

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
SUIT No. B-09 / 2009

DATE

ORDER WITH SIGNATURE OF JUDGE

Plaintiff: **Pak China Investment Co. Ltd. through Mr. Sardar Qasim along with Mr. Abdul Qayyum Abbasi Advocate.**

Defendant: **Dewan Cement Limited through Mr. Asim No. 1. Mansoor Khan Advocate.**

- 1) **For hearing of CMA No. 9447/2010.**
- 2) **For hearing of CMA No. 320/2009.**
- 3) **For hearing of CMA No. 3185/2009.**
- 4) **For hearing of CMA No. 3186/2009.**

Date of hearing: **11.05.2018.**

Date of order: **10.07.2018.**

Muhammad Junaid Ghaffar, J. This is a Suit for Recovery of Rs. 228,149,425/- under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (“**FIO, 2001**”) and application at Serial No.4 bearing CMA No. 3185/2009 is under Section 10 of the FIO, 2001 whereby, the Defendant No.1 seeks Leave to Defend this matter.

2. Learned Counsel for Defendant No.1 has contended that the present management of Defendant No.1 took over two separate entities namely *Pakland Cement Limited* and *Saadi Cement Limited* which were subsequently merged and renamed as Defendant No.1, whereas, there were various liabilities against both these companies, and thereafter, certain scheme of arrangements were filed under the Companies Ordinance 1984 before this Court and due to various reasons the said scheme of arrangements could not finally materialize and were cancelled which forced Defendant No.1 into the present arrangement with the Plaintiff. According to the learned Counsel, a Term Finance

Certificate (TFC) Investors Agreement dated 09.01.2008 was though entered into with the Plaintiff; but for that the Defendant No.1 was coerced, whereas, the payment made by the Plaintiff was credited in an account which was not under the control of Defendant No.1. He has further contended that pursuant to the agreement TFC's were to be issued by way of public offering in respect of various investors, including the Plaintiff, but they all created a situation, whereby, the permission of Securities & Exchange Commission was delayed and during this period the Stock Exchange crashed and was closed for various days making it impossible to float the Term Finance Certificate through public offering. Per learned Counsel the payment was never received by Defendant No.1, whereas, no TFCs were issued, therefore, recovery, if any, and the alleged re-payment / demand of money can only be sought through an ordinary Suit, and not by way of a Banking Suit; hence, the plaint is liable to be returned and or rejected. Learned Counsel has further contended that Defendant No.1 has not availed any *finance* as defined under Section 2(d) of the FIO, 2001 and therefore, is not a *Customer* under Section 2(c) *ibid*; hence, if at all a Suit is maintainable it can be under the normal law i.e. Civil Procedure Code and this Court being a Banking Court lacks jurisdiction. Without prejudice to this, he has further contended that the statement of account does not fulfill the mandatory requirements under Section 9 of the FIO, 2001 read with Bankers Book Evidence Act, 1891 and therefore, the Suit is also liable to be dismissed on this ground as well. According to him after insertion of Article 10-A in the Constitution of Pakistan the fundamental right for a fair trial and due process has been granted; therefore, an unconditional leave to defend this Suit must be granted as a matter of right. In support he has relied upon *ABL vs. Khalid Mahmood (2009 CLD 401)*, *HBL vs. Wisdom Education System (2009*

CLD 1367), *Yuba Jamil Ansari vs. Bank Al-Falah* (2009 CLD 117), *Abdul Ghaffar Adamjee vs. MCB Bank* (2009 CLD 655), *Tariq Rafique Sheikh vs. Citi Bank* (2008 CLD 1252), *HBL vs. Kamoke Rice Mills* (2008 CLD 36), *Ehsanullah vs. ZTBL* (2005 CLD 1442), *ABL vs. Sawan Impex* (2007 CLD 656), *Faysal Bank vs. Genertech Pakistan* (2009 CLD 856), *PASSCO vs. Omer Bilal Traders* (2007 CLD 492), *KASB Bank vs. Rana Munir A. Khan* (2007 CLD 170), *Waqar Jamal Asnari vs. NBP* (2008 CLD 1611), *HBL vs. Muhammad Naveed Soomro* (2009 CLD 354), *Fine Textile vs. Haji Umar* (PLD 1963 SCV 163), *Abdul Malik K. Lakha vs. Abdul Karim* (PLD 2004 Karachi 309), *Saudi Pak Comm. Bank vs. Nizamuddin* (2009 CLD 1195), *Sardar Nawaz vs. HBL* (2005 CLD 1437), *First Grindlays Modarba vs. Pakland Cement* (2000 CLC 2017), *Agrofoster (Pvt.) Ltd. Vs. Judge, Banking Court* (PLD 1999 Karachi 398), *ADBP Vs. Jasarat Hussain* (2002 CLD 93 (Lah.)), *ABL vs. Aisha Garments* (2002 AC 104), *Textile Management (Pvt.) Ltd. Vs. N.I.T* (2002 CLD 276), *ABL Vs. Modern Metallic Services* (2003 CLD 1352 (Kar.)), *ABL Vs. Mrs. Fahmida & others* (SBLR 2003 Sindh 1532), *Nasir M. Vohra Vs. Crescent Inv. Bank Ltd* (2005 SLJ 35/2005 CLD 444), *Yussra Textile Corporation vs. PICIC Comm. Bank* (2003 CLD 905 (Lahore)), *HBL Vs. Al-Jalal Textile Mills Ltd.* (2003 CLD 1007), *NBP Vs. Punjab Buildings Products Ltd.* (PLD 1998 Karachi 302), *I.C.P. & Others Vs. Chiniot Textile Mills Ltd.* (PLD 1998 Karachi 316), *UBL Vs. Central Cotton Mills Ltd.* (1999 CLC 1374), *HBL Vs. Pakistan National Textile Mills* (2001 MLD 1137 (Karachi)), *UBL Vs. Aftab Ahmed & others* (2001 MLD 1332 [Karachi]), *City Bank Vs. Tariq Mohsin Siddiqi & others* (PLD 1999 Karachi 196), *Askari Commercial Bank Ltd. Vs. Pakland Cement* (PLD 2000 Karachi 246), *PICIC vs. Sultan Ahmad* (2001 CLC 1551), *Trycot Synthetic Fibre Company vs. HBL* (2012 CLD 1670), *Petrosin vs. Faysal Bank* (2009 CLD 361), *Hashwani Hotels Ltd. Vs. Fed. Of Pakistan* (PLD 1997 SC 315), *Muhammad Jala Khan Doltana Vs. Election Tribunal (Local Government Elections) Multan*, *Gulfaraz Khan Vs. Government of Khyber Pakhtunkhwa* (PLD 2017 Peshawar 23), *Allied Bank Ltd. Bankers Equity Ltd. 680, Bahria Town (Pvt.) Ltd. Vs. Government of Punjab* (2017 CLC 1793), *Muhammad Younis vs. The State & another* (2017 YLR Note 306), *Hasnat Ahmad Khan vs. Institution Officer* (2017 YLR Note 69), *Naeem Akhtar Chang*

vs. Federation of Pakistan (2017 PLC (CS) Note 100, Ishtiaq Ahmed vs. Hon'ble Competent Authority (2016 SCMR 943), M/s. D.J. Builders and Developers vs. Federation of Pakistan (2016 PTD 1723), Pakistan Defence Officers Housing Authority vs. Creek Marina (Pvt.) Ltd. (2016 CLD 1453), Muhammad Hanif Khan vs. Malir Development Authority (2016 YLR 1652), Muhammad Ather Hafeez Khan vs. Messrs SSANGYONG & Usmani J.V. (2016 YLR 214), Mst. Parveen Akhtar vs. Subash Chandar & others (2016 MLD 1596) and Bilal Akbar Bhatti vs. Election Tribunal Multan (PLD 2015 Lahore 272).

3. On the other hand, learned Counsel for the Plaintiff has contended that the agreement in question has not been denied, whereas, failure to issue TFCs on the part of the Defendant No.1 amounts to default and merely for such non-issuance, it would not become an ordinary lending of money as the agreement in question falls within the FIO, 2001. Learned Counsel has referred to the various clauses of the agreement in question and has contended that pursuant to such agreement the Defendant No.1 has acted further, whereas, the amount of Rs. 200 million in question was paid to Defendant No.1 in the designated account and a duly crossed cheque dated 18.01.2008 was issued in its name, and therefore, no exception can be drawn by raising technical objections. He has further contended that a letter of hypothecation was duly issued pursuant to the agreement by Defendant No. 2 and similarly memorandum confirming constructive deposit of title deeds and documents was also issued by Defendant No.2; hence, the objection that this is not a banking transaction is totally misconceived. According to the learned Counsel the objection that money was not under the control of Defendant No.1 is also not tenable inasmuch as the payment was made in the name of Defendant No.1 and if the said Defendant had any arrangement for repayment of earlier loan, it has no concern with the Plaintiff and therefore, this argument is also misconceived. As to the objection regarding authenticity of the

statement of account, learned Counsel has contended that the same is duly signed and certified by the authorized officers therefore, this objection is also misconceived. Learned Counsel has also referred to letter dated 10.01.2008 through which Defendant No.1 issued directions for disbursement of the amount in question in a designated account being maintained with National Bank of Pakistan, therefore, per learned Counsel all these objections have been belatedly taken to delay the proceedings in question, whereas, admittedly, a default has been committed. In support he has relied upon *Habib Metropolitan Bank Ltd. vs. Mian Abdul Jabbar Gihllin and another (2013 CLD 88)*, *Mst. Tasleem Fatima and others vs. Bank of Punjab and others (2017 CLD 552)*, *M/s Habib Metropolitan Bank Ltd. vs. Messrs Faizan Ali and Company (Pvt.) Ltd. (2017 CLD 1583)*, *The Bank of Punjab vs. Messrs Khan Unique Developers Pvt. Ltd. and 9 others (2016 CLD 29)*, *Industrial Development Bank of Pakistan, Karachi vs. M/s. Zamco (Pvt.) Ltd. and 10 others (2007 CLD 217)* and *Siddique Woollen Mills and others vs. Allied Bank of Pakistan (2003 SCMR 1156)*.

4. I have heard both the learned Counsel and perused the record. The facts have been briefly stated hereinabove and it appears that admittedly Defendant No.1 entered into an agreement dated 09.01.2008 with the Plaintiff which is called as TFC Investors Agreement and it has been provided therein that the issuer (Plaintiff) requires finance by way of issuance of redeemable capital for the purposes of pre-payment of the Scheme [of] Lenders and is proposing issuance of redeemable capital up to an aggregate amount of Rs. 1,250,000,000/- (Rupees One Billion, Two Hundred and Fifty Million only) and a private placement up to the amount of Rs. 3,750,000,000/- (Rupees Three Billion, Seven Hundred and Fifty Million only) in the form of TFCs of the face value of Rs. 5000/- each and for such purposes Defendant No. 2 has been appointed as Trustees in the TFC issue. The agreement further reflects

that upon disbursement, TFCs were to be issued by the Plaintiff and
 Clauses 2.1 & 2.2 provide as under:-

- “2.1 In consideration of the payment by the Investor of Rs.200000000/- (Rupees Two Hundred Million Only) the (“Payment”) agreed to be made by the Investor, the issuer shall issue to the investor or to its nominee (if such nominee is legally authorized to be issued the TFCs) within 30 days of the Allotment Date, 40000 TFCs of aggregate face value of Rs.5,000/- (Rupees Five Thousand only) each (the “Said TFCs) making a grand total amount of face value of Rs.200000000 (Rupees Two Hundred Million Only). Payment for the Said TFCs shall be effected by the Investor on or before the Issue date on date(s) notified in writing by the Company to the Investor at least three (3) days prior to the date on which the Payment or part thereof is required by the Company. The Said TFCs once issued will be dispatched to the Investor or its nominee to the address supplied by the Investor to the Issuer.
- 2.2 The Issuer agrees, undertakes and confirms that the Issuer shall pay profit to the Investor on the Payment from the date of receipt (i.e. the day of Payment is credited to the Issuer’s designated account), pursuant to Clause 2.1 of the Investor Agreement, till the day immediately preceding the Issue Date. The payment of the profit amount will be made on or before the Issue Date. Such profit shall be calculated in the same manner as to be calculated in respect of the TFCs as provided in condition No.25 of the Schedule 1 hereto.”

5. The aforesaid agreement which is not denied clearly provides that in consideration of the payment by the plaintiff / Investor of Rs. 200 million, the issuer / defendant No.1 shall issue to the Plaintiff or its authorized nominee within 30 days of the allotment was to issue 40,000 TFCs of aggregate face value of Rs. 5,000/- each making a grand total of Rs.200 Million and it was further agreed that Plaintiff shall pay profit to the investors on the payment from the date of receipt.

6. Insofar as the legal objection, as raised by the learned Counsel for Defendant No.1 with regard to the transaction in question and so also the relationship of the parties in terms of FIO, 2001, is concerned, it may be observed that Defendant No.1 had sought funds / finance from the plaintiff and entered into an Agreement and so also asked Defendant No.2 to act on its behalf to issue hypothecation and memorandum confirming constructive deposit of title deeds and documents. It will not be out of place to mention that for a Suit to be

maintainable before a Banking Court in terms of FIO, 2001, there must exist a relationship of *Customer* and *Financial Institution* between the parties, whereas there must have been a *finance* facility, which must have been availed by the *Customer* and the dispute must have arisen between the *Customer* and the *Financial Institution* with regard to violation or breach of any *obligation* required to be performed or honored by any of them as defined in Section 2(e) of the 2001 Ordinance, which again must be in respect of the *Finance* as defined in Section 2(d) of the 2001 Ordinance. It would be relevant to appreciate the definition of *Customer*, *Financial Institution* and *Finance* as spelt out in Section 2 (a), (c) and (d) of the 2001 Ordinance and it would be advantageous to refer to the said provisions which read as under:

(a) “**Financial Institution**” means and includes:-

(i) any company whether incorporated within or outside Pakistan which transacts the business of banking or any associated or ancillary business in Pakistan through its branches within or outside Pakistan and includes a Government savings bank, but exclude State Bank of Pakistan);

(ii) a modaraba or modaraba management company, leasing company, investment bank, venture capital company, financing company, unit trust or mutual fund of any kind and credit or investment institution, corporation or company; and

(iii) any company authorized by law to carry on any similar business, as the Federal Government may by Notification in the official gazette, specify;

“(c) **Customer** means a person to whom finance has been extended by a financial institution and includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution as well as a surety or an indemnifier.”

(d) “**Finance**” includes:-

- (i) an accommodation or facility provided on the basis of participation in profit and loss, mark-up or mark-down in price, hire-purchase, equity support, lease, rent-sharing licensing charge or fee of any kind, purchase and sale of any property including commodities, patents, designs, trademarks and copyright, bills of exchange, promissory notes or other instruments with or without buy-back arrangement by a seller, participation term certificate, musharika, morabaha, musawama, istannah or modaraba certificate, term finance certificate;
- (ii) Facility of credit or charge cards;

- (iii) facility of guarantees, indemnities, letters of credit or any other financial engagement which a financial institution may give, issue or undertake on behalf of a customer, with a corresponding obligation by the customer to the financial institution.
- (iv) a loan, advance, cash credit, overdraft, packing credit, a bill discounted and purchased or any other financial accommodation provided by a financial institution to a customer.
- v) a benami loan or facility that is, a loan or facility the real beneficiary or recipient whereof is a person other than the person in whose name the loan or facility is advanced or granted;
- vi) any amount due from a customer to a financial institution under a decree passed by Civil Court or an award given by an arbitrator, any amount due from a customer to a financial institution which is the subject matter of any pending suit, appeal or revision before any Court, any other facility availed by a customer from a financial institution.

7. Perusal of the aforesaid definition of Section 2(c) of the 2001 Ordinance reflects that a *Customer* includes a person to whom *finance* has been extended by a *Financial Institution* and also includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution, as well as a surety or an indemnifier. From the aforesaid definition it emanates that there are in fact three categories of persons who can be called or termed as a *Customer* within the contemplation of the FIO, 2001. First, a person to whom finance is extended by a financial institution; second a person who avails non-fund based financial facility such as letter of credit; third and last a person who stands surety or indemnifier before a financial institution on behalf of a direct customer of the institution and in fact is somewhat different from a Customer of first two categories. These three categories of *Customer* as defined in Section 2 (c) of the 2001 Ordinance, have been elaborately explained by a learned Single Judge of this Court in the case of ***Procter & Gamble Pakistan (Pvt) Limited, Karachi Vs. Bank AL-Falah Limited, Karachi & 2 Others (2007 CLD 1532)***.

8. In the instant matter money has been borrowed by Defendant No.1 on a promise to issue TFCs and so also to pay markup and for that

Agreement(s) have been executed which have not been denied and the only ground which has been raised is that payment was not under its control and no TFCs have been issued. This all is an afterthought and is based on flimsy grounds. It is not in dispute that Plaintiff is an authorized company to lend money and was part of a consortium of Banks and Financial Institution who had acted in support of Defendant No.1 to refinance and or re-arrange the already availed finance facility. And for that mechanism was agreed upon by the parties, which has not been denied. This leaves in manner of doubt that the transaction in question will fall within the FIO, 2001, as it is between a Customer and Financial Institution whereas, finance facility has been provided and there is a default. It is not in dispute that the Plaintiff pursuant to approval by the regulatory authority is notified and defined as a financial institution. The objection that the money in question was not under the control of Defendant No.1 is of no relevance as it is the Defendant No.1 itself which issued directions for crediting the amount in a nominated account, whereas, the cheque in question was also issued in the name of Defendant No.1. It is not in dispute that amount was credited and the question that whether it was under the control of Defendant No.1 or not is not a matter between the Plaintiff and Defendant No.1, and therefore, this objection is also misconceived. As to the non-issuance of TFCs it may be observed that default in doing so in on Defendant No.1 and for that Plaintiff cannot be penalized, whereas, if permitted, it would be amounting to add premium to its actions. Hence, in my view all in all this was a finance facility, availing of which has not been denied, therefore, failure in issuing TFCs would not render it an ordinary lending of money as contended, and therefore instant Suit is very much competent before this Court under its Banking jurisdiction.

9. Insofar as the objection regarding statement of account not being in conformity with Section 9 of the FIO, 2001 is concerned, it may be observed that this objection is also misconceived and not tenable on the ground that the statement has been duly certified by the authorized officers and there cannot be any exception to such fact. Even otherwise, it has only one disbursement of Rs. 200 million and the accrued profit thereon; therefore, there could hardly be any objection on the actual transaction which is only one or two in numbers.

10. In view of hereinabove facts and circumstances of this case, I am of the view that Defendant No.1 has failed to make out any case for grant of leave to defend and accordingly, CMA No. 3185/2009 is hereby dismissed, whereas, other listed applications have become infructuous and the Plaintiff's Suit is decreed for an amount of Rs.200 Million (Two hundred million only) with agreed profit as stated in Para 4 of the Agreement dated 9.1.2008, and thereafter cost of funds as notified by the State Bank of Pakistan till realization of the decretal amount.

11. Suit stands decreed as above, office to prepare decree accordingly.

Dated: 10.07.2018

J U D G E

ARSHAD/