IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 2580 of 2015

Azgard Nine Limited and others----------Plaintiffs

Versus

JS Global Capital Limited ---------- Respondents

For hearing of CMA No. 18764/2015.

Suit No. 2581 of 2015

Azgard Nine Limited and others----------Plaintiffs

Versus

Trustees of JS & Co Ltd Staff Provident Fund ---------- Respondent

For hearing of CMA No. 18766/2015

Suit No. 2582 of 2015

Azgard Nine Limited and others----------Plaintiffs

Versus

JS Large Cap Fund ---------- Respondent

For hearing of CMA No. 18768/2015

Suit No. 2583 of 2015

Azgard Nine Limited and others----------Plaintiffs

Versus

JS Bank Limited ---------- Respondent

For hearing of CMA No. 18770/2015

Suit No. 2584 of 2015

Azgard Nine Limited and others----------Plaintiffs

Versus

JS Growth Fund ---------- Respondent

For hearing of CMA No. 18772/2015

Suit No. 2585 of 2015

Azgard Nine Ltd and others ----------Plaintiffs

Versus

Mahvish & Jahangir Siddiqui Foundation and Association---------- Respondent

For hearing of CMA No. 18774/2015

Suit No. 2586 of 2015

Azgard Nine Limited and others ----------Plaintiffs

Versus

JS Principal Secure Fund-I ---------- Respondent

For hearing of CMA No. 18776/2015

Date of hearing: **11.01.2016**

Date of order: **20.01.2016**

Plaintiffs: **Through Mr. Wasif Riaz Advocate.**

Defendants **Through Mr. Khalid Javed Khan Advocate.**

O R D E R

Muhammad Junaid Ghaffar, J. Through all the listed Suits for declaration and permanent injunction, the plaintiffs have sought a common /similar relief against the defendants, to the effect that the plaintiffs are not customers of defendants as defined in Section 2(c) of the Financial Institutions (Recovery of Finance), Ordinance, 2001, (Ordinance 2001) and thus the defendants are also not a Financial Institution as defined in Section 2(a) of the Ordinance, 2001, and by way of an interim relief, through listed applications, notices dated 2.9.2015 and 17.12.2015 have been sought to be suspended with a further prayer that the defendants be restrained from calling upon the personal guarantee of plaintiff No.2, and may further be restrained from taking any adverse action against the Plaintiffs. Since a common issue is involved in all these matters, by consent, all the listed applications are being decided by a common order.

2. Very briefly, the facts as stated are that plaintiff No.1 is a Public Limited Company engaged in the business of manufacturing and sale / exports of textile products, whereas, the plaintiff No.2 is the Chief Executive Officer of plaintiff No.1. The defendants in all the Suits are a Group of Companies / Stock Funds owned by a Brokerage House listed on the Stock Exchange. It is further stated that on 21.2.2004 the plaintiff

No.1 offered and issued 86,865,434.00 listed redeemable Preference Shares of the face value of Rs. 10/- each to various public and institutional investors under the provisions of Companies Ordinance 1984. The defendants in all the aforesaid Suits had acquired such Preference Shares of plaintiff No.1 from secondary market and all the defendants jointly hold an aggregate of 42,615,168 Preference Shares of plaintiff No.1 at a total aggregate of par value of Rs: 426,151,680/-. It is further stated the plaintiff No.1 who had obtained loans from various banks could not adjust the same on the due dates and in order to settle and adjust the outstanding amounts, on 11.2.2010, entered into a settlement agreement with the lenders / banks (*which in the present controversy is not relevant*). It is further stated the plaintiff No.1 had also proposed to the defendants to convert their 42,615,168 Preference Shares into privately placed Term Finance Certificate(s) which was accepted, and an agreement to this effect was arrived at on 22.10.2012, wherein, as per redemption Schedule the Term Finance Certificates were to be finally redeemed by 19.10.2020. It is further stated that at the time of such settlement agreement, the plaintiff No.2 issued and executed his personal guarantee in favour of the defendants for the aforesaid amount of TFC's. The plaintiff No.1 was required to make certain payments in respect of redemptions starting from 19.4.2015 however, could not fulfill its obligations due to financial crunch and approached the defendants through letter dated 1.10.2015 for restructuring of the said TFCs. However, the defendants did not agreed to such proposal and instead issued impugned notices dated 2.9.2015 and 17.12.2015, whereby, the plaintiffs have been called upon to redeem the entire outstanding TFCs issued upon, with all accrued and unpaid profits till realization.

3. Mr. Wasif Riaz, Counsel for the plaintiffs has contended that the plaintiff No.1, due to recession in the textile market, local as well as international, is facing a serious financial crunch, besides some litigation with the lending banks, and therefore, is unable to pay off the debts / redemption money to the defendants as agreed upon vide agreement dated 22.10.2012. He has further submitted that the Plaintiffs have approached the defendants for reduction in markup rate from 11% to 5%, however, no response has been received from the defendants and instead the impugned notices have been issued to them, whereby, the entire TFCs have been demanded to be redeemed, which according to the Counsel cannot be done until 2020. Per Counsel such premature redemption cannot be exercised by the defendants, whereas, the plaintiffs were, and are, willing to make payments to the defendants, however, they need further extension in time and so also reduction in markup rates.

4. Mr. Khalid Javed Khan, learned Counsel for the defendants has not filed any counter affidavits to the listed applications and has instead chosen to argue the applications, as according to him, the facts are not in dispute as it is admitted by the plaintiffs that in lieu of the Preference Shares they have issued TFCs and have default in payment of the redemption amount. He further submits that as per clause 11.2.4 of the Agreement dated 22.10.2012, in case of default, there were two options with the plaintiffs, that either TFCs were to be converted into ordinary voting shares on immediate basis, or in the alternative, the defendants could call upon the issuer to redeem the entire outstanding aggregate amount of the TFCs along with unpaid profit, whereas, such payment per clause 11.2.4(b) was to be made within 5 days. Learned Counsel has further contended that neither any breach of agreement has been alleged, nor any other act has been attributed to the defendants, whereas, the

plaintiffs are merely seeking extension of the agreement and time of payment of redemption amount, which this Court cannot grant as it is a private settlement between two parties. He has further contended that neither a prima facie case is made out nor balance of convenience lies in their favour, whereas, irreparable loss has been caused to the defendants instead of the plaintiffs, therefore, the listed applications may be dismissed as no case is mad out by the plaintiffs.

5. I have heard both the learned Counsel and have perused the record. For the sake of brevity the facts are not reiterated again as they are not in dispute, whereas, the agreement in question has not been disputed either. It appears that apparently the plaintiff No.1 has defaulted in making payment of the redemption installments / amounts for reasons as stated in the pleadings which have also been mentioned hereinabove. In fact the matter simply pertains to, whether in case of such default; the defendants are justified in calling for redemption of the entire amount of TFCs along with all accrued and unpaid profits, and, whether any extension in time and reduction in Mark-up rates can be granted by this Court in instant proceedings. The event of default has been dealt with in clause 11 of the settlement agreement dated 22.10.2012 and it would be advantageous to refer to it which specifically provides the mechanism in case of default:-

> "11. **"Payment Event of Default**
>
> 11.1 Payment Event of Default means any failure, refusal or inability on part of ANI to pay profits on each of the TFCs issued as per the profit Payment Schedule given in Annexure XIII and / or to redeem the TFC(s) on its due date(s) as depicted in the Redemption Schedule given in Annexure VII, or in case of the Term Loan, failure, refusal or inability on part of ANI, to pay Mark-Up and / or principal amount of the Terms Loan as depicted in the Illustrative Repayment Scheduled given in Annexure XI. Such a default would be considered as a default on the entire TFC issue/Term Loan.
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> 11.2 Upon occurrence of a Payment Event of Default after the TFCs are issued.

11.2.1 *The Majority TFC Holders shall, via the Trustee, issue a Notice of Payment Event of Default in writing to the Issuer, requiring the Issuer to rectify the Payment Event of Default within the Cure Period along with an Offer for Sale ("OFS") of the TFCs to the Shaikh Family.*

11.2.2 The OFS shall comprise of the option to exercise purchase of the Instrument at the Purchase Value, and shall be valid for the duration of the Cure Period.

11.2.3 In case of acceptance of the OFS, the Shaikh Family shall make 25% non-refundable payment of the outstanding TFCs plus accrued profit due till the end of the Cure Period to each TFC Holder before the expiry of the Cure Period along with their acceptance of the OFS. The remaining 75% shall be paid by the Shaikh Family within 60 days from the acceptance of OFS. Upon receipt of the amount in clear funds, the TFCs (along with profit accrued thereon) shall be transferred by the TFC Holder(s) to the each member of the Shaikh Family pro rata to his / her contribution.

11.2.4. In case the Payment Event of Default remains un-rectified within the stipulated Cure Period and the Shaikh Family does not accept the OFS or if the Shaikh Family does not make the balance 75% payment after accepting the OFS by the end of the stipulated period, then, without prejudice to the ordinary legal course of action available to the TFC Holders, the Majority TFC Holders shall have the option to either.

a. *Call upon the Issuer to convert the TFCs into ordinary voting shares of the Issuer immediately without the need for completion of any other formality. The number of shares to be issued shall be determined as per the Conversion Ratio. In such a case, in addition to converting all outstanding amounts due under the Transaction documents, the Issuer will pay to the TFC Holders the amount corresponding to the costs incurred by the TFC Holders in connection with conversion of the TFCs and other amounts due under the Transaction documents; or*

b. *Call upon the Issuer via the Trustee to redeem the entire outstanding Aggregate Issuer Amount of the TFCs along with unpaid profit accruing till the date of realization. If the Majority TFC Holders choose this second option, then the Issuer will be obliged to pay the redemption proceeds along with the profit to the TFC Holders within 5 days of the Majority TFC Holders decision, as communicated by the Trustee, and the Personal Character of Ahmed Humayun be invoked."*

(Emphasis Supplied)

6. Perusal of clause 11.2.1 reflects that in case of default the defendants could issue a notice of payment in writing to the plaintiffs, requiring them to rectify the payment Even in Default within the Cure period along with an offer for sale of the TFCs. Pursuant to such clause a notice dated 2.9.2015 was issued to the plaintiffs, however, the same was not acted upon and instead the Plaintiffs sought further time as well as reduction in the Mark-up rates. Since after expiry of the 30 days Cure period, the offer for sale was not accepted, the defendants decided by

virtue of the impugned notice dated 17.12.2015, to call upon the plaintiffs to redeem the entire outstanding TFCs issued, along with all accrued and unpaid profits till realization which has been impugned through the aforesaid Suits.

7. After having perused the record and the submission of the Counsel for the plaintiffs I am of the view that no case of indulgence is made out by the plaintiffs as the only ground which they have urged before this Court is, that due to financial crunch, they were unable to fulfill their obligations as contemplated under the settlement agreement. They have further pleaded that the rate of markup may be reduced by the defendants from 11% to 5%. This is hardly a ground for this Court to give any indulgence in the matter as it is a private issue between two parties and is entirely for the defendants to accept or reject such request. Neither any specific performance of the agreement is being sought nor has any other violation been alleged for which the Court can issue any directions to the defendants. It is neither the case of the Plaintiffs that the defendants have breached any of the clauses of the agreement in question, nor the Counsel could refer to any covenants of the agreement, whereby, the defendants could be restrained from seeking encashment of the TFC's as sought through the impugned Notices. In fact what the plaintiffs have made is a mercy prayer before this Court, whereby; they have sought directions to the defendants from this Court to accept the terms as are being offered by them for restructuring. This perhaps cannot be done or enforced by the Court under the given facts and circumstances of this case, at least at the injunctive stage. As to the other prayers in the Suit, the matter can be decided after evidence is led by the parties as the injunction application(s) are only to the extent of

coercive measures for the encashment of TFC's and the personal guarantee of Plaintiff No.2

8. In view of hereinabove facts and circumstances I am of the view that no case for indulgence is made out by the Plaintiffs, whereas, it is settled law that while deciding an interlocutory application for injunction, the Plaintiff(s) have to make out a prima facie case and to show that irreparable loss would be caused to them if no such injunctive order is passed in their favor. In the instant case, I am afraid, neither any prima facie case has been made out nor the balance of convenience is in favor of the Plaintiff(s) and no irreparable loss would be caused to the plaintiff(s) if injunction is refused, whereas, if the injunctive relief as sought is granted, as rightly pointed out by the Counsel for defendants, irreparable loss, if any, would be caused to the defendants, as the plaintiffs are required to fulfill their financial obligations with the defendants pursuant to the agreement entered into by them. The breach of agreement, if any, is perhaps by the Plaintiffs. In the circumstances, all the listed applications in the aforesaid Suits filed under Order 39 Rule 1 & 2 CPC are hereby dismissed.

Dated: 20.01.2016

JUDGE

ARSHAD/