

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
SUIT No. B-36 / 2013

DATE

ORDER WITH SIGNATURE OF JUDGE

Plaintiff: Soneri Bank Limited through Mr. Neel
Keshav Advocate

Defendant: Grey Printers Pvt. Ltd. & others through
Mr. Abdul Qayyum Abbasi Advocate.

For hearing of CMA No. 6106/2017.

Date of hearing: 15.03.2018.

Date of order: ____ .03.2018.

O R D E R

Muhammad Junaid Ghaffar, J.

This is a Suit for Recovery of

Rs. 11,42,16,425.95 under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (**FIO, 2001**) and through listed application the Defendant seek Leave to Defend instant Suit.

2. Briefly, the facts as stated are that Defendant No.1 was initially a proprietorship concern and was availing various finance facilities and was converted into a private limited company on 16.04.2008 and as per arrangement the entire business of the proprietorship concern with assets and liabilities was taken over by Defendant No.1 whereas, all facilities and accounts were also transferred in the name of Defendant No.1. In all there were (8) eight facilities which were transferred into the account of Defendant No.1 in 2008 which included Running Finance of Rs. 75 million, Term Finance of Rs. 8.136 million, Letter of Credit of Rs. 40.00, Letter of Credit of Rs. 17 million, FATR/DA-DEL of Rs. 33.00 million, Term Finance Car of Rs. 1.7 million, Terms Finance II Car Facility of Rs. 00.480 million and Letter of Guarantee facility of Rs.

00.615 million were sanctioned in the name of Defendant No.1 vide sanction letter dated 23.7.2008. It is further stated that pursuant to such facilities Defendant No.1 duly signed a Finance Agreement dated 23.07.2008 (available at Page 107) whereas, Defendants No.2 to 4 signed the Letter of Guarantees and mortgaged properties and also signed personal guarantees, whereas, Defendant No.1 also created and executed hypothecation in all its current and fixed assets vide letter of hypothecation dated 18.8.2008 which is duly registered with Securities & Exchange Commission. All eight facilities expired in December 2008 and were renewed vide sanction letter dated 1.1.2009 at the request of Defendant No.1 and out of the eight facilities, Running Finance Facility was enhanced from Rs. 75 million to Rs. 85 million and FATR/DA-DEL was reduced from Rs. 33 million to Rs. 23 million vide sanction letter dated 3.6.2009. It is further case of the Plaintiff that from time to time these facilities were extended at the request of Defendant No.1 and as of today there are two facilities which are relevant for the present purposes i.e. Running Finance Facility of Rs.85.0 Million and FATR of Rs.23.0 Million, wherein, default has been committed.

3. Learned Counsel for the Defendants has raised various objections in respect of all (8) eight facilities, including the Running Finance Facility as well as FATR and so also the maintainability of instant Suit. However, since the learned Counsel for the plaintiff has confined himself to only two facilities as above, therefore, I have not considered the arguments in respect of the remaining six facilities. According to the learned Counsel, no proper documents were signed or even if they were signed the documents were signed blank, whereas, they do not reflect clearly as to for what purposes such documents including Letter of Guarantee were obtained. The other objection is to the effect that no proper renewal documents were signed by the Defendant. Insofar as the

Running Finance Facility is concerned, learned Counsel has contended that major portion of the same was in respect of the proprietorship concern which has been unlawfully transferred to the account of Defendant No.1 whereas, markup over markup has been charged. Per learned Counsel the account statement reflects that various payments were made by the Defendant No.1 and in fact excess payments have been made. Learned Counsel has further contended that though an indemnity-cum-guarantee was obtained for an amount of Rs. 92.308 million shown as a debit balance in the account of sole proprietorship concern; but for that no corresponding accounts statement has been produced. Learned Counsel has also raised an objection that the agreements produced by the Plaintiff are not proper agreements being contrary to the requirements of Article 17 of Qanoon-e-Shahadat Order, 1984 as they are without attesting witnesses. Insofar as the competency of filing of Suit is concerned, according to the learned Counsel the Suit has been filed on the basis of Power of Attorney, whereas, the person who has executed the Power of Attorney has not been authorized through any Board Resolution and therefore, instant Suit is incompetent. Learned Counsel has also raised an objection in respect of the accounts statement and has contended that they are not properly attested as required under the FIO, 2001 read with Banker's Book Evidence Act, 1891 and therefore, the Defendant are entitled for Leave to Defend. Learned Counsel has further contended that through replication certain additional documents have been brought on record and for that the Defendant have not been provided any chance to rebut the same and therefore, leave must be granted. Per learned Counsel the Plaintiff has also failed to comply with the mandatory provision of Section 9(2)(3) of the FIO, 2001 and therefore, even if the Defendant do

not fulfill the requirement of Section 10 *ibid*, are even otherwise, entitled for grant of Leave to Defend.

4. On the other hand, learned Counsel for the Plaintiff bank has contended that out of the eight facilities six facilities have been fully adjusted and it is only in respect of Running Finance and FATR for which instant Suit has been filed. According to the learned Counsel, the availing of facilities have not been denied, whereas, all necessary documents including Letter of Guarantees, mortgaged deeds, letter of hypothecation have been signed and agreed upon and therefore, per learned Counsel entire facilities have been utilized whereas, no objection of whatsoever nature was ever raised by the Defendant which have now been agitated through instant Leave to Defend application. He has further submitted that accounts statement clearly reflects that they have been utilizing the facilities by issuing cheque(s) and even making deposits in the Running Finance Account, and therefore, they are estopped from raising any objections on any of the facility. Per learned Counsel no markup over markup has been charged, whereas, it is a case of Running Finance Facility and therefore, the objection raised is misconceived. According to the learned Counsel, the FATR facility was also availed and all documents clearly reflects the LC numbers, whereby, payments were made to foreign banks on behalf of the Defendant and therefore, all such objections are misconceived. Learned Counsel has referred to letter dated 25.4.2012, and has contended that this is an admission of making payment of Rs. 98 million and therefore, no case is made out by the Defendants. Per learned Counsel the objection regarding non-disbursement of the amount in the account is also misconceived, as it is a case of renewal and rescheduling, wherein, admittedly no fresh disbursements are made. Learned Counsel has also referred to the audit accounts of Defendant No.1 for the year 2008-2011

and has contended that the liability of the Plaintiff is clearly reflected in the accounts of Defendant No.1. Insofar as maintainability of the Suit is concerned, learned Counsel has contended that power of attorney duly executed is on record whereas, no Board Resolution is necessary in such cases and moreover, when the principal does not dispute the power of attorney a presumption of correctness is always attached to such power of attorney. Even otherwise, per learned Counsel such defect is a curable defect and therefore, this objection is also misconceived. In support learned Counsel has relied upon **2012 CLD 337 (Apollo Textile Mills Ltd. and others V. Soneri bank Ltd.), 2014 CLD 1049 (Bank Al-Habib Ltd. V. Angora Textile Ltd.), 2004 CLD 1334 (Haji Sagheer Ahmed V. United Bank Limited), PLD 1984 SC 12 (Ghulam Qadir V. Abdul Sattar), 2011 CLD 393 (Allied Bank Limited V. Muslim Cotton Mills Pvt. Ltd), 2004 CLD 1376 (Muhammad Ramzan V. Agricultural Development Bank of Pakistan through Manager), 2002 CLD 381 (Mst. Anwar Begum V. Allied Bank of Pakistan Ltd.), 1998 CLC 1436 (National Bank of Pakistan V. Muhammad Tahir Paracha), 2005 CLD 1367 (Muhammad Ashraf V. Habib Bank Ltd.), PLD 1998 Karachi 302 (National Bank of Pakistan V. Punjab Building Products Ltd.), 2007 CLD 217 (Industrial Development Bank of Pakistan Karachi V. M/s Zamco Pvt. Limited and 10 others), 2005 CLD 1571 (Nazir Ahmed V. Habib Bank AG Zurich), 2011 CLD 267 (KASB Bank Limited V. Dewan Salman Fibre Limited), 1986 CLC 438 (Grindlays Bank V. Fancy Investment Ltd.).**

5. I have heard both the learned Counsel and perused the record. The facts have already been stated briefly hereinabove, whereas, the case of the Plaintiff is now only in respect of two facilities i.e. the facility of Running Finance of Rs. 85 million and the FATR facilities i.e. Fiance

Against Trust Receipt of Rs 18 million. Though learned Counsel for the Defendant has made extensive arguments in respect of each and every facility with minute details; however, time and again he was confronted as to execution of the documents and availing of the facility to which he could not specifically respond but gave an evasive reply and made references to the objection regarding authenticity and admissibility of the documents. It is to be appreciated that all documents are on record and they have been duly signed and executed. The first objection learned Counsel has taken is in respect of some blank documentation. It is by now settled that in banking transaction(s), even if there are certain documents which are empty / blank or have not been properly filled, once the borrower avails the facility and does not dispute it, while availing such facility, then subsequently on default, these objections are not to be appreciated. Reliance in this regard may be placed on the case of _____ .

6. Insofar as the objection regarding power of attorney and non-production of Board Resolution is concerned, it is to be appreciated that this is a Suit under FIO, 2001 and the law clearly provides under Section 9(1) that where default is committed in fulfillment of any obligation with regard to any finance, a Suit may be instituted in the Banking Court by presenting an plaint which shall be verified on oath, in the case of a Financial Institution by the Branch Manager or such other official of the Financial Institution *as may be duly authorized in this behalf by power of attorney or otherwise*. The law clearly provides that a Financial Institution can file a Suit on the basis of a power of attorney which has been duly placed on record. In such circumstances, the general provision of law regarding production of a Board Resolution is not applicable. Moreover, the principal has not come before the Court

to cancel, or challenge the execution of power of attorney and filing of the Suit and therefore, this objection is hereby repelled.

7. Insofar as the statement of accounts and its certification is concerned, on perusal thereof, it reflects that they have been properly attested as required under the FIO, 2001 read with Section 2(8) of the Banker's Book Evidence Act, 1891 and therefore, this objection is also misconceived.

8. Insofar as the change from proprietorship concern to Defendant No.1 and transfer of liability is concerned, a request to that effect made by Defendant No.1 is already on record, and therefore, this objection is also not appropriate that suddenly a debit entry of Rs. _____ has been debited in the account of Defendant No.1 from nowhere. The facility was availed by the proprietorship concern, and once it was converted into a private limited company, request was made by Defendant No.1 that is to continue with the facility and transfer of the liability in their account; therefore, subsequently, taking exception to such an entry is otherwise misconceived. Insofar as the argument regarding charging of markup over markup and disbursement as well as repayments made by Defendant No.1 and so also making of excess payments is concerned, it is to be appreciated that this is a case of Running Finance Facility _____

(copy from some other case)

9. In view of hereinabove facts and circumstances of this case, I am of the view that the Defendant have failed to make out a case for leave to defend and accordingly, the listed application is hereby dismissed. However, the Plaintiff bank would only be entitled for the principal amount outstanding in respect of the finance facility and FATR whereas, markup can only be charged upto the date of agreement

between the parties and not beyond that. After the expiry of the agreement the Plaintiff is only entitled for cost of fund as per rules.

J U D G E

ARSHAD/