IN THE HIGH COURT OF SINDH, KARACHI

SUIT No.B-89 / 2013

BEFORE
MR. JUSTICE ARSHAD HUSSAIN KHAN

FOR HEARING OF CMA 11078/2013
[u/s 10 of the Financial Institutions (Recovery of Finances) Ordinance 2001]

Mr. Waqar Ahmed, Advocate for the Plaintiff.
Mr. Furqan Naveed, Advocate for the Defendants

ARSHAD HUSSAIN KHAN, J.- This is an application [C.M.A. 11078/2013] Under Section 10 of the Financial Institution [Recovery of Finances] Ordinance, 2001, whereby the Defendants have prayed to grant them unconditional leave to appear and defend the instant suit.

2. The facts give rise to the filing of present suit, as averred in the plaint, are that the plaintiff is a banking company incorporated under the Companies Ordinance, 1984. It has been stated that defendant No.1 is a limited company incorporated under the laws of Pakistan while defendants 2 to 4 are guarantors of defendant No.1 and they have executed their personal guarantees in favour of the Plaintiff to secure the liabilities of defendant No.1. It has been further stated that upon request and based on representations and warranties by the defendants, the plaintiff from time to time during the period from 2009 to 2012 extended various Finance Facilities to defendant No.1, details whereof are mentioned in para-4 of the petition, and in order to secure the said facilities, availed by defendant No.1, following securities were created by the Defendants in favour of the Plaintiff.

i) Pledge of Raw Cotton with 10% Margin applicable on KCA Rates [Ex-Gin] under effective control of BAL's approved macadam [pledged stocks].

ii) **HYPOTHECATED GOODS**
A charge by way of Hypothecation of all present and future goods, merchandise, products stocks, stocks in trade, raw materials work in progress, finished and unfinished goods, stored or located or lying at 63 KM Multan Road, Bhaipero, Chunia or any other place of storage godown in Pakistan and all such aforesaid goods in the course of transit including goods referred by and released under trust receipts and all future goods/stocks that may be brought into the above place of storage/godowns.

HYPOTHECATED RECEIVABLES

iii) Demand Promissory Note dated April 20, 2009, October 1, 2009, march 5, 2010 and April 26, 2011 in respect of Running Finance Facility No.1 and Demand Promissory Note dated October 1,2009, March 5, 2010 and April 26, 2011 in respect of Running Finance Facility No.2 executed in favour of the Plaintiff.

iv) Personal Guarantee dated April 26, 2011 executed by Defendant No.2 to 4 in favour of the Plaintiff.

It has been further averred that the subject facilities were fully availed and utilized by defendant No.1. But, the defendants in breach of the terms and conditions stated in various finance and security documents which were duly executed by them, failed and/or neglected to repay their outstanding obligations as and when the same fell due despite various demands and reminders. The failure of the defendants to repay their outstanding liabilities since a long period tantamounts to their refusal to pay the same. It has been further stated that the defendants have defaulted and have continued to default on their obligations and as a result of the same, a sum of Rs.187,657,590.06 is due and payable by the defendants. It has also been stated that the Plaintiff is entitled to claim the profit / mark-up, charges, commissions, service charges, and other costs upon the outstanding amount.

3. Upon notice of the application [C.M.A. 11078/2013], objections by way of Replication on behalf of plaintiff have been filed wherein while reiterating the stance taken in the plaint denied the allegations levelled in the application. It is stated that the application has not been framed in accordance with the provisions of Ordinance, 2001, and the same does not raise any question of fact or law, and also does not fulfill the mandatory requirements of law and as such it is liable to be dismissed. It has been further stated that since the defendants have not disputed the execution of finance and security documents filed along with plaint therefore, no evidence is required to be led and the application is liable to be dismissed on this ground alone. It has been further stated that the denial of the defendants for availing the finance facilities, in absence of any documentary proof is nothing but denial for the sake of denial and an attempt to mislead this court just to avoid payments due in respect of finance facilities availed by defendant No.1.

4. Learned counsel for the defendants, during the course of arguments while reiterating the facts mentioned in the application has contended that Section 9 and 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 [FIO 2001], under which the instant suit has been filed, are contrary to the Constitution of the Islamic Republic of Pakistan, 1973, and fundamental rights of fair trial and due process of law enshrined therein. Per learned counsel the said provisions of the Ordinance 2001 gives free hand to the Financial Institutions to deprive the customers of their fundamental rights of defending their case as a matter of right as envisaged in the Constitution and puts an embargo upon the same by requiring the Defendant to obtain leave for the same. The same is inconsistent with and in derogation of fundamental rights provided under Article 10-A of the Constitution and thus are void and ultra vires. It is also argued that the suit is also liable to be dismissed as the same does not comply with the mandatory requirements of Section 9 of the FIO 2001, more specifically sub sections (2) and (3) wherein obligations have been casted upon a financial institution to file with the Plaint all the relevant documents as well as to give details regarding the finance alleged to have been disbursed, availed and repaid. It has also been argued that it is established law that Corporate suit must be filed after obtaining due authorization of a company through all necessary corporate actions and after passing of the board resolution whereas the instant suit has not been filed by plaintiff's competent or authorized officer nor any valid document to that effect has been filed with the plaint, therefore, the suit is liable to be dismissed on this ground alone. Learned counsel for the defendant argued that Running Finance Facilities, as mentioned in the plaint, was never offered by the plaintiff-Bank, neither availed nor any amount in respect thereof ever disbursed to the defendant. Furthermore, the alleged finance facilities have not been corroborated with documents and in order to conceal the same, the plaintiff has not attached any details or documents with respect of such facilities. Further argued that the claim of the plaintiff is not supported by the relevant documents i.e. Bill of Exchange, Letter of Credit, Commercial Invoice and Delivery Challan. He has argued that per the pronouncements of the superior Courts any and all documents creating financial obligations between

two or more entities/individuals must be duly signed, stamped and witnessed at the time of execution before they can be admitted as evidence before the Courts. Learned counsel argued that from the documents appended with the Plaint and the admissions made therein, it is evident that the most of the alleged facilities were on account of particular and special kind of finance e.g. export finance facilities and as per the circulars of the SBP and the authoritative pronouncements of the superior Courts such finance facilities are distinct and separate from the facilities on mark-up basis and are inherently self-liquidating and no mark-up can be charged with respect to such facilities, therefore, the claim of the plaintiff against the defendant No.1 without submitting details with respect to such facilities is not maintainable. It is also argued that the letter of pledge does not corroborate with the documents appended with the plaint and made basis of the claim against defendant No.1 nor does the same creates any valid pledge in favour of the plaintiff as is being claimed and alleged in the plaint. He has argued that it is settled law that any suit filed by a financial institution / bank must be supported by a properly verified statement of account on Oath, whereas the statements of accounts filed by the plaintiff are not duly verified on Oath and fail to fulfill other requirements of the Bankers Books Evidence Act, 1981, which is a mandatory requirements in terms of Section 9 of FIO 2001, thus no presumption of truth can be attached to the same, and in view of such glaring defect in the Statement of Account, the suit of the plaintiff is liable to be dismissed. It is also argued that as is apparent from the documents appended with the plaint, the relationship between the parties, span over a period of two decades and no document pertaining to the said relationship period have been appended with the plaint to corroborate the claim of the plaintiff or to enable to the defendants to identify the alleged claim of the plaintiff. He has further argued that it is settled law that both credit and debit entries should be particularized in such a manner that the statement discloses a true and fair picture but the requirements of Section 9 of the FIO 2001 have not been complied with, which specifically provides that the plaint shall be supported with statement of Account as well as other relevant and necessary documents. It is vehemently argued that the plaintiff obtained / procured blank forms and the same were later filled in by the plaintiff without notice to the defendant contrary to the

understanding between the parties, particularly with respect to the repayment period of the alleged finance as well as the security documents, that is manifestly apparent from the forms on the record and such glaring mala fide acts of the plaintiff is incumbent to be disallowed reliance on such forms. It is argued that the Account Statement filed with the Plaint is full of inaccuracies and illegal computation of mark-up, compounding of mark-up and charging of mark-up on mark-up and liquidated damages, which is clearly contrary to the law and regulation of the State Bank of Pakistan. He has also argued that the plaintiff has acted negligently in discharging its duties. The learned counsel has argued that no amount is due and payable by defendant No.1 to the plaintiff with regard to any finance facility and no document affixing any liability upon the defendants has been appended with the Plaint as well as no relationship of banker and customer exists between the parties. Lastly, learned counsel urged that in view of his arguments; instant suit may be dismissed being misconceived or the defendants may be granted unconditional leave to appear and defend the suit. Learned counsel in support of his arguments has relied upon the cases of *ASKARI BANK LIMITED v. DCD SERVICES LIMITED* **[2018 CLD 799]**, *PAK OMAN INVESTMENT COMPANY LIMITED v. CHENAB LIMITED and 9 others* **[2016 CLD 1903]** and *HABIB METROPOLITAN BANK LIMITED v. ABID NISAR* **[2014 CLD 1367].**

5. Conversely, learned counsel for the plaintiff, during the course of arguments, while reiterating the contents of his plaint as well as replication to the subject application has urged that the defendants have admitted the execution of finance and security documents and it is a well settled law that the admitted facts need not to be proved, therefore, upon admission of the execution of the finance and security documents, the application cannot be granted on this score alone and the same is liable to be dismissed. Learned counsel argued that the defendants have concealed and twisted the material facts and the application is hit by the principle of approbation and reprobation which is not permissible under the law. He has further argued that the objections raised by the defendants in respect of Article 10-A introduced by the Constitution is misconceived and misleading being not attracted in the

present proceedings and in no way, affect the proceedings pending under the provisions of FIO 2001. He further argued that the Court has to see whether the defendants have raised any substantial question of law and fact or not, otherwise the application must liable to be dismissed. Learned counsel further argued that the plaintiff has filed this suit in accordance with law and filed statement of account in accordance with Bankers Books Evidence Act, 1891, by fulfilling all the requirements of law and the defendants have failed to raise any objection in respect of any entry of the Statement of Account or any documents attached with the Plaint. He has also argued that the plaintiff has filed this suit through duly authorized attorneys and in this regard the Power of Attorney is attached with the plaint. Learned counsel also vehemently denied the allegations that the plaintiff has charged any amount of mark-up illegally. He has also denied that the plaintiff has obtained any blank document and has charged any amount of mark-up upon mark-up or any other amount in violation of terms and conditions of the documents attached with the Plaint. Learned counsel argued that the defendants have raised frivolous objections even without going through the contents of the documents attached with the plaint. Further argued that the plaintiff is entitled to recover the outstanding amount from the defendants as they have failed to pay the same. He has also argued that the defendants have miserably failed to raise any question of law or fact which requires evidence and the facts are denied by the defendants for the sake of denial only without any documentary evidence or basis, therefore, leave to defend may be dismissed with costs. Learned Counsel in support of his stance has relied upon the cases of *HABIB METROPOLITAN BANK LTD v. Mian ABDUL JABBAR GIHLLIN* **[2013 CLD 88]**, *NIB BANK LTD. v. HIGHNOON TEXTILE LTD. and 3 others* **[2014 CLD 763]**, *APOLLO TEXTILE MILLS LTD. and others v. SONERI BANK LTD.* **[2012 CLD 337]**, *BANK OF KHYBER v. Messrs SPENCER DISTRIBUTION LTD. and 14 others* **[2003 CLD 1406]** and *INDUSTRIAL DEVELOPMENT BANK PAKISTAN, KARACHI v. Messrs ZAMCO (PVT.) LTD. and 10 others* **[2007 CLD 217].**

6. I have heard learned counsel for the parties and have perused the documents available on the record and have also gone through relevant law.

7. Before I proceed to examine the respective contentions of the learned counsel for the parties, it would be useful to reproduce the relevant provisions of Financial Institutions (Recovery of Finances) Ordinance 200, herein below:

> **9. Procedure of Banking Courts.-**
> (1) . . .
> (2) . . .
> (3) The plaint, in the case of a suit for recovery instituted by a financial institution, shall specifically state:-
>
> (a) the amount of finance availed by the defendant from the financial institution;
>
> (b) the amounts paid by the defendant to the financial institution and the dates of payment; and
>
> (c) the amount of finance and other amounts relating to the finance payable by the defendant to the financial institution up to the date of institution of the suit.
>
> (4) …….
> (5) …….
>
> **10. Leave to defend.**
> (1) . . .
> (2) . . .
> (3) The application for leave to defend shall be in the form of a written statement, and shall contain a summary of the substantial questions of law as well as fact in respect of which, in the opinion of the defendant, evidence needs to be recorded.
> (4) In the case of a suit for recovery instituted by a financial institution the application for leave to defend shall also specifically state the following:-
>
> (a) the amount of finance availed by the defendant from the financial institution; the amounts paid by the defendant to the financial institution and the dates of payments;
>
> (b) the amount of finance and other amounts relating to the finance payable by the defendant to the financial institution up to the date of institution of the suit;
>
> (c) the amount if any which the defendant disputes as payable to the financial institution and facts in support thereof:
>
> *Explanation.*- For the purposes of clause (b) any payment made to a financial institution by a customer in respect of a finance shall be appropriated first against other amounts

> relating to the finance and the balance, if any, against the principal amount of the finance.
>
> (5) The application for leave to defend shall be accompanied by all the documents which, in the opinion of the defendant, support the substantial questions of law or fact raised by him.
>
> (6) An application for leave to defend which does not comply with the requirements of subsections (3), (4) where applicable and (5) shall be rejected, unless the defendant discloses therein sufficient cause for his inability to comply with any such requirement.
>
> (7) ……
> (8) …….
> (9) ……..
> (10) ……..
> (11) ……..
> (12) ……..

From the perusal of the above provisions, it appears that parties to a suit are obliged to specifically mention/plead in the plaint and Leave-to-Defend Application, the amount of finances availed by a defendant from the financial institution, the amount paid by the defendant to the financial institution and dates of repayment as well as the amount of finance and other amounts relating to the finance facility payable by a defendant to a financial institution up to the date of institution of suit for recovery.

8. In the present case the claim of the plaintiff is that defendant No.1 from time to time availed various Finance Facilities viz. Running Finance Facility for Rs.160,000,000/- vide Agreements for Financing for Short/Medium/Long Terms on Mark-Up Basis dated 20.04.2009 and 01.10. 2009 **(Annexures B-5 and B-6** to the plaint**)**, Running Finance Facility for Rs.160,000,000/- vide Agreement for Financing for Short/Medium/Long Terms on Mark-Up Basis dated 05.03.2010 **(Annexure-B-7)**, Running Finance Facility for Rs.210,000,000/- vide Agreement for Financing for Short / Medium/Long Terms on Mark-Up Basis dated 26.04.2011 **(Annexure-B-8)**, Running Finance Facility for Rs.5,000,000/- vide Agreements for Financing for Short/Medium/Long Terms on Mark-Up Basis dated 20.04.2009 and 01.10.2009 **(Annexures B-9 and B-10)**, Running Finance Facility for Rs.5,000,000.00 vide Agreements for Financing for Short/Medium/Long Terms on Mark-Up basis dated 05.03.2010 and

26.04.2011 **(Annexures B-11 and B-12)**. Besides this, the plaintiff on the request and representation of defendant No.1 also extended facility for forward purchase of US Dollars, which were to be received by Defendant No.1 on account of export proceeds. The Plaintiff has been discharging its obligations on a timely basis whenever the differential was payable by the Plaintiff. However, Defendant No.1 failed to pay the differential amount when the same was payable by Defendant No.1. Details of said facility are as under:

i) Forward Contract No.958210 for US$ 400,000/-, dated 17.04.2012, whereby the Plaintiff agreed to purchase US Dollars in advance at Rs.93.22 per Dollar from Defendant No.1 on 17.04.2012. The maturity date was 31.07.2012. The booked exchange rate was Rs.93.22 and the exchange rate prevailing on the maturity date was Rs.94.9. The difference between rate of purchase and prevailing exchange was Rs.672,000/- which is payable by Defendant No.1. (**Annexure-C/2** available at Pgs.163 to 165 to the plaint)

ii) Forward Contract No.964353 for US$ 500,000/- dated 08.05. 2012. Whereby the Plaintiff agreed to purchase US dollars in advance at Rs.93.52 per Dollar from Defendant No.1 on 08.05.2012. The maturity date was 31.08.2012. The booked exchange rate was Rs.93.52 and the exchange rate prevailing on the maturity date was Rs.94.55. The difference between rate of purchase and prevailing exchange was Rs.515,000/- which is payable by Defendant No.1. (**Annexure- C/1** available at Pgs.157 to 161 to the plaint).

Record also reflects that in order to secure the Finance Facilities, availed by defendant No.1, following securities were created by the Defendants in favour of the Plaintiff.

i) Pledge of Raw Cotton with 10% Margin applicable on KCA Rates [Ex-Gin] Under effective control of BAL's approved macadam [Letter of Pledge dated 20.04.2009, 01.10.2009, 05.03.2010 and 26.04. 2011-available as **Annexures-D-1, D-2, D-3 and D-4** to the plaint].

ii) A charge by way of Hypothecation in respect of all present and future goods, merchandise, products stocks, stocks in trade, raw materials work in progress, finished and unfinished goods, stored or located or lying at 63 KM Multan Road, Bhaipero, Chunia or any other place of storage godown in Pakistan and all such aforesaid goods in the course of transit including goods referred by and released under trust receipts and all future goods/stocks that may be brought into the above place of storage/godowns. (letter of Hypothecation of Book Debts and movables dated 29.08.2011 available as **Annexure-E** to the plaint).

iii) Demand Promissory Notes dated 20.04.2009, 01.10.2009, 05.03.2010 and 26.04.2011 in respect of Running Finance Facility

No.1 and Demand Promissory Notes dated 01.10.2009, 05.03.2010 and 26.04.2011 in respect of Running Finance Facility No.2 executed in favour of the Plaintiff (**Annexure-F/1, F/2, F/3, F/4, F/5, F/6, F/7 and F/8**). Besides this Defendants No.2 to 4 also executed their personal Guarantees in favour of the plaintiff through Guarantee dated 26.04.2011(**Annexure-G** to the plaint).

9. The plaintiff in support of its stance in the case has also filed certified statement of accounts as well as break-up summaries as annexure **H/1** to **H/5** to the plaint. Break-up summaries for the sake of ready reference is reproduced as under:

RUNNING FINANCE FACILITY No.1

(i)	Maximum Limit of Finance Facility as per Agreement dated April 20, 2009 and October 1, 2009.	Rs.160,000,000.00
(ii)	Maximum Limit of Finance Facility as per Agreement dated March 5, 2010	Rs160,000,000.00
(iii)	Maximum Limit of Finance Facility as per Agreement dated March 29, 2011	Rs.210,000,000.00
(a)	Total amount availed by Defendant No.1 from time to time under the aforesaid agreements	Rs.563,979,935.15
(b)	Total amount repaid	Rs.453,092,695.86
	i) Principal	Rs.408,700,000.00
	ii) Mark-up	Rs. 25,370,316.48
(c)	Outstanding amount	Rs.180,650,251.48
	i) Principal	Rs.155,279,935.00
	ii) Mark-up	Rs.25,370,316.48
(d)	Total amount payable	Rs.180,650,251.48

RUNNING FINANCE FACILITY NO.2

(i)	Maximum Limit of Finance Facility as per Agreement dated April 20, 2009 and October 1, 2009.	Rs.5,000,000.00
(ii)	Maximum Limit of Finance Facility as per Agreement dated March 5, 2010	Rs.5,000,000.00
iii)	Maximum Limit of Finance Facility as per Agreement dated March 29, 2011	Rs.5,000,000.00
(a)	Total amount availed by Defendant No.1 from time to time under the aforesaid agreements	Rs.216,233,606.53
(b)	Total amount repaid	Rs.216,956,146.29
	iii) Principal	Rs.214,955,371.85
	iv) Profit/Mark-up	Rs.2,000,774.44
(c)	Outstanding amount	Rs.5,928,186.15

	iii) Principal	Rs.5,000,000.00
	iv) Profit/ Mark-up	Rs. 928,186.15

EXPORT FORWARD COVER FACILITY

(a)	Total Difference of Amount availed by Defendant No.1 from time to time.	Rs.1,079,152.43
(b)	Total Amount Repaid	Rs. Nil
(c)	Total amount payable	Rs.1,079,152.43

GRAND TOTAL

RUNNING FINANCE NO.1	Rs.180,650,251.48
RUNNING FINANCE NO.2	Rs.5,928,186.15
EXPORT FORWARD COVER FACILITY	Rs.1,079,152.43
Grand Total	Rs.187,657,590.06

The record also transpires that the defendants in their application for leave to defendant did not dispute the documents viz. finance and security agreements, promissory notes etc. annexed by the plaintiff along with the plaint, they however, maintained that the plaintiff never availed the Finance Facilities mentioned in the plaint of the suit. They have also raised objections regarding the statement of accounts being not in conformity with the requirements of law including F.I.O., 2001 as well as Bankers' Book Evidence Act, 1891, is not sustainable in law. It is imperative to mention here that the defendants have not filed a single document in support of their stance in the case which could show that they have ever objected to the entries in the statement of accounts and or raised objections in respect of subject finance facilities thus, the stance/objections of the defendants without any proof is nothing but devoid of merit. On the contrary, the plaintiff has annexed all the agreements, security documents, promissory notes etc. and the statement of bank accounts of defendant No.1 reflecting all transactions of the finance facilities from time to time as well as charging of markup and other expenses, substantiate the stance of the plaintiff in the present case. It may be observed that 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.

On perusal of the statement of accounts and the summary of transactions it shows that the finances were availed and utilized, therefore, the objections of the nature at this stage of the proceedings are not liable to be considered. Insofar as the objections in respect of blank documents is concerned, 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. Even otherwise, the defendants have not denied their signatures as well as rubber stamps of defendant No.1 on the documents, which on the face of it are duly filled-up. Insofar as the objection with regard to markup, the defendants have also not particularized or specified the amounts of mark up claimed by them to have been excessively charged by the plaintiff-bank as mark up on mark up or beyond the agreed rate. The defendants by taking such objections cannot avoid the payment of the outstanding amounts due against them, which they availed in terms of the Finance Agreements/Undertakings and Promissory Notes, available on the record. Moreover, all documents pertaining to finance facilities including finance agreements, promissory notes and undertakings etc., available on the record are duly filled, which beside binding are valid documents. Besides, all the finance agreements involved in the case in hand have also been acted upon. Under law, one cannot 'approbate and reprobate' or otherwise, wriggle out of the commitments made at the time of availing the finance facilities.

It may also be observed that F.I.O., 2001, is a special law and as per section (2)(e) of Financial Institutions (Recovery of Finances) Ordinance, 2001, customer is duty bound to fulfill the performance of undertakings, promises and commitments vis-a-vis repayment of finance facility availed by him. Being relevant, section 2(e) of F.I.O., 2001 [Ordinance XLVI of 2001], is reproduced hereinbelow:

> "**2. Definitions.-** In this Ordinance, unless there is anything repugnant in the subject or context -
> (a) . . .
> (b) . . .
> (c) . . .
> (d) . . .
> (e) "obligation" includes

(i) any agreement for the repayment or extension of time in repayment of a finance or for its restructuring or renewal or for payment or extension of time in payment of any other amounts relating to a finance or liquidated damages; and

(ii) 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 any other amounts relating to a finance or performance of an undertaking or fulfillment of a promise; and [Underlining is' mine].

(iii) all duties imposed on the customer under this Ordinance; and

(f) . . .

From perusal of the above it is manifestly clear that a bank's customer is obliged and duty bound not only to perform/fulfill his/its' undertakings promises made in respect of re-payments of the outstanding dues including other amounts relating to finance facility, availed. In the present case, the defendants have not denied the execution of finance agreements, security documents and promissory notes. In the circumstances, the defendants are liable to pay not only finance availed but also other accrued charges, if any.

Moreover, the defendants, in the present case, have also signed 'Promissory Notes' which under section 118 of Negotiable Instruments Act, 1881, [XXVI of 1881] attaches itself the presumption of truth. Section 118 of Negotiable Instruments Act, 1881 [XXVI of 1881] being relevant is reproduced herein below:-

"118. Presumptions as to negotiable instruments---(a) Of consideration; (b) as to date; (c). as to time of acceptance; (d) as to time of transfer; (e) as to order of endorsements (1) as to stamp; (g) that holder is a holder in due course. - --Until the contrary is proved, the following presumptions shall be made,

(a) that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

(b) as to date: that every negotiable instrument bearing a date was made or drawn on such date;

(c) as to time of acceptance: that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer: that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of endorsement: that the indorsements appearing upon a negotiable were made in the order in which they appear thereon;

(f) as to stamp: that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course: that the holder of a negotiable instrument is a holder in due course; provided that, where the instrument has been obtained from its law the owner; or from any person in lawful custody thereof by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or, fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."

Not only, under section 118 of Negotiable Instruments Act, 1881 [XXVI of 1881], a statutory presumption vis-a-vis consideration, date, time of acceptance and transfer, order of endorsement, stamping and as to holder in due course of Negotiable Instrument is attached to a negotiable instrument but the same also attracts a special rule of evidence. Reliance in this regard can be placed on the cases of *MUHAMMAD ARSHAD and another v. CITIBANK N.A., LAHORE* **[2006 SCMR 1347]** and *HABIB BANK LTD. v. TAJ TEXTILE MILLS LTD. through Chief Executive and 5 others* **[2009 CLD 1143]**.

10. In the present case, the defendants have not disputed the execution of documents i.e. finance agreements, promissory notes. Moreover, the defendants have also failed to pin-point any entry in the 'certified statement of accounts', as being wrong or incorrect. It is needless to say that entries made in the 'certified statement of accounts' attach themselves the statutory presumption of truth' that is to say under the Bankers' Books Evidence Act, 1891 [Act XVIII of 1891]. Reliance in this regard, can be placed on the cases of *UBL v. Messrs SARTAJ INDUSTRIES through Qaiser Iqbal, Managing Partners and 6 others* **[PLD 1990 Lahore 99]** And *ASKARI*

COMMERCIAL BANK LTD. v. HILAL CORPORATION [PVT.] LTD. and 6 others **[2009 CLD 588]**.

11. Before proceeding further, here it would be imperative to discuss the objection raised by the defendants in respect of provisions viz. Sections 9 & 10 of the FIO 2001 being inconsistent with and in derogation of fundamental rights of fair trial provided under Article 10-A of the Constitution and such are void and ultra vires. Under the parameters of Financial Institutions (Recovery of Finances) Ordinance, 2001 [FIO 2001] the defendant is entitled for a relief if question of law and fact is being established. Article 10-A of the Constitution of Islamic Republic of Pakistan no doubt provides an opportunity of fair trial but it does not amount to a trial of a suit where neither any question of law nor a fact was established. Article 10-A of the Constitution of Islamic Republic of Pakistan also provides for the determination of a civil right and the obligation to be determined by the Court. Once the due process as required in terms of Financial Institutions (Recovery of Finances) Ordinance, 2001, is adopted and the defendant is before the Court for redressal of his grievance, all he has to do is to establish the question of fact and law for determination of civil right and obligation, which is to be determined by the Court. In terms of section 10(3) of FIO 2001 the application for leave to defend is supposed to be in the form of written statement which shall be containing summary of substantial question of law as well as fact in respect of which in the opinion of defendant, evidence needs to be recorded. In view of the circumstances, where the defendants have failed to establish any question of law and the fact which requires the determination of civil right and obligation by the Court and the Court is of the opinion that there is no question or issue which requires evidence then it would not only be a futile effort but the proceedings would also be frustrated. Orders XIV and XV of Civil Procedure Code which deal with Settlement of Issues and disposal of a suit at first hearing also support that if parties are not at issue, judgment is to be passed straightaway without recording evidence. Denial against law cannot constitute any question of law. If the principle as alleged by defendants is set then perhaps the provisions of Section 10 of FIO 2001 would become redundant, hence after adopting due process, person who is

entitled for any relief should be granted and on this account only the trial should not be frustrated but not otherwise. Reliance in this regard can be placed on the case of NATIONAL BANK OF PAKISTAN v. RAJA TRADERS, Through Sole Proprietor and 8 others **[2016 CLD 1938]**

Moreover, the Honourable Supreme Court in the case of *APOLLO TEXTILE MILLS LTD. and others v. SONERI BANK LTD.* **(PLD 2012 Supreme Court 268),** inter alia has held that 'the rationale of the schematic discipline of Ordinance of 2001 is evident. A banking suit is normally a suit on Accounts which are duly ledgered and maintained compulsorily in the books of Accounts under the prescribed principles/standards of Accounting in terms of the laws, rules and Banking practices. As such instead of leaving it to the option of the parties to make general assertions on Accounts, the Ordinance binds both the sides to be absolutely specific on accounts. The parties to a suit have been obligated equally to definitively plead and to specifically state their respective accounts. The scope of the suit under FIO thus becomes well defined. The controversies are confined to the claimed and / or the disputed numbers, facts and reasons thereof. Unnecessary controversial details, the evidence thereto and the time of the trial, are curtailed. The trial would remain within the laid out parametrical scope of the claimed and the disputed accounts.'

In the present case, from the perusal of record, it is manifestly clear that due process and fair trial has been adopted hence the objection is not sustainable in law.

12. Reverting to the case in hand, the objections of the nature raised by the defendants are general and evasive denials, as such the same are not sustainable in law. Moreover, the defendants cannot take refuge under the said objections and refuse to payback amount already availed by defendant No.1 in respect of finance facilities under the agreements of the subject proceedings. Furthermore, the very object of section 10(4)(b) of the Ordinance is to give an opportunity to the defending customer to make out a case for the grant of leave by disclosing the amounts paid by him to the financial institution and the dates of such payments. He will not be absolved from his obligation under section 10(4) ibid by simply disputing or

denying the amount claimed in the Suit, or by stating an amount towards repayments in general or vague terms without disclosing dates of payments and without filing documents in support thereof. In the instant case, the defendants did not file any documentary proof in support of their stance taken in the application for leave to defend. In the case of **Apollo Textile Mills Ltd** *(supra)*, the Honourable Supreme Court was also pleased to hold, inter alia, that under section 10(4) of the Ordinance, the defending customer has statutory responsibility to plead and state clearly and particularly the finances availed by him, repayments made by him, the dates thereof, and the amounts of finance repayable by him; and, he is saddled with an additional responsibility to also specify the amounts disputed by him. It has been further held that a defending customer is obliged to put in a definite response to the bank's accounting and has under subsections (3) and (4) of section 10 ibid to compulsorily plead and answer in the application for leave to defend his accounts as well as the facts and amounts disputed by him as repayable to the plaintiff. It has been specifically held that non-impleadment of accounts under subsections (3) and (4) of section 10 ibid in terms thereof, entails legal consequences under subsections (1), (6) and (11) of section 10 ibid. It has been further held that because of the Ordinance being a special law, the provisions of section 4 thereof override all other laws; the provisions contained in the said Sections require strict compliance; and, non-compliance therewith attract consequences of rejection of the application for leave to defend. In the instant case, the defendants despite having full opportunity to comply with the mandatory requirements of subsections (4) and (5) of section 10 ibid at the time of filing the application for leave to defend, have failed in availing such opportunity, hence, they are bound to face the consequence of their non-compliance as held by the Honourable Supreme Court in **Apollo Textile Mills Ltd** (supra); and, their application for leave to defend is liable to be rejected.

13. In view of the 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 facilities have been availed and the defendants

have failed to substantiate their claim and stance taken in the leave to defend application through any supporting documents, therefore, while dismissing the leave to defend application instant Suit is decreed against the defendants for an amount of Rs.161,359,087.43 as principal and for Rs.26,298,502.63 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 pledged stocks and hypothecated assets as mentioned in the plaint.

JUDGE