ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. B-06 of 2016

Allied Bank Limited

Versus

Enshaa NLC Development (Pvt.) Ltd. & others

Date	Order with signature of Judge

1. For hearing of CMA No.5269/16
2. For hearing of CMA No.5270/16
3. For hearing of CMA No.5272/16
4. For hearing of CMA No.5560/16
5. For hearing of CMA No.2474/16

Date of Hearing: 04.10.2016

Plaintiff: Through Mr. Umer Shoaib Pirzada Advocate

Defendants No.1 to 3: Through Mr. Hasan Mandviwala Advocate

Defendant No.4: Through Mr. Waqar Ahmed Advocate

O R D E R

Muhammad Shafi Siddiqui, J.- By a short order dated 04.10.2016 the leave applications were granted and following are the reasons for the same.

2. That in terms of definition of a "customer" in section 2(c) a person to whom finance has been extended by a financial institution and includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution as well as a surety and indemnifier. The definition of "customer" was considered in the case of Procter & Gamble Pakistan (Pvt.) Limited v. Bank Al-Falah Limited & others reported in 2007 CLD 1532. In terms of the observation made therein the first category of a person to whom the finance is extended by a financial institution is the person who availed fund based financial facility from a financial institution.

3. The second category of a persons who came within the definition of "customer" are the persons who avails non-fund based financial facility such as guarantee or letter of credit i.e. the persons on whose behalf a guarantee or letter of credit has been issued by a financial institution. The person for whose benefit such instruments are opened i.e. the beneficiary of such instruments are not included within the definition of Section 2(c) of the Ordinance, 2001 as it includes within its ambit as "customer" only such person on whose behalf a guarantee or a letter of credit has been issued. The persons who are entitled to receive finance from a financial institution without any obligation to repay, such as a beneficiary of a guarantee or letter of credit or a person who is entitled to receive payment from the financial institution in order to make supplies to a customer of a financial institution cannot be treated as a "customer" of the financial institution.

4. The third and last category of a person who fall under the definition "customer" are those who stand surety or indemnifier before the financial institution on behalf of direct customers of the financial institution as is the case with the first two categories of persons but through a deeming provision of Section 2(c) of the Ordinance, 2001 they too have been made customers of the financial institutions as they have taken upon themselves the obligation to discharge the liability of the customer who availed the financial facility from the financial institution.

5. Defendant No.2 does not fall under any of the categories mentioned above. It has neither availed fund based financial facility nor a person on whose behalf guarantee or letter of credit has been issued but has simply furnished an undertaking that Enshaa Holdings Limited shall inject equity of US dollars 10,233,025 into Enshaa NLC (Pvt.) Limited the defendant No.1. This obligation of defendant No.2 has been discharged by remitting the equity of defendant No.1 by Encashment Certificate No.RKRB338/06/001 dated 26th September, 2006 which is an

encashment certificate after one month of the issuance of letter of undertaking by defendant No.2.

6. The other ground taken by the defendant is that the subject amount which is claimed is an investment and hence cannot be recovered under Financial Institutions (Recovery of Finances) Ordinance, 2001. It seems that the definition of finance as defined in Section 2(d) of the Ordinance, does not include "investment" to be claimed through the instant proceedings.

7. In the case of Ramzan Ali v. Javed Industries & others reported in 1999 CLC 1294 this Court observed as under:

> "*In my view none of the parties to the transaction in issue i.e plaintiff or any of the defendants is either a borrower or a customer and neither have obtained a loan or finance from a bank. According to the plaint a certain sum of money was placed with defendant no.1 by the plaintiff as an investment for which defendant no.7 issued cheques drawn on defendants No.1's account which were endorsed good for payment but subsequently dishonoured. It cannot be said in the circumstances that the plaintiff borrowed money from the defendant No.7 Bank as nothing has been brought on record in support of this proposition.*"

8. Prima facie it seems that by virtue of undertaking sum of money as equity amount was required to be injected by way of investment and it is thus no case of repayment of any amount disbursed to defendant No.2.

9. In the case of National Bank of Pakistan v. S.G Fibre Limited & others reported as 2004 CLD 689 this Court has observed as under:-

> "*Similarly, the undertaking executed by defendants no.2 to 8 does not amount to guarantee or create any relationship of financial institution and customer between the parties, nor breach of such undertaking could be*

termed as default in fulfilment of any obligation with regard to any finance, which are the preconditions under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 for giving jurisdiction to the Banking Court to entertain a suit. "

10. These are substantial questions of law and fact which are sufficient for grant of leave to the defendants and these are the reasons for allowing the application to contest the suit unconditionally.

Judge