ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.B-116 /2011

DATE ORDER WITH SIGNATURE OF JUDGE

For hearing of CMA No.12467/2011

Date of hearing 16.12.2014

Mr. Aijaz Ahmed Haq Advocate for the plaintiff
Mr. Furqan Naveed Advocate for Defendants
.x.x.x..x.

MUHAMMAD SHAFI SIDDIQUI, J: This is a leave application filed by the defendants Nos.2 to 6. The main grounds which have been emphasized by the Counsel while arguing the application are as under:-

i. That the applicants/defendants do not fall within the term "Customer" as provided in section 2(c) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 nor breach of any obligation as defined in section 2(e) of the Ordinance was committed and hence in absence of such prerequisite in terms of Section 9 of the Ordinance the suit would not lie in the present form. It is contended by the learned Counsel that the claim of plaintiff based on alleged breach of Sub-Underwriting-cum-Buy Back Agreement dated 08.10.1990 between the plaintiff and one Hamid Textile Mills Limited and such undertaking to repurchase shares does not amount to a guarantee or create any relationship of financial institution and customer and no breach of such undertaking could be termed as default as defined under the law which could be utilized in specification of requirement of section 9 of the Ordinance.

ii. The second ground that is urged by the learned Counsel was that the investment made by the plaintiff in the shares

of the company in terms of underwriting agreement do not fall in the definition of term “Finance” as given in section 2(d) of the Ordinance. Hence since it is an investment therefore, any breach of such undertaking could not be termed as default for institution of a suit under section 9 of the Ordinance, 2001. Learned Counsel submits that the Court lacks jurisdiction to entertain and adjudicate upon the instant suit under banking jurisdiction or at the very least leave is liable to be granted to the defendants.

iii. Learned Counsel further submitted that the claim as made out is hopelessly barred by time . He submitted that in terms of the Buy Back Agreement the defendants/ applicants were required to buy back the shares of the company taken up by the plaintiff under Underwriting Agreement within the period of two years from the date of take up by the plaintiff and since such shares were taken up by the plaintiff on 13.2.1991 hence it is to be bought back on or before 13.2.1993. Since recovery suit, if any, is to be filed within a period of three years from the date it became due and payable for performance, it is barred by time. It is urged that it is barred by more than 15 years and no reason or explanation is assigned for such delay.

iv. Learned Counsel submits that the suit is also barred in terms of section 11 as well as Order II Rule 2 CPC. He submits that the plaintiffs have earlier filed a suit for recovery bearing COS No.02/99 titled as Banker Equity Limited vs. Hamid textile Limited & others, against the company and the applicants before the Lahore High Court dealing with the liabilities of the company and the applicants. It is urged that said suit was decreed vide

consent decree dated 27.5.199 in terms of agreement dated 30.4.999. It is further contended that during course of payments by the company, winding up proceedings were initiated as JM No.15/2000 and an Official Liquidator was appointed by this Court to manage the affairs. It is further claimed that such agreement and consent decree was modified in the year 2003 on an application made by the company which was duly approved by this Court vide order dated 09.9.2003 passed on Official Assignee Reference No.77/2003 all questions relating to the shares which are subject of Buy Back Agreement were dealt with and collateral securities were submitted for meeting the Buy Back Commitment under the Buy Back Agreement and the Buy Back Agreement was released by the plaintiff vide letter dated 03.10.2003 upon settlement and discharge of all liabilities by the company towards the plaintiffs and no objection certificate dated 30.9.2003 was issued certifying that no liabilities outstanding against the company, hence no amount is due and payable and in view of above facts and circumstances the suit is barred by time and res judicata as well as Order II Rule 2 CPC.

v. It is further urged that under the facts and circumstances of the case and as argued above, there is significant novation in terms of agreement dated 30.4.1999 and reference No.77/2003 whereunder all the obligations were fulfilled hence in view of such novation any guarantee stood discharged and the instant suit on such ground is not maintainable.

vi. It is further argued that the Court lacks territorial jurisdiction to entertain and adjudicate up the instant suit.

It is claimed that the applicants are residents of Lahore having no place of residence at Karachi and/or in Sindh and the company has its office at Lahore and cause of action, if any, has arisen that is within the territorial jurisdiction Courts in Punjab more specifically in Lahore.

vii. It is further submitted that the Court lacks the pecuniary jurisdiction as well. It is claimed that without prejudice to the contentions, the plaintiff in terms of Buy Back Agreement can only claim mark up during the period the mark-up option is exercised i.e up to 13.2.1993 hence the illegal and mala fide claim of mark-up was only to attract the minimum limits of pecuniary jurisdiction of this Court by including the exorbitant amount of mark-up in its claim.

On the other hand learned Counsel for the plaintiff has categorically denied each and every averment raised by the defendants Counsel. It is urged by the learned Counsel for the plaintiff that the defendants are not only customer of the plaintiff in respect of its Buy Back Agreement as defined in section 2(c) of the Ordinance 2001 but they have committed wilful breach of their obligation as defined under section 2(e) of the Ordinance 2001. He further submitted that the Buy Back Agreement/facility is specifically mentioned in the definition of finance contained in section 2(d)(i) of the Ordinance, 2001.

It is further argued that the claim of the plaintiff against the defendants is not barred by time as it is a continuous wrong. He further submitted that the plaintiff issued letters, reminders, demands to the defendants on 17.5.2008 and 12.6.2009 and that the defendant admitted their liabilities.

Learned Counsel for the plaintiff submitted that the suit bearing COS No.02/1999 was filed by the plaintiff against the Hamid Textile Mills

Limited who was principal borrower/customer of the plaintiff and the defendant was cited guarantor of the aforesaid customer/principal borrower as they were jointly and severally liable. He however maintained that the subject matter of the aforesaid suit was finance facility which was granted by the plaintiff to the aforesaid company which was compromised hence he submitted that the question of any compromise or settlement as alleged does not arise insofar as the present facility is concerned, hence the application is not barred under section 11 CPC and under Order II Rule 2 CPC.

It is also denied by the learned Counsel for the plaintiff that this Court has no jurisdiction to entertain and adjudicate the matter in terms of clause 3.03 of the Underwriting Agreement on the basis of which the Buy Back Agreement was executed. Learned Counsel submitted that it was agreed categorically and specifically that the court of appropriate jurisdiction at Karachi shall be the proper Court to entertain all the matters arising out of or under this agreement. Learned Counsel further submitted that since the two Courts have jurisdiction therefore the plaintiff and the defendants have every right under the law to choose one out of the two jurisdictions which they did.

Learned Counsel further urged that the valuation of the suit is more than 50.00 Million and no mark-up as claimed is contrary to law and as such this Court has pecuniary jurisdiction as well.

Heard the learned Counsels and perused the material available on record.

I deal with the questions raised by the defendants' Counsel as under:-

Insofar as the term "customer" is concerned or the breach of any obligation in terms of Sub-Underwriting-cum-Buy Back Agreement the case of Allied Bank of Pakistan Limited vs. Safa Textile Limited reported

in 2013 CLD 2022 is important. It was held by the Division Bench that the term "finance" as used in the 2001 Ordinance could not be regarded as including the obligation undertaken by a financial institution in an underwriting transaction. The Division Bench held as under:-

> "*12. We have carefully considered the submissions made by learned Counsel for the respondents. We accept that "finance" as used in the 2001 Ordinance cannot be regarded as including the obligation undertaken by a financial institution in an underwriting transaction. This is so for two principal reasons. Firstly, as pointed out, both commercially and legally there is a well-accepted distinction between equity financing and debt financing. An underwriting transaction and obligation goes to the former and not the latter. Secondly, in section 7 of the 1962 Ordinance, which as noted above lists several types of additional businesses that banking companies can engage in, the underwriting business and the business of providing finance are stated in two separate sub-clauses [(a) and (aa) respectively]. Sub-clause (a), which lumps together several types of businesses, does refer to the business of "the lending or advancing of money either upon or without security", and the latter is also covered by "finance" as used in the 2001 Ordinance. However, the separate listing of these types of business (i.e, underwriting and finance) does point towards that the issue raised in para 6 above ought to be answered in the negative i.e., that the obligations undertaken by a financial institution in respect of an underwriting transaction ought not to be regarded as "finance" within the meaning of section 2(d)*"

In the similar way in the case of National Bank of Pakistan vs S.G. Fiber Limited reported in 2004 CLD 689, similar question was decided and the learned Judge went on to observe that undertaking in terms of such Underwriting Agreement does not amount guarantee or create any relationship of financial institution and customer between the parties, nor breach of such undertaking could be termed as default and held that the suit cannot be entertained under the Banking jurisdiction of the Court. Somehow similar view was taken in the cases of Karachi Electric Provident Fund v. National Investment (Unit) Trust reported in 2003 CLD 1026, Bank Al-Falah Limited v. Iftikhar A. Malik 2003 CLD 363 and Avari Hotels Limited & others v. Investment Corporation of Pakistan & others reported in 2000 YLR 2407. Such observations were made by the

appellate Court despite the fact that the terms “equity” is available in section 2(d)(i) of the 2001 Ordinance.

The next question as raised in this regard was on account of the fact that the suit being barred by time and res judicata without prejudice to the above rights and contentions. In this regard reliance is placed on the case of Ehsan Ali Alibhoy & others v. Industrial Development Bank of Pakistan & others reported in 2003 CLD 440.

In defence learned Counsel for the plaintiff has argued that the claim of this suit was not in the earlier proceedings as referred by the defendant and hence provisions of section 11 CPC would not be able to consider it as being res judicata. He emphasises that since it is an independent claim, therefore, section 11 CPC would not be attracted.

The question here is not that this claim was not included in the earlier claim, the question is that why it was not included in the earlier litigation when it could have been raised and hence the questions in terms of Order 2 Rule 2 CPC would squarely be applied in such contentions. Reliance is placed on the case of Fecto Belarus Tractor Ltd. V. Government of Pakistan reported in PLD 2005 SC 605, State Bank of Pakistan v. Imtiaz Ali Khan reported in 2012 SCMR 280 and Irene Wahab v. Lahore Diocesan Trust Association reported in 2002 SCMR 300.

Insofar as the question regarding the claim barred by time is concerned, it appears that prima facie the shares are to be bought back within two years and the mark-up is to be paid quarterly for two years apparently and since the shares were taken up on 13.2.1991 therefore, it requires consideration as it is a mixed question of law and facts that the claim is barred by time. Reliance is placed on Ehsan Ali Alibhoy v. Industrial Development Bank of Pakistan reported in 2003 CLD 440 and Habib Bank Limited vs. Aizad Hassan reported in 2007 MLD 1687.

Learned Counsel for the defendant relied upon the cases of Talib Hussain Nakai v. Returning Officer reported in 2003 YLR 3264 on the ground that the facts of the case are sufficient to establish novation in the agreement dated 30.4.1996 and Reference No.77/2003 whereunder the obligations have been fulfilled hence they are entitled at least for unconditional leave to defend at this stage.

Insofar as the question relating to the territorial jurisdiction and pecuniary jurisdiction of this Court is concerned, the facts and circumstances are such in my view could only be decided on the basis of evidence and not summarily. Reliance is placed on Pakistan Kuwait Investment Company Pvt. Ltd. V. Messrs Active Apparels International & others reported in 2012 CLD 1036 and Trycot Synthetic Fibre Company & another vs. Habib Bank Limited reported in 2012 CLD 1670.

In my view the defendant discloses facts which constitute plausible defence and there are substantial questions of law and facts and are bona fide, triable and not elusory and hence needs to be tried or investigated into and hence entitled to leave to defend.

Any observations made above are tentative and meant for grant of unconditional leave only and will not affect trial.

These are the reasons of my short order dated 16.12.2014 by which I allowed the application on account of having substantial questions of law and facts.

JUDGE