

THE HIGH COURT OF SINDH, KARACHI

Suit No. B-04 of 2014

[National Bank of Pakistan versus Amna Export (Pvt.) Ltd. & others]

Plaintiff : National Bank of Pakistan through Mr. M. Khalid Shaikh Advocate.

Defendants 1-3 : Amna Export (Pvt.) Ltd. and 02 others through M/s. Asim Mansoor Khan and Muhammad Muaaz Saqib Advocates.

Dates of hearing : 04-02-2020, 19-02-2020 & 03-03-2020.

Date of decision : 09-06-2020.

ORDER

Adnan Iqbal Chaudhry J. - This order decides the leave-to-defend application of the Defendants moved under section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (FIO).

2. The claim of the Plaintiff (Bank) is for outstanding Packing Finance/Export Refinance of Rs. 449,546,190/- including markup. The Defendant No.1 has been sued as principal borrower; the Defendant No. 2 as mortgagor and surety; and the Defendant No. 3 as surety.

3. It is the case of the Bank that by sanction letter dated 21-03-2011 it renewed a previous finance limit extended to the Defendant No.1 and enhanced the same to Rs. 370,000,000/- as Packing Finance cum Export Refinance (Part-I), valid up till 31-12-2011 and repayable with markup at the rate prescribed by the State Bank of Pakistan plus 1%. Pursuant to the said sanction, the Bank and the Defendant No.1 entered into a Finance Agreement dated 22-04-2011.

4. The above finance was secured *inter alia* by the Defendant No.1 by hypothecation of its movable assets; by the Defendant No. 2 by equitable mortgage coupled with token registered mortgage deeds of seven (07) immovable properties listed in para 11 of the plaint; and by the Defendants 2 and 3 by Personal Guarantees to the extent of Rs. 451,400,000/-.

5. Mr. Asim Mansoor Khan, learned counsel for the Defendants submitted that leave to defend the suit ought to be granted on the following grounds:

(i) that the Bank has recovered from the Defendant No.1 an excess amount of Rs. 2,206,906,374/- for the recovery of which the Defendants have filed Suit No. B-57/2013 against the Bank in which leave to defend has been granted to the Bank; hence leave ought to be granted in this suit as well;

(ii) that the Bank has not accounted for repayments amounting to Rs. 2,206,906,374/- which are evidenced by deposit slips and bills of exchange annexed to the leave application;

(iii) that assuming that the bills of exchange were dishonored by the buyer/drawee, then under section 30 of the Negotiable Instruments Act, 1881 the Bank was required to issue notice of dishonor to the Defendant No.1, which it never did; therefore, the Defendant No.1 is not liable under the said bills of exchange and it is for the Bank to prove which of the bills of exchange had not been realized;

(iv) that since the Bank has not categorically denied the bills of exchange in its replication, the non-filing of the bills of exchange with the plaint is a non-compliance of section 9(2) of the FIO, 2001;

(v) that all entries in the Bank's statement of account are described simply as "transfer" without indicating the nature of the underlying transaction; thus it is for the Bank to first show what those entries relate to;

(vi) that while the plaint alleges and claims outstanding markup amounting to Rs. 79,456,190/-, such claim is not supported by any statement of account; and

(vii) that the Bank's statement of account shows a number of debit entries made on 23-01-2012 whereas the subject Finance Agreement dated 22-04-2011 had expired on 31-12-2011, and thus in the absence of a fresh contract no markup can be charged on such debits.

6. Mr. Khalid Shaikh, learned counsel for the Plaintiff submitted that the instant suit is confined to the Packing Credit/ERF-I facility under the Finance Agreement dated 22-04-2011 and does not include or carry forward any amount from any previous finance facility. He

submitted that the debit entries dated 23-01-2012 in the Bank's statement of account which are after the expiry of the subject Finance Agreement dated 22-04-2011 were in fact disbursements under that very agreement so as to release to the Defendant No.1 the remaining amount of the committed finance. He submitted that this was also done inasmuch as at the time a request by the Defendants for a rescheduling and restructuring of the outstanding finance was pending with the Bank, though such request was eventually declined. In that regard, learned counsel pointed to letters of the Defendant No.1 annexed to the leave application requesting the Bank for restructuring and rescheduling. However, learned counsel was unaware whether any fresh finance agreement was executed between the parties after the expiry of the Finance Agreement dated 22-04-2011. Though learned counsel could not deny that the claim for markup was not supported by any statement of account, he submitted that the claim for the principal amount was duly supported by a statement of account certified as per the Bankers' Books Evidence Act, 1891.

7. Heard the learned counsel and perused the record.

8. The instant suit is with regards to only one finance facility, i.e., a credit limit under the head of Packing Credit/Export Refinance-I (pre-shipment) extended by the Bank to the Defendant No.1 pursuant to a sanction letter dated 21-03-2011 and Finance Agreement dated 22-04-2011. While that facility was by way of a renewal and enhancement of a previous finance limit, the entry dated 10-03-2011 in the Bank's statement of account shows that the previous finance outstanding was repaid bringing the balance to zero, and fresh disbursements were made to the Defendant No.1 w.e.f. 30-04-2011 under the subject Finance Agreement dated 22-04-2011. Since no amount from the previous finance facility has been carried forward to the subject facility, the scrutiny of accounts in this suit is confined to disbursements and repayments made w.e.f. 30-04-2011. Apart from that, no issue was raised by learned counsel for the Defendants with

regards to the hypothecation, mortgage or personal guarantees subject matter of the suit.

9. Mr. Asim Mansoor, learned counsel for the Defendants had relied on deposits slips and bills of exchange submitted/drawn after 30-04-2011 to submit that these were repayments of the finance availed under the Finance agreement dated 22-04-2011 which repayments have not been accounted for by the Bank. However, the deposit slips relied upon relate to account No. 1476-6, whereas the loan account No. is 019032-0. Assuming that account No. 1476-6 was the current account of the Defendant No.1 from which deposits were routed to the loan account, the Defendant No.1 has not filed the statement of its current account to demonstrate that.

10. The other mode of repayment relied upon by Mr. Asim Mansoor, and which constitutes the bulk of the alleged repayment, is by way of bills of exchange. From the documents filed with the leave application, the relevant from Annexure K/303 onward, it appears that after availing finance the Defendant No.1 engaged the Bank as a collection agent by furnishing the Bank with shipping documents of its' exports along with bills of exchange drawn on the buyer/importer and made payable to the Bank. These documents were submitted to the Bank for onward delivery to the buyer's bank with instructions that the shipping documents be released to the buyer on DA basis i.e., against acceptance of bills of exchange by the buyer, as opposed to acceptance against payment (DP basis). Be that as it may, learned counsel was unable to demonstrate which ones of the bills of exchange w.e.f. 30-04-2011 had been honoured/paid by the buyer (the drawee) but not credited by the Bank (the payee). Surely, the mere drawing of the bills of exchange by the Defendant No.1 cannot constitute repayment of the finance.

11. Mr. Asim Mansoor had then submitted that if any of the bills of exchange had not been honoured for payment by the buyer/importer, then the Bank was required by section 30 of the Negotiable Instruments Act, 1881 to give the Defendant No.1 a notice

of dishonor of the bills which it never did. However, I see no point in delving into such argument further when the Bank has not sued the Defendant No.1 on the bills of exchange but has sued it on the Finance Agreement (markup agreement) dated 22-04-2011 which constitutes a cause of action independent of the bills of exchange/negotiable instrument. It is apparent that the bills of exchange along with the shipping documents were provided by the Defendant No.1 to the Bank under a collateral contract between the parties. In my view, the Bank can have recourse against the Defendant No.1 on the original contract between the parties viz. the Finance Agreement dated 22-04-2011 while forgoing an action on the bills of exchange received under a collateral contract between the parties. Since the Bank has opted to do so, it is pointless for the Defendants to assert the collateral contract in defense. For that proposition reliance can be placed on *United Bank Ltd. v. Taj Seafood Industries* (PLD 1975 Kar 410); *Habib Bank Ltd. v. Mahmood Ahmed* (2004 CLD 1703); and *BOC Pakistan Ltd. v. National Gases (Pvt.) Ltd.* (2013 CLD 889). The case of *National Bank of Pakistan v. Shahyar Textile Mills Ltd.* (2003 CLD 1370) relied upon by Mr. Asim Mansoor is of no help to him as in that case the bank had sued on the bills of exchange.

12. Getting down to the brass tacks of the case; w.e.f. 30-04-2011, the debits in the Bank's statement of account, claimed to be disbursements under the Finance Agreement dated 22-04-2011, add up to Rs. 740,000,000/- ; while the credits, said to be repayments thereof, add up to Rs. 370,000,000/- ; hence the claim for the outstanding principal amount of Rs. 370,000,000/-. But oddly, all entries in the Bank's statement of account are simply described as 'transfer'. From such description of entries, and more particularly of debit entries which charge the loan account of the customer substantially, it cannot be deciphered which entries represent actual disbursement. Rather such description creates a doubt when there is no indication of the account from which such transfers were made. A 'transfer' debited to the loan account may well be a liability transferred from the account of a finance facility not subject matter of the suit, or a charge otherwise not contemplated under the contract

between the parties. Regards the credit entries described simply as 'transfer', the transactions recognized as repayments cannot be deciphered, and consequently the Defendants are disadvantaged in demonstrating which transaction was not recorded as repayment. The effect of such vague statement of account is not only that it keeps the customer in the dark of the transactions it purports to encompass and thus prejudices the defense, it also does not assist the Court in determining accounts between the parties. In other words, the statement of account filed by the Bank is incomplete evidence. Excepting the acknowledged amount which is discussed *infra*, the statement of account requires further proof and thus it cannot be received as *prima facie* evidence within the meaning of section 4 of the Bankers' Books Evidence Act, 1891. In the case of *United Dairies Farms (Pvt.) Ltd. v. United Bank Ltd.* (2005 CLD 569), the statement of account comprised of transfer entries which did not reveal the accounts wherefrom those originated. A learned Division Bench of the Lahore High Court held that the presentation of an integrated picture of the transactional history in a customer's account is also to enable the Banking Court to determine the correct financial liability of the customer; that if the statement of account is presented in an incomprehensible manner, its contents would require corroboration; and that for a statement of account to attract the evidentiary presumption under the Bankers' Books Evidence Act, 1891, it must have attributes of clarity, detail and completeness. Again, in the case of *Habib-ur-Rehman v. Judge Banking Court No.4, Lahore* (2006 CLD 2017) one of the grounds for allowing a banking appeal was that substantial debit entries in the bank's statement of account were identified merely as 'to transfer' without explaining where and on what authority those transfers were made.

13. Having held as above, I have noticed that out of the alleged disbursement of Rs. 740,000,000/- under the subject Finance Agreement, the statement of account filed by the Defendant No.1 with the leave application (Annexure B) acknowledges a disbursement of Rs. 370,000,000/- which reconciles with the Bank's statement of account in debit entries from 30-04-2011 to 06-09-2011.

Thus, the issue between the parties with regards to the principal amount can be confined to the disbursement of the remaining principal amount of Rs. 370,000,000/- which the Bank claims to have made vide debit entries of 'transfer' from 10-11-2011 to 23-01-2012, and to the credit 'transfer' transactions which purport to be the amount recovered from 30-04-2011 onwards.

14. As regards markup on the subject finance facility, though the plaintiff claims an outstanding markup of Rs. 79,456,190/-, no statement of account has been filed by the Bank in support of such claim. It is settled law that the omission by the bank to support its claim or any part thereof by a duly certified statement of account is a non-compliance of the mandatory provision of section 9(2) of the FIO, 2001¹. In the circumstances of the case, the effect of such non-compliance entails grant of leave to defend. Assuming that the debit entries dated 23-01-2012 amounting to Rs. 92,800,000/- in the statement of account of the principal amount were disbursements to the Defendant No.1, since those entries appear after 31-12-2011, the date of expiry of the subject Finance Agreement, the additional question of fact that arises is whether there was any fresh contract between the parties for charging markup on that amount of Rs. 92,800,000/-.

15. For the foregoing reasons, CMA No. 2958/2014 is allowed in terms that leave to defend the suit is granted to the Defendants to the extent of the following issues only:

- (i) Whether debit transfer entries in the Plaintiff's statement of account w.e.f. 10-11-2011 are also disbursements of finance under the Finance Agreement dated 22-04-2011 ?
- (ii) What are the transactions underlying the credit transfer entries commencing from 30-04-2011 which have been adjusted by the Plaintiff as repayments ?
- (iii) Whether any amount over and above Rs. 370,000,000/- was repaid by or on behalf of the Defendant No.1 under the Finance Agreement dated 22-04-2011 ?

¹ *Elbow Room v. MCB Bank Ltd.* (2014 CLD 985); and *Soneri Bank Ltd. v. Classic Denim Mills (Pvt.) Ltd.* (2011 CLD 408).

- (iv) To what amount is the Plaintiff entitled as markup for the period 30-04-2011 to 31-12-2011 ?
- (v) Whether the Plaintiff is entitled to markup on the sum of Rs. 92,800,000/- said to be disbursed on 23-01-2012 after the expiry of the Finance Agreement dated 22-04-2011 ?
- (vi) What should the decree be ?

The leave application of the Defendants shall be treated as their written statement. The parties are allowed to file list of documents within 3 week.

JUDGE

Karachi:
Dated: 09-06-2020