ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.B-41 of 2016

DATE	ORDER WITH SIGNATURE OF JUDGE

Plaintiff: **First Women Bank Ltd. through Mr. S.M. Kazim, Advocate alongwith Ms. Farzana Aftab, Branch Manager.**

Defendants: **Through Mr. Muhammad Arif, Advocate.**

For hearing of CMA No.597/17.

Date of Hearing: 15.02.2018
Date of Order: 09.03.2018

O R D E R

Muhammad Junaid Ghaffar J. This is a Suit under Section 9 of the Financial Institution (Recovery of Finances) Ordinance, 2001 **(FIO 2001)** for recovery of Rs.370, 383,869/- alongwith cost of funds with a further request for sale of mortgaged and hypothecated properties. Through listed application, Defendants seek leave to defend this Suit.

2. Learned Counsel for the Defendants has contended that the Plaintiff-Bank had though agreed to provide financial assistance for certain amounts, but did not reimbursed the agreed amount, whereas, exaggerated markup has been charged by the Plaintiff-Bank, which is impermissible in law. Learned Counsel has further contended that different amounts were mentioned in the Legal Notice, whereas, Suit has been filed for some other amount, while substantial payments were made to the Bank

but they have not shown the same in their Statement of Accounts. He has further submitted that prior to filing of this Suit; the Defendants have already filed Suit No.B-39/2016 for Rendition of Accounts as well as Damages. Per learned Counsel admittedly some fire broke out in the Defendants' factory and even the claim of Insurance was directly obtained by the Plaintiff-Bank. According to the learned Counsel since the promises were not fulfilled, whereas, the Defendants' Suit is also pending, they are entitled for grant of leave to defend so that evidence may be recorded. Learned Counsel has referred to various documents annexed with the leave to defend application.

3. On the other hand, learned Counsel for the Plaintiff-Bank has opposed the leave to defend application and has contended that there is no specific objections regarding any of the entries in the Account and the Defendants have failed to fulfill their obligation including filing of the details of Accounts in terms of Section 10(5) of the **FIO 2001,** therefore, they are not entitled for any leave to defend. Learned Counsel has referred to the Statement of Account as well as category-wise finance facilities availed by the Defendants and has contended that the Defendants have defaulted and no substantial question of law or even on facts has been brought to the notice of this Court, on which any leave to defend can be granted.

4. I have heard both the learned Counsel and perused the record. Though the Counsel for the Defendants has made a feeble attempt to point out the discrepancies in the Statement of Account, but while confronted as to pinpoint

any specific entry, which is disputed, the learned Counsel could not satisfactorily respond to the query of the Court. Learned Counsel only stated that since fire broke out, therefore, the Defendants are not in possession of any Statement of Account issued to them by the Bank but they are only in possession of some deposit slips for repayment made to the Plaintiff. To this learned Counsel was further directed to refer to Account Statement on record and reconcile those entries but again learned Counsel failed to do so. It may be appreciated that the Defendants have not disputed the disbursement of various finance facilities including but not limited to running finance, demand finance, export refinance etc. The only contention, which the learned Counsel made, was in respect of charging of alleged excessive markup, however, time and again he was asked to refer to any of the entries in the Statement of Account to that effect but the learned Counsel failed to do so. It is but settled law that markup is to be paid as per agreement, whereas, if finance facility is availed in respect of running finance even beyond the date of Agreement, the Borrower is liable to pay the markup at least on such running finance availed. The Defendants kept on availing facility and never objected to any of the payments and or markup.

5. In the case reported as **2015 CLD 452** ***(Messrs U.I.G (Pvt) Ltd. through Director and 6 others v. Bank Al-Falah Ltd*** a learned Division Bench of this Court speaking through me has discussed the question so raised on behalf of the Defendants. The relevant findings are as under:-

"7. Insofar as the first objection with regard to juggling or maneuvering of figures and disbursement in excess of Rs.15.0 Million and the repayments made by the appellants is concerned, in our humble view the same is not correct and is misconceived. It must be kept in mind that this is a case of Running Finance Facility and has its own peculiar mechanism unlike any other Finance Facility. In this type of facility, the borrower is allotted a cash limit, as agreed upon between the parties, whereafter the borrower is at liberty to withdraw the amount from the account as required by him and the Mark-up is charged when the amount is withdrawn from the limit on the utilized amount. The amount of Mark up is then calculated on a daily basis, allowing the borrower to make payments towards the utilized principal as well, thereby reducing the mark-up burden. The borrower withdraws the amount at his own sweet will from time to time and is liable to pay the agreed markup on the amount which he has withdrawn from the amount disbursed or credited by the Bank. The borrower also makes deposits in the same account and such deposits are credited in the said account and accordingly the amount of markup is charged on the outstanding amount. This is in fact a revolving credit, having a debit and credit entry in the statement of account as and when the same is operated, either by withdrawal or deposit. In the instant matter it is simpliciter, operating an account in which the Bank has credited an amount of Rs. 15.0 Million at the disposal of the appellants and nothing else. The more the appellant withdraws, the higher the mark-up would be. On a careful examination of the statement of account, it is reflected that on various dates, the appellants have withdrawn money, either through cash or payees account cheques, and similarly have made deposits, either in cash or through crossed cheques. This operation of account is spread over a period of almost 2 years starting from 13-6-2007 to 17-6-2009. Therefore, the amounts reflected in Para 10 of the Plaint are a total aggregate of the withdrawals, as well as the deposits by the appellants and is not in fact the total principal amount reimbursed at one point of time. The manner it has been stated in Para 10 of the pliant is in fact to fulfill the requirement of the 2001 Ordinance and the appellants' contention is this regard is not based on any sound reasoning. On further perusal of the record and specially the statement of account, it is noticed that at no point of time, the total withdrawal from the said account ever exceeded Rs. 15 million. In view of such position the objection raised by the learned counsel for appellants with regard to juggling and or maneuvering of figures and the claim of any excess payment or repayment of the principal amount is misconceived and is hereby repelled.

8. Next objection raised on behalf of the appellants is with regard to the charging of mark up after the expiry of agreement dated 31-5-2008. The appellants have not disputed that in fact an agreement was signed for availing the Running Finance Facility by them, but according to them the same stood expired on 31-5-2008; hence no further mark-up can be charged by the respondent bank beyond this period i.e. 31-5-2008. However, from the perusal of the record it appears that the appellants continued to avail the Finance Facility even after the expiry of the agreement on 31-5-2008 and such fact is not in dispute and is also supported from the perusal of the statement of account which reflects that the appellants continued to operate the said account as was being done before 31-5-2008. The appellants have made withdrawals as well as deposits in the said account after 31-5-2008 and such withdrawals reflects debit entries which establishes that Finance

> Facility was being availed by the appellants. It is also not disputed by the appellants that appellant No.1 vide its letter dated 16-5-2008 had requested for renewal of the Finance Facility and on such request, the respondent Bank had forwarded the renewal agreement as well as other documents to the appellants for signatures, but were not signed by the appellants, and thereafter an objection was raised as there was some typographical errors in the said renewal agreement wherein names of some other parties were mentioned. It appears that this objection which is now being raised by the appellants is an afterthought. As soon as the agreement expired on 31-5-2008 and if the appellants intention was to discontinue with any such finance facility or agreement, then it was incumbent upon the appellants to settle the account of Running Finance Facility, and the outstanding amount of Finance Facility as on 31-5-2008 was required to be paid in full and final by the appellants. If not, then any other legal course was required to be adopted by the appellants, either by filing any legal proceedings before a competent Court of law or any other correspondence in the form of legal notice or a letter. We have not been assisted in this regard by any such supportive documents. On the contrary, it is reflected from the record that the appellants had themselves requested the respondent bank to extend the finance facility for further period and continue with the arrangement. It is also reflected from the record and perusal of the statement of account, that the appellants even after 31-5-2008 had in fact also made transfer of funds from some other accounts into the account in which the Running Finance Facility was being operated, thereby considerably reducing liability in the said account and also for making provision for the respondent Bank to debit the quarterly mark up and other agreed charges. This conduct of the appellants shows that despite of the fact that no formal agreement was signed by them for continuing the previous agreement, their intention was to continue with the arrangement of the Running Finance Facility on the same terms and conditions. In view of such position, we are of the view that the conduct of the appellants would fall in the implied renewal of the agreement of Finance Facility as the appellants continued to avail the said Finance Facility much after 31-5-2008 without raising any objection with regard to non-signing of any agreement to this effect. Moreover, the Finance Facility was also utilized by the appellants, which shows the intention to continue with such renewal of the Finance Facility which was extended by the respondent Bank at the request of the appellants dated 16-5-2008. In our humble view, such renewal request would fall in the category of "obligation" of the customer as defined in section 2(e)(ii) of the 2001 Ordinance wherein it has been defined that obligation includes, any and all representations, warranties and covenants made by or on behalf of the customer to a financial institution at any stage, including representations, warranties and covenants with regard to the ownership, mortgage, pledge, hypothecation or assignment of; or other charge on, assets or properties or repayment of a finance or payment of ants other amounts relating to a finance or performance of an undertaking or fulfillment of a promise: (emphasis supplied) hence this objection is also misconceived and not tenable under the law."

On over all perusal of the record as well as the arguments of the learned Counsel for the Defendants, it

appears that no substantial question of law or fact has been raised, whereas, all such arguments so raised are stereotype and without any substantial material to support the same. It is not in dispute that finance facility was availed for which various agreements were signed and properties were mortgaged and hypothecated. Accordingly the leave to defend application is dismissed.

5. In view of such position, instant Suit is decreed to the extent of Prayer Clause (a), (b), (e) & (g). Office to prepare the decree accordingly.

Dated: 09.03.2018

Judge