Judgment Sheet

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

1st Civil Appeal No. D – 09 of 2011

Before :
Mr. Justice Nadeem Akhtar
Mr. Justice Muhammad Faisal Kamal Alam

Appellants : Nand Lal and another,
through Mr. Ashok Kumar K. Jamba Advocate.

Respondent : Askari Commercial Bank Limited,
Sarrafa Bazar, Sukkur, through
Mr. Muhammad Shamim Khan Advocate.

Dates of hearing : 13th, 18th and 19th December 2017.

J U D G M E N T

NADEEM AKHTAR, J. **–** Through this appeal under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance 2001 **('the Ordinance')**, the appellants have impugned the judgment delivered on 26.03.2011 and the decree drawn in pursuance thereof on 28.03.2011 by the learned Banking Court-I Sukkur in Suit No.53 of 2010, whereby the said Suit filed by the respondent No.1-bank was decreed jointly and severally against the appellants and respondents 2 to 9 in the sum of Rs.18,702,831.34 with costs and markup at the agreed rate till realization of the decretal amount and cost of funds under Section 3 (2) of the Ordinance.

2. Relevant facts of the case are that the above Suit was filed by respondent No.1 before the learned Banking Court against the appellants and respondents 2 to 9 for recovery of Rs.18,702,831.34. The case of respondent No.1, as averred in the plaint, was that Short Term Finance facilities viz. Finance Against Foreign Bills (FAFB-I) of Rs.5,600,000.00 and Finance Against Packing Credit (FAPC-II) of Rs.6,500,000.00 were granted to appellant No.1 in the year 2003 which were renewed from time to time, and lastly on 25.04.2006. The above facilities were secured by the appellants through hypothecation of stocks of dry dates, equitable mortgage of immovable properties and personal guarantee of appellant No.2. On 25.04.2007, an Agreement For Financing For Short / Medium / Long Term on Markup Basis was executed by appellant Suit1 and respondent Suit1 whereby the sale price and purchase price were agreed by the parties at Rs.12,100,000.00 and Rs.14,520,000.00, respectively. Under this agreement, appellant Suit1 was required to pay the purchase price on or

before 24.04.2008. It was alleged by respondent Suit1 that the appellants failed to settle the outstanding amount and were thus liable to pay an amount of Rs.18,702,831.34 to respondent Suit1.

3. Defendants 3 to 10 / respondents 2 to 9 did not file any application for leave to defend and as such they were declared ex-parte by the learned Banking Court vide order dated 29.06.2010 ; whereas, the application for leave to defend filed by the appellants was dismissed by the learned Banking Court on 23.11.2010. After dismissal of their application for leave to defend, the learned Banking Court proceeded to examine the claim of respondent Suit1 and decreed the Suit in the above terms by observing that the claim of respondent Suit1 was supported by documentary evidence, the plaint was verified on oath and the case of respondent Suit1 stood proved. The decree was passed for the entire following amounts claimed in the Suit :

FAFB Finance Against Foreign Bills :	Rs. 6,500,000.00
FAFB Finance Against Packing Credit :	Rs. 5,600,000.00
Outstanding Mark-up FAFB-I :	Rs. 978,835.00
Outstanding Mark-up FAPC-II :	Rs. 2,475,448.31
Forced Liability (SBP Penalty) :	Rs. 2,824,870.36
Outstanding Mark-up Forced Liability (SBP Penalty) :	Rs. 323,677.67
Amount prayed for in the Suit and granted by the Banking Court :	Rs. 18,702,831.34

4. It was contended by Mr. Ashok Kumar K. Jamba, learned counsel for the appellants, that the Suit of respondent No.1 ought to have been dismissed or its plaint should have been rejected as compliance of Sub-Sections (2) and (3) of Section 9 of the Ordinance was not made by respondent No.1. It was further contended by him that penalties granted and awarded by the learned Banking Court to respondent No.1 are illegal as the appellants never agreed to pay any such penalty which, in any event, are illegal. Regarding the principal amounts of Rs.5,600,000.00 and Rs.6,500,000.00 in respect of both facilities, he conceded that the appellants are still liable to pay not only the said principal amounts, but also the markup thereon, however, only at the agreed rate and for the agreed period only.

5. Mr. Muhammad Shamim Khan, learned counsel for the respondent No.1-bank, contended that respondent No.1 did not claim any such amount in its Suit which was illegal or not agreed to by the appellants, and no such amount has been awarded in the impugned decree by the learned Banking Court. By pointing out that the appellants have not disputed their liability to the extent of outstanding principal amount and markup thereon, he contended that the penalty claimed by respondent No.1 and awarded by the learned Banking Court was imposed upon respondent No.1 by the State Bank of Pakistan and the

same has already been recovered from respondent No.1 by the State Bank. He submitted that appellant No.1 had not only agreed to pay the said penalty, but had also executed an undertaking to pay the penalty at the rate prescribed by the State Bank and had also authorized respondent No.1 to debit the amount thereof from his account. It was argued by him that after agreeing and undertaking to pay the penalty, the appellants cannot wriggle out from such liability on flimsy grounds. It was urged that the amounts awarded in the impugned judgment and decree are just and proper, therefore, the same should be maintained.

6. We have heard learned counsel for the parties at length and have also examined the material available on record with their assistance. It appears that the above mentioned two finance facilities were merged and re-scheduled through a single agreement dated 25.04.2007 which is not disputed by any of the parties. As per the terms and conditions of this agreement, sale price and purchase price were agreed by the parties at Rs.12,100,000.00 and Rs.14,520,000.00, respectively, and the said purchase price was to be paid by appellant No.1 on or before 24.04.2008. It is a normal banking practice that when outstanding dues are capitalized or the facility is re-scheduled with the consent of parties, the outstanding amount is treated as the principal amount / sale price and a new purchase price is fixed which includes markup at a specific rate for the period of such agreement for re-scheduling. It is well-settled that such practice is permissible in law as held by a learned Division Bench of this Court in *Messrs Dadabhoy Cement Industries Ltd. and others V/S Messrs National Development Finance Corporation*, ***2002 CLC 166***, which was upheld by the Hon'ble Supreme Court in *Messrs Dadabhoy Cement Industries Ltd. and 6 others V/S National Development Finance Corporation, Karachi*, ***PLD 2002 S.C. 500***.

7. As noted above, learned counsel for the appellants has conceded that the appellants are still liable to pay the principal amount as well as the markup thereon, however, only at the agreed rate and for the agreed period only. It is well-settled that markup cannot be claimed, charged or granted over and above the agreed rate and/or beyond the agreed period. Thus, respondent No.1 was entitled to claim only the above mentioned purchase price of Rs.14,520,000.00, and no other, further or additional amount could be claimed by respondent No.1 over and above the said purchase price or after 24.04.2008. The question of loss, if any, accrued to a financial institution due to blockade of its funds with the defaulting customer has been taken care of in

Sub-Section (2) of Section 3 of the Ordinance which provides cost of funds to the financial institution as certified by the State Bank of Pakistan for the period from the date of default by the customer. It is for this reason that when a Suit is decreed under the Ordinance, future markup on the decretal amount is not awarded nor is the cost of funds awarded from the date of decree. In the present case, learned Banking Court has erred by granting future markup on the decretal amount at the agreed rate till realization of decretal amount.

8. Regarding penalty claimed by respondent No.1 and granted by learned Banking Court, it may be noted that the facilities in question were availed by the appellants admittedly for Export Re-Finance and in consideration thereof, appellant No.1 executed an undertaking dated 22.02.2007 in favour of respondent No.1 which is available as annexure C-4 at page 159 of the Suit file called from the learned Banking Court. Clause 8 of this undertaking is relevant and as such the same is reproduced below for convenience and ready reference:

> **"***8. We further undertake that in the event of shortfall in Exports for which we have availed for the above finance or in the event of our failure to submit to you from EE-I duly verified by the Bank concerned within the prescribed period of the relevant monitoring year, we will be liable to pay fine at the rate as prescribed by the State Bank of Pakistan from time to time and hereby irrevocably authorize you to debit the same to our account with you.***"**

9. Record shows that along with its plaint respondent No.1 had filed not only the above undertaking executed in its favour by appellant No.1, but also the statement of entries and export documents as well as statements of account of FAFB and FAPC with markup. It may be noted that the application for leave to defend filed by the appellants and all the objections / grounds urged therein by them were rejected by the learned Banking Court. Thus, under Section 10(11) of the Ordinance, the learned Banking Court was fully justified in proceeding forthwith to pass judgment and decree in favour of respondent No.1 against the appellants and other defendants. It has never been denied by the appellants that they failed in exporting the goods on the basis of the subject finance facilities which were availed by them from respondent No.1. Learned counsel for respondent No.1 has placed on record BPRD Circular No.44 dated 17.12.1998 in relation to Export Finance Scheme which specifically provides imposition of fine at the rate of 37 Paisas per Rs.1000.00 or part of the borrowing product in case a direct exporter who had obtained finance under Part IV of the Scheme fails to match his borrowing by

his export performance. Thus, it is clear that under the Scheme the State Bank had the authority to impose penalty upon the customer / appellant, and as already discussed above appellant No.1 had given an undertaking to pay such fine / penalty to the State Bank and had also authorized respondent No.1 to debit amount of penalty from his account. We are of the view that no irregularity or illegality was committed by the learned Banking Court by granting such penalty to respondent No.1. In this context, reference may be made to two Division Bench cases of learned Lahore High Court viz. *United Bank Limited VS Messrs Usman Textile and 6 others*, ***2007 CLD 435*** and *United Bank Limited VS Messrs Blast International (Pvt.) Limited and 6 others*, ***2003 CLD 39***.

10. In view of the above discussion, we are of the considered view that respondent No.1 was/is entitled only to the purchase price of Rs.14,520,000.00, penalty / forced liability of Rs.2,824,870.36 imposed by the State Bank of Pakistan, markup of Rs.323,677.67 on the said penalty and cost of funds under Section 3(2) of the Ordinance. Accordingly, the impugned judgment and decree are modified by decreeing the Suit in the sum of Rs.17,668,548.03 (Rupees seventeen million six hundred sixty eight thousand five hundred forty eight and Paisas three only) which includes the above mentioned purchase price, penalty and markup on penalty. Respondent No.1 shall also be entitled to cost of funds on the above mentioned decretal amount as prescribed by the State Bank of Pakistan from the date of default till realization and costs of the Suit.

The appeal is partly allowed with the above modification with no order as to costs.

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JUDGE

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JUDGE