IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. B-63 of 2007

National Bank of Pakistan
Versus
Raja Traders & others No.

A N D

Suit No.1588 of 2006

M/s Raja Traders (Pvt.) Ltd.
Versus
National Bank of Pakistan & others

BEFORE:

Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing:	08.04.2015
Plaintiff:	Through Mr. Jehnzaib Awan Advocate
Plaintiffs in Suit 1588/06:	Through Syed Shabbir Shah Advocate
Defendant Nos.2,5,7 & 8:	Through, Mr. Saalim Salam Ansari Advocate
Defendant No.9:	Through, Mr. Rizwan Ahmed Siddiqui Advocate

J U D G M E N T

Muhammad Shafi Siddiqui, J.- In Suit No.B-63 of 2007 CMA Nos.2675, 2776 and 2677 of 2008 are leave applications filed by the defendants No.1 to 9 whereas CMA No.2678 is an application under order VII Rule 11 CPC filed by defendants No.1 & 6 and through application bearing CMA No.452/2008 the plaintiff has sought restraining orders against the defendants from disposing of the movable and immovable properties as prayed in the application.

The instant suit B-63 of 2007 is filed under Financial Institutions (Recovery of Finances) Ordinance, 2001 for the recovery of outstanding amount which recovery is being denied by the defendants in terms of leave applications. The connected suit is filed by the defendant No.2 in the original civil jurisdiction of this Court seeking fulfilment of obligation arising out of decision of the State Bank of Pakistan's Committee for

Settlement of Liabilities under Circular BPD 29 issued by the State Bank of Pakistan.

It is the case of the defendants that Raja Traders which was a proprietary concern/defendant No.1 applied for certain finance facilities and the same facilities were granted, extended, rescheduled and enhanced from time to time vide sanction advise letters dated 09.10.1984, 03.6.1985, 08.9.1988, 18.3.1990 and 13.8.1998. It is claimed that Raja Traders/defendant No.1 availed finance facilities and lastly finance facilities were rescheduled by 26.5.2001 in response of renewal of financial facility, agreements and security documents which were signed on behalf of Raja Traders/defendant no.1.

It is the case of the defendants that defendant No.2 which is a private limited company were entered into a finance agreement dated 19.2.2003 and the amount shown as sale price was Pak Rs.139,992,000/- and the purchase amount also appeared as Pak Rs.139,992,000/-. It is thus urged that the defendant No.2 availed the facility and the same amount was agreed to be returned within a period of seven years without mark up. It is thus submitted that the three finance agreements dated 19.2.2003 available at page 317, 19.2.2003 at page 335 and 19.2.2003 at page 495 are without consideration and no amount has been disbursed to defendant No.2 and since it is without consideration as no amount was disbursed therefore, it is hit by Sections 24 and 25 of the Contract Act. Learned Counsel has relied upon the cases reported in 1998 CLC 816 and PLD 1995 Lahore 395.

It is the case of defendants that defendant No.2 and the plaintiff bank entered into aforesaid Finance Agreements as private limited company and has agreed to own the liabilities of defendant No.1 without knowledge and/or without consent of the other defendants No.3,4,5,6,7 & 8 and therefore, these defendants are discharged from liabilities due to novation of the Contract under Sections 133 to 135 of the Contract

Act. Learned Counsel has further relied upon BPD Circular 29 and stated that since the committee formed by the State Bank of Pakistan has determined the liability of the defendants and given the decision which is available on record as annexure P-1 at page 341 therefore, on this score alone the leave application is to be granted as the bank is under obligation to comply with the State Bank of Pakistan Committee's decision. Counsel has further relied upon Article 10-A of the Constitution of Islamic Republic of Pakistan and submitted that this right of fair trial has now been guaranteed by the Constitution of Islamic Republic of Pakistan as a fundamental right. Learned Counsel submitted that this Section 10 of FIO in fact is contrary to the fundamental right as guaranteed under 18th Amendment and hence this hurdle to defend the suit by recording evidence is to be treated as ultra vires.

On the other hand learned Counsel for the plaintiff has denied the contention and submitted that the defendant have violated the mandatory provisions of Section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. It is contended that the defendants have not denied at all that they have availed finance facilities from the plaintiff bank from time to time and hence this admission merits dismissal of the application summarily. Learned Counsel for the plaintiff, insofar as the BPD Circular 29 is concerned, submitted that Section 33B of the Banking Companies Ordinance, 1962 meant to provide only guidelines. Learned Counsel submitted that neither BPD Circular 29 as has been drafted is mandatory upon the plaintiff insofar as the decision of its implementation is concerned nor committee's decision is enforceable. Learned Counsel submitted that the State Bank of Pakistan has also confirmed this position before the Hon'ble Supreme Court in Suo Moto Case No.26/2007 and hence they themselves conceded insofar as its mandatory implementation is concerned in writing off the loans. Learned Counsel has relied upon the case of Azam Wazir Khan v. IDBP reported in 2013 SCMR 678 which

provides Circular issued by the State Bank of Pakistan could be termed as delegated legislation/ directives/orders, however it cannot displace legislative instruments such as Acts of Parliament. He_further relied upon the observation of the Hon'ble Supreme Court vide order dated 29.9.2010 passed in Suo Motu Case No. 26/2007 reproduced is as under:-

> "*Prima facie without prejudice to the case of either party we are of the opinion that Circular 29 on the basis of which huge amount of loan/financial facilities were extended to the borrowers has been written off is contrary to Section 33B of the Ordinance, 1962.----- it speaks for settling the account that too, on two important conditions i.e. for want of adequate security or for rehabilitation of a sick unit. Similarly, element of discrimination in terms of Article 25 of the Constitution is also identifiable in this circular.* "

Learned Counsel further relied upon the order dated 20.11.2013 passed in Suo Moto Case No.26/2007. Learned Counsel submitted that the decision of the private individuals in the shape of committee formed by the State Bank of Pakistan cannot be applied to the plaintiff and they have never accepted the decision of the committee throughout. Learned Counsel further relied upon the contents of BPD Circular 29 itself. Learned Counsel submitted that under no stretch of imagination it could be binding and obligatory upon the plaintiff.

He has further argued that it was agreed between the parties that the sole proprietorship was converted into a private limited company to move towards a corporate structure and to formalize the role of family members who in any case stood as guarantors. It is submitted that contents of the connected suit No. 1588/2006 itself is sufficient to negate the defence of novation. Learned Counsel thus submitted that no question of law and fact has been raised and hence the applications are liable to be dismissed and since none of the amount has been challenged in any way and before any forum therefore, the suit of plaintiff/Bank is liable to be decreed as prayed.

Syed Shabbir Shah, learned counsel for plaintiff in connected suit also argued that a cause of action has accrued to defendant (plaintiff in

connected suit) for implementation of decision of committee and hence trial is necessary in the connected suit failing whereof it would become infructuous.

Heard the learned Counsels and perused the available record.

The defendants substantially raised question which allegedly involve novation of contract at the time of transferring the liability from proprietary concern to private limited company, agreement being without consideration and it being void in terms of Sections 24 and 25 of the Contract Act, entitlement in terms of BPD Circular 29 and lastly trial of connect suit and its disposal on merits. I would like to deal with the issue of BPD Circular 29 first.

Insofar as the BPD Circular 29 is concerned the defendant appears to have filed a suit for fulfilment of the obligation arising out of a decision of State Bank of Pakistan Committee for settlement of liabilities under Circular BPD 29 issued by the State Bank of Pakistan. Originally the prayer in the connected suit were as under:-

1. *As the defendant failed to fulfill an, obligation which is arises of the decision of SBP committee for settlement of disputes dated 21.12.2004, direction may be issued to them to sign an agreement as determined by the committee in terms of BPD Circular 29 issued by the State Bank of Pakistan.*

2. *That the defendant be directed to sign the agreement as determined by the above said committee amounting to Rs.33.259 million payable be (by) plaintiff per schedule laid down per terms of the decision of the said committee.*

3. *Any other relief which this court may think it ; proper. (fit and proper).*

4. *Cost of the suit.*

Subsequently an application bearing CMA No.7656 of 2007 was filed for amendment in prayer clause to the effect that the earlier prayers, as reproduced above, be numbered as 4, 5, 6 and 7 respectively and following prayer clauses were sought to be added:-

1. *That this Hon'ble Court be pleased to pass a judgment and decree declaring that the BPD Circular No.29 dated October*

15, 2002, has the force of law and is binding on defendants No.1 and No.2; (Issue of Pure Law)

2. *That this Hon'ble Court be pleased to declare that the case of the plaintiff is fully and admittedly covered by BPD Circular No.29 and that the plaintiff is entitled to full benefits and concessions vis-à-vis the entire amount owed by him to defendant No.1 as per the letter, sprit and mandate of BDP Circular No.29.*

3. *That this Hon'ble Court may be pleased to grant and issue a direction (mandatory injunction) ordering defendants No.1 and No.2 to consider, decide and dispose of the case of the plaintiff in accordance with BPD Circular No.29 and the decision of the SBP Committee dated 12.12.2004.*

In order to understand the binding nature of BPD Circular 29 as alleged, it is necessary to go through the contents of the aforesaid circular. Simple reading of BPD Circular 29 provides that it is issued to all the banks concern in relation to the "non-performing loans". It is claimed in the said circular that stock of "non-performing loans" in the banking sector has affected the entire health of the institution. It further laid emphasis on the restructuring under committee for revival of sick industrial units hence in order to facilitate the banks to deal with these loans in loss category, which have been outstanding on the books since long and for which the probability of recovery is "negligible" the State Bank of Pakistan has developed a new set of guidelines in consultation with the banks and Federation of Pakistan, Chamber of Commerce and Industries. It appears that these guidelines did not effect in any way the legal right of Financial Institutions to recover their written off loans if they still wish to pursue them legally. Prima facie the purpose of this guideline was to provide balance sheet to the banks in order to strengthen their financial matters. In terms of clause-3 of the aforesaid circular this prerogative was exclusively given to the banks/ financial institutions. These guidelines have further categorised non-performing loans into three categories. In view of above this BPD Circular 29 does not, in any way issued to be enforced upon the banks to act upon it in any manner whatsoever and under any circumstances. It simply provides a guideline that in case all these financial institutions or

banks who are in process of setting off all such accounts which may come into such categories, may act accordingly but this does not demonstrate that these institutions are under any compulsion nor they could be. Circular says it is for them to decide as to how and in what way such accounts are to be dealt with. There is no cavil to the proposition that once the bank would agree to the setting off the accounts, then the terms and guidelines as provided in BPD Circular 29 could be made applicable as mandatory. That does not mean that the banks are under obligation to write off or set off the individual accounts despite prerogative of the bank which empowers them to undergo a legal process for the recovery of such loans. The instant case is not where probability of recovery is "negligible" since properties are mortgaged and guarantees are enforceable.

Insofar as this BPD Circular 29 is concerned the Hon'ble Supreme Court in Suo Motu Case No.26/2007 has already observed as under:-

> "*Syed Iqabl Haider, Sr. ASC has placed on record Circulars of State Bank of Pakistan issued during the period commencing from May 31, 1972 up till Circular No.06, of June 5th, 2007 including two circulars bearing Nos. 29 dated 15th October, 2002 and 13 dated 16th April, 2006. Learned Counsel vehemently argued that these circulars relating to financial benefits and concessions of writing of the loans under the guidelines of State Bank of Pakistan were issued in pursuance of section 33-B of the Banking Companies Ordinance, 1962 and Rules & Regulations of the Bank. Prima-facie and without prejudice to the case of either party we are of the opinion that Circular No.29, on basis of which huge amount of loan/financial facilities were extended to the borrowers has been written off, is contrary to section 33-B of the Ordinance, 1962. Interestingly, this section does not confer authority upon the State Bank of Pakistan to allow facility of loan to any of the borrowers, contrary to it, it speaks of settling the accounts that too, on two important conditions i.e. for want of inadequate security or for rehabilitation of a sick unit. Similarly, element of discrimination in terms of Article 25 of the Constitution is also identifiable in this circular. More interestingly, the borrowers who became defaulters on account of non-payment/reimbursing have been accommodated by allowing them facility of further loan/financial facility in the name of working capital. Thus, the arguments seems to have been made, prima-facie, without any lawful authority because it is a question of common sense that when a borrower commits default he proves himself not a person fit to claim the same facility from the Banks.- "*

Similarly the Hon'ble Supreme Court on 20.11.2013 in Suo Motu Case No.26/2007 further observed as under:-

> *"The learned Attorney General for Pakistan stated that he contacted the Finance Ministry in connection with the report filed in Court by the Commission suggesting different modes for recovery of the written off loans but he was surprised that none had knowledge of filing the report and the recommendations made therein. Mr. Tanvir Ahemd Butt, Joint Secretary, Ministry of Finance stated that the Federal Government required one month's time to file a reply. We failed to understand why the Government is not interested in recovering the loans which belong to the public exchequer and this Court in exercise of its Suo Motu jurisdiction, constituted a Commission headed by a former Judge of this Court and two other Members who examined only selected cases and concluded that the loans were written off "contrary to the law" prevailing at the time.*
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> *2. It is to be noted that the State Bank and the other Banks responsible for writing off the loans, should have also come forward by suggesting mechanism to effect the recovery of the said loans keeping in view the suggestions of the Commission but unfortunately none has present on their behalf. We are thankful to Khawaja Haris Ahmed, learned Sr. ASC who had initially assisted the Court along with Mr. Ali Zafar, Advocate and at their suggestion the Commission was constituted. Kh. Haris Ahmed has again addressed the Court at considerable length. We hope that the Government will take stringent and immediate measures to recover the public money and if need be by adopting temporary legislation. Be that as it may, let the Secretary Finance, the State Bank of Pakistan and all other scheduled Banks submit their replies in respect of the contents of the report suggesting ways and means for recovery of loans which had/have been wrongly written off. The report shall reach the Court within 15 days. The matter is adjourned. To be listed for hearing after two weeks. "*

The State Bank of Pakistan itself issued a circular/letter on 03.6.2011 wherein they have stated that serious questions have arisen in respect to written off, remitted, reversed or waived off loans, advances and finances under BPD Circular 29 dated 15.10.2002 or otherwise from 1971 onwards. The State Bank of Pakistan went on to observe that these questions are against possibility that the written off loan may have been allowed without validity or justification or because of political reasons or consideration other than law or bona fide business consideration. The

State Bank of Pakistan directed these banks to submit entire record of written off loans in pursuance of the aforesaid order for its examination.

In the instant case it appears that defendant No.2 to whom all liabilities and obligations were transferred never approached the State Bank of Pakistan, it is only defendant No.1 who intended to act upon it, which is not it's prerogative. The documents attached with the leave application as well as connected Suit No. 1588/2006 provides that the correspondence was between the defendant No.1 and State Bank of Pakistan/National Bank of Pakistan. The National Bank of Pakistan never undertook to resolve the dispute accordingly in terms of the alleged settlement of liabilities under BPD Circular 29. It appears that as against hundreds of millions, decision was unilaterally given by committee for Rs.33.529 Million. Without going into merit of such assessment or decision by committee, in my view there was neither any occasion for such decision nor there could be any, since the plaintiff who was the sole decision maker insofar as the recovery of the outstanding liability is concerned has never taken a decision to settle the dispute in terms of BPD Circular 29. It is not a case where chances of recovery are negligible, which is a condition precedent. At this stage question would be that during the pendency of the connected suit where such questions are raised by the defendant as a plaintiff, it might cause prejudice to the trial of the suit. The defendants may have filed a connected suit for the implementation of such decision but I have to assign reasons to whatever orders I pass. So far as leave application is concerned, surely this is no ground to consider the leave application.

The observation while deciding the leave application may or may not have any effect on the connected suit but simply the Court cannot keep quite while deciding the leave application that it might affect the trial of the connected suit. I am of the view that even if the proceeding of connected suit are effected it is only the applicability of law that it is

so. The Court is required to find out as to whether any question of law and fact raised which is to be determined.

Since the observation while deciding the leave application may have an effect to the connected suit, which was argued by Mr. S. Shabbir Shah, I would like to consider its maintainability insofar as the cause in filing the connected suit is concerned. As I have observed earlier that originally the suit was filed to direct the plaintiff to sign the agreement, the terms of which were determined by the Committee of the State Bank of Pakistan. Subsequently the defendant (plaintiff in the connected suit) has moved an application under order VI rule 17 CPC for the amendment in the prayer clauses which are also reproduced in the earlier paras. The substance of the amendments, so prayed for, are only that the judgment and decree be passed in terms of the decision made by the committee of the State Bank of Pakistan for enforcing BPD Circular 29. In this regard it is very material and important to see as to whether any cause of action, either for the original set of prayers or for the subsequent amended prayers, is available or accrued to the defendant (plaintiff in the connected suit).

At the very outset insofar as the first set of original prayers is concerned the plaintiff cannot be coerced to sign any unilateral agreement, terms of which were never agreed by the plaintiff. It would simply be hit by the provisions of section 13, 14 and 16 of Contract Act. Hence, there cannot be a valid cause of action as against the law. Secondly even if the amended prayer clauses are to be taken into consideration, plaintiff in the connected suit is required to show that not only the rights have been infringed but a right to seek a relief is in existence. As I have observed that BPD Circular 29 does not provide right to them unless it is such that they meet the precondition as set out in the BPD Circular 29 such as that the chances of the recovery of loan are negligible and that it is considered as sick unit etc. In both the cases no cause would come into existence to give right to defendant (plaintiff in

connected suit) to initiate such proceedings as it is not its (plaintiff) case. It is to be seen whether the allegations made in the plaint would give rise to a cause of action or not and if no cause of action is made out, the plaint is liable to be rejected.

At the very outset I may say, as I have already observed that there was no occasion for the State Bank of Pakistan to intervene and to settle the claim of the plaintiffs who have never decided to set off or write off the loan or to approach them. It would have been made applicable when plaintiff in this suit had chosen to adopt such course.

In another Suit bearing No. B-29/2005 I have already observed as under:-

> "----*Even otherwise, the enforcement of BPD Circular 29 by the individual banks to their respective customer is in fact the prerogative of the banks and it is for them to decide whether such debt outstanding against the customer is a lost debt or recoverable in terms of the assets mortgaged with them. Such BPD Circular 29 is of course binding once the bank reaches to a decision that such debt is not recoverable or a lost category and then the procedure and the parameters as laid down therein are to be adopted as a binding parameter but prima facie not in terms of its mandatory application.*
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> *In the judgment passed in High Court Appeal No.07 of 2013, as referred above, it has been observed that the judgment and decree passed in Suit No.1507 of 1998 cannot be made subservient to the outcome of the instant suit in terms of section 22 and 27 of Financial Institutions (Recovery of Finances) Ordinance 2001 and hence any mode whereby the consent decree passed in suit No.1507 of 1998 is sought to be deferred, modified, altered, reviewed would be violative of law.*-----"

Insofar as novation of contract is concerned, plaintiff in this regard pleaded in the memo of plaint that since 1983 onwards the defendant No.1 which is a proprietory concern availed numerous finance facilities from the plaintiff. Defendant No.1 and other family members/guarantors at later stage formed a private limited company which is being managed by them. Defendant No.2 i.e. private limited company was incorporated in the year 1991 for the purposes of taking over entire business of defendant No.1. It is pleaded in the plaint that at the request of both these defendants the finance facilities and

outstanding liabilities of defendant No.1 was transferred to the account of defendant no.2 subsequent to the last rescheduling, enhancement and renewal in November 2002. Such facts are also admitted by the defendant at the time of filing the connected Suit No.1588/2006. In the leave to defend application the answering defendant and in particular in CMA No.2675/08 the defendants in the parawise reply have admitted the contents of paras 1 to 4 as being formal. The last rescheduling took place vide sanction letter dated 21.11.2002 which was executed by defendant No.1 vide letter dated 22.11.2002. Defendant Nos.2,3,4,5,7 & 8 in respect of para-23 of the plaint have pleaded no concern since it was allegedly related to defendant No.1. Such is although an evasive reply, the defendant No.2 has not denied to have taken over outstanding liabilities of defendant no.1. Defendant No.1 in its application for leave to defendant has denied that loan is payable by the defendant No.1 in fact all outstanding loans alleged to have been transferred to defendant No.2. Defendant No.2 after such transfer of outstanding liabilities entered into a Finance Agreement dated 19.2.2003 available at page 317 of the purchase price as agreed was payable to the bank on or before 18.2.2010 i.e. within seven years. This is the rescheduled amount which was done on the condition that the defendant No.1 will sell the immovable property situated in Multan and all pledged stock by December 2002 and proceeds thereof was to be adjusted against demand finance. The remaining amount of the demand finance-1 was to be adjusted by the bank through realization of export proceeds and hence on breach of such agreement the plaintiff became entitled to recall/recover the entire amount which has fallen due which were granted to defendant No.1 and transferred to defendant No.2.

The Demand Finance Limit-1 was availed to the extent of Rs.152.991 Million and the account shows that the payment of Rs.13.259 million was received whereas Rs.139.732 Million was still payable. Insofar as Demand Finances-II & III are concerned the amount of

Rs.179.592 Million was sanctioned which was to be repaid after repayment of Demand Limit Finance-I. Since the demand finance was never adjusted as referred the entire amount of 179.592 Million availed by defendant Nos. 1 & 2 is still payable. The Packing Finance Limit which was disbursed to defendant No.2 to the tune of Rs.34.654 Million between 20.2.2003 to 11.12.2004 out of which an amount of Rs.7.972 Million was paid by defendant No.2 leaving outstanding amount of Rs.26.682 Million. The plaintiff also claimed the mark up on fresh disbursement of Rs.26.682 Million till date which is not justified in the absence of any agreement as no such agreement is shown.

It appears that the agreed terms were that if defendant failed to generate sufficient revenue to liquidate the dues against pledged stock, the Demand Finance-IV is to be created which was done accordingly and an amount of Rs.126 Million on 20.2.2003 with the authorization of defendant No.2 was done. Again to the extent of entitlement of 8% mark-up plaintiff has not been provided with any such arrangement or agreement. Thus all this demand finance-1 to 4 and packing finances are admitted and accordingly the finance agreements were executed by the defendant no.2.

For demand finance-I to the extent of Rs.139.992 Million against which a promissory note, authority to debt the account and memorandum of deposit of title deeds were filed.

Again a finance agreement was executed for demand finance for Rs.179,592,000/- and promissory note, authority to debt the account, memorandum of deposit of title deeds and guarantee was issued.

Since the packing finance disbursed to defendant No.2, the statement of account in respect of packing finance is available as annexure-AT The statement of account of Packing Finance Limit provides that fresh finance was disbursed as Rs.34.654 Million on 20.2.2002 up to 11.12.2004. Rs.7.972 was paid leaving outstanding balance of an amount of 26.682 Million. Insofar as this finance is concerned plaintiff is unable

to provide any agreement in order to claim mark up of any period and that too up to the filing of the suit. Thus the only justified amount that appears is balance of Rs.26.682 Million hence I am not satisfied insofar as the claim of mark up on this amount is concerned. Similarly the plaintiff has not produced any document to substantiate the claim of moqadam charges and security guard charges hence such amount as claimed is also not justified leaving an amount of:

i) Demand Finance-I as Rs.139.732 Million.

ii) The Demand Finance of Rs.179.592 Million

iii) Packing Finance of Rs.26.682 Million and

iv) Demand Finance of Rs.126 Million

At the time when such finance agreements were executed in the year 2002/2003 the defendants i.e. defendant No.1 & 2 have executed a supplemental agreement. On behalf of Raja Traders the sole proprietory concern it was executed by one Humayyon Riaz (mortgagor) whereas other directors of Raja Traders Pvt. Limited have also executed and signed aforesaid supplemental agreement.

The original security documents are still available with the plaintiff bank. If it were the intention of the parties that any of the charge/guarantee were to get extinguished upon the execution of the finance/security documents with the defendant No.2 (Raja Traders Limited), then all the previous security documents including the original title documents and/or the Personal Guarantees executed by the family members of Mr. Hmayun Riaz would have been returned back to the Guarantors. It may not be out of place to mention that the same would have been demanded back by the Guarantors if it had been agreed by the parties that the liability of the sole proprietor/guarantors would come to an end upon the execution of the finance/security documents with the defendant No.2. The defendants have not produced a single document/letter/ correspondence to substantiate their assertion in this regard.

The reference may be made to Clause (8) of the Personal Guarantee executed by Mr. Humayun Riaz (Page 219 of the plaint). It clearly states that any change in the constitution of the customer shall not affect their liability towards the plaintiff Bank. Furthermore, it also states that unless a written notice is given by the guarantor to the Bank, the Guarantee shall not be discharged. It goes further to say that even if such a notice is given the guarantor will nevertheless continue to remain liable/responsible. No such written notice is available on record.

It may be pertinent to mention here that an identical personal guarantee has also been executed by defendant No.3, 6, 7, 8 and 9. A supplement agreement is also annexed with the injunction application, clause 4 of which clearly states that if the company/defendant No.2 failed to meet its obligation towards the plaintiff bank, then the parties shall be jointly and severally liable to meet those obligations. All the mortgagors/guarantors/directors are signatories to the agreement.

The defendant Nos.1 to 6 in terms of para-4 of their written statement admitted that defendant No.6 is only guarantor of defendant No.1 and it was denied that defendant No.6 has given any personal guarantee on behalf of defendant No.2. It is quite surprising that despite execution of such supplemental agreement defendant No.6 has taken such stance. This denial appears to have no basis and particularly after the execution of the supplemental agreement all this defence appears to be nullified. Thus in my view, in view of the execution of the finance agreement and the supplemental agreement which has not been denied the defence of novation of contract appears to be a futile attempt to disregard claim of the plaintiff.

Since these are rescheduled accounts regarding which agreements were executed so there is no question of it being without consideration or disbursement.

Under the parameters of Financial Institutions (Recovery of Finances) Ordinance, 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. 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 the Financial Institutions (Recovery of Finances) Ordinance, 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. As I have observed earlier that the questions as raised by the defendants have been answered categorically and a due process of law was adopted. In view of all these circumstances where the defendants have failed to establish any question of law as well as fact the requirement is met for determining civil right and obligation. If the Court is of opinion that there is no question or issue which require evidence then it would not only be a futile effort but the proceedings would also be frustrated. Filing of a suit by defendant which otherwise has no cause of action against financial institution, cannot be considered to be a guarantee for the grant of leave to defend the suit filed by the financial institution. Order XIV and XV which deal with issue 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 Financial Institutions (Recovery of Finances) Ordinance, 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. Thus in view of the above the leave applications bearing CMA Nos.2675, 2776 and 2677 of 2008 and so also CMA 2678 of 2008 (under order VII Rule 11 CPC) are dismissed and the suit No.B-63 of 2007 is decreed in the sum of 472.006 Million with cost of funds till realization of the amount and plaint in Suit No.1588 of 2006 is rejected.

Dated: 16.07.2015 **Judge**