IN THE HIGH COURT OF SINDH AT KARACHI

1st Appeal No.128 of 2011

Jamil Paper Mart----- Appellant

Versus

M/s. Habib Bank Limited ------- Respondent

BEFORE:
Mr. Justice Mushir Alam, Chief Justice
Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing: 04.12.2012

Appellant: Through Mr. Sohail Hameed Advocate

Respondent Through Mr. Salman Hamid Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This appeal is arising out of the judgment and decree dated 01.11.2011 and 21.10.2011 respectively passed in Suit No. 120/2009 by the Banking Court-I at Karachi.

The brief facts of the case are that the respondent filed Suit No. 120/2009 before Banking Court No.I, Karachi for the recovery of various finance facilities including running finance facility which were renewed from time to time. The said last renewal/banking arrangement dated 15.7.2008 are available as annexure-B-3 page 105 in terms whereof the Habib Bank Limited defined Banking arrangements with

appellant. Such arrangement were endorsed when subsequent to this letter, an agreement of finance dated 06.08.2008 was executed. In terms of the aforesaid agreement the appellants were obliged to pay mark up at the rate of 16% i.e. 3 months KBI + 3%per annum on quarterly basis and in the event of default/delay in payment of markup on each of the due dates, the respondent was entitled to recall the entire facility together with amount of markup accrued thereon as well as cost of funds since from the date of default.

That in consideration of the aforesaid facility the appellants as a security for repayment of aforesaid signed, executed, and delivered (i) Agreement of Finance dated 06.8.2008, (ii) Demand Promissory Note dated 06.8.2008 and (iii) Undertaking dated 06.8.2008 assuring the respondent that the appellant shall not use facility for any purpose other than it was granted. Besides this, the appellants also executed and delivered letter of guarantee and hypothecation stock through letter of hypothecation. It appears that the proprietor of the appellants as security also created mortgage in respect of his immovable property by means of registered Mortgage Deed dated 24.2.1992 duly registered before the Sub Registrar T. Division and deposited the original title Deeds and documents vide Memorandum of Deposit dated 07.2.2003 as well as supplemental Memorandum of Deposit dated 14.10.2004.

That after filing of the suit the summons were issued and the appellants filed application for leave to defend and primarily raising the question that the statement of

account since beginning i.e. from the date of the inception of the account were not provided and also did not accompany/attach with the plaint. Learned Counsel for the appellant also submitted that the respondent bank has played fraud with the appellant in terms of the account which has been placed on record w.e.f August 2008 and as such the earlier accounts were concealed. Learned Counsel further submits that the Agreement of Finance and Promissory Note are illegal and void.

On the other hand learned Counsel for the respondent has argued that all these questions were substantially heard by the Banking Court and consequently the leave to defend application was dismissed on 24.2.2011 and the parties were required to file their respective break ups and consequently pursuant to the break ups and statements of account the suit was decreed accordingly. Learned Counsel further submitted that there was no reason or occasion to file the statement of account since the inception of the account as the last reschedule was observed in terms of banking arrangement 15.7.2008 in terms whereof an Agreement of Finance on markup basis running finance was executed on 06.8.2008 followed by execution of promissory note, undertaking guarantee, letter of hypothecation of movable assets and as such there is no requirement of placing on record accounts since inception of accounts.

We have heard the learned counsels and perused the record. From the perusal of the application for leave to defend it reveals to be an admitted fact that the respondent purchased certain goods in the sum of Rs.3.5 Million and resold the same

in the sum of Rs.46,40,000/- to the appellants at the rate of 16% per annum. Thus it appears that the execution of the Finance Agreement is not denied. There is no substance in the arguments of the learned Counsel for the appellant that the accounts of the appellant as held by the respondent bank since 1992 have not been furnished or attached with the plaint. It appears from the perusal of the Finance Agreement dated 06.8.2008 that the appellants/proprietor namely Muhammad Jamil son of Shamsuddin executed the said agreement and confirms having immediately purchased the goods from the bank prior to the execution of this agreement at the price of Rs.46.40 million. Learned Counsel for the appellant has failed to point out as to how and under what circumstances this agreement is illegal or unlawful under the law. Learned Counsel also failed to point out as to how the requirement of statements of account since inception is essential when rescheduling Agreement itself as admitted by the appellant was made on 06.8.2008 and the statements of account has also been filed w.e.f. from the said date. In fact the learned Counsel for the appellant himself furnished statement of account from 02.1.2006 which include the crucial dates when the Finance Agreement was executed.

Learned counsel for the appellant has placed reliance on the case of Apollo Textile Mills Ltd. v. Soneri Bank Ltd. reported in PLD 2012 SC 268. It appears that the judgment has gone against the arguments of learned counsel for the appellant. In this case the re-scheduling was made on 06.08.2008 which fact is admitted by learned

counsel for the appellant in his leave to defend application and only defence that has been taken by learned counsel for the appellant was that the agreement of finance and promissory note are illegal and void. Appellant very categorically in his leave to defend application has admitted in the same breath that the respondent/bank purchased certain goods in the sum of Rs.3.5 Million from the appellant and resoled at the rate of 16% per annum. Such admission is categorical and in consonance with the finance agreement dated 06.08.2008. In terms of Para 24 of the judgment ibid, as referred by learned counsel for the appellant, the Hon'ble Supreme Court held as under:-

> *"24. Despite admitting the claim of the respondent bank, the documents and the Statements of Accounts, the petitioners contended that the Statements of Accounts were incomplete as they started with a brought forward balance than the zero balance. Having so said, the effect of the availed rollovers/reschedulings/rearrangements was not denied for rebutted to prove the invalidity or prejudice thereof. This aspect of the matter was duly responded to by the learned Single Judge in his order by observing that "such objection would have carried weight in case the appellants would have disputed the existing outstanding or the respondent would have been claiming markup. The appellants nowhere have disputed the disbursement of facilities or have brought to the notice and payment not reflected in the Statements of Accounts". The petitioners have not shown the prejudice caused to them purportedly by so called incomplete Statements of Accounts which we find to be complete on considering the effect of rollovers. We also note that separate Statement of Account was filed by the plaintiff Bank in each separate/independent Account which commenced without a debit from its respective date of commencement. The petitioners have failed to distinguish the particulars of one Account from the other, lending non-credibility to their objection as raised. In the absence of denial of availing of the finance facilities, execution of the charge/security documents and admission of the outstanding liability per the Statements of Accounts, we do not find existence of a substantial question of law or fact requiring evidence."*

In the same view the appellant in this case has categorically admitted the re-scheduling whereas insisted for filing the statement of accounts since inception which has no reference or relevance as far as the finance agreement dated 06.08.2008 is concerned. Thus, the appeal has no merits and was accordingly dismissed by a short order dated 04.12.2012 and these are the detailed reasons for the same.

Dated: **Judge**

Chief Justice

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dated 06.8.2008 assuring the respondent that the appellant shall not use facility for any purpose other than it was granted. Besides this, the appellants also executed and delivered letter of guarantee and hypothecation stock through letter of hypothecation. It appears that the proprietor of the appellants as security also created mortgage in respect of his immovable property by means of registered Mortgage Deed dated 24.2.1992 duly registered before the Sub Registrar T. Division and deposited the original title Deeds and documents vide Memorandum of Deposit dated 07.2.2003 as well as supplemental Memorandum of Deposit dated 14.10.2004.

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On the other hand learned Counsel for the respondent has argued that all these questions were substantially heard by the Banking Court and consequently the leave to defend application was dismissed on 24.2.2011 and the parties were required to file their respective break ups and consequently pursuant to the break ups and statements

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Dated: **Judge**

Chief Justice