IN THE HIGH COURT OF SINDH AT KARACHI.

I.A No.03 of 2012.

M/s. Jan Sher Khan Petroleum Service and another
v/s
M/s. Allied Bank Limited

Before:

MR. JUSTICE AQEEL AHMED ABBASI J.
MR. JUSTICE FAROOQ ALI CHANNA J.

Date of Hearing: 24.08.2012

Appellants: Through Mr. Khaleeq Ahmed, Advocate.

Respondent: Through Mr. Nisar Ahmed, Advocate.

O R D E R

FAROOQ ALI CHANNA J.:- By this appeal, the appellants have assailed the Judgment and Decree dated 19.12.2011 and 23.12.2011, respectively, passed by the Banking Court No.I, Sukkur, in Suit No.14/2011 (M/s. Allied Bank Limited v. M/s. Jan Sher Khan Petroleum Service & another), whereby, the trial Court has decreed the suit of the respondent-bank in the sum of Rs.31,54,535.44ps with cost, the cost of funds to be determined U/S 3(2) of the Financial Institution (Recovery of Finances) Ordinance 2001.

2. Succinctly, the facts of the case are that the respondent-bank at the request of appellant No.1 sanctioned a running finance facility in the sum of Rs.3 Millions (renewal with enhancement of Rs.2 Millions) vide sanction advise dated 05.07.2008 for expansion of his business of petroleum service and to meet working capital requirements. The financial facility was granted against the mortgaged surety/securities of petrol pump and its land, out of Survey No.542 and 543 and reaming as equitable mortgage of property admeasuring 20 guntas situated at Deh Kandhra belonging to appellant No.1 and the agricultural land

bearing Survey No. 963 and 964 admeasuring 4-11 acres situated at Deh Kandhra Tehsil Rohri belonging to the appellant No.2. The appellants also mortgaged the hypothecation of stock of petrol, diesel and other lubricant items with 25% margin duly insured under Bank's clause. Both the appellants executed the required documents in favour of the respondent-bank. The running finance facility was for a period of one year, repayable on 30.06.2009 with mark-up of six months average asks side Kibor + 500 BPS to be charged quarterly. The appellants failed to discharge their liability of repayment of running finance facility within the stipulated time, therefore, the respondent-bank served notice upon them, thereafter filed the suit with the following prayers:-

a) To pass judgment and decree in favour of plaintiff/bank against the defendant for Rs.31,54,536.11/- alongwith costs of suit and incurred by the bank and with future markup at the agreed rate till amount is finally recovered.

b) To grant 20% liquidated damages.

c) Costs of funds be awarded from date of default till realization of outstanding amount.

d) To attach property Petrol Pump and Land on out of Survey No.542 and 543(Part) and remaining equitable mortgage of property admeasuring 20 ghuntas situated at Deh Kandhra and agricultural land Pass Book No.B-404412, Survey No.S-963 and 964 admeasuring total 04.11 acres, situated at Deh and Tapo Kandhra, Taluka Rohri, District Sukkur to recover/satisfy the suit amount/decretal amount alongwith all charges/costs, costs of suit, costs of funds to satisfy the claim of plaintiff bank.

e) To award costs of suit.

f) To grant any other relief, under the circumstances of case.

3. The appellants after service of notice appeared before the trial Court and filed application for leave to defend the suit U/S 10 of the Financial Institution (Recovery of Finances) Ordinance 2001, admitting each para of the plaint regarding the sanction of running finance facility in the sum of Rs.3 Millions for a period of one year repayable up to 30.06.2009 with agreed rate of markup and other charges, however, the plea of the appellants was that they could not fulfill

the terms and conditions for repayment of outstanding amount of the respondent-bank due to eruption of fire at the petrol pump on 25.1.2009, whereby all the moveable assets of the appellants were burnt/deteriorated, therefore, they became handicapped to liquidate the finance availed by them as the circumstances were beyond their control due to above natural calamity. The appellants in their leave to defend application also took a plea that in the event of fire, it was the responsibility of the respondent-bank to get the reimbursement/compensation from the Insurance Company as the hypothecated stock goods were got insured at the directions of respondent-bank. The insurance was also arranged by the respondent-bank on their own accord as against the policy without adverting to clauses inserted in the fire policy.

4. The learned counsel for the appellants, besides other technical grounds, has mainly focused his arguments on the plea that the hypothecated stock goods were got insured by the respondent-bank, therefore, they were under legal obligation to get the reimbursement and recovery of the outstanding amount from the Insurance Company. It has been further argued that since the insurance policy was arranged by the respondent-bank on their own accord, without the consent of the appellants, therefore, the respondent–bank had to approach the Insurance Company for recovery instead the filing the suit for recovery against the appellants who have discharged their responsibility by informing the respondent-bank promptly about the fire incident took place at the business place of the appellants but the respondent-bank remained silent, paid no heed and failed to file the claim with the Insurance Company. The learned counsel has further contended that while executing the terms and conditions of sanction advise they were not taken into confidence regarding the clause of insurance cover for securing the repayment of finance facility, hence in view of the above factual position i.e. existence of insurance policy, the respondent-bank has no lawful claim against the appellants.

5. Conversely, the learned counsel for the respondent-bank has contended that the finance facility was sanctioned subject to the insurance of hypothecated stock goods to doubly secure the repayment of liabilities so also to save the appellants from any kind of loss due to any incident/accident or damage to hypothecated stock. The learned counsel has further contended that the insurance policy was arranged with the consent of the appellant and such condition was inserted in the sanction advise which has been duly signed by the appellants who have also paid the premium against such policy. Per learned counsel, the involvement of the respondent-bank for the insurance of the hypothecated stock goods was to the extent of securing the liability by imposing such condition and to facilitate the customers otherwise, the insurance policy was obtained, the documents were signed and the premium was paid by the appellants themselves. Therefore, per learned counsel, the respondent-bank has no obligation to file claim of the insurance policy with the insurance company whereas the respondent-bank is entitled to have the outstanding amount recovered from the appellants as per agreement.

6. We have heard both the learned counsel for the parties, perused the record and the documents placed on record. From perusal of record it appears that the appellants have admitted the sanction of loan and the execution of finance agreement and other charged documents. None of the documents executed between the parties or relied upon by the respondent-bank have been refuted or denied by the appellants. The disbursement of finance facility and its full availment is also admitted. The only question before the Court is that as to whether the respondent-bank was under legal obligation to seek reimbursement and the recovery of the outstanding liabilities against the appellants from the insurance company and not from the appellants, keeping in view the execution of insurance policy. Record reveals that the insurance policy was obtained in the name of the company of the appellant No.1 and the entire insurance policy

documents were singed and the premium was also paid by the appellants. Nowhere, it is stated that the respondent-bank had any involvement in the terms and conditions of insurance policy which was a document executed between the appellants and the insurance company. As per clause of insurance in the sanction advise it was the condition precedent that all the assets of the company and/or personal properties of the partners/directors be charged with the Bank as security for the payment/obligations of company until the facility is fully settled and shall be insured with an insurance company acceptable to the Bank. However, such insurance was meant to cover the risks of fire, riot & strike damage, earthquake, burglary, terrorism, theft etc. It is noted that such insurance policy has been assigned in favour of respondent-bank but nothing has been mentioned in the sanction advise of finance facility about the extinguishment of the liability of the appellants towards bank on account of any loss, whether it was insured or not. The learned counsel for the appellants has also failed to point out any such condition either in the sanction advise or in the terms and conditions of the insurance policy which absolved them from discharging their liability of payment of outstanding amount to the respondent-bank. In the circumstances it appears that the condition of insurance of hypothecated stock goods was imposed only to doubly secure the liabilities of the respondent-bank in addition to the execution of personal guarantees and mortgage deeds of the properties against the finance facility provided by the respondent-bank. It has also come on record that the appellants have already approached the Insurance Tribunal for Province of Sindh and have filed their claim against the insurance company for the loss of insured goods. By filing the claim against the insurance company, the appellants themselves have controverted their own plea that it was the responsibility of respondent-bank to get the reimbursement/compensation from the insurance company instead of claiming the same from appellants. The record produced by the appellants further reveals that the appellants have filed the claim for recovery of Rs.29,85,237/= which claim is much less than the amount which is outstanding

against the appellant. We may observe that even if the argument of appellant in this regard is accepted, the claim of the bank would not be satisfied if the insurance claim is received by the Bank from insurance company.

7. In view of hereinabove facts and circumstances of the case we are of the view that the appellants are liable to pay their all outstanding liabilities towards the claim of the respondent-bank, irrespective of the clause relating to insurance of the goods & machinery. Moreover, the insurance policy was duly signed by the appellant whereas the respondent bank was neither the signatory to such insurance policy nor there was any clause in such policy which could possibly put the respondent bank under obligation to file a claim with the insurance company of any outstanding liability of the appellant in case of default. Accordingly, we do not find any merits in the instant appeal which was dismissed by our short order dated 24.08.2012 and these are the reasons for such short order.

Dated: __.08.2012. **J U D G E**

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