

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

Suit No.B-66 of 2011  
Askari Bank Limited  
Versus  
Magna Steel Private Limited & others

Date	Order with signature of Judge
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1. For hearing of CMA 8636/11
2. For hearing of CMA 8637/11

**Date of hearing: 27.03.2014 and 28.03.2014:**

Mr. Atiqur Rehman along with Mr. Jam Asif Mehmood for the plaintiff.

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

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**Muhammad Shafi Siddiqui, J.**- These are two applications one filed by defendants No.1 to 3 and the other by defendant No.4 for grant of unconditional leave to defend the suit which is filed under section 9 of Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as Ordinance 2001) for recovery of Rs.412,716,849.64.

Learned counsel for the defendant at the very outset has raised legal submissions which in his view are such that without appreciating and without recording of evidence the claim of the plaintiff cannot be established. Learned counsel for the defendant has pointed out that the suit appears to have been instituted and filed through Muhammad Ali Faraz son of Amanullah Sheikh and Syed Abbas Hamadani son of Ather Hussain Hamadani who have no right and authority to institute and file the present suit on behalf of plaintiff. Learned counsel further submitted that the alleged Power of Attorney available at page 59 as Annexure P/2 to the plaint which was allegedly executed on behalf of

Askari Commercial Bank Limited and in addition to this it is not explained as to whether they are the Branch Manager to enable them to file the present proceedings. Learned counsel submitted that the instant suit has been filed by Askari Bank Limited hence the Power of Attorney on the basis of which instant suit has been filed cannot be considered to have been executed on behalf of the plaintiff. Learned counsel in support of this contention has relied upon the case of Askari Bank Limited v. Waleed Junaid Industries (2012 CLC 1681) and National Bank of Pakistan v. Karachi Development Authority (PLD 1999 Karachi 260).

Learned counsel for the defendants while arguing the second legal point submitted that the statement of account which is available as Annexure P/95 is not substantial compliance of requirement of law. He submitted that the said statement of account appears to have been signed by Credit Incharge and by Manager Operations. He submitted that along with the replication the plaintiffs have filed yet another statement of account as Annexure R/2 allegedly in compliance of the provisions of subsection 2 of section 9 of Bankers' Books Evidence Act, 1891 (hereinafter referred as Act 1891). Learned counsel submitted that such statement of account also being defective and in violation of the provisions of Act 1891 cannot be relied upon and in view of categorical denial of the claim it has become necessary for the plaintiff to have established their statement of account and as such the outstanding amount. Learned counsel further submitted that the defendants in their leave to defend applications have provided entire statements including the disputed amount/amount paid and hence such statement of account filed by the plaintiff being devoid of the endorsement as required under the Act 1891 cannot be relied upon.

Learned counsel in support of above submissions has relied upon the case of United Bank Limited v. Messrs Ilyas Enterprises (2004 CLD

1338) wherein learned Division Bench of Lahore High Court observed that the certification of the statement of accounts filed by the banks were found not to be in accordance with the definition of certified copy under section 2(8) of Act 1891 and as such the statement of account in the circumstances were not to be treated as certified copies of entries of the Books of Accounts and while appreciating the contention as above, the appeal filed by the Bank was dismissed.

Learned counsel for the defendants has relied upon another case of Lahore High Court in the case of National Bank of Pakistan v. M/s Mujahid Nawaz Cotton Ginners (2007 CLD 678) wherein the same observation was made by the learned Division Bench that the statement of account as required was not certified and thus was not in accordance with the provisions of section 2(8) of Act 1891. It was further observed that in view of such fact the defendants could not be held liable to pay the amount claimed by the Bank on the basis of such statement and the appeal filed by the Bank was dismissed by the learned Division Bench.

Learned counsel for the defendants further contended that the plaintiff has filed a number of documents including statement of account along with replication. Learned counsel submitted that without prejudice to his rights such documents could neither be relied upon nor could be filed or entertained as the defendants are not in a position to rebut such documents filed with the replication. Learned counsel submitted that on this score alone the defendants are entitled for an unconditional leave to defend the suit. Learned counsel in this regard relied upon the case of Soneri Bank Limited v. Classic Denim Mills (Pvt.) Limited (2011 CLD 408) and C.M. Textile Mills (Pvt.) Limited v. Investment Corporation of Pakistan (2004 CLD 587).

On the other hand learned counsel for the plaintiff opposed the grant of application and submitted that the statement of account filed

along with the plaint as Annexure P/95 has been signed by Credit Incharge and by Manager Operations hence the strict compliance in terms whereof it is to be signed by the Principal Accountant cannot be applied. Learned counsel further submitted that as far as his filing of the statement of account along with replication is concerned, the plaintiff would not rely upon the same and the same may be ignored while considering the case of the plaintiff. He further submitted that as far as name of the plaintiff is concerned that has not materially altered the situation as the name was changed from Askari Commercial Bank Limited to Askari Bank Limited and no prejudice would be caused to the defendants in case the plaintiff is allowed and continued to proceed with the instant suit as the name of the plaintiff has been notified by the State Bank of Pakistan.

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

The defendants have raised submissions on three legal points; first one is that the suit has been filed by unauthorized person as the Power of Attorney was executed by Askari Commercial Bank Limited and no notification in this regard was filed by the plaintiff either with the plaint or even with the replication as to the change of the name. I am afraid on the basis of presumption such question cannot be resolved hypothetically. It may or may not have been notified by the State Bank of Pakistan but it is to be established by filing required notification to establish that the name of Askari Commercial Bank Limited is now changed as Askari Bank Limited. It is quite surprising that in the case of Askari Bank Limited (Supra) despite facing same situation, the plaintiff has not cared to file such notification. In the above referred case of Askari Bank Limited on this score alone the learned Single Judge of Lahore High Court granted unconditional leave to defend the suit. In this

case same question as to name of the Bank was raised by the borrower that the Power of Attorney annexed with the plaint was executed by Askari Commercial Bank Ltd. whereas the suit has been filed by Askari Bank Limited and the learned Single Judge of the Lahore High while granting unconditional leave has observed as under:-

*“30. In response to the objection of leaned counsel for defendant that Power of Attorney in favour of one of the signatory of plaint is by Askari Commercial Bank Limited, the other attorney of Askari Bank Limited, alone has no authority to file the suit simply. Learned counsel for plaintiff submit that Askari Commercial Bank Limited is renamed as Askari Bank Limited, as is evident from sanction letter dated 23.5.2008, which find mention as “Formerly Askari Commercial Bank Limited”, further the objection has raised in arguments and the same is not found mention in PLA and as such this objection could not be considered. It is an admitted fact that power of attorney in favour of Mr. Muhammad Nadeem one of the signatory of plaint was granted by Askari Commercial Bank Limited, the plaintiff has not asserted in the plaint that Askari Commercial Bank Limited is renamed as Askari Bank in accordance with law as such in the absence of any assertion of the above fact, the objection of defendant required evidence.*

*31. Learned counsel for defendants, submits that, defendants have filed a suit for recovery, redemption, rendition of account on the same transaction, the parties are the same, the PLA of plaintiff in either suit has been allowed and as such defendants are entitled for the same treatment. Learned counsel has relied on Muhammad Khalid Butt v. United Bank Limited (2003 CLD 911), the argument of learned counsel could not be considered for the simple reason that the defendant has not taken the said ground in his PLA, nor the copy of plaint is available on record, hence in the absence of any pleadings, the argument of learned counsel is of no avail.*

*32. The upshot of the above discussion is that defendants have raised substantial question of law and facts, which could only be resolved after recording evidence, the defendants are thus allowed to defend the suit unconditionally. PLA is accepted.”*

Similarly, in the case of National Bank of Pakistan (supra) it was observed by the learned Single Judge of this Court that the suit was filed by unauthorized person on behalf of the plaintiff Bank and mere existence of clause in Power of Attorney empowering the attorney to

initiate proceedings in the absence of Articles of Association and exercising of authority in terms thereof was not sufficient.

As far as the statement of account is concerned, the law has now been established that without compliance of subsection 2 of Section 9 of the Act 1891 a claim of the Bank cannot be considered as gospel truth. In certain situation the Courts were inclined to reject the plaint as well leaving the plaintiff bank at liberty to institute a fresh suit after complying with the provisions of *ibid* law. Though learned counsel for the defendants has categorically conceded that they would not like to take the plaintiff to such a situation however they would be satisfied if on consideration of such fact unconditional leave to defend the suit is granted.

In the case of Soneri Bank Limited (*Supra*) learned Judge of this Court held 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.*

*Since the complete statement of account was filed with the replication and further additional documents were filed through statement, no opportunity was given to the defendants to rebut the statement of account and to answer the additional documents. After 18<sup>th</sup> Amendment, right of a fair trial has become a fundamental right under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 which clearly provides that for the determination of civil rights and obligations or in any criminal charge, a person shall be entitled to a fair trial and due process.”*

The learned Single Judge in the above referred case also dilated upon the fact that in all fairness the plaint needs to be scrutinized first and in doing so if the Court comes to the conclusion that the plaint is defective or the documents filed therewith could not be relied upon, appropriate orders as required could be passed.

Similarly the case of C.M. Textile Mills (Pvt.) Limited (Supra), as relied upon by learned counsel for the defendants, provides that compliance of subsection 2 of Section 9 of Act 1891 is mandatory for the Bank to support its plaint in suit against the customer by statement of account duly certified under the Act 1891. Similarly in para 20 of the said judgment the learned Division Bench of the Lahore High Court has observed as under:-

*“.....The words “to produce documents alongwith the plaint” used in C.P.C. connote meanings different from the words “plaint shall be supported by a Statement of Accounts....” Under section 9 of the Ordinance. The distinction thereto is obvious. C.P.C. allows a plaint independent of production of documents as consequence of non-filing thereto is inadmissibility of documents in evidence if leave of the Court is not obtained for subsequent production of the same. Contrarily, Legislators chose not to use the word “produced” in section 9 of the Ordinance but used the word “plaint shall be supported with a Statement of Account”. This clearly conveys the intent of the legislators that suit cannot be initiated through a plaint which is not so supported by a Statement of Accounts and documents of finance.”*

Similarly in the case of United Bank Limited v. Mehmood Ilyas Khan (2012 CLD 1372) it was observed that the Court would be bound to grant such application if satisfied that there was even a single substantial question of law or fact raised therein.

In the case of Soneri Bank Limited v. Messrs Compass Trading Corporation (2012 CLD 1302) while considering the fact that the statement of account filed by the Bank was not in accordance with

subsection 2 of section 9 of Act 1891 granted unconditional leave to the defendant to defend the suit.

Similarly the last point that was argued with regard to filing of the documents along with replication it is also an established law that no document could be filed along with replication nor could be relied upon as the defendants would not be in a position to rebut such documents in view of limited procedural mechanism of Ordinance 2001. Even if the contention of the learned counsel for the plaintiff is taken into consideration that such documents may not be considered while considering the application for leave to defend, such would take the plaintiff nowhere as the statement of account filed along with the plaint is not the substantial compliance of law and cannot become basis for passing decree, even if the leave to defend application is to be dismissed then on scrutiny of the plaint the claim cannot be considered.

Recently in the case of Apollo Textile Mills Limited vs. Soneri Bank Limited reported in 2012 CLD 337, it is observed in para-13 that the provisions of Sections 9 and 10 of the of the Financial Institutions (Recovery of Finances) Ordinance, 2001 oblige the parties to the suit to identically/plead and state the same nature of accounts or the heads of accounts.

In paras-15,18 and 21 it is 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. etc.*

*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.----*

*21. The similarity of the provisions legislated in sections 9 and 10 ibid, as discussed above, leads in 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 in 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.— “provision“*

The perusal of the above referred judgments provide an irresistible conclusion that the provision of section 9 & 10 of the of the Financial Institutions (Recovery of Finances) Ordinance, 2001 are mandatory.

Upshot of the above discussion is that both leave to defend applications are allowed as prayed.

Above are the reasons of short dated 28.03.2014.

Dated:

Judge