

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. B-46 of 2015

Bank Al-Habib Limited-----Plaintiff.

Versus

**Tuwairqi Steel Mills Limited
& others -----Defendants.**

1. For hearing of CMA No.13977/15.
2. For hearing of CMA No.13978/15.
3. For hearing of CMA No.15901/15.
4. For hearing of CMA No.15946/15.
5. For hearing of CMA No.17130/17.

Dates of hearing: 05.04.2018 & 20.04.2018

Date of Judgment 14.05.2018

**Plaintiff: Through Mr. Ghulam Murtaza Malik,
Advocate.**

**Defendant No.1: Through M/s. Khalid Mehmood Siddiqui &
Ghulam Rasool, Advocates.**

Defendant No.2: Through Mr. Taha Alizai, Advocate.

Defendant No.3: Through Mr. Waqar Ahmed, Advocate.

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (“**FIO 2001**”) for recovery of US \$ 5,300,980.85 with interest and cost of funds. Application at Serial No.4 bearing CMA No.15946/2015 is leave to defend application of Defendant No.1, the Customer of the Plaintiff.

2. Learned Counsel for Defendant No.1 while making his submission in support of the leave to defend application has referred to Offer Letter dated 04.05.2012, and has contended that through this Offer, restructuring and rescheduling of the finance facility was offered for an amount of US \$ 7.5 Million and the tenure of the such facility was six years, which is yet to expire. He has further contended that in the Agreement for Long Term

Finance dated 31.01.2013, there is a reference of Letter dated 30.12.2012, but such letter has not been placed on record. According to the learned Counsel, the Plaintiff Bank has failed to fulfill the mandatory requirement of Section 9(5) of FIO 2001 as it has failed to disclose the total amount of finance granted, the amount repaid and so also the restructured amount; hence the Suit is not competent even otherwise. Per learned Counsel since the last date for repayment is 05.10.2018, therefore, the Suit is not competent as default has not yet occurred. He has further contended that pursuant to clause-4 of the Agreement for Long Term Finance dated 31.01.2013, some disbursement was to be made and admittedly it was also agreed in terms of Clause 6 (e) that *“the sums owing from the Customer to the Bank shall be such as may be certified by a duly authorized officer of the bank and the Customer agrees to accept the same as conclusive and waives his right to challenge the same in the absence of manifest error”*, which provided enough leverage to Defendant No.1, and therefore, no default has been committed. He has further contended that Clause-10 of the Agreement provided that as to how, and in what manner, in case of default, a notice was required to be issued; but this has not been complied with and without this compliance, instant Suit has been filed, which is not maintainable. Learned Counsel has also referred to the Statement of Account and submits that the same is also not in conformity with requirement of FIO 2001 read with Bankers Books of Evidence Act, 1891, and therefore, the plaint is liable to be rejected. According to the learned Counsel, the Plaintiff Bank has also charged markup over markup, which is impermissible and against the settled principle of law. Learned Counsel has also objected to the competency of this Suit and has contended that no Power of Attorney has been placed on record as there is no mention of the same in the plaint and it is the case of Defendant No.1 that the Power of Attorney, if any, has been subsequently placed on record surreptitiously, hence same cannot be considered. He has relied upon the cases reported as **2011 CLD 37** (*Crescent Commercial Bank Now Samba Ltd. V. Genertech Pakistan Ltd.*), **2007 CLD 1424** (*Agricultural Development Bank of Pakistan v. Messrs Modern Leathers and others*), **2003 CLD 1007** (*Habib Bank Limited v. Al-Jalal Textile Mills Ltd.*), **2002 CLD 276** (*Textile Management (Pvt.) Limited v.*

N.I.T.), 2003 CLD 1352 (Allied Bank of Pakistan v. Messrs Modern Metallic Services through Proprietor and 6 others), 2014 CLD 1367 (Habib Metropolitan Bank Limited v. Abid Nisar), 2014 CLD 985 (Elbow Room and another v. MCB Bank Limited), 2012 CLD 1036 (Pakistan Kuwait Investment Company (Pvt.) Limited through Authorized Representative v. Messrs Active Apparels International and 6 others), 2012 CLD 1681 (Askari Bank Limited v. Waleed Junaid Industries and 2 others).

3. On the other hand, learned Counsel for the Plaintiff Bank has contended that the leave to defend application itself is not in conformity with Section 10(3), (4) & (5) of the FIO 2001, hence the same is liable to be dismissed. Per learned Counsel availing of finance facility, execution of documents and agreement have not been denied, whereas, there is an admitted default on the part of Defendant No.1, hence the leave to defend application is to be dismissed and Judgment and Decree may be passed. According to the learned Counsel, the Statement of Account is in conformity with the requirement of law, as all disbursements have been shown date-wise and a separate statement for markup is also annexed, whereas, repayments made by Defendant No.1 are also clearly shown; therefore, this objection is misconceived. As to the Power of Attorney, learned Counsel has referred to Para-14 and submits that while filing instant Suit the original was shown to the Office and photocopy is on record, therefore, this objection is also not sustainable. Learned Counsel has referred to Clause 3.3 of the Agreement dated 31.01.2013 and submits that though the final date is 05.10.2018, but it is for the last installment, whereas, it has been clearly provided in Clause-10(e) (ii) & (iii) that if payments are not made as agreed, default would occur and proceedings can be initiated. Learned Counsel has referred to the Legal Notice of the Bank and its reply and submits that there is clear admission on the part of Defendant No.1, therefore, there is no ground to contest this Suit. According to the learned Counsel substantial compliance has been made in respect of notice as objected, and therefore, the Plaintiff is entitled for Judgment and Decree. In support he has relied upon the cases reported as ***2006 CLD 1011 Muhammad Arshad and another v. Citibank N.A. Al-Falah Building Lahore***, ***PLD 2012 SC 268*** (*Appolo Textile Mills Ltd. And others v.*

Soneri Bank Ltd.) , SBLR 2014 Sindh 1 (Younus Kamal v. Standard Chartered Bank), 2015 CLD 802 (Messrs Ibrahim Oil Mills through Proprietor and 2 others v. MCB Bank Limited) and 2016 CLD 1080 (National Bank of Pakistan v. Messrs Honda Point Pvt. Limited and others).

4. Insofar as the learned Counsel for Defendant Nos.2 & 3 are concerned, they have contended that though they are proforma parties to this Suit as Defendant No.1 is also a defaulter in respect of their claim(s) and if leave to defend application of Defendant No.1 is dismissed, then they will not press their leave to defend applications.

5. I have heard all learned Counsel and perused the record. Insofar as the availing of finance facility and execution of documents is concerned, the same has not been disputed; rather admitted, however, what is disputed is that certain repayments have been made, whereas, the balance amount is to be paid by or before 05.10.2018, therefore, no default has occurred. Insofar as compliance of Section 10(4) of FIO 2001 is concerned, the Defendant No.1 in its leave to defend application has stated as follows:-

	USD
a. Amount of finance availed:	7,500,000.00
b. Amount of finance repaid:	3,049,020.05
Amount of finance payable:	4,450,979.95 alongwith interest outstanding on 05-10-2018.

The above contention of Defendant No.1 in its leave to defend application is in fact an admission that a finance amount of US\$ 7.5 Million was availed. However, Defendant No.1 has failed to point out as to how much amount being claimed as repaid, was in respect of the principal and how much in respect of markup. This is against the substantial compliance of Section 10(4) of the FIO 2001, whereas, the case of Plaintiff is, as per Account Statement that out of US\$ 7.5 Million, US\$ 2.5 Million has been repaid in four installments i.e. three installments of US \$ 7,50,000/- each, starting from 05.04.2014 to 05.04.2015 and thereafter an amount

of US \$ 2,50,000/- on 20.04.2015, whereas, an amount of US \$ 300,980.85 is outstanding as markup.

6. Insofar as the objection regarding the Power of Attorney is concerned, perusal of record reflect that this objection is misconceived, inasmuch as the original power of attorney was placed before the office and while retaining the photo copy on record, an endorsement to the effect that "original seen and returned" is available on the photo copy annexed with the Vakalatnama of the plaintiff's Counsel. Hence the same is hereby repelled. The other objection regarding failure to produce a Board Resolution and any other authority is also misconceived. From perusal of Section 9 of FIO, 2001, it could be seen, that the Financial institution on failure of a customer to fulfill any of its obligation with regard to any finance, may institute a Suit in the Banking Court by presenting a plaint which shall be verified on oath, by the branch manager or such other officer of the Financial Institution as may be duly authorized in this behalf by power of attorney or otherwise. It may be observed that unlike the provisions of CPC or the Banking Tribunal Ordinance 1984, ("1984 Ordinance") as well as the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act (XV of 1997), the provision of Section 9 of FIO, 2001, is worded somewhat differently and is independent in so far as the institution of proceedings by way of filing of Suit is concerned. Under FIO, 2001, Suit can be filed by authorized officer on the basis of a power of attorney duly executed in favor of such officer. On examination of the power of attorney available on record, I am of the opinion that it has been properly executed and fulfills the requirement of law viz Section 9 *ibid*, whereas, the objection of the defendants Counsel in this regard besides being hyper technical, is otherwise misconceived. 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.

7. Insofar as non-placement of earlier agreement as well as offer letters is concerned, it may be observed that that this is a case of restructuring and not a fresh finance. The offer letter in question, its acceptance and execution of agreement has not been

denied, therefore, the Defendant No.1 cannot resile from such commitment and raise purely technical objections to contest this matter. Insofar as the objection, that date is not due, and Defendant No.1 can repay the amount by 05.10.2018, which is the last date of installment is concerned, it may be observed that the agreement itself provides schedule of Re-payment(s) of principal amount. The amount of US \$ 7.5 Million was to be repaid in 10 equal installments of US \$ 7,50,000/-, each starting from 05.04.2014 till 05.10.2018. Though the Defendant No.1 has failed to provide specific dates of its repayments as contended in the leave to defend application; however, the Statement of Account reflects that till 20.04.2015, a total payment of US\$ 2.5 Million has been made, and thereafter default has occurred. The Agreement in question in clause-10 clearly provides that if any such event as provided therein (clause 10.1 a to j), happens or occurs in the reasonable opinion of the Bank and they continue, the Bank may by notice, may declare the principal and the interest under the Facility then outstanding or due and payable immediately and in which case the Bank shall have the right to cancel the facility and demand the repayment of all outstanding principal amount under the facility plus the accrued interest thereon. Once such relevant event has been provided in clause e(ii) & (iii), and that is "*ceases or threatens to cease to carry on its business or any substantial part of its business; or is unable to pay its debts as they fall due or otherwise becomes insolvent*". This provides enough permission and authority to the plaintiff to take and initiate action for recovery and other remedial measures. It is a matter of record that Defendant No.1's Letter dated 08.09.2015 at page 121, clearly states that *eventually, due to huge cumulative losses, the whole equity of TSML was wiped off and the Company has been forced to close down its operations and initiate the realization of the assets/winding up process. It has been further stated that the Defendant No.1 acknowledges its responsibility to pay off towards lenders through realization of Company's assets.* When this admission is read in conjunction with Clause 10.1(e)(ii) & (iii) of the Agreement, it appears that the Plaintiff Bank is entitled and competent to initiate the proceedings for recovery of the amount and not to wait till the last date of installment i.e. 05.10.2018. Defendant No.1 itself has closed down the operations and has even shown its willingness to winding up and pay off the debts by selling assets, therefore, the

default is admitted. Even otherwise, a winding up of the company itself is suggested, and if any order(s) are passed, and plaintiff bank must wait till, 5.10.2018, as suggested, does not seem to be a fair argument, and if accepted, will seriously prejudice the interest and claim of the plaintiff. The other objections so raised are also purely technical in nature and to avoid Judgment and Decree on such premise, whereas, in the given facts and circumstances of this case, there appears to be no question of law or even facts, which has been raised in the leave to defend application for grant of leave to defend.

8. In view of hereinabove facts and circumstances, CMA No.15946/2015 is dismissed and as consequence thereof, all remaining pending applications have become infructuous and they are also dismissed as infructuous. Instant Suit is decreed against Defendant No.1 in the sum of US \$ 5,300,980.85 (or its equivalent in Pakistani rupees at the time of payment on the rate of exchange notified by the State Bank of Pakistan for such payments), in respect of the principal outstanding with 8% interest on this amount till the date of expiry of the Agreement; and thereafter cost of fund on the decretal amount till its realization. The Suit is further decreed for the sale of mortgaged and hypothecated assets of Defendant No.1.

Dated: 14.05.2018

J U D G E

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