

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI
(Banking Jurisdiction)

Suit No.B-40 of 2010

The Royal Bank of Scotland Ltd. v. Engineering Construction
International (Pvt.) Ltd and Another

Plaintiff: The Royal Bank of Scotland Ltd. through
its duly constituted attorney through Mr
Muhammad Haseeb Jamali

Defendant Nos.1 & 2: Engineering Construction (Pvt.) Ltd.
through its duly constituted attorney
(Defendant No.1) and Mr S. Arif Zia s/o
Zia-ul-Hasan (Defendant No.2) through
Mr Mansoorul Arfin, Advocate

Dates of Hearing: 12.10.2023

Date of Decision: 21.12.2023

Date of Announcement: 21.12.2023

ORDER

Jawad Akbar Sarwana, J.: This is a banking suit for recovery of Rs.92,867,772/- along with the cost of funds, etc., filed by the Plaintiff under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as “the FIO, 2001”).

2. The Plaintiff is a financial institution licensed by the State Bank of Pakistan to carry on banking business under the Banking Companies Ordinance, 1962. The Plaintiff is henceforth referred to as “the Plaintiff-Bank. The Plaintiff-Bank falls within the meaning of a “Financial Institution” as defined in Section 2(a) of the FIO, 2001.

3. Defendant No.1 is a limited liability company registered in Karachi. Defendant No.2 is the executant of agreement of several finance facilities availed by Defendant No.1 from time to time duly authorized by the Board of Directors of Defendant No.1. The two

Defendants have been availing and availed from the Plaintiff-Bank finance as defined under section 2(d) of the FIO, 2001. These finance facilities were renewed from time to time up to the date of default of the payment obligations arising from such finance. To secure the finance, the Defendants executed Personal Guarantees and mortgaged their properties in favour of the Plaintiff-Bank. As such, the two Defendants fall within the definition of "Customer" within the meaning of Section 2(c) of the FIO, 2001.

4. Apart from the Banking Suit No. B-40 of 2010 by the Plaintiff-Bank filed in the banking jurisdiction of the High Court of Sindh at Karachi, pending hearing of the leave to defend application, the Defendants herein have filed a Banking Suit No.B-170/2010 against the Plaintiff-Bank. The leave to defend application in the Banking Suit No.B-170/2010 was decided vide Order dated 11.02.2011 when the learned Counsel for the Defendants stated No Objection to the grant of the leave to defend filed by the Plaintiff-Bank in Defendants' Suit No.B-170/2010. In view of the No Objection of the learned Counsel for the Defendants in Suit No.B-170/2010, the Plaintiff-Bank's application for leave to defend was allowed. Thereafter, on 02.02.2012, by consent of the parties, the Court settled issues in Suit No.B-170/2010. Out of the 11 issues settled by the Court in Suit No.B-170/2010, almost half of the issues settled were in relation to disputed entries in the several Statements of Accounts relied upon between the contesting parties. Be that as it may, matters in Suit No.B-170/2010 proceeded for the recording of evidence and was concluded as well. The Banking Suit No.B-170/2010 is/was listed for final arguments when this matter (Suit No.B-40/2010) was taken up by this bench for hearing of the leave to defend application filed by the Defendants.

5. The Leave to Defend Application in Suit No.B-40/2010 was heard in peace-meal by this Bench. The Defendants have filed the Leave to Defend Application on several grounds, including, inter alia, that markup on markup has been charged, the amount claimed in Banking Suit No.B-40/2010 is not calculated in the manner as provided

in BCD Circular and the law applicable thereto, entries in the Statement of Account are divergent, the quantum of markup is varying in the absence of fresh agreement of finance and/or in the absence of agreement of finance (instead of applying the cost of funds during intervening periods when no agreement of finance was in force), the mark-up account numbers are varying and changing across the period of finance, Statement of Account of "PRIMAX CLASSIC" and A&Z International are not filed however the cross-entries are appearing in the Statement of Accounts which have been filed and relied upon by the Plaintiff-Bank and that there are repetitive amounts which have been posted in the markup accounts twice leading to mark up on mark-up. In a nutshell, the Defendants have challenged the Statements of Account and the manner in which entries are made. The learned Counsel for the Defendants, Mr Mansoorul Arfin, has pointed out various entries in the statement of account filed by the Plaintiff to show that the markup on the markup has been charged.

6. I have examined the entries, and it appears, albeit tentatively, that markup may have been added towards the principal amount, and the said amount was added to charge further markup in the succeeding entries. The controversy as to the account could effectively be addressed after an Amicus Curiae/Commissioner for Accounts verifies the Statements of Accounts.

7. In an unreported Judgment of a Division Bench of the High Court of Sindh, Circuit Court Bench, Hyderabad in CP No.D-1570/2022, Muhammad Siddique v. SILK Bank Ltd. dated 01.06.2022, the Petitioner, being a borrower, challenged the Order dated 15.03.2022 whereby the Banking Court-II Hyderabad in Suit No. 341 of 2015 allowed an Application under Section 5(8) of FIO, 2001 for calling of an Amicus Curiae, who is an expert from the State Bank of Pakistan having ten years experience of Banking at senior management level in a Financial Institution. The Division Bench of the High Court held that it was up to the Banking Court if it so desired to appoint an expert or amicus, which cannot be done at the behest of the parties. The

statute does not provide any remedy of appeal; hence, such a statutory scheme cannot be bypassed by challenging the impugned Order in a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan. If aggrieved by the findings of the order and the conclusion drawn in the impugned order, the petitioner may challenge it cumulatively after passing the final judgment and decree if he is so aggrieved. The petition being misconceived was dismissed.

8. In the *Bank of Punjab through Attorney v. Institute of Leadership and Management through Secretary and Another*, 2017 CLC 1784, the Single Judge of the Lahore High Court observed that the appointment of an Amicus Curiae was akin to the appointment of a local commissioner and was not binding on the Banking Court and could not be treated as ipse dixit.¹ In *Messrs. United Rubber (Pvt.) Ltd. and 4 Others v. Bank of Khyber (BOK)*, 2014 CLD 1220, the Single Judge of the Peshawar High Court observed that the appointment of a commissioner to audit the accounts maintained by the bank with that of the borrower would be in the interest of both parties to the extent that a well reputed and experienced commissioner be appointed to audit the accounts submitted by the parties properly.

9. **In view of the above precedent, provision of Section 5(8) of FIO, 2001, and the facts and circumstances of the case at hand, let the Statements of Account filed by the Plaintiff-Bank and Defendants be verified by any Chartered Accountant of any one of the Category "A", Chartered Accountant Firms approved by the State Bank of Pakistan.**² Let the learned Counsel for the Plaintiff-Bank, within 15 days from the date of this Order, propose to the learned Counsel for the Defendants-Customer three (3) names of

¹ The term "ipse dixit" (Latin for "he said it himself") is an assertion without proof, or a dogmatic expression of opinion.

² Parties to ensure that the Chartered Account has ten years experience on the banking side and has worked at a senior management level in a Financial Institution of repute or the State Bank of Pakistan, and has the requisite qualifications as per Section 5(8) of the FIO, 2001. Any deviation from the statutory requirement would reduce the commission to a cypher. Reliance is placed on the Division Bench Judgment of the Peshawar High Court in *Messrs. Soneri Bank Limited through AVP/Manager v. Messrs Azeem Match (Pvt.) Ltd. through Chief Executive and Seven Other*, 2013 CLD 1504.

Chartered Accountants from any three different Chartered Accountant Firms listed in the List of Chartered Accountants maintained by the State Bank of Pakistan under Section 35(1) of Banking Companies Ordinance, 1962 (available on the State Bank of Pakistan's website: [CL12-Annex.pdf \(sbp.org.pk\)](#)). The learned Counsel for the Defendants-Customers will select and nominate any one of the Chartered Accountants who will be deemed to be the Court's Amicus Curiae/Commissioner of Accounts under Section 5(8) of FIO, 2001. The Amicus Curiae/Commissioner for Accounts shall examine each of the Statements of Accounts as detailed in para 51 of the Plaint and paras 30 and 33 of the Amended Leave to Defend Application as per Order dated 01.02.2011 from the date of inception of each account up to the date of filing of the Banking Suit. The report to contain up to the date of filing of the Banking Suit, inter alia, (A) the total amount of finance availed by the Defendants from the Plaintiff-Bank; (B) the total amount of repayment made by the Defendants to the Plaintiff-Bank; (C) the breakup of the amount of payment along with the dates of payments of such amounts paid by the Defendants-Customers to the Plaintiff-Bank in (A) and (B); and, (D) the breakup of the total amounts stated in (A), (B) and (C) above, as the case may be, disclosing further details/sub-headings identifying the Principal Amount, Markup, Cost of Funds and other charges, if any, and as applicable to the finance, in accordance with the BCD Circulars and Instructions of the State Bank of Pakistan. The Counsels for the Plaintiff-Bank and Defendants-Customers are directed to provide all the Statements of Accounts as may be relevant to calculate the amount due and payable by the Defendants-Customers. Let such exercise be carried out preferably within four (4) months.

10. The Amicus Curiae/Commissioner of Accounts will commence work in terms of this Order after settlement of his terms of engagement with the parties facilitated through the learned Counsels of the Plaintiff-Bank and Defendants-Customers, as the case may be. The fee of the commissioner shall be borne by the parties in equal ratio.

11. The hearing of the Leave to Defend Application is deferred and will be heard afresh, to be taken up after the above exercise has been completed, i.e. after receipt of the Amicus Curiae/Commissioner of Accounts Report. Meanwhile, this Banking Suit is not to be treated as part-heard (following this Order) and shall be listed according to Roster. Office to ensure compliance.

12. The bench notes that the Office has listed Banking Suit No.B-40/2010 along with Banking Suit No.B-170/2010 on the same dates. While finalizing today's Order, Suit No.B-170/2010, involving the same parties as in this Suit, appears on this Court's website as Heard and reserved for Judgment since 12.10.2023. This is not correct. Counsels have not submitted final arguments in the said Banking Suit. Counsels argued Leave to Defend Application in Suit No.B-40/2010 only. No hearings took place in Suit No. B-170/2010. A separate Order has been passed in Banking Suit No.B-170/2010 today.

13. It is pertinent to mention here that vide the Court's Order dated 02.02.2012 in Banking Suit No.B-170/2010, the Plaintiff-Bank's name was amended from "Royal Bank of Scotland Limited" to "Faysal Bank Limited", and a fresh updated Title of the Plaint was also filed in Banking Suit No.B-170/2010. This Bench could not find any such orders in this Suit, i.e. Suit No.B-40/2010. The learned Counsel of the Plaintiff-Bank is directed to take necessary action in this respect.

14. It is clarified that the observations made herein are confined to provide a background of this Order and are without prejudice to the parties' claims and defence in the leave to defend application and the two banking suits, namely Suit No.B-40/2010 and B-170/2010, and/or any future litigation between the parties.

J U D G E

Announced by me.

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