

IN THE HIGH COURT OF SINDH AT KARACHI**Suit No. B-02 of 2013**

United Bank Limited

Versus

Fashionwear (Pvt.) Limited & others

BEFORE:**Mr. Muhammad Shafi Siddiqui, J**

Date of Hearing: 05.11.2014, 15.12.2014, 16.12.2014,
08.04.2015

Plaintiff: Through Mr. Aijaz Ahmed Advocate.

Defendant: Through Mr. Waqas Qadeer Shaikh
Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This is suit filed by the plaintiff against the defendants for recovery of Rs.115,738,648.74.

It is the case of the plaintiff that at the request/representation and/or on warranties of defendant No.1, it extended various financial facilities to defendant No.1 from time to time which are as follows:-

- i) Non-Interest Cash Finance (NICF-I) upto an aggregate sum of Rs.17,500,000/-
- ii) Non-Interest Cash Finance (NICF-II) upto an aggregate sum of Rs.21,450,000/-
- iii) Finance Against Packing Credit Export-I (FAPE-I) upto an aggregate sum of Rs.5,000,000/-
- iv) Finance Against Packing Credit Export-II (FAPE-II) upto an aggregate sum of Rs.32,550,000/-
- v) Finance Against Bill Purchase (FBP-A) upto an aggregate sum of Rs.10,000,000/-
- vi) Letter of Credit (LC) upto an aggregate sum of Rs.10,000,000/- and Letter of Guarantee (Guarantee) upto an aggregate sum of Rs.3,200,000/-

The defendants have filed application under section 10 of Financial Institutions (Recovery of Finances) Ordinance, 2001 for grant of leave summarily on the following questions/grounds:-

1. That whether the mortgaged deed dated 23.05.2002 and memorandum of deposit of title deed dated 20.05.2002 cover the finance agreements dated 27.06.2007, 25.08.2008, 19.02.2009, 13.07.2009, 28.01.2010 and 20.09.2010?
2. That whether the plaintiff has charged markup on markup through renewal agreements without actual disbursements?
3. That whether the statement of account has been prepared in accordance with the provisions of law and verified under Bankers' Books Evidence Act, 1891?

Learned counsel for defendants further objected as to the authorization of Azhar Murtaza Qureshi and Shafqat Mehmood by the plaintiff bank to file instant suit.

In the leave to defend application on merits, learned counsel for defendant has argued and conceded that the plaintiff bank extended finance facilities of Rs.35 Million to the defendant against Repurchase Price of Rs.37.8 Million which included mark up of 2.8 Million vide finance agreement executed in May 2002 for a period of one year which expired in May 2003.

In addition to the aforesaid finance facility the defendant further availed finance facility of Rs.15 Million against Repurchase Price of 15.75 million vide finance agreement executed in February 2005 for a period of one year which expired in February 2006. He agreed that the plaintiff bank bifurcated the already availed amount of Rs.35 Million into FAPE-II (28 Million) L/G (Rs.2 Million) and FBP-D/FBP-A (Rs.5 Million) vide letter dated 12.07.2002.

Learned counsel further contended that sum of Rs.28 Million was further bifurcated as FAPE-II (Rs.15 Million), NICF (Rs.13 Million) and FBP-D/FBP-A (Rs.5 Million) vide letter dated 23.10.2003. Thus by showing NICF of Rs.13 Million as fresh finance facility, the plaintiff is

charging markup on markup by showing already availed finance facilities as fresh finance facilities.

Learned counsel for the defendants further argued that the plaintiff has defaulted in fulfilment of its obligations and as a result of the same defendants suffered losses to the tune of Rs.100 Million which is liable to be paid by the plaintiff to the defendants. He thus concedes that the balance amount receivable by the plaintiff is Rs.37 Million approximately as Rs.55 Million have been repaid and after deducting this amount from the losses of Rs.100 Million which was suffered by the defendants, the plaintiff is liable to pay Rs.63 Million to the defendants.

Learned counsel for the plaintiff submitted that FAPC-1 (Finance Against Packing Credit) was interchangeable with NICF-I (Non-Interest Cash Finance) facility and the defendant No.1 availed same amount as NICF-I Facility. The facility of FBP-A (Finance against Bill Purchase) was Rs.10 Million and out of this amount an amount of Rs.2 Million interchangeable with NICF-I Facility. Defendant No.1 availed Rs.2 Million as NICF-I facility and did not pay remaining 8 Million hence the total amount of NICF-I facility was Rs.24,500,000/-.

It is further claimed that the plaintiff has furnished guarantee in favour of Sui-Southern Gas Company to the extent of Rs.3,200,000/- however no demand has been received by the plaintiff in respect of the aforesaid amount. Plaintiff also claimed to have opened a Letter of Credit in terms of facility letter dated 02.02.2009 of Rs.3,096,596.25 pursuant to application dated 27.05.2009. The counsel thus contended that following amount is outstanding:-

Facility No. 1 (NICF-I)

Principal outstanding (Annexure L-1)	Rs.24,484,250.10
Markup outstanding (Annexure L-1)	Rs.7,909,217.08

Facility No. 2 (NICF-II)

Principal outstanding (Annexure L-2)	Rs.21,450,000.00
Markup outstanding (Annexure L-2)	Rs.7,017,535.00

Facility No. 3

This facility is filed as NICF facility being interchangeable,

Facility No.4 (LC)

Principal outstanding (Annexure L-3)	Rs.3,096,596.25
Markup outstanding (Annexure L-3)	Rs.1,619,630.21

Facility No.5 (FAPE-II)

(i) Principal outstanding (Annexure L-4)	Rs.29,350,000.00
Markup outstanding (Annexure L-4)	Rs.12,567,757.64
(ii) Principal outstanding (Annexure L-5)	Rs.3,200,000.00
Markup outstanding (Annexure L-5)	Rs.1,346,630.19

State Bank Penalties

1) Annexure L-6 (Page 961 of plaint)	Rs.425,933.00
2) Annexure L-6 (Page 969 of plaint)	Rs.1,141,098.00
3) Annexure L-6 (Page 979 of plaint)	Rs.308,720.00

Counsel has provided breakup of the all the finances, which is reproduced as under:-

Non Interest Cash Finance (NICF-I)

Including interchangeable Facility of Rs.5,000,000/- of FAPE-1 and Rs.2,000,000/- of FBP-A Facility

Date of Default:	30.09.2010
(i) Maximum Limit of Finance Facility As per Agreement dated June 27, 2007	Rs.17,500,000/-
(ii) Maximum Limit of Finance Facility As per Agreement dated August 25, 2008	Rs.17,500,000/-
As per Agreement dated August 25, 2008 <small>FAPE</small>	Rs.5,000,000/-
As per Agreement dated August 25, 2008 <small>FBP-A</small>	Rs.2,000,000/-
(iii) Maximum Limit of Finance Facility As per Agreement dated July 13, 2009	Rs.17,500,000/-
As per Agreement dated July 13, 2009 <small>FAPE</small>	Rs.5,000,000/-
As per Agreement dated July 13, 2009 <small>FBP-A</small>	Rs.2,000,000/-
(iv) Maximum Limit of Finance Facility As per Agreement dated Sept. 20, 2010	Rs.17,500,000/-
As per Agreement dated Sept. 20, 2010 <small>FAPE</small>	Rs.5,000,000/-
As per Agreement dated Sept. 20, 2010 <small>FBP-A</small>	Rs.2,000,000/-
(a) Total Amount availed by defendant No.1 from time to time under the aforesaid agreements	Rs.287,118,008.81
(b) Total amount repaid	Rs.262,633,758.08
(i) Principal	Rs. 262,633,758.08
(ii) Mark up	N I L
(c) Outstanding amount	Rs.32,393,467.18
(i) Principal	Rs.24,484,250.10
(ii) Mark-up	Rs.7,909,217.08
(d) Total outstanding amount	Rs. 32,393,467.18

Non Interest Cash Finance (NICF-II)

Date of default:	30.09.2010
(i) Maximum Limit of Finance Facility as per Agreement dated September 20, 2010	Rs.21,450,000/-
(a) Total amount availed by def. No.1 from time to time under aforesaid agreements	Rs.21,450,000/-
(b) Total amount repaid	NIL
(c) Outstanding amount:	Rs.28,467,535/-
i) Principal	Rs.21,450,000/-
ii) Mark-up	Rs.7,017,535/-
(d) Total outstanding amount	Rs.28,467,535/-

LC Facility

Maximum Limit of Finance Facility:	Rs.10,000,000/-
Date of default:	06.10.2009
(a) Amount of Finance availed by Def. No.1	Rs.3,096,596.25
(b) Amount repaid by defendant No.1	NIL
(c) Outstanding amount	Rs.4,716,226.46
i) Principal	Rs.3,096,596.25
ii) Mark-up	Rs.1,619,630.21
(d) Total outstanding amount	Rs.4,716,226.46

FAPE-II**(1)**

Date of disbursement:	04.03.2010
Date of Default:	31.08.2010
(a) Amount of Finance availed by Def. No.1	Rs.29,350,000/-
(b) Amount repaid	NIL
(c) Amount overdue	Rs.29,350,000/-
(d) Mark up	Rs.12,567,757.64
(e) Total outstanding amount	Rs.41,917,757.64

(2)

Date of disbursement:	04.03.2010
Date of Default:	31.08.2010

(a)	Amount of Finance availed by Def. No.1	Rs.3,200,000/-
(b)	Amount repaid	NIL
(c)	Amount overdue	Rs.3,200,000/-
(d)	Mark up	Rs.1,346,630.19
(e)	Total outstanding amount	Rs.4,546,630.19

(3)

Date of disbursement: 04.03.2009
Date of Default: 31.08.2009

(a)	Amount of Finance availed by Def. No.1	Rs.1,298,601/-
(b)	Amount repaid	NIL
(c)	Amount overdue	Rs.1,298,601/-
(d)	Mark-up	Rs.389,211.78
(e)	Total outstanding amount	Rs.1,687,812.78
	i) Principal	Rs.33,848,601/-
	ii) Mark-up	Rs.14,303,599.61
	iii) SBP Penalty	Rs.1,456,818/-
	iv) Mark-up on SBP penalties	Rs.552,401.49

Total amount outstanding : Rs.50,161,420/-

Rs.32,393,467.18 + Rs.28,467,535/- + Rs.4,716,226.46 +
Rs.50,161,420.10 = Rs.115,738,648.74.

Heard learned counsel for the parties and perused the material

I have gone through the application, contents of the plaint as well and it appears that the defendant has evasively denied his liabilities in the leave to defend application which is not requirement of Order VIII Rule 4 CPC. Under the law every allegation of fact in the plaint should be denied specifically and if not it would amount to an evasive denial. Insofar as the statement of account is concerned, it appears to be duly certified as required under the law. The claim of the defendant that they have availed FAPE facility of Rs.35 Million in 2002 which was subsequently rescheduled and hence it is not fresh disbursement and

their entitlement for any leave is of no substance for considering a ground in granting leave to defend.

Adverting to the contention raised by the learned Counsel regarding the execution of documents, suffice it to say that these defendants have not denied the sanctioning of the financial facilities favouring defendant No.1 and their signatures on all the documents annexed with the plaint by the plaintiff in support of their claim. It is evident from the record that at the time of availing the financial facilities, as noted above, the defendant company not only executed the charge documents, but other defendants also mortgaged their properties and in addition thereto the rest of the defendants executed their personal guarantees favouring the plaintiff. The company executed Finance Agreements, Demand Promissory Notes, Letters of Continuity and Letters of Pledge. Additionally the company created charge over the assets of the company, which was duly registered, at their behest, with the Registrar of Companies and the certificates issued by the said department are on record. It appears from the record that the defendants executed various documents in favour of the plaintiff, signatures whereof, by these defendants are admitted. The present defendants have baldly denied the execution of the documents without any legal foundation and basis, completely forgetting that they have admitted their signatures on all the documents. The act of denial of execution of the documents appears to be desperate attempt, on the part of the defendants, to wriggle out of their contractual obligations and to save themselves from liquidating the financial liabilities incurred by them through the execution of the documents. To my mind, after the execution of the documents, availing different financial facilities by defendant No.1 and failure to liquidate them, now it does not lie in the mouth of the defendants to assert that they did not execute the documents. Above all, no defence at all has been pleaded on behalf of the company. In the back drop of the said discussion, I am of the view

that these defendants executed all the documents, are denying their execution only to avoid their liabilities and thus, the contention of the learned Counsel has no force.

I would now deal with the accounts as under:-

Facility No.1 (NICF-I)

Including interchangeable Facility of Rs.5,000,000/0 of FAPE-I and Rs.2,000,000/- of FAP-A Facility.

(a) Total amount availed by Defendant No.1 from time to time under the aforesaid agreement	Rs.287,118,008.18
(b) Total amount repaid	<u>Rs.262,633,758.08</u>
Outstanding amount	Rs.24,484,250.10

Facility No.2 (NICF-II)

(a) Total amount availed by Defendant No.1 from time to time under the aforesaid agreement	Rs.21,450,000.00
(b) Total amount repaid	<u>Nil</u>
Outstanding amount	Rs.21,450,000.00

Facility No.3 (LC)

(a) Total amount availed by Defendant No.1	Rs.3,096,596.25/-
(b) Total amount repaid	<u>Nil</u>
Outstanding amount	Rs.3,096,596.25

Facility No.4 (FAPE-II)

(a) Total amount availed by Defendant No.1	Rs.29,350,000.00
(b) Total amount repaid	<u>Nil</u>
Outstanding amount	Rs.29,350,000.00

(2)

(a) Total amount availed by Defendant No.1	Rs.3,200,000.00
(b) Total amount repaid	<u>Nil</u>
Outstanding amount	Rs.3,200,000.00

(3)

(a) Total amount availed by Defendant No.1	Rs. 1,298,601.00
(b) Total amount repaid	Nil
Outstanding amount	<u>Rs. 1,298,601.00</u>

Total outstanding amount : Rs.82,879,447.78

I am not convinced insofar as the claim of the mark up is concerned as it should be strictly subject to agreement as in chart given below as the plaintiff has not cited any agreement to entitle them to claim mark up as sought, however no dispute with cost of funds from the date of default which is as under:-

MARK UP CALCULATED UNTIL ORIGINAL DEFAULT/CONTRACTUAL PERIOD IN ACCORDANCE WITH FACILITY LETTERS				
Facility	Principal	Mark up	Total	Cost of Funds from
NICF Facility	24,484,250.10	5,321,570.09	29,805,820.19	21.9.2011
NIFC-II Facility	21,450,000.00	4,751,368.97	26,201,368.97	21.9.2011
LC Facility	3,096,596.25	-	3,096,596.25	06.10.2011
FAPE-II(1)	29,350,000.00	7,665,905.62	37,015,905.62	21.9.2011
FAPE-II(2)	3,200,000.00	812,186.33	4,012,186.33	21.9.2011
FAPE-II (3)	1,298,601.00	-	1,298,001.00	01.01.2010
SBP Penalty	4225,933.00	-	425,933.00	17.10.2010
SBP Penalty	1,141,098.00	-	1,141,098.00	24.11.2010
SBP Penalty	308,720.00	-	308,720.00	27.10.2010
Total	84,755,198.35	18,551,031.01	103,306,229.36	

In view of the above the leave to defend application is dismissed and the suit is decreed in terms of above calculation given in the chart which include the principal amount, mark-up up to agreed period and the cost of funds.

Dated: 18.09.2015

Judge