ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.B-28 of 2011

DATE	ORDER WITH SIGNATURE OF JUDGE

For hearing of CMA No.4539/2011

06.02.2018

Mr. Abdul Sattar Lakhani, Advocate for Plaintiff.
Mr. Naveed-ul-Haq, Advocate for Defendant.

Muhammad Junaid Ghaffar, J. This is an Application under Section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 **(FIO 2001)**, filed on behalf of the Defendant.

2. Learned Counsel for the Defendant at the very outset has referred to Order dated 21.11.2013 and submit that order was passed after considering the contents of the Plaint and the account statement annexed thereto, as the Court was not satisfied with such statement and issued certain directions, which according to the learned Counsel renders the account statement on record liable to be discarded as it does not fulfills the requirements of Section 2(8) of the Bankers Books Evidence Act, 1891 and Section 9(2) of **FIO 2001,** and therefore the Plaint is liable to be rejected by allowing the leave to defend application. Per learned Counsel after the observations of this Court, the Accounts Statement on record has lost its sanctity as the Plaintiff ought to have been careful in performing their duties as a Financial Institution. In support he has relied upon ***Habib Metropolitan Bank Limited v. Abid Nisar*** **(2014 CLD 1367),** ***Elbow Room and another v. MCB Bank Limited*** **(2014 CLD 985)** ***and Apollo Textile Mills Ltd and others v. Soneri Bank Ltd*** **(2012 CLD 337).**

3. On the other hand, learned Counsel for the Plaintiff submits that the leave to defend application does not fulfills the requirement of Section 10(2) of the **FIO 2001**, whereas neither the availing of finance facility has been denied nor its default. Per

learned Counsel in fact the Defendant seeks direction of this Court for restructuring of the finance facility and this itself is an admission on the part of the Defendant. Insofar as Order dated 21.11.2013 is concerned, learned Counsel submits that the proper account statement was already on record and the Court just wanted itself to be satisfied regarding the Re-payments made by the Defendants, which according to the learned Counsel was never required as this is a case of Current Finance facility. He submits that despite this another Statement for the period starting from 21.11.2007 to 31.10.2008 as directed has been placed on record through Statement dated 04.12.2013. In view of such position, learned Counsel has prayed for a Judgment and Decree.

4. I have heard both the learned Counsel and perused the record. Insofar as the sanction as well as availing of the finance facility is concerned, the same does not appear to be in dispute inasmuch as a limit of current finance of Rs.250 Million was sanctioned and was availed from time to time by the Defendant by withdrawing the amount so made available. In Para-10 of the Plaint such breakup was stated and since this is a current finance facility, the Plaintiff stated that Rs.250 Million was sanctioned and Rs.249.530875 Million was availed, whereas, no principal amount was repaid. On examination of this breakup in Para-10 on 21.11.2013, the Court passed the following Order:-

> "Learned Counsel for the defendant has concluded his submissions. For want of time, the submissions of the learned Counsel for the plaintiff will be heard on the next date of hearing.
>
> The plaintiff is directed to file a summary of statement of accounts, disclosing the amounts disbursed to the defendant with dates, the amounts repaid by the defendant out of the principal amount with dates, the total amount of markup charged, and the rate and period of markup. The statement shall be confined to the period from 21.11.2007 till 31.10.2008, and shall be certified by the Branch Manager of the relevant branch. Learned Counsel for the plaintiff undertakes to file the summary in the above terms before the next date of hearing. A copy of the said summary shall be supplied to the learned Counsel for the defendant at least (03) days prior to the next date of hearing.
>
> By consent adjourned to 06.12.2013 at 11:00 am."

5. Learned Counsel for the Defendant has not raised any other objection while arguing the listed application and only submits that since the Court itself passed the above order asking the plaintiff to file a summary of accounts disclosing the amounts disbursed, the amounts repaid out of principal amounts with dates, the total amount of markup charged and the period of markup from 21.11.2007 till 31.0.2008, duly certified by the Branch Manager of the relevant Branch, the defendant is entitled for the relief prayed for. However, on perusal of the aforesaid order and the Plaint as well as leave to defend application, I am not inclined to give any weightage to this objection for grant of the leave to defend. Firstly, I may observe that in the leave to defend application, the Defendant has itself failed to fulfill the requirements of Section 10(2) of the **FIO 2001**, whereby, it is mandatory to disclose by itself the total amount availed and the repayments made. There is no such disclosure in leave to defend application. Even otherwise, the Defendant has not raised any such objection in its application and in fact the entire objections are in relation to the difficulties faced by the Defendant in continuing with the project for which the finance facility was availed. Even the Defendant has asked for restructuring of the finance facility. This is clearly an ample proof that finance facility was availed and default has occurred.

6. Notwithstanding the above observation, even the order of this Court dated 21.11.2013 can at best be understood to the effect that the Court wanted itself to satisfy as to the figures so mentioned in Para-10 of the Plaint. It needs to be appreciated that this is a case of running/current finance facility, wherein, the amount sanctioned is made available for the disposal of the customers as and when needed. There is no concept of any repayment of principal amount in such cases. It is only the outstanding amount of current finance facility, which if default occurs is to be considered and the agreement between the parties in respect of payment of markup. In this case it is reflected from the account statement already filed with the Plaint that starting from 03.12.2006, the facility was availed pursuant to an approval

of a credit facility vide Letter dated 02.12.2006. Thereafter, the facility was enhanced from 175 Million to 250 Million through Sanction Advice dated 20.11.2007 and such facility was to expire on 31.10.2008. The Defendant kept on availing facility and never objected to any of the payments and or markup. Thereafter, the Defendant vide its Letter dated 06.03.2010 requested for rescheduling of the finance facility already availed under the head of running finance facility of Rs.249,530,874/-. This request itself justifies the claim of the Plaintiff that this amount of facility was availed and default had occurred. In such circumstances, the question that Court had asked for placing on record another specified statement, which entitles the Defendant to avail leave to defend does not arises.

7. 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 Defendant as well as by the Court in its Order dated 21.11.2013. 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."

8. In this case, also though the Agreement entered into by the parties was till 31.10.2008, however, even after this date, the Defendant continued with the finance facility and did so till

20.01.2010. In fact in 2010 a request was made to restructure the facility. This amounts to offer and acceptance, though not recorded through a written agreement, making the defendant liable for payment of mark-up till the date when the facility was last availed. Thereafter the Defendant would be liable to pay cost of funds as per notified rates of State Bank of Pakistan.

9. In view of hereinabove facts and circumstances of this case, the Plaintiff's Suit is decreed for the principal amount of current finance facility availed i.e. RS.249,530,875/- and markup amount of Rs.29,198,014.11 till 20.1.2010, and thereafter cost of fund from 20.01.2010 till its realization on the outstanding principal amount. It further stands decreed for attachment and sale of hypothecated assets as mentioned in Para 5 & 7 of the plaint for recovery of the above amount.

10. The Suit stands decreed in the above terms.

Judge

Ayaz