

IN THE HIGH COURT OF SINDH AT KARACHI

Spl. HCA No.225 of 2015

Present:
Mr. Justice Irfan Saadat Khan
Justice Mrs. Kausar Sultana Hussain

J U D G M E N T

Dates of hearing: 24.01.2019, 11.02.2019 and 3.04.2019.

Appellants: Muhammad Saleem Shaikh through Mr. Ali Raza Habb, Advocate.

Respondent: M/s. KASB Bank Limited through Mr. Faiz Durrani and Mrs. Samia Faiz Durrani, Advocates.

IRFAN SAADAT KHAN, J. The instant Special High Court Appeal has been filed against the judgment and decree dated 09.06.2015 and 29.06.2015, respectively, in Suit No.B-158 of 2009, whereby the learned Single Judge decreed the suit filed by the respondent in a sum of Rs.33,750,086.52, alongwith cost of funds.

2. Briefly stated the facts of the case are that the appellant obtained certain finances from the respondent bank in the following manner:

- (a) Cash Finance Facility Rs.50,000,000/- (Rupees Fifty Million only)
- (b) Finance Against Packing Credit (Sub-limit of Cash Finance Facility) Rs.35,000,000/- (Rupees Thirty Five Million only)
- (c) Running Finance Facility Rs.15,000,000/- (Rupees Fifteen Million only)
- (d) Finance Against Foreign Bills Rs.20,000,000/- (Rupees Twenty Million only)
- (e) Foreign Bills Purchase (Discounting)(Sub-limit of FAFB) Rs.20,000,000/- (Rupees Twenty Million only)

3. The above finances were sanctioned by the respondent bank to the appellant through Facility Offer Letter dated 07.11.2007 on the basis of six month Kibor + 2% with Floor Rate 12% and SBP ERF Rate + 1%, which was valid for one year. Necessary documents were prepared in this behalf, which were duly signed by the appellant and the respondent bank. The appellant then, in order to secure further finance facility, pledged stock of rice in favour of the respondent bank through letters of pledge alongwith valuation reports and thereafter the respondent bank sanctioned /enhanced /renewed finance facility on the basis of three months Kibor + 3.5% and SBP ERF Rate + 1%. However, when allegedly the appellant failed to discharge finance facility availed by him, the respondent bank filed a suit for recovery of Rs.58,282,490/-, being the principle plus markup and other charges including cost of suit, against the present appellant, which matter proceeded before the learned Single Judge, who after hearing the parties decreed the same in favour of the respondent bank in respect of Rs.33,750,086.52/-, alongwith cost of funds. Being aggrieved and dissatisfied with the said judgment and decree the present Special High Court Appeal has been filed.

4. Mr. Ali Raza Habb Advocate has appeared on behalf of the appellant and stated that the learned Single Judge was not justified in allowing the suit without considering various aspects, evidences and the documents produced before him. He stated that the learned Single Judge without considering the fact that higher quality of stock of rice was pledged with the respondent bank against finance facility has decided the suit on technical grounds only. He further stated that the appellant pledged his best quality Super Kernal Basmati Rice with the respondent as security however somehow or the other the same rice, as per the respondent, turned out to be that of lower quality i.e. Aree-6, Aree-9 and D-90 in the custody of the

bank. According to the learned counsel the said pledged /hypothecated goods were in the custody of the bank and if there was a difference in the quality, as alleged by the bank, it was the bank who was responsible for the same and not the appellant, since, as stated above, the stock of rice hypothecated with the bank was in the custody of the bank being monitored by their Muqaddam and security guards. He stated that inspection /survey reports were also presented and produced before the learned Single Judge but the same were not considered. He in this regard invited our attention to various documents annexed with the instant appeal to show that the hypothecated /pledged stock was in the custody of the bank and it was the bank who was the custodian of that stock of rice. He further submitted that if there was a misappropriation in the stock of rice the same was due to the negligence of the respondent bank and the appellant has got nothing to do in this behalf. He further stated that the learned Single Judge dismissed the leave to defend application in a cursory manner without considering various aspects, which were explained to him. He stated that in the valuation /survey report also the stock of rice has been mentioned as Super Kernal Basmati Rice, which was not at all considered. He stated that the dispute arose between the parties when the auction purchaser wrote a letter dated 21.09.2010 to the bank that the pledged stock is not Super Kernal Basmati Rice rather the same was Aree-6, Aree-9 and D-90. He also stated that under Sections 151 and 152 of the Contract Act, since hypothecated goods were lying under the custody of the bank, it was the responsibility of the bank to care for the quality and the quantity of the hypothecated goods and if there was any disparity, it was only the respondent bank who was to be blamed and not the appellant. He further stated that the learned Single Judge has not considered the fact that the respondent bank has failed to disburse Rs.20,000,000/- (Rupee Twenty Million only) against FAFB and

has breached the trust between the appellant and the bank. He stated that even the amounts mentioned in the suit were exaggerated, which were not at all considered by the learned Single Judge. He further stated that the learned Single Judge has also relied upon such documents which have no relevancy with the issue in hand and has decided the matter on mere technical grounds without considering the mandatory requirement of subsection (2) of Section 9 of Financial Institutions (Recovery of Finances) Ordinance-2001 (**FIO 2001**). He, therefore, submitted that the judgment and the decree passed by the learned Single Judge may be set-aside. In support of his above contentions, the learned counsel has relied upon the following decisions:

- 1) Habib Bank Limited Vs. Messrs Medina Rice and Ice Mills and others (2015 CLC 1808)
- 2) Messrs Ali Traders Rice Dealer Gujranwala through Sole Proprietor and another Vs. National Bank of Pakistan (2015 CLD 1)
- 3) Pakistan through Secretary Communication, Islamabad Vs. Messrs Habib Insurance Company Ltd., Karachi (1991 CLC 1270)
- 4) Q.B.E Insurance Ltd. Vs. The Trustees of Port of Karachi through Chairman & others (1992 CLC 804)
- 5) A.M. Burq and others Vs. Central Exchange Ltd. and others (1966 PLD (W.P) 1)
- 6) Apollo Textile Mills Ltd. and others Vs. Soneri Bank Ltd. (2012 CLD 337)
- 7) Messrs Bhangoo Farming Services and 2 others Vs. The Bank of Punjab through Manager (2016 CLD 766)

5. Mr. Faiz Durrani Advocate alongwith Mrs. Samia Faiz Durrani Advocate has appeared on behalf the respondent bank and stated that this appeal is not maintainable as the same is hopelessly time-barred. According to them the judgment was passed on 09.06.2015 and the appeal was to be filed within 20 days, whereas the same was filed on 22.07.2015 hence,

according to them, the appeal is time-barred and is liable to be dismissed in limine. They further submitted that the appellant has miserably failed to demonstrate that they have not availed the finance facility granted to them and even during the course of the arguments before the learned Single Judge and before this Bench also the appellant has not denied availing of the loans and the finance facility. According to them the manner in which the various finance facilities were availed by the appellant has elaborately been discussed by the learned Single Judge in his impugned judgment. They stated that the appellant has breached the trust of the bank by misstating about the quality and the quantity of the stock of the rice pledged by him with the bank, which prompted the respondent bank to take appropriate action against him. They also stated that though the appellant has stated that the quality of the pledged /hypothecated stock to be Super Kernal Basmati, which rice is of superior quality, but in fact pledged with the bank lower quality of rice being Aree-6, Aree-9 and D-90 which aspect, according to them, has been confirmed by an independent valuer appointed by the learned Single Judge, when the matter was being agitated before him. They stated that the learned Single Judge was quite justified in declining the leave to defend application on the basis of the facts obtaining in the instant matter. They stated that it was the appellant who approached the bank for availing the finance facilities, which were duly granted, but the appellant has failed to fulfill his financial legal obligations towards the bank and thereafter the suit was filed against him. The learned counsel stated that when the appellant had failed to adjust the finance facilities granted to him it was only thereafter that the suit was filed. They stated that the pledged /hypothecated stocks were not in the custody or possession of the bank. They further stated that even certain cheques issued by the appellant to the bank were dishonoured. They also invited our attention to

Section 10(6) of the FIO 2001 and stated that the case of the appellant squarely falls under the said provision of the law. They vehemently refuted the contention of the learned counsel for the appellant that if there was a disparity in the quality and quantity of the stock of goods why no action was taken by the bank in this behalf. They submitted that it should have been the appellant rather than the bank to lodge FIR if there was some disparity in the quality and quantity of the pledged stock. They further submitted that when the appellant has not questioned the various finance facility agreements entered between him and the bank, he now is legally restrained and barred from agitating the instant matter when he has duly been found to be a defaulter in respect of the agreements entered between the parties and the bank is fully authorized to take appropriate legal action against the appellant in case of any default. They invited our attention to various clauses of the agreements and other documents to prove and show the liability of the appellant towards the bank and his failure in clearing out the debts of the bank. They in the end supported the order of the learned Single Judge and stated that this appeal being meritless is liable to be dismissed with heavy cost. In support of their above contentions, the learned counsel have relied upon the following judgments:

- 1) Habib Bank Limited Vs. Orient Rice Mills Ltd. and others 2004 CLD 1289
- 2) Messrs World Trans Logistics and others Vs. Silk Bank Limited and others (2016 SCMR 800)
- 3) Siddique Woollen Mills and others Vs. Allied Bank of Pakistan (2003 CLD 1033)
- 4) Messrs Sadia Industries and 3 others Vs. Messrs Soneri Bank Limited (2014 CLD 1458)
- 5) Younus Kamal Vs. Standard Chartered Bank (SBLR 2014 Sindh 1)
- 6) Zeeshan Energy Ltd. and 2 others Vs. Faisal Bank Ltd. (2004 CLD 1741)

- 7) Apollo Textile Mills Ltd. and others Vs. Soneri Bank Ltd. (2012 CLD 337)
- 8) Muhammad Arshad and another Vs. Citibank N.A., Lahore (2006 SCMR 1347)
- 9) Messrs Ibrahim Oil Mills through Proprietor and 2 others Vs. MCB Bank Limited (2015 CLD 802)
- 10) Bank of Khyber Vs. Messrs Spencer Distribution Ltd. and 14 others (2003 CLD 1406)
- 11) Muhammad Arshad and another Vs. Citibank N.A., Al-Falah Building, Lahore (2006 CLD 1011)
- 12) Siddique Woollen Mills and others Vs. Allied Bank of Pakistan (2003 SCMR 1156)

6. Mr. Ali Raza Habb in his rebuttal stated that he has two main objections against the judgment of the learned Single Judge firstly the learned Single Judge has not considered the fact that the respondent bank has not disbursed the finance facilities to the appellant as per the agreements entered between the parties and secondly the difference in quality of the pledged rice was due to the negligence of the respondent bank, hence the order may be set-aside and the matter may be remanded to the learned Single Judge for deciding the matter afresh.

7. We have heard all the learned counsel at considerable length and have also perused the record and the various decisions relied upon by them.

8. From the arguments of the learned counsel for the appellant it is evident that primarily he has agitated and argued two main points in the instant Special High Court Appeal. The learned counsel for the appellant seems to be aggrieved by the order of learned Single Judge on two issues only:-

- 1) *That the learned Single Judge was not justified in observing that the finance facilities granted by the respondent-bank to*

the appellant was not fully utilized/disbursed to them, as per the agreements entered between the parties.

- 2) *That the learned Single Judge was not justified in not considering the fact that the difference in the quality of the rice pledged by the appellant with the bank was due to the negligence of the bank, who were the custodians of the same.*

9. We will take-up the first objection of the appellant with regard to the non-availing/disbursing of the finance facilities by the appellant from the bank. The record reveals that in the year 2007 the appellant approached the respondent-bank for availing finance facilities. The bank after fulfilling legal and codal formalities and evaluating the collateral offered as security by the appellant sanctioned certain finances. The details of which have already been given at page 1 of the present judgment. Thereafter, the parties entered into agreements with each other and several documents were executed. It is an undeniable position that the appellant fully availed and utilized the above said finance facilities, which he was under legal obligation to adjust by 31.10.2008. However, when the appellant failed to pay out the liabilities in respect of the finances availed by him, he made a request for enhancing/renewing the finance facilities. In the letter of facility dated 7.11.2007, which is Annexure 'P/2' full description of the finance facilities offered and accepted by the appellant is given. Thereafter, in pursuance to this facility of the letter the parties entered into the following agreements dated 8.11.2007:-

- 1) *The bank agreed to disburse Rs.6,50,00,000.00 to the appellant and the appellant was liable to pay to the bank Rs.7,47,50,000.00.*
- 2) *The bank agreed to disburse to the appellant Rs.5,50,00,000.00 and the appellant was liable to pay Rs.5,99,50,000.00 to the bank.*

10. The appellant, as noted above, fully utilized the above finance facilities, however, he failed to adjust and clear out the bank's liability on or before 31.10.2008. Thereafter the appellant approached the bank for renewal/enhancing of the finance facilities. Again facility offer letter dated 6.12.2008 was prepared and on 18.12.2008 the appellant returned the facility offer dated 6.12.2008 after duly signing the same. The details of the new approved facilities are as follows:-

- “(i) Cash Finance Facility Rs.50,000,000/- [Rupees Fifty Million only.*
- (ii) Finance Against Packing Credit Part in short FAPC – I and II [Sub-limit of Cash Finance Facility] Rs.50,000,000/- [Rupees Fifty Million only]*
- (iii) Finance Against Foreign Bill [SBP] Rs.20,000,000/- [Rupees Twenty Million only]*
- (iv) Finance Against Foreign Bills [Own] Rs.20,000,000/- [Rupees Twenty Million only] [Sub-limit of FAFB-SBP]*
- (v) Foreign Bills Purchase (Discrepant Sub-limit of FAFB-SBP) Rs.20,000,000/- [Rupees Twenty Million only]*
- (iv) Running Finance Facility Rs.15,000,000/- [Rupees Fifteen Million only]”*

11. The above finance facilities thereafter were made available to the appellant, who as per the record availed the same also in full. The details of revised finance facilities are available on the record, as per bank facility offer letter dated December 06, 2008 (Annexure ‘P/14’ of the file) and the agreements entered between the parties dated 18.12.2008 (Annexures ‘P/15’ to ‘P/22’ of the file). The appellant in order to utilize the finance facilities offered by the bank in full created hypothecation in favour of the bank and executed a letter of hypothecation in respect of his stock of rice stored at Khawaja Godown. The dispute arose between the parties when the appellant after fully availing the finance facilities did not pay out the bank's liabilities towards the bank inspite of various requests and it was thereafter

that the suit was filed on behalf of the bank for recovery of the outstanding amount of Rs.5,82,82,490/-. From the various communications, available on the record, between the parties it could be seen that the appellant had promised to clear out the bank liabilities and has asked the bank to give him some time due to the some shipment problems. The appellant has even promised to clear out the entire markup if some time is given to him due to bad market position and has clearly stated in his letters about bad market position of export of rice, that the shipment payment would soon be realized to him, that he is in contact with the buyers however as noted from the record the appellant has failed to clear out the bank liabilities in due time. The assertion now taken by the learned counsel for the appellant, in our view, appears to be an afterthought that he has not fully utilized the finance offered by the bank as per the agreements entered between the parties; whereas from the facts noted from the record the bank had duly made available to the appellant all the finance facilities as per the agreements entered between the parties, which were as per the offer letters. The appellant before the learned Single Judge as well as before this Court has failed to demonstrate as to which finance facilities have not been fully availed or were not made available by the bank to him. The facility offer letters of November 7, 2007 and 6.12.2008 clearly show the details and description of the finance facilities being offered by the bank, which have fully been utilized by the appellant. Hence, the assertion of the learned counsel for the appellant that the finance facilities offered by the bank were not fully utilized or made available by them is not borne out of the records and is found to be contrary on the basis of the facts obtaining in the instant High Court Appeal. We, therefore, find no merit in this submission made by the learned counsel for the appellant and reject the same accordingly.

12. We will now dilate upon the second issue raised by the learned counsel for the appellant that if there was any change in the quality of the pledged rice, the bank was responsible for the same since they were the custodian of it. It is seen from the record that the appellant initially approached the respondent-bank in 2007 for grant of certain finance facilities, details of which have already been mentioned in upper paras of this judgment on securing personal guarantees and offering other collaterals, which were fully utilized. However when the appellant failed to clear out the liabilities of the respondent-bank in due time they again approached the respondent-bank for extension of time for paying-out the liabilities and for renewal of the finance facilities and then pledged their stock of rice stored in Khawaja Godown in favour of the respondent-bank and duly executed a letter of pledge dated 18.12.2008 in this behalf. It was only when the appellant failed to pay-out his liabilities in due time, he consented on selling out the pledged stock to clear his liabilities. Correspondence in this behalf are available on record including a letter dated 22.1.2009 (Annexure 'R/34 of the file) wherein promise to pay out the liabilities in favour of the bank has duly been mentioned.

13. It is a matter of record that the pledged stock of rice was sold either to the auction purchaser by the Nazir of this Court or purchased by the appellant himself with the permission of the Court and with the consent of the respondent-bank. It is noted that when the order was made by the Court with regard to the sale of the pledged rice it transpired that only a portion of the pledged stock comprised of Basmati Rice whereas remaining portion was other variety of rice. The portion of the rice comprising of Basmati Rice was sold out and sale proceeds were paid to the respondent-bank. Since there was a dispute with regard to the remaining portion of the rice whether the same was Basmati or not M/s. K.G. Traders (Pvt.) Limited was

appointed for examination of the rice, who after examining the same furnished a report dated July 12, 2011 (Annexure 'G' at page 459 of the file) and at page 465 of the file complete description of the stock available at the Khawaja Godowns was mentioned, which clearly reveals that Super Basmati was only 7.7% of the entire stock available at the said godown. It was under those circumstances that auction purchaser refused to lift the rice at the given price and then reauction proceedings were initiated and the remaining rice was sold out which interestingly was purchased by the appellant himself. It is also noted that all these proceedings were culminated in presence of the appellant with his consent.

14. Now here a question would arise, if the quality of the rice was changed by the respondent-bank then why no legal proceedings were initiated by the appellant against the bank. This question perhaps remained unanswered on the part of the appellant as it has been averred quite strongly that since the respondent-bank was the custodian of the pledged rice and if there was a change in the quality, it was the bank who was responsible for it. It is also noted from the record that it was the duty of the appellant to secure the pledged stock so far as the quality and quantity is concerned as evident from his correspondence with the respondent-bank. The contents of the various clauses of the pledge agreement between the parties also clearly reveal that it was the duty of the appellant to maintain the pledged stock and keep the respondent-bank informed about the same; keep the register of the pledged goods for the time being and from time to time pledged with the respondent-bank, duly and punctually enter particulars of the sold goods or consumed and furnish a report on a weekly basis; keep the bank harmless and indemnified against all losses, injury, damage or deterioration; in case the pledged goods suffer any reduction or diminution in market value an additional security to the extent of such shortfall be

deposited, pay all rents, rates, taxes other imposition and charges in respect of the pledged stock, will insure the stock and pay the premium etc. From the valuation /inspection report dated 17.10.2009 it is noted that the keys of the godown were lying jointly with the Muqaddam and the appellant. It was also observed in the survey report that the pledged stock was stored in the godown since long without any movement. Though, it has been averred by the appellant that the stock was in the custody of the bank but it was the appellant who had arranged the godown and placed the goods over there. In the undertaking given by the appellant it has clearly been mentioned that they would give a free access on the premises to the representative of the bank and provide them necessary assistance for conducting quarterly site visits and stock inspections. Hence the assertion of the appellant with regard to the custody of the pledged stock rice with the bank does not seem to be borne out of the records. It is noted that the appellant informed the respondent-bank that the pledged stock was Super Kernal Basmati Rice, which according to them in 2009 was worth Rs.8,600/- per 100 kgs. and if the same was found out subsequently to be Aree-6, Aree-9 and D-90 by an independent valuer, a portion of which was purchased by the appellant himself subsequently, it was the appellant who appears to have not given the correct factual position about the quality of rice to the respondent bank. This also goes against the appellant. Had this being the case, the appellant would definitely have taken some legal action against the respondent-bank for manipulation and misappropriation in the stock, which admittedly was not been done till date rather it was the other way round as it was the respondent-bank, who informed the appellant about the quality of the pledged goods. Moreover even the auction purchaser refused to lift the rice, which was not Super Kernal Basmati, it was then the appellant himself purchased the remaining rice and alleged the respondent-bank to have

changed the quality of rice. It is noted that it was with consent of the parties that M/s. K.G. Traders was appointed for inspection /survey who submitted their report, which has been discussed in the above paragraphs. It is also interesting to note that no reply in respect of the shortfall with regard to the quality of rice as informed by the respondent-bank to the appellant was even given by him.

15. Therefore keeping in view all the above facts, we have reached to the conclusion that the appellant has miserably failed to demonstrate that the shortfall with regard to the quality of the stock was upon the respondent-bank and reject his contention accordingly. The other grounds raised by the learned counsel for the respondent need not be addressed in view of the categorical observations made above. So far as the decisions relied upon by the learned counsel for the appellant and the respondent are concerned they are found to be distinguishable on the basis of facts obtaining in the instant appeal.

16. In the light of what has been stated above, we do not find any illegality or irregularity, misreading or non-reading of the evidence in the judgment and decree dated 9.6.2015 passed by the learned Single Judge by decreeing the suit in the sum of Rs.33,750,086.52, plus cost of funds as certified by the State Bank of Pakistan from time to time w.e.f. 1.11.2009 till realization of the decretal amount. The judgment and decree thus is hereby up-held and affirmed and this High Court Appeal is dismissed alongwith the listed application.

JUDGE

JUDGE

Karachi:

Dated: .04.2019.