THE HIGH COURT OF SINDH, KARACHI

Suit No. B – 58 of 2015

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

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| Plaintiff | : | National Bank of Pakistan through Mr. Waqar Ahmed, Advocate. |
| Defendants | : | Tuwairqi Steel Mills Limited and Al-Tuwairqi Holding Company through Mr. Ali Akhtar Advocate, holding brief for M/s. Khalid Mehmood Siddiqui and Ghulam Rasool Korai, Advocates. |
| Date of hearing | : | 08-12-2020 |
| Date of decision | : | 10-02-2021 |

# JUDGMENT

**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) has been sued as the principal debtor; while the Defendant No.2, Al-Tuwairqi Holding Company, has been sued as surety.

2. Order dated 31-05-2019 passed in this suit shall be read as part of this judgment. By that order, leave to defend the suit was declined to the Defendants and the order culminated as follows:

> "28. …….. 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.
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> 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:
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> 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/-

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| Under Finance Facility III<br>(commission on the Bank Guarantee) | =USD | 81,763.53/- |
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| 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."

3. Questions (a) and (b) above had arisen in view of the Foreign Currency Loans (Rate of Exchange) Order, 1982, the relevant provisions of which stipulate that:

"**2. Definitions.-** In this Order, unless there is anything repugnant in the subject or context,--

(a) "financial institution" means the Pakistan Industrial Credit and Investment Corporation Limited, the Industrial Development Bank of Pakistan, the National Development Finance Corporation, the Bankers Equity Limited and the Small Business Finance Corporation and includes any other financial institution advancing loans in foreign currencies which the Federal Government may, by notification in the official Gazette, declare to be a financial institution within the meaning of this Order;

**3. Rate of exchange applicable to foreign currency loans.-** For the removal of doubts, it is hereby declared that notwithstanding anything contained in any other law for the time being in force, the judgment of any Court or any agreement, contract or other instrument, the rate of exchange for the purpose of conversion into Pakistan currency for repayment in respect of an outstanding foreign currency loan or any part thereof or interest in respect is thereof payable to a financial institution on the day of commencement of this Order shall be, and shall be deemed at all material times to have been, the rate of exchange in force under Section 23 of the State Bank of Pakistan Act, 1956

(XXXIII of 1956), on the day on which the loan, part or interest is actually repaid or paid to the financial institution; and all parties by whom the loan, part or interest is repayable or payable shall make the repayment or payment accordingly".

4. Learned counsel for the Plaintiff submitted that though the Plaintiff was not notified as a financial institution under section 2(a) of the Foreign Currency Loans (Rate of Exchange) Order, 1982, but nevertheless, it has been held by the Supreme Court of Pakistan in *Terni SPA v. PECO (Pakistan Engineering Company) Ltd.* (1992 SCMR 2238) and *Sandoz Ltd. v. Federation of Pakistan* (1995 SCMR 1431) that a decree in Pakistan can be passed in foreign currency, and the rate of exchange applicable would the one prevailing on the date of payment.

5. In *Terni SPA v. PECO (Pakistan Engineering Company) Ltd.* (1992 SCMR 2238) the Supreme Court held that :

> "27. For all the above reasons, we consider that fresh considerations of a substantive nature have emerged which compel us to change the old view. Justice demands that the creditor should not suffer from fluctuations in the value of the Pakistani rupee. If his contract is for a foreign currency and he has bargained for the same, he should get that currency and no other. ……. If a judgment can be given 'for so much in foreign currency or the Pak rupees equivalent thereof'; it is giving effect to the substantive obligation of the contract and the Civil Procedure Code would not in any case stand in the way. This Court can depart from a previous rule or interpretation if it feels that circumstances have changed and that not to do so would lead to injustice. The development of the law should not be permitted to be stifled. It should move with the time and articulate the changes coming in. <u>We would therefore hold that a Pakistani Court can grant a judgment for 'so much in foreign currency or the Pak Rupees equivalent thereof'</u>.
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> 28. The next question that arises is what should be the date which this Court should impose for converting into rupees the equivalent of the foreign currency. …….. The Pakistani Courts have been following the old English rule. …… However, in view of the change in the circumstances detailed above, it is necessary to also effect similar change here. In Syndic in Bankruptcy of Nasrullah Khoury's case (supra), Lord Wright, J:, whilst calling attention to the date at which the rate of exchange should be calculated, referred to the fact that different views had been taken at different times and by different systems of laws. He

stated that "indeed there are at least four different alternative rules which might be adopted. The rate of exchange might be determined as at the date at which payment was due, or at the date of actual payment, or at the date of the commencement of proceedings to enforce payment or at the date of judgment". However, he later found that there was no doubt that the first rule applied. In Marrache v. Ashton 1943 A.C. 311, in a suit brought on a debt payable in a foreign currency, the rate of exchange was calculated as on the date the plaintiff took out a writ of summons in the Supreme Court of Gibralter, which would correspond in our system to the date of institution of suit. Since the parties were not at dispute on this date, the Privy Council ordered the conversion in terms of that date. This case coming from high authority also shows that the date of the commencement of the suit can be treated as a material date for calculating the rate of exchange. In 1982, the Foreign Currency Loans (Rate of Exchange) Order, 1982, which was enacted in Pakistan, recognised the rule laid down by the House of Lords in Miliangos' case (supra). Therefore, in keeping with the moving trend and the sweeping changes in the economic field that have been ushered in and to support the same and be in line with the law in England, we would, for reasons stated in para 27 above, hold that if a judgment and decree is given for 'so much in foreign currency or the Pak rupees equivalent thereof at the time of payment', we would be articulating the correct law in keeping with the changing time. In stating this rule, we would like to make it clear that questions of cause of action or limitation must be treated separately, which shall continue to be governed by the law on those subjects and the application of this rule should be treated as without prejudice to these two matters. We would therefore, hold that where the money of account in respect of a contract is a foreign currency, or where it is not so but under the contract the particular account claimed is payable in a particular foreign currency, and demand is made for payment in that foreign currency, the Pakistani Courts can give judgment in 'so much of that foreign currency or the Pak rupees equivalent thereof at the time of payment'. Here it must be stated that where the decree is in such terms, the language of the decree, as stated in para 18 above, would give the judgment-debtor the option to either make payment in foreign currency or in Pak rupees, and execution can always be taken out by the decree-holder if no payment is made by the judgment-debtor in respect of so many Pak rupees as equal the foreign currency at the rate of exchange prevalent on the date the payment is made."

6. In view of what has been held in *Terni SPA* above (underlining supplied to highlight), and then reiterated in the case of *Sandoz Ltd. supra,* it seems to be settled that even if a case does not attract the provisions of the Foreign Currency Loans (Rate of Exchange) Order, 1982, a decree in foreign currency or its equivalent in Pak rupee on

the date of payment, can be passed if the conditions highlighted in *Terni SPA* are met. In the instant suit the said conditions are met, in that the account of the finance contracts is in a foreign currency (USD), made payable in that foreign currency, and the demand in the suit is for payment in that foreign currency. The amount payable in foreign currency has already been determined as USD 79,727,793.07/- vide order dated 31-05-2019 reproduced above.

7. By virtue of section 3(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001, the Plaintiff is also entitled to cost of funds from the date of default till realization. The 'date of default' for each of the finance facilities is determined as follows:

(i) Though the last installment under the Restructuring Agreement dated 01-10-2012 (Finance Facility I) was payable on 03-08-2018, clause 1.5 thereof provided that the agreement could be terminated earlier in the event of a default by TSML. Owing to default by TSML, the Plaintiff terminated the Restructuring Agreement by legal notice dated 08-10-2015. Therefore, the date of default of Finance Facility I (USD 33,728,382.20) would be 08-10-2015.

(ii) The date of default of Finance Facility II (USD 45,917,647.34) as per clause 1.5 and Schedule 3 of the Finance agreement dated 21-06-2013 would be its Termination Date of 30-06-2014 when any and all amount thereunder became payable by TSML to the Plaintiff.

(iii) The date of default of Finance Facility III viz. commission on the Bank Guarantee (USD 81,763.53) would be 18-06-2014 being the date on which such commission accrued as per the statement of account at Annexure S to the plaint at page 1583.

8. The Plaintiff prays for the attachment and sale of hypothecated assets of the Defendant No.1. Under letter of hypothecation dated 14-09-2012, the hypothecated assets were *"all present and future raw materials, inventories, spares and stores wherever located/lying"*. Under letter of hypothecation dated 12-06-2012, the hypothecated assets

were *"present and future fixed assets (excluding the land)"* on *pari passu* basis with the Islamic Corporation for the Development of the Private Sector and Bank Al Habib Ltd. Execution of the letters of hypothecation is not under dispute. Hence, the Plaintiff is entitled to a decree accordingly.

9. The Plaintiff also prays for attachment and sale of pledged goods. However, the letters of pledge dated 14-09-2012 and 21-06-2013 show that the same were agreements to pledge finished goods in *futuro* and not a pledge in *praesenti*. Such agreements were executed in anticipation that the steel mill of TSML would come into production. Apparently, that never happened. Nonetheless, the Plaintiff has not filed any material to show that the pledge came into existence, nor any description or ledger of the goods that came to be pledged. In these circumstances, prayer clause (5) is declined.

10. As regards the prayer for attachment and sale of *'all other assets'* of the Defendants, suffice to say that no decree can follow for attachment and sale of any asset not charged to the Plaintiff. Therefore, prayer clauses (4) and (6) are also declined.

11. In view of the foregoing, the suit is decreed in favor of the Plaintiff as follows:

(a) for a sum of US$ 79,727,793.07 (USD seventy nine million, seven hundred twenty seven thousand, seven hundred ninety three and seven cents only) or Pak rupee equivalent thereof as on the date of payment, plus cost of funds under section 3(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 from the date of default determined above till realization, jointly and severally against the Defendants, provided that liability of the Defendant No.2 shall not exceed US$ 30,000,000/- (USD thirty million only);

(b) for attachment and sale of raw materials, inventories, spares and stores of the Defendant No.1 in terms of letter of hypothecation dated 14-09-2012;

(c) for attachment and sale of fixed assets of the Defendant No.1, excluding land, pursuant to letter of hypothecation dated 12-06-2012 on *pari passu* basis with the Islamic Corporation for the Development of the Private Sector and Bank Al Habib Ltd.;

(d) for a permanent injunction restraining the Defendant No.1 from selling, alienating, disposing of or creating any third party interest in the assets hypothecated under the letters of hypothecation dated 14-09-2012 and 12-06-2012;

(e) for cost of the suit.

**JUDGE**

Karachi:
Dated: 10-02-2021