BUSINESS RECORDER
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# LHC order regarding jurisdiction in loan default case set aside

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The Supreme Court held that the courts should do their best to ensure that there is effective redressal and recovery of finances and loans from the defaulting customers of financial institutions. The apex court set aside the Lahore High Court order regarding the jurisdiction in loan default case.

It directed the Banking Court, Lahore, to fix the matter in the first week after the summer vacations for decision afresh on the basis of the plaint and the leave applications already filed by the respondents within a period of one month positively, with intimation to the Registrar of this Court of due compliance.

A three-judge bench, headed by Chief Justice Mian Saqib Nisar, on July 2, 2018 after hearing the appeal against the Lahore High Court had reserved the judgment which was announced on Tuesday.

WRSM Trading Company (respondent No.1) on 22.1.2001 availed finance from the Habib Bank (appellant) branch in Dubai, UAE. On 22.11.2002, the Habib Bank filed a plea before Banking Court No. 1, Lahore, for recovery of UAE Dirhams 2,042,059.22 (PKR 33,285,565.28). The respondents No.2 to 5 (LLC and others) were impleaded on account of being the directors of the WRSM Trading Company and in their capacity as guarantors for the finance availed by the said respondent. The Banking Court on 15.07.2005 returned the plaint for presentation in the Court of proper jurisdiction. The appellant challenged the Banking Court's order through RFA No. 395/2005 which was dismissed by the Lahore High Court on 10.03.2015.

The LHC order held that the appellant is not a financial institution within the meaning of Section 2(a) of the Financial Institutions (Recovery of Finances) Ordinance 2001 (FIO, 2001) as it did not undertake the transaction in Pakistan and that the appellant would have been entitled to file a recovery suit under Section 9 of the FIO, 2001 only if it had transacted business within Pakistan.

It further held that no interest based transaction could take place in Pakistan after 01.01.1985 in violation of State Bank of Pakistan (SBP) Banking Control Department (BCD) Circulars No. 13 dated 20.06.1984 and No. 32 dated 26.11.1984, as pursuant to Sections 3-A, 25 and 41 of the Banking Companies Order, 1961 the said circulars have the force of law and the interest-based agreements entered into by the appellant providing finance(s) to the respondents in Dubai were void in terms of Section 23 of the Contract Act, 1872 (Contract Act) as they were based on interest.

It further held that Section 20 of the Civil Procedure Code, 1908 (CPC) is procedural in nature and the same is not applicable to the FIO, 2001.

The primary consideration before the Court must be where the ends of justice in this case will be best served. The factors to consider in this regard are the convenience or expense (including the availability of witnesses) and others, such as which law governs the relevant transactions, or the respective places of residence or business of the parties and finally where a decree would be most effective.

Were the appellant to obtain a decree against the respondents in the UAE would this be of any avail to them? Would they be forced to pursue the assets of the respondents in Pakistan for purposes of actually executing the decree? If so, then it does not behove the courts in Pakistan to shirk their duty to adjudicate the lis.

"We may take this opportunity to observe that no situation should or ought to be created where citizens of Pakistan avail finance(s) outside Pakistan and retreat to Pakistan safe in the knowledge that there is no effective redress against them. Comity amongst nations requires that we in Pakistan do our best to

ensure that there is effective redressal and recovery of finances and loans from the defaulting customers of financial institutions. The economic health of our great nation and confidence in the banking sector is dependent upon an effective machinery for the recovery of monies from defaulting customers because in the absence of the same there is reluctance on the part of the public to place their trust in the banking system."

The court said that in the normal course of events the question of territorial jurisdiction would require the recording of evidence.

Certain jurisdictional facts may require to be established through evidence.

But this is not a rule set in stone because at times, as in the instant case there are admitted facts which on the basis of interpretation of law lend themselves to a clear cut answer as to the question of which court is to assume jurisdiction in the matter. "Whilst courts ought not to adopt arbitrary procedures and ignoring established practices is to be deprecated but at the same time we must not lose sight of the fact that courts must not become slaves to technicalities and create a fetish of procedures to the obvious detriment of litigants."

The apex court judgment said that the LHC verdict proceeds on the understanding that the transaction being based on interest, does not qualify as "finance" for the purposes of the FIO, 2001. In terms of the history of the banking laws, till 1984, there was no reference in the legal definition of a finance/loan provided under the law to a non-interest based system. Thereafter SBP issued the two aforementioned BCD Circulars No. 13 dated 20.06.1984 and No. 32 dated 26.11.1984.

It is to be noted that the transaction in question between the appellant and the respondents was entered into in March 2001, prior to the enactment of the FIO, 2001 in October 2001. The transaction in question was, therefore, governed by the terms of the Act, 1997, which clearly included within its ambit "loans" under a system based on interest. The Section 2(f) of the Act, 1997 provided: "S.2(f) "loan" means a loan, advance and credit under a system based on interest and includes..."

The fact the transaction in question was based on interest does not therefore detract from its status as a "loan" with regard to which the Banking Court could exercise jurisdiction. Since the governing law at the time unequivocally recognized the transaction(s) in question, i.e. interest based loans as being legally binding and treated the same as recoverable under the law, the assertion that the transaction(s) in question were void under Section 23 of the Contract Act for not having a lawful purpose, is entirely flawed and illogical.

The BCD Circulars are in the nature of instructions issued by the SBP to regulate the business of banking companies. Sections 3A, 25, and 41 of the Ordinance, 1962 do not give instructions issued by the SBP the force of law. Nothing in the Ordinance, 1962 leads to the conclusion that violation of these instructions would void an agreement.

"Therefore we do not find any merit in the finding of the learned High Court that the transaction was violative of Section 23 of the Contract Act on account of the circulars."



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