IN THE HIGH COURT OF SINDH KARACHI

Suit No. B – 32 of 2021

[Pak Brunei Investment Company Ltd., v. Atlas Cables (Pvt.) Ltd., & others]

Plaintiff	:	Pak Brunei Investment Company Limited through M/s. Syed Shayan Ahmed, Ghulam Murtaza and Ahmed Magsi, Advocate.
Defendant 1	:	Atlas Cables (Private) Limited through M/s. Waqar Ahmed and Abdullah Azzam Naqvi, Advocates.
Defendant 2	:	Aasim Azim Siddiqui son of Haleem Ahmed Siddiqui through Mr. Hasan Khurshid Hashmi, Advocate.
Defendants 3, 4, 5 & 7	:	Sheikh Arshad Javed son of Shaikh Nazir Hussain and three others through M/s. Talha Javed, Heer Memon and Ammar Suria, Advocates.
Defendant 6	:	Sheikh Adeel Javed son of Sheikh Arshad Javed through M/s. Zeeshan Abdullah and M. Adnan Abdullah, Advocates.
Dates of hearing	:	03-02-2025, 08-04-2025 & 24-04-2025.
Date of Judgment	:	20-08-2025

O R D E R

Adnan Iqbal Chaudhry J. – This order decides leave-to-defend applications by Defendants under section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 **[FIO]**.

Facts:

2. The Plaintiff and its subsidiary Awwal Modaraba, acting as a syndicate, extended finance in the sum of Rs. 630,000,000/ to Defendant No.1 in the form of a Diminishing Musharakah Facility. Contracts dated 28.03.2017 were structured by the syndicate to finance moveable fixed assets (Musharakah Assets) held by Defendant No.1 at its factory. Defendant No.1 committed to buy-out

units of the syndicate in the Musharakah Assets by 29.02.2024, and till such time agreed to pay rent/profit to the syndicate for using the Musharakah Assets. The finance facility was restructured by addendum contracts dated 29.04.2019 to extend the tenure of repayment to 20.04.2026. Still, the Defendant No.1 could not make repayment as per schedule. Therefore, the Plaintiff recalled the finance facility by invoking section 15 of the FIO for recovery. However, that action was stayed by order dated 27.05.2021 passed in Suit No. B-22/2021 instituted by some of the Defendants, hence this suit under section 9 of the FIO.

3. The Plaintiff seeks recovery of its share in the finance that was extended by the syndicate, which is said to be Rs. 430,000,000/. Per the Plaintiff, the outstanding amount is Rs. 551,901,749/- including profit up to 30.06.2021. The finance facility was secured by hypothecation of current and fixed asset of Defendant No.1 (the company), by mortgage of immoveable property of Defendant No.1, by mortgage of personal properties of Defendants 2 to 5, by pledge of shares held by Defendants 2 to 7 and by personal guarantees of Defendants 2 to 7, all of whom have filed applications for leave to defend.

4. The leave application by Defendant No.2 as mortgager and personal guarantor was time-barred by 25 days or so and was accompanied by an application to condone delay under section 5 of the Limitation Act, 1908. By order dated 29.10.2021, the application for condoning delay was allowed by the Court when the Plaintiff gave consent.

Delay in leave application by Defendant No.1 (principal debtor):

5. Leave application by Defendant No.1 (CMA No. 16188/2023) is also after the prescribed period of 30 days and is accompanied by an application to condone delay under sections 5 and 18 of the Limitation Act (CMA No.16190/2023). It was however clarified by its counsel that the application to condone delay is by way of abundant

caution as it is the case of Defendant No.1 that if a certain period is excluded under section 18 of the Limitation Act then the leave application is within time. The application was opposed by the Plaintiff's counsel who submitted that the delay is over 2 years.

6. Learned counsel for Defendant No.1 (the company) submitted that it was Defendant No.2 who was running the affairs of the company as director holding 75% shares and he was expected to file a leave application for the company when he filed his own; that he had earlier done so in Suit No. B-22/2021; that due to disputes between Defendant No.2 and other directors of the company who had been ousted from the affairs of the company, they were not aware that the Defendant No.2 did not file a leave application for the company; that in return for concessions for himself and his properties, the Defendant No.2 had made an underhand deal with the Plaintiff to let the suit go uncontested by the company which was the principal debtor; and that when the other directors came to know of such fraud on 26.09.2023, they rushed to file a leave application for the company. It is therefore submitted that the case attracts section 18 of the Limitation Act for excluding the time during which the other directors were fraudulently kept from knowledge that no leave application had been filed for the company.

7. Apparently, summons of the suit were served on Defendant No.1/company by all four modes in August 2021. Leave application was filed after more than 2 years on 18.10.2023. It was verified by Defendant No.4 on the authority of Defendant No.3 who was Chairman of the Board of Directors of the company. Significantly, the application for condoning delay does not dispute service of summons or the date thereof. Rather, the contention is that Defendant No.2 deliberately did not file a leave application for the company to defraud the company and consequently the other Defendants, therefore limitation should be computed under section 18 of the Limitation Act from the date the fraud was discovered by other directors.

8. For computing limitation for making an application, section 18 of the Limitation Act excludes such period during which a person having a right to make the application has, by means of fraud, been kept from knowledge of such right by the person against whom the application is to be made. For such purpose, knowledge of the company would be knowledge of its officers. In view of Order XXIX Rule 1 CPC, the leave application for the company could have been filed by the company Secretary or by any Director or other principal officer of the company. The officers who eventually filed the leave application for the company had already filed a leave application for themself within the prescribed time. Therefore, firstly, they cannot say that they did not have knowledge that the company was also sued and had to file a leave application within 30 days. Secondly, the fraud alleged here is said to be committed by Defendant No.2, not by the Plaintiff. In other words, the Plaintiff did not prevent the company or its directors from filing a leave application within time and cannot be faulted for infighting between directors of the company. Therefore, I do not see how section 18 of the Limitation Act can be invoked here to extend limitation for the leave application by the company/Defendant No.1. Resultantly, the application to condone delay i.e. **CMA No.16190/2023 is dismissed** as misconceived and the leave application by the Defendant No.1 i.e. **CMA No. 16188/2023 is dismissed** as time-barred.

Non-compliance of section 9(2) of the FIO and effect of Electronic Transactions Ordinance, 2002 :

9. Plaintiff's counsel had submitted that should the Court decide to dismiss the leave application of Defendant No.1, a decree against it should follow forthwith in view of section 10(12)[1] of the FIO. However, it is by now settled that even where no leave application is filed, or where the leave application is dismissed, the Court is still required to apply its mind to the plaintiff's case before passing any

[1] Previously section 10(11) of the FIO, 2001.

order/judgment;[2] that the consequence of dismissal of the leave application provided in section 10(1) of the FIO *viz.* that allegations of fact in the plaint shall be deemed to be admitted, bind the defendant not the Court;[3] and that the effect of plaintiff's non-compliance with the provisions of section 9 of the FIO is something that is to be examined independent of the defense set-up.[4] Here, the Defendant No.1 has made an application to reject the plaint under Order VII Rule 11 CPC (CMA No. 16189/2023) for non-compliance of sub-sections (2) and (3) of section 9 of the FIO. The Defendants 3, 4, 5 and 7 have also pleaded that the plaint is to be rejected for non-compliance of sub-section (2) of section 9 of the FIO. Therefore, I proceed to examine whether there are grounds to reject the plaint.

10. It was submitted by learned counsel for Defendant No.1 that the plaint does not comply with sub-section (3) of section 9 of the FIO inasmuch as para 11 of the plaint mentions only the dates on which the finance was availed by Defendant No.1 and not the amount of finance, which disclosure is mandated by clause (a) of said provision. However, the amount of finance availed is separately mentioned in para 5 of the plaint. Therefore, the requirement of clause (a) of sub-section (3) of section 9 of the FIO has, in fact, been fulfilled.

11. It was then submitted by learned counsel for all Defendants that the Plaintiff did not comply with section 9(2) of the FIO in that, the "*statement of accounts showing outstanding position*" filed with the plaint as Annexure 'H' is not a statement of account of debits and credits appearing in the bank/loan account of Defendant No.1, and that such statement is also not certified under the Bankers' Books Evidence Act, 1891 **[BBEA]**. This objection is weightier.

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[2] *Ali Khan and Company v. Allied Bank of Pakistan Ltd.* (PLD 1995 SC 362); *C.M. Textiles (Pvt.) Ltd. v. Investment Corporation of Pakistan* (2004 CLD 587); *Emirates Global Islamic Bank Ltd. v. Muhammad Abdul Salam Khan* (2013 CLD 1291); *Ali Waqar Azeem v. Standard Chartered Bank Ltd.* (2024 CLD 397).
[3] *Apollo Textile Mills Ltd. v. Soneri Bank Ltd.* (PLD 2012 SC 268).
[4] *Apollo Textile ibid*; *Elbow Room v. MCB Bank Ltd.* (2014 CLD 985); *Soneri Bank Ltd. v. Classic Denim Mills (Pvt.) Ltd. (*2011 CLD 408); *Imran Hussain v. Bankers Equity Ltd.* (2019 CLD 272).

12. The document purporting to be statement of account filed as Annexure 'H' to the plaint is essentially a break-up of the outstanding amount. The first page is the computation of profit/rent and cost of funds payable on the outstanding principal amount, and the second page reflects the amount paid by Defendant No.1. The dates on which the principal amount was disbursed are not mentioned. When juxtaposed with section 2(8) of the BBEA, Annexure 'H' does not reflect entries contained in the 'ordinary' books of the bank made 'in the usual and ordinary course of business' *viz.* a statement of debit and credit entries in the customer's account. It was similarly held in *C.M. Textiles (Pvt.) Ltd. v. Investment Corporation of Pakistan* (2004 CLD 587), *Elbow Room v. MCB Bank Ltd.* (2014 CLD 985) and *Al Raheem Rice Mills v. Bank Alfalah Ltd.* (2018 CLD 1351) that the statement of account envisaged in section 9(2) of the FIO is a document reflecting debits and credits and the dates thereof from the time of disbursement; and that, a statement only of balances or a certificate of outstanding amount is not such a statement of account. Moreover, Annexure 'H' to the plaint is also not certified as required by section 9(2) of the FIO *i.e.* it does not bear the certificate prescribed by section 2(8) of the BBEA and cannot be taken as *prima facie* evidence of existence of the entries it reflects, which recognition is otherwise provided to a certified copy by virtue of section 4 of the BBEA. It seems that the Plaintiff realized such defect when it proceeded to file the requisite statement of account with its replications.

13. The question now is of the consequence of filing the requisite statement of account with the replication instead of filing it with the plaint as required by section 9(2) of the FIO. Per learned counsel for Defendants, the consequence is rejection of plaint as held in *Apollo Textile Mills Ltd. v. Soneri Bank Ltd.* (PLD 2012 SC 268). The alternative submission of learned counsel for Defendants 2 to 7 was that in the very least they become entitled to leave to defend. In reply, learned counsel for the Plaintiff's submitted that Annexure 'H' to the plaint discloses the necessary figures and can be taken as a statement of

account for all practical purposes; that such statement of account was an "electronic document" as defined in the Electronic Transactions Ordinance, 2002 **[ETO]**, which statute overrides the FIO; and that, under section 3 of the ETO, an electronic document is not required to be certified. To support the latter submission, reliance was placed on *Habib Metropolitan Bank Ltd. v. Abdul Jabbar Gihllin* (2013 CLD 88), *Habib Metropolitan Bank Ltd. v. Faizan Ali & Company (Pvt.) Ltd.* (2017 CLD 1583) and *Tasleem Fatima v. Bank of Punjab* (2017 CLD 552) where it was observed that the ETO does away with the requirement in section 9(2) of the FIO for a certified copy of statement of account.

The alternative submission of Plaintiff's counsel was that section 9(2) of the FIO was not a mandatory provision as a penal consequence was not provided for non-compliance; therefore, the statement of account filed with the replication, which was duly certified under the BBEA, was substantial compliance with section 9(2) of the FIO; consequently, the plaint cannot be rejected and at best, leave to defend can be granted to Defendants 2 to 7.

14. I have already discussed in para 12 above why Annexure 'H' to the plaint does not qualify as a 'statement of account'. As regards the reliance placed on section 3 of the ETO for overriding section 9(2) of the FIO, section 3 of the ETO reads:

> "3. **Legal recognition of electronic forms**.—No document, record, information, communication or transaction shall be denied legal recognition, admissibility, effect, validity, proof or enforceability on the ground that it is in electronic form and has not been attested by any witness."

Firstly, section 3 of the ETO does not exempt production of a 'certified copy', rather it exempts 'attestation by witness'. Secondly, and more importantly, section 3 only relates to a document that is "in electronic form". Section 2(m) defines an "electronic document" as a document that is "in electronic form". Surely, Annexure 'H' to the plaint, or for that matter any document on paper is not in electronic form and cannot be termed an electronic document. A 'print-out' of

an electronic document should not be confused with the electronic document itself. This distinction is also brought out in section 12 of the ETO which stipulates:

> "12. **Certified copies**.—Where any law requires or permits the production of certified copies of any records, such requirement or permission shall extend to printouts or other forms of display of electronic documents where, in addition to fulfillment of the requirements as may be specified in such law relating to certification, it is verified in the manner laid down by the appropriate authority."

15. Section 12 of the ETO clarifies that where a law requires production of certified copies of any record (as for example section 9(2) of the FIO), such requirement shall extend to print-outs of electronic documents, which printouts should fulfill requirements of certification specified in said law in addition to any requirement of verification laid down by the appropriate authority defined in section 2(e) of said Ordinance (for present purposes, the latter requirement of verification by the appropriate authority is not relevant). Therefore, accepting that a statement of account is now maintained by a financial institution in electronic form, nevertheless when it brings a print-out of such electronic document for the purposes of section 9(2) of the FIO, such print-out is still required to be certified under the BBEA. Since sections 3 and 12 of the ETO are not in conflict with section 9(2) of the FIO, there is no question of either statute overriding the other. For these reasons I respectfully disagree with the view taken in *Abdul Jabbar Gihllin* (2013 CLD 88) by a learned single Judge of this Court. The other two cases cited by learned counsel (2017 CLD 1583 and 2017 CLD 552) that follow *Abdul Jabbar Gihllin,* are by the Lahore High Court and not binding on this Court. In *Askari Bank Ltd. v. DCD Services Ltd.* (2018 CLD 799) another learned single Judge of this Court has disagreed with *Abdul Jabbar Gihllin* and held that section 3 of the ETO does not override section 9(2) of the FIO.

16. Adverting to the alternative submission of Plaintiff's counsel on the effect of section 9(2) of the FIO, he is correct to the extent that said provision itself does not stipulate a penalty for non-compliance.

Nevertheless, this aspect seems to have been considered by the Supreme Court in *Apollo Textile* in concluding that it is mandatory for the financial institution to comply with section 9(2) of the FIO, failing which the plaint can be rejected. That being said, it is to be noted that the law laid down in *Apollo Textile* to the extent of section 9(2) of the FIO was by way of approving the case of *Bankers Equity Ltd. v. Bentonite Pakistan Ltd.* that was cited before it, and where the Lahore High Court had rejected the plaint of the financial institution for non-compliance of section 9(2) of the FIO.[5] But, *Bentonite* was eventually set-aside by the Supreme Court by order dated 12.03.2013 which is reported at 2015 CLD 56. Though such order records that the respondent had conceded, it reflects that there the Supreme Court was of the view that non-filing of the requisite statement of account with the plaint was a rectifiable defect.

17. Be that as it may, from the facts in *Bentonite* it appears that the acceptable statement of account was not filed at any stage, not even with the replication. In other words, both in *Bentonite* and *Apollo Textile* there was no occasion to examine whether the plaint should also be rejected where the requisite statement of account though not with the plaint, is subsequently filed with the replication, and especially when section 10(9) of the FIO takes into consideration the replication as well for deciding the leave application. Therefore, for rejecting the plaint, the case of *Apollo Textile* can be distinguished as applicable in circumstances where the statement of account required of the financial institution is not even produced with its replication.

18. In most cases where the statement of account was brought on the record with the replication, the High Courts have been inclined to grant leave to defend and not reject the plaint.[6] The underlying consideration in such orders appears to be that even though the

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[5] Judgment of the Single Bench of the Lahore High Court is reported as *Bankers Equity Ltd. v. Bentonite Pakistan Ltd.* (2003 CLD 931). The affirming judgment of the Division Bench is reported at 2010 CLC 651.

[6] *Soneri Bank Ltd. v. Classic Denim Mills (Pvt.) Ltd.* (2011 CLD 408); *Decent Builders and Developers v. Standard Chartered Bank (Pakistan) Ltd.* (2021 CLD 130); *Jamal Tube (Pvt.) Ltd. v. First Punjab Modaraba* (2021 CLD 1372).

omission of the statement of account with the plaint is a defect that has been rectified to avoid rejection of plaint, it has nonetheless deprived the defendants of a defense on accounts, thereby raising a substantial question of fact for granting leave to defend.

19. Over the years there have emerged still other facets of non-compliance of section 9(2) of the FIO which were not in contention in *Apollo Textile*, as for example where the statement of account is incomplete;[7] where the statement of account bears the certificate prescribed by section 2(8) of the BBEA but it is not subscribed by the relevant officer or with the name and official title of the relevant officer.[8] In all such cases, the High Courts have again been inclined to grant leave to defend and not reject the plaint. In such orders, the underlying consideration appears to be that the plaint cannot be rejected for partial non-compliance, and leave to defend is granted because a partially compliant statement of account cannot be taken as *prima facie* evidence under section 4 of the BBEA.

20. In view of the foregoing discussion, the case of *Apollo Textile* is not attracted in present circumstances for rejecting the plaint. Therefore, **CMA No. 16189/2023 is dismissed**. However, Defendants 2 to 7 are entitled to leave to contest the Plaintiffs accounts inasmuch as those were produced for the first time with the replication. As regards the Defendant No.1, though it has lost the right to lead evidence, it can still cross-examine the Plaintiff's witnesses.

21. There were other grounds urged for grant of leave. It was submitted by learned counsel for Defendant No.6 that in view of section 133 of the Contract Act, 1872, the Defendant No.6 was discharged as surety when the Plaintiff and Defendant No.1 varied

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[7] *National Bank of Pakistan v. Amna Export (Pvt.) Ltd.* (2020 CLD 1243). *National Bank of Pakistan v. Pakistan Textile City Ltd.* (2021 CLD 194)

[8] *Soneri Bank Ltd. v. Compass Trading Corporation* (2012 CLD 1302); *Pak Kuwait Investment Company (Pvt.) Ltd. v. Active Apparels International* (2012 CLD 1036); *Elbow Room v. MCB Bank Ltd.* (2014 CLD 985); *Pakistan Kuwait Investment Company (Pvt.) Ltd. v. Three Star Hosiery Mills* (2017 CLD 546); *NIB Bank Ltd. v. Venus Chemicals (Pvt.) Ltd.* (2020 CLD 1227).

the terms of the finance contracts by the addendum contracts dated 29.04.2019 without the consent of the Defendant No.6. Such submission was dealt with by this Bench in *National Bank of Pakistan v. Tuwairqi Steel Mills Ltd.* (2019 CLD 1140) as follows:

> "Therefore, the legal position that emerges from decided case-law is firstly that the variation of contract within the contemplation of section 133 of the Contract Act means a material variation that adversely affects the surety; and secondly that the defense conferred on the surety under section 133 of the Contract Act can be waived by the surety by a specific agreement in the deed of guarantee provided that such waiver does not defeat any provision of law, and then such a waiver would amount to "the surety's consent" within the meaning of section 133 of the Contract Act with the result that the surety would not be discharged."

22. Clause 2 of the personal guarantee stipulates that it is a continuing guarantee which binds the Defendant No.6 *"till all the amount(s) have been paid in respect of the Facility in terms of the Diminishing Musharaka Agreement and other agreements associated therewith"*. Clause 4 of the guarantee further stipulates that if the lender gives time to the customer to repay the finance or varies the finance contract, that shall not prejudice the guarantee. These clauses constitute "the surety's consent" within the meaning of section 133 of the Contract Act. The addendum contracts had only extended the tenure of repayment which did not adversely affect Defendant No.6. Therefore, the addendum contracts do not discharge the Defendant No.6 as surety.

23. It was then submitted by learned counsel for the Defendants 3-7 that they had been duped by the Defendant No.2 into mortgaging their properties and executing personal guarantees for the Defendant No.1. But even assuming that to be so, that is a dispute *inter se* the Defendants to which the Plaintiff is not party. Such dispute cannot be a ground to grant leave to defend in the Plaintiff's suit.

24. In view of the foregoing, **CMA No. 15511/2021 by Defendants 3, 4, 5 and 7, CMA No. 18263/2021 by Defendant No.2 and CMA No.**

15509/2021 by Defendant No.6 are allowed, granting them leave to defend the suit however, only for determining the following issues:

(i) *What amount of finance was availed by the Defendant No.1 from the Plaintiff and what amount was repaid ?*

(ii) *Whether the profit charged in the statement of account is in accord with the finance agreements ?*

(iii) *What amount is due to the Plaintiff by the Defendants under the finance agreements ?*

(iv) *What should the decree be ?*

For the above purpose, leave applications by the Defendants 2 to 7 shall be treated as written statements. List of witnesses shall be filed in 7 days. List of documents shall be filed within three weeks. Thereafter, the suit shall be fixed for orders for appointing a Commissioner to record evidence.

JUDGE

Karachi
Dated: 20-08-2025
SHABAN*