IN THE HIGH COURT OF SINDH AT KARACHI

First Appeal No.66 of 2010

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

J U D G M E N T

Dates of hearing:	31.01.2019 and 16.04.2019.
Appellant:	Allied Bank Limited through Mr. Ghulam Ali Abbasi, Advocate.
Respondents	Mst. Allah Bachae (deceased) and 05 others through Mr. Abdul Salam Memon, Advocate.

IRFAN SAADAT KHAN, J. The instant First Appeal has been filed against the order and decree dated 24.02.2010 and 16.03.2010, respectively, passed by the Judge of Banking Court No.4 Karachi in Suit No.150 of 2006.

2. Briefly stated, the facts of the case are that the appellant bank in order to grow its deposit base with the collaboration of Commercial Union Life Insurance Company (Pakistan) Limited launched a Scheme in 2001 under the name and style "Allied Tahaffuz Deposit Scheme". As per the said scheme a person depositing Rs.50,000/- with the bank would be automatically insured for a sum of Rs.2,50,000/- and a person depositing an amount of Rs.10,00,000/- and above would be insured for a sum of Rs.50,00,000/-. It was clearly mentioned in the advertisement that it is a revolutionary offer and ideal for ages upto 64 years, as the person

depositing the amount would not only become entitled for an attractive monthly profit but would also be insured, the premium of which would be paid by the bank itself and in case of death of the said person, being an insurer, full payment of the claim would be granted to the beneficiaries of that person. It is also mentioned that no medical check-up would be carried out for deposit upto Rs.500,000/- and age upto 60 years. It is also mentioned that the said deposit known as "Allied Tahaffuz Deposit Certificate" would be acceptable as collateral.

3. The respondent No.1 thereafter approached the bank and on 05.01.2002 opened her account by depositing a sum of Rs.4,50,000/- and nominated the respondents No.2 and 3 as her beneficiaries. Thereafter on 28.04.2002 i.e. after a period of more than 3 months, the respondent No.1 expired in Tando Jam due to cardio respiratory failure. The respondents No.2 and 3 then approached the bank and presented succession certificate and required from the appellant bank for payment of the deposit amount alongwith its profit and insurance claim. Thereafter the bank paid the amount deposited by the respondent No.1 but did not entertain the insurance claim. Being aggrieved with the action of the appellant bank the respondents filed a suit for recovery of Rs.22,50,000/- bearing Suit No.150 of 2006, with the prayer that the above referred amount be paid to them as per the promise made by the appellant bank as clearly mentioned in their deposit scheme. The said suit proceeded before the learned Judge, Banking Court No.IV, Karachi, who after hearing the parties at length found the claim of the respondents to be in accordance with law and decreed the suit in the sum of Rs.22,50,000/- with cost as well as cost of fund from the date of withholding the amount till its final realization vide order dated 24.02.2010. It is against this order that the present first appeal has been filed.

4. Mr. Ghulam Ali Abbasi Advocate has appeared on behalf of the appellant bank and stated that the order of the learned Judge is not in accordance with law as the learned Single Judge has not considered various aspects going to the roots of the case and the evidences produced before him. While elaborating his viewpoint, the learned counsel stated that before allowing the claim the learned Judge should have called some more material before reaching to a final conclusion. He stated that the learned Judge while granting cost of fund has not considered the fact that the respondents were not financial institutions hence were not entitled for any cost of fund. He further stated that the respondents do not fall under the definition of "Customer" as given under Section 2(c) of the Financial Institutions (Recovery of Finances) Ordinance 2001 **(FIO-2001)**. He stated that the learned Judge has also failed to consider the term "Finance" as given under Section 2(d) of the FIO-2001, as no finance was extended by the bank to the respondents hence, in his view, the bank was not obliged to pay the decrial amount to the respondents. He further stated that it is only a customer who is entitled for payment by the bank and since the respondents were not its customers hence as per Section 9(1) of the FIO-2001 the appellant bank was not under legal obligation to pay the insurance amount as claimed by the respondents. He stated that the deceased Mst. Allah Bachai (respondent No.1) was never medically examined by the appellant bank and if the respondents No.2 & 3 had any claim of insurance, the same should have been made against the Insurance Company and not against the bank. He further stated that the matter should have been proceeded before the Insurance Tribunal rather than the Banking Court. He, in the end, submitted that since the order of the learned Judge suffers with the above referred illegalities and irregularities hence the same may be set aside. In

support of his above contentions, the learned counsel has placed reliance upon the following decisions:

1. *M/s. Long Term Venture Capital Modarba Vs. M/s. State Life Insurance Corporation of Pakistan (2004 AC 810)*
2. *Procter & Gamble Pakistan (Pvt.) Ltd., Karachi Vs. Bank Al-Falah Limited, Karachi and 2 others (2007 CLD 1532)*

5. Mr. Abdul Salam Memon Advocate has appeared on behalf of the respondents and stated that the matter was rightly heard and decided by the Banking Court, since the claim of the respondents was against the appellant bank and not against the Insurance Company. He stated that so far as the insurance is concerned it was an internal arrangement between the bank and the Insurance Company and the respondents No.2 & 3 had no concern with the Insurance Company, as it was the bank with whom the respondent No.1 deposited the amount and thus it was the bank which categorically promised its depositors not only for the payment of monthly deposit but had also given the facility of insurance cover. He stated that from the Scheme it is clear that no medical examination was required. He further stated that the bank is a financial institution and the respondent No.1 was its customer hence, the provisions of law upon which reliance was placed by the learned counsel for the appellant in fact supports him rather than the appellant bank. He stated that since the matter pertains to the banking affairs hence the suit was rightly filed under the provisions of Section 9(1) of the FIO-2001 before the Banking Court. He further stated that the appellant bank was under the legal obligation, as per their own promise, to pay the insurance claim to the deceased's beneficiaries. He in this behalf invited our attention to the terms of the deposit, available at page 39 of the file. He stated that the relationship between the appellant bank and the respondent No.1 clearly falls under the definition of "Customer" hence the bank was under legal obligation to pay the insurance claim to the deceased's

beneficiaries. He further stated that the appellant bank cannot now back out from its promise by not paying the insurance claim of the respondent No.1. He also stated that the decisions relied upon by the learned counsel for appellant are distinguishable from the facts obtaining in the instant matter. He also stated that the claim of the respondents was with regard to Rs.22,50,000/- and the learned Single Judge has decreed the suit on the said amount. He lastly prayed that the instant appeal, being devoid of any merit, may be dismissed and the order of the learned Judge may be affirmed.

6. We have heard both the learned counsel at considerable length and have also perused the record and the decisions relied upon by the learned counsel for the appellant.

7. Before proceeding further, we deem it expedient to reproduce herein below the provisions of law on which reliance was placed by the learned counsel for the parties:

> ***Financial Institution (Recovery of Finances) Ordinance, 2001***
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> ***Section 2(c):*** ***"Customer"*** *means a person finance has been extended by a financial institution [within or outside Pakistan] and includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution as well as a surety or an indemnifier.*
>
> ***Section 2(d):*** ***"finance"*** *includes –*
>
> *(i) An accommodation or facility provided on the basis of participation in profit and loss, mark-up in price, hire-purchase, equity support, lease, rent-sharing, licensing charge or fee of any kind, purchase and sale of any property including commodities, patents, designs, trade marks and copy-rights, bills of exchange, promissory notes or other instruments with or without buy-back arrangement by a seller, participation term certificate, musharika, morabaha, musawama, intisnah or modaraba certificate, term finance certificate.*
>
> *(ii) Facility of credit or charge cards;*

(iii) *Facility of guarantees, indemnities, letters of credit or any other financial engagement which a financial institution may give, issue or undertake on behalf of a customer, with a corresponding obligation by the customer to the financial institution;*

(iv) *A loan, advance, cash credit, overdraft, packing credit, a bill discounted and purchased or any other financial accommodation provided by a financial institution to a customer;*

(v) *A benami loan or facility that is, a loan or facility the real beneficiary or recipient whereof is a person other than the person in whose name the loan or facility is advanced or granted;*

(vi) *Any amount due from a customer to a financial institution under a decree passed by a Civil Court or an award given by an arbitrator.*

(vii) *Any amount due from a customer to a financial institution which is the subject matter of any pending suit, appeal or revision before any Court;*

(viii) *Any amount of loan or facility availed by a person from a financial institution outside Pakistan who is for the time being resident in Pakistan;*

(ix) *Any other facility availed by a customer from a financial institution.*

Section 9(1): Procedure of Banking Courts.-- *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 institute a suit in the Bank Court by presenting a plaint which shall be verified on oath, in the case of a financial institution by the Branch Manager or such other officer of the financial institution as my be duly authorized in this behalf by power of attorney or otherwise.* *(Underline ours for emphasis)*

8. From the facts it is noted that the appellant bank with the collaboration of the Commercial Union Life Insurance Company (Pakistan) Limited launched a Scheme under the name “Allied Tahaffuz Deposit Scheme” (hereinafter referred as scheme) by categorically terming the said scheme as a “Revolutionary Offer”, with the promise that the appellant bank would pay premium of the insurance if an individual deposits an amount of Rs.50,000/- and the said depositor would be entitled for

insurance in this behalf for a sum of Rs.2,50,000/- and on deposit of Rs.10,00,000/- and above insurance would be Rs.50,00,000. It is also provided in the said Scheme that not only depositor's life Insurance is covered but profit also would be paid on monthly basis and that life insurance would be up to 5 times of the deposited amount with no extra cost and full payment of the claim would be paid in case of death or permanent disability. It is clearly mentioned that there would be no requirement of medical examination for deposit upto RS.500,000/- and age 60 years. In view of this promise made by the appellant bank the respondent No.1 deposited an amount of Rs.4,50,000/- on 05.01.2002.

9. So far as claim of the learned counsel for the appellant that Mst. Allah Bachai has not filled health questionnaire it may be noted that she was not required to fill such questionnaire when a categoric assurance was given to the depositor that no medical examination would be made. It is also averred that the deceased did not fulfill certain requirements as required by insurance cover. Here we tend to disagree with the learned counsel that whether the respondent No.1 was ever required to fulfill those requirements to avail insurance cover. The answer to this question is in emphatic 'No'. The said averment made on behalf of the appellant bank appears to be not only misconceived but also an afterthought on their part. If the depositor was required to fill health questionnaire and there were certain requirements which were to be fulfilled for an insurance cover, whether the appellant bank brought such requirements into the knowledge of the depositor and whether these requirements can be raised subsequently when no such requirement was mentioned in the advertisement by the bank. In our view if the insurance cover was not approved by the insurance company, this is a matter between the bank and the insurance company and no adverse inference in this behalf could be drawn against the respondent

No.1. Has any legal proceedings initiated by the bank against the insurance company. Again no satisfactory reply is available in this behalf with the counsel for the appellant. If there was no assurance on behalf of the insurance company why the bank launched the scheme without firstly entering into an understanding with the insurance company and how the respondent could be deprived of the insurance claim as the respondent No.1 acted and deposited the amount as per assurance of the bank and not that of insurance company. Hence the assertion of the learned counsel for the appellant that the matter with regard to insurance cover was between the insurance company and the respondent No.1 appears to be wholly fallacious and uncalled for. In our view it was the bank's liability to pay the premium of the depositor as it was categorically promised by them that premium would be paid by the bank, which is evident from the advertisement of the bank. hence the claim of the learned counsel for the appellant that the respondents should have filed the suit against the Insurance Company before the Insurance Tribunal appears to be wholly misconceived and not maintainable.

10. If the provisions of FIO-2001 are examined it would become clear that the respondent No.1 squarely falls under the definition of "Customer" as mentioned above and in case of any controversy arising between the financial institution and its customer, a suit has to be filed before the Banking Court. It is interesting to note that the bank has not denied that the respondent No.1 had invested an amount of Rs.4,50,000/- with them. Hence for all practical purposes the respondent No.1 was a customer and all matters concerning a dispute between the financial institution and the customer have to be referred to the Banking Court, as specifically mentioned in Section 9 of the FIO-2001 reproduced supra.

11. A bank is a financial institution which has not been denied. The term "Finance" used in Section 2(d) of the FIO-2001 is an inclusive definition which clearly demonstrates that any accommodation or facility provided by the financial institution on the basis of participation in profit and loss or participation in term certificate or any other financial accommodation provided by the financial institution falls under the definition of "Finance". How the appellant bank can now turn around and state that the respondent No.1 was not its customer and the amount deposited by her in the scheme was not a finance. This aspect has not been controverted and in our view the amount deposited by the customer (respondent No.1) was a finance to the bank categorically falling under Section 2(c) and 2(d) of the FIO-2001. Needless to state that as per the definition of Section 9 of the FIO-2001, where a customer or a financial institution commits a default in fulfillment of any obligation with regard to any finance, the financial institution or the customer, as the case may be, can institute a suit in the Banking Court. This is what the respondents No.2 and 3 have done. When they found that the appellant bank in spite of their promise had failed to pay the insurance amount to them thereafter they instituted a suit against the appellant bank which, in our view, was very much maintainable and was correctly decided by the Judge having jurisdiction over the matter.

12. The term "obligation" has also been defined under Section 2(e) of the FIO-2001, which includes payment of any amount relating to finance or performance of an undertaking or fulfillment of a promise. In the instant case, has the bank not promised to pay to the depositor (respondent No.1) monthly profit as well as to insure her? Is the promise not a financial promise? Is the promise not an undertaking? Has the bank fulfilled its promise? The answers to these questions are quite obvious. The matter between the respondent No.1 and the bank was a financial matter. The

performance of an undertaking or fulfillment of a promise is an obligation on the part of the appellant bank, which has to be fulfilled and upon non-fulfillment of the said obligation the customer was fully authorized to institute a suit before the Banking Court against the financial institution. When a financial institution can institute a suit against its customer for non-fulfillment of its obligation, why cannot its customer also. Hence, we find no merit in the submission of the learned counsel for the appellant that the Banking Court or the Banking Judge had no jurisdiction to proceed with the matter. The Banking Court had the jurisdiction to resolve the controversy between its customer and financial institution with regard to finance and financial controversies.

13. The decision relied upon by the learned counsel for the appellant bank of Procter & Gamble Pakistan (Pvt.) Ltd. (supra) is of no help to the bank as in that case the suit against bank was filed by the beneficiary of letter of credit and guarantee, whereas in the instant case the claim of insurance was lodged by the beneficiaries of an expired insured person after the promise of the bank to pay full amount of the claim in case of death of that depositor cum insured person. Hence, on this aspect also the claim as made by the respondents No.2 and 3 against the bank appears to be in order and the facts of the above case are found to be distinguishable from the facts obtaining in the instant matter.

14. We ourselves have made some research in the present matter and were able to lay our hands on a decision given in the case of Brig. (Retd.) Hamid-ud-Din Vs. Askari Leasing Limited (2005 CLD 898) wherein a Division Bench of the Peshawar High Court observed that certificates issued to the appellant were promissory notes and thereafter the appellant was covered by the definition “Customer” and the Banking Court has the

jurisdiction to adjudicate upon the controversy between the customer and the financial institution.

15. It is also to be noted that in the advertisement an offer was being made to the depositors to not only enjoy the profit but that they would also enjoy life time insurance to the extent of five times the amount of their deposit. Was it not a proposal? Was it not a promise? Was the bank not a promisor? Was the promise to pay profit alongwith life time insurance to the extent of five times of the amount deposited not a consideration of the promise? Was not there an implied agreement and contract between the respondent No.1 and the appellant bank when she deposited an amount of Rs.4,50,000/- with the bank as per their promise in their advertisement? Was the agreement not enforceable by law? We are sure that answers to all above questions would be in affirmative. There definitely was a promise by the bank to the depositors for payment of not only monthly profit but also life insurance coverage upto five time of the amount deposited. The bank definitely is a promisor and the depositor is a promisee and there was an agreement between the parties and, in our view, the appellant bank was under the legal obligation to fulfill its promise and cannot now back out from it on some flimsy grounds, as mentioned in the contents of this first appeal.

16. We, therefore, are of the view that the bank is under the legal obligation to pay the amount of the insurance coverage as promised by them in their “Revolutionary Offer” and find no merit in the appeal filed by the bank and affirm the order passed by the learned Judge.

17. So far as the issue of cost of fund is concerned the said objection of the learned counsel firstly appears to be self-contradictory as in the whole pleadings it is the main claim of the appellant bank that the respondent

No.1 was not their customer whereas by quoting decision of ***Long Term Venture Capital Modarba*** they themselves admit that the respondent No.1 was their customer. Moreover the suit of recovery was with regard to 5 times of the deposit Rs.4,50,000/- for Rs.22,50,000/- only and the decree was issued of the said amount. Hence in our view the issue raised by the learned counsel for the appellant does not require any adjudication on our part.

Above are the reasons of our short order dated 16.04.2019, whereby we have dismissed this first appeal.

JUDGE

JUDGE

Karachi:
Dated: .04.2019.