

THE HIGH COURT OF SINDH, KARACHI

Suit No. B-02 of 2017

[Bankers Equity Limited versus Galadari Cement (Gulf) Limited & others]

Plaintiff : Bankers Equity Limited (In Liquidation) through Waqar Ahmed, Advocate.

Defendants : Galadari Cement (Gulf) Limited and others through Mr. Muhammad Salim Thepdawala, Advocate.

Dates of hearing : 06-02-2020, 20-02-2020 & 04-03-2020.

Date of decision : 17-06-2020.

ORDER

Adnan Iqbal Chaudhry J. - This order decides CMA No. 2054/2017 seeking leave to defend under section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (FIO).

2. The Defendant No.1 has been sued as principal borrower and mortgagor while the other Defendants have been sued as sureties and pawners. On behalf of the Defendant No.1, the leave application has been signed by its Chief Executive, Mr. Faisal Alam Khan. Though Mr. Salim Thepdawala's vakalatnama and the verification clause of the leave application state that Mr. Faisal Alam Khan also acts as Attorney of the other Defendants, the Power of Attorney annexed to the leave application is executed only by the Defendants 3, 4 and 6. This fact was noticed while writing this order in Chambers after the matter had been reserved for orders. Therefore, the Additional Registrar (O.S.) shall probe into the said aspect, and if there is no Power of Attorney on behalf of the Defendants 2(i) to 2(vii), 5 and 7, the Additional Registrar shall put up a report as to sufficiency of service of summons on the said Defendants, most of whom are shown to be residing abroad. I proceed to decide the matter on the

assumption that the Defendants 2(i) to 2(vii), 5 and 7 were duly served. In the event the report of the Additional Registrar is otherwise, nothing herein shall be read to the disadvantage of the defendants unserved.

3. The Defendant No.1 endeavored to set up a cement factory at Lasbella, Balochistan (the Project). The initial capital for the Project was provided by the sponsors of the Defendant No.1 and by foreign lenders. The land for the Project was acquired by the Government of Balochistan for the Defendant No.1 under the Land Acquisition Act.

4. To meet the local currency cost of the Project, the Defendant No.1 applied for finance to the Bankers Equity Limited (BEL - the Plaintiff) as the lead bank of a syndicate of financial institutions comprising of BEL, NBP, HBL, UBL, MCB and ABL (the Syndicate). By Investment Agreement dated 25-04-1982, the Syndicate agreed to finance the Project against issue of Participation Term Certificates by the Defendant No.1 to the Syndicate members (the PTC facility). The contribution committed by each member of the Syndicate to the finance facility was highlighted in the Investment Agreement; hence this separate suit by BEL to recover the amount extended by it. 'Finance Facility-I' in the plaint is an amount of Rs. 68,180,378/- (including markup) said to be outstanding and payable to the Plaintiff in respect of the PTC facility under the Investment Agreement dated 25-04-1982. However, this amount of Rs. 68,180,378/- is claimed by the Plaintiff under the head of 'Finance Facility-IV', the LT-TFC facility, as it was contended on the Plaintiff's behalf that the said amount was subsequently rescheduled and converted to the LT-TFC facility discussed *infra*.

5. For setting-up the Project, the Defendant No.1 entered into technical contracts with foreign contractors. To meet the cost of such contacts the Defendant No.1 entered into a Credit Agreement dated 14-12-1994 with a consortium of French lenders. To secure the French

lenders the NBP agreed with the Defendant No.1 vide Agreement of Guarantee dated 24-01-1995 to give a bank guarantee to the French lenders; and to secure NBP, the Syndicate and the IDBP agreed to provide a counter-guarantee to NBP, which was so executed by the Syndicate vide Counter Guarantee dated 13-07-1995. Pursuant to another Agreement to Guarantee dated 18-06-1995, HBL provided an exchange risk cover to NBP, and the Syndicate and IDBP provided a Counter Guarantee to secure HBL. None of the two Counter Guarantees were called. 'Finance Facility-II' and 'Finance Facility-III' in the plaint is BEL's claim for its share of the commission outstanding on the two Counter Guarantees.

6. By sanction letter dated 06-11-1994, read with a revised sanction letter dated 12-06-1995, the Syndicate also approved Long Term TFC financing for the Project (LT-TFC facility). Pursuant thereto, the Defendant No.1 and the Syndicate entered into an Investment Agreement dated 26-03-1996 amended by a Supplementary Investment Agreement dated 10-03-2000. BEL's commitment under the LT-TFC facility was to extend a sum of Rs. 88,414,000/-. 'Finance Facility-IV' in the plaint is BEL's claim for recovery of the amount extended under the LT-TFC facility along with markup.

7. On 27-12-2002, the Government of Pakistan (GoP) and the Government of France entered into an agreement to reorganize certain debts of the GoP to the French Republic (the Paris Club Agreement), including commercial credits guaranteed by financial institutions on behalf of the French Republic to the public sector of the GoP. The said agreement also provided that debt service due by the private sector and guaranteed by a public sector commercial bank would be included in the reorganization under certain conditions. It appears that in 2005, the GoP included within the reorganization of the Paris Club Agreement the bank guarantee given by NBP to the French lenders on behalf of the Defendant No.1, and required NBP to

substitute such bank guarantee with a fresh bank guarantee in favor of the GoP. The NBP in turn required a fresh counter guarantee from the Syndicate. It appears that despite negotiations between the GoP, the NBP, the Syndicate members and the Defendant No.1, which carried on till 2015, neither the NBP issued a fresh guarantee in favor of the GoP, nor did the Syndicate issue a fresh counter-guarantee to NBP. The Defendant No.1 has filed Suit No. B-02/2016 before this Court against the NBP and the Syndicate to enforce a restructuring and rescheduling of its debt, which according to it, is a necessary consequence of the Paris Club Agreement.

8. Mr. Salim Thepdawala, learned counsel for the Defendants submitted that pursuant to the Paris Club Agreement, the reorganization by the GoP of part of the debt owed by the Defendant No.1 to NBP was an event beyond the control of the Defendant No.1; that pursuant to such reorganization, the GoP had agreed to finance the Project once NBP provided a fresh bank guarantee to the GoP; but that, even though the sponsors of the Defendant No.1 injected further equity into the Project, the NBP did not issue the required bank guarantee to the GoP, and consequently the Syndicate also did not give a fresh counter-guarantee to the NBP; that the failure of NBP and the Syndicate to adhere to the instructions of the GoP left the Project in doldrums; that in the circumstances where the GoP, the NBP and the Syndicate have acted to the detriment of the Defendant No.1, it is not liable for the alleged default. Learned counsel further submitted that once the debt of the Defendant No.1 was included by the GoP for reorganization pursuant to the Paris Club Agreement, the previous finance agreements stand superseded. The leave application further contends that except a sum of Rs. 27,500,000/- under the Investment Agreement dated 25-04-1982 (the PTC facility), no other finance was actually disbursed to the Defendant No.1, and that only a sum of Rs. 7,212,405/- was outstanding, the payment of which was conditioned on completion of the Project.

9. Mr. Waqar Ahmed, learned counsel for the Plaintiff submitted that the Defendant No.1 was in default long before the GoP decided to bring part of the debt of the Defendant No.1 under Paris Club Agreement; that the Plaintiff cannot be compelled to forgo the amount due to it; and that in any case, after the Plaintiff came under liquidation, it could not extend any further concessions to the Defendant No.1 by way of restructuring or rescheduling. Learned counsel submitted that the record shows that the liability of Rs. 68,180,378/- under the Investment Agreement dated 25-04-1982 (the PTC facility) has been acknowledged by the Defendant No.1 from time to time; that the LT-TFC facility was utilized by the Defendant No.1 to adjust the liability of Rs. 68,180,378/- accrued under the Investment Agreement dated 25-04-1982; that the remaining amount of Rs. 20,233,622/- committed by BEL under the LT-TFC facility was duly disbursed to the Defendant No.1; and that since the Defendant No.1 had paid part of the commission accrued in the Counter Guarantees, it is now estopped from disputing the same.

10. Heard the learned counsel and perused the record.

11. Mr. Salim Thepdawala's prime argument was essentially that once the GoP had interfered on the basis of the Paris Club Agreement with the financial arrangements of the Defendant No.1 to its detriment, then a restructuring and rescheduling of the entire debt of the Defendant No.1 was a necessary consequence for which the Defendant No.1 had filed Suit No. B-02/2016, and therefore the Defendant No.1 was not in default. While I am not inclined to address that argument here lest the case of any party in Suit No. B-02/2016 is prejudiced, but for the purposes of the instant suit suffice to say that until a contract is concluded between the parties of the instant suit for rescheduling or restructuring, the Plaintiff remains entitled to sue for the debt already accrued to it. Therefore, I proceed to examine the merits of the Plaintiff's claim.

12. Under the Investment Agreement dated 25-04-1982 between the Syndicate and the Defendant No.1 (the PTC facility), the finance was to be secured by a mortgage of the fixed assets of the Defendant No.1. However, pending the groundwork for creating the mortgage, the Defendant No.1 was in need of finance and therefore the Defendant No.1 furnished the Plaintiff with performance guarantees dated 21-09-1982 and 10-07-1984 issued by another financial institution to secure the release of a sum of Rs. 27,500,000/- to the Defendant No.1 out of the Plaintiff's share of the finance committed under the Investment Agreement dated 25-04-1982. Admittedly, that was the only amount disbursed by the Plaintiff under the PTC facility. The above mentioned performance guarantees given to secure the PTC facility were renewed upto 31-08-1990. Thereafter, by an Agreement to create Mortgage dated 25-10-1994, the Defendant No.1 acknowledged its liability to pay the Plaintiff under the Investment Agreement dated 25-04-1982 (PTC facility) the principal amount of Rs. 27,500,000/- along with markup of Rs. 40,405,378/- plus charges, adding to a total of Rs. 68,180,378/-, and secured the same by an equitable mortgage of its property at Lasbella, Balochistan, more particularly described in para 5(i) of the plaint.

13. It was contended by Mr. Waqar Ahmed for the Plaintiff that the amount of Rs. 68,180,378/- outstanding under the Investment Agreement dated 25-04-1982 (the PTC facility) was rescheduled and converted to the LT-TFC facility; and to meet the Plaintiff's commitment of Rs. 88,414,000/- under the Investment Agreement dated 26-03-1996, the Plaintiff made a further disbursement of Rs. 20,233,622/- to the Defendant No.1 as LT-TFC finance. However, the record does not show any contract between the parties for the rescheduling of Rs. 68,180,378/- outstanding under the Investment Agreement dated 25-04-1982 (the PTC facility) and for its conversion to the LT-TFC facility. The sanction letters dated 06-11-1994 and 12-06-1995, and the Investment Agreement dated 26-03-1996 with regards to the LT-TFC facility make no mention of the rescheduling

and conversion. In support of his contention, Mr. Waqar Ahmed had relied on the account summary of the LT-TFC facility at Annexure O/7 to the plaint which states that "*Amount of rescheduled / conversion PTCs – Rs. 68,180,378/-*". But even that does not disclose the date on which the amount of Rs. 68,180,378/- in question was transferred to the LT-TFC account. In any case, Annexure O/7 is admittedly only a break-up of the LT-TFC facility. It is not a statement of account as it does as it does not bear the certification required of section 2(8) of the Bankers' Books Evidence Act, 1891. In fact, there is no statement of account with regards to the principal amount of the LT-TFC facility to show the entry of disbursement of Rs. 20,233,622/- and its date, to show transfer of Rs. 68,180,378/- to the LT-TFC account and its date, or to show entries of bank charges claimed on the LT-TFC facility. The absence of such a statement of account is not only a non-compliance of section 9(2) of the FIO 2001, it also lends support to the contention of the Defendant No.1 that no amount was actually disbursed under the LT-TFC facility, and thus constitutes a ground for leave to defend.

14. If the Plaintiff cannot prove that there was an agreement between the parties to reschedule and convert the amount of Rs. 68,180,378/- outstanding under the Investment Agreement dated 25-04-1982 to the LT-TFC facility, then its claim for the same may well be time-barred. The Agreement to create Mortgage dated 25-10-1994 and the statement of account of the PTC facility (Annexure O) manifest that as far as the Plaintiff was concerned, it had terminated/recalled the Investment Agreement dated 25-04-1982 (the PTC facility) on 31-08-1993 as no further markup was charged thereafter. Thus, 31-08-1993 was the date on which the outstanding amount of Rs. 68,180,378/- in respect of the PTC facility became due and payable to the Plaintiff and limitation to sue for the same commenced. However, since the said liability was subsequently acknowledged by the Defendant No.1 vide Agreement to create Mortgage dated 25-10-1994, in terms of section 19 of the Limitation Act, a fresh period of

limitation began to run from 25-10-1994. Given the mortgage, limitation was governed by Article 132 of the Limitation Act, and thus, a suit for the recovery of the said Rs. 68,180,378/- could have been filed within 12 years i.e. uptill 24-10-2006. However, since it was contended by Mr. Waqar Ahmed that the Defendant No.1 had time and again acknowledged its liability to pay the said sum of Rs. 68,180,378/-, that too would be a question of fact requiring evidence to see whether any such acknowledgment was made before 24-10-2006 so as to extend the period of limitation by virtue of section 19 of the Limitation Act.

15. The Plaintiff claims Rs. 282,977,616/- as markup over the LT-TFC facility. On the other hand, from the Investment Agreement dated 26-03-1996 as amended by the Supplementary Investment Agreement dated 10-03-2000, it appears that the total liability of the Defendant No.1 to the Plaintiff in respect of the LT-TFC facility did not exceed Rs. 175,115,929/- including markup (after accounting for the prompt payment bonus). The additional markup charged by the Plaintiff remains unexplained. While the statement of account at Annexure O/6 to the plaint shows the number of days for which markup was charged on the LT-TFC facility, oddly it does not give the dates on which entries of markup were made in the account. While para 8 of the plaint acknowledges that Rs. 573,067/- was paid towards markup '*from time to time*', Annexure O/6 shows no entry of repayment. Such statement of account is incomplete evidence of the underlying transactions and cannot be received as *prima facie* evidence within the meaning of section 4 of the Bankers' Books Evidence Act, 1891. In that regard, reliance can be placed on the cases of *Elbow Room v. MCB Bank Ltd.* (2014 CLD 985) and *United Dairies Farms (Pvt.) Ltd. v. United Bank Ltd.* (2005 CLD 569). Resultantly, the Defendant No.1 is also entitled to leave to defend the Plaintiff's claim in respect of the markup claimed on the LT-TFC facility.

16. The Counter Guarantees were given by the Syndicate in 1995. Per Annexure O/2 and O/4 to the plaint, these Counter Guarantees had matured on 24-07-2003. If that is correct, then limitation for recovery of commission outstanding on the Counter Guarantees commenced from 24-07-2003 and the instant suit filed on 30-12-2016 appears to be time-barred even under Article 132 of the Limitation Act. It will be for the Plaintiff to establish by evidence whether that period of limitation stood extended by virtue of section 19 of the Limitation Act. Further, Annexure O/2 and Annexure O/4 which purport to be statement of account for the commission outstanding, do not give the dates on which accrued commission was charged to the account, nor the dates on which part payment of the commission was received by the Plaintiff. For the law already discussed in para 15 above, Annexure O/2 and Annexure O/4 cannot be received as *prima facie* evidence within the meaning of section 4 of the Bankers' Books Evidence Act, 1891. Resultantly, the Defendant No.1 is entitled to leave to also defend the Plaintiff's claim in respect of commission outstanding on the Counter Guarantees as well.

17. The LT-TFC facility and the Counter Guarantees were also secured by the Defendant No.1 by assigning two Mining Leases dated 08-09-1994 to the Plaintiff vide Assignment Deed dated 14-06-1995. These Mining Leases were granted to the Defendant No.1 by the Directorate of Mineral Development, Government of Balochistan for a period of 30 years to mine limestone and shale from land near the Project land for extracting raw material for cement production. One of the Plaintiff's prayer is for the sale of the mining rights assigned to it by the Defendant No.1. Mr. Saleem Thepdawala had submitted that the Mining Leases had been cancelled by the Government of Balochistan. That much is also pleaded in the Suit No. B-02/2016 filed by the Defendant No.1 against the Syndicate. The Mining Leases were not filed with the plaint but were placed on the record during the course of hearing. I am of the view, that to exercise rights under the Assignment Deed dated 14-06-1995 the Plaintiff will have to

demonstrate that the underlying Mining Leases are intact, and that its prayer is not in conflict with the terms and conditions of the Mining Leases and the Balochistan Mineral Rules, 2002; a mixed question of law and fact necessitating the grant of leave to defend.

18. The Plaintiff also seeks recovery from sureties. One Abdul Latif E. Galadari had executed a personal guarantee dated 03-11-1994 to pay the outstanding amount of Rs. 68,180,378/- under the Investment Agreement dated 25-04-1982 (the PTC facility), and personal guarantees dated 01-03-1995 and 28-06-1995 to repay the LT-TFC facility and the Counter Guarantee facilities. Per para 20.11 of the leave application, Abdul Latif E. Galadari passed away on 09-03-2002. Since he had already incurred liability under the subject finance facilities before he passed away, the provision of section 131 of the Contract Act would not be triggered to revoke his personal guarantee and hence the suit has been filed against his legal heirs, the Defendants 2(i) to 2(vii). However, I note here that in the event the Defendants 2(i) to 2(vii) are found liable, their liability would extend only to the estate that they inherited from the deceased surety¹. The LT-TFC facility and the Counter Guarantee facilities had also been guaranteed by the Defendants 3, 4, 5 vide personal guarantees dated 01-03-1995 and 28-06-1995, and by the Defendant No.6 by personal guarantees dated 31-07-1996. For the same facilities, Abdul Latif E. Galadari and the Defendant No.7 had also executed agreements dated 20-11-1996 and 21-11-1996 respectively pledging shares held by them in the Defendant No.1.

19. Again, the question that arises is whether this suit to the extent of recovery against the sureties, for sale of the pledged shares against the pawnors, and for sale of hypothecated movables of the Defendant No.1 is time-barred. Though limitation had not been taken as a defense against any of the finance facilities, however, in view of

¹ *Qasim & Co. v. Bolan Bank Ltd.* (2005 CLD 723); and *Industrial Bank of Pakistan v. Roqaiya Begum* (1986 CLC 1592).

section 3 of the Limitation Act, 1908, such question has to be examined by the Court nonetheless.

20. Per Annexure O/2 and O/4 to the plaint, the Counter Guarantees had matured on 24-07-2003. It is the Plaintiff's case that the PTC facility had been converted to the LT-TFC facility (though yet to be proved), and per the Supplementary Investment Agreement dated 10-03-2000, the last instalment of the LT-TFC facility was due on 01-01-2008. Assuming all those facts were accurately described by the Plaintiff, then it is the Plaintiff's own case that the subject finance facilities became due for repayment in 2003 and 2008 respectively, and therefore that is when limitation commenced to sue the Defendant No.1 for recovery as principal debtor. Even if the Plaintiff can establish that the suit is within the limitation of 12 years under Article 132 of the Limitation Act to recover all of the subject finance facilities, that Article extends only 'to enforce money charged upon immovable property' and thus only to the extent the suit is against the Defendant No.1 as mortgagor. Article 132 of the Limitation Act would not govern limitation for seeking sale of hypothecated movables, or against the pawners for sale of pledged shares, or for recovery against the sureties.

21. With regards to recovery from sureties, the question would be whether limitation to sue the sureties also commenced at the same time as against the Defendant No.1 ? There appears to be consensus of judicial opinion² on two principles. Firstly, section 128 of the Contract Act which provides that the liability of the surety is co-extensive with that of the principal debtor, that is not intended to nullify statutes of limitation. Secondly, the liability of the principal

² Case-law examined: *Brojendro Kissore Roy Chowdhury v. Hindusthan Cooperative Insurance Society Ltd.* (AIR 1918 Calcutta 707); *Charu Chandra v. L. Faithful* (AIR 1919 Cal 636); *Commerce Bank Limited v. Crescent Paint Colour and Varnish Works Ltd.* (PLD 1975 Karachi 504); *United Bank Ltd. v. Haji Bawa Company Ltd.* (1981 CLC 89); *National Bank of Pakistan v. F.S. Aitzazuddin* (PLD 1982 Karachi 577); *Industrial Development Bank of Pakistan v. Roqaiya Begum* (1986 CLC 1592); and *Syndicate Bank v. Channaveerappa Beleri* (AIR 2006 SC 1874).

debtor and his surety, though arising under the same transaction, are distinct and separate; and therefore, resort is to be first made to the terms and conditions of the guarantee to determine the point in time when the surety accrues liability and limitation commences to sue him. However, in the circumstances of the case, where it was contended on behalf of the Plaintiff that liability had been acknowledged by all Defendants from time to time, the question of limitation to sue the sureties also appears to be a mixed question of law and fact requiring evidence, and therefore it would be pointless at this stage to examine the terms and conditions of the personal guarantees.

22. In view of the foregoing, leave to defend is granted to determine the following issues :

- (i) Whether there was any contract between the Plaintiff and the Defendant No.1 for the rescheduling of Rs. 68,180,378/- outstanding under the Investment Agreement dated 25-04-1982 (the PTC facility) and for its conversion to the LT-TFC facility ? If not, whether the Plaintiff's claim for the said Rs. 68,180,378/- against the Defendant No.1 is time-barred ?
- (ii) Whether a sum of Rs. 20,233,622/- was disbursed to the Defendant No.1 under the LT-TFC facility ?
- (iii) To what amount is the Plaintiff entitled as markup on the LT-TFC facility ?
- (iv) Whether the Plaintiff's claim for commission outstanding on the Counter Guarantees given to NBP and HBL is time-barred against the Defendant No.1 ? If not, to what commission is the Plaintiff entitled ?
- (v) Whether the Mining Leases dated 08-09-1994 granted to the Defendant No.1 are still intact? If so, whether the Plaintiff's prayer for sale of mining rights assigned to it under the Assignment Deed dated 14-06-1995 can be granted ?
- (vi) Whether the prayer for sale of hypothecated movables of the Defendant No.1 is time-barred ?

- (vii) Whether the suit, to the extent it is against the Defendants 2(i) to 2(vii) and the Defendant No.7 for sale of pledged shares, is time-barred ?
- (viii) Whether the suit, to the extent it is against the Defendants 2(i) to 6 as sureties, is time barred ?
- (ix) What should the decree be ?

Subject to the report of the Additional Registrar sought at the outset of this order, the leave application shall be treated as written statement of the Defendants who had authorized the same, and the parties are permitted to file list of documents within three weeks.

JUDGE

Karachi:
Dated: 17-06-2020