

**IN THE HIGH COURT OF SINDH AT KARACHI**

BEFORE:  
Mr. Justice Mohammad Shafi Siddiqui

Suit No.B-190 of 2010

Askari Bank Limited & others

Versus

Magna Steel (Pvt.) Limited & others

Date of Hearing: 26.01.2016

Plaintiffs: Through Mr. Aijaz Ahmed along with Mr. Aijaz Shirazi Advocates.

Defendant: Through Mr. Muhammad Imran Malik Advocate

**J U D G M E N T**

**Muhammad Shafi Siddiqui, J.**- By short order dated 26.01.2016 the leave application bearing No.1432 of 2011 was dismissed and the suit was decreed. Following are reasons for the same.

2. Plaintiffs have filed this suit against the defendants for recovery of certain outstanding amounts. The defendants on service of notice put appearance and filed application for leave to defend the suit.

3. Defendants' counsel while arguing leave application has raised some preliminary points for its consideration in granting leave to defend the suit. The first contention in this regard was that the defendants have filed a suit bearing No.B-33 of 2011 wherein the plaintiffs were granted leave and hence in order to avoid the conflicting judgments the defendants herein are entitled for the leave in this suit. He has relied upon the cases reported in 2003 CLD 911, 284 SCMR 108, 2014 CLD 696, 2013 CLD 1390 and 2004 SCMR 108. Counsel further submitted that the trial of both the suits would not only be expedient in the interest of

justice but would also be in the interest of both the parties as the joint trial of both the suits would avoid possibility of conflicting judgments.

4. Second contention which also relates to the preliminary point/objections that the suit was not filed by the authorized person. The counsel has relied upon Power of Attorney at page 23 (Annexure 'A') and submitted that this Power of Attorney was executed by Askari Commercial Bank Limited whereas the suit is filed by this attorney on behalf of Askari Bank Limited and hence two entities are different. Learned counsel in this regard has relied upon the judgment passed in Suit No.B-66 of 2011 and the case of Askari Bank Limited v. Waleed Junaid Industries reported in 2012 CLD 1681 wherein on this score alone the leave was granted.

5. With regard to the merits of the case, learned counsel for the defendants has taken me to the statement of account available at page 291 onwards and submitted that it does not comply with the requirements of Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and subsection 8 of Section 2 of Bankers' Books Evidence Act, 1891. Each page of the statement of account has not been signed rather it is initialed.

6. The next contention, as submitted by learned counsel for the defendants, is that some of the documents were filed along with replication and since the defendants were unable to rebut those documents, which should have been filed along with plaint, hence the defendants are entitled for an unconditional leave.

7. Learned counsel finally submitted that the plaintiffs have not been able to establish as to how and in what manner the loan was disbursed as the relevant entries for its disbursement are not reflected in the statement of account, as relied upon by the plaintiffs.

8. On the other hand learned counsel for plaintiffs submitted that insofar as the notification in relation to the names of the plaintiffs/ concerned banks are concerned, the State Bank of Pakistan vide notification dated 09.06.2007 in pursuance of clause (c) of subsection (2) of Section 37 of State Bank Act, 1956 has clarified the name of Askari Commercial Bank Limited as being Askari Bank Limited w.e.f. 11.06.2007. Similarly in relation to plaintiff No.5 while exercising such powers the name of Metropolitan Bank Limited was changed as Habib Metropolitan Bank Limited w.e.f. 26.10.2006 and hence this, being a technical ground, cannot be considered as a paramount consideration for granting leave to the defendants.

9. Learned counsel further submitted that insofar as the suit filed by the defendants is concerned that has no nexus with the instant suit as there could neither be a conflicting judgment nor subject matter of the two suits is the same. The defendants have only claimed damages in that suit whereas in the instant suit the plaintiffs are seeking recovery of certain amounts outstanding.

10. Insofar as the additional documents are concerned, the counsel submitted that those are only audit reports, which could not have been denied by the defendants. That audit report is filed only in support of document Annexure A/2 attached with the plaint which in fact is an admission for grant of loan of Rs.345 Million with request for terminating rest of the limit of Rs.155 Million. He submitted that the date of the agreement was inadvertently shown as 16.03.2008 instead of 14.04.2008. He submitted that there is no other agreement in relation to such finances and hence it could only be termed as a typographical error in relation to the date of the agreement. Learned counsel submitted that without prejudice to the reply in relation to the validity of the

statement of account, the disbursed amount is otherwise admitted by the defendants.

11. Heard learned counsel and perused the material available on record.

12. As to the contention of learned counsel for the defendants that the plaintiff was granted leave in Suit bearing No.B-23 of 2011 filed by the defendants against the plaintiff, and the leave, as a consequence, ought to have been granted to the defendant in this suit as well is far-fetched. The prime consideration for granting leave is availability of substantial question of law and fact. Grant of leave in the other connected suit of borrower, if constitutes a question of law and fact, then of course it needs consideration as it is to be seen whether the two suits that are being considered have a common question of law and fact. This suit is a suit for recovery filed by the bank whereas the order relied upon by the defendants' counsel is a suit filed for damages on the basis of alleged non-compliance and non-performance, as claimed.

13. The above question was raised and decided by full Bench of this Court in the case of Muhammad Shafi v. Habib Bank Ltd reported in SBLR 2010 Sindh 1573 in which it has been observed as under:-

*“However, for trial of recovery suits filed under banking laws, the law makers intended expeditious disposal of banking suits for which summary mode of trial has been provided under the banking laws. The object behind providing expeditious mode of trial is that the controversy in banking courts generally pertains to accounting disputes which could be decided by merely considering the statement of accounts and the documents of financial transactions executed by the parties. This saves the banking Court from undertaking a time consuming process of recording evidence in each and every case. .... Section 9(4) of the 2001 Ordinance thus enables the banking Court to proceed with the trial of the suit filed by a financial institution irrespective of the fact that the customer has already filed a suit for settlement of account or damages against the financial institution. In this manner, a suit which though may have been filed by a financial institution subsequent to the suit filed against it*

*by its customer, nevertheless it continue to proceed and is not liable to be stayed on the basis of the conditions laid down in Section 10 of the Civil Procedure Code. ....This object of expeditious disposal of recovery suits under banking laws should not be lost sight of while deciding transfer applications. The purpose behind providing expeditious mechanism for disposal of banking cases under banking laws would be defeated if this aspect of the matter is ignored while considering transfer applications for trial of both the suits together.”*

14. Thus, it would not be justified to consolidate the two suits on the pretext that parties are common. The fact that in one of such suits leave was not granted as in the subject case the borrower is yet to avail such relief otherwise than on this account does not itself mature as independent point of law and fact for grant of leave. I am of the view that the Courts should not exercise such powers either to grant leave or to consolidate the two suits despite involvement of same parties as the subject matter being different. The subject of two suits herein is totally different. The trial of the two suits could only be possible if (i) the subjects of the two suits are common and (ii) leave is granted in both the suits on a question of law and fact raised by the defendants. I am not inclined to consider this aspect that since a leave in the referred suit is granted therefore it becomes a question of law and fact in this suit as well. Besides both the suits have different subject matters.

15. Indeed if such practice is allowed then whenever a borrower faced with the situation, as is here, could simply file a suit for damages whether he is entitled to it or not, and would also consent to the grant of leave and thus would be sufficient to be considered as a license for granting leave in a suit filed by the financial institution.

16. Next I will deal with the contention of learned counsel for the defendants that the persons who have initiated the proceedings are not authorized under the law as the Power of Attorneys placed on record were executed by Askari Commercial Bank Limited whereas this suit was

filed by the same attorney on behalf of Askari Bank Limited. In this regard the notifications of State Bank of Pakistan placed on record are of significance. In the cited case of Askari Bank Limited i.e. Suit No.B-66 of 2011 the leave was granted on account of the fact that those notifications on the basis of which the State Bank of Pakistan has allowed the bank to change its name were not placed on record whereas such facts were cured by the plaintiff in the instant case. In terms of the circulars all such powers which were granted to the authorized person of Askari Commercial Bank Limited are deemed to be granted by Askari Bank Limited with effect from the date of notification and hence in view of such notification allowing the plaintiff to represent itself as Askari Bank Limited, this objection is over ruled as being not tenable under the law.

17. Now I would deal with the question of statement of account, which is available on record as Annexure page 291. It is the case of the defendants that all these relevant pages of the statement of accounts were only initialed at the foot of this statement hence it does not fulfill the requirement of subsection 8 of Section 2 of Bankers' Books Evidence Act, 1891. I have gone through each and every page of this statement of account and wherever the space is available it is certified that it is true copy of the entries contained in the books of bank and was made in usual ordinary course of business. Additionally it is accompanied by a certificate Annexure E/1 at page 327 giving a gist/summary of the entire statement of account and that too is certified by two officers who have duly signed it along with their designations and so also E/2, as it is a consortium loan. The subject certificates of the respective banks are available as Annexure E/1 to E/6.

18. The defendants have not substantially challenged the entries of the statements of accounts. The two entries in relation to 31.10.2008 of

Rs.126,113.42 and 126,113.43 were applied in the accounts of defendant No.1 after calculation of three months Kibor at the applicable rate. The defendants since admitted the repayment of the same finance facility were stopped from denying or questioning such finances. This is even supported by a letter whereby they agreed to avail Rs.345 Million and requested to terminate remaining amount of Rs.155 Million. The subject Syndicate Terms Finance Agreement is available as Annexure B/1 page 87. Although the purchase price was mentioned as Rs.696,875,000/- but the statement of account provides charging of markup in accordance with agreed formula. Such admission in terms of the agreed rate of markup is also admitted by defendant No.1 in their annual account and the outstanding amount is also reflected in the statement of annual account.

19. There are no questions raised to the finances and security documents executed by the defendants out of their free will and hence are binding on them.

20. Insofar as the application for the amendment is concerned, it has already been not pressed by the defendants and hence the amendment sought in relation to the added documents through replication also conceded. Even otherwise without considering such documents along with the replication, the statement of account is in terms of section 2 of subsection 8 of Banker's Books Evidence Act and the contents of the leave application, goes on to admitting the finances made by the plaintiff to the defendant. The finance facility to the extent of Rs.345 Million is reflected in chart of paragraph 4 and is reproduced as under: -

Name of the plaintiff	Share
Askari Bank Limited	Rs. 69,000,000
Allied Bank Limited	Rs.138,000,000
Mybank Limited	Rs. 69,000,000
Pak Oman Investment Company Limited	Rs. 34,500,000
Habib Metropolitan Bank Limited	Rs. 34,500,000
<b>Total</b>	<b>Rs.345,000,000</b>

21. The defendants in order to secure repayment of the finance facility executed certain documents which are highlighted in paragraph 5 of the plaint.

22. Originally amount of 500 million was sanctioned, however Rs.345 million was disbursed as requested for by defendants.

23. It is manifestly clear from the statement of account and other documents filed and referred to by the learned counsel for the plaintiffs that the defendants failed to pay a single penny towards the principal amount and also stopped paying markup from February 2010 except plaintiff No.2 who stopped from November 2009.

Accordingly, in view of above the suit is decreed in the sum of Rs.345,000,000/- being principal amount with cost of fund from date of default i.e. from February 2010 however in case of plaintiff No.2 from November, 2009 till realization of the total decretal amount.

Dated:

**Judge**