IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

SUIT NO.428/2012

Plaintiff	:	Manzar Masood, through M/s. Mehar Khan and Ahmed Niazi, advocates.
Defendant	:	Bank Islami Pakistan Limited, through Mr. Jaffar Raza, advocate.

Date of hearing	:	07.02.2017.
Date of announcement	:	03.04.2017.

JUDGMENT

Plaintiff filed this suit for Compensation and Damages pleading therein that he owns and is proprietor of M/s. Sardar CNG Filling Station situated in Gulistan-e-Jauhar, Karachi and his sons namely Muhammad Ashraf, Muhammad Shoaib and Muhammad Khalid are partners in that business; that in the year 2007 plaintiff and his partners were granted Ijara Finance Facility of Rs.14.23 million and Letter of Guarantee Facility of Rs.3.3 million in favour of SSGC in respect of said CNG Filing Station, by the defendant subject to mortgage of bungalow owned by plaintiff bearing No.C-103, Block-J, North Nazimabad, Karachi, measuring 600 square yards comprising of ground and first floors, west opened corner, situating at posh area having direct approach from 320 feet wide main road; that plaintiff handed over original documents of the bungalow to defendant on 16.05.2007 for mortgaging for the purpose of

loan facility which documents file included (i) original registered lease deed dated 06.11.1968, (ii) mutation order dated 06.05.1972, (iii) registered gift deed dated 18.11.1989 and (iv) mutation order dated 11.01.1990 in favour of plaintiff, were received and acknowledged by defendant and thereafter the bungalow was mortgaged vide mortgage deed dated 15.05.2007. It is pleaded that plaintiff has paid off the loan facility, defendant issued clearance letter on 06.09.2010 thereby letter of guarantee furnished in favour of SSGC was withdrawn and defendant issued no objection dated 05.03.2012 for redemption of said mortgaged property however officers of defendant adopted delay tactics in the matter of such redemption; plaintiff received information from officials of defendant that original documents of the property have been misplaced by officers of defendant, plaintiff made request on 29.06.2011 and 15.07.2011 to allow him to examine the original documents but defendants failed to respond; the plaintiff made a complaint to Banking Mohtasib of Pakistan on 07.07.2011 and 19.07.2011 against defendant, enquiry was made but plaintiff could not get his grievances redressed as authorities informed him to seek remedy before proper forum. It is further pleaded that plaintiff got valuation certificate of the property from Gandhara consultant Architecture, property was examined and after considering all aspects value was estimated at Rs.30 million, said consultant also issued certificate that if original documents of the property are misplaced/lost then keeping in view the risk of fraud, cheating and corruption being played concerning landed properties, the value of the property on duplicate documents will be reduced and depreciated by 50% as genuine

buyers do not take any risk purchasing such properties on duplicate documents; that due to loss of original documents the plaintiff went under continuous mental shock, tortures and agony keeping in view future consequences and continued risk of devaluation of the property hence prayed that:-

a) This Court be pleased to pass decree against the defendant in favour of plaintiff granting the compensation of Rs.15 million for deprecation and devaluation of the property No.C-103, Block J, KDA Scheme No.2, North Nazimabad Karachi and Rs.15 million as damages for the shock and mental tortures caused to the plaintiff in all Rs.30 million.

b) Any appropriate relief as deemed fit under the circumstances.

2. Defendant raised legal objections that plaintiff has no cause of action and that instant suit relates to dispute between a customer and financial institution hence suit has wrongly been filed in ordinary civil jurisdiction. It is pleaded that defendant bank has complied with the orders of Banking Mohtasib and State Bank of Pakistan in letter and spirit and has settled all disputes with plaintiff by arranging certified true copies of all relevant documents; that plaintiff has incorporated inflated damages only to ensure that instant case is filed before this Court; that instant suit is filed on imaginary ground that value of property would depreciate by 50% as again no proof has been annexed that this would be the scenario while value of property does not depreciate rather increases with the passage of time; it is denied that plaintiff or his sons have been

subject to any mental torture or agony by defendant or its officials or that defendant's officials have any personal grievance, dislike or hatred against plaintiff to subject him or his sons to torture. Defendant prayed for dismissal of suit.

3. On pleadings of the parties following issues were framed:-

1) Whether original title documents of plaintiff's bungalow bearing No.C-103, Block J, KDA Scheme No.2, North Karachi misplaced/lost by the defendant?

2) Whether if original title documents misplaced/lost, the sale value on duplicate documents of this property depreciated/devalued by 50%?

3) Whether plaintiff is entitled for compensation/damages as prayed by him on account of depreciation of the price of his property and damages for shock and mental torture?

4) Whether the defendant is liable to pay the compensation/damages to plaintiff?

5) Whether the suit filed without cause of action and not maintainable?

6) What should the decree be?

4. Commissioner was appointed to record evidence; parties filed their respective affidavits in evidence. Plaintiff Manzar Masood examined himself and produced his affidavit-in-evidence and other documents who was also cross-examined and then side of the plaintiff was closed. On the other hand, defendant-bank examined DW-1 Farogh Ahmed Siddiqui and DW-2 Muhammad Mazharuddin who were also

cross-examined and then the side of the defendant-bank was closed. Accordingly, commission was returned duly completed.

5. Heard learned counsel for parties, perused the record.

6. Learned counsel for plaintiff argued that plaintiff consulted with Gandhara Consultant Architecture, property was examined and after considering all aspects value was estimated at Rs.30 million, said consultant also issued certificate that if original documents of the property are misplaced/lost, the value of the property on duplicate documents will be reduced and depreciated by 50% as genuine buyers do not take risk purchasing such properties; that due to loss of original documents of highly expensive property by the defendant, the plaintiff remained under continuous mental shock, tortures and agony in view future consequences and continued risk of devaluation of the property therefore estimated the loss to the property at Rs.15 million and Rs.15 million as damages for shock and mental tortures caused to plaintiff.

7. Learned counsel for defendant contended that plaintiff has invoked wrong jurisdiction as in view of section 7 sub-section (4) suit should have been instituted in Banking Court; that plaintiff can only maintain present suit before this Court if he has a claim under tort which requires that plaintiff suffers an actual damage and not a presumption of damages in future and for that plaintiff would have to put his property in market for sale which was not done as admitted in his cross examination and as such plaintiff has no cause of action; that defendant bank in order

to compensate the plaintiff obtained certified true copies of misplaced documents and plaintiff most willingly accepted the same; that plaintiff preferred the suit only on sole ground that value of property has depreciated because of loss of original documents; mental agony though pleaded but in cross examination plaintiff admitted that he had not approached to his consultant for treatment of mental agony and stress as he is myself a homeopathic doctor; that there is no method to quantify a loss that has not incurred as if plaintiff were to sell the property after 20 years, defendant cannot be held liable to pay the amount to compensate the difference between actual price and alleged depreciated value; report by Ghandhara Consultant without calling the author as witness, though defendant filed application for calling the author as witness but same was dismissed; that plaintiff suffered no loss and failed to establish any damages hence suit is liable to be dismissed. Learned counsel relied upon 2012 CLD 483, 2009 CLD 49, 2014 CLC 5 and 1970 SCMR 506.

FINDINGS.

Issue No.1	In affirmative.
Issue No.2	As discussed.
Issue No.3	In affirmative
Issue No.4	In affirmative
Issue No.5	In negative.
Issue No.6	Suit is decreed for an amount of Rs.7,000,000/- (Rupees seven million).

ISSUE NO.5

'Whether the suit filed without cause of action and not maintainable?

8. Since the above issue is framed to see competency and maintainability of the suit therefore, it would be in all fairness to decide this issue *first*. The objection to jurisdiction of this Court has been insisted with reference to subsection (4) of Section-7 of Financial Institutions (Recovery of Finances) Ordinance, 2001. The jurisdiction of the Banking Court, the perusal of the Ordinance, in particular the Section 9 which starts as:

> *"**Section 9(1)*** Where a customer or a financial institution **commits** a default in fulfillment of **any obligation** with regard to any **finance,** the financial institution or, as the case may be, the customer, may….

prima facie would make it clear that it is confined to disputes, committed *either* by **'financial institution'** (section 2(a)) or **'Customer' (**section 2(c)) with regarding to **'finance** (section 2(d)) or **'obligation** (section 2(e)) *only.* Since, the terms **'financial institution'**; **'customer'** and **'finance'** need no much debate nor are disputed yet jurisdiction is being challenged hence interpretation, if any, would require a direct referral to last *definition* i.e *obligation'* as defined by Section 2(e) of the Ordinance i.e:

> *"(e) "obligation" includes :*
>
> *i) any agreement for the repayment or extension of time in repayment of finance or for its restructuring or renewal of for payment of extension of time in payment of any other amount relating to finance or liquidated damages; and*

> *ii) any and or representation, warranties, covenants made by or on behalf of the customer to a financial institution at any stage, including representations, warranties, covenants with regard to ownership, mortgage, pledge, hypothecation or assignment of, or other charge on assets or properties or repayment of a finance or payment of any other amount relating to finance, performance of an undertaking or fulfillment of a promise; and*
>
> *iii) all duties imposed on the customer under this ordinance, and*

The definition of *obligation* also does not extend the jurisdiction of banking Court rather affirms that only *disputes* relating to finance between the Customer and Financial Institution can *competently* brought before the Banking Court. Since, much insist has been laid to Section 7(4) of the Ordinance in support of ousting the jurisdiction of this Court hence it would be appropriate to have a direct referral thereto so as to see whether same extends jurisdiction of Banking Court or *otherwise.* The Section 7(4) of the Ordinance reads as:

> *"(4) Subject to sub-section (5), no Court other than a Banking Court shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of a Banking Court extends under this ordinance,* **including a decision as to the existence or otherwise of a finance** *and the execution of a decree passed by a Banking Court."*

The above provision first confines the jurisdiction of the Banking Court to **'any matter to which jurisdiction of a Banking Court'** extends under this Ordinance i.e a dispute between Customer and Financial Institution over finance or obligations and then vests jurisdiction to pass a *declaratory* decree with regard to existence or otherwise of a **'finance'** which *too*

appears to be with an object that one (customer or financial institution) could not dispute jurisdiction of Banking Court merely by denying **'finance'.** In short, it could *safely* be concluded that whenever there is a :

i) default *either* by a Customer or a Financial institution with regard to finance or obligations, arising therefrom upon Customer & Financial institution; and

ii) dispute with regard to existence or otherwise of a *finance* between customer and Financial institution

then it shall be Banking Court *alone* to entertain such a *lis* for passing appropriate order. Thus, before insisting application of the Ordinance, one shall be required to *prima facie* establish that:

i) parties claim within status of **'customer'** or **'financial institution';**

ii) the *dispute* is relating to **'finance'** or **'obligation'** , as defined by this Ordinance;

Now, on said *touchstone* let's examine the instant case. In the instant matter, it is not disputed that parties *though* enjoyed the status of **'customer'** and **'financial institution'** for purpose of availing a **'finance'** but *admittedly* such relationship (status) came to an end when undisputedly the plaintiff re-paid the all *dues* of the defendant-bank, as is evident from the **'redemption deed',** executed by the defendant-bank wherein admitting as:

> ***"AND WHEREAS the entire sum of money due to the Bank and wing (owing) from the said borrower in connection with the said advance has been fully and trully (truly) repaid."***

Besides, it is also a matter of record that the plaintiff has not alleged any *default* against the defendant-bank towards its (defendant-bank's) obligation with reference to finance but has set-up his claims of **'Compensation & Damages'** with reference to a duty, fell upon the defendant-bank, after satisfactory completion of obligations both by Customer and Bank i.e **'non-return of original property documents'** and claimed consequence thereof i.e **'shocks e.t.c'** which would fall within meaning of **'tort case'. T**he Banking Court has no jurisdiction to try such a suit but jurisdiction would *squarely* fall with ordinary but competent Civil Court. The reference can well be made to the case of Mst. Arifa Shams through Special attorney v. Muhammad Imtiaz Ahsan & 2 others (2012 CLD 483), relied by counsel for defendant, wherein such *distinction* was properly appreciated. The relevant portions of the judgment are made hereunder:-

> "10. Similarly, under subsection (4) of section 7 of 2001 ordinance, it is provided that no other court than a Banking Court shall have the jurisdiction with respect to any matter to which the jurisdiction of Banking Court extends and that such Banking Court is also empowered to decide existence or otherwise of a finance. It, therefore, becomes abundantly clear that it is only the banking court, under the 2001 Ordinance which is competent to decide whether the appellant was *a customer*; *whether any finance* was extended to the appellant and whether such finance was repayable by the customer (Appellant) and that whether *obligation* for the payment of the *finance* arises to the customer (Appellant). Therefore, the Single Judge, looking at all these aspects correctly returned the plaint of the Suit for its presentation to the Banking Court, possessing jurisdiction to try the same."

> 11. Coming to the case of M. Nujeebullah Qureshi , cited by the learned counsel for the appellant, we may observe that in such case a banking suit against financial institution had been filed by Nujeebullah on the ground that his name

> was put on defaulter data check list by which enlistment Nujeebullah stated to have suffered losses and in turn he filed banking suit for declaration, permanent injunction and damages against the financial institution, which banking suit was dismissed by the Banking Court by observing that since **nothing was due and payable** by Nujeebullah to the financial institution on the date of filing of the banking suit, **the relationship of customer ceased to exist**. Upon appeal, a division bench of this court upheld the order of the banking court and further observed that the case of Nujeebullah based on **torturous liability** arising out of **an act and omission of State Bank of Pakistan** by placing his name on data check list therefore Banking Court had no jurisdiction over a tort case based **upon damages** whereas in the. ……"

In view of the above discussion, the issue No.5 is answered as **'negative'.**

ISSUE NO.1.

> "Whether original title documents of plaintiff's bungalow bearing No.C-103, Block J, KDA Scheme No.2, North Karachi misplaced/lost by the defendant?"

9. The *initial* burden was upon the plaintiff to prove this issue who *discharged* the same by producing the letter (Ex.P/1), addressed to Branch Manager with subject **'Receiving of Original Property Documents';** complaint to Banking Mohtasib (Ex.P/5) for **'Loss of Property Mortgaged File'**; order of Banking Mohtasib (Ex.p/8); redemption deed (Ex.P/12) wherein defendant-bank's attorney admitted as **"AND the Bankislami has returned CTC documents in lieu of original documents, as the Bank has lost the original property documents of C-103, Block-J, North Nazimabad, Karachi'** hence the burden stood shifted upon the defendant-bank to disprove *otherwise.*

At this *juncture* it is material to mention that defendant-bank made no clear denial to such claim of the plaintiff regarding loss of original documents by the defendant-bank, as shall stand evident from the *documents*, relied and produced by the defendant-bank *itself* i.e:

Document filed with written statement as annexure P-3 which is a letter of the defendant-bank itself. The paras-3 & 4 of such letter reads as:

> "During July, 2011, client asked from our branch for showing of original property documents. We informed them that **we are in search of that** and **as we find it out we will inform the same**. They had taken the matter with Banking Mohtasib (BM). After formal correspondence and discussion, BM vide their letter No.2011-514-7210 dated 21st Oct 2011, directed the Bank "*to arrange Certified true Copies of property documents of Complainant from the office of the Registrar at Bank's expenses… ensure the complainant that as and when original file will be traced out, the same would be properly placed in the record or delivered to the complainant as per requisite*". The order enclosed and marked as **annexure 'C'**
>
> After necessary arrangements, on 25th Nov 2011, one of our Banks; **representative contacted the Customer and copy of Certified True Copies (CTC) of property documents were delivered to the complainant at his residence** vide our letter no……."

The above letter, produced with written statement while placing reliance thereon, *itself* was sufficient to conclude that **'original documents'** were deposited with defendant-bank which were lost / misplaced by defendant-bank. It was the document, produced by the defendant-bank with written statement, hence the defendant-bank *legally* cannot seek an exception to contents of such documents because the settled principle of law is that **'no one would like to make any admission against his own interest unless the same was true'.** Reliance can *safely* be placed on the

case of *Muhammad Yaqoob through L.Rs v. Feroze Khan & Others* (2003 SCMR 41), wherein it is held as:

> *"We are not persuaded to agree with Chaudhry Muhammad Tarique , learned Advocate Supreme Court that admission of Muhammad Yaqoob be treated as an innocent admission as it would be a* new phenomenon having no legal foundation at all as **no one would like to make any admission against his own interest unless the same was true.** In this regard reference can also be made to Article 31 of the Qanun-e-Shahadat Order, 1984 and thus the principle that ***no one would make any admission against his own interest has rightly been taken into consideration by the learned forums below."***

I am mindful of the fact though the defendant-bank has not produced that document during course of examination but such deliberate *act* of not exhibiting such a document shall not cause any prejudice to binding effect of such document of the defendant-bank itself particularly when it was *owned* at time of filing written statement. Such document shall earn an status of *'admission'* hence legally the defendant-bank cannot build *its* case beyond or contradictory to *its* own pleadings. Reference may well be made to the case of *Muhammad Iqbal v. Mehboob Alam (2015 SCMR 21)* wherein it is held as:

> "It is a settled principle of law that a fact admitted needs no proof, especially when such admission has been made in the written statement (*see PLD 1975 SC 242),* and it is also settled that no litigant can be allowed to build and prove his case beyond the scope of his pleadings….."

Even otherwise, a reference to an answer to a question, posed to DW-2 Muhammad Mazharuddin, shall ease the conclusion to the issue under discussion which is:

> "*I*t is correct that the documents mentioned in para 3 of my affidavit-in-evidence are in custody of Head of Credit Administration of defendant bank. That the documents misplaced from the custody of Mr. Muhammad Furqan. I have no knowledge that the defendant bank have taken my (any) departmental enquiry against the said person. It is not (in) my knowledge that the defendants bank has taken any action against the said person. "

Not only did this but the defendant-bank produce certificate of re-valuation (Ex.D/3) which also contains an admission of the defendant-bank i.e

> "We…., with a firm information that **original title documents of property were misplaced from Bank**. …"

This was the document of the defendant-bank *itself* which has been exhibited hence contents thereof are binding upon the defendant-bank wherein the defendant-bank admitted that original title documents of property were misplaced from Bank.

In view of above, the issue No.1 is answered as **'affirmative'**

ISSUE NO.2

> "Whether if original title documents misplaced/lost, the sale value on duplicate documents of this property depreciated/devalued by 50%?"

10. The burden to prove this issue lies upon the plaintiff; for which the plaintiff examined *himself* only and produced *valuation certificate* and *Certificate*, issued by GANDHARA CONSULTANTS, an Architecture consultant on penal of the defendant-bank. The Certificate (Ex.P/11), being sole documents in proof of such claim of the plaintiff, is referred directly which reads as:

> "If the original documents of this property are **misplaced / lost / theft,** then keeping in view the RISK FACTOR due to fraud, Cheating and Corruption in Pakistan (especially in Land concerned Govt. Departments), the Re-sale valve of this property on duplicate documents (CTC) will **depreciate by 50 %**. As this double west open corner property is situated in a posh area of North Nazimabad, Where usually the **Genuine Buyers do not take any sort of risk.**
>
> Hence, on CTC duplicate documents, the Value of the said property will be Rs.15,000,000/- (Rupees in Word Fifteen Million Only)."

From the above, it is evident that *opinion* with regard to depreciation was based with *specific* reference to **' misplaced / lost / theft'** of original title documents.

11. Before going any further, I feel it quite necessary to add here that in the instant matter the *expertise* is even acceptable to the defendant-bank which *fact* shall stand evident that defendant-bank *itself* approached for an *opinion* to GANDHARA CONSULTANTS therefore, *expertise* and *opinion* of GANDHARA CONSULTANTS, being acceptable to both of the parties, does matter for forming an *opinion* within meaning of Article 59 and 63 of the Qanun-e-Shahadat Order, 1984.

12. The defendant-bank did produce the **'revaluation certificate'**, filed by the defendant-bank (Ex.D/3) so as to disprove the contents of the certificate, produced by the plaintiff, in proof of his claim which reads as:

> "We have re-evaluate the captioned property, on the basis of the fact that Bank have produced us certified copies of the title documents including mutation, with a firm information that **original title documents of property were misplaced from Bank**. Under such circumstances we found no risk or

> chances of fraud and issuing annexed report without prejudice and keeping in considering the received documents.
>
> Further clarified that previously we did not valuate the above said property in question previously we only issued a certificate at owner's request **on the basis of fact and circumstances rough by him before its**. "

From above it is quite evident that the *expert* did not deny the issuance of earlier certificate nor *categorically* denied the *earlier* opinion / view but attempted to have faded *earlier* while saying that **'since original title documents were lost by bank hence there is no risk or chances of fraud'.** I am unable to understand that how a loss of **'original title document'** by a *bank* would be justified *differently* from the loss of **'original title document'** by owner himself because normally the **'sale consideration'** is not dependent *purely* to possession of property but a clear title of *ownership* which *too* to the satisfaction of the *purchaser.* However, since it (Ex.D/3) was claim and stand of the defendant-bank, which even affirmed the fact of issuance of earlier certificate by same *expert* as was admitted by DW-2 in his cross examination as:

> "It is correct that in the certificate the reference of earlier certificate is also mentioned."

Thus, it is quite obvious that it was the defendant-bank who wanted the Court to believe that earlier *opinion* was of no bearing as same expert on approach of defendant-bank, issued subsequent certificate, the burden stood shifted upon defendant-bank, hence it was obligatory upon the defendant-bank to have examined the *author* of such document to

establish that reasons, given in earlier certificate, were of no bearing and that **'theft/loss and misplacement'** of original title document by a *bank* shall carry a different impact for a ***'genuine buyers'*** but the defendant-bank has not examined such an *expert* whose appearance *otherwise* was necessary to provide an opportunity of cross-examination to plaintiff in whose favour *undisputedly* same *expert* has given a *different* opinion for one and same situation i.e **'loss / theft and misplacement'** of original title document. The plaintiff *however* has not examined any other witness so as substantiate his claim that there *did* happen depreciation in value of his property to extent of 50% rather admitted as:

> "I have not received any offer due to the reason that I have C.T.C. documents of my property and even none is agree to purchase the same. I have not mentioned any name of broker or buyer in my list of witnesses or plaint or affidavit-in-evidence. I have not mentioned the reason or any intention or afford to sale my property."
>
> **"I have not tried to sale the property on the basis of C.T.C. documents.** Vol. says that the property can be sale on the basis of C.T.C documents, but on the half value. I have never sold any property on C.T.C. documents because I have not the Estate Broker."
>
> **"It is correct that still I have not bear any loss but if I will sale of my property then I will bear the loss."**

From above, it is quite evident that except the certificate of depreciation, the plaintiff neither attempted to get his property valued on basis of CTC nor attempted to sell the property, therefore, the depreciation, claimed in such a certificate, cannot be taken as a sufficient *proof* to determine quantum of depreciation, but the fact and ground are relevant within meaning of Article 60 and 65 of Qanun-e-Shahadat Order, 1984 so as to

form an opinion within meaning of Article 63 of Qanun-e-Shahadat Order. The opinion of an *expert,* in law, has been given status of **'relevant facts'** *only* hence the same is always to be considered with *great caution* which should always be taken subject to *particular* facts and circumstances of that particular case. Reliance may be made to the case of *Saadat Sultan v. Muhammad Zahur Khan* (2006 SCMR 193) wherein it is held as:

> "5. … There is nothing in the Evidence Act to require the evidence given by an expert in any particular fact case to be corroborated before it could be acted upon as sufficient proof of what the expert states. Of court the question as to how much reliance a Court would be entitled to place on the statement of any particular witness in any particular case must necessarily depend on the facts and circumstances of that particular case. Ladharam Narsinghdas v. E.1945 S.4."

13. Since, I have no hesitation in saying that normally an *owner* (seller) would not require to involve a *bank* or *third* party to satisfy the *purchaser* about his *title* nor shall be required to explain reasons of giving **'certified true copy of original title document'** therefore, involving a *third* person for one's *own* legal title is *itself* sufficient to depreciation, as was / is opined by the GANDHARA CONSULTANTS therefore, I am of the clear view that loss of the **'original title document'** even by the bank shall bring depreciation in value of the *property* the quantum whereof *however* is subject to actual and genuine sale consideration, which, in the instant case, admittedly not *even* attempted. The issue is answered accordingly.

ISSUE NO.3 & 4

> "Whether plaintiff is entitled for compensation/damages as prayed by him on account of depreciation of the price of his property and damages for shock and mental torture?
>
> Whether the defendant is liable to pay the compensation/damages to plaintiff?

14. Both these issues are strongly connected with each other hence I feel it quite appropriate to discuss the same *jointly* so as to avoid repetition and conflicts. Since, it stood established that lost / misplacement of the **'original title document'** happened while in custody and control of defendant-bank which did bring depreciation in value of the property of the plaintiff hence plaintiff is entitled for compensation to such an *extent* . Since, the plaintiff had claimed mental shock and mental torture in result of such **misplacement / loss** of original title document which claim *even* was admitted by the DW-2 in his cross-examination as:

> "It is correct that any person documents misplaced **thus the said person will come under tension.** Vol. says the tension based on circumstances the 'Magnitude of Tension and Anxiety' would be deposed on when you are given the documents, the documents were in the hand of bank it will be minimum tension near to zero level.

Now, comes the most difficult question i.e assessing damages because there can be no yardstick or definite principle for assessing damages which *otherwise* are meant to compensate one, suffered an injury. The plaintiff has not examined anybody in support of his claimed

damages with reference to mental shock e.t.c which he *otherwise* was required to prove. The plaintiff admitted in his cross-examination that

> **"It is correct that I have not approach to my consultant for treatment of mental agony and stress** because I have myself is Homeopathic Doctor but I have suffered loss."

In absence of sufficient evidence the plaintiff cannot be legally entitled to claimed amount but where the **'wrong'** on part of the defendant is *otherwise* established then the Court cannot left wrong-doer go *free* but should assess a fair compensation while considering the facts of the case keeping in view that how far the society would deem it to be a fair sum, determines the damage. Reference may be made to the case of *Malik Gul Muhammad Awan* (2013 SCMR 507) wherein it is held as:

> "… However, awarding of damages is discretionary and the said discretion has to be exercised in the light of the evidence led qua the extent of damages suffered by a party. Petitioner claimed damages to the tune of Rs.81.82 Million but it has been concurrently been found that petitioner failed to substantiate the claim to the said extent by cogent evidence. In these circumstances, a duty is cast on the court. In *Sufi Muhammad Ishaque v. The Metropolitan Corporation, Lahore through Mayor* (PLD 1996 SC 737), it was held as under:-
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> > '*Once it is determined that a person who suffers mental shock and injury is entitled to compensation on the principles stated above, the difficult question arises what should be the amount of damages for such loss caused by wrongful act of a party. There can be no yardstick or definite principle for assessing damages in such cases.* ***The damages are meant to compensate a party who suffers an injury.*** *It may be bodily injury loss of reputation, business and also mental shock and suffering.* ***So far nervous shock is concerned, it depends upon the evidence produced to prove the nature, extent and magnitude of such suffering,*** *but even on that basis usually it becomes difficult to assess a fair compensation and in those circumstances it is the discretion of the Judge who may, on facts of the case and considering how far the*

> *society would deem it to be a fair sum, determines the damage. The conscience of the Court should be satisfied that the damages awarded would, if not completely, satisfactorily compensate the aggrieved party.'*
>
> 4. It is now a well-established principle that the person claiming special damages has to prove each item of loss with reference to evidence brought on record and for general damages as claimed by the petitioner **relating to mental torture, agony, defamation and financial loss, those are to be assessed following the Rule of Thumb and the said exercise falls in the discretionary jurisdiction of the court which has to decide it in the facts and circumstances of each case**. The courts below having appreciated the evidence led have already determined the damages to which petitioner could be entitled. In order to show that the amount of damages determined by the learned Division bench vide the impugned judgment is not commensurate with the extent of shock and injury suffered by the petitioner, he has placed on record photocopies of certain documents which were never tendered in evidence during trial or appeal. These documents at this belated stage are of no avail to him. At no stage, the petitioner filed application for additional evidence either. The concurrent findings of fact, in the afore-referred circumstances, have not been found by us to be against the record and the law declared. The petition lacking in merit is accordingly dismissed and leave refused."

Keeping above, in view and discussions in respect of issues *supra,* I feel it necessary to add that business of bank is based on mutual trust between the bank and its customer. The *customer* believes rather are ensures by the *Banks* that deposit of his original documents and *writing* is in **'safe hands'** hence legally the bank cannot seek an exception as and when such *trust* and *faith* is shattered by the bank or any of its officials nor the defendant-bank can *easily* escape its obligations to keep such **'original title documents** or **entitlement'** of its *customer* merely by saying that defendant-bank or its official had no personal grievance against the customer. A reference to the case of *Ghulam Mustafa Channa v. MCB Ltd.*

(2008 SCMR 909), being relevant is made hereunder wherein it was observed as:

> "The business of bank is based on mutual trust between bank and the customers and further that the bank acts as a custodian of the public money, **any slightest doubt or suspicion with regard to its activities and transaction and dishonesty of its employees** would shake the confidence of the customers resulting in ruination of the business of the Bank."

I would also add *here* that the importance and vitality of the **'original title'** in comparison to **'Certified true copy'** even cannot be denied or disputed even with reference to Qanun-e-Shahadat Order whereby the **'original'** falls within meaning of **'primary evidence'** while the **'certified true copy'** falls within meaning of **'secondary evidence'.** It was the deposit of **'original title document'** which was taken as part of it (defendant-bank's) *satisfaction* for granting finance. After legal satisfactory completion of *transaction* between plaintiff (customer) and defendant (bank) it was obligatory upon the defendant-bank to have **ensured** return of all those things which were meant as **'AMANAT'** but defendant-bank failed in its obligation / commitment. The defendant-bank legally cannot take the *plea* of innocent negligence in discharge of *its* bounden legal and moral obligation particularly when its (bank's) whole business requires full and complete confidence and satisfaction of its customers. Be as it may, before insisting the plea of guilty of innocent negligence, the defendant-bank was always required to have established its *bonafide* for which the defendant-bank proved nothing substantial. On the other hand, defendant-bank's witness *himself* admits that loss of **original title**

document shall be a cause of 'tension & anxiety' yet the attitude of defendant-bank shall speak for *itself* how they have dealt with approaches of the plaintiff with regard to his **'lost original title documents'**. A reference to cross-examination of the DW-2 shall make picture clear which is:

> "It is correct that the bank / defendant has not sent the letter in respect of misplaced the documents of property in question and to save the plaintiff from this loss. Vol. says that defendant has sent a letter to Sub-Registrar for Redemption purposes till that time the properly was Mortgaged in favour of bank therefore, was have released our lien or mortgage and given certified true copies of the relevant document to the plaintiff.
>
> "It is incorrect that the plaintiff visited 130 times to the defendants bank to find out the original documents. **Vol. says only 3 or 4 times the plaintiff visited the bank for that purpose.** It is correct that the **plaintiff wrote two letters to the defendants bank for find out the documents. It is correct that the plaintiff also approached to the Banking Mohtasib Office for redress his grievance. It is also correct that the plaintiff also approached to the State Bank of Pakistan for redressed his grievance.**'

From above, it is quite evident that it was not the defendant-bank which at *its* own never tried to redress the grievance of the plaintiff despite his approaches to bank even may be for 3 or 4 times, as admitted, rather defendant-bank continued with its such *unexpected* attitude thereby compelled the plaintiff to approach the above said *two* forums before approaching this Court which *too* for a thing (original title documents) which was *always* undisputedly his *own*. The claim of the plaintiff, being not at fault, stood established; *agony* and *suffering* is worth believing which compelled the plaintiff to run from one *forum* to another;

depreciation in value in absence of original *title* documents is also there. Accumulative effect of all these, make me to hold that the defendant-bank is liable to compensate the plaintiff by paying Rs.5 Millions. None will deny a well-established principle of life, applicable in all walks of life, that responsibility is always proportionate to status i.e *'the greater responsibilities come with the greater designata.* The defendant-bank does deal in *finances* of **'millions'** against **'properties'** of much *least* sufficient amount for *easy* recovery thereof, hence the act of losing / misplacing the **'original title document'** of plaintiffs' property was / is always a *serious* negligence rather mis-trust which fact also makes the defendant-bank to compensate the plaintiff for such *score* alone. Keeping in view the status of defendant-bank and undisputed *high* price of the property in question, I find it appropriate and just to award an amount of Rs.2 Million to be awarded to plaintiff for mis-trust. Accordingly, defendant-bank is liable to pay a *total* sum of Rs.7 Million to plaintiff. Accordingly, both these issues are answered in affirmative.

ISSUE NO.6

16. In result of the discussion *made* on issue Nos.1 to 4, the suit of the plaintiffs is decreed in above terms. Let such decree be drawn. However, parties are left to bear their own costs.

IK **J U D G E**