

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

Suit No.B-124 of 2011

National Bank of Pakistan
Versus
Fateh Textile Mills Ltd.

Date	Order with signature of Judge
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For hearing of CMA 793/12

Date of hearing: 31.01.2017

Mr. Bahzad Haider for plaintiff.
Mr. Farogh Naseem for defendants.

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Muhammad Shafi Siddiqui, J.- The listed is the application under section 10 of Financial Institutions (Recovery of Finances) Ordinance, 2001 filed by the defendants No.1, 2, 6 and 7 for leave to defend the suit, which suit is filed by the plaintiff for recovery of an amount of Rs.4,910,020,281/- against the defendants.

Learned counsel for defendants at the very outset submitted that statement of account filed by the plaintiff in support of its claim is not sustainable under the law as it is not certified in terms of Bankers Books' Evidence Act, 1891. He took me to the relevant part/page of statement of account available at page 1947 Annexure 'Q' and submitted that the foot note provides, as is claimed, that it is undated and the status/designation of the officer who has signed it is not disclosed hence it suffers from the mandatory requirement.

It is further submitted that the plaintiff operates from Hyderabad Branch of National Bank of Pakistan whereas Annexure 'Q', which is claimed to be outstanding ledger position of loans, apparently is certified by one Muhammad Rafiq, Vice President of National Bank of

Pakistan having office at FTC, Karachi. This statement of account is claimed to be undated and without any designation of the Manager of the concerned branch of Hyderabad. Learned counsel submitted that in case of Apollo Textile Mills Ltd. v. Soneri Bank Ltd. reported in PLD 2012 SC 268, the cases of Bankers Equity Limited v. Bentonite Pakistan Limited reported in 2003 CLD 931 and 2010 CLD 651 were considered. The two provisions i.e. Section 9 and 10 Financial Institutions (Recovery of Finances) Ordinance, 2001 were discussed in those cases and held to be mandatory. However, the provisions are not interconnected or dependent so as to apply the provisions of Section 10 of Financial Institutions (Recovery of Finances) Ordinance, 2001 first. He further submitted that logically if the claim itself is not sustainable under the law in terms of Section 9(2) of Financial Institutions (Recovery of Finances) Ordinance, 2001, the applicability of Section 10(4) before provisions of Section 9(2) cannot be enforced.

Learned counsel in addition to the above has also taken me to a special Power of Attorney executed by the President of the bank in favour of one Syed Muhammad Abbas to institute and file petitions/suits/appeals and other legal proceedings on behalf of the bank. This Power of Attorney was given on and/or to be effective from 10.04.2004 in pursuance of a Board Resolution of the Bank dated 14.12.1994. Learned counsel has relied upon a judgment in the case of Muhammad Idrees v. Federation of Pakistan reported in PLD 2011 SC 213 dated 14.01.2011 in terms whereof the appointment of the President was held to be unconstitutional and he ceased to hold office of President with immediate effect. Hence submits that the Power of Attorney executed by him (the president) on 10.04.2004 also loses its effect.

In addition learned counsel further submitted that the judgment was rendered on 14.01.2011 whereas the suit was filed on the basis of

the subject Power of Attorney on 20.12.2011 hence in the absence of such lawful delegation of power by the so called president, who had already been declared to have been unlawfully appointed, the suit appears to have been filed by an incompetent person as plaintiff could not have utilized such Power of Attorney for initiating and filing the subject suit hence from the very inception the suit is not maintainable under the law. The attorney who had filed this suit was very much aware of the fact that his principal ceased to exist.

In reply to the above, learned counsel for plaintiff submitted that the subject statement of account cannot be scrutinize on the touchstone of Bankers' Books Evidence Act, 1891 as it is a computer generated statement and by virtue of Electronic Transaction Ordinance, 2002 such requirement is done away.

I have heard the leaned counsel for the parties and perused the material available on record.

There is no doubt that this statement of account filed along with plaint is not subscribed and certified on the touchstone of Section 2(8) of the Act 1891, the requirements under which are as under:-

“Certified copy means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.”

The contention of the learned counsel for the plaintiff that in case of electronically generated statement of account, the strict rule of Act 1891 is not applicable, is not confidence inspiring. The presumption of truth cannot be said to be attached to a statement of account, which is not certified as required under Act 1891. Computer generated

accounts may not have required attestation under Act 1891 for any other issue but not for considering the claim of the plaintiff as true and correct. Indeed such statement could be believed to be true in case it is ratified as above and on the assumption/confirmation that it is certified by the relevant officers concerned. Even in a computer generated statement, the statistics/figures are being fed by the accountants. These accountants were previously used to prepare ledger/accounts books through their own hands/manually hence the presumption of truth in relation to both the statements could only be said to be attached in case they are certified, as required under the law.

As far as reliance of learned counsel for defendant on Electronic Transaction Ordinance, 2002 is concerned, the preamble to the said Ordinance confirms that it provides for the recognition and facilitation of documents, records, information, communications and transactions in electronic form, accreditation of certification service provides and for matters connected therewith and ancillary thereto. The said law has not specified its application to any one area. In other words, it is to be construed as a general law, having general application with regard to electronically generated documents. In contrast the 2001 Ordinance which contains section 9(2) and which in turn refers to section 2(8) of 1891 Act, is a special law pertaining to recovery of finances extended by financial institutions. It is a settled principle of law that in case of conflict between special laws and general laws, special laws prevail.

The case under banking jurisdiction is governed by special statute i.e. Financial Institutions (Recovery of Finances) Ordinance, 2001 and in terms of Section 9(2) this special statute requires the statement of account to be certified under Act 1891. The provisions of this law would become redundant in case the contention of the plaintiff is considered to be correct.

It is quite surprising that despite the judgment of Hon'ble Supreme Court, whereby the appointment of the President of the plaintiff bank was held to be unconstitutional, the Power of Attorney executed by such alleged president was continued to be implemented/ acted upon. This act of the plaintiff bank is not only contemptuous but also unlawful and illegal in view of the fact that the principal ceased to exist the moment the judgment was rendered by the Hon'ble Supreme Court insofar as the appointment of the president of the plaintiff bank is concerned. In what capacity the attorney had filed this suit is no more a mystery. Prima facie in view of the judgment when such delegation ceased to exist, the Board of the bank ought to have resolved again as far as delegation of powers are concerned. There are serious question as to the maintainability of the suit and I intend to frame preliminary issue in this regard. In view of such fact and circumstances serious questions of law and fact exists and as such the defendant is entitled for an unconditional leave to defend.

In view of the above, the application is allowed and unconditional leave to defend the suit is granted to these defendants No.1, 2, 6 and 7.

Dated: 07.02.2017

Judge