

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. B-45 of 2000

J U D G M E N T

Date of hearing : 10.03.2014.

Plaintiffs: : Allied Bank of Pakistan through M/s.A.I.
Chundrigar & Co. Mr. Nabeel Kolachi,
Advocate.

Defendants No.1&2 : Mrs. Fahmida through legal heirs.

Defendant No..3. : Abdul Rashid

NAZAR AKBAR, J. Plaintiff has filed this suit under the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997, for the recovery of Rs.148,321,982.50 with the following reliefs.

i) Final Mortgage Decree in respect of the above described properties of Defendants Nos.1 to 3 mentioned hereinabove for purposes of recovery of Rs.148,321,982.50 as on 31.12.99 with further mark up at the contracted rate of 23% per annum from the date of filing of the above suit till realization.

ii) A Personal Decree against Defendants No.1 to 3 singly and jointly for a sum of Rs.148,321,982.50 as on 21.12.99 with further mark up at the contracted rate of 23% per annum from the date of filing of the suit till realization.

iii) Costs of the suit.

iv) Any other relief which this Hon'ble Court may deem fit and proper.

On 5.6.2003 leave to defend application was granted and on 02.10.2003 four issues were framed by the Court. However, on 08.12.2003 when application (CMA No.6204/2003) filed by the Defendant was allowed, the issues were recasted as follow;

1. Whether the amended application for leave to defend (CMA No.8691/2001) fulfills the mandatory requirement of Section 10 of the Financial Institutions (Recovery of Finances Ordinance, 2001 and can be treated as written statement on behalf of the Defendant? Or
2. Whether the written statement filed subsequent to the order dated 5.6.2003 granting leave to defend to the Defendants, can be treated as written statement. If not, its effect?
3. Whether no cause of action for the suit accrued to the Plaintiff?
4. Whether the charge documents admittedly executed / signed by the Defendants were obtained in blank and / or are not binding on the Defendants?
5. Whether 2019.02 M. Tons of imported RBD Palm Oil was at all pledged with the Plaintiff Bank by Defendant No.1? whether the said Palm Oil was pledged or not, who is liable to account for loss of the same?
6. Whether 2019.02 metric tons of RBD Palm Oil pledged by the Defendants was misappropriated, if so, by whom and who is liable to account for this loss?
7. Whether the Defendants can legally claim set-off in this Court of Rs.102.00 millions, though separately claimed by them in suit No.830 of 1997?
8. To what reliefs Plaintiff are entitled?
9. What should the decree be?

The Plaintiff's evidence was recorded through Muhammad Ismail son of Muhammad Qadeer, Officer Grade-I when on 25.10.2007 his examination-in-chief was partly recorded. On 8.4.2008 further examination-in-chief was recorded but nobody turned up for cross-examination of the Plaintiff. He has produced Ex.P5/1 to P/37, which amongst others included mortgaged through deposit of title deeds dated 01.9.1996 Ex.5/11 second mortgage of same date as Ex.P-5/12. Third mortgaged dated 13.12.1997 in respect of jointly owned immoveable property in the name of M/s.Sattar Enterprises partnership concern bearing Plot No.D-127, SITE, Karachi,

alongwith factory as Ex.P-5/18 and letter of Defendant No.1 dated 29.12.1998 regarding conversion of FAC Facility of Rs.15 Million into running finances as Ex.5/32 as well as two certified statement of accounts of running finances and letter of credits facilities as Ex.P-5/22 and 5/23.

The Plaintiff's witness kept on coming to the Court for his cross-examination but nobody on behalf of Defendants ever cross-examined him and ultimately on 28.3.2013 the Defendant side for cross-examination was closed and case was adjourned for filing of affidavit-in-evidence by the Defendant with advance copy to the Plaintiff. However, it never happened as nobody filed affidavit-in-evidence on behalf of the Defendant and ultimately on 2.5.2013 the side of the Defendant was closed for evidence and the case was fixed for final arguments. Since leave was granted and issues were framed and the plaintiff had led evidence, I propose to record my findings on each issue as follows:-

Issues No.1 & 2 These issues have no significance as on promulgation of Financial Institutions (Recovery of Finances) Ordinance 2001 the Defendants No.1 to 3 have filed an amended application for leave to defend in terms of Section 10(12) of the Ordinance of 2001. It was granted on 21.1.2003 and under Section 10(3) of the Ordinance 2001 it was to be treated written statement and copy of the same was supplied to the Plaintiff. Even otherwise this is not a material issue that which of the written statement to be treated as such for the simple reason that written statement has no significance unless the contents of the written statement are proved by way of evidence through the witness of the

Defendant and therefore, these issues need not to be answered being insignificant.

Issue No.3 The cause of action has been specifically mentioned by the Plaintiff in paras No.4, 6 9, 11 & 17, of the plaint which have been replied by the Defendant and in each reply the Defendants have only controverted the figures but they have not denied that they had obtained facility from the Plaintiff and that is why in the leave to defend order, this Court has observed that a detailed investigation is to be made to ascertain / determined the accounts and markup after recording of evidence of both the parties therefore, the Plaintiff had cause of action to file the present suit. The issue No.3 is answered in affirmative.

Issue No.4 The Defendant has not come forward to cross-examine the Plaintiff witness when he produced charged documents. The documents do not show any manipulation by the bank the figures mentioned in the charged documents and the statement of accounts filed by the Plaintiffs are same and therefore, without any contrary evidence the charged documents have to be accepted as true and correct. It was the duty of the Defendants to establish any adverse effect of signing the blank document, if at all, it happened. The Defendants unfortunately have not come forward to substantiate their claim that these documents are not binding on the Defendants. Therefore, I hold that the charged documents are binding on the Defendants and issue No.4 is answered accordingly.

Issue No.5 The burden of issue No.5 was on the Defendants to establish that Palm Oil was pledged with the Plaintiff Bank by the Defendants before claiming that it was misappropriated by the Bank. The Plaintiff has established through evidence that Plaintiff Bank was never in physical possession or control of Palm Oil which was directly placed by the Defendants in the custom warehouse and even an FIR was lodged by the custom authority against the Defendant No.1 for illegally removing palm Oil from the warehouse. The Defendants are facing trial. The Defendants have failed to produce any documents showing that they had pledged goods in favor of the Plaintiff Bank. The case of the Plaintiff is that the financial facilities including LCs were secured by mortgages of immovable property and against personal guarantees of the Defendants and therefore, issue No.5 is answered in negative.

Issue No.6 This issue seems to have been wrongly framed. The Defendants themselves have claimed that they have filed a Suit No.830/1997 for recovery of Rs.102 million from the Plaintiff and since issue of such recovery is already pending before the competent forum the same cannot be claimed as set off in another suit. Even otherwise the Defendants were required to lead evidence to show the bonafide of their claim for adjustment of huge amount against the finances facility availed by them but unfortunately Defendants have not entered into witness box. Therefore, the set off claim cannot be awarded in absence of any evidence. The issue No.6 is answered in negative.

Issue No.7 In view of the findings on Issues No.1 to 6 it is established that Plaintiffs is entitled to the relief claimed. However

the suit was filed under the Banking Companies (Recovery of Loans, Advances credits of Finance, Act) 1997 which on promulgation of financial institutions (Recovery of Finances) 2001 by operation of Section 7(6) was transferred to the Baking jurisdiction of this Court, therefore, Plaintiff is entitled to recover a sum of Rs.148,321,982.50 from the Defendants jointly and severally alongwith cost of funds.

Issue No.8 Suit is decreed as prayed with cost of funds.

Karachi
Dated:_____

JUDGE

SM