ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.B-78 of 2013

Habib Metropolitan Bank Limited
Versus
M/s Shahi Textiles & others

Date	Order with signature of Judge

For hearing of CMA No.8374/13

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Date of hearing: 04.02.2014

Ms. Samia Faiz Durrani along with Mr. Manzoor-ul-Haq for plaintiff.

Mr. Asghar Bangash for defendants.

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Muhammad Shafi Siddiqui, J.- This suit is filed for recovery of Rs.425,474,198/- by the plaintiff against the defendants under Financial Institutions (Recovery of Finances) Ordinance, 2001.

The notices and summons were issued by way of publication in Daily Jang and The News dated 18.06.2013, by registered A/D and courier service on 17.06.2013 and 15.06.2013 respectively and through bailiff. Apparently notices/summons were served on 17.06.2013. The defendants filed their application for leave to defend on 05.08.2013.

The salient features of the application for leave to defend are that in the restructuring agreement, attached as Annexure P/12 to the plaint, it has been agreed that in case for any reason if the customer failed to sell out the property i.e. L-4/3/1, Block 21, KDA Scheme No.16, Federal B. Area, Karachi, by 30.06.2012, the plaintiff by virtue of Irrevocable General Power of Attorney will sell the same and appropriate the sale proceed to the extent of Rs.70 Million for partial adjustment

towards the settlement of liabilities and the short fall, if any, will be made by the customer.

Learned counsel for defendants submitted that the first installment in terms of the agreement fell due on 01.07.2012 and hence in view of agreement the property is required to be disposed of, of course not on throw away price but the partial payment of Rs.70 Million is to be adjusted.

Learned counsel submitted that the rescheduling agreement include the accounts of M/s Akhtar Brothers and since it is a separate legal entity therefore restructuring agreement itself is not sustainable in law. The said agreement for rescheduling/ restructuring of finance is dated 29.06.2009, available as Annexure P/4 to the plaint, which categorically provides that the defendants were provided running finance facility of Rs.101,416,635.41 and packing credit of Rs.200,000,000/- and the outstanding markup on running finance was Rs.3,748,326.71 and the outstanding markup on packing credit is Rs.13,370,000/-. Thus, the total outstanding of defendant No.1, a partnership firm, was Rs.318,534,962.12 whereas outstanding liabilities of Akhtar Brothers include demand finance of Rs.12,500,000/- and the outstanding markup on demand finance is Rs.498,561/-. Thus total and the consolidated figure of the two entities was rescheduled in terms of agreement dated 29.06.2011 aggregated to Rs.331,533,523.77. Learned counsel submitted that such rescheduling of an agreement where the outstanding of the two different entities were adjusted is void. Learned counsel has relied upon the judgment reported in 2001 MLD 1351 and 2005 CLD 444 and also relied upon Section 23 of the Contract Act.

Learned counsel in addition to the above submitted that the suit is also not maintainable in view of the provisions of section 9 of the Ordinance 2001 as the requirements of section 9(3) were not complied

with by the plaintiff inasmuch as proper settlement of accounts as required under the law have not been submitted along with the plaint. Learned counsel submitted that accounts which were filed with the plaint are available as Annexure P/31. However, the detailed entries of the accounts were not disclosed which have been subsequently filed along with replication as Annexure R, which entries provides that not only in the agreement markup on markup was charged but subsequent to the execution of such rescheduling agreement the plaintiff has also charged markup from 18.07.2009 in addition to the account of M/s. Akhar Brothers. Learned counsel further submitted that since they cannot rebut such entries, therefore, leave for all intent and purpose should be granted to enable the defendants to challenge such entries and lead evidence in this regard.

On the other hand learned counsel for the plaintiff submitted that the defendants availed different finance facilities and in September, 2009 the defendants approached the plaintiff for restructuring of finance facilities by way of term finance of Rs.335 Million. Both the plaintiff and the defendants agreed for such rescheduling and restructuring of finance and the defendant No.1 agreed to the terms and conditions which were accepted subject to execution of various documents and continuation of mortgage created by defendants No.2 to 5 in favour of the plaintiff as security. Accordingly, the finance facilities were rescheduled by way of term finance of Rs.335 million along with agreed markup being the buyback price in terms of agreement for reschedule and executed the agreements of reschedule dated 29.06.2009 annexed as Annexure P/3 to P/5. Learned counsel further submitted that offer letter available as Annexure P/11 dated 08.02.2012 was accepted and an agreement for restructure dated 21.05.2012 was executed which contains the terms that in the event of default on the part of the customer (defendant

No.1) to repay Rs.70 Million on or before 30.06.2012 the Bank (plaintiff) would be entitled for the recovery of their outstanding dues forthwith. Learned counsel for the plaintiff further submitted that since the terms of the agreement were violated as the required sum of Rs.70 Million were not paid and so also other installments, the plaintiff in violation of such terms has filed this suit for recovery of the amount as prayed.

Learned counsel for the plaintiff further submitted that such claim of markup upon markup is agreed by the defendants in terms of rescheduled agreement and hence is a valid piece of document and the defendants cannot take advantage that the markup upon markup has been charged. Learned counsel further concedes that in case the Court comes to the conclusion that such markup has been wrongly charged or that in the rescheduled agreement the markup has been charged, as a buyback price of Rs.335 Million, the original figure of Rs.331,533,523.77 can be considered along with cost of funds at the latest rate as determined by the State Bank of Pakistan from the date of default under section 3 of the Ordinance 2001. Learned counsel for the plaintiff submitted that under the garb of this claim that markup upon markup has been charged the defendants cannot be granted leave to defend the suit as no substantial question of fact and law has been raised.

Learned Counsel for the plaintiff has also submitted that the notices and summons were served by way of publication on 18.6.2013, by registered post A/D and by courier service on 15.6.2013 and 17.5.2013 respectively as well as through Bailiff. Learned Counsel in this regard submitted that the application for leave to defend was sworn on 15.7.2013 i.e. during summer vacations whereas it was presented in Court on 05.8.2013. Learned Counsel submitted that the notices and summons even if it is considered to be served by way of publication i.e. 18.6.2013 the leave to defend application ought to have been filed

within 30 days from the date of such publication despite being fallen during summer vacations. Learned Counsel submitted that even if 30 days they were to be completed in summer vacations, the defendant has no justification for filing the same on the first opening day after summer vacations as the verification was done during summer vacation and hence the application is time barred. In this regard Learned Counsel has relied upon the case of SIMNAW vs. National Bank of Pakistan (2002 CLD 1510) and Shahmeer vs. Ghulam Haider (2013 CLD 1796).

I have heard the learned counsel for the parties and perused the record.

The plaintiff has challenged filing of the leave to defend application as being time barred; I would consider this point to be discussed first. In this regard it is very important to peruse the relevant provision of the Ordinance i.e. 10(2) of Financial Institutions (Recovery of Finance Ordinance) 2001 whereby the defendant is allowed 30 days' time to file leave to defend application. However under Sindh Chief Court Rules long vacation and holidays are provided which are exempted from such computation of 30 days in terms of Section 4 of the Limitation Act. This section provides a formula for computation of days to overcome closure of Court on the day when limitation expired. The swearing of an affidavit during summer vacations will not curtail the rights of the defendant where they were required to file the application within 30 days in terms of section 10(2) from the date of first service by any mode laid down in subsection (5) of section 9 subject to above computation. Swearing of an affidavit during summer vacations may have many reasons but the requirement and right under the law whereby the days of summer vacations are to be excluded from the computation cannot be taken away from the defendants. In case such 30 days are falling during summer vacations, the defendant will be within his right to

file application on the opening day and hence the application cannot be considered to be time barred. The judgments relied upon by the learned Counsel for the plaintiff are not applicable to the facts and circumstances of the case as it relates to the computation of the days from the date of first service which is not a question here. The issue of 30 days falling during vacation or holidays is not discussed in the referred judgment.

In terms of reschedule agreement dated 29.06.2009 the outstanding liabilities of the defendants appears to be Rs.318,534,962/- whereas the outstanding liabilities of Akhtar Brothers, which was undertaken by the defendants, were Rs.12,998,561/- which comes to a total of Rs.331,533,523/- including markup hence the agreement of finance for a sum of Rs.335 Million with markup on the sale price at the rate of 7.5% per annum appears to be without any lawful justification as the correct outstanding liability of both the groups agreed upon included the markup on the principal which admittedly was Rs.331,533,523/-. In restructuring agreement dated 21.05.2012 the Bank agreed to restructure outstanding principal finance liability of Rs.331.200 million by allowing a period of ten years for repayment of principal finance and at the request the Bank agreed not to claim outstanding markup of Rs.61.064 million as well as further markup from 01.01.2012 till June 2022 provided the terms and conditions of restructuring agreement are complied with in letter and spirit.

The defendants have seriously objected to the amalgamation of two accounts i.e. account of Shahi Textile Mills and account of Ms/ Akhtar Brothers, though it is admitted in terms of the agreement but at the most the agreement can be considered as guarantee without consideration. Secondly despite inclusion of mark up on the initial agreement of rescheduling dated 29.6.2009 they yet again entered into

an agreement for rescheduling which apparently claim markup upon mark up and subsequently the statement of account filed along with replication provides that the entries are nothing but markup upon markup.

There is a reason for discussing the merit of the case before the preliminary question as raised from both sides could be thrashed out. The reason is that defendants despite raising substantial question of law and fact are required to make compliance of provisions of section 10(4)(5) of Ordinance 2001. It is also the requirement of law that both the parties were obliged to submit accounts in compliance of section 9 and 10 of Ordinance 2001. Had it been a case of admission on the part of defendants then it had different application as far as plaintiffs compliance of 9(2) is concerned following the case of Apollo Textile Mills Ltd & others vs. Soneri Bank Limited (PLD 2012 SC 268), discussed hereunder and the merit need not to be discussed. The application is silent as far as the amount of fiancé availed by them is concerned; it is also silent as to what amount has been paid by the defendants to the financial institution and the dates of payment; it is also silent as to what amount of finance and other amounts relevant to the finance payable by the defendants to the financial institution up to the date of institution of the suit. Thus, apparently the defendants have failed to make compliance of the mandatory requirements of Section 10(4) of the Ordinance 2001, which alone is sufficient for the rejection of leave to defend application despite raising substantial question of law and facts.

In view of the facts and circumstances and in view of the latest pronouncement of Hon'ble Supreme Court in the case of Apollo Textile (Supra) the application is accordingly dismissed. However, this would leave me to peruse the contents of the plaint on the touch stone of the said judgment.

While scrutinizing the plaint as well as accounts filed by the plaintiff on the parameters of section 9 of the Financial Institutions

(Recovery of Finance Ordinance) 2001 it reveals that the plaintiff was obliged to file the plaint along with statement of account which in the case of Financial Institutions (as the case here) shall be duly verified under the Bankers Books Evidence Act, 1891, and all other relevant documents relating to the grant of finances. The plaintiff stated to have filed their statement of accounts as annexures P-31, P-31/A and another one page statement of account at page 241. All three alleged statements of accounts are undated and without signatures of persons who are required to sign under the law. The statement of account is stated to have been signed by one Afzal Ahmed Vice President and Mirza Sultan Ali Senior Vice President. All these three purported statements of accounts apparently do not show as to whether they are the principle accountants to have certified the accounts. The provisions of Section 4 of the Bankers Books Evidence Act, 1891 is reproduced as under for assistance.

> ***"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."*

In terms of subsection (8) of Section 2 the statement of account is stated to be certified under Bankers Books Evidence Act, 1891. The definition of the certified copy is also provided in the Bankers Books Evidence Act, 1891 which reads as udder:-

> ***"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.*

Perusal of the statement of account allegedly filed with the plaint shows that it may have contained the title of the official but it does not show that he is the principle accountant or manager of the bank and such statement of account is also undated.

The provision of Sections 9 and 10 of the Ordinance, 2001 are mandatory in nature and consequences have been provided by the judgment ibid. Initially such question as raised in the case of M/s. Soneri Bank Limited vs. Compass Trading Corporation, the learned single Judge of this Court while granting leave to defend observed that the persons having certified statement of account were not officers as contemplated by section 2(a) of the Bankers Books Evidence Act, 1891 and were not in employment of bank at the time of filing of the suit. It was further held that Power of Attorney filed simply describes such persons to be officers of the bank without having power to certify such statement on behalf of the bank. It was held that specific statutory requirement of section 2(8) cannot be ignored and that such statement was not duly certified for the purposes of the said Act and hence in view of such the unconditional leave to defend was granted.

Subsequently same point was dealt with by the Division bench of Lahore High Court in the case of Bankers Equity Limited vs. M/s Bentonite Pakistan Limited & others (2010 CLD 65). Learned Division Bench observed as under:-

> *"18. The contention of the learned Counsel for the appellants that after the dismissal fo the petition for leave to appear by the Judge Banking Court, the suit of the plaintiffs should have been decree automatically is not correct. The Courts of law are under a legal obligation to apply their mind and correct law notwithstanding the fact that defendant in the suit has appeared or not before the Courts during the proceedings. Reliance is placed upon judgment reported as Haji Ali Khan and Company, Abbotabad v. Messrs Allied Bank of Pakistan Limited, Abbotabad PLD 1995 SC 362.*

19. Respectfully following the case-law already holding the field, this Court is of the confirmed opinion that the statement of facts narrating the accounts given in paragraph No. 18 of the plaint and reflected in the documents annexed with the plaint have been held to be not a statement of account as visualized by the provision of Banker's Books Evidence Act, 1891 and therefore the plaint in the suit instituted by the appellants was not supported by the statement of accounts as per provisions of Section 9(2) of the Financial Institutions (Recovery of Finance Ordinance) 2001, which provisions are held in the earlier judgments passed by the two Division Benches of this Court to be mandatory. The plaint has, therefore, been rightly rejected by the learned Judge Banking Court/Single Judge of this Court vide impugned judgment dated 13-3-2002.

20. It shall be further important to submit that a rejection of plaint under Order VII, rule 11 of C.P.C does not preclude a plaintiff from instituting a subsequent suit on the basis of same cause of action and which provision is contained in Order VII, rule, 13 of C.P.C, which is reproduced as under:-

> *"**Order VII Rule 13 of C.P.C** When rejection of plaint does not preclude presentation of fresh plaint:- The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action."*

21. The plaintiffs in this case could have instituted a subsequent suit by supporting the plaint with a detailed and lawfully prepared statement of accounts fulfilling the requirement of section 9(2) f the Financial Institutions (Recovery of Finance Ordinance) 2001 and this Court is unable to understand as to why the above course has not been adopted by the appellants/plaintiffs immediately after the announcement of judgment dated 13-3-2002.

22. In the light of all the above circumstances, this FRA has no merits and is dismissed, without any orders as to cost."

Subsequently the matter involving the similar question came before the Hon'ble Supreme Court in the case of Apollo Textile Mills Ltd & others vs. Soneri Bank Limited (PLD 2012 SC 268) as referred above wherein the Hon'ble Supreme Court 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. ect.

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. This Court in the case of 'Niaz Muhammad v. Fazal Raqib' (PLD 1974 SC 134) held that:-

> *"It is true that no universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of the Courts to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed. As a general rule however, a statute is understood to be directory when it contains matter merely of direction, but not when those directions are followed up by an express provision that, in default of following them, the facts shall be null and void. To put in differently, if the Act is directory, its disobedience entails serious legal consequences amounting to the invalidly of the act done is disobedience to the provision."*

21. The similarity of the provisions legislated in section 9 and 10 ibid, as discussed above, leads to 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 to 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.

Thus Hon'ble Supreme Court on the touch stone of the provisions of section 9 of the Bankers Books Evidence Act, 1891 has held that the provision of section 9 and 10 are mandatory. In the above referred case of Apollo Textile Mills the Hon'ble Supreme Court while dismissing the application for leave to defend also laid down the test of the petitioner therein as in the said case the petitioner has admitted all transactions and accounts submitted along with the plaint though it suffered from the compliance of section 9. The discussion of the above referred cases would leave a solitary conclusion that the provisions of sections 9 and 10 are mandatory. The parties are burdened heavily for the non-compliance of the relevant provisions for the obvious reason that these are special provisions and require summary trial. The non-compliance of section 9(3) and subsections 3 and 4 of Section 10 of the Ordinance, 2001 entails penal consequences under the Ordinance. The provisions of section 4 of the Ordinance, 2001 are clear that the provision of this Ordinance shall have effect notwithstanding anything in-consistent contain in any other law for the time being enforced which is unlike of the provisions of section 3 of the Act, 1997.

In view of the case laws referred above and in view of the judgment of the Hon'ble Supreme Court in the case of Apollo Textile Mills Ltd & others vs. Soneri Bank Limited (PLD 2012 SC 268), I am of the view that the statement of account filed along with the plaint cannot be stated to be a statement of account under the provisions of Banker Books Evidence Act, 1891 and cannot support the claim of the plaintiff in terms of the provisions of Section 9 subsection (2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001.

I therefore, in view of the above, reject the plaint. However, such rejection of the plaint would not preclude the plaintiff from instituting subsequent suit on the basis of same cause of actin.

Dated: **Judge**