IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. B-16 of 2014

Habib Bank Limited ---------- Plaintiff

Versus

Dynasel Ltd. and others ---------- Defendants

1) For hearing of CMA No. 4790/2014.
2) For hearing of CMA No. 4791/2014.

Date of hearing: **29.03.2018.**
Date of judgment: **27.04.2018.**

Plaintiff : **Through Mr. Waqar Ahmed Advocate.**

Defendants: **Through Mr. Haq Nawaz Chatta Advocate.**

ORDER / J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit under Section 9 of the Financial Institutions (Recovery of Finances) Ordnance, 2001 (**"FIO, 2001"**) for Recovery of Rs. 197,509,580/- along with liquidated damages, cost of funds, charges and costs.

2. The leave to defend applications have been filed on behalf of all Defendants except, Defendants No. 4 & 6. One leave to defend application is on behalf of Defendant No.1, 2, 3, 7 & 8 (**CMA No. 4790/2014**) and the other by Defendant No. 5 (**CMA No. 4791/2014**).

3. Learned Counsel for the Defendants has contended that his first objection is to the maintainability of this Suit as according to the learned Counsel the erstwhile Plaintiff i.e. Barclays Bank PLC, is no more in

existence and has been taken over by the present Plaintiff; but only an amended title has been filed, and no amendment of whatsoever nature has been sought in the plaint, whereas, the facts already stated in the plaint pertain to the erstwhile bank, and not to the Plaintiff bank; therefore, according to the learned Counsel any reference to Barclays Bank PLC which no more exists, is a nullity in law and fact. Learned Counsel has next contended that the attorney who had filed the Suit ceases to be the employee of the Bank, and therefore, the Power of Attorney is no more valid and the delegation of authority if any, also vanished as it is settled law that if the principal goes away the attorney also goes. He has relied upon ***PLD 2011 SC 811 (Al-Jehad Trust and another V. Federation of Pakistan and others)*** in this regard. As to the second ground, learned Counsel has referred to the finance agreement, i.e. the master agreement dated 10.01.2011, and has submitted that in all, there were 24 finance facilities, but there are no independent agreements on record in respect of each such facilities. He has further submitted that one such facility was in respect of Letter of Credit, whereas, the agreements in question have not been properly stamped under Section 33 of the Stamp Act, 1899 and therefore, not admissible in evidence. Per learned Counsel this is a question of law which entitles grant of leave to defend. Learned Counsel has further contended that the contract was for one year, whereas, markup over markup has been charged even beyond the period of agreement. Learned Counsel has also objected to the statement of account and has submitted that the same is not in a proper form and manner as required under FIO, 2001 and various other transactions which are not relatable to the finance facilities are also mentioned in the said account. Learned Counsel has referred to various debit and credit entries and has made an

attempt to argue that they are un-explained entries, and have been mixed up without proper explanation; hence, the accounts statement cannot be relied upon. Learned Counsel has further contended that various different entries have been made regarding liquidation of bills, loan interest maturity, penalty etc. but they have not been explained in the plaint. In support of his objection regarding statement of accounts he has relied upon ***2005 CLD 569 (Messrs Untied Dairies Farms (Pvt) Limited and 4 others V. United Bank Limited) , 2016 CLD 609 (Messrs Asia Motor Company and another V. Messrs NIB Bank Limited), 2016 CLD 1471 (Sheikh Murshid Ali and others V. United Bank Limited) and 2016 CLD 1903 (Pak Oman Investment Company Limited V. Chenab Limited and 9 others).*** Learned Counsel has also raised an objection that insofar as the mortgaged of properties is concerned, various other banks have also charge on such properties, whereas, majority of the documents are of Subleases and it is also a question of law that whether such Subleases can be accepted as mortgages. As to the guarantees in question learned Counsel has contended that all Defendants whom he represents except Defendant No.5 have objections to the extent that the guarantees of 2008 facility have been utilized for finance disbursement in 2001, whereas, this is a novation of a contract, therefore, the guarantees in question cannot be enforced. According to the learned Counsel these are not continuing guarantees and in support he has relied upon Section 129 of the Contract Act. As to the case of Defendant No.5, he has contended that the signatures of the said Defendant on the guarantees are fake and forged as is visible from bare perusal of the same, whereas, at the relevant time, the said Defendant was out of country and in support he has relied upon the copies of Passport. To the extent of signatures and

the difference he has relied upon ***2009 CLD 189 (Mst. Akhtar begum V. Muslim Commercial Bank Ltd.)***. He has also raised an objection regarding delay in filing the Suit and submits that the last payment was due in December, 2011 whereas, Suit has been filed in April, 2014 hence, the Suit is also time barred. On this he has relied upon ***2006 CLD 808 (Industrial Development Bank of Pakistan V. Pakistan Belting (Pvt.) Limited and 5 others).*** Learned Counsel has prayed that for such reasons, the contesting defendants are entitled for grant of an unconditional leave to defend, and in the alternative, the Suit may be decreed to the extent of admission in the leave to defend application and not beyond that.

4. On the other hand, learned Counsel for the Plaintiff bank has contended that the finance facility of 185 million was availed and a master agreement dated 10.01.2011 was entered into for 24 separate contracts. Learned Counsel has referred to the annexures with the plaint and has contended that all these contracts have not been denied which pertain to various facilities, including but not limited to, trust receipts, imports, letter of credits etc. etc. As to the objection regarding the bank statement learned Counsel has contended that the entire bank statement of the current account has been annexed which reflects the individual entries of the 24 contracts in question, whereas, at Page 1743 a summary of the entire outstanding amount as an extract has been placed, and all requirements of the FIO, 2001 read with Bankers Book Evidence Act, 1891 have been complied with and there is no objection to that extent. He has submitted that only technical objections have been raised which are not to be entertained by the Court. As to the objection regarding merger of the bank, learned Counsel has submitted that this was pursuant to a Notification issued by the State Bank of Pakistan and

it is not that after the merger the claims already filed are extinguished, therefore, this objection is also misconceived. In support learned Counsel has referred to Sections 37 & 48 of the Banking Companies Ordinance, 1962. To the objection regarding authorization of the person who has filed the Suit, learned Counsel has contended that merely for the fact that if one employee has left the services, the Suit would not abate, as it was competent at the time when it was filed, and the Plaintiff bank is within its right to pursue such matters. As to the insufficiency of stamping on the agreement learned Counsel has contended that Section 18(4) of FIO, 2001 which is a special law, overrides the provision of Stamp Act and has taken care of such deficiency, if any, therefore, this objection is also not maintainable. Per learned Counsel insofar as the entries in the accounts are concerned, while availing facilities never ever any such objection was raised, whereas, the entire transactions have been clearly reflected in the statement of account which is complete in nature. Insofar as the objection regarding overdue markup is concerned, learned Counsel has conceded that the Plaintiff will not claim any markup beyond the period of agreement, but only cost of funds as per settled provisions and the directions of this Court from time to time. As to the objection regarding guarantees, learned Counsel has submitted that the same provides for current finance facility, as well as future amounts, with a joint and several liability; hence, this objection is also misconceived. Insofar as the stance of Defendant No.5 is concerned, learned Counsel has submitted that since the said Defendant is admittedly having two Passports, one of Pakistan and the other Canadian, therefore, he being out of the country, at the time of signing of the guarantee, cannot be substantiated and entertained by the Court. Without prejudice learned Counsel has contended that insofar as other

Defendants are concerned, none has objected as to the execution of the guarantees, and therefore, any forgery, as alleged, it could only be by the other Defendants, but not by the Plaintiff. According to the learned Counsel the Defendants have miserably failed to fulfill the requirements of Section 10(4) of the FIO, 2001 and have failed to enclose any documents to substantiate their leave to defend application which is otherwise liable to be dismissed. Per learned Counsel, there is an admission of at least Rs. 80 million as principal and Rs. 10 million as markup (approximately) in the leave to defend application; therefore, no case is made out for grant of any leave to defend. In support he has relied upon ***2000 MLD 1066 (Agricultural Development Bank of Pakistan V. Pak Green Fertilizer Company Limited and others) and 2012 CLD 337 (Apollo Textile Mills Ltd. and others V. Soneri Bank Ltd.).***

5. I have heard both the learned Counsel and perused the record. This is a Suit for recovery of Rs. 197,509,580/- along with mark-up and other costs and charges under Section 9 of FIO, 2001, and in the leave to defend application, the defendant has admitted an amount of Rs.80,035,009/- payable as principal, and Rs.10,134,487/- payable as mark-up, and at very outset I may observe, that in the given facts, an interim decree could also have been passed by this Court in terms of Section 11 of the FIO, 2001. However, for one reason or the other, it could not. Nonetheless, it is of utmost importance to observe that the objections raised on behalf of the defendants are to be dealt with while keeping in mind the admission in the leave to defend application. Insofar as the first objection regarding merger of the erstwhile Barclays Bank PLC with the present Plaintiff is concerned, the same appears to be misconceived and unreasonable. It is not that if a bank is merged into another, the entire plaint always ought to be amended. It is only the title

which could be permitted to be amended, as mere merger does not even otherwise entitle the Plaintiff to seek amendment in the plaint, barring certain exception(s) which is not the issue in hand. The plaintiff except change in name has not sought any further or additional relief for which plaint might require amendment. In fact it is a novel proposition on behalf of the defendant in this case, and in fact appears to be an attempt to avoid payment of liability which has not been seriously disputed, except objections of purely technical nature, having no basis. If such objection is sustained, then perhaps it will negate the entire law on mergers and amalgamation. Section 48(6) of the Banking Companies Ordinance, 1962, caters to this objection as well, and provides that on the sanctioning of a scheme of amalgamation by the State Bank of Pakistan, the property of the amalgamated banking company shall by virtue of the order of sanction, be transferred to and vest in, and liabilities be transferred to and become the liabilities of the Banking Company which is to acquire the business of the amalgamated Bank. In the present case the claim of the merged bank when filed at the relevant time was competently done so, and it is only that the present Plaintiff has stepped into the shoes of the merged bank, therefore, this objection is hereby repelled. As to the other objection regarding competency and maintainability of the Suit, again the same appears to be misconceived inasmuch as if an employee has left service of a company; the same would not render a Suit as incompetent before the Court. When the Suit was filed, the person was competently doing so on behalf of the bank, and the Suit remained alive. At the most, it is only at the subsequent stage of the proceedings, (if needed), that any other employee would come and proceed further on the basis of a fresh authority. Therefore, this objection is also hereby repelled. The other objection regarding various

debit entries in the statement of accounts and the same being not in conformity with the requirements of law including FIO, 2001 as well as Bankers Book Evidence Act, 1891 is concerned; the same also appears to be devoid of any merits. The Plaintiff has annexed the entire current account of the Defendant No.1 which reflects all transactions of the finance facility from time to time as well as charging of markup and other expenses. It is important to note that never ever any such entry was objected to by the Defendants and I had specifically confronted the learned Counsel on this point and he could not satisfactorily respond, but argued that this is a legal objection and can be raised at any stage and is to be decided by the Court. However, with utmost respect, I am not impressed with such line of arguments on the ground that if one does not object to an entry in its account at the relevant time, then the same is deemed to be accepted. Once the borrower avails the facility and does not dispute it while availing such facility, or for that matter later, then subsequently on default, these objections are not to be appreciated. It has in fact become a common practice on the part of borrowers to raise such objections through leave to defend, whereas, when such facility is being advanced, and availed, they keep silent and mum. On perusal of the statement of accounts and the summary of transactions it reflects that the finance was availed and utilized, therefore, these petty objections at this stage of the proceedings are not to be considered. In fact the availing of finance facility and its disbursement has not been denied, but only the quantum. In the leave to defend application there is a clear admission in respect of availing the finance facility in the following terms:-

The following parties under Section 10(4) of the Financial Institutions (Recovery of Finances) Ordnance, 2001 are being given:-

Amount availed	**:**	**Rs. 144,778,393/-**
Amount paid towards principal	:	Rs. 29,309,905/-
Amount illegally claimed / charged by the bank which is liable to be deducted from the claim of the bank	:	Rs. 45,567,966/-
Markup actually payable for the Period	**:**	**Rs. 10,134,487/-**
Markup paid	:	Entire
Amount due	**:**	**Rs. 80,035,009/-**
Amount disputed	:	Rs. 117,474,571/-
Markup (outstanding)	:	NIL
Other amount pertaining to the Principal	:	NIL
Other amount pertaining to the markup	:	NIL"

6. Perusal of the aforesaid stance of the Defendants itself reflects that an amount of Rs. 144,778,393/- was availed and then it has been claimed that certain amount was paid towards principal. The amount of markup has also been disputed; however, the learned Counsel for the Defendants has failed to refer to any supporting documents in respect of the above claim that any such amount was ever paid. Learned Counsel also failed to support the contention with any documents regarding payment of the entire markup. He could also not refer to any document or statement of account which could substantiate the claim that, neither any markup, nor other amount in respect of the principal is outstanding. Insofar as the objections in respect of guarantees pertaining to the year 2008 and being utilized subsequently, it may be observed that perusal of the guarantees reflect that they have been executed in respect of current

facility as well as future facilities. It is by now settled that in banking transaction(s), even if there are certain documents which are empty / blank or have not been properly filled, once the borrower avails the facility and does not dispute it while availing such facility, then subsequently on default, these objections are not to be appreciated. When such facility is being advanced, the documents are signed without any objection to that effect and subsequently objections are raised. Furthermore Section 20 of the Negotiable Instrument Act, 1881, caters to it and provides a complete answer to such objection. Reliance in this regard may be placed on a decision of Division Bench of this Court in the case reported as ***Muhammad Imran v National Bank of Pakistan*** (**2016 CLD 2093**). Moreover it is not the case of the Defendants that the earlier finance facility was discharged in full, and if that had been the case, the guarantees would have been returned to them duly discharged. Therefore, this objection is also misconceived. As to the stance of Defendant No.5 that he was never in the country when the guarantees were signed, firstly, such alleged forgery cannot be attributed to the Plaintiff as the signatures of other Defendants have not been denied. Moreover it is not necessary that the guarantee must have been signed by the said Defendant on the very date when it was presented; therefore, the contention that he was out of country at the relevant time is also misconceived. Additionally, he is in possession of two Passports of different countries, and therefore, it cannot be ruled out he may have travelled out on one passport and returned on another. The objection of limitation also appears to be misconceived inasmuch as the liability has been admitted in the leave to defend application, whereas, the limitation is to run from the date of last default and not from the date of disbursement or agreement as contended. The first agreement in

question was to mature on 12.11.2011, whereas, the last on 6.5.2012, and even from such date(s), the Suit is otherwise within limitation; hence this objection is also of no avail. Lastly as to the deficient stamping a complete answer is provided in Section 18(4) of FIO, 2001, whereas, a sub-lease property can be mortgaged or not is not a question for this Court to adjudicate presently, as this pertains to execution proceedings.

7. In view of hereinabove facts and circumstances of this case, I am of the view that no case is made out for grant of leave to defend, whereas, the finance facility has been availed and not denied and the Defendants have failed to substantiate their claim and stance taken in the leave to defend applications with any supporting documents in respect of the amounts actually payable according to them, therefore, while dismissing the leave to defend application(s) instant Suit is decreed against the Defendants for an amount of Rs. 144,788,392.80 as principal and for Rs. 9,271,738.85 as markup up to the date of agreement; and thereafter, for cost of funds on the decretal amount till its realization. The Suit is further decreed for sale of mortgaged properties and hypothecated assets as mentioned in the plaint.

Dated: 27.04.2018

J U D G E

ARSHAD/