

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 1025 of 2003

Date	Order with signature of Judge
Plaintiff	: M/s. Union Nation Bank, Through Mr. Habib-urRehman, advocate.
Defendant	: Bilal Ahmed Qureshi, Through Mr. Zahid F. Ibrahim, advocate.
Date of hearing	: 28.02.2018
Deceided on	: 12.03.2018

JUDGEMENT

Nazar Akbar.J,- Brief facts of the case are that the plaintiff, a Banking Company Incorporated in (Deira, Dubai) UAE, on the application of defendant advanced a loan of a sum of USD: 425,000, among others, on the condition of its full and final adjustment by 17.12.1991. The Defendant has submitted copy of his Passport No. E005791 and identity Card bearing No. AM 051616 for identification and loan facility was extended on a promissory note and other related document which were also executed by the Defendant including personal guarantee for the value in the sum of USD: 425,000/- in favor in the Plaintiff. The Defendant having received the loan amount, by June, 1990 could repay only US \$:141,646.07. Plaintiff on **12.07.1992** agreed for a settlement with the defendant since he has failed to repay the outstanding loan and executed an agreement containing, inter alia, covenants as under:

- i) The Plaintiff Bank, accepted to receive in full and final settlement outstanding liability in the sum of US\$: 394,304.28 with no interest accrued payable in total 12 equal installments, each calendar month @ USD: 11,833.33 with effect from 1st of August, 1992 fulfilling the repayment in the manner so divided by 1st of July, 1993.
- ii) The defendant in furtherance of the written settlement failed to adhere to the modality of regular monthly agreed payment of installments, so presented in the settlement.

iii) The aggregate amount, so received, against the agreed settlement was US Dollar 75962.60 only.

iv) The last amount, received was USD: 2718.87 on 14 July, 2001.

It is further averred that, as per above settlement, it was the condition precedent, that if the Defendant paid the settled amount by regular installment, the Plaintiff-Bank would be willing to release the said defendant from the obligation to pay the balance amount. However, the defendant despite approaches and request notice failed to abide by the undertaking, settlement, guarantee and repayment, therefore the plaintiff filed the instant suit for recovery of US\$ 585,692.42.

2. Defendant filed his written statement and raised preliminary objection, that the suit is clearly time-barred and the persons instituting the suit on behalf of the plaintiff do not have the requisite authority to do so and the suit is liable to be dismissed on this preliminary ground alone. It is denied by the defendant that any loan was advanced by the plaintiff and took the stance that the plaintiff and defendant had jointly decided to undertake an investment to open a bank in Pakistan. In this regard it was agreed that a sum would be made available to the defendant to enable him to explore the prospects and possibility of such business. It is averred that upto June 1990 the defendant had repaid an amount of US 141,646.07 to the plaintiff. It was clearly agreed that interest will not be charged on the so called loan. It is further contended that there is no conditions precedent in the Settlement Agreement that the so called balance loan amount will be reinstated if the defendant fails to adhere to the repayment schedule in the Agreement.

3. On **01.11.2004** out of the pleadings of the parties followings issues were framed by the Court.

- i. Whether the suit suffers from any legal infirmity, if so, to what effect?

- ii. Whether the suit is barred/liable to be dismissed under the Limitation Act, 1908?
- iii. Whether the suit has been instituted with lawful authority?
- iv. Whether the monies advanced to the defendant were on account of loan or investment? If loan, to what effect?
- v. Whether the defendant obtained / utilized loan against execution of various documents appended with the plaint or advance made for consideration, as alleged in written statement?
- vi. Has the defendant admitted the repayment/settlement of loan, if so, to what effect?
- vii. What should the decree be?

4. I have heard learned counsel and perused the record. My findings on the issues are as follows:-

Issues No.i. ii and iii.

5. The burden of proof of these issues is on the defendant. Learned counsel for the defendant has not pressed issue No.ii about limitation. He has, however, very vehemently contended that suit has not been filed by competent person and therefore, it is liable to be dismissed. Learned counsel has drawn my attention to the plaint to point out the person who has filed and verified the plaint on behalf of the Banking Company. He has contended that only one attorney namely Moustafa Ali Rekaby has filed the plaint on the basis of power of attorney executed by the plaintiff bank on **28.4.2003**. The said power of attorney has been produced by the witness of the plaintiff as Ex.P/1-A. Learned counsel has referred to the following recital from Ex.P/1-A.

General Power of Attorney

KNOW ALL MEN by these presents that UNION NATIONAL BANK, Abu Dhabi, United Arab Emirates (hereinafter called the "Bank") does hereby nominate, constitute and appoint **Mr. Moustafa Ali Rekaby** an employee of the Bank (hereinafter called the "Attorney") to be the true and lawful Attorney of the Bank.

1. **Jointly with another Attorney of the Bank** for and in the name and on behalf of the Bank to do, execute, transact and perform all or any of the acts, deeds, matters, and things following at any place or places:

- (i) To commence, prosecute, continue and defend all actions, suits or legal proceedings whether civil, criminal or revenue, including proceedings to procure or establish the bankruptcy or insolvency of any person or firm in liquidation or winding-up of any company, to compromise or refer to arbitration any claims or disputes either in such suits or proceedings or otherwise; to appoint Solicitors, Counsel, Advocates, Pleaders, Vakils and other legal agents; to make, sign, verify, execute writs, complaints, petitions, written statements, memorandum of Appeal, applications, tabular statements, warrants of authority or any other papers, writings or documents expedient or necessary in the opinion of the Attorney to be made, signed, executed, verified, presented or filed.

2. For and in the name of the Bank to do, execute, transact and perform **alone and singly and without joining any other Attorney or officer** of the Bank the following acts or any of them, namely:

6. It has been further contended by the learned counsel for the defendant that the suit in view of above Power of Attorney is incompetently filed and burden of proof that the person who signed and verified was duly authorized was on the plaintiff. In the cross-examination to the suggestion of the plaintiff, the attorney has simply asserted that he has authority to institute the suit and lead evidence. However, the examination of Power of Attorney confirms he alone was not authorized to institute the proceeding for and on behalf of plaintiff-bank. It is settled law that Power of Attorney has to be strictly construed and therefore, in the absence of joint (another) attorney the suit was not filed by an authorized and competent person. It is hit by the provisions of **Order XXIX Rule 1 CPC**. He has relied on the following case law.

- i. *Khan Iftikhar Hussain Khan of Mamdot* (REPRESENTED BY 6 OTHERS) *..Vs.. Messrs Ghulam Nabi Corporation Ltd., Lahore (PLD 1971 Supreme Court 550).*
- ii. *Messrs Pakistan Oil Mills (Pvt.) Ltd., ..Vs.. Messrs Peter Shipping Co. Ltd., and others (2005 MLD 1745).*
- iii. *National Bank of Pakistan and others ..Vs.. Karachi Development Authority and others (PLD 1999 Karachi 260).*

7. In rebuttal learned counsel for the plaintiff has not disputed the factual position with reference to the authorization of the person who has instituted the suit and even appeared as witness. Learned counsel for the plaintiff also concedes that it is settled principle of law that contents of Power of Attorney are to be strictly construed. He has, however, attempted to introduce concept of “moral estoppel” to wriggle out of uncomfortable legal position on the ground that the defendant has admitted un-rebuttable documentary evidence against him. He has vehemently contended that the defendant is estopped from taking the plea that the suit was not instituted lawfully because he has not denied the advancement of loan and its repayment as well as settlement agreement in 1992. He has also referred to the statement of accounts in which the loan has been returned / repaid by the plaintiff and these documents are admitted documents. Learned counsel for the defendant has disputed the interpretation of the documents and contended that without prejudiced to the maintainability of suit, the relationship of the defendant with the plaintiff-Bank was not a relationship of borrower and the bank. It was in the nature of joint investment at the stage of exploring prospect of establishing plaintiff-bank within Pakistan and it may be appreciated from the fact that the alleged loan has been disbursed without any security or guarantee merely on the basis of photocopies of passport and identity card. Be that as it may, the learned counsel for the plaintiff has not supported his contention of “moral estoppel” with any case law and unfortunately I am handicapped by

Article 189 of the Constitution. I cannot go that far to stretch the definition of estoppel beyond the binding authorities of law cited before me on the point that incompetently filed suit is not maintainable and it has to be dismissed. The binding nature of the decision of Hon'ble Supreme Court as well as Division Bench of this Court cannot be ignored by me. It is not the case of only lack of authority to file the suit, but it is also a case of no-evidence. The perusal of power of attorney shows that Mr. Rakaby was not authorized to enter into witness box on behalf of the plaintiff bank. The witness has produced photocopies of fourteen documents including power of attorney. Learned counsel for the defendant has raised objection on production of photocopies and it was left by the Commissioner for recording evidence to be decided by Court. The plaintiff has not advanced any excuse for not filing the original. In view of the evidence and legal position, issues No.i and iii are decided in the affirmative.

8. The Court, in view of findings on issues No.i and iii, in my humble view, is not required to answer issues No.iv, v & vi.

Issue No.vii.

9. In view of the reasoning given on issue No.(i) and (iii) above, the suit is dismissed with no order as to cost.

JUDGE

Karachi
Dated:12.08.2018