judges of High Court as specifically provided under Section 22(4) of the Ordinance. Under Section 22(2) of the Ordinance, the person filing an appeal is required to give a notice in accordance with the provisions of Order XLIII Rule 3 CPC to the respondent(s). In this case, the appellant issued such notice to both the respondents before filing this appeal, which is available at page 281 of the Court file. Issuance of the said notice is not disputed by learned counsel for respondent No.1. Moreover, the appellant has also affixed maximum Court fee of Rs.15,000.00 on the memorandum of this appeal. We are, therefore, of the view that this appeal has been competently filed as it fulfils all the requirements of Section 22 of the Ordinance.

9. Section 3(1) of the Law Reforms Ordinance, 1972, provides that an appeal shall lie to a bench of two or more judges of High Court from a decree passed or final order made by a single Judge of that Court in exercise of its original civil jurisdiction. Previously, an appeal did not lie before the Court under the above mentioned Sub-Section (1) from an interlocutory order or an order which does not dispose of the entire case. Subsequently, an amendment in the aforesaid Section 3 was made through Code of Civil Procedure (Amendment) Ordinance X of 1980, whereby through Section 15 of the said Amendment

Ordinance X of 1980, an appeal against an interlocutory order passed by a single Judge of High Court in exercise of its original jurisdiction was provided before a bench of two or more judges of that High Court. The requirement of issuance of a notice under Order XLIII Rule 3 CPC before filing an appeal against an interlocutory order was also inserted through Section 14 of the said Amendment Ordinance X of 1980. After examining the above mentioned provisions for filing an appeal as well as the provisions of Section 22 of the Ordinance, it is clear that an appeal lies before a bench of two or more Judges of this Court against the final judgment, decree and/or an interlocutory order passed by a single Judge of this Court exercising original civil jurisdiction, as well as against the judgment, decree, sentence or final order passed by a single Judge of this Court exercising banking jurisdiction. We have noticed from the record that the appellant had only mentioned the word "Appeal" in the title of this appeal, and that hand written words "Special High Court" were added by the office. The word "Special" in appeals arising out of judgment, decree, sentence or final order passed by a single Judge of this Court exercising banking jurisdiction is used in this Court merely as a practice to distinguish such appeals from other High Court Appeals filed against the interlocutory orders, final judgment and decrees passed by a single Judge of this Court exercising original civil jurisdiction. In our opinion the words "Special High Court Appeal" appearing in the title of this appeal have no importance and have no relevance with the merits of this case.

10. In the above context, we would like to refer to a reported case, namely, Merhaba Textiles Ltd. V/S IDBP reported as **2003 CLD 1822**, wherein a learned Division Bench of this Court held that jurisdiction conferred on High Court under the Ordinance is "banking jurisdiction", and while exercising such jurisdiction, High Court bears the fictional character of a "Banking Court" as defined in the Ordinance. It was further held in the aforesaid case that judgment and orders passed by a Banking Court cannot be assailed before any forum except in accordance with the provisions of Section 22 of the Ordinance, and that appellate power conferred on High Court was only to the extent of

entertaining appeal against final Order, judgment, decree and sentence passed under banking jurisdiction.

11. Fortunately, we came across a very recent and detailed judgment on the above point delivered by the Hon'ble Supreme Court of Pakistan in the case of Apollo Textile Mills Ltd. and others V/S Soneri Bank Ltd. reported as **PLD 2012 Supreme Court 268**. The relevant paragraphs 29, 30, 31 and 32 of the aforesaid judgment are reproduced below for convenience and ready reference :-

> ***"*** *29. From the original decree, appeal is provided in section 96 of the Civil Procedure Code. The procedure thereof is contained in Order 41 CPC. Section 96 (though not referred to in the impugned judgment) reads as under :-*
>
> > *" 96. Appeal from original decree – (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.*
> >
> > *(2) An appeal may lie from an original decree passed ex-parte.*
> >
> > *(3) No appeal shall lie from a decree passed by the Court with consent of parties."*
>
> *The first appeal under CPC thus lies against the original decree and not against the findings or decisions contained in the judgment upon which the decree is founded……*
>
> *30. Like in Section 96 CPC, appeal was prescribed to be against a decree under sub-section (1) of Section 21 of the repealed Act XV of 1997 i.e. The Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997. This Section is reproduced hereunder for comparison:-*
>
> > *" 21. Appeal … (1) Subject to sub-section (2), any person aggrieved by a decree, or an order refusing to set aside a decree, or an order permitting or preventing the sale of property, or a sentence passed by a Banking Court established under section 4 may, within thirty days of such order, decree or sentence, prefer an appeal to the High Court."*
>
> *The provisions of appeal against a decree were thus nearly similar to the provisions of section 96 of the CPC.*

31. In this case, however, appeal was filed by the petitioners under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, which was the applicable law. The appeal in the present case was not filed by the petitioners under Section 96 of the CPC read with Rule 1 of Order XLI CPC.

Sub-section 1 of Section 22 ibid reads as under :-

" 22. Appeal – (1) Subject to sub-section (2), any person aggrieved by any judgment, decree, sentence, or final order passed by a Banking Court may, within thirty days of such judgment, decree, sentence, or final order prefer an appeal to the High Court."

32. We may say this with profound respect that the Hon'ble Judges of the Division Bench of the High Court, should also have examined above provisions as well. The linguistic construction, phraseology, terms, words and the schematic design / layout of the above appeal provision is distinguishably different than in Section 96 of the CPC and Section 21 of the Act of 1997. Under Section 22 ibid an appeal has been provided against "any judgment, decree, sentence, or final order passed by a Banking Court, within 30 days of such judgment, decree, sentence, or final order". Was intention of the legislature to provide a scheme of appeal(s) under Section 22 ibid, to be different from that in Section 96 CPC or the Act of 1997……..."

We have already held above that this appeal has been competently filed as it fulfils all the requirements of Section 22 of the Ordinance. In view of the above mentioned judgments of a learned Division Bench of this Court and the Hon'ble Supreme Court, we further hold that the appellant was not required to file this appeal under the Law Reforms Ordinance, as the same could be filed ONLY under Section 22 of the Ordinance. The objection to this effect raised by learned counsel for respondent No.1, therefore, is not sustainable.

12. Next contention of the learned counsel for respondent No.1 was that the agreement for appointment of *Muccaddam* was not denied by the appellant, whereby he agreed to indemnify respondent No.1 in case of any loss etc. in respect of the pledged stocks. The learned counsel specifically referred to Clauses 5(w) and 5(y) of the aforesaid agreement, and submitted that by virtue of the above mentioned indemnity clauses, the appellant falls within the definition of "customer"

under Section 2(c) of the Ordinance. The learned counsel emphatically argued that the word "indemnifier" used in the said Section 2(c) does not require any interpretation and/or explanation as the same is fully applicable to the appellant. In order to appreciate learned counsel's contention as well as for convenience and ready reference, we would like to reproduce here the above mentioned clauses of the agreement for appointment of *Muccaddam* :-

> " *(w) That the Muccadum shall be liable for all losses, theft, damages, pilferage, claim, demands, expenses, charges, rents, actions and suits etc, which the Bank shall suffer due to shortage, loss and destruction of the goods for any reason whatsoever*."
>
> " *(y) That the Muccadum shall indemnify and keep indemnified the Bank against all losses, damages, payments, demands, dues, claims, expenses, charges*."

Before discussing the above contention of the learned counsel, we may point out that in para 3 of the plaint respondent No.1 itself had described the appellant as "MUCCADDAM (CUSTODIAN)". Further, the agreement for appointment of *Muccaddam* dated 11.05.2009 filed and relied upon by respondent No.1 also contains the word "Custodian" in the title thereof.

13. We would like to highlight some crucial and important salient features of the said agreement for appointment of *Muccaddam* (Custodian) dated 11.05.2009 (hereinafter referred to as "THE AGREEMENT"). The Agreement was admittedly between respondent No.1 and the appellant, and respondent No.2 / principal borrower was not a party thereto. It was mentioned in the Agreement that the appellant approached respondent No.1 for its appointment as *Muccaddam* to act as such in respect of such stocks of goods as may be pledged and/or offered for pledge to respondent No.1 <u>on a remuneration as respondent No.1 in its sole discretion may decide</u>. In Clause 1 of the Agreement, it was mentioned that <u>respondent No.1 had appointed the appellant as *Muccaddam* to provide service to respondent No.1</u> in respect of the stocks / goods pledged in favour of respondent No.1 by its customers. Respondent No.2's name was not

disclosed in the Agreement as a customer of respondent No.1, nor the goods pledged by him were described therein. Clause 2 of the Agreement specifically provided that respondent No.1 shall be entitled to terminate the Agreement with or without compensation to the appellant / *Muccaddam* without assigning any reason. Clause 3 of the Agreement provided that it was a non-exclusive Agreement, and that during the continuance of the Agreement, respondent No.1 shall be entitled to appoint such other person as its *Muccaddam* as it may deem expedient. The above terms and conditions of the Agreement only between respondent No.1 and the appellant / *Muccaddam* clearly show that respondent No.1, for its own benefit and in order to secure its own interest, hired the appellant, and in consideration thereof, respondent No.1 had agreed to pay remuneration to the appellant. The appellant actually had no privity of contract with respondent No.2 / principal borrower.

14. Another striking feature of this case is that it was nowhere mentioned in the Agreement that the appellant had been appointed as *Muccaddam* by respondent No.1 in respect of the goods pledged by the appellant. More importantly, the suit filed by respondent No.1 was admittedly based on two Agreements for Financing on Markup Basis dated 22.11.2007 and 07.11.2008. Whereas, the Agreement between respondent No.1 and the appellant / *Muccaddam* was admittedly executed on 11.05.2009, that is, much later than both the said finance agreements. This clearly proves that the Agreement was not executed in consideration of and/or as security for any of the aforesaid finance agreements. The Agreement, therefore, had no nexus with any of the said finance agreements. The appellant indeed reported removal of pledged goods to respondent No.1 and also lodged FIR to this effect, as he was bound to do so under the Agreement. However, such actions of the appellant did not change the position explained above. In order to decide whether the appellant falls within the definition of "customer" and "indemnifier" under Section 2(c) of the Ordinance as urged by Mr. S. Mamnoon Hassan, we shall have to closely examine both the above mentioned terms.

15. "Customer" has been defined in Section 2(c) of the Ordinance in the following terms :-

> " (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 ".*

In a number of reported cases, it has been consistently held that the pre-requisite for assumption of jurisdiction by a banking Court in a suit by a financial institution against the customer is the "default" of the "customer" in fulfilling "obligation" with regard to any "finance". We have examined the following reported cases wherein the above important view has been discussed :

(i) In the case of Bankers Equity Ltd. V/S Bentonite Pakistan Ltd. reported as **2003 CLD 931**, it was held by a learned single Judge of the Lahore High Court that the pre-requisite for the assumption of jurisdiction by a Banking Court over the suit by a financial institution against the customer is the default of the customer in fulfilling obligation with regard to any finance, which obviously involves accounting.

(ii) In the case of Karachi Electric Provident Fund V/S National Investment Trust reported as **2003 CLD 1026**, a learned single Judge of this Court held that the jurisdiction of Banking Court would be attracted only in case where a customer or banker commits default in fulfilling any obligation with regard to any finance.

(iii) In the case of Abdul Rehman Allana V/S Citibank reported as **2003 CLD 1843**, it was held by a learned single Judge of this Court that three pre-conditions must be present for exercise of jurisdiction under the Ordinance of 2001, namely, that the Plaintiff should either be a financial institution or a customer, and cause of action must have accrued on default in fulfilment of any obligation with regard to a finance.

(iv) A learned single Judge of this Court in the case of National Bank of Pakistan V/S S.G. Fiber Ltd., reported as **2004 CLD 689** observed that there was an underwriting agreement executed by bank without any condition of buyback, and bank's plea was that undertaking executed by defendants amounted to guarantee and

its breach could be termed as default in fulfilment of obligation with regard to finance. Such plea was rejected and it was held that such undertaking was not a guarantee, nor its breach would amount to default in obligation, and banking Court did not have jurisdiction.

(v) A learned Division Bench of the Lahore High Court held in the case of Imtiaz Ahmed V/S Platinum Commercial Bank Ltd., reported as **2004 CLD 481**, that the defendant in the said case had neither any connection with the finances availed by other defendants nor had executed any guarantee or other security documents in favour of the bank and Memorandum of Deposit of Title Deeds was also not signed by him. Therefore, the application for leave to defend of such defendant merited acceptance and he was entitled to contest the Suit as a regular long cause.

(vi) In the case of A. Rashid M. Hanif V/S Faysal Bank Ltd. reported as **2003 CLD 722**, the plaintiff bank had arrayed certain persons as defendants only for the reason that at the relevant time when the loan facility was granted they were also the directors of the borrower company. Leave was granted to such persons on their plea that they were neither principal debtors nor guarantors, however, banking Court decreed suit against all defendants including such persons. In appeal, it was held by a learned Division Bench of the Lahore High Court that such persons, not being borrowers or guarantors, were not "customers", and the judgment and decree against them was set aside.

(vii) In the case of Rainbow Packages Ltd. V/S First Elite Capital Modaraba, reported as **2004 CLD 1313**, the plaintiff sued limited company and 11 others as real beneficiaries. The defendants arrayed in the said case had not executed finance agreement nor they stood as sureties **or indemnifiers** or in any manner undertook to discharge the liabilities. A learned Division Bench of the Lahore High Court held that the defendants could not be said to have derived any personal benefit nor they were real beneficiaries, and allowed their appeal by allowing them to defend the suit on merits.

(viii) Here we would also like to mention the case of Procter & Gamble Pakistan (Pvt) Ltd, Karachi V/S Bank Al-Falah Limited, Karachi & 2 others, reported as **2007 CLD 1532** (authored by the learned senior member of this bench Faisal Arab J.), cited and relied upon by the learned counsel for the appellant. In the said case,

not only the definition of customer has been discussed in detail, but the same has been categorized in three different classes in paragraph 17 at page 1541 as under :-

> **"** *17. The above analysis of the meaning of the word "customer" as defined in section 2(c) of the Ordinance clearly leads to the conclusion that the word "customer" means and includes (a) a person to whom finance has been extended directly by a financial institution ; (b) a person on whose behalf a financial institution undertakes to make payment to a third party e.g. under a Guarantee or a Letter of Credit ; and (c) a person who has taken upon himself the obligation to repay to the financial institution the defaulted sum in his capacity as surety or indemnifier. Therefore, only these categories of persons come within the definition of "customer" and only they can sue or be sued under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. No person, no matter in what other capacity he is connected with a financial facility, if he does not fall within the definition of a "customer" as defined under section 2(c) of the Ordinance, 2001, he can neither sue nor be sued under section 9 of the Ordinance, 2001, and the legal remedy for and against him lies before ordinary Civil Court.* **"** (Emphasis added)

16. The respondent No.1 itself had described the appellant as a "custodian" in paragraph 3 of its plaint, and the same terminology was used in the Agreement between respondent No.1 and the appellant. "Custodian" has been defined as under in the following well known law dictionaries :

a. In the Third Edition of 2008 of Biswas Encyclopaedic Law Dictionary (Legal & Commercial), custodian has been defined as "*custodian is required to assist in the attachment of the notified person's property and to manage the same thereafter*".

b. The Third Edition of Ballentine's Law Dictionary, custodian has been defined as "*a person whose duty it is to watch, guard and account for that which is committed to his custody*".

c. In Advanced Law Lexicon (Volume I) 2005 Edition, it has been defined as "*one who has the care or custody of anything ; a guardian ; a caretaker*".

d. In the Permanent Edition of Words and Phrases (Volume 10A), it has been defined as "*a custodian, such as a bonded custodian of warehoused property, is one entrusted with the care and possession of a thing*".

17. It is an admitted position that no "finance" was ever granted by respondent No.1 to the appellant. Through the Agreement, the appellant was in fact hired on remuneration as a custodian by respondent No.1 to secure its own interest in the pledged goods. The Agreement was a private arrangement between respondent No.1 and the appellant to which respondent No.2 / principal borrower was admittedly not a party, nor it was mentioned anywhere in the Agreement that the appellant was hired in respect of the goods pledged by respondent No.2 / principal borrower. We are, therefore, of the view that hiring or appointment of *Muccaddam* is not covered under the definition of "finance" contained in Section 2(d) of the Ordinance, and that it was not the duty of the appellant / *Muccaddam* hired on remuneration by respondent No.1 to fulfil his "obligations" as required under Section 3 of the Ordinance to bring him within the definition of a "customer". The definitions of "custodian" discussed above also support our view that rights and liabilities of a custodian are altogether different from those of a customer defined under the Ordinance. Since no finance was ever granted to the appellant by respondent No.1, there was no question of fulfilment of obligation or committing default thereof by the appellant. In the absence of the above mentioned pre-requisite, suit filed by respondent No.1 against the appellant in the banking jurisdiction of this Court citing him as one of the defendants and a customer, was not maintainable.

18. While examining the definition of "customer" in Section 2(c) of the Ordinance, we have noticed that a surety or an indemnifier have also been included in the said definition. This does not mean that any kind of indemnity or all indemnities given by a person bind such person as an indemnifier under the said Section 2(c). An indemnifier shall fall within the definition of customer ONLY if he agrees to indemnify on behalf of the principal borrower / customer. As already observed above, in this case the appellant actually had no privity of contract with respondent No.2 / principal borrower, and it was nowhere mentioned in the Agreement that the appellant had been appointed as *Muccaddam* by respondent No.1 in respect of the goods pledged by the appellant.

An indemnifier cannot be made liable for more than the amount for which he had agreed to indemnify. It is important to note in this case that the quantum of the alleged liability of the appellant (alleged indemnifier) was not mentioned anywhere in the Agreement. Moreover, respondent No.1 had failed to mention in the plaint as to on what basis a decree for Rs.35,739,530.00 was sought against the appellant.

19. With respect to the learned counsel for respondent No.1, we have not been able to convince ourselves that the appellant, being an indemnifier, falls within the definition of customer as he had agreed to indemnify respondent No.1 against loss etc. in respect of the pledged goods. We have already held that the appellant was never a customer of respondent No.1. If the above contention of the learned counsel is accepted only for the sake of argument, even then the appellant does not fall within the definition of customer under the Ordinance for the simple reason that the appellant never agreed to indemnify respondent No.1 on behalf of respondent No.2 / principal borrower, nor any document to this effect is on record either in this appeal or in the R & P of the suit. It is once again pointed out that the Agreement was a private arrangement between respondent No.1 and the appellant to which respondent No.2 / principal borrower was admittedly not a party, nor it was mentioned anywhere in the Agreement that the appellant was hired in respect of the goods pledged by respondent No.2 / principal borrower.

20. The cause of action in favour of respondent No.1 against respondent No.2 / principal borrower accrued in view of default of obligation relating to finance provided under finance agreements and trust receipt. Whereas, the cause of action, if any, against the appellant was alleged on the basis of the Agreement for appointment of *Muccaddam* (Custodian). It is our clear opinion that both the above mentioned causes of action were separate and distinct from each other, the former one falling under the banking jurisdiction under the Ordinance and the latter against the appellant for breach of Agreement, if any, under the original civil jurisdiction. Mere execution of the Agreement by the appellant did not bring the appellant within the

definition of a “customer” as defined under section 2(c) of the Ordinance, and he could not be sued under Section 9 of the Ordinance. Respondent No.1’s legal remedy against the appellant, if any, was under the original civil jurisdiction. Therefore, respondent No.1’s suit against the appellant was not maintainable and, with profound respect, the learned single Judge had no jurisdiction under the banking jurisdiction to pass the impugned judgment and decree against the appellant.

21. Last contention of Mr. S. Mamnoon Hassan, learned counsel for respondent No.1, was that the appellant cannot be allowed to urge new grounds for the first time in this appeal. In support of this contention, learned counsel relied upon the following reported cases :-

PLD 1974 SC 322 – Mst. Murad Begum & others V/S Muhammad Rafiq & others.

1996 SCMR 1770 – Anwar Ali & Others V/S Manzoor Hussain & another.

1998 SCMR 593 – Amir Shah V/S Ziarat Gul.

2003 SCMR 686 – Chief Engineer, Hydel (North) & Project Director, WAPDA, Warsak V/S Zafarullah Shah & another.

PLD 2011 SC 155 – Mubarak Ali & others V/S Khushi Muhammad & others.

2000 CLC 847 – Citibank N.A., a banking company through Attorney V/S Riaz Ahmed.

2004 CLD 1376 – Muhammad Ramzan & 4 others V/S Agricultural Development Bank of Pakistan, through Manager.

2004 CLD 207 – Tariq Shahbaz Chaudhry & 5 others V/S Bank of Punjab, through attorney & 4 others.

2005 CLD 1685 – Ch. Muhammad Ashraf & another V/S Muslim Commercial Bank Ltd., through its Manager.

2005 CLD 1489 – Shahid Farooq Sheikh V/S Allied Bank of Pakistan Ltd., through Manager.

2005 CLD 1728 – Bashir Ahmed V/S Judge, Banking Court-I, Gujranwala, Division Gujranwala & another.

The above contention of learned counsel for respondent No.1 has no force and none of the above mentioned cases is relevant to this case. The appellant, in his application for leave to defend, had categorically pleaded that he was not a customer of respondent No.1 ; that there was no relationship of financial institution and customer between respondent No.1 and the appellant ; that the suit against the appellant was not maintainable under the Ordinance ; that the suit against the appellant could not be filed under the Ordinance ; and that the learned single Judge of this Court acting under the banking jurisdiction had no jurisdiction to entertain and/or to adjudicate the suit against him. Even otherwise, it is settled law that legal grounds can always be urged for the first time in appeal, and even before the Hon'ble Supreme Court.

22. In rebuttal, Mr. S. Mazhar-ul-Haque, learned counsel for the appellant, vehemently opposed all the contentions raised by Mr. S. Mamnoon Hassan, and strongly reiterated his submissions as noted above.

23. We have noted that the application for leave to defend filed by the appellant was dismissed by the learned single Judge also on the ground that he had failed to comply with the provisions of Section 10(3) of the Ordinance. In this context, it is observed, under Section 9(3) of the Ordinance, it is mandatory for plaintiff / financial institution to disclose in the plaint the amount of finance availed by the defendant from financial institution ; the amount(s) repaid by the defendant to financial institution and the date(s) of such payment(s) ; and the amount of finance and other amounts relating to the finance payable by the defendant to financial institution till the date of filing of the suit. Similarly, under Section 10(3) of the Ordinance, it is mandatory for the defendant to disclose in his application for leave to defend the amount of finance availed by him from financial institution ; the amount(s) paid by him to financial institution and the date(s) of such payment(s) ; the

amount of finance and other amounts relating to finance payable by the defendant to financial institution till the filing of the suit ; and the amount, if any, which the defendant disputes as payable to financial institution and the facts in support thereof. We have already held above that the appellant was not a customer of respondent No.1 nor any finance was granted to him by respondent No.1. Therefore, the appellant was not required to fulfil any of the above mentioned requirements of Section 10(3) of the Ordinance.

24. In the most recent case reported as **PLD 2012 Supreme Court 268** (ibid), it has been held by the Hon'ble Supreme Court in paragraph 14 that ***"****The plaintiff institution and the defending 'customer' have identical statutory responsibility respectively under Section 9(3) and 10(4) to plead and state clearly and particularly the finances availed by a defendant, repayments made by him, the dates thereof and the amounts of finance repayable by such defendant who has also been saddled with the additional responsibility to also specify the amounts disputed by him……****".*** It is important to note that respondent No.1 had not complied with the above mentioned requirements of Section 9(3) of the Ordinance in respect of the appellant and had not stated anywhere in the plaint about the finance availed by the appellant, the repayments made by him with the dates thereof, and/or the amount of finance repayable by the appellant. Because of such failure on the part of respondent No.1 and in view of the above mentioned latest authority of the Hon'ble Supreme Court, respondent No.1 had not established any case against the appellant under the Ordinance and the suit was liable to be dismissed.

25. In view of our above findings, we allow this appeal and set aside the impugned judgment and decree passed against the appellant in Suit No.B-111 of 2010. As the appellant has been unnecessarily dragged into this uncalled for litigation by respondent No.1, we also allow costs of this appeal to the appellant.

JUDGE

JUDGE.