

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
 Suit No.B-89 of 2012

Habib Metropolitan Bank
 Versus
 Abid Nisar

 DATE ORDER WITH SIGNATURE OF JUDGE

For hearing of CMA No. 13735/2012

Date of Hearing: 21.02.2014

Plaintiff: Through Mr. Khalid Mehmood Siddiqui
 Advocate

Defendant No.1: Through Mr. Taimor Mirza, Advocate

Muhammad Shafi Siddiqui, J.- This suit has been filed for the recovery of loan under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 . After service of notice and summons the defendant filed leave to defend application where apart from contesting the suit on merit and denying the claim, preliminary question regarding maintainability of suit has been raised in view of the mandatory provisions of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Since the defendant has raised a point that involves mandatory compliance without which a suit for recovery under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 would not lie, I have heard the parties on the maintainability of the suit first.

Learned Counsel for the defendant submitted that in terms of provision of sections 9 and 10 of the of the Financial Institutions (Recovery of Finances) Ordinance, 2001 both the plaintiff and the defendant are obliged to make strict compliance of the mandatory provisions and failure thereof would lead to identical consequences. In the absence of compliance i.e. the suit of the plaintiff by the financial

institution would not lie while the defendant's application for leave would be open for rejection as well. Learned Counsel further submitted that in terms of section 9 of the of the Financial Institutions (Recovery of Finances) Ordinance, 2001 it was incumbent upon the financial institution to have submitted the account with the plaint duly certified in pursuance of the Bankers Books Evidence Act, 1891. Learned Counsel submitted that the account preferred and filed along with the plaint is available as annexure-Q and onward consisting of several pages, however none of the page is stated to have been certified as required in terms of section 4 of the Bankers Books Evidence Act, 1891. Learned Counsel submitted that under section 9(2) of the of the Financial Institutions (Recovery of Finances) Ordinance, 2001 the plaint in case filed by the financial institution shall be duly certified under Bankers Books Evidence Act, 1891 and hence the mandatory provision has been breached and the claim made thereunder is liable to be rejected and the suit would not lie for non-compliance of this mandatory provision.

Learned Counsel further submitted that the suit has been filed by two alleged Attorneys namely Muhammad Fawad and Javed Ahmed Pathan whose Power of Attorneys are available on record. The Power of Attorney of Javed Ahmed Pathan filed as annexure-A/1 at page-21 provides that in terms of clause(i) he is jointly with another Attorney of the Bank authorized in the name of the bank to do and transact the acts, matters, deeds and things provided thereunder. The said Attorney Javed Ahmed Pathan was authorized to file the instant suit jointly with another Attorney which Attorney is said to be Muhammad Fawad whose Power of Attorney is available as annexure-A at page 13. Such Attorney Muhammad Fawad however was not authorized to institute, commence or continue the legal proceedings whether civil or criminal. The powers of Javed Ahmed Pathan in terms of clause (xi) are as under:-

- xi. *To commence, , prosecute, continue and defend all actions, suits or legal proceedings whether civil,*

criminal or revenue, including proceedings to procure or establish the bankruptcy, insolvency of any person or firm or liquidation or winding up of any company, or otherwise, to appoint solicitors, Advocates, Pleaders, Vakils and other legal agents, to make sign, verify, execute, plaints, petitions, written statement, Memorandum of Appeal, applications, tabular statements, Vakalatnama, warrants of Authority or any other papers, writing or documents expedient or necessary in the opinion of the Attorney to be made, signed, executed, verified, presented or filed.”

Such powers are not available to the other Attorney and the Power of Attorney is absolutely silent. Learned Counsel submitted that hence one out of the two Attorneys who have presented suit is not authorized to institute the suit jointly. Learned Counsel submitted that on these two scores the suit does not lie and the claim is liable to be rejected.

On the other hand learned Counsel for the plaintiff has argued that the plaintiff has made substantial compliance as in para-4 of the plaint they have stated the amount financed, amount paid, the amount of finance and other amounts relating to the finance payable to the financial institution, principal (demand finance), accumulated markup and total amount recoverable which constitute substantial compliance. Learned Counsel submitted that by stating account in the body of the plaint and on account of substantial compliance it is not obligatory upon the plaintiff to file a separate statement of account which is also to be certified by the Bankers Books Evidence Act, 1891 and hence the defendant cannot succeed on this score. Learned Counsel submitted that as far as other grievance that one out of the two attorneys is not authorized to file the present suit is concerned is also not tenable as the Attorney Javed Ahmed Pathan who was authorized to file and institute the suit along with another Attorney, though he was not authorized in such powers however, such powers were jointly exercised and it need not to be embodied in the power of Muhammad Fawad hence

preliminary objections are not in accordance with law and the defendant is required to proceed with the case on merits.

I have heard the learned Counsels and perused the record.

The provisions of Sections 9 and 10 of the of the Financial Institutions (Recovery of Finances) Ordinance, 2001 are undoubtedly mandatory. Financial institution who preferred suits are required to adhere strictly in terms of Section 9 as in addition to subsection(3) of Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 the plaintiff/financial institution are obliged to file statement of account duly certified under the Bankers Books Evidence Act, 1891.

In fact such cases under the Banking jurisdiction are strictly based on accounts and in these circumstances the parties are obliged to make compliance strictly. Generally despite denial of claim the defendant's leave to defend application is liable to be dismissed on account of non-compliance of Section 10 of the Financial Institutions (Recovery of Finance Ordinance) 2001. Hence, despite having substantial questions of law and fact, the defendant faced such consequences. Such is also the obligation on the part of the plaintiff/financial institution to have based their claim on certified statement of account and in absence of such compliance the claim is not acceptable. Such questions came in discussion before number of Benches. In the case of Bankers Equity Limited vs. M/s Bentonite Pakistan Limited & others (2003 CLD 931) in terms of para-7 and 8 the learned Single Judge of the Lahore High Court observed as under:-

“7. In view of the above, subsection (2) of section 9 of the Financial Institutions (Recovery of Finance Ordinance) 2001 makes it mandatory for a Banking Institution to support its plaint in a suit against the customer by a Statement of Account duly certified under the Bankers' Books Evidence Act, 1891 and also by all other relevant documents relating to grant of finance. Without such a “Statement of Account” filed along with the plaint, a customer will obviously remain totally unaware of the amount advanced, mark-up charged and the basis, break-up, premise, mode of calculation of account, nature etc. of default and the actual amount of Bank's claim against the defendant customer. He will thus be unable to fame

*his defence within the limited period prescribed by law, to show reasonable, serious and plausible grounds of contest to be able to seek obtain leave to defend the suit. Absence of filing the requisite Statements of Account along with the plaint, will essentially amount to absence of providing adequate, proper and reasonable opportunity of defence to the defending customer. Being thus unable to file a proper leave petition within thirty days under section 10(2) of the Ordinance of 2001 or within twenty one days under section 10(12) *ibid* . such a customer may or may not later be able to amend his leave petition. His defence shall thus be rendered illusory, hence denied. Upon the compliance a Banking Company with the provision of section 9(2) of the Ordinance of 2001, dependent the right of defence of a defendant in the summary suits as visualized under the Ordinance wherefore, the filing of duly certified Statements of Account by a Banking company along with its plaint, cannot be taken to be a mere formality or a technicality. This provision can only be held to be mandatory. Without strict compliance wherewith, the plaint is incomplete and cannot become basis of a suit under this law.*

8. *Another word employed in subsection (2) of Section 9 *ibid* requires deeper consideration as this word has a direct bearing and impact on the essential mandate contained in this provision of law. This subsection provides that “plaint shall be supported by a Statement of Account” duly certified under the Bankers Books Evidence Act, 1891 and all other relevant documents relating to the grant of finance.*

*In my opinion, the word “support” read in the mandatory perspective of word “shall”, makes the plaint filed by a Banking institution, as totally dependent upon duly certified Statement of Account; on the support of which can a plaint stand and sustain as per section 9(1) and (2) *ibid*. Plaint is subservient to or upon the statement of Account for its life, sustainability, security and maintenance. Without support of such Statement of Account (and documental) a plaint by itself cannot be presumed to stand independent. No building can be raised constructed or created without the support of a foundation, columns and walls. Likewise, as per provisions of law, a plaint cannot be structured, constructed, built or raised without the foundation of a duly certified Statement of Account and the requisite documents-----.*

The said judgment was challenged before the Division Bench reported as 2010 CLD 651 and the learned Division Bench of Lahore High Court upheld the said judgment.

The issue also came before a learned single Judge of this Court in the case of Soneri Bank Limited vs. Compass Trading Limited reported in 2012 CLD 1302. In terms of the said judgment, the provisions of Section

9(2) of the of the Financial Institutions (Recovery of Finances) Ordinance, 2001 were held to be mandatory.

The similar question also came before the learned Division Bench of Lahore High Court in the case of National Bank of Pakistan vs. Mujahid Nawaz Cotton Ginners reported in 2007 CLD 678. In para 5 of the judgment the learned Division Bench observed as under:-

“5. We have minutely examined the statement of accounts and find that the same has not been certified as required under the law. The certificate given at the bottom of the statement of accounts is reproduced below:-

“Certified on oath that all the entries are correct as per ledger which is still in our custody.”

“certified copy” has been defined under section 2(8) of Bankers’ Books Evidence Act, 1891, which reads as follows:-

“Certified copy” means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.

It flows from the bare perusal of the said provision of law that a certificate, which is to be given at the foot of copy of statement of account, so as to make it certified copy of the statement of Accounts, must state the following facts:-

- (i) It is true copy of the such entry;*
- (ii) Such entry is contained in one of the ordinary books of bank;*
- (iii) It was made in the usual and ordinary course of business;*
- (iv) Such book is still in the custody of the bank*
- (v) It must be dated; and*

- (vi) Subscribed by the principal accountant or manager of the bank with his name and official title.

*Placing the definition of “certified copy” as reproduced above, in juxtaposition with the certificate given by the bank on the copy of the statement of accounts, one leads to the irresistible conclusion that the certificate is not in accordance with the aforesaid provision of law. Thus the statement of accounts is not “certified copy” as contemplated under section 2(8), *ibid*. Consequently, the said copy cannot be received as *prima facie*, evidence of the existence of such entry and cannot be admitted as evidence of the matters, transaction and accounts as required under section 4 of the Bankers’ Books Evidence Act, 1891. On the basis of this statement of accounts, which is not the certified copy, the respondents cannot be held liable to pay the amounts claimed by the appellant.”*

Recently in the case of Apollo Textile Mills Limited vs. Soneri Bank Limited (reported in 2012 CLD 337, it is observed in para-13 that the provisions of Sections 9 and 10 of the of the Financial Institutions (Recovery of Finances) Ordinance, 2001 oblige the parties to the suit to identically/plead and state the same nature of accounts or the heads of accounts.

In paras-15,18 and 21 it is observed as under:-

“15. The rationale of the schematic discipline of Ordinance of 2001 is evident. 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. The parties to a suit have been obligated equally to definitively plead and to specifically state their respective accounts.

18. The Financial Institutions (Recovery of Finance Ordinance) 2001 i.e. is a special law. It provides a special procedure for the banking suits. The provisions of the Ordinance, 2001 under section 4 thereof override all other laws. The provisions contained in the said Sections require strict compliance. Non-compliance therewith attract as above referred, consequences of rejection of leave petition along with decree etc. etc.

Applying all the settled and well known principles to determine the mandatory construction of a provision of law, the said provisions cannot but be held to be mandatory.-----.

21. The similarity of the provisions legislated in sections 9 and 10 *ibid*, as discussed above, leads in identical consequences in the absence of the demanded Accounts and the documents. Suit of the plaintiff institution will be rejectable while defendants' leave petition will be exposed in rejection etc. A plaintiff institution may be rendered unable or deficient in appropriately setting up its answers to the accounts, disputed amounts and facts of the defendant in reply to the leave application as per section 10(8) *ibid*. And that in the absence of the requisite accounts and the facts etc. in defence filed by a defendant in the leave petition a plaintiff will remain unaware of the admitted or denied or disputed accounts and facts of the defendants, to adequately seriously and reasonably pursue the suit and its trial. This will obviously defeat the intent and the object of the provided provisions of the Financial Institutions (Recovery of Finance Ordinance) 2001.—“provision“

The perusal of the above referred judgments provide an irresistible conclusion that the provision of section 9 & 10 of the of the Financial Institutions (Recovery of Finances) Ordinance, 2001 are mandatory.

In the instant case the statement of account was filed without any certificate as required in terms of section 4 of the Bankers Books Evidence Act, 1891 which reads as under:

“4. Mode of proof of entries in bankers' books. Subject to the provisions of this Act, a certified copy of any entry in a banker's books shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.”

Thus a certificate which is the mandatory requirement is missing in the instant case. The definition of certified copy is also provided by the Bankers Books Evidence Act, 1891 in terms of subsection(8) of Section 2 which reads asunder:-

“S. 2(8). “certified copy” means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank

and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.

Thus the statement of account being without certificate has missed the following requirements:-

- (i) *It is true copy of the such entry;*
- (ii) *Such entry is contained in one of the ordinary books of bank;*
- (iii) *It was made in the usual and ordinary course of business;*
- (iv) *Such book is still in the custody of the bank*
- (v) *It must be dated; and*
- (vi) *Subscribed by the principal accountant or manager of the bank with his name and official title.*

Thus the essential requirement to qualify the test is that such statement of Account is necessarily stated to have been certified by principal accountant or manager. No matter if such principal accountant or manager holds any other official position but to make it qualify such certificate must emphasized the requirement. The contention of the learned Counsel that since the account is also part and parcel of the plaint is sufficient compliance is without any force. The provisions of Sections 9 and 10 of the of the Financial Institutions (Recovery of Finances) Ordinance, 2001 are mandatory and are required to be performed strictly in its letter and spirit. The mandatory provisions of statute are required to be complied strictly and no deviation of whatsoever nature is acceptable unless otherwise required by the law. Compliance of mandatory provision of law is more important than wisdom of individual which negate such compliance. The scheme of section 9 and 10 of Ordinance 2001 is such that once a suit is filed and leave application is preferred the consequences must follow as the

scheme of Ordinance 2001 does not provide filling up of lacuna at later stage and hence not curable.

No doubt the grounds of rejection of plaint stated in Order VII Rule 11 CPC cannot be regarded as exhaustive of limiting the powers of the Court, particularly in dealing with circumstances where it appears that on account of certain non-compliance which are mandatory in nature the suit cannot be maintained, the Court has powers to pass appropriate order for rejecting the plaint. The land mark principles with regard to incompetent suits contemplates that still born or incompetent suit should be buried at its inception so that no time is consumed on a fruitless litigation and that in the same breath it may give chance to the parties to retrace their steps at the earliest possible moment so that, if permissible he may found a properly instituted case. Reference in this regard may be made to the cases of *M/s Standard Hotels (Private) Limited v. M/s Rio Centre & others* (1994 CLC 2413) and *Muhammad Akhtar etc. v. Abdul Hadi etc.* (1981 SCMR 878).

Though application for leave to defend has been filed but in my opinion the plaint itself has to be seen first from the yardstick provided under section 9 of the Ordinance 2001. The claim under the Financial Institutions (Recovery of Finance Ordinance) 2001 is based on accounts and once such accounts does not qualify the test, it cannot be a basis of passing decree in favour of plaintiff and hence on this score it is held in the judgments of *Apollo Textile and National Bank of Pakistan* (Supra) that the claim must fail. Since the defendant besides challenging the entire claim and refuting the recovery amount has preliminary raised this point of competence, in the above circumstances, I considered it necessary to decide this point first, hence in view of the above facts and circumstances, the claim of the plaintiff/financial institution could neither be established nor lie as the claim lack the necessary compliance of section 9(2) Financial Institutions (Recovery of

Finance) Ordinance 2001 and following the dictum laid down by the Hon'ble Supreme Court the plaint is liable to be rejected. It may however be noted that the rejection of the plaint under Order VII Rule 11 CPC does not preclude the plaintiff from instituting subsequent suit on the basis of same cause of action in pursuance of Order VII Rule 13 CPC which is also highlighted in the judgment of Bankers Equity (Supra).

Above are the reasons of short order dated 21.2.2014 by which the plaint was rejected, and resultantly pending applications stand disposed of.

Dated: 03.03.2014

Judge