

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
 SUIT No. B-1674 / 1997

DATE	ORDER WITH SIGNATURE OF JUDGE
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- 1) For hearing of CMA No. 2367/2003.
- 2) For hearing of CMA No. 2564/2005.
- 3) For hearing of CMA No. 2806/2005
- 4) For hearing of CMA No. 7986/2007.
- 5) For hearing of CMA No. 7987/2007.
- 6) For hearing of CMA No. 747/2008.
- 7) For hearing of CMA No. 7887/2008.
- 8) For hearing of CMA No. 7685/2009.
- 9) For hearing of CMA No. 11630/2012.
- 10) For hearing of CMA No. 3064/2013.
- 11) For hearing of CMA No. 12715/2013.
- 12) For hearing of CMA No. 133374/2014.
- 13) For hearing of CMA No. 13375/2014.
- 14) For hearing of CMA No. 13669/2016.

Date of Hearing: 11.12.2017

Date of Order: 17.01.2018

Mr. Salman Aslam Butt & Mr. Mansoorul Arfin along with
 Mr. Shoaib Rashid Advocates for Plaintiff.
 Mr. Anwar Mansoor Khan along with Mr. Bashir Ahmed
 Advocates for Defendants.
 Mr. Saif Akbar Advocate for Contemnor No. 1 & 2.
 Mr. Khurram Ashfaq Advocate for Faisal Bank.
 Mr. Samiur Rehman Advocate for Intervener.
 Mr. Shoukat Hayat Advocate.
 Mr. Mubin Lakho Advocate.

ORDER

S.No.8 (**CMA-7685/20090**). This is an Application Under Order
 14 Rule 5 CPC (CMA No.7685/2009) filed on behalf of the Plaintiff,
 whereby, it is prayed to reframe the Issues in this matter.

Precisely the facts as they appear are that this is a Banking
 Suit and through Order dated 12.11.2004, the Leave to Defend
 Application filed by the Defendant was granted and parties were
 directed to file proposed Issues and on 13.01.2005, thirteen (13)
 Issues were settled by the Court. Through listed application, the
 Plaintiff seeks reframing of the Issues.

Learned Counsel for the Plaintiff has referred to Paragraphs 3, 4 & 5 of the Plaint and submits that the Issues have not been properly settled as this is a Banking Suit under the Financial Institution (Recovery of Finances) Ordinance, 2001 (**FIO 2001**) and not a Civil Suit under Section 9 CPC, therefore, the Issues so settled cannot be adjudicated by this Court; that no third party issues can be a subject matter of a Banking Suit as it is restricted only to finance and obligation between the Customer and the Bank; that in terms of Article 175(2) of the Constitution of Pakistan, no Court can adjudicate a matter except under a jurisdiction so conferred upon it and even by consent no jurisdiction can be conferred on a Court; that it is settled law that Issues can be reframed and amended at any stage of the proceedings under Order 14 Rule 5 CPC; that in view of the Judgment in the case reported as **2012 CLD 337 (Apollo Textile Mills Ltd. and others v. Soneri Bank Ltd.)** the controversy between the parties can only be adjudicated in respect of the finance and default, and therefore, listed application be granted and the amended proposed Issues be settled by the Court for leading evidence. In support he has relied upon **2014 CLD 696 (Zeeshan Energy Ltd. and others v. Faysal Bank Ltd.)**, **PLJ 1981 Lahore 141 (Pakistan Through General Manager, PAFI, Lahore v. M/s. Agro Marketing Corpn. And others)**, **PLD 1961 (W.P.) Karachi 486 (Rajabali v. Messrs Gujrat Bus Service, Karachi and another)**, **2007 YLR 305 (Fawaz Valliani v. Samina Valliani and 3 others)**, **1998 CLC 1718 (Nasimuddin Siddiqui and another v. United Bank Limited and others)**, **2007 CLD 1532 (Procter & Gamble Pakistan (Pvt.) Ltd, Karachi v. Bank Al-Falah Limited, Karachi and 2 others)**, **PLD 1961 SC 192 (Islamic Republic of Pakistan v. Muhammad**

Saeed), 2013 SCMR 338 (S.M. Waseem Ashraf v. Federation of Pakistan through Secretary, M/O Housing and Works, Islamabad and others), PLD 1964 Supreme Court 97 (Muhammad Swaleh and another v. Messrs United Grain & Fodder Agencies), 2008 CLC 645 (City District Government, Karachi through District Coordination Officer, through Authorized Officer District (HRM), C.D.G.K. and 3 others v. Faqir Muhammad), 1996 SCMR 696 (Macdonald Layton & Company Pakistan Ltd. v. Uzin Export-Import Foreign Trade Co. and others).

On the other hand, learned Counsel for the Defendants at the very outset contends that the Issues have been settled on the basis of the observations recorded in the leave granting order, therefore, any further order would amount to a review, which is impermissible in this manner; that the Plaintiff cannot at the same time seek amendment of the issues when at the original stage their proposed Issues have been adopted; that settled Issues in this matter cannot be altered and amended; that the dispute in the Suit can only be adjudicated on the basis of the Plaint and the leave to defend application, whereas, admittedly there were certain legal and factual grounds, which were raised on the basis of which leave to defend was granted and now such objections on facts and law are part of the Issues, therefore, if any issue is left out that would seriously prejudice the interest of the Defendant, and therefore, the listed application being misconceived is liable to be dismissed.

I have heard both the learned Counsel and perused the record. It is not in dispute that this is a Suit for recovery of US \$ 51,066,208.70 under the then Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997, which is now being dealt with under the FIO 2001, therefore, before I proceed further it is to be appreciated that the jurisdiction being exercised

by this Court is under a Special Law and this is a Banking Court under the **FIO 2001** and not under Section 9 CPC. The **FIO 2001** is a Special law, which governs the subject matter, which includes, inter-alia, resolution of disputes pertaining to a default in fulfilling of the obligations by the Customer, Borrower or Banking Company as defined. The **FIO 2001** is supposed to be enacted as a complete and comprehensive Code and covers the disputes between Financial Institutions and Customers pertaining to recovery of finances. The FIO 2001 confers a special jurisdiction to the Banking Court, which involves the Financial Institution and a Customer as defined therein, whereas, the subject matter of a Banking Suit before a Banking Court for which such jurisdiction has been conferred is the default by a Customer or a Financial Institution in fulfillment of any obligation in respect of a finance.

The Honorable Supreme Court very recently in an unreported case (*Gulistan Tectile Mills Ltd v Soneri Bank Limited- **Civil Appeal No.1447 of 2016***) through judgment dated 2.1.2018, has delved upon this issue and has come to the following conclusion which appears to be relevant for deciding the listed application. The relevant findings are at Para No. 4 and reads as under;

4. Heard. It is pertinent to mention at the very outset that throughout this opinion, we have deliberately refrained from commenting or adjudicating upon the factual aspect as to whether the goods in question were pledged or hypothecated as this would involve a detailed factual exercise and determination in a matter arising out of an interlocutory order, which in turn would have a direct impact on the suit filed by the respondent and the application for leave to defend filed by the appellant, pending before the Banking Court. In order to determine whether the Banking Court has the power to direct interim sale of goods under the provisions of Section 16 of the Ordinance we find it expedient to briefly discuss the history and purpose of banking laws in Pakistan. Initially the resolution of banking disputes was by means of filing a civil suit, with the CPC governing the proceedings. In 1978, a special law was enacted; the Banking Companies (Recovery

of Loans) Ordinance, 1978 (Ordinance of 1978) which created Special Courts and moreover provided a special procedure for the disposal of matters pertaining to banking companies and recovery of loans which fell within the ambit of the said Ordinance. It was followed by the Banking Companies (Recovery of Loans) Ordinance, 1979 which repealed and re-enacted with certain modifications the Ordinance of 1978. Thereafter, the Banking Tribunals Ordinance, 1984 (Ordinance of 1984) was promulgated which created the Banking Tribunals and provided a machinery for recovery of finances provided by banking companies. Then the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Ordinance, 1997 which eventually culminated into the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 (Act of 1997) created the Banking Courts to resolve disputes pertaining to defaults in terms of fulfilling of their obligations by the customer, borrower or banking company as defined by the said Act. Finally, the Financial Institutions (Recovery of Finances) Ordinance, 2001 was promulgated which repealed and re-enacted with certain modifications the Act of 1997. The aforementioned banking statutes in general and the Ordinance in particular were essentially enacted to be complete and comprehensive codes. **This special law postulates the procedure for the resolution of disputes between financial institutions and customers pertaining to recovery of finances falling within the domain of the Ordinance.** A special triumvirate of jurisdiction has been conferred upon the Banking Courts created by the Ordinance : territorial, party based and subject matter based. Territorial jurisdiction refers to the geographical reach to which the jurisdiction of the Banking Court is extended (Sections 1(2) and 5 of the Ordinance). **With respect to parties, the Banking Courts only have jurisdiction over a matter which involves a financial institution and a customer (Section 9(1) of the Ordinance), and both terms have been defined in Sections 2(a) and (c) of the Ordinance respectively. The subject matter over which the Banking Courts have jurisdiction is the default (by a customer or financial institution) in fulfillment of any obligation with regard to any finance (Section 9(1) of the Ordinance), where the terms finance and obligation have been defined in Sections 2(d) and (e) of the Ordinance respectively. Undoubtedly the jurisdiction of the Banking Courts is special and exclusive and this is bolstered by Section 7(4) of the Ordinance which provides as follows:-**

“Subject to sub-section (5), no Court other than a Banking Court shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of a Banking Court extends under this Ordinance, **including a decision as to the existence or otherwise of a finance** and the execution of a decree passed by a Banking Court.”(**Emphasis supplied**)

Perusal of the aforesaid observations of the Hon’ble Supreme Court reflects that insofar as a Banking Suit before the Banking Court is concerned, the subject matter over which the Banking

Court has jurisdiction is the default (if any) in respect of a finance and in fulfillment of an obligation by a Customer Financial Institution. This resultantly, means that the only determination which the Banking Court has to do is that whether firstly, there is any finance facility availed, if yes, then secondly, whether there is a default, and thirdly, if there is any default, then how to recover it. This is all, a Banking Court has to do and determine. Now if there are various reasons for challenging as to whether there was any finance facility availed, or for that matter, in respect of default, they need not necessarily be titled or called as Issues, as is contended on behalf of the defendants. The defendant may have raised such facts and grounds in the leave to defend application, which may have been dilated upon by the Banking Court, but they ipso facto need not be termed or settled as Issues. The defendant is not precluded for leading evidence on such facts and grounds if these not taken as issues, as they have already been taken in the leave to defend, which on its grant, has been treated as a written statement, and now forms part of the pleadings. It is by now settled law that evidence can be led by a party from its pleadings.

Now coming to the facts of this case it appears that the Leave to Defend Application of the Defendant was granted through Order dated 12.11.2004 and the operating part whereof reads as under:-

“19. I have considered the submissions of the learned Counsel. From the contentions raised by two sides and the documents relied upon by them it is found that each and every contention and the document of one party is contested / disputed by the other. It cannot be said to be an open-and-shut case. It requires an in-depth investigation and inquiry by holding a regular trial. It would neither be safe nor in the interest of justice that the defendant be nonsuited at this stage by decreeing the suit without framing the issues and recording the evidence. In the prevailing disputes and controversies between the parties, decreeing the suit without allowing the defendants an opportunity of contesting the matter, is likely to cause prejudice and loss to their case whereas no prejudice or loss would be caused to the plaintiffs. I am therefore of the opinion that the substantial questions of law and facts i.e. i) whether the defendant is liable for the guarantee furnished by the plaintiff in favour of Al-Taufiq

Investment Bank, Jeddah Standard Chartered Bank Ltd., Dubai and Bank Al Mashriq, Dubai as well as the overdraft facilities, ii) whether Promissory Note Annexure P/5 and letter of Lien P/6 are forged, iii) whether the banks are prohibited from extending finances to its directors and therefore, indirectly the finance was obtained from Al-Taufiq on the basis of guarantee given by the Plaintiff, utilizing the account of Defendant at EPZ Branch, iv) whether it was a private arrangement between the Defendant and the directors of the bank, v) whether the Defendant sought and availed financial facilities from the Plaintiff, vi) whether the plaintiff could have, in absence of any written request from the Defendant, approved, grant and issue a bank guarantee without first accepting any margin and collateral tangible security, vii) whether the plaintiff was entitled to charge interest in absence of any agreement, have arisen which requires a regular trial for adjudication.

20. The application of the defendant u/s 10 is therefore, granted and the same is treated as written statement subject to the conditions that i) M/s Lucky Cement Company Ltd. is directed to deposit with the Nazir within 15 days, the dividend/bonus shares declared by them in respect of defendant's shares and to continue to deposit the same as and when so declared till final disposal of the suit., ii) Nazir is directed to issue notice to M/s Lucky Cement Company Ltd. for compliance of the above, and, iii) the plaintiffs are directed to deposit with the Nazir within 15 days, the dividend/bonus shares declared by them in respect of defendant's shares of MCB and to continue to deposit the same as and when so declared till final disposal of the suit.

The dividends to be received by the Nazir will be invested by him in profitable schemes.

25. The matter to be fixed for framing of issues. In the meantime parties are at liberty to file their proposed issues."

After passing of this Order the Court settled the Issues on 13.01.2005 after going through the proposed Issues of both the parties. The Issues settled reads as under:-

- "1. Whether the banks are prohibited from extending finances to its directors and therefore, indirectly the finance was obtained from Al-Taufiq on the basis of guarantee given by the Plaintiff, utilizing the account of Defendant at EPZ Branch?
2. Whether the amount received from Al-Taufiq Investment Bank, Jeddah in the Foreign Exchange Account of defendant at EPZ Branch of the plaintiff was the loan to the defendant or the same amount was utilized by the Plaintiff to give a loan to its own directors?
- 3) Whether the amount from the account of the defendant was debited by the plaintiff for the purchase of 2,00,000 PTCL Vouchers for its directors, if so, effect?
- 4) Whether the defendant sought and availed financial facilities from the plaintiff?

- 5) Was any finance agreement executed between the plaintiff and the defendant in respect of the finances from Export Processing Zone Branch of Plaintiff, if not, effect?
- 6) Could the plaintiff approve, grant and issue bank guarantee for the defendant in favour of Al Taufiq Investment Bank Jeddah, Standard Chartered Bank Limited Dubai and Bank Al Mashriq Dubai without first getting any margin and collateral intangible security?
- 7) Whether the defendant is liable for the guarantee furnished by the plaintiff in favour of Al Taufiq Investment Bank, Jeddah, Standard Chartered Bank Limited Dubai and Bank Al Mashriq Dubai as well as the overdraft facilities?
- 8) Whether the letters dated 8.8.1994 and 15.9.1994 issued by Hussain Lowai are not binding upon the plaintiff?
- 9) Whether the Chairman of the Board of Directors or the Board of the plaintiff bank were legally competent to freeze defendant's Foreign Currency Account and operate it and make debit entries?
- 10) Whether the debit of US \$ 2,11,48,421.60 was lawfully made by the plaintiff from the account of the defendant?
- 11) Whether the promissory note and letter of lien in the suit are forged and fraudulent?
- 12) Whether the plaintiff's suit is not maintainable?
- 3) What relief the plaintiff is entitled to?"

Perusal of the aforesaid Issues reflects that majority of them do not relate or are aligned with the special and restricted jurisdiction of a Banking Court under **FIO 2001**. They appear to be argumentative in nature, for which it would be impossible for the Court to answer them either in the affirmative or negative. It further appears that there may be a dispute between the parties in the mode and manner by which the finance facility was extended or utilized, but this would not form an issue viz a viz recovery of the defaulted amount. If this is permitted, then it would no longer remain a Banking Suit. The **FIO 2001** very clearly defines the parties and the subject matter of a Suit. It must be between a Financial Institution or a Customer, Borrower and/or a Guarantor and the controversy can only be to the effect (in a Suit by a Financial

Institution) that whether any finance was obtained by the Customer or the Borrower and whether there is any default. To my understanding no further dispute can be adjudicated by a Banking Court though there may be various grounds raised by a Customer and/or a Borrower/Guarantor through its leave to defend application to contest the Suit. But this would not confer any extended jurisdiction to the Banking Court as that may be available to any ordinary Civil Court. It is not that if the Banking Court, while granting leave to defend, has discussed various objections and grounds taken by a Defendant (as in this case) that every such ground will definitely have to be adjudicated by the Banking Court like an Ordinary Court. The Defendant's stance in contesting this application is wholly dependent on the discussion of the Court in the leave granting order. However, as discussed, the Banking Court has a limited and special jurisdiction and the controversy cannot be stretched on the basis of such a discussion in the leave granting order. It may further be observed that in fact settlement of Issues is not a final adjudication of a matter. Issues can always be amended / resettled by a Court at any stage of the proceedings and even before announcing the Judgment. An impression has been created that perhaps the settled Issues in this matter have been done so on the basis of the observation in leave granting order, and therefore, they cannot be altered or amended as it would amount to review of such leave granting order. However, in my opinion this contention is not correct and appropriate. Firstly defendants [plaintiff here] are not seeking review of any order for no order was passed on any application, but only issues were framed and certain reasons were stated for framing of those issues. Nonetheless even if framing of certain issues is

considered to be an order, rule 5 of Order XIV, C.P.C. itself gives powers to the Court to amend issues or frame additional issues, and in fact, second part of sub-rule (1) of rule 5 makes it imperative on the Court to frame such additional issues as may be necessary to determine the controversy between the parties¹. It is not that each and every ground taken in the leave to defend application can become an issue for adjudication though it may be a valid ground for granting leave to defend. The controversy would still have to be resolved on the basis of the special and limited jurisdiction conferred upon a Banking Court under **FIO 2001**. It was held by this Court [Hon'ble SC] in the Province of East Pakistan v Major Nawab Khawaj Hasan Askary and others (PLD 1971 SC 82) that if issues are not framed but allegations made in the plaint are challenged in the written statement and the Court has allowed evidence to be led, then a decision rendered with framing of the issues is not illegal². The mere fact that an allegation is made and denied does not imply that the proposition is material. The Court framing issues in suit is to confine itself only to the material questions in controversy, is to bypass irrelevant allegations or matters and must always remain alive to the nature of the suit when attending to its obligation of striking the issues³. Even otherwise, law regarding framing of issues is finally settled to the effect that when parties enter into trial of the case with all awareness of controversy between them, its framing or non-framing loses importance⁴.

¹ Premier Insurance Company of Pakistan v P.&O. And B.I. (Strath Services Cunard Brocklebank) (PLD 1980 KAR 412)

² Fazal Muhammad Bhatti and another v Mst. Saeeda Akhtar (1993 SCMR 2018)

³ Raja Ghulam Hyder v Major (Retd.) Jamshed Alam Khan (1991 MLD 1284)

⁴ Muhammad Ameer and another v Syed Shujat Ali Tirmizi and 4 others (2007 CLC 357)

The prayer in this Suit is to the following effect:-

- i) A decree in the amount of US \$ 51,066,208.70 with interest at 9.5 percent per annum with quarterly rest from the date of suit till payment;
- ii) an order that the pledged shares as mentioned in Para 10 hereinabove be sold and net sale proceeds be utilized towards discharge of the defendant's liabilities to the plaintiff;
- iii) cost of the suit; and
- iv) Any other / further / additional relief or reliefs which this Honourable Court may deem fit and proper in the circumstances of case."

Now whatever be the ground, which may have been taken by the Defendant in its Leave to Defend Application but under no manner, the same can be formed as an Issue. The Plaintiff seeks recovery of the amount as above with a further decree for selling the pledged shares. Merely for the fact that Defendant denies the transaction and contends that it was for numerous reasons, all such disputes so raised cannot be adopted as Issues by the Banking Court. If it would have been an ordinary Suit under Section 9 CPC or Order 37 CPC, then perhaps the contention of the Defendant could have been considered. The Plaintiff's case is only to the extent that Defendant has taken a finance and has defaulted and since it had pledged certain shares the same are to be sold.

The entire case before this Court is in respect of an alleged finance facility extended to defendant by way of certain guarantee(s), over draft(s) or through some other mode which is vehemently denied on behalf of the defendants. The further case is that there were certain securities under lien with the plaintiff from defendants in the shape of shares and or funds available in the other business concern(s) of defendant for which again there is a

complete denial by the defendants inasmuch as that these sister concern(s), if any, had no relationship and business dealings with the present defendant and the lien or claim on such securities as marked and claimed is otherwise unlawful. These are precisely two issues which form the entire controversy between the parties and for that it is not necessary that each and every ground urged by the defendant in support of their claim must be settled as a Court issue as the defendant is well within its right to lead evidence to deny such assertion of the plaintiff if that is already part of the leave to defend / written statement / pleadings.

In view of hereinabove facts and circumstances of this case, I am of the view that the listed application merits consideration and in view of the special jurisdiction conferred under the **FIO 2001** of this Banking Court, the Issues already settled through Order dated 13.01.2005 cannot be adjudicated under the banking jurisdiction. Accordingly by exercising powers conferred on this Court under Order 14 Rule 5 CPC, the following Issues are re-settled/amended.

1. Whether the finance facilities were availed by the defendant from Plaintiff in the form of guarantee(s), over draft or under any mode permissible by law?
2. Whether plaintiff rightly held security / lien over shares / vouchers, of other companies as well as amounts lying in various Accounts of the defendant and / or his business concerns.
3. Whether the plaintiff is entitled to a decree as prayed for?

Application bearing CMA No.7685/2009 listed at Serial No.8 stands allowed.

1, to 7 & 9 to 14. Adjourned.

Dated: 17.01.2018

Judge