

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

Suit No.B-130 of 2011
NIB Bank Limited
Versus
Tanveer Cotton Mills (Pvt.) Limited

Date	Order with signature of Judge
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For hearing of CMA 12540/16

Dated: 02.11.2016

Mr. Waqar Ahmed for plaintiff.

Mr. Muhammad Imran Malik along with Mr. Muhammad Ramzan Meo for defendants.

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By consent listed application is allowed and the leave application bearing CMA No.1258 of 2012 is restored and at the request of both the counsel has been heard.

Learned counsel for defendant while arguing his leave to defend application has raised some preliminary objections which relate to the statement of account. He claims that the statement of account annexed with the plaint is not certified as required in terms of Section 2(8) of Bankers' Books Evidence Act, 1891. He has taken me to the relevant Statement of Account available at pages 277, 279 and 281 and break-up at page 283 which show major defect and discrepancy that could be seen apparently which is required to be signed by authorized person/signatory. It is claimed that it has been made mandatory that such statement of account should have been signed by the Principal Accountant and/or Branch Manager which designation is missing in those statement of account and hence the Statement of Account as presented along with plaint cannot be relied upon to consider the claim of the

plaintiff as the presumption of truth cannot be said to be attached to this statement of account.

Learned counsel in support of the above has relied upon the case of *Asia Motor Company v. M/s NIB Bank Limited* reported in 2016 CLD 609 and an order passed by this Court in Suit No.B-66 of 2011. It is claimed that insofar as the order passed in Suit No.B-66 of 2011 is concerned on this score alone the leave was granted whereas in the earlier referred/reported case learned Division Bench of this Court has remanded the matter to learned Single Judge on account of this error and defect. Counsel submits that although on account of non-compliance of the mandatory requirement, the plaint ought to have been rejected, he only prays for grant of leave in this regard as such defect is curable in the normal trial but not at the cost of dismissal of leave application.

On the other hand learned counsel for plaintiff at the very outset submits that this is not a defect in the statement of account; it is only a discrepancy which too was subsequently cured when the replication was filed and the designation of these two authorized officers were mentioned who signed the same statements of account, which were filed earlier. Hence, per learned counsel, this discrepancy and/or ground cannot be said to be available as far as the statement of account is concerned. He further submits that insofar as subsection 8 of Section 2 of Bankers' Books Evidence Act, 1891 is concerned such provisions were in fact introduced at a time when the accounts were being prepared manually and hence it was felt necessary that whenever such statement of accounts are being filed/relied upon the concerned authorized officer must endorse and ratify a certificate as to the authenticity of such statement of account hence it is not considered as a material question/ground for grant of leave in the matter. He further argues that the

statements of account as being obtained electronically could be relied upon in the absence of such authorization and designation.

I have heard the learned counsel and perused the material available on record.

In the case of Soneri Bank Limited v. Classic Denim Mills (Pvt.) Limited reported in 2011 CLD 408 it has been observed as under:-

“In my view, it is clear beyond any shadow of doubt that while instituting the plaint in the Banking Court, it is duty of the plaintiff to file complete statement of account. The purpose of this obligation on the plaintiff is to give fair opportunity to the defendant to come up with cogent justification and ground for leave to defend and if the plaintiff is left open and allowed to file statement of account in piecemeal through replication or by way of separate statement then no opportunity could be availed by the defendants to counter or reply subsequent statement of account as after filing, leave to defend application, law does not permit further or fresh leave to defend application as it is clear from section 10 of the Ordinance 2001, that where an application for leave to defend is accepted, the Banking Court shall treat the application as written statement.”

Subsequently the matter involving the similar question came before the Hon’ble Supreme Court in the case of Apollo Textile Mills Ltd & others vs. Soneri Bank Limited (PLD 2012 SC 268) as referred above wherein the Hon’ble Supreme Court observed as under:-

“15. 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.

18. The Financial Institutions (Recovery of Finance Ordinance) 2001 i.e. is a special law. It provides a special procedure for the banking suits. The provisions of the Ordinance, 2001 under section 4 thereof override all other laws. The provisions contained in the said Sections require strict compliance. Non-compliance therewith attract as

above referred, consequences of rejection of leave petition along with decree etc. ect.

Applying all the settled and well known principles to determine the mandatory construction of a provision of law, the said provisions cannot but be held to be mandatory. This Court in the case of 'Niaz Muhammad v. Fazal Raqib' (PLD 1974 SC 134) held that:-

"It is true that no universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of the Courts to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed. As a general rule however, a statute is understood to be directory when it contains matter merely of direction, but not when those directions are followed up by an express provision that, in default of following them, the facts shall be null and void. To put in differently, if the Act is directory, its disobedience entails serious legal consequences amounting to the invalidity of the act done in disobedience to the provision."

21. The similarity of the provisions legislated in section 9 and 10 ibid, as discussed above, leads to identical consequences in the absence of the demanded Accounts and the documents. Suit of the plaintiff institution will be rejectable while defendants' leave petition will be exposed to rejection etc. A plaintiff institution may be rendered unable or deficient in appropriately setting up its answers to the accounts, disputed amounts and facts of the defendant in reply to the leave application as per section 10(8) ibid. And that in the absence of the requisite accounts and the facts etc. in defence filed by a defendant in the leave petition, a plaintiff will remain unaware of the admitted or denied or disputed accounts and facts of the defendants, to adequately, seriously and reasonably pursue the suit and its trial. This will obviously defeat the intent and the object of the provided provisions of the Financial Institutions (Recovery of Finance Ordinance) 2001.

The situation here is more or less same. No doubt the documents attached with the replication cures the defect as originally existing in the statement of account available at pages 277 onwards however such document attached with the replication cannot be replied or rebutted. At the most it could be considered as a document curing the defect existing in the earlier document but on this defect and deficiency a leave application cannot be out rightly dismissed since the claim of the

plaintiff is based on statement of account which is not in accordance with subsection 8 of Section 2 of Bankers' Books Evidence Act, 1891. In such a situation an opportunity ought to have been provided to the defendant to defend the suit which is not based on proper statement of account. The presumption of truth cannot be said to be attached to this Statement of Account. Even if it is a computer generated statement it is being fed by human being therefore in my view even such Statement of Account for the purposes of deciding the claim ought to have been certified in the same manner.

In view of the above and in view of the observations of the Hon'ble Supreme Court, as referred above, I feel it appropriate to grant unconditional leave to defend in this suit. Accordingly, leave to defend application bearing No.1258 of 2012 is allowed as prayed. However, insofar as the corrected statement of account is concerned, that may be considered as part of the statement of account once the issues are framed and the trial commences.

Judge