IN THE HIGH COURT OF SINDH AT KARACHI

SPL. HCA NO. 123 / 2008

Present:
Mr. Justice Aqeel Ahmed Abbasi.
Mr. Justice Muhammad Junaid Ghaffar.

M/S Kalb-e-Haider & Co. (Pvt.) Ltd. ---------- Appellant

Versus

National Bank of Pakistan & another ---------- **Respondents**

Dates of hearing:	**6.8.2014, 20.8.20143, 23.9.2014, 9.10.2014, 17.11.2014, 8.12.2014 and 20.5.2015**
Date of judgment:	**10.07.2015**
Appellant:	**Through Mr. Shehenshah Hussain Advocate.**
Respondents:	**Mr. Muhammad Rehan Qureshi Advocate holding brief for Mr. Muhammad Zubair Qureshi Advocate.**

JUDGMENT

Muhammad Junaid Ghaffar, J. Through instant Special High Court Appeal, the appellant has impugned judgment dated 27.3.2008 and decree dated 11.4.2008 passed under Banking Jurisdiction by a learned Single Judge of this Court, whereby, the Suit filed by the appellant for Declaration, Permanent Injunction, Damages and Recovery of Rs. 601.00 Million against the respondents has been dismissed.

2. Briefly stated facts are, that the appellant, who claims to be a leading Exporter of rice had exported about 70,000 metric tons of Basmati rice to Islamic Republic of Iran by

negotiating the letters of credits through respondent No. 2. The appellant was maintaining two accounts with the Campbell Street Branch. of the Bank, which is now called as Nicol Road Branch (respondent No. 2) namely, a Running Finance Account in Pak rupees baring No. 007117-6 and a US$ Account bearing No. 72. In addition to these two accounts, the appellant was also holding fixed deposit receipts (FDR) of US$ 315000/- dated 15.4.1997 for a period of five years with respondent No. 2. It has been further stated that in all,13 shipments, against four different letters of credits, were made through respondent No. 2 out of which 9 shipments were made in the name of the appellant. whereas, the other 4 shipments were made by its sister concern viz. Ali Associates. It is further stated that all these letters of credits were opened by the Importers in Iran through Bank Millat Iran, who also had an account bearing No. 1860 with the head office of respondent No. 2 which has been arrayed as respondent No. 1 in the instant matter. It is the case of the appellant that as per Exchange Control Regulations, if the payments were made to the exporter (appellant) from the funds of the opening bank (Bank Millat Iran), then, TT (Telegraphic Transfer) rate as prescribed by State Bank has to be applied, as in such a situation, the funds of the negotiating bank, (respondent No. 2) are not involved. According to the appellant, such mechanism is also termed as ACU system of payment (Asian Clearing Union account arrangement between Pakistan& Iran). Similarly in a situation, wherein, the funds of the negotiating Bank's are involved, then OD (Over Draft) buying rate as prescribed by State Bank of Pakistan is made applicable, while disbursing the payment to the Exporter. It is the case of the appellant that in all these 13 shipments as referred to herein above, the payment was made to the appellant by respondent No. 1 on the basis of TT buying rate, as all these payments were made out of the proceeds and funds being maintained by Bank Millat Iran, and available with respondent No. 1. It is further stated that thereafter on 22.2.1997 a notice was issued by respondent No. 2, whereby a demand of Rs. 701778/= was raised against the appellant, being mark up in relation to the payments already made to the appellant on account of exports made from January 1996 to 8.7.1996.Thereafter another notice dated 26.7.1997 was issued demanding an amount of Rs. 2725125/= which included the aforesaid amount

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and also additional mark up in relation to the exports up to December 1995. On the basis of these two notices. the respondent No. 2 had put a lien on the foreign currency account of the appellant. Such conduct on the part of respondent No. 2 was brought to the knowledge of State Bank of Pakistan by making written complaint and on its intervention, the lien on the said account was lifted, whereas. no further action was being initiated by respondent No. 2. which led the appellant to believe that the issue stood resolved. However, two years thereafter, another notice dated 10.6.1999, was issued to the appellant whereby. an amount of Rs. 2725125/= and an additional sum of Rs. 1954076/=being markup was demanded and on this occasion, the complaint made to State of Pakistan proved futile. In all, the respondent No. 2 had made a claim for a total amount of Rs. 4679201/- in respect of the mark up and the difference in the rate of OD and TT buying.

3. Similarly, the appellant had made another shipment to AMC General Traders Uganda, who had placed an order for supply of rice through a demand draft of US$ 80.000.00 bearing No. 014028 dated 106.1997. Such demand draft was deposited by the appellant in its account with respondent No. 2with instructions to credit the proceeds of the same in the account of its sister concern viz. Five Star International who was required to ship rice to Uganda. Such request was made by the appellant vide letter dated 6.8.1997, whereas, the proceeds against the said demand draft were realized on 13.8.1997 and shipment was made on 15.8.1997. It is further stated that prior to this shipment the respondent No. 2 had certified on 9.8.1997. the bonafide of the importer by issuing Form "E" in terms of Exchange Control Manual Chapter 12. Thereafter, the appellant received a letter from respondent No. 2 dated 18.4.1998, that the demand draft as aforesaid was altered and forged and eventually demanded Rs. 41.12.000/=being equivalent to US$ 80.000/= at that point of time, and finally the respondent No. 2 debited an amount of Rs. 41.12,000/- and also Rs. 27.25.125/- and additional markup then amounting to Rs. 3545127/- from the local and foreign currency accounts being maintained by the appellant and also by premature encashment of its FDR of US$ 315000 dated 15.4.1997. Thereafter

at the behest of respondent No.2. State Bank of Pakistan filed a complaint against the appellant, before the Foreign Exchange Adjudicating Court, wherein, Show Cause Notice issued to the appellant was vacated vide order dated 31.7.2000, by extending the benefit of doubt to the appellant. The appellant thereafter filed a Banking Suit bearing No. 50 of 2001 before a learned Single Judge of this Court, under the Banking jurisdiction, whereby, the appellant had sought declaration, injunction, damages and recovery of Rs. 601.00 million in which the respondent Bank filed leave to defend application, which was allowed and after filing of written statement following consent issues were framed on 25.8.2003 by the Court:-

"1 Whether the defendant is entitled to charge from the plaintiff T.T. rates or O.D. rates on the transaction does by the plaintiff with the Iranian counter parts?

2. Whether the cheque of US $ 80,000/- was cleared by the National Bank whereafter shipment was effected by the plaintiff to Uganda?

3. Whether the plaintiff has clouded (sic) with the foreign importers (Uganda) at the cost of the defendant?

4 Whether National Bank could en-cash the plaintiff NDRP Certificate to recover amount in connection with another transaction.

5. Damages.

6. Relief.

4. The appellant examined its Chief Executive Officer, namely Syed Mazhar Hussain Moosavi, whereas, on behalf of the Respondent Bank, the Manager Mr. Javed Haider was examined, whereas, a representative of American Express Bank viz. Mr. Babar Kaleem was also examined.

5. Mr. Shehenshah Hussain learned Counsel for the appellant has contended that insofar as the payments made to the appellant in respect of its exports to Iran are concerned, the same were made by respondent No. 2 from the proceeds and the funds in the account of Bank Millat Iran, lying with them; hence, in view of directions of State Bank of Pakistan, the same was required to be made on T.T. buying rate, which had in fact been applied by respondent No. 2 initially, when payments were made, whereas, later

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on the respondent No. 2, unlawfully demanded additional amounts on the premise that instead of T.T. buying rate, O.D. buying is to be applied. Per learned Counsel since the negotiating bank i.e. respondent No. 2. had not utilized any of its funds in making payments to the appellant, therefore, it was not entitled for any mark up or cost of funds in this regard. Learned Counsel further contended that as per proceed realization certificates (Ex 5/56 to 5/68) as well as statements of respondent Bank (Ex5/70 to 5/72), it has come on record, that date of negotiation and realization is the same. Therefore, this proves that no funds of respondent No. 2 were involved while making payments to the appellant. In support of such contention learned Counsel has also referred to statement issued by the respondent Bank available at page 270 and 271 of Paper Book. Learned Counsel also referred to the cross examination of the respondents witness namely Javed Haider (Ex-7) wherein, it has been admitted that the date of negotiation and realization in all these shipments are same. In support of his contention the learned Counsel also referred to Foreign Exchange Circular No. 83/1993 dated 30.12.1993 and Foreign Exchange Circular No. 95/1997 dated 20.3.1997 and contended that in view of these circulars, TT buying rate is applicable when the funds of negotiating Bank are not involved. Whereas per learned Counsel in the instant matter the appellant was paid out from the funds already available with respondent No. 2 on behalf of the LC opening bank i.e. Bank Millat Iran, therefore no question of applicability of O.D buying rate arises.

6. With regard to the shipment mad by the appellant to Uganda, learned Counsel contended that the Demand Draft which was sent by the Importer in Uganda, was deposited by the appellant with respondent No. 2 and the same was cleared after due process, whereas DW-2 the witness of respondent bank in his cross-examination, has admitted that the shipment was made by the appellant after realization of the proceeds in respect of the said demand draft. Learned Counsel contended that it was the responsibility of respondent No. 2 and its corresponding Bank viz. American Express, to verify and ensure that such demand draft was genuine, and once the payment had been credited to the account of the appellant, the onus or responsibility of the appellant came to an end.

Learned Counsel further contended that the said amount was credited on 13.8.1997 and shipment was made thereafter on 15.8.1997, whereas, the same was received by the Importer in Uganda in 23.9.1997, and the information with regard to the alleged forgery of the demand draft was brought to the notice for the first time on 18.4.1998. Learned Counsel further submitted that no evidence was brought on record to prove any collusion between the appellant and the importer in Uganda, whereas the learned Banking Judge has erred in observing, that since the export was made on behalf of the sister concern of the appellant and not by the appellant itself, hence, there was some collusion in the instant matter. Learned Counsel further contended that even in the complaint made before State Bank of Pakistan, the appellant has been honorably acquitted, and therefore, no case of fraud or collusion can be made out against the appellant. Learned Counsel further submitted that even otherwise and without prejudice, the respondent No. 2 was not entitled to en-cash the FDR being held as a deposit in trust, to recover the amount in connection with any other transaction, between the parties, and the proper course was to file a claim through Suit for recovery against the appellant. In support of his contention learned Counsel has relied upon the case of ***National Bank of Pakistan and 117 others Vs. Saif Textile Mills Limited and another (PLD 2014 SC 283)*** and ***London Joint Stock Bank, Ltd V. Macmillan and another (1918 ALL ENGLAND REPORT 30).***

7. Conversely, learned Counsel appearing on behalf of the respondent bank Mr. Zubair Qureshi had requested through Mr. Muhammad Rehan Qureshi Advocate holding brief, that he may be allowed to file written arguments and vide order dated 17.11.2014 such request was accepted, whereafter, written arguments have been filed on behalf of respondent bank. It has been stated in the written arguments that the appellant had failed to prove the ACU (Asian Clearing Union) mechanism, whereby TT buying rate are allegedly applicable on the exports between ACU member countries. It has been further stated that the appellant's case does not fall within the ambit of Foreign Exchange Circular No. 5/1997, as the transaction pertains to the year 1995-96 and such circular cannot be applied retrospectively, whereas, the appellant's case falls within the purview

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of Foreign Exchange Circular No. 83/1993, which has been exhibited as D/1. It has been further contended on behalf of the respondents that they are bound to follow the Circulars of State Bank of Pakistan, which have a binding effect like any other provision of law. Whereas, the respondent at the very initial stage had applied the T.T. Buying Rate inadvertently, and on objection by the audit department, the differential amount was collected / recovered from the appellant. It has been further stated that since the exports in the instant matter were being made against letters of credits, the respondent was required to apply O.D. buying rate, irrespective of the terms and condition of the letter of credit, on the basis of Foreign Exchange Circular No. 83/1993. It has been further stated that insofar as the credit of demand draft amounting to US $ 80,000/- is concerned, the same was sent for clearing to American Express Bank Karachi, which was later on dishonored and returned by the collecting bank to respondent No. 2 as being forged and counterfeit instrument vide letter dated 18.9.1997 with remarks *"altered amount"*. Whereas the appellant in order to avoid any consequences executed the shipment through its sister concern viz. Five Star International, which shows malafide on the part of the appellant, therefore, the respondent No. 2 on such dishonor of the demand draft was left with no option, but to adjust the amount from the lien under NDRP-III. It has been further stated that the appellant has admitted in his cross examination that they have not filed any case against the Importer in Uganda who had sent them the said demand draft of US $ 80,000.00, which shows that the appellant was in collusion with the said party and had manipulated a forged instrument by making shipment through its sister concern. It has been further stated that since the appellant was maintaining a Running Finance Account No. 007117-6, the respondent Bank was left with no option but to debit the Running Finance Account, as well as encashment of the FDR prematurely, as the appellant had failed to respond to the notices with regard to the difference in rate of TT buying and OD buying, as well as markup accrued and also with regard to the claim against the forged demand draft. Therefore, according to the respondents such action was justified in the given facts and circumstances of the case, as the bank had a lien marked on such Running Finance as well as FDR, and the same was done in terms of State Bank of Pakistan

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Circular No. SBP/FECIR-2/97, hence no illegality has been committed by the respondents. It has been further stated that no case has been made out by the appellant, whereas, the appellant has also failed to lead any evidence, with regard to grant of damages. In support of its contention, the respondent has relied upon the case of ***United Bank Limited Vs. Messrs Azmat Textile Mills Limited (2002 CLD 495), Abdullah Vs. Muhammad Siddique (1992 CLC 1561), The Mayor of Manchester Vs. Williams (1890 I.Q.B. 94)*** (sic), ***Rubber Improvement Ltd. Vs. Daily Telegraph Ltd. (H.L. (E.) 1963 page 234),(1963 W.L.R. page 1063), Federation of Pakistan Vs. Messrs Alfarooq Flour Mills Ltd. (2000 CLC 215)*** and ***Mst. Nur Jehan Begum Vs. Syed Mujtaba Ali Naqvi (1991 SCMR 2300).***

8. We have heard the learned Counsel for the appellant, perused the record and the written arguments of respondents as well as the case law relied upon by the parties. It appears that the appellant had exported about 70,000 Metric Tons of Basmati Rice to Iran against letters of credits, whereas, the negotiation of these letters of credits was handled by respondent No. 2 with whom the appellant was also maintaining its Accounts. One such account was a Running Finance Account No. 00717-6 and the other was a US$ Account bearing No. 72. In addition to these accounts, the appellant was also holding a fixed deposit (FDR) of US$ 315000/- from 15.4.1997 for a period of five years. The quantity of 70,000 Metric ton was exported in 13 shipments, against four different letters of credits out of which 9 shipments were made by the appellant itself, whereas, four other shipments were made through its sister concern namely Ali Associates. It further appears that all these letters of credits were opened by the importer in Iran through Bank Millat Iran, who was also having an Account bearing No. 1860 being maintained with the Head office of respondent No. 2 i.e. respondent No. 1 in the instant matter. Insofar as these shipments are concerned, the contention of the appellant is that as per the Exchange Control Regulations, while negotiating the letters of credits in US$, the TT buying rate was to be applied, as according to the appellant, the negotiating bank was not utilizing its own funds while making payments from the funds of the L.C opening Bank i.e. Bank

Millat Iran, who was having an account with respondent No. 1. This according to the appellant is also called and termed as ACU System of payment (Asian Clearing Union Account Arrangement between Pakistan and Iran). It is also the case of the appellant that in all these shipments, when payments were made to the appellant and the letters of credits were negotiated by respondent No. 2, as per prevailing practice, the payment was made to the appellant on the basis of TT buying rate and not on the basis of O.D. buying rates. This is precisely the first controversy between the parties, that as to whether, in this situation, TT buying rate is to be made applicable or OD buying rate is to be applied. It appears to be an admitted position that shipments pertaining to the all these letters of credits were negotiated by respondent No. 2 on the basis of TT buying rate, whereas, on the other hand, the case of the respondents is that such act on the part of the respondents was apparently due to mistake and when such mistake was noticed by the auditors of the respondents, a notice was issued to the appellant on 22.2.1997, whereby, a demand of Rs. 701778/= was raised in respect of the exports made from January 1996 to 8.7.1996 and subsequently, another notice dated 26.7.1997,whereby, another payment of Rs. 2725125/= was also raised relating to exports up to December, 1995. Initially the respondent had put a lien on the Foreign Currency account of the appellant, however, on the complaint to State Bank of Pakistan, such lien was lifted and no further proceedings were initiated by the respondents until 10.6.1999, whereby, an amount of Rs. 2725125/= with an additional sum of Rs. 1954076/= being markup was demanded from the appellant, whereafter the account of the appellant was debited by the respondents and the FDR's were also en-cashed prematurely to make good the short fall in recovering this amount. This is precisely, one aspect and issue of controversy between the parties in the instant matter. On the other hand the other point / issue between the parties is with regard to the shipment made to Uganda on the basis of advance payment through a demand draft, which according to the respondents, was thereafter found to be forged and fabricated and hence the payment made in that regard to the appellant was also recoverable and for such purposes also, the account was debited as well as the FDR's were en-cashed to overcome the short fall and an aggregate of Rs. 10382252/= was recovered from the appellant in

respect of these issues. The appellant being aggrieved by such conduct on the part of the respondents, filed a Suit before this Court under the Banking jurisdiction for Declaration, Permanent Injunction, Damages and Recovery of Rs. 601.00 million, against which the respondents filed leave to defend application which was granted and thereafter written statement was filed by the respondents and issues were framed by the Court on 25.8.2003. The appellant lead its evidence through Syed Mazhar Hussain Moosavi (PW-1), whereas, respondents through Mr. Babar Kaleem (DW-1) Manager Remittance, American Express bank and the Javed Haider (DW-2) Branch Manager of respondent No. 2.

9. Insofar as the issue with regard to the negotiation of letters of credits on the basis of TT buying and OD buying rate is concerned, it is an admitted position that initially all the payments were made to the appellant on the basis of TT buying rate by the respondents, whereas, subsequently, demand for the difference accumulated on the basis of OD buying rate was raised and in addition to such difference, the respondents also claimed markup on the differential amount and the account of the appellant was debited for such differential amount as well as the markup accrued therein. In this regard the learned Counsel for the appellant has contended that since admittedly in respect of these 13 shipments, the date of negotiation and date of realization is the same, hence, admittedly no funds of the negotiating bank are involved and therefore, no question of applying OD buying rate arises. Learned Counsel in support of its contention has referred to the cross examination of DW-2 namely Javed Haider, the Branch Manager of defendant No. 2 (respondent No. 2) exhibit No. 7.It would be advantageous to refer to the relevant portion of the cross examination of the said witness available at page 19 of the evidence file:-

> "I am familiar with the Circulars of the State Bank of Pakistan and Rules and Regulations of UCP-500. Four L.Cs of the subject matter of the suit were routed through main Branch. The account of Bank Millat Tehran was in our main Branch. I see Exhibit No. 5/128 (The witness is confronted with the clause) it is L.C. and there is a clear cut stipulation. It is specifically mentioned that "date of negotiation should be advised to us by tested telex before sending the Airmail DOC's certifying that all terms and conditions have been complied with, so you are authorized to debit our H.O. ACU DURS. ACC 1860 with yourselves otherwise cable discrepancies and obtain our approval or send on collection basis.

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2-PLS delete the purase (sic) "one copy, legalized by Iranian Consulate from subject No. 3, A/M L/C Terms."

In all the L.Cs, the Debit Advice was to be made after negotiation. I see Exhibit NO. 5/122, it is correct to suggest that through telex dated 23/2/1995, terms and conditions as regard reimbursement instructions the following phrase in the beginning first part was added:

"PLS DEBIT OUR ACU ACC WITH YOUR AND... STOP. OTHER TERM REMAIN UNCHANGED"

"Annexure "A" is issued either it is advance or letter of credit where proceed are realized. Annexure "A" is issued for the export rebate. Under UCP-500, the negotiation is deemed to be completed on giving of funds. We reimburse ourselves by debiting the accounts of Tehran Millat Bank with us who were L.C. opening Bank."

"It is correct to suggest that 13 shipments were made against the four (4) Letter of Credits. We have issued Exhibit Nos.5/56 to 5/68. I see circular No.64 of 1993, it is correct to suggest that the exhibits referred to above are annexed "A" to circular No.64 of 1993 is a proforma to the Circular. It is correct to suggest that Annexure A is issued after the proceeds are realized. I see Exhibits Nos.5/70, 5/71 and 5/72, it is correct that as per said exhibits date of negotiation and date of realization is same. It is correct to suggest that in all 13 shipments, we charge O.D instead of T.T rates. *(Emphasis supplied)*

Question: Could you explain when the date of negotiation and date of realization is same then how the funds of the bank are involved?

Answer: This is the internal arrangement between the banks. Banks maintain accounts of other banks for import and export transactions. We follow instruction of State Bank of Pakistan and we have to apply and charge O.D buying rate. If we are negotiating the transaction against the Letter of Credit."

10. From perusal of the aforesaid cross examination of respondent's witness, insofar as the date of negotiation and realization is concerned, it appears that in the instant matter the same had happened on the same day. Learned Counsel has also relied upon the Bank Credit Advice in this regard available as exhibit 5/56 to 5/68 which also reflects that the date of negotiation as well as the date of realization is the same. The learned Counsel has further referred to exhibit 5/70 and 5/71 onwards which are Bank Statements and they also reflect that the date of negotiation and date of realization as the same. Now the issue which falls for determination before this Court is, that in such a situation, whether the Exchange rate of TT buying or OD buying would be applicable. The learned Trial Court

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in the instant matter, while dilating upon this issue, has referred to and examined two Foreign Exchange Circulars issued by the State Bank of Pakistan namely FE Circular No. 83/1993 dated 30.12.1993 and Foreign Exchange Circular No. 5/1997 dated 20.3.1997 and has come to the conclusion that insofar as Circular No. 5/1997 is concerned, the same perhaps would not be applicable to the case of the appellant, as the shipments in the instant matter were made and effected prior to issuance of such Circular and has decided the issue on the basis of and interpretation of Circular No. 83/1993. It would be advantageous to refer to this Circular which read as under:-

> *"FE Circular No. 83/93 dated 30th December 1993.*
> "Under the existing rules Authorized Dealers are required to convert inward remittances on account of exports at the T.T. Clean buying rate where documents are sent on collection basis or where advance payment is received. In cases where the documents are drawn under a letter of credit, conversion is required to be made at the O.D. buying rate. The rationale is that under letters of credit, negotiating banks are required to make immediate payment upon negotiation of documents while the payments from the opening / reimbursing banks are received subsequently. The exporters have, however, complained that the Authorized Dealers are making payment even in the case of documents presented against the letters of credit after receipt of funds from the opening / reimbursing banks at the O.D. buying rate instead of making upfront payments. It is, therefore, advised that in cases where documents presented under letters of credit are not negotiated for any valid reason but payment is made to the exporter after receipt of funds from the opening / reimbursing bank, conversion will invariably be made at the T.T. clean buying rate instead of O.D. buying rate. The Authorized Dealers will, however, be free to recover from the customers their service charges and postages." (Emphasis supplied)

11. It appears that the trial Court while deciding the issue against the appellant in respect of charging of OD buying rate has relied upon a certain portion of the said Circular, which states and deals with regard to a situation, wherein the documents are drawn under a letter of credit and provides that conversion is required to be made on OD buying rate. Though in the instant matter also, the documents have been drawn under letters of credits, however, there is an exception in the instant matter with regard to utilization of funds of the negotiating bank, as according to the terms of the aforesaid Circular No. 83/93, the purpose and intent of charging OD buying rate in respect of letters of credits is for the reason, that such letters of credits are negotiated on behalf of the L/C-opening bank and the exporter is paid immediately on presentation of such documents,

whereas, the realization of funds from the L/C-opening bank takes some time and for this purpose, the cushion period of 15 days is provided for which the OD buying rate (lower rate) is applied and the negotiating bank by utilizing its own funds, charges a certain mark up or gets benefited by applying OD buying rate which is always less than the TT buying rate. In the instant matter, it appears to be an admitted position on the basis of evidence of the parties, that the date of negotiation and the date of realization is the same; therefore, while applying the aforesaid Circular, we must not lost sight of the fact that the negotiating bank (respondents) has not utilized its own funds. We may observe that the learned Trial Court has only relied upon a portion of the Circular, whereas, it requires to be read as a whole, and if the latter part of the Circular is properly read into, it appears that the exporters had complained to the State Bank of Pakistan, that the Authorized Dealers (negotiating banks) are making payment even in case of documents presented against the letters of credits, after receipt of funds from the opening / reimbursing banks and were applying OD buying rate and therefore, State Bank of Pakistan advised, that in cases where documents were presented under the letters of credit and the payment was made to the exporter after receipt of funds from the opening / reimbursing bank, conversion was invariably be made on the T.T clean buying rate, instead of OD buying rate. However, the negotiating bank would be free to recover from the customer, their service charges and postages. This portion of the Circular makes it abundantly clear, that the intention of the regulating bank i.e. State Bank of Pakistan is, that T.T. buying rate would be applicable in situations, where the funds of the negotiating bank have not been utilized, be it under letter of credit or not. When we examine the entire case of the appellant on the basis of evidence and the peculiar circumstances of the instant case, it appears that the negotiating bank i.e. respondents in the instant matter, cannot be allowed to be benefitted by claiming refuge under the first portion of the aforesaid Circular, whereby, the State Bank of Pakistan has applied OD buying rate in case of letters of credits as in that situation, the respondents would be making profits / gains and charging mark up without utilizing their own funds, for which the State Bank of Pakistan has advised applying OD buying rate. In the present situation, there is no overdraft facility

being availed by the appellant who is admittedly being paid from the funds / account of the L/C-opening bank. It is also pertinent to observe that respondents witness (DW-2) as referred to hereinabove, has also admitted in cross-examination, that they reimbursed themselves by debiting the account of Tehran Millat Bank with us who were L/C opening Bank. Therefore, in the given situation, merely for the reason that shipments were made against letter of credits, the Trial Court had misdirected itself, by relying upon a part of the Circular in question, which in fact supported the case of the appellant, if properly read into and applied.

12. In view of herein above, facts and circumstances of the case and on the basis of evidence led by the parties with regard to the dispute in respect of applicability of OD buying rate or TT buying rate, we are of the opinion that the learned Single Judge was not justified to hold that in view of the Foreign Exchange Circular No. 83/1993 and for the fact that negotiation of documents was on basis of letters of credits, OD buying rate would be applicable, whereas, according to us in the given facts when admittedly the funds of the negotiating bank were not being utilized and the State Bank of Pakistan had already dealt with such a situation in the aforesaid Circular, the appellant was entitled for negotiations of documents on the basis of TT buying rate which had been initially applied by the respondents and therefore, the order for the recovery of amount of Rs. 27,25,125/- and mark up of Rs. 19,54,076/- from the appellant was not justified which is accordingly held to be unlawful. Accordingly, we hold that the appellant is entitled for its reimbursement with profit / markup as prescribed by the State Bank for the relevant period.

13. Insofar as issue No. 2 & 3 are concerned, that as to whether the demand draft of US$ 80,000/= was cleared by National Bank, whereafter, shipment was made by the appellant to Uganda, and as to whether the appellant had colluded with the foreign importers at the cost of respondents is concerned, both are interlinked and are therefore being decided together. It is an admitted position that the export in respect of this

shipment was made on the basis of Advance Payment through a demand draft of US$ 80,000/=received from the importer / buyer in Uganda, which was deposited with respondent bank, with directions to credit the same into the account of Five Star International a sister concern of the appellant. It further appears from the record that the proceeds of the said demand draft were credited in the account of the appellant / sister concern on 13.8.1997, whereas, shipment of the consignment was made on 15.8.1997, and the consignment was received by the Importer / buyer in Uganda on 23.9.1997. It further appears that on 18.4.1998, the appellant received a letter from the respondents stating that the said demand draft was counterfeit, and, consequently, the appellant was asked to pay the amount or equivalent of US$ 80,000/= to the respondent. It is also an admitted position and which has not been disputed by the respondents, that after credit / realization of this amount, the appellant effected shipment of the consignment, against the aforesaid demand draft through its sister concern on or about 15.8.1997, whereas, the shipment was also received by the buyer on 23.9.1997. In such a situation when a demand draft received by the appellant from its buyer, after its deposit with the respondent bank, is credited into the account of the appellant, without any objection, the appellant would not have been in a position to either suspect or to apprehend that the said demand draft could have been forged or altered. The appellant after receiving the money was under obligation to export the goods to the buyer, and could not have withheld the same any further. In fact it is the responsibility of the respondent bank as well as its corresponding banks, through whom the demand draft was being routed for its encashment, to have taken care and seek prior conformation of its correctness and or genuineness and then to credit the amount in the appellant's account. We have not been assisted in any manner by the Counsel for the respondent bank to show us any law or regulation in this regard, whereby, the appellant can be asked to repay the amount after 8 months of effecting shipment to the buyer, on the ground that the demand draft was forged or altered. The evidence which has been led by the respondent in this regard is totally based on the witness (DW-1) namely Babar Kaleem, who appears to be the Manager Remittance of American Express Bank, through which the respondents had made correspondence for

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clearance of the demand draft. The said witness in his examination in chief (Ex-6) has confirmed that the Head office of American Express Bank had debited the account of National Bank of Pakistan, almost after seven months, and such act of American Express Bank was based on the general practice being strictly followed in USA, where if a wrong credit or debit entries are made, then on furnishing a legal affidavit, the Bank has to make good the loss or restore the amount. The said witness has also produced a summary of instructions (Exhibit 6/5) which was required to be followed in this regard, along with affidavit of material alteration (Ex.6/2), signed by one J.E. Martinez Useros Mateos, residing in Spain, claiming to the legal department Principal, employed at CAJA DE AHORROS DE MURCIA (Bank in Spain which had issued the demand draft). However, we are unable to subscribe to such piece of evidence, as firstly the same is not based on any instructions or documentation / rules or regulations either of the State Bank of Pakistan or by the respondent bank itself, and secondly the respondent bank has not led its own evidence in this regard, nor the person on whose affidavit (Ex.6/2) the entire case of respondents is based, entered the witness box. It further appears that the said witness in his cross examination has confirmed, that they have not alleged any instance of forgery or fraud against the appellant in respect of the document in question. The said witness has also confirmed that the respondent bank has not filed any claim in respect of the amount of demand draft, whereas, they have also not filed any claim against the other corresponding bank i.e. Bank of New York and the Spanish Bank who had issued such demand draft. The said witness also confirms that he had no knowledge that if Pakistan is a signatory to any such convention that as to whether, such summary of instructions (Ex.6/5), being followed by the Banks in USA, are binding upon Pakistani Banks or not. After having examined this piece of evidence, we are of the view that in the given facts and circumstances of the instant case, insofar as the appellant is concerned, they cannot be burdened with such dishonoring of demand draft after a period of almost seven months of its credit in the account of the appellant and the shipment of the consignment to the buyer, whereas, the witness of American Express Bank himself has confirmed that they have not alleged any instance of forgery against the appellant, therefore, the question of

collusion on the part of the appellant with the foreign buyer is not substantiated. It would not be out of place to observe, that in export shipments, the mode of advance payment is the safest way for an exporter in Pakistan to export the goods. Through this mode, the payment is first received by the exporter in his account, and thereafter, the shipment is affected. In the other modes, that is letters of credits at sight or on 90 days basis or on deferred payment basis, there still is a margin of risk and error, whereby, the exporter is exposed to default on the part of the buyer. In the case of advance payments through demand draft, the exporter, once, after receiving the payment effects shipment, the matter stands as past and closed for the exporter. The exporter after effecting shipment is required to send all the original documents of the shipment to the buyer directly or through the Bank, as the case may be, as it does not involve any transaction through the bank, once the amount has been credited. Merely for the reason that the set of document has been sent or requested to be sent to the buyer through the respondent bank, does not have any bearing on this issue, which appears to have prevailed upon the learned Single Judge while deciding this issue No. 3 against the appellant. It is also pertinent to observe that some proceedings were also initiated against the appellant by the State Bank of Pakistan under Section 12(1) and 23(b)(4) of the Foreign Exchange Regulations Act, 1947, in the Court of Director of Adjudication, Foreign Exchange, Adjudication Court, who after a detailed hearing of the case vide its order dated 31.7.2000,also observed that the sister concern of the appellant namely Five Star International had acted in good faith while depositing the demand draft in the Bank for collection with clean hands and had exported the goods only on receipt of advice of its bank regarding the realization of proceeds of demand draft, and, accordingly, the Adjudication Court gave benefit of doubt to the alleged accused and had vacated the show cause notice issued to him. We have not been assisted on behalf of the respondents, that as to whether, any further proceedings took place in this regard whereby, such order of the Adjudication Court of Foreign Exchange was challenged any further. In view of such position, insofar as the appellant is concerned in this entire transaction, they cannot be burdened or saddled with any such liability and the responsibility, if any, was of the corresponding Banks, involved in taking

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care of the demand draft for its encashment. In view of hereinabove facts and circumstances of instant case we hold that the learned Single Judge of this Court had misdirected himself in deciding both these issues against the appellant, and the said finding being contrary to facts and law, is hereby set aside. Accordingly we hold that the shipment of the goods made by the appellant was after realization of the proceeds of US$ 80,000/= in its account and the appellant had not colluded with the foreign importer at the cost of the respondents.

14. Now reverting to the fourth issue, that as to whether the respondents could en-cash the appellant's FDR certificates prematurely to recover the amount in connection with another transaction. Since we have already held and decided that no amount was recoverable from the appellant, therefore, the response to this issue has now become, only an academic exercise, however for the sake of clarity, we may observe that even otherwise nothing has been brought before us to show that the respondents had any authority to en-cash the FDR prematurely, for settling any alleged outstanding liability against the appellant. Though we may observe that the Bankers generally have lien in respect of any security / property as laid down in Section 171 of the Contract Act for setting off the liability of a defaulter, however, the question is that such liability against a party must have been settled / adjudicated by a proper forum having jurisdiction in the matter. In the instant case the respondents Bank instead of initiating any recovery proceedings against the appellant, took undue advantage of the fact that substantial amount was available with them on behalf of the appellant in the shape of FDR as well as other accounts and instead of going through the legal process, merely debited the account of the appellant and became Judges of their own cause. It is a settled law that in such matters the banks cannot take any unilateral action and have to resort to the legal process provided under the law and can exercise the right of set off only when the money owed to them is a sum certain, which is due. Further the Bank cannot be conferred with judicial powers for determination of the amount due against its customers. The right of set off would only be available when the amount due is certain and determined by a competent

judicial forum. The Hon'ble Supreme Court in the case of ***National Bank of Pakistan (Supra)*** while dealing with the provision of Section 15 of the Financial Institution (Recovery of Finances) Ordinance, (XLVI of 2001), whereby, the banks were entitled to auction a mortgaged property on their own and without going through the legal process of adjudication by the competent Banking Courts has been pleased to declare such provision as ultra vires to the Constitution in the following terms:-

> "32. In order to ascertain the real import and effect of Section 15 of the Ordinance of 2001, it is necessary to contextualize the said provision. A functional banking sector is an integral and essential component of any modern economy. In the normal course of business, loans and finances are advanced by the banks and utilized by their customers. However, some of such customers will be unable or unwilling to meet their obligations. Defaults by customers whether willful or commercial are facts of life. The banks too may occasionally act unfairly by raising inflated and exaggerated claims and engineer defaults as they may cover the assets of their customers. Banks also default necessitating huge bailouts with tax payer's money. A utopian world where all customers fulfill their obligations and all bankers are saints does not exist. A large number of private banks and financial institutions now populate the financial sector and therefore more often than not the provisions of law under scrutiny would be pressed into service with regard to a dispute between private parties in respect of commercial transactions. No doubt the Banking Sector is vital to any country and may need some protection and preservation yet bestowing of an unfair advantage at the cost of customers may not be necessary or permissible. (Emphasis supplied)
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> 33. The matters pertaining to the financial claims secured by mortgagors as in the instant case, generally involves a two stage process, firstly the determination of the liability through due process and after a fair trial inclusive of a right of hearing and opportunity of show cause. Such determination under the general law is evidenced by a decree of a Court of competent jurisdiction. And secondly, the recovery of the determined amount by way of the satisfaction of execution of such decree including through the sale of mortgaged property. Even if a liability has been determined by a decree of the Court, the mortgagor / debtor is not deluded of all his civil rights including with regards to the modes and methods of such recovery through the sale of the mortgaged property. The right of such debtor to ensure that the mortgaged property is sold in a free, fair and transparent manner so as to fetch the best possible price is now a well-recognized principle of law, which finds its manifestation both in various statutory provisions, more particularly, Code of Civil Procedure (including Order XXI of C.P.C.) as well as the law, as laid down by this Court, including the case reported as Mir Wali Khan V Agricultural Development Bank of Pakistan, Muzafargarh and another (PLD 2003 SC 500), wherein it has been held as follows:-
>
> > "Crux of what has been discussed above is that clever maneuvering forcing way for disposal of a property in execution of a decree for a paltry sum has to be guarded against and jealously so with all the care and circumspection so that it may go for a sum it deserves."

15. In view of hereinabove discussion we are of the opinion that since neither any liability was adjudged by any competent forum, nor any such proceedings were initiated by the respondents, they in law, could not have debited the account of the appellant or en-cash the FDR's prematurely, for settlement of any alleged liability of the appellant, therefore, such act on the part of the respondents is also illegal and is hereby set-aside.

16. Insofar as the claim of damages raised on behalf of the appellant is concerned, we may observe that such damages can only be claimed, at the most, only in respect of the business in hand, and which could not have been materialized and or executed, due to any of the act(s) and or conduct of the other party. What the appellant has claimed is in fact based on the expected volume of business, which according to the appellant could not materialize due to unilaterally withholding / debiting of their account, which left them with no money to do any further business. The appellant has also submitted that due to this act of the respondent bank, the overall credibility of the appellant was damaged to such an extent that all the local suppliers had stopped credit sales to the appellant, and for one reason or the other, the appellant's reputation was put to stake, therefore, this continuous suffering of loss, entitles the appellant for award of damages. However, on perusal of the evidence led by the appellant in this regard, we are of the view that no such damages can be quantified, as the appellant has failed to lead any appreciable evidence in this regard. The appellant's failure to lead and or produce its best or positive evidence should be reckoned against him. The claim based on oral statements without any supporting or corroborating material, except balance sheets of previous years i.e. 1994, 1995 & 1996, cannot be considered as best piece of evidence for grant of damages, as it draws an adverse inference against the appellant insofar as the claim of damages is concerned. To substantiate the claim of damages based on losses suffered due to the act of respondents as alleged, it was incumbent upon the appellant to demonstrate that such losses had in fact occurred during such period by quantifying and substantiating them, whereafter damages proportionate to such losses could have been claimed. Damages cannot be awarded on such expectation or on hearsay evidence. It has to be specific with

transactions and the quantum of losses, so as to claim damages in retrospect. Therefore, insofar as the claim of damages is concerned, we do not see any reason to allow any such damages and accordingly we hold that insofar as instant appeal is concerned, the same fails with regard to claim of damages.

17. In view of hereinabove facts and circumstances of the case, and the discussion and reasoning recorded hereinabove, we are of the view that the appellant has successfully made out a case for indulgence by this Court and accordingly for the aforesaid reasons we hereby set aside the impugned judgment dated 27.3.2008 and decree dated 11.4.2008 passed by the learned Banking Judge of this Court by allowing instant appeal and decree the Suit of the appellant in respect of prayer clause(s) (a), (b), (c), & (e), whereas, the Suit with regard to claim of damages is dismissed.

18. The appeal stands allowed as above.

JUDGE

JUDGE

ARSHAD

Announced by us

(Shaukat Ali Memon-J)

(Aqeel Ahmed Abbasi-J) 10/7/2015

Order
Issued in
Suit No. B-50/2001
returned a/w
Part file dt: 15/7/15