

**IN THE HIGH COURT OF SINDH  
AT KARACHI**

**SUIT NO. B-08 OF 2017**

Plaintiff : Faysal Bank Limited, through Mr. Syed Ijaz Hussain Shirazi, Advocate

Defendants  
Nos. 3 & 4 : Muhammad Rafiq and Muhammad Yahya A. Ghaffar, through Ms. Arjuman Khan, Advocate

Date of hearing : 09.10.2018

**ORDER**

**YOUSUF ALI SAYEED, J** – The instant Suit has been filed by the Plaintiff under the Financial Institutions (Recovery of Finances) Ordinance, 2001, seeking recovery of a sum of Rs.106,084,470/- along with mark-up/profit jointly and severally as against the Defendants, of whom the Defendant No.1, namely A. R. Securities (Private) Limited, is designated as the principal debtor as well as mortgagor of an immovable property, whereas the Defendant Nos. 2 to 7 are said to have executed personal guarantees whereby they have allegedly stood surety for the obligations owed by the Defendant No.1 to the Plaintiff, and in the particular case of the Defendant No.2 also to have pledged certain shares for securing such obligations.

2. Of the Defendants, only the Defendants Nos. 3 and 4 entered appearance through counsel and filed an Application for Leave to Defend (CMA No. 2793/17), which is the subject presently under consideration, whereas service was held good in respect of the other Defendants on 18.09.2017 and it was ordered that the matter proceed ex parte as against them.
3. Learned counsel for the Defendants Nos. 3 and 4 submitted that said Defendants had not executed any guarantees in favour of the Plaintiff and pointed out that whilst a photocopy of a Guarantee ostensibly dated 04.08.2008 and purporting to bear the signature of the Defendant No.4 had been filed as

Annexure “D-2” to the plaint, as far as the Defendant No.3 was concerned, no Letter or Guarantee or any other document for that matter had been placed on record which bore a signature that even purported to be his. Furthermore, it was pointed out that the Guarantee ascribed to the Defendant No.4 predated the finance agreements dated 23.02.2010 (wrongly stated in the plaint to be dated 10.02.210) and 24.01.2011 filed as Annexures “A-1” and “A-2” to the plaint, and that the signature claimed by the Plaintiff as being that of the Defendant No.4 was not his and had been manipulated either through forgery or tampering through other means, the reality of which would come to the fore upon proper examination of the original document as and when it was introduced in evidence and could be submitted for forensic examination to a handwriting expert. Reliance was placed on a judgment of the Honourable Supreme Court in the case reported as Mst. Akhtar Begum v. Muslim Commercial Bank Ltd 2009 SCMR 264, as well as two Single Bench judgments of this Court emanating from Suit No.366 of 1999, reported as Messrs Habib Bank Limited v. Messrs Pan Islamic Steamship Co. Limited and others 2003 CLD 683 and Messrs Habib Bank Limited v. Messrs Pan Islamic Steamship Co. Limited and 6 others 2005 CLD 626. In this respect, it was also pointed out that the alleged signature of the Defendant No.4 appeared randomly on the document beneath certain other signatures against a stamp of the Plaintiff endorsing verification of the signature. It was submitted that the Defendant No.4 was not a customer of the Plaintiff and did not otherwise maintain any banking relationship that would have enabled or facilitated the purported verification, and it was also pointed out no such stamp appeared in respect of the signature of any other person on the document. Additionally, it was contended that the claim of the Plaintiff was even otherwise barred by limitation in as much as the date of default was specified in the plaint as being 31.12.2011, whereas the Suit had been filed on 20.02.2017, and no demand had been made in terms of the Guarantee during the applicable period of limitation for effecting recovery against the principal obligor. It was submitted that under the circumstances the Defendants ought to be granted unconditional leave to defendant the suit.

4. Confronted with these submissions, learned counsel for the Plaintiff candidly conceded that no guarantee bearing the signature of the Defendant No.3 or other document creating any liability on said Defendant had been filed along with the plaint or otherwise placed on record. However, as regards the Defendant No.4, it was submitted that the Guarantee on which reliance was placed (Annexure "D-2" to the plaint) was a genuine document bearing the signature of the Defendant No.4, and that it was evident from a visual comparison of the signature on the copy of the Guarantee filed along with the Plaint and the signature of the Defendant No.4 on the Application for Leave to Defend that they were one and the same. He submitted further that as the Guarantee in question was a continuing guarantee, it served to bind the Defendant No.1 vis-à-vis the obligations of the Defendant No.1 arising from the subsequent finance agreements in accordance with its terms. He placed reliance on a judgment of a learned single Judge of this Court in the case reported as Dubai Islamic Bank Pakistan Limited v. Gulistan Textile Mills Limited & others SBLR 2016 Sindh 753. In response to the aspect of limitation, he submitted that the liability of the Defendants stood admitted in terms of a Letter dated 20.11.2014 filed as Annexure "F" to the plaint and that the period of limitation stood extended and ought to be reckoned accordingly. Alternatively, it was contended that a claim could be advanced by the Plaintiff against the Defendant No.4 under the Guarantee even if the Plaintiff's claim was barred and was no longer maintainable as against the principal obligor. He contended that the period of limitation in relation to a guarantor would begin to run from the date that the demand was made on the guarantor and submitted that in the instant case the filing of the Suit itself constituted such a demand. In this regard, he placed reliance on a judgment of the Honourable Supreme Court in the case reported as Messrs Seamlen Pipe Industries Ltd. and 2 others v. Messrs Security Leasing Corporation Ltd 2002 CLD 550 and a judgment of a learned single Judge of this Court in the case reported as National Bank of Pakistan v. General Tractor and Machinery Co. Ltd. & another 1996 CLC 79.

5. Having considered the arguments advanced in light of the material on record, it merits consideration that only a photocopy of the Guarantee sought to be invoked as against the Defendant No.4 has been placed on record, and whilst the signature appearing thereon ostensibly appears to correspond with that of the Defendant No.4 on the Application for Leave to Defend as contended, it is difficult to form a conclusive opinion as to the genuineness of the signature through such comparison. In the face of a consistent denial as to execution, a proper determination of whether the signature appearing on the Guarantee was indeed made by the Defendant No.4 would require examination of the original document.
6. Furthermore, turning to the question of limitation, it merits consideration that a guarantor's liability depends upon the terms of the contract, and even under a 'continuing guarantee', the question as to when the liability of a guarantor arises would depend purely on the applicable terms. In the instant case, the Guarantee specifically states that the guarantors agree to pay and satisfy the bank on demand. As such, limitation would begin to run when a demand was made and the guarantor committed a breach by not complying.
7. In this context, it is to be noted that as per the plaint, in terms of paragraph 11 thereof, the cause of action is stated to have arisen in the following terms:

“That the cause of action for the suit arose at Karachi on various dates firstly when the Plaintiff, on the request of the Defendants granted the Finance Facilities and on dates when the Defendants executed finance and security documents referred in paragraphs 3 and 4 above, in favour of the Plaintiff, when the Defendants failed to honour their commitments and defaulted in making payments, on all such dates when the Defendants were called upon to make payments and on December 20, 2014 when the Defendants admitted their liability however, failed to make the payments of their outstanding liabilities and they failed/refused/neglected to repay the outstanding liabilities and continue from day to day until the outstanding dues of the Plaintiff are fully paid.”

8. The plaint itself is silent as to the date on which a demand, if any, was made on the Defendant No.4, and from the submissions advanced by learned counsel for the Plaintiff it appears that the Suit was in fact not preceded by any formal demand. Indeed, this was conceded by counsel during the course of arguments, and it was submitted that the Suit was within time by virtue of effect of the Letter dated 20.11.2014 (Annexure "F" to the plaint). Turning to the form of the Guarantee, the same states that the guarantors agree to pay and satisfy the Bank 'on demand', thus making it clear that the liability to pay would arise on the guarantors only when a demand is made. Whilst, as per Article 115 of the Limitation Act, time will begin to run when the contract is 'broken' or the breach 'occurs', and whilst it may well be that under certain conditions a claim may be advanced against a guarantor even if it is no longer maintainable under the principal debtor, as observed in Huffaz's case (Supra), it merits consideration that at the time of the demand the sum should be legally due and recoverable and not a debt that has already become time-barred against the principal debtor. A judgment illustrative of this aspect is that of the Supreme Court of India in the case reported as Syndicate Bank v. Channaveerappa Beleri and others 2006 (11) SCC 506, which turns on this very point, wherein it was observed as follows:

"We have to, however, enter a caveat here. When the demand is made by the creditor on the guarantor, under a guarantee which requires a demand, as a condition precedent for the liability of the guarantor, such demand should be for payment of a sum which is legally due and recoverable from the principal debtor. If the debt had already become time-barred against the principal debtor, the question of creditor demanding payment thereafter, for the first time, against the guarantor would not arise. When the demand is made against the guarantor, if the claim is a live claim (that is, a claim which is not barred) against the principal debtor, limitation in respect of the guarantor will run from the date of such demand and refusal/noncompliance. Where guarantor becomes liable in pursuance of a demand validly made in time, the creditor can sue the guarantor within three years, even if the claim against the principal debtor gets subsequently time-barred. To clarify the above, the following illustration may be useful:

Let us say that a creditor makes some advances to a borrower between 10.4.1991 and 1.6.1991 and the repayment thereof is guaranteed by the guarantor undertaking to pay on demand by the creditor, under a continuing guarantee dated 1.4.1991. Let us further say a demand is made by the creditor against the guarantor for payment on 1.3.1993. Though the limitation against the principal debtor may expire on 1.6.1994, as the demand was made on 1.3.1993 when the claim was 'live' against the principal debtor, the limitation as against the guarantor would be 3 years from 1.3.1993. On the other hand, if the creditor does not make a demand at all against the guarantor till 1.6.1994 when the claims against the principal debtor get time-barred, any demand against the guarantor made thereafter say on 15.9.1994 would not be valid or enforceable.”

The Single Bench judgment of this Court in the case reported as *Habib Bank Limited v Time-N-Tide & another* 1991 MLD 1464 also addresses this proposition.

9. As reliance is placed by the Plaintiff for such purpose on the Letter dated 20.11.2014 (Annexure “F” to the plaint), the effect of such letter falls to be considered, which is a matter of argument and requires a determination of whether the terms thereof amount to an acknowledgment of liability and if so, against who and to what extent. The signature on the Letter is evidently not that of the Defendant No.4 and also does not appear to correspond with the signature on the other documents filed along with the plaint, and the identity and status of the signatory is not clear. Whether the same in fact emanated from the Defendant No.1 is itself therefore a question of fact to be determined prior to any further determination being made as to its effect, if any, as regards the period of limitation.
10. In view of the foregoing observations, CMA No. 2793/17 is allowed and the Defendants Nos. 3 and 4 are granted unconditional leave to defend the Suit.

JUDGE