

Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

**Suit No. B – 17 of 2012**

Plaintiff : Saudi Pak Industrial and Agricultural Investment Company Limited, through Mr. Ijaz Ahmed Zahid, Advocate.

Defendants : Indus Steel Pipes Limited and 4 others, through Khawaja Naveed Ahmed, Advocate.

Date of hearing : 16.12.2013.

**J U D G M E N T**

**NADEEM AKHTAR, J.** – This Suit has been filed by the plaintiff against the defendants under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance XLVI of 2001 (**‘the Ordinance’**) for recovery of Rs.80,147,847.00.

2. It is the case of the plaintiff that two finance facilities ; namely, a Term Finance Facility of Rs.40.000 million and a Short Term Revolving Finance Facility of Rs.50.000 million, were granted by the plaintiff to defendant No.1 company. Defendants 2, 3 and 4 executed their personal guarantees, and defendant No.5 executed a corporate guarantee. By executing the said guarantees in favour of the plaintiff and delivering the same to the plaintiff, defendants 2 to 5 stood guarantors on behalf of defendant No.1. In order to secure the repayment of the said finance facilities, defendant No.1 mortgaged in favour of the plaintiff its immovable property bearing Plot No. A/18, SITE, National Highway, Kotri, Sindh, measuring 14-45 acres. Defendant No.1 also hypothecated in favour of the plaintiff all its future operating fixed and movable assets including its plant, machinery, equipment, generators, etc., as well as receivables and book debts / trade debts. A demand promissory note was also executed and handed over to the plaintiff by defendant No.1 as security. The plaintiff has alleged that both the facilities were fully availed and utilized by defendant No.1, but it committed breach in fulfilment of its obligations. As per the disclosure made in the plaint under Section 9(3) of the Ordinance, the defendants are jointly and severally liable to pay to the plaintiff an amount of Rs.80,147,847.00 towards the outstanding principal amount, the markup thereon and the delayed payment charges in respect of both the facilities.

3. Upon service of summons, the defendants filed their joint application bearing C.M.A. No. 11660 of 2012, for leave to defend the Suit under Section 10 of the Ordinance. I have noticed that in their application for leave to defend the Suit, the defendants have categorically admitted that both the finance facilities

were extended to defendant No.1 ; the documents relating to the mortgage and hypothecation, as well as the demand promissory note, were executed by defendant No.1 ; defendants 2 to 5 executed their respective personal and corporate guarantees ; and, both the finance facilities were fully availed and utilized by defendant No.1. Despite the above admissions, the defendants have disputed the plaintiff's claim and have denied their liability. A perusal of the defendants' application for leave to defend the Suit reveals that they have not complied with the mandatory requirements of Sub-Sections (4) and (5) of Section 10 of the Ordinance. Under Sub-Section (4) *ibid*, the defendants were obliged to disclose (a) the amount of finance availed by them from the plaintiff, (b) the amounts paid by them to the plaintiff and the dates of payments, (c) the amount of finance and other amounts relating to the finance payable by them to the plaintiff up to the date of institution of the Suit, and (d) the amount, if any, which they dispute as payable to the plaintiff, and the facts in support thereof. None of the above particulars have been disclosed by the defendants in their application. Under Sub-Section (5) *ibid*, the defendants were obliged to file all such documents along with their application which, in their opinion, support the purported substantial questions of law and fact raised by them. However, no such document has been filed by them. The implications for not complying with the mandatory requirements of Sub-Sections (4) and (5) *ibid* are specifically provided in Sub-Section (6) of Section 10 of the Ordinance, which provides that an application for leave to defend which does not comply with the requirements of any of Sub-Sections (3), (4) and/or (5) of Section 10 *ibid*, shall be rejected unless the defendant discloses therein sufficient cause for his inability to comply with any such requirement. The defendants have not only failed in fulfilling the mandatory requirements of Sub-Sections (4) and (5) *ibid*, but they have also failed to disclose any sufficient cause for their inability in complying with the same.

4. In the most recent authoritative pronouncement of the Hon'ble Supreme Court in the case of *Apollo Textile Mills Ltd. and others V/S Soneri Bank Ltd.*, **PLD 2012 Supreme Court 268 = 2012 CLD 337**, it has been held that the plaintiff institution and the defending customer have identical statutory responsibility respectively under Sections 9(3) and 10(4) of the Ordinance, to plead and state clearly and particularly the finances availed by a defendant, repayments made by him, the dates thereof, and the amounts of finance repayable by such defendant, who is saddled with an additional responsibility to also specify the amounts disputed by him. It has been further held that a defending customer is obliged to put in a definite response to the bank's accounting and has under Sub-Sections (3) and (4) of Section 10 *ibid* to compulsorily plead and answer in the application for leave to defend his accounts as well as the facts and amounts disputed by him

as repayable to the plaintiff. It has been further held that a banking Suit is normally a Suit on accounts which are duly ledgered and maintained compulsorily in the books of accounts under the prescribed principles / standards of Accounting in terms of the laws, rules and banking practices ; as such instead of leaving it to the option of the parties to make general assertions on accounts, the Ordinance binds both the sides to be absolutely specific on accounts ; and the parties to a Suit have been obligated equally to definitely plead and to specifically state their respective accounts. It has been specifically held that non-impleadment of accounts under Sub-Sections (3) and (4) of Section 10 *ibid* and Sub-Section (3) of Section 9 of the Ordinance in terms thereof, entails legal consequences under Sub-Sections (1), (6) and (11) of Section 10 *ibid*. It has been further held that because of the Ordinance being a special law, the provisions of Section 4 thereof override all other laws ; the provisions contained in the said Sections require strict compliance ; and, non-compliance therewith attract consequences of rejection of the application for leave to defend along with decree.

5. At the time of filing the application for leave to defend, the defendants had full opportunity to comply with the mandatory requirements of Sub-Sections (4) and (5) of Section 10 *ibid*, but as they failed in availing such opportunity, they are bound to face the consequence of their non-compliance as held by the Hon'ble Supreme Court in *Apollo Textile Mills Ltd.* supra. Accordingly, C.M.A. No. 11660 of 2012 filed by the defendants for leave to defend the Suit is hereby dismissed.

6. Upon dismissal of the defendants' application, I have proceeded to examine the claim made by the plaintiff in this Suit. On 03.12.2013, learned counsel for the plaintiff undertook to file a summary of accounts reflecting only the principal amount disbursed to defendant No.1 with dates, the amounts repaid by the defendants out of the principal amount with dates, and the markup charged for the agreed period at the agreed rate. He was directed to delete / exclude all the amounts claimed by the plaintiff on account of delayed payment charges, penalties, penal charges, etc. The summary of accounts in terms of the directions of this Court was filed on behalf of the plaintiff on 09.12.2013, and in reply thereto, a statement was filed on behalf of the defendants with the permission of this Court, containing details of payments made by the defendants and the amount outstanding against them. Thereafter, the learned counsel for the parties made their respective submissions on 16.12.2013, when they agreed that the matter may be decided on the basis of the aforementioned summary of accounts and statement filed by the parties.

7. In paragraph 8 of the plaint, the plaintiff has claimed amounts of Rs.20,120,138.00 and Rs.60,027,709.00 against the defendants in respect of the

Term Finance Facility and the Short Term Revolving Finance Facility, respectively, including the outstanding principal amount, the markup thereon and delayed payment charges. Thus, the total amount that has been claimed in this Suit by the plaintiff is Rs.80,147,847.00. After deducting the delayed payment charges and markup beyond the agreed period in pursuance of the order passed on 03.12.2013, the plaintiff's claim, as reflected in its summary of accounts, has been reduced to Rs.12,690,570.00 from Rs.20,120,138.00 in respect of the Term Finance Facility, and to Rs.31,666,528.00 from Rs.60,027,709.00 in relation to the Short Term Revolving Finance Facility. Accordingly, the total claim of the plaintiff has been reduced to Rs.44,357,098.00 from Rs.80,147,847.00.

8. In the statement filed by the defendants on 16.12.2013, they have admitted their liability to the extent of Rs.43,095,098.00, and that they are ready to pay the same to the plaintiff in equal installments within five years. However, they have claimed that markup of Rs.1,262,000.00 was included in the principal amount of Rs.31,665,528.00 when the Short Term Finance Facility of Rs.50.000 million was rescheduled on 31.03.2008. In support of this contention, the defendants have filed along with their said statement a copy of the offer letter dated 31.03.2008 issued by the plaintiff to defendant No.1, whereby the principal amount of Rs.31,665,528.00 outstanding against the Short Term Finance Facility of Rs.50.000 million was rescheduled on the terms and conditions mentioned therein. The contention of the defendants does not appear to be correct and is hereby rejected, as the said offer letter was issued by the plaintiff for rescheduling of only "the outstanding principal amount", and not for the outstanding liability including markup. It is to be noted that the contents of the said offer letter have not been disputed by the defendants, who have in fact relied thereupon.

9. In view of the above, the Suit of the plaintiff is hereby decreed with costs jointly and severally against the defendants in the sum of **Rs.44,357,098.00** (Rupees forty four million three hundred fifty seven thousand and ninety eight only) with cost of funds thereon from the date of default at the rate prescribed by the State Bank of Pakistan. A decree for the sale of the immovable mortgaged property and hypothecated assets of defendant No.1 is also passed.

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