IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. B-29 of 2014

M/s. Pak China Investment Company Ltd.----------Plaintiff

Versus

Digri Sugar Mill Limited and others----------Defendants

Date of hearing:	**16.01.2018**
Date of Order:	**14.02.2018**
Plaintiff:	**Through Mr. Sattar Mohammad Awan, Advocate.**
Defendant:	**Mr. Saleem Thepthawala, Advocate**

O R D E R

Muhammad Junaid Ghaffar, J. This is an application **(CMA No.9430/2014)** under Section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 **(FIO 2001),** filed on behalf of the Defendants seeking leave to defend this Suit.

2. Instant Suit is for Recovery of Rs.112,500,000/- towards principal and Rs.7,155,801/- towards markup along with cost of funds under Section 9 of **FIO 2001.** It is the case of the Plaintiff that pursuant to agreement, Defendant No.1 was granted various terms finance facilities and first sanction of Rs.200 Million was made in the year 2008, whereas, Defendants No.2 to 4 executed personal guarantees. The Defendants have also secured the said term finance facility by executing various documents for hypothecation etc. as mentioned in para-6 of the Plaint. It is further stated that Defendant No.1 thereafter defaulted in repayments and at the request of Defendant No.1, First Supplemental Terms Finance Agreement was executed, whereas, time and again they have defaulted. Subsequently, on 24.4.2014,

they were directed to repay the outstanding loan failing which proceedings would be initiated, hence instant Suit.

3. Learned Counsel for the Defendants has contended that the finance facility of Rs.200 Million was granted for a five years term on 14.11.2008 and thereafter in 2010 due to heavy floods, the entire Mill of Defendant No.1 was affected and some default occurred. Per learned Counsel owing to this natural disaster, all Banks were directed to reschedule the finance facilities in case of defaults and in this scenario first Supplemental Term Finance Agreement was reached between the parties in 2013 extending the facility for further three years up till 2016. Learned Counsel has contended that after execution of Supplemental Agreement, there were some disputes with the Bank regarding charge of markup. However, there was no default on the part of Defendant No.1. He has further contended that time and again the Plaintiff Bank was requested to either increase the finance facility, or in the alternative, issue No Objection Certificate enabling Defendant No.1 to obtain finance facility from other lenders as admittedly the hypothecated/mortgaged assets were much higher in value. However, the Plaintiff Bank never responded on time and kept on lingering the matter for no justifiable reason. In this regard, learned Counsel has referred to various correspondence with the Plaintiff Bank including with other Banks filed along with the listed application and has contended that admittedly the Plaintiff Bank without any justifiable reason withheld the NOC and due to regulations of State Bank of Pakistan and Securities & Exchange Commission of Pakistan ("SECP"), no other Bank agreed to disburse the finance facility in absence of NOC required to be issued by the Plaintiff Bank. This according to the learned Counsel resulted in default after October, 2013 and in view of such circumstances, the Defendants are entitled for grant of an unconditional leave to defend as the default occurred due to fault of the Plaintiff. Learned Counsel has further contended that even otherwise the Plaintiff Bank has failed to fulfill the requirements of Section 9 of the **FIO 2001** as they have failed to annex proper statement of accounts duly certified in terms of **FIO 2001** read with the requirements of Banker's Books Evidence Act, 1891. Learned Counsel has also raised objections regarding charging of

markup over and above the agreed amount as well as the period and has contended that in such circumstances, the Defendant is entitled for leave to defend. In support he has relied upon ***Messrs First Women Bank Limited v. Registrar, High Court of Sindh, Karachi and 4 others*** **(2004 SCMR 108),** ***Qamaruzaaman Khan v. Industrial Development Bank of Pakistan & others*** **(SBLR 2008 Sindh 1957),** ***Muhammad Khalid Butt v. United Bank Limited*** **(2003 CLD 911),** ***United Bank Limited v. Messrs Usman Textiles and 6 others*** **(2007 CLD 435),** ***Citi Bank N.A., A Banking Company through attorney v. Riaz Ahmed*** **(2000 CLC 847)** ***and Messrs C.M. Textile Mills (Pvt.) Limited through Chairman and 5 others v. Investment Corporation of Pakistan*** **(2004 CLD 587).**

4. On the other hand, learned Counsel for the Plaintiff has contended that Defendant No.1 is a habitual defaulter and seeing the conduct of Defendant No.1, the NOC was refused as it is not binding in law. Per learned Counsel once the Defendant No.1 had defaulted, no question of permitting the Defendant No.1 arises to obtain loan/finance facility from another Bank. Learned Counsel has further submitted that the Defendants have failed to fulfill the requirements of Section 10 of **FIO 2001** as no details of the finance facility availed and repayments made has been mentioned in the leave to defend application, therefore, on this ground alone this application is liable to be dismissed. Insofar as the objection regarding account statement and its non-certification is concerned, he has contended that the said defect is not fatal and can be cured and if permitted a fresh statement can be filed. In view of such position he has prayed for dismissal of the leave to defend application.

5. I have heard both the learned Counsel and perused the record. I would first like to dilate upon second ground urged on behalf of the Defendants for granting of leave to defend application i.e. non-filing of a proper statement of account as required under Section 9(2) of the **FIO 2001** read with Section 2(8) of the Banker's Books Evidence Act, 1891. For convenience both the relevant Sections are reproduced as under:-

FIO 2001

"Section 9: PROCEDURE OF BANKING COURTS

1. ----------
2. ***The plaint shall be supported by a statement of account which in the case of a financial institution shall be*** **duly certified** ***under the Bankers Book, Evidence Act, 1891 (XVII of 1891),*** and all other relevant documents relating to the grant of finance. Copies of the plaint, statement of account and other relevant documents shall be filed with the Banking Court in sufficient numbers so that there is one set of copies for each defendant and one extra copy."

Banker's Books Evidence Act, 1891

"2. "Bank" and "banker' mean---
(a) ----------
(b) ----------
(c) ----------
3. ----------
4. ----------
5. ----------
6. ----------
7. ----------
8. *"certified copy" means a copy of any entry in the books of bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title."*

6. The aforesaid provisions have been interpreted in various orders of this Court by various learned Single Judges and the majority view is to the effect that if a Statement of Account has been filed, whereby, the aforesaid two provisions are not complied with, then the Defendants are either entitled for leave to defend or in the alternative even Plaints have been rejected. Very recently, I myself in the case of ***Askari Bank Ltd. Vs. DCD Services Ltd***. and others **(Suit No.B-121/2011)** through Order dated 11.01.2018 has held that fulfillment of these two provisions is mandatory and failure in doing so entitles the Defendants /borrowers / customers for an unconditional grant of leave to defend. The relevant finding in the said order has been recorded in the following manner:-

> "Perusal of the aforesaid provision of FIO 2001 clearly reflects that the accounts statement which is to be filed and annexed with the plaint in a Suit under this Ordinance has to be duly certified in the manner as provided under the Banker's Book, Evidence Act, 1891. Whereas, Section 2(8) ibid provides that certified copy means a copy of any entry in the books of bank together with a certificate written at the foot of such copy

> that it is a true copy of such entry and that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank. It further requires that such certificate should be dated and subscribed by the principal accountant or manager of the bank with his name and official title. As stated hereinabove this requirement is lacking in this case and there is no dispute to that effect, rather conceded by the learned Counsel for the plaintiff bank. They have only been signed by two officers. The argument that in view of the provisions of Electronic Transaction Ordinance, 2002 this condition is no more applicable does not appear to be convincing. It may be appreciated that though in the modern day era the accounts are stored and kept on computers and electronic / magnetic storage devices, but perhaps, when the same is presented before a Court of law through a printout and is not certified or even properly signed, the same could not be admitted plainly without adducing of evidence. And for such purposes, an unconditional leave is eminent without further dilation and argument. The legislature was cognizant of the fact that whenever a Suit for recovery would be filed under the FIO 2001, the accounts or the bank statement would be annexed and for such reason since the originals would not be filed at the time of filing of a Suit, it was required that the copies so annexed with the plaint should be certified in a manner as provided under the Banker's Book, Evidence Act, 1891. It is not the moot question that in view of promulgation of Electronic Transactions Ordinance, 2002, this is no more required, but the question is that as and when copies of a bank statement or account will be annexed with the plaint they should be properly certified by the officer as required under the Banker's Book, Evidence Act, 1891. And this has been mandated for the reason that when the same is presented before the Court in a recovery Suit under Section 9 of FIO 2001, it has attached to it some authenticity. Be it a computer printout or an extract or copy of an account being maintained manually by the bank, the condition of its certification is mandatory in both situations. It is not that after promulgation of Electronic Transaction Ordinance, 2002, the question of its certification goes away. This Ordinance only provides a mechanism or a substitute to keep the accounts on Electronic / magnetic data and devices, instead of retaining them manually. It only facilitates such method of keeping the records electronically, so as to overcome any impediment in its acceptance in totality. This in no way absolves a party regarding the condition of its certification in terms of Section 2(8) of the Bankers Book Evidence Act, 1891, especially when it is presented before the Court under a Suit for Recovery in terms of Section 9 of FIO 2001."

Same view has been taken by learned Single Judges of this Court in the cases reported as ***Soneri Bank Limited v Compass Tading Corporation (Private) Limited*** (**2012 CLD 1302**), ***Muhammad Yasin Pakistan Kuwait Investment Company (Pvt) Limited v Active Apparels International & 6 others*** (**2012 CLD 1036**) **and** ***Habib Metropolitan Bank Limited v Abid Nisar*** (**2014 CLD 1367**)

7. In this matter, in fact admittedly, there is not even an *original* statement of account on record and only a photocopy has been presented, which is not even signed, what to talk of its

certification as required in law. Such factual position was not disputed by the learned Counsel for the Bank as during arguments he sought permission to place on record requisite statement of account. In fact, after the matter was reserved for orders, he even made an attempt to furnish such certified statement of account in chambers, which request was naturally regretted. This clearly reflects on the part of the Plaintiffs Bank that admittedly compliance as required in law was not made, therefore, in these circumstances; I am of the view that the Defendants are entitled to defend the Suit unconditionally on this ground alone.

8. Coming to the first argument of the learned Counsel for Defendants regarding withholding of NOC enabling the Defendant No.1 to obtain further finance facility from other banks is concerned; it transpires that Defendant No.1 has continuously approached the Plaintiff after execution of the Supplemental Term Finance Agreement. One such Letter annexed as "D-5" was written on 29.07.2013 requesting NOC for creating first charge in favour of an investment Company, who had agreed to grant finance facility to Defendant No.1. Thereafter Annexure "D-6" has been placed on record, which is an Email dated 29.08.2013 issued by the Plaintiff Bank, showing its inability to consider any NOC request until the issues raised in the said Email are first resolved. The precise objection was in respect of outstanding amount of Rs.3,514,408/ as markup for the quarter ending June 2013 with further demand of audited finance accounts for the year 2012, stock reports for April, 2013 and a Board Resolution. It appears that through Letter dated 05.09.2013, the Defendant No.1 complied with three out of four objections, whereas, payment of markup as demanded was complied with subsequently, on 09.09.2013 (Annexure "D-8"), and the amount of markup of Rs.3,514,408/- was paid through Cheque No.10581926. It appears that thereafter on 09.09.2013, the Plaintiff wrote another Letter asking for the following documents:-

> In this regard, before initialization of any approval formalities for NOC, PCICL requires the following:
>
> - Justification for Fresh Facility requirement
> - Term Sheet duly approved and agreed by DSML and PAIR Investment Company Limited short Term Facility
> - Revised Financial Projections which incorporates the PAIR's Short Term Financing

- Latest Search Report and Valuation Report reflecting the cushion available against fixed assets of the company

An early response will be appreciated. In case of any query please contact the under signed.

9. It further appears that there is a series of correspondence annexed by Defendants, wherein, time and again requests have been made for grant of NOC in favour of Pak Iran Investment Company Limited as well as National Bank of Pakistan and NIB Bank and time and again the matter has been delayed by the Plaintiff Bank without citing any justifiable reason except demanding documents, which were from time to time supplied to them. It further appears that during the same period the other creditors / Banks issued respective NOCs to Defendant No.1 for obtaining further finance facility from Pak Iran Investment Company. One such Letter is annexed as "D-35" dated 30.07.2013. It is also a matter of record that (see Annex-D/11-letter dated 17.9.2013), the defendant No.1 has specifically pleaded that new short term finance facility being generated from new lenders was for meeting the working capital requirement as well as for outstanding liabilities. This was further reiterated through letter dated 26.10.2013 (Annex-D/26) wherein it was once again requested to issue the NOC immediately as the next installment (of Plaintiff) was to be paid by Pak Iran Investment Company Limited, to them from the new sanctioned limit. No assistance has been provided on this correspondence on behalf of the Plaintiff, whereas, it is the case of the Defendants that such conduct has resulted in commission of alleged default. However, despite this, the Plaintiff Bank kept on lingering the matter but no such NOC was issued to them.

10. Overall perusal of the correspondence so placed on record, it appears that the demand of Defendant No.1 was consistently to the effect that the assets against which charge in favour of the Plaintiff was created were much higher in value as against their finance facility of Rs.200 Million. This factual assertion has not been controverted before the Court in any substantial manner, nor any such document, has been referred by the learned Counsel for the Plaintiff to rebut the contention of the Defendants. In fact the Certificate of Registration of Mortgage issued by SECP (Annex-P/12) reflects that charge created in favor of Plaintiff was only for Rs.266.6667 Million approximately. Therefore, at this stage, this

Court is inclined to believe that the value of assets under their charge was much higher than the amount of finance facility. Consequently, the question, which arises is that whether in such a situation a Bank is entitled or is within its rights to refuse issuance of NOC for a *pari passu* charge. Though it cannot be justifiably said that in such circumstances, this creates a reasonable cause for default; but at the same time it is to be appreciated that when a customer, who is in a difficult position insofar as meeting its repayments are concerned, then whether such act of a lending bank can be justified. It is also a matter of record that the Defendants have filed an independent Suit, claiming damages for such alleged default for non-cooperative attitude of the Bank, which according to them resulted in sustaining losses as well as default. Therefore, this appears to be a case of first impression that when there are no enforceable regulations either issued by the State Bank of Pakistan or for that matter by SECP regulating the issuance of NOCs by one Bank to another, could this be a legal ground within the contemplation of s.10 of FIO 2001, entitling the defendant a right for leave to defend or not. Since in this matter, I have already reached to a conclusion that leave is to be granted as plaintiff has failed to comply with the mandatory requirements of s.9(2) ibid, & s.2(8) of Bankers Books Evidence Act, 1891, therefore it will be in the fitness of things that a separate issue is also framed in this regard as in my view it will not prejudice the case of any of the parties. Grant of leave to defend merely ensures that a right which is ordinarily available to all defendants as of right in all civil suits is not denied to defendants in Banking suits under the Ordinance if there are substantial questions of law and fact which have been raised by a defendant[1]. In such facts of the case then perhaps this in my view is a substantial question of law and requires leading of evidence by the parties in this regard.

11. Notwithstanding the above, it may be observed that in the case of ***A.M. Fabric (Pvt.) Ltd. v. I.D.B.P and others*** **(2003 CLD 1321)**, a learned Single Judge of this Court has dealt with somewhat similar proposition. In that case though it was a Suit by the Borrower, but nonetheless, Defendants, after creation of charge and signing of agreement, failed to disburse the finance amount,

[1] Zeeshan Energy Ltd. V Faysal Bank Ltd., (2014 SCMR 1048)

and therefore, the Borrower came before this Court seeking enforcement of the Agreement for reimbursement of the finance facility and in the alternative issuance of No objection Certificate in the name of another Bank. The relevant finding is as under:-

> "16. The contention of Mr. Salman Hamid that request for grant of NOC to create pari passu charge is beyond the scope and terms of Running Finance Facility sanctioned in favour of plaintiff has no force as the alternate request of NOC for creating pari passu charge has been made by the plaintiff in an attempt to salvage their project from disaster in an unforeseen situation created by the defendant No.1. The defendant No.1 therefore, cannot claim benefit of their own wrong on such pretext. The other contention of learned counsel to justify refusal of NOC on the basis of ownership of Messrs Sadiqabad Textile Mills Ltd. has also no force as apart from other material on record, from the report/ reference of respondent No.2 in J.M.A. No.41 of 1998, dated 28-5-2001 it is evident that besides all assets consisting land, building and revived plant/machinery of Sadiqabad Textile Mills Ltd. other properties of plaintiff are also encumbered with defendant No.1 for the purpose of collateral securities. Further defendant No.1 have not specifically denied the subsequent investment made by the plaintiff in the project and the fact that existing assets/securities of the plaintiff are much higher in value than their outstanding liabilities.
>
> 17. From the above discussion it is evident that not only it will be just and convenient but also expedient in the interest of justice that this Court may pass an interim order, restraining the defendant No. 1 from committing breach of their contractual obligation by not providing Running Finance Facility to the plaintiff in terms of their letter, dated 19-7-2001, or to make an alternate arrangement to redress the grievances of the plaintiff which are of urgent nature.

12. In view of hereinabove facts and circumstances of this case, I am of the view that the Defendants have made out a case for grant of unconditional leave to defend. Accordingly, the listed application is allowed and their application for leave to defend shall be treated as Written Statement, whereas, parties are directed to file proposed Issues on the next date.

13 Application stands allowed in the above terms.

Dated: 14.02.2018

J U D G E

Ayaz