IN THE HIGH COURT OF SINDH KARACHI

Suit No. B-58 of 2015

[National Bank of Pakistan versus Tuwairqi Steel Mills Ltd. and another]

Plaintiff	:	National Bank of Pakistan through Mr. Waqar Ahmed, Advocate.
Defendant No. 1	:	Tuwairqi Steel Mills Limited through Mr. Khalid Mehmood Siddiqui Advocate.
Defendant No. 2	:	Al-Tuwairqi Holding Company through Mr. Ghulam Rasool Korai Advocate.
Dates of hearing	:	30-10-2018, 26-11-2018, 03-12-2018, 10-12-2018 and 17-12-2018.
Date of decision	:	31-05-2019

O R D E R

Adnan Iqbal Chaudhry J.- This is a Suit for recovery of finance filed under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. The Defendant No.1, Tuwairqi Steel Mills Ltd. (hereinafter TSML), a public company under the laws of Pakistan has been sued as the principal debtor; while the Defendant No.2, Al-Tuwairqi Holding Company, a company under the laws of Saudi Arabia has been sued as surety.

Both TSML and the Defendant No.2 have filed applications under section 10 for leave to defend, bearing CMA No.1029/2016 and CMA No.1030/2016 respectively, and both these applications are decided by this order.

2. TSML had applied to the Plaintiff through the Export Processing Zone Branch of the Plaintiff for certain financial facilities for setting up a steel mill. The various finance agreements between the parties from time to time are discussed as follows.

Finance Facility I-A:

3. Pursuant to Offer Letters dated 04-06-2008 and 02-07-2008, and pursuant to Finance Agreement dated 16-07-2008, the Plaintiff agreed to provide TSML with USD 5,000,000/- as working capital, repayable in 12 months with mark-up as USD 5,600,000/-. Time for repayment was extended vide Offer Letter dated 11-07-2009 and Finance Agreement dated 24-07-2009 under which the amount repayable was increased to USD 6,100,000/- to include mark-up for the second year, repayable by 18-07-2010. Time for repayment was again extended vide Offer Letter dated 17-08-2010 and Finance Agreement dated 01-09-2010 under which the amount repayable remained USD 6,100,000/- repayable by 31-12-2010.

Finance Facility I-B:

4. Pursuant to Offer Letter dated 17-12-2008 and Finance Agreement dated 17-12-2008 the Plaintiff agreed to provide TSML with USD 15,533,000/- for retirement of LCs, repayable in 1 year with mark-up as USD 17,396,960/-. Time for repayment was extended up till 31-01-2010 vide a Supplemental Finance Agreement dated 31-12-2009, and then again extended till 30-12-2010 vide Offer Letter dated 08-12-2009 and Finance Agreement dated 01-02-2010, under which the amount repayable was increased to USD 18,950,260/- to include mark-up for the extended period.

Finance Facility I-C:

5. Pursuant to Offer Letter dated 18-12-2008 and Finance Agreement dated 30-12-2008 the Plaintiff agreed to provide TSML with USD 4,467,000/- for working capital, repayable by 31-12-2009 with mark-up as USD 5,003,040/-. Per the Offer Letter, these funds were to be routed through the New York Branch of the Plaintiff. Time for repayment was extended till 31-12-2010 vide Finance Agreement dated 19-08-2010 under which the amount repayable was increased to USD 5,449,740/- to include mark-up for the second year.

Finance Facility I-D:

6. Pursuant to Offer Letter dated 24-09-2009 and Finance Agreement dated 05-10-2009 the Plaintiff agreed to provide TSML with USD 5,000,000/- as bridge financing, repayable by 03-02-2010 with mark-up as USD 6,100,000/-. Time for repayment was extended till 31-12-2010 vide Offer Letter dated 04-02-2010 and Finance Agreement dated 15-09-2010, under which the amount repayable remained USD 6,100,000/-.

Finance Facility I-E:

7. Pursuant to Offer Letter dated 14-01-2010 and Finance Agreement dated 01-02-2010 the Plaintiff agreed to provide TSML with USD 3,850,000/- as bridge financing, repayable by 21-07-2010 with mark-up as USD 4,697,000/-. The increased exposure of the EPZ Branch of the Plaintiff necessitated risk management by the Plaintiff, and therefore vide a Supplemental Finance Agreement dated 03-03-2010 the parties agreed that out of the agreed finance of USD 3,850,000/-, a sum of USD 1,000,000/- would be routed through the New York Branch of the Plaintiff. The time for repayment of this Finance Facility I-E was extended till 31-12-2010 vide Offer Letter dated 17-08-2010 and Finance Agreement dated 27-09-2010 under which the amount repayable remained USD 4,697,000/-.

8. Thus the total principal amount of Finance Facilities I-A to I-E was USD 33,850,000 and the total amount repayable thereunder by TSML with mark-up (the marked-up price) was USD 41,297,000/-.

Finance Facility I:

9. Pursuant to Offer Letter dated 05-01-2011 and Finance Agreement dated 09-03-2011, Finance Facilities I-A to I-E were merged and the total of the principal amounts and marked-up price of Finance Facilities I-A to I-E, being USD 33,850,000/- and USD 41,297,000/- respectively, were brought under one agreement and the time for repayment was extended up till 30-06-2011. That time for repayment was again extended up till 23-11-2011 vide a Supplemental

Finance Agreement dated 30-06-2011 and then further extended up till 30-06-2012 vide Offer Letter dated 16-08-2011 and Finance Agreement dated 23-11-2011. Per learned counsel for the Plaintiff, such extensions in time were given in anticipation that TSML's steel mill would start production and enable TSML to commence repayments. But when that did not transpire, the parties entered into negotiations and vide Offer Letter dated 22-05-2012 the said finance of USD 33,850,000/- (principal amount) extended by the Plaintiff to TSML, was restructured from a short-term loan to a long-term loan, repayable over a period of 6 years up till 30-09-2018 vide a Restructuring Agreement dated 01-10-2012 whereby the amount repayable was agreed at USD 44,639,688/-. Per clause 2 and Schedule I of the Restructuring Agreement, such agreement superseded and overrode the agreements of Finance Facilities I-A to I-E. The said Restructuring Agreement is hereinafter also referred to as 'Finance Facility I'.

Finance Facility II:

10. Pursuant to Offer Letter dated 22-05-2012 and Finance Agreement dated 14-09-2012, the Plaintiff agreed to provide TSML with USD 45,500,000/- as working capital, repayable by 30-06-2013 with mark-up as USD 48,685,000/-. This facility was renewed up till 30-06-2014 vide by Finance Agreement dated 21-06-2013.

Finance Facility III:

11. On behalf of TSML, the Plaintiff had issued a Bank Guarantee dated 18-12-2012 for Rs.2,040,000,000/- (equivalent to USD 22,000,000/-) to SSGCL to secure payment of gas bills by TSML. This Bank Guarantee was initially valid till 17-06-2013. Vide a 1st Addendum dated 13-06-2013, the validity of the Bank Guarantee was extended till 30-06-2013. Vide a 2nd Addendum dated 27-06-2013, the validity of the Bank Guarantee was extended till 30-06-2014. However, the said Bank Guarantee was never called by SSGC and therefore the claim of the Plaintiff under Finance Facility III is only for commission outstanding on the said Bank Guarantee.

12. The agreements executed by TSML to secure and assure repayment of the finance are as follows:

(i) Letter of Hypothecation dated 14-09-2012 in respect of raw materials, inventories, spares and stores;

(ii) Letter of Hypothecation dated 12-06-2012 in respect of fixed assets issued jointly in favour of the Plaintiff, the Islamic Corporation for the Development of the Private Sector and Bank Al Habib Ltd. on *pari passu* basis by way of a first ranking exclusive charge over all of TSML's present and future fixed assets (but excluding land);

(iii) Letters of Pledge dated 14-09-2012 and 21-06-2013 to pledge finished goods executed in anticipation of production by TSML's steel mill;

(iv) Demand promissory notes corresponding to each of the finance agreements.

13. In addition to the above finance agreements executed by TSML to secure the finance, the Defendant No.2 also executed a Corporate Guarantee in favour of the Plaintiff to stand surety for TSML *albeit* to the extent of USD 30,000,000/-. Though the Corporate Guarantee does not bear the year in which it was executed, the Board Resolution of the Defendant No.2 appended thereto authorizing its execution is dated 15-07-2008.

14. Per the Plaintiff, the TSML defaulted in repayments, resultantly the Plaintiff recalled the finance facilities vide legal notice dated 08-10-2015 and filed this Suit. Per the plaint, the amount payable by TSML as on 30-09-2015 was as follows:

		USD
Finance Facility I (the Restructuring Facility):		33,728,382.20
Finance Facility II	:	49,259,355.57
Finance Facility III (commission on Bank Guarantee)	:	81,763.53
Total		83,069,501.30

15. To get down to the brass tacks of the case, a comparison of the pleadings of the parties as to what amount was availed, repaid and what remains payable by TSML, is as follows:

As per the plaint	**As per leave application of TSML**
Total amount availed = USD 79,348,907.44/- This amount of course does not include the Bank Guarantee of USD 22,000,000/- which was never called for payment.	Total amount availed = USD 101,348,907.44. This amount apparently includes the Bank Guarantee of USD 22,000,000/- even though the same was never called for payment. USD 101,348,907.44/- less USD 22,000,000/- = USD 79,348,907.44/-
Total amount repaid = USD 10,240,374.63/-	Total amount repaid = USD 66,090,374.63/-
Total payable = USD 83,069,501.30/-	Total payable = USD 35,258,532.81/-

The above comparison shows that TSML does not dispute the amount that is said to have been availed by it from the Plaintiff. Rather it disputes the amount said to have been repaid by it. Per the Plaintiff, the total amount repaid by TSML was USD 10,240,374.63/- and that is supported by a statement of account duly certified as per the Bankers' Books Evidence Act, 1891, which certified copy per section 4 of the said Act, carries a presumption of correctness. On the other hand, while TSML claims to have repaid an amount of USD 66,090,374.63/- but such averment is completely unsubstantiated. Not a single document has been filed by TSML with its leave application to show repayment of USD 66,090,374.63/- allegedly made by it. Therefore, the entire defense of TSML hinges on submissions made on its behalf to rebut the presumption of correctness attached to the statement of account filed by the Plaintiff.

16. Mr. Ghulam Rasool Korai, learned counsel for the Defendant No.2 (the surety) was the first to make submissions on behalf of the defense, and apart from submissions as to the liability of the surety, which are discussed in the latter part of this order, he also objected to

certain entries in the statement of account filed by the Plaintiff. While adopting the arguments of Mr. Korai, Mr. Khalid Mehmood Siddiqui, learned counsel for TSML, made additional submissions to question certain entries in the statement of account filed by the Plaintiff. Therefore, arguments of both learned counsel on the statement of account are discussed together.

17. Learned counsel for the Defendants submitted that regards the statement of account of Finance Facilities I-A to I-E, these facilities were adjusted by an entry dated 05-10-2012, but no statement of account has been filed to show where the amount so adjusted was carried to, and therefore the adjustment entry should be taken as a repayment entry. But in making such submission, learned counsel had overlooked the statement of account at Annexure O/5 to the plaint (page 1393) which does reflect a debit entry of USD 33,850,000 dated 05-10-2012 to record the adjustment and restructuring of Finance Facility I-A to I-E.

18. Learned counsel for the Defendants had then tried to dispute certain debit entries in the statement of account of Finance Facility I-A to I-E including the markup charged on the said facilities. But then, and as also submitted by Mr. Waqar Ahmed, learned counsel for the Plaintiff, Finance Facilities I-A to I-E had been merged and then restructured under the Restructuring Agreement dated 01-10-2012 duly executed by TSML; that per clause 2 and Schedule I of the Restructuring Agreement, such agreement superseded and had overridden the finance agreements of Finance Facilities I-A to I-E, therefore any objection to the statement of account of Finance Facilities I-A to I-E would be meaningless when TSML does not dispute the restructuring of the said facilities and the statement of account of the restructured facility viz. Finance Facility I.

19. Learned counsel for the Defendants had submitted that part of the markup claimed by the Plaintiff in respect of Finance Facility II was markup charged after the expiry of the relevant finance

agreement. I have noted that the last finance agreement in respect of Finance Facility II had expired on 30-06-2014, however the statement of account of the said facility (Annexure Q/3 at page 1579) shows that a sum of USD 3,341,708.23/- has been charged as markup after the said expiry. It is settled law that after expiry of the markup agreement, the bank does not have mandate to continue to charge contractual markup[1].

20. It was also contented by learned counsel for the Defendants that the Plaintiff's calculation of the commission on the Bank Guarantee (Finance Facility III) is erroneous; and that at the given rate of 0.4%, the total commission works out as USD 131,879 and not USD 486,465.53 as claimed by the Plaintiff. However, it appears that learned counsel for the Defendants have calculated the said commission @ 0.4% 'per annum', whereas the rate of commission mentioned in the Offer Letter annexed to the Bank Guarantees is 0.4% "per quarter". Therefore, the calculation of the Defendants is incorrect.

21. Learned counsel for the Defendants had also raised the objection that the statement of account of the overseas branches of the Plaintiff do not account for mark-up charged. However, firstly, as pointed out by Mr. Waqar Ahmed, the statements of account of the overseas branches of the Plaintiff are part of the bank's internal risk management that have no bearing on the liability of TSML. Such fact had been pointed by the Plaintiff to TSML vide letter dated 26-09-2012 (annexed to the Replication), and in any case, part of the finance was routed through the overseas branches of the Plaintiff with the consent of TSML as is apparent from the Supplemental Finance Agreement dated 03-03-2010 duly executed by TSML. Secondly, the statement of account of the overseas branches of the Plaintiff relates to the Finance Facility I (the restructured finance facility), and mark-

[1] See the cases of *HBL v. Farooq Compost Fertilizer* (1993 MLD 1571); *United Bank Ltd. v. Usman Textiles* (2007 CLD 435); *Emirates Global Islamic Bank Ltd. v. Muhammad Abdul Salaam Khan* (2013 CLD 1291).

up in respect of such facility is accounted for in the statement of account at Annexure O/6 to the plaint at page 1509.

22. Therefore, except the submission that markup amounting to USD 3,341,708.23/- in respect of Finance Facility II is unlawful having been charged beyond the expiry of the said facility, none of the other objections to the Plaintiff's statement of account as raised by learned counsel for the Defendants have any force. The contention of the Defendants that markup of USD 3,341,708.23/- is unlawful having been accepted by the Court as held in para 19 above, the same will be deducted from the Plaintiff's claim while passing the decree and thus there is no ground to grant of leave to defend to TSML.

23. Adverting now to the case of the Defendant No.2, it was contended on its behalf by Mr. Mr. Ghulam Rasool Korai Advocate that the Corporate Guarantee executed by the Defendant No.2 as surety was only for Finance Facilities I-A to I-E; and that in view of section 133 of the Contract Act, 1872, the Defendant No.2 was discharged as surety when the Plaintiff and TSML subsequently varied the terms of their contract by entering into the Restructuring Agreement dated 01-10-2012. Alternatively, learned counsel submitted that since the liability of the Defendant No.2 under the Corporate Guarantee was capped at USD 30,000,000/-, the prayer for a decree against the Defendant No.2 'jointly and severally' for the entire amount claimed in the suit could not be granted.

24. Mr. Waqar Ahmed, learned counsel for the Plaintiff conceded that the liability of the Defendant No.2 as surety was capped at USD 30,000,000/-, but he contested the contention that the Defendant No.2 was discharged from such liability. He submitted that a mere extension in time to repay the debt does not constitute a variation of the contract under section 133 of the Contract Act, 1872 especially where the surety also benefitted from such extension in time. In support of his submission Mr. Waqar Ahmed relied on the case of

Industrial Development Bank of Pakistan v. Hyderabad Beverages Company (Pvt.) Ltd.(2016 SCMR 451).

25. Though the ground of discharge as surety has not been taken by the Defendant No.2 in its leave application, nonetheless I proceed to examine such contention. Section 133 of the Contract Act, 1872 reads as follows:

> **"133. Discharge of surety by variance in terms of contract.---**Any variance, made without the surety's consent in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance."

The criteria of section 133 of the Contract Act is (a) that there should be a variance in the terms of the contract between the principal debtor and the creditor; and (b) such variance should have been without the surety's consent; and it is only then that the surety is discharged from transactions subsequent to the variance.

26. In the case of *Industrial Development Bank of Pakistan v. Hyderabad Beverages Company (Pvt.) Ltd.,* (2016 SCMR 451) it was contended by the surety that once the rescheduling of the loan was accepted and acted upon by the principal debtor then the surety was discharged in view of section 133 of the Contract Act, 1872. The Supreme Court quoted from the case of *Aftab A. Sheikh v. Trust Leasing Corporation Limited* (2003 CLD 702) as follows:

> "If variation or composition of the loan or time etc. as to its repayment was allowed by the creditor to the borrower and consent/assent in advance thereto was given by the guarantor in the letter of guarantee, subsequent to the date of guarantee, such variation, composition, extension, change or indulgence being within the contemplation of the parties at the time of execution of guarantee did not effect discharge of the surety/guarantee from obligations under the guarantee. And as such surety continued to be bound by the terms of the guarantee despite moratorium, enlargement of time, composition and variations between the creditors and principal borrower."

The Supreme Court noted that the guarantee executed by the surety had agreed in the widest terms that the lender could settle the debt by extending any concession, and therefore it was held that the surety had bartered away his rights and defense against variation of contract within the meaning of section 133 of the Contract Act. It was further held that the variation of contract within the contemplation of section 133 of the Contract Act means a material variation or alteration in the original contract that may prejudicially or adversely affect the surety.

In the case of *Asim Traders v. National Bank of Pakistan* (2016 CLD 1654) a learned Division Bench of the Lahore High Court held that the rights conferred on the surety under sections 133, 135 or 141 of the Contract Act 1872 can be waived by specific agreement in the deed of guarantee provided that such waiver does not defeat any provision of law and is not against public policy (section 23 of the Contract Act), and that such an agreement by the surety would constitute consent within the meaning of the aforesaid sections of the Contract Act.

Therefore, the legal position that emerges from decided case-law is firstly that the variation of contract within the contemplation of section 133 of the Contract Act means a material variation that adversely affects the surety; and secondly that the defense conferred on the surety under section 133 of the Contract Act can be waived by the surety by a specific agreement in the deed of guarantee provided that such waiver does not defeat any provision of law, and then such a waiver would amount to "the surety's consent" within the meaning of section 133 of the Contract Act with the result that the surety would not be discharged.

27. The Defendant No.2 is the holding company of TSML and therefore it is highly unlikely that the Defendant No.2 did not have knowledge of the subsequent finance agreements between the Plaintiff and TSML. Nevertheless, the relevant provisions of the Corporate Guarantee executed by the Defendant No.2 are as follows:

"Whereas, at the request of Messer Tuwairqi Steel Mills Limited and on our guarantee you have agreed to issue/grant to Messer Tuwairqi Steel Mills Limited (hereinafter referred to as the 'Customer' which expression shall, wherever the context so admits mean and include as successors-in-interest and assigns) credit facilities to the extent of US$ 30.00 Million (United States Dollars Thirty Million only) ('Facilities'). This guarantee shall secure the monetary obligations of the Customer pursuant to the Facilities; PROVIDED our maximum liability under this guarantee shall not exceed US$ 30 Million (Maximum Amount).

NOW THEREFORE BY THIS GUARANTEE, we, …….. hereby guarantee, agree and undertake as under:-

1.(i) due performance of all the obligations of the Customer and due observance of all the terms and conditions of the agreement which the Customer has or may execute in respect of the facilities;

2.(i) That this guarantee shall be a continuing guarantee and shall not be considered as satisfied by any intermediate payment of the whole or part of the moneys owing or to become owing to you by the Customer under the Facilities and shall be enforceable by you or your assign(s) against us, our legal representatives, successors and/or assigns;
(iii) with (sic) prejudicing and affecting your rights against us hereunder you shall be at liberty at any time to determine vary or enlarge any credit granted by you to the Customer to take further securities to substitute release or grant renewals to the Customer or to vary or compromise the terms or conditions in respect of any transaction with the Customer or grant any indulgence or time to the Customer.
(iv) in the event of your granting facility of opening Letters of Credit by the Customer we agree as under:-

(j) independently of the above stipulation we further agree to be liable as principle debtor or debtors for the payment of any money secured hereunder as may not be recoverable from us as security/securities by reason of legal disability of Customer or of any limitation of Customer's contractual or borrowing powers whether such disability or limitation be known to you or not;

4. This guarantee shall become valid from the date of its execution and shall expire on the earlier of: (i) fulfillment of all of Customer's obligations in respect of the Facilities; or (ii) on payment under this guarantee of the Maximum Amount only upon default of the Customer of its monetary obligations in respect of the Facilities."

28. Therefore, firstly by reason of the aforesaid clauses 2(i), 2(iv)(j) and 4 of the Corporate Guarantee, the liability of the Defendant No.2 subsists until TSML's debit is settled or until payment under the Guarantee is made. Secondly, clause 2(iii) of the Guarantee is the

prior consent of the Defendant No.2 that the Plaintiff may vary the terms of its contract with TSML. As held in the cases of *Hyderabad Beverages* and *Asim Traders supra*, such prior consent in the deed of Guarantee is sufficient to constitute "the surety's consent" within the meaning of section 133 of the Contract Act. Therefore any variance of the original contract between the Plaintiff and TSML does not discharge the Defendant No.2 as surety who remains liable under the Corporate Guarantee *albeit* to the extent of USD 30,000,000/- only.

29. The upshot of the above discussion is that both Defendants have filed to make out a case for the grant of leave to defend the Suit. Consequently, the leave applications of the Defendants (CMA No.1029/2016 and CMA No.1030/2016) are dismissed. The amount outstanding and due in respect of the subject finance facilities is worked out as follows:

Under Finance Facility I (the Restructuring Agreement)	= USD 33,728,382.20/-
Under Finance Facility II (after deducting USD 3,341,708.23 charged as markup after expiry of the finance agreement)	= USD 45,917,647.34/-
Under Finance Facility III (commission on the Bank Guarantee)	= USD 81,763.53/-
Total	= USD 79,727,793.07/-

30. The leave applications having been dismissed, I would have proceeded to pass a decree but for the fact that while making submissions the learned counsel had confined themselves to the leave applications and the following aspects of the case had not been addressed by them:

(a) since a decree in the suit is to be passed in terms of local currency (PKR) and not in USD as prayed, what will be the rate of exchange applicable ?

(b) if the Foreign Currency Loans (Rate of Exchange) Order, 1982 is applicable, what is its affect, if any, on 'cost of funds' under the Financial Institutions (Recovery of Finance) Ordinance, 2001 ?

(c) keeping in view the other prayers in the suit, what should the decree be ?

Therefore, the office to list this matter for final arguments when learned counsel are expected to address the above questions for the purposes of passing a decree.

J U D G E

Karachi
Dated: 31-05-2019