

IN THE HIGH COURT OF SINDH AT KARACHI**Suit No. B-30 of 2012****Bank Al-Falah Limited ----- Plaintiff****Versus****First Pakistan Securities Limited and others ----- Defendants****For hearing of CMA No. 9235/2012.****Date of hearing: 07.12.2017.****Date of judgment 07.12.2017.****Plaintiff : Through Mr. Abid Naseem Advocate.****Defendants: Through Mr. Syed Danish Ghazi Advocate.****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) Ordinance, 2001 for Recovery of Rs. 149,702,549.67 along with cost of funds from the date of default till final payment and sale of hypothecated goods and other assets.

2. After issuance of summons Leave to Defend application has been filed and the learned Counsel for Defendants submits that initially a Running Finance Facility was though provided by the Plaintiff; but thereafter, certain negotiations were entered into and novation of contract was made. He further submits that after such negotiations there were certain objections raised by the Defendants as to the novation of the contract and the conditions imposed thereon, and thereafter, such

objections were never removed, therefore, the Plaintiff is not entitled to seek Judgment and Decree in respect of the initial contract. He further submits that it is settled law that once a novation of the contract has been made the original contract is not enforceable and in support thereof he has relied upon Section 62 of the Contract Act and explanation appended thereto. Per learned Counsel no restructuring was carried out and there is no further disbursement and therefore, Defendants are entitled for unconditional Leave to Defend. In support he has relied upon ***Habib Bank Ltd. v. Sarmast Cooling Oil Ltd. and others (2000 CLC 1502)***, ***(Mst. Parveen Amir v. National Bank of Pakistan and 3 others (2002 CLD 509)***, ***Muhammad Afaq Shamsi and 8 others v. National Accountability Bureau through Chairman NAB and 4 others (PLD 2011 Karachi 24)***, ***Banque Indosuez v. Banking Tribunal for Sindh & Balochistan and others (1994 CLC 2272)***, ***National Bank of Pakistan v. Shogan INT (Pvt.) Ltd. and others (2005 CLC 1207)***, ***Abdul Razak and 4 others v. Standard Insurance Company Ltd. (1990 MLD 1842)***, ***Hamid Ali Khan v. Khalid Mumtaz (2003 AC 231)***.

3. On the other hand, learned Counsel for the Plaintiff Bank submits that the contention of the Defendants vis-à-vis. the novation of the contract is misconceived, inasmuch as it was only a restructuring which was requested by the Defendants and was considered by the Plaintiff. Per learned Counsel even the subsequent negotiations very clearly reflect that all along it was restructuring of the Running Finance Facility which had already been availed and consumed by the Defendants and at the request of the Defendants certain concessions were granted for repayment of the said amount. He further submits that this does not absolve the Defendants from abiding by the first contract on the basis of

which admittedly Running Finance Facility was availed by them. Learned Counsel has referred to the Bank statement as well as the correspondence made by the Defendants and submits that such contention so raised on behalf of the Defendants is misconceived. He further submits that even otherwise, the Defendants have failed to comply with the provisions of Section 10 of the Ordinance, 2001 and therefore, the Leave to Defend Application is otherwise not maintainable and is liable to be dismissed. In support he has relied upon ***Bank of Khyber v. Messrs Spencer Distribution Ltd. and 14 others (2003 CLD 1406)***, ***Messrs Shahi Textiles and 4 others v. Habib Bank Limited through President (2012 CLD 506)***, ***Equity Participation Fund v. Messr Abrasive Products Co. Limited and 4 others (2012 CLD 971)***, ***Manzoor Qadir v. United Bank Limited through Branch Manager (2013 CLD 2116)***, ***Habib Bank Ltd. v. paragon Industries (Pvt.) Ltd. through Chief Executive and 5 others (2009 CLD 1346)***, ***Apollo Textile Mills Ltd and others v. Soneri Bank Ltd. (PLD 2012 Supreme Court 268)***, ***NIB Bank Ltd. v. Dewan Textile Mills Ltd. (2012 CLD 141)***, ***Syed Abbas Ali v. Bank of Punjab through Manager and others (2015 CLD 1409)***, ***Muhammad Arshad and another v. Citibank N.A. Al-Falah Building Lahore (2006 CLD 1011)*** and ***Shahid Farooq Sheikh v. Allied Bank of Pakistan Limited through Manager (2005 CLD 1489)***.

4. I have heard both the learned Counsel and perused the record. It is not in dispute that the Defendants availed the Running Finance Facility through sanction advice dated 2.1.2008 for Rs. 100 Million which was supposed to expire on 31.12.2008 and for that purposes agreements were signed and letters of hypothecation and pledged were issued. It is also not in dispute that such facility was time and again availed by the

Defendants as is reflected from the statement of accounts which has not been disputed but has rather been admitted during the course of the arguments. The Defendants seek Leave to Defend on the ground that after negotiations there were a novation of the contract and therefore, the initial contract cannot be enforced. Their case is that in such circumstances, the plaintiff bank is not entitled to seek any recovery on the basis of 1st sanction dated 2.1.2008 and subsequent agreement(s) and since the negotiation did not materialize finally, leave to defend may be granted on this issue. However, this contention appears to be wholly misconceived. There was no novation of the contract but only a restructuring enabling the Defendants to make payment of the availed Running Finance Facility within certain period of time with mark up. The Defendants have admittedly consumed the entire Running Finance Facility and thereafter, defaulted in making repayments as well as payment of mark up. For this purposes certain negotiations were held for restructuring the said Running Finance Facility and therefore, under no circumstances, it could be termed as a novation of the contract. Even otherwise, it is not in dispute, that initially after expiry of 1st agreement of running finance as alleged, subsequently also the Defendant entered into agreement(s) and signed the relevant Bank documents. The Bank statement annexed with the plaint has not been disputed which reflects that on various occasions the Finance Facility was availed. It further appears that even otherwise, the Defendants have failed to strictly comply with the provisions of Section 10 of the Ordinance, 2001 and inconformity with the observations of the Hon'ble Supreme Court in the case of *Apollo Textile supra*. Learned Counsel was confronted as to from where the figures have been so arrived at Para 87 of the Leave to Defend application, wherein, certain objections have been raised in respect of the

Running Finance amount as well as repayments, the learned Counsel could not refer to any supporting vouchers or account books. He however, submits that reliance in this regard is made on the statement of accounts which are not disputed. However, I am not impressed with this argument as well, as this is a case of Running Finance Facility and there appears to be no dispute that amounts were reimbursed to the Defendants and the same have been availed and consumed. The contention of the defendants that there was a novation is also belied from the facts on record. It is their own case that it was not final as their objections were not removed by the plaintiff. Therefore, on this account also their admitted availing of running finance facility has to be settled. Further in cases of restructuring (Novation for defendants for that matter) of running finance there is no fresh disbursement and the earlier liability has to be discharged. This admittedly has not been done. The accounts statement clearly reflects that as on 26.7.2011 an amount of Rs. 97,486,051.33 in respect of the principal amount and Rs. 52,234,498.34 in the markup amount as on 30.04.2012 is outstanding. In view of such position, there appears to be no legal ground or a question of law which would entitle the Defendants to seek grant of Leave to Defend. Accordingly, listed application is dismissed.

5. In view of the dismissal of the Leave to Defend application, the averments made in the plaint are to be treated as correct. However, on perusal of the markup statement, it appears that the Plaintiff has annexed the bank statement of markup even beyond the period of the first agreement which expired on 31.12.2008 when the outstanding markup is shown as Rs. 6,493,222.43. The Plaintiff would be entitled to mark up to the extent of validity of agreement and not beyond that. It further appears that subsequent thereon, the Defendants have made two

payments of markup amounting to Rs. 3,855,998.65 and Rs. 4,259,853.00 which makes it a total of Rs. 8,115,851.64. This markup was paid after the date as above and therefore, the same is to be adjusted. This results to outstanding amount of markup Rs. 2,935,829.13. In view of such position the Plaintiff's Suit is decreed for an amount of Rs. 149,702,549.67 as principal amount of running finance and Rs. 2,935,829.13 under markup up to 31.12.2008 and thereafter, cost of funds from the date of default till its realization. The Plaintiff shall also be entitled for further decree for sale of pledged shares and hypothecated receivable / assets as disclosed in the plaint.

6. Suit stands decreed in the above terms.

ARSHAD/

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