IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Arshad Hussain Khan
Mr. Justice Amjad Ali Sahito

Special High Court Appeal No.240 of 2009
Special High Court Appeal No.241 of 2009

Appellant [in Spl. HCA No.240/2009 & Respondent No.2 in Spl. HCA No.241/2009]	:	Hashwani Hotels Limited through Mr. Zahid F. Ebrahim, Advocate
Appellant [in Spl. HCA No.241/2009 & Respondent No.2 in Spl. HCA No.240/2009]	:	Euro Ceramics Limited through Mr. Ghulam Abbas Pishori, Advocate
Respondents [in both appeals]	:	Industrial Development Bank of Pakistan and other through Mr. Salman Hamid, Advocate appearing for Respondent No.1
Date of Hearing	:	23.11.2026
Date of Judgment:		___.11.2026

J U D G M E N T

Amjad Ali Sahito, J-. Through these connected appeals, the appellants have called in question the judgment dated 12.06.2009 and the decree drawn pursuant thereto, passed by the learned Single Judge in Suit No.B-34 of 2004, whereby the suit instituted by Industrial Development Bank of Pakistan (hereinafter referred to as "the Bank") for cancellation of the package arrangement and recovery of Rs.331,273,411.73, together with a further amount of Rs.14,182,831/- in respect of guarantees issued in favour of the Customs Authorities, was decreed with costs. Since both appeals arise out of the same judgment and decree, involve common questions of law and fact and emanate from the same package arrangement dated 18.11.1999 and 19.11.1999, they are being decided through this common judgment.

2. Briefly stated, the facts giving rise to the present controversy are that Euro Ceramics Limited (hereinafter referred

to as "Euro Ceramics") had obtained financial facilities from the Bank for establishing a ceramic manufacturing project. The project commenced operations in 1992 but, owing to financial difficulties, accumulated losses and other circumstances, became sick and was unable to service its financial liabilities towards the Bank. The original liability of Euro Ceramics was stated to be approximately Rs.329.968 million, out of which the serviceable principal liability was restructured at Rs.126.090 million, whereas the remaining liability of approximately Rs.203.878 million was treated as unserviceable and was proposed to be frozen and written off upon implementation of the restructuring arrangement.

3. In order to revive the sick industrial project and settle the outstanding liability, negotiations took place between Euro Ceramics and the Bank. The matter was considered in the context of the State Bank of Pakistan's BPRD Circular No.19 dated 05.06.1997, concerning the revival of sick industrial units. Initially, proposals were exchanged between the parties through letters dated 22.06.1999 and 28.06.1999. Subsequently, Euro Ceramics introduced Hashwani Hotels Limited (hereinafter referred to as "Hashwani Hotels") as an intending purchaser of its industrial assets and as a participant in the proposed settlement arrangement.

4. The arrangement ultimately culminated in the letter dated 18.11.1999 addressed to the Bank by Euro Ceramics, followed by the Bank's acceptance letter dated 19.11.1999. The material terms of the arrangement, as reflected in the correspondence, were substantially as follows:

(i) The total serviceable restructured liability of Euro Ceramics, including mark-up, was determined at approximately Rs.126.091 million.

(ii) Euro Ceramics had made a down payment of Rs.22.881 million.

(iii) Hashwani Hotels was to deposit Rs.60 million with the Bank by way of a long-term fixed deposit for a period of 25 years.

(iv) The said deposit was to earn profit at a fixed rate of 16.667% per annum, payable at half-yearly rests.

(v) The profit accruing on the deposit, after deduction of applicable withholding tax, was to be adjusted towards the outstanding serviceable liability of Euro Ceramics.

(vi) Upon implementation of the arrangement and fulfilment of its terms, the Bank was to release its charges, liens and securities over the movable and immovable assets of Euro Ceramics and discharge the relevant liabilities in accordance with the package.

(vii) The amount of Rs.60 million was to remain with the Bank for the agreed period of 25 years and was to be returned upon maturity in accordance with the arrangement.

5. The appellants' case is that the aforesaid arrangement was not merely a paper transaction but was acted upon by the parties. Euro Ceramics transferred its ceramic plant and land to Hashwani Hotels through an agreement dated 13.06.2000, followed by a public notice published on 16.06.2000. The appellants maintain that the arrangement was entered into after negotiations, with the knowledge and approval of the relevant committee constituted by the Bank in pursuance of the State Bank of Pakistan's aforesaid circular, and was intended to facilitate the revival of a sick industrial project and recovery of the Bank's outstanding dues. It is further their case that, after accepting and acting upon the arrangement, the Bank subsequently reduced the agreed rate of return on the fixed deposit from 16.667% to 12%, prompting Hashwani Hotels to address several letters to the Bank, including letters dated 19.05.2003, 16.07.2003, 27.08.2003, 23.02.2004, 12.04.2004 and 07.06.2004, objecting to the reduction. Instead of addressing the appellants' grievance concerning the agreed rate of return, the Bank issued a legal notice alleging that the package arrangement was unconscionable, lacked bona fide business consideration and was hit by Section 8 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as "the Ordinance"). Consequently, Suit No.B-34 of 2004 was instituted seeking cancellation of the package arrangement and recovery of the aforesaid amounts.

6. The appellants contested the suit and were granted unconditional leave to defend on 16.03.2005. They maintained that the arrangement was a bona fide commercial settlement, supported by substantial consideration, and that the Bank, having accepted and acted upon the same, could not subsequently resile from its contractual commitments. They also raised objections concerning the maintainability of the suit, the absence of approval of the Board of Directors under Section 8(2) of the Ordinance, the failure to establish the statutory ingredients of Section 8 and the absence of any legally sustainable basis for holding Hashwani Hotels jointly liable for the original financing facilities obtained by Euro Ceramics.

7. On the basis of the pleadings, the learned Single Judge framed nine issues, including whether the package arrangement was unconscionable, without consideration and not bona fide in violation of Section 8 of the Ordinance; whether Hashwani Hotels was privy to the original transaction; whether the suit had been approved by the Board of Directors; whether the package arrangement suffered from illegality; whether the Bank was entitled to revoke it; and whether the amounts claimed in the suit were due and payable.

8. After recording the evidence of the parties, the learned Single Judge answered all material issues in favour of the Bank and decreed the suit as prayed. Hence, these appeals.

9. Learned counsel for the appellants, while reiterating the grounds taken in the respective memoranda of appeals and written arguments, contended that the learned Single Judge failed to appreciate the true scope and applicability of Section 8 of the Ordinance. It was argued that the said provision places a specific burden upon the financial institution to establish that an amount was written off, released or adjusted for political reasons or considerations other than bona fide business considerations. Mere assertion that an arrangement was commercially disadvantageous or lacked business consideration, according to learned counsel, could not satisfy the statutory requirement. It

was further contended that the Bank's own witnesses admitted that the package arrangement had been considered and approved by the committee constituted pursuant to the State Bank of Pakistan's BPRD Circular No.19 dated 05.06.1997. The witnesses were neither participants in the negotiations nor signatories to the arrangement and, therefore, were not competent to establish the circumstances in which the settlement had been negotiated and approved.

10. Learned counsel further submitted that the deposit of Rs.60 million for a period of 25 years, the agreed return thereon, the down payment already made and the purchase of the industrial assets by Hashwani Hotels constituted tangible commercial consideration. The arrangement was intended to facilitate the revival of a sick industrial unit and enable the Bank to recover its serviceable liability through a structured mechanism. It was also contended that the finding of the learned Single Judge that Hashwani Hotels was not privy to the original transaction was irreconcilable with the decree passed against both defendants. The appellants further challenged the finding regarding the maintainability of the suit in the absence of the specific approval contemplated by Section 8(2) of the Ordinance.

11. Conversely, learned counsel for the Bank supported the impugned judgment and decree. Through written arguments, it was contended that the package arrangement resulted in substantial release of securities and exposure of the Bank to an unsecured liability. It was argued that the arrangement lacked bona fide commercial justification, particularly when the Bank had relinquished its existing securities against the original liability of Euro Ceramics. The Bank also relied upon the statements of account, the evidence of its officers, the release of securities and the alleged outstanding liability. It was further contended that, even if the arrangement was found to be void, the Bank was entitled to restitution under Section 65 of the Contract Act, 1872, and that the appellants could not retain the benefits obtained under the arrangement without restoring the Bank to its original position.

12. We have heard learned counsel for the parties, examined the memoranda of appeals, written arguments filed on behalf of the appellants as well as the Bank, and have carefully gone through the impugned judgment, pleadings, documentary evidence and depositions of the witnesses.

13. The principal question requiring determination is whether the Bank established the statutory conditions necessary for invoking Section 8 of the Ordinance and whether the findings recorded by the learned Single Judge are supported by the evidence available on record.

DISCUSSION AND FINDINGS:

Scope of Section 2 of the Ordinance and the expression "customer", "finance" and "obligation":

14. Before examining the controversy concerning the package arrangement, it would be appropriate to consider the relevant definitions contained in Section 2 of the Ordinance, as the applicability of Section 8 cannot be determined in isolation from the statutory scheme. Section 2(a) defines a "financial institution" to include a banking company and other institutions specified therein. Section 2(c) defines the expression "customer" as a person to whom finance has been extended by a financial institution 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. Similarly, Section 2(d) provides an inclusive definition of "finance". It encompasses various financial accommodations and facilities, including loans, advances, credit facilities, guarantees, indemnities, letters of credit and other financial engagements undertaken by a financial institution on behalf of a customer, with a corresponding obligation on the part of the customer. Section 2(e), in turn, defines "obligation" to include agreements relating to repayment, extension of time, restructuring or renewal of finance, together with representations, warranties, covenants and undertakings made by or on behalf of a customer to a financial institution.

15. A combined reading of the above definitions demonstrates that the Ordinance does not confine the expression "customer" merely to the principal borrower. The expression also encompasses persons who fall within the specifically enumerated categories of sureties, indemnifiers and persons on whose behalf a financial institution has issued a guarantee or letter of credit. However, the inclusive nature of the definition does not dispense with the requirement that the person sought to be proceeded against must fall within one of the statutory categories. A person does not automatically become a customer merely because he has participated in a commercial transaction with a borrower or has acquired assets from a company indebted to a financial institution. The nature of the undertaking, the contractual relationship and the corresponding obligation assumed by such person must be established from the relevant documents and evidence.

16. In the present case, it is not disputed that Euro Ceramics was the original borrower and had availed financial facilities from the Bank. Thus, its status as a customer within the meaning of Section 2(c) of the Ordinance is not in dispute. As regards Hashwani Hotels, the record indicates that it was introduced by Euro Ceramics as an intending purchaser of the industrial assets and agreed to place a fixed deposit of Rs.60 million with the Bank for the purpose of facilitating the settlement of the outstanding liability of Euro Ceramics. The mere fact that Hashwani Hotels was not the original borrower would not, by itself, exclude it from the statutory definition if the Bank established that it had assumed the character of a surety or indemnifier or had otherwise undertaken an obligation falling within the Ordinance. However, such status cannot be presumed merely from its participation in the package arrangement.

17. The learned Single Judge, while deciding Issue No.2, specifically concluded that Hashwani Hotels was not privy to the original transaction between the Bank and Euro Ceramics. Having arrived at such a conclusion, the learned Single Judge was required to examine the precise nature of the independent

undertaking, if any, assumed by Hashwani Hotels and the legal basis on which it could be held jointly and severally liable for the original financing liability. No such independent determination appears to have been undertaken. The decree, nevertheless, proceeds against both defendants without identifying the particular obligation of Hashwani Hotels under which such liability could be imposed. This aspect assumes significance because the statutory liability of a customer, surety or indemnifier must flow from an established obligation and cannot be imposed merely on the basis of participation in a subsequent commercial arrangement.

Scope and object of Section 8 of the Ordinance:

18. The controversy primarily revolves around Section 8 of the Ordinance, which deals with suits for recovery of written-off finances, etc. The relevant provision, as applicable to the transaction in question, provided that a financial institution could, within the prescribed period, institute a suit for recovery of any amount written off, released or adjusted under an agreement, contract or consent, including a compromise, withdrawal of legal proceedings or adjustment of a decree entered into between a financial institution and a customer on or after 01.01.1990 and before the commencement of the Ordinance, if it could establish that the amount had been written off, released or adjusted for political reasons or considerations other than bona fide business considerations. Sub-section (2) further stipulated that no suit under sub-section (1) could be instituted unless its filing had been approved by the Board of Directors in the case of a financial institution incorporated within Pakistan, or by the Chief Executive in the case of a financial institution incorporated outside Pakistan.

19. A plain reading of Section 8 makes it evident that the provision is not intended to confer an unrestricted right upon a financial institution to reopen every settlement, compromise or restructuring arrangement merely because, at a subsequent stage, the institution considers the arrangement financially

disadvantageous. The provision creates a specific statutory remedy in respect of amounts written off, released or adjusted under earlier arrangements, subject to fulfilment of the conditions prescribed therein. The expression "if it can establish" is of particular significance. It places the burden squarely upon the financial institution instituting the suit to establish that the amount in question was written off, released or adjusted for political reasons or considerations other than bona fide business considerations. Consequently, the financial institution is required to establish more than the mere existence of a write-off, release or adjustment. It must further establish the circumstances and considerations under which such benefit was conferred and demonstrate that the transaction was not founded upon bona fide business considerations.

20. It is equally important to distinguish between an arrangement which may subsequently prove to be commercially unsuccessful and an arrangement which was entered into for considerations other than bona fide business considerations. The two concepts are not interchangeable. A commercial decision does not become mala fide merely because the anticipated financial results are not achieved or because the financial institution subsequently considers that it could have negotiated better terms. Similarly, the release of collateral or restructuring of an outstanding liability, by itself, does not establish that the arrangement was politically motivated or devoid of bona fide business considerations. The statutory requirement must be established through cogent evidence and cannot be substituted by assumptions, conjectures or the subjective opinion of officers who were not involved in the negotiations or approval of the transaction.

Whether the Bank discharged the burden imposed by Section 8:

21. In the present case, the Bank's principal allegation was that the package arrangement was without business consideration, unconscionable and had left it exposed to substantial unsecured liability. The learned Single Judge

accepted this assertion primarily on the basis of the evidence of PW-1 Jamil Ahmed and PW-2 S.M. Aqeel. However, a closer examination of their depositions reveals that neither witness was a participant in the negotiations which culminated in the acceptance of the package arrangement dated 19.11.1999. Nor were they the persons who had negotiated or executed the arrangement on behalf of the Bank. During cross-examination, PW-1, when questioned as to what was meant by the alleged lack of business consideration, replied that he could not add anything beyond what had already been stated in his affidavit-in-evidence. Likewise, PW-2 explained the alleged lack of business consideration by stating that any settlement involving a heavy write-off or release of securities would be regarded as lacking business consideration.

22. In our view, such an explanation does not satisfy the statutory requirement of Section 8. The release of securities and restructuring of liabilities may form part of a commercial settlement, particularly where the object is to revive a sick industrial undertaking and secure recovery of an otherwise doubtful debt. The material question was not whether the Bank had released securities or whether the arrangement involved financial concessions. The question was whether those concessions had been granted for political reasons or considerations other than bona fide business considerations. The witnesses examined by the Bank did not furnish any specific particulars identifying the alleged political influence, extraneous consideration, improper benefit or other circumstances which would establish that the package arrangement had been procured for reasons falling within Section 8.

23. We further find that the learned Single Judge observed that the version of the Bank's witnesses concerning the transaction and the alleged arrangement had not been specifically controverted by the defendants. Such observation does not appear to be consistent with the record. The appellants specifically challenged the allegation of lack of business consideration during cross-examination and produced

documentary evidence in support of their defence. The evidence of DW-1 Akbar Karamali is material in this regard. He explained that Euro Ceramics had become a sick industrial unit owing to financial difficulties and that efforts were made to keep the project alive as a viable industrial asset. He also stated that Hashwani Hotels was introduced as a potential purchaser with sufficient financial resources to acquire and operate the project. When questioned about the consideration for Hashwani Hotels to provide Rs.60 million, he categorically stated that its object was to acquire the project and run it profitably. He further confirmed that Hashwani Hotels did run the project and that the project survived. The witness also explained that the balance amount required for the settlement was arranged through family resources. These statements, read with the correspondence dated 18.11.1999 and 19.11.1999 and the subsequent sale agreement dated 13.06.2000, constitute material evidence which required proper consideration before arriving at a conclusion that the arrangement was without bona fide business consideration.

24. The Bank's own evidence also assumes importance. Its witnesses acknowledged that the package arrangement had been approved by the committee constituted by the Bank in pursuance of the State Bank of Pakistan's BPRD Circular No.19 dated 05.06.1997. In particular, PW-2 admitted during cross-examination that the copies of the arrangement were forwarded to the Vice President, Law Department, Executive Vice President, Commercial Banking and other concerned officials, and that the entire transaction had been approved by the committee constituted pursuant to the aforesaid circular. This admission is significant. It establishes that the arrangement was not shown to have been entered into privately or secretly by an individual officer without institutional consideration. Rather, the evidence brought on record by the Bank itself indicates that the matter had been processed through its institutional mechanism for revival of sick industrial units.

25. We are conscious that approval by an internal committee, by itself, would not conclusively establish the legality or bona fide

nature of a transaction. Nevertheless, such approval is a relevant circumstance which cannot be ignored while determining whether the arrangement was entered into for bona fide commercial considerations. It is also noteworthy that the persons who negotiated and executed the arrangement on behalf of the Bank, particularly Sheikh Aftab Ahmed, the signatory of the acceptance letter dated 19.11.1999, were not produced as witnesses, despite the appellants specifically raising the issue and asserting that the concerned officers were still serving the Bank. The Bank chose to examine Jamil Ahmed and S.M. Aqeel, neither of whom was shown to have participated in the negotiations or the decision-making process culminating in the settlement. In circumstances where the Bank sought to invalidate an arrangement executed by its own officers and processed through its institutional mechanism, the evidence of the persons directly involved in the negotiations and approval would have been of considerable assistance in determining the true circumstances surrounding the transaction. The absence of such evidence, particularly when the burden of establishing the statutory ingredients rested upon the Bank, assumes significance. An allegation of lack of bona fide business consideration cannot be established merely through the subsequent opinion of officers who were not involved in the transaction.

26. We are, therefore, unable to agree with the finding of the learned Single Judge that the Bank had discharged its burden under Section 8 merely by asserting that the arrangement was unconscionable, unsecured and financially disadvantageous. The evidence, when considered as a whole, does not establish that the concessions made under the package arrangement were motivated by political reasons or considerations other than bona fide business considerations. The finding recorded on Issue No.1, therefore, cannot be sustained.

Whether the package arrangement was supported by consideration and was bona fide:

27. The learned Single Judge, while deciding Issue No.4, principally relied upon the fact that the Bank had released its securities against the original liability of Euro Ceramics and that the arrangement was unusual in banking practice. With respect, the mere fact that a particular arrangement was unusual or had not been adopted by the Bank in other transactions could not, by itself, render the arrangement illegal or establish a violation of Section 8. The question was required to be examined with reference to the actual terms of the settlement, the consideration received by the Bank and the commercial object sought to be achieved. The documentary evidence reflects that Euro Ceramics had an outstanding liability which had become difficult to recover owing to the sickness of its industrial project. The Bank was faced with a situation in which the original borrower was unable to service the outstanding liability. The settlement provided for a down payment of Rs.22.881 million by Euro Ceramics and the placement of Rs.60 million by Hashwani Hotels with the Bank for a substantial period of 25 years. The profit accruing on the deposit was to be adjusted against the outstanding serviceable liability. In addition, Hashwani Hotels was to acquire the industrial assets and operate the project. Thus, the arrangement contemplated not only a mechanism for recovery of the Bank's outstanding dues but also the revival and continuation of an industrial undertaking which had otherwise become financially unviable.

28. The consideration available to the Bank, therefore, was not confined to an immediate cash payment. It included the down payment, the long-term deposit, the agreed return thereon for adjustment towards the outstanding liability and the prospect of revival of the industrial project through its acquisition by a financially capable purchaser. Whether the arrangement ultimately proved to be as profitable as anticipated is a different question. The commercial wisdom of a negotiated settlement must ordinarily be assessed with reference to the circumstances

prevailing when it was entered into, rather than by hindsight. The learned Single Judge did not adequately examine these aspects and proceeded largely on the assumption that the release of securities against a long-term deposit was inherently unconscionable and without consideration.

29. We may observe that the Bank was not precluded from challenging the arrangement if it could establish that its officers had acted for extraneous considerations or that the settlement was a device to confer an undue benefit upon the appellants. However, such allegations required proof. No specific evidence has been brought to our notice demonstrating that the appellants had procured the arrangement through political influence, personal favour or any other consideration unrelated to the commercial objective of settling the outstanding liability and reviving the sick project. The admission of DW-1 that Hashwani Hotels was an influential businessperson, without more, cannot establish that the transaction was politically motivated or that the settlement was entered into for considerations other than bona fide business considerations. Accordingly, the finding that the package arrangement was unconscionable, without consideration and illegal under Section 8 is not supported by the evidence in the manner required by law.

Institutional approval under Section 8(2) of the Ordinance:

30. There is another material aspect which requires consideration. Section 8(2) of the Ordinance specifically required approval of the Board of Directors before institution of a suit under sub-section (1), in the case of a financial institution incorporated within Pakistan. The requirement is couched in mandatory language. It is not merely a procedural formality which can be dispensed with by the general authority of an officer to institute legal proceedings on behalf of the institution. The Bank, in its written arguments, has relied upon the Gazette notifications and the relevant provisions of the Industrial Development Bank of Pakistan Ordinance, 1961, particularly

Section 39, to contend that the officer concerned was duly authorized to institute and pursue legal proceedings on behalf of the Bank. We do not dispute that a statutory bank may, in accordance with its governing law and valid delegation, authorize its officers to institute and conduct legal proceedings. However, the question of general authority to sign, verify or pursue a plaint is distinct from the specific statutory requirement of prior approval of the Board of Directors for filing a suit under Section 8(1) of the Ordinance. The record, as placed before us, does not establish that the Board of Directors of the Bank had granted the specific approval contemplated by Section 8(2) for institution of the present suit. The reference to Gazette notifications empowering an officer to institute proceedings generally cannot, without further material, be treated as proof of compliance with the separate requirement under Section 8(2). The distinction between authority to institute proceedings on behalf of a corporation and the statutory approval required for invoking a particular special remedy must be maintained.

31. We are, therefore, of the view that the objection raised by the appellants concerning compliance with Section 8(2) also required due consideration. The learned Single Judge, while deciding Issue No.3, did not adequately address this statutory distinction.

Whether the Bank was entitled to cancel the package arrangement:

32. The Bank's suit was substantially founded upon Section 8 of the Ordinance. It sought a declaration that the package arrangement was unconscionable, without consideration and in violation of the said provision, and consequently prayed for its revocation and recovery of the amounts claimed. However, the statutory remedy under Section 8 could only be invoked upon proof of the conditions prescribed therein. The Bank could not obtain cancellation of an arrangement merely by describing it as commercially disadvantageous or by asserting that the release of collateral had exposed it to financial risk. The package arrangement was evidenced by the written correspondence dated

18.11.1999 and 19.11.1999. The Bank accepted the proposal and the parties thereafter acted upon it. The subsequent sale of the industrial assets to Hashwani Hotels through the agreement dated 13.06.2000 further demonstrates that the transaction proceeded beyond the stage of a mere proposal. Once the arrangement had been accepted and acted upon, the Bank was required to establish a legally sustainable ground for avoiding or rescinding it. The subsequent dissatisfaction of the Bank with the agreed rate of return or the commercial consequences of the settlement could not, by itself, furnish such a ground.

33. The Bank has also relied upon Section 65 of the Contract Act, 1872, contending that where an agreement is discovered to be void or subsequently becomes void, the party which has received an advantage under such agreement is bound to restore it or make compensation therefor. The principle of restitution embodied in Section 65 is well recognized. However, its application presupposes that the agreement is shown to be void or has subsequently become void in accordance with law.

34. In the present case, the Bank has not established the statutory foundation upon which it sought to invalidate the package arrangement. The mere fact that the Bank subsequently considered the arrangement commercially disadvantageous does not render it void within the meaning of the Contract Act. Nor can Section 65 be invoked as an independent substitute for the proof required under Section 8. The Bank was required to establish the legal basis for avoiding the agreement and thereafter identify the advantages received by each defendant, the corresponding obligations and the amount, if any, requiring restitution. Furthermore, the claim for recovery of Rs.331,273,411.73 was not established merely by producing a statement of account. The statement had to be examined in the context of the accepted package arrangement, the payments already made, the deposit of Rs.60 million, the profit accruing thereon and the adjustments contemplated under the settlement. The Bank's own case was that the profit on the deposit was to be adjusted against the serviceable liability of Euro Ceramics.

Consequently, the amount recoverable, if any, could only be determined after accounting for the payments, deposits, returns and adjustments made in accordance with the arrangement or any legally established basis for avoiding it. The learned Single Judge, while deciding Issue No.8, relied substantially upon the findings recorded on Issues Nos.1, 4, 6 and 7 and concluded that the amount claimed was due and payable. Once the foundational findings concerning the illegality and revocability of the package arrangement are found unsustainable, the consequential finding regarding the amount due and payable cannot independently survive.

Release of securities and guarantees:

35. The Bank has further contended that the release of its securities and collateral under the package arrangement could be recalled and that the appellants were liable to restore the Bank to its original position. We are unable to accept this proposition in the manner in which it has been advanced. The release of securities was part of the package arrangement accepted by the Bank. The appellants have placed on record correspondence and certificates relating to satisfaction of charges issued by the competent authority, which were required to be considered in the context of the settlement. The Bank could seek restoration of the securities or appropriate compensation if it first established that the arrangement was legally avoidable and that the appellants had obtained an advantage which was liable to be restored under the applicable law.

36. In the absence of proof establishing the statutory grounds for revocation, the Bank cannot simply disregard the consequences of its own acceptance and implementation of the settlement and seek to revive securities which it had agreed to release. Moreover, the decree does not identify the particular securities capable of restoration, the extent of the appellants' individual liability or the legal basis upon which released securities could be recalled. The finding on Issue No.6, therefore,

cannot be sustained independently of the unsustainable findings on the validity and revocability of the package arrangement.

Agreed rate of return on the Rs.60 million deposit:

37. Another aspect of the controversy concerns the rate of return payable on the long-term fixed deposit of Rs.60 million. The acceptance letter dated 19.11.1999 expressly recorded that the amount of Rs.60 million deposited by Hashwani Hotels would be converted into a long-term fixed deposit for 25 years carrying profit at the rate of 16.667% per annum, payable at half-yearly rests. The appellants have relied upon the express terms of the acceptance letter and the subsequent correspondence through which Hashwani Hotels objected to the unilateral reduction of the agreed rate. The learned Single Judge, while deciding Issue No.7, accepted the contention of the Bank that the rate of interest was variable in accordance with the prevailing directions of the State Bank of Pakistan. However, no specific regulatory direction or statutory provision has been identified in the impugned judgment which rendered the agreed rate inoperative in the circumstances of this particular deposit. A general observation that banking rates are variable cannot, by itself, displace an express contractual term. The enforceability of the agreed rate was required to be examined with reference to the terms of the deposit and the applicable regulatory framework.

38. We are, therefore, of the view that the finding on Issue No.7 was also recorded without adequately examining the express terms of the acceptance letter dated 19.11.1999 and the legal basis for the subsequent reduction. This is particularly relevant because the Bank's own case was that the profit accruing on the deposit would be applied towards the outstanding liability of Euro Ceramics. The amount of such profit and the rate at which it was payable were, therefore, material components of the settlement and its accounting.

Claim relating to guarantees issued in favour of the Customs Authorities:

39. The Bank also sought recovery of Rs.14,182,831/- in respect of guarantees issued in favour of the Customs Authorities. However, the mere issuance of guarantees does not, without more, establish that the entire amount claimed thereunder became immediately recoverable from the appellants. The Bank was required to establish the nature and terms of each guarantee, the circumstances giving rise to its invocation, the actual payment or liability incurred by the Bank and the corresponding contractual obligation of the person against whom recovery was sought. The impugned judgment does not contain a sufficiently reasoned determination of these essential aspects. The amount claimed under the guarantees was decreed as part of the overall relief without a separate examination of the underlying guarantee documents and the liability of each defendant.

40. In view of the failure to establish the statutory foundation of the suit and the absence of a sustainable determination of the individual liabilities, the decree for this amount cannot be maintained.

Contradictory findings concerning Hashwani Hotels:

41. There is yet another inconsistency in the impugned judgment. While deciding Issue No.2, the learned Single Judge held that Hashwani Hotels was not privy to the original transaction between the Bank and Euro Ceramics and that it had merely been introduced by Euro Ceramics to facilitate discharge of the latter's liability. However, while passing the decree, the learned Single Judge granted relief against both defendants without separately identifying the contractual or statutory basis for imposing liability upon Hashwani Hotels. It is settled that a decree must follow the findings recorded by the Court and the legal obligations established against each party. A finding that a defendant was not privy to the original financing transaction cannot be reconciled with a decree imposing joint

and several liabilities for the entire original financing without establishing an independent undertaking or statutory basis for such liability. The learned Single Judge was required to examine whether Hashwani Hotels had acted as a surety, indemnifier or had otherwise assumed an enforceable obligation within the meaning of the Ordinance. The mere fact that it deposited Rs.60 million in pursuance of the package arrangement did not automatically make it liable for the entire outstanding liability of Euro Ceramics. The decree, to this extent, suffers from an inconsistency which materially affects its enforceability.

Conclusion:

42. For the foregoing reasons, we are unable to sustain the conclusion reached by the learned Single Judge that the Bank had established that the package arrangement dated 18.11.1999 and 19.11.1999 was unconscionable, without consideration and entered into for considerations other than bona fide business considerations within the meaning of Section 8 of the Ordinance. The evidence, when considered in its entirety, indicates that the arrangement was negotiated in the context of the revival of a sick industrial unit, was reduced into writing, was accepted by the Bank and was subsequently acted upon by the parties. The Bank has failed to establish through cogent evidence that the concessions or adjustments under the arrangement were made for political reasons or considerations other than bona fide business considerations. The mere fact that the arrangement involved release of securities or that the Bank subsequently considered the terms financially disadvantageous was insufficient to invoke the extraordinary remedy contemplated by Section 8. The learned Single Judge also failed to properly appreciate the statutory requirement of approval under Section 8(2), the contractual consideration reflected in the package arrangement, the evidence concerning institutional approval and the distinction between the original borrower and the subsequent participant in the settlement. We are, therefore, of the considered view that the findings recorded in the impugned judgment suffer from material misreading and non-reading of the evidence and an

erroneous application of Section 8 of the Ordinance. The appellants have made out sufficient grounds for interference in appellate jurisdiction.

43. Consequently, both appeals are **allowed**. The impugned judgment dated 12.06.2009 and the decree drawn pursuant thereto in Suit No.B-34 of 2004 are hereby set aside. Resultantly, the suit filed by Industrial Development Bank of Pakistan for cancellation of the package arrangement and recovery of the amounts claimed therein stands **dismissed.**

44. The parties shall bear their own costs.

JUDGE

JUDGE

KAMRAN/PS