

2011 CLD 84**[Karachi]****Before Muhammad Ali Mazhar, J****MCB BANK LIMITED---Plaintiff****Versus****EASTERN CAPITAL LTD. and 7 others---Defendants**

Suit No.B-42 of 2009 in C.M.As. Nos.8027, 2444, 2445, 4684 and 4685 of 2009, decided on 16th September, 2010.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 9 & 10(4)(5)---Qanun-e-Shahadat (10 of 1984), Arts.117 & 120---Bankers' Book Evidence Act (XVIII of 1891), S.4---Recovery of bank loan---Liability, determination of-Shifting of onus---Procedure---Bank sought recovery of bank loan and liability was not disputed by defendants---Effect---Plaintiff-Bank was responsible under S.9 of Financial Institutions (Recovery of Finances) Ordinance, 2001, in first phase to submit statement of accounts duly certified under Bankers' Book Evidence Act, 1891, with supporting documents and thereafter burden was shifted to defendants to answer the claim keeping in view the provisions of S.10(4) and (5) of Financial Institutions (Recovery of Finances) Ordinance, 2001---In order to avoid delay in disposal, efforts should be made to institute banking suit and file leave to defend in letter and spirit of law along with property documents relating to disbursement of finance facility, payments, repayments and plaint and leave to defend must be equipped with proper break up of amount---Terms of rescheduling/restructuring/settlement of liabilities were accepted and agreed vide letter/agreement which showed that liability was accepted with due care and caution after institution of suit and filing of leave to defend application, therefore, in view of the clear admission of liability, instead of dismissing the application for leave to defend for non-compliance of requirement of S.10(4) and (5) of Financial Institutions (Recovery of Finances) Ordinance, 2001, in all conscience---High Court passed an interim decree against the defendants on the basis of undisputed letter/agreement produced by the plaintiff-Bank along with the replication---Suit was decreed accordingly.

Messrs Taxila Cotton Mills Ltd. v. Allied Bank of Pakistan Limited 2005 CLD 244; Rafaqat Ali and 2 others v. Muslim Commercial Bank Limited 2006 CLD 115; Messrs Iqbal Traders v. National Bank of Pakistan 2006 CLD 977 and Messrs Allahwallah Printers v. The Bank of Punjab 2004 CLD 1643 ref.

Behzad Haider for the Plaintiff.

Emmad-ul-Hassan for the Defendants Nos. 1 to 4 and 6 to 8.

Khadim Ali Metlo, holding brief on behalf of Saleem Thepdawala for Defendant No.5.

ORDER

MUHAMMAD ALI MAZHAR, J.---The plaintiff has filed this banking suit against the defendants under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 for recovery of Rs.53,151,383.43 with cost of funds from the date of default and for sale of mortgaged property. As required under subsection (3) of section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, the plaintiff in paragraph 28 of the plaint has mentioned two types of claims recoverable from the defendants one type of claims recoverable from the defendants one against RF Facility and another Forced Demand Facility and in paragraph 29, it is submitted that cause of action accrued in favour of the plaintiff and against the defendants when they defaulted in the payment obligations towards the plaintiff.

C.M.A. No.4684 of 2009 is an application to leave to defend filed by the defendants Nos. 1 to 4 and 6 to 8. Mr. Emmad-ul-Hassan, learned counsel for the aforesaid defendants argued that the defendant No.1 is a brokerage house who buys and sells the securities at the Stock Exchange and he has more than 4000 clients. During the course of business, it used to obtain various finances from various financial institutions. In the year, 2008, the K.S.E. Management took the decision of stock declining trend of the market and freeze its index at 9114 till December, 2008 resulting in panic and increasing selling pressure. He further argued that that plaintiff initially sanctioned a lower limit of running finance which was subsequently rolled over annually from year to year considering the good performance of the defendants and finally it was rolled over in 25-7-2008 for a period of one year for Rs.65 million. Due to global recession, every one is suffering financial crises. SBP held various meetings but no concrete steps were taken. SBP decreased the margin on finances and also directed the banks to convert running finance into term finance. He also disputed the liability and argued that the defendants are not wilful defaulter but trapped in financial crises due to the factors beyond their control.

In rebuttal, Mr. Behzad Haider, the learned counsel for the plaintiff argued that the leave to defend application has not been filed in accordance with the law. The mandatory provisions of law as enunciated under subsections (4) and (5) of section 10 Financial Institutions (Recovery of Finances) Ordinance, 2001 have not been complied with, therefore the leave to defend application is liable to be dismissed under subsection (6) of section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. The learned counsel for the plaintiff also invited my attention to the replication with which a Resolution of the Eastern Capital Ltd., dated 29-6-2009 is attached as Annexure "C" which shows that Mr. Munir M. Ladha and Mr. M. Samad Ladha, both the Directors of the company were authorized to negotiate/finalize with the Muslim Commercial Bank Limited (plaintiff) for rescheduling/ restructuring/settlement of liabilities on behalf of the company and besides this Board Resolution there is another letter attached dated 27-6-2009 as Annexure "D" which shows the terms and conditions of rescheduling/ restructuring/settlement of liabilities in the sum of Rs.45,963,345 being principal amount, costs of funds up to 31-5-2009 and legal expenses were already settled. This document was prepared by the plaintiff and forwarded to the defendant No.1 which was accepted by the defendant No.1 and it was duly signed by the duly authorized representatives of the defendant No.1. Learned counsel for the plaintiff argued that in view of the clear

admission and signature on the document attached with the replication, interim decree may be passed in the sum of Rs.45,963,345 and defendants may be allowed leave to defend.

Heard the learned counsel for the parties. The procedure for applying leave to defend is provided under section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. The contents of leave to defend application prima facie show that the requirements of subsections (4) and (5) of section 10 of Financial Institutions (Recovery of Finances) Ordinance, 2001 have not been fulfilled. The learned counsel for the defendants Nos.1 to 4 and 6 to 8 relied upon a Judgment reported in Messrs Taxila Cotton Mills Ltd. v. Allied Bank of Pakistan Limited 2005 CLD 244 in which section 10 of the aforesaid Ordinance was discussed and considered by the learned Divisional Bench of Lahore High Court and it was held that according to section 10(6) of the Financial Institutions (Recovery of Finances) Ordinance, 2001, in case of failure, in complying with the requirements of sections 10(3), 10(4) and 10(5) of the said Ordinance, application for leave to defend is to be rejected, but there is also a proviso in the words that in case the defendant discloses a sufficient cause explaining his inability to comply with such requirement the application under section 10(6) is not to be rejected. The judgment cited by the learned counsel is purely based on the legal provision mentioned under subsection (6) itself but to claim this immunity or relaxation, it is an onus upon the defendant to explain sufficient cause in the leave to defend application itself as to why the defendant was prevented or precluded not to comply with the mandatory requirement of law. At present, no reason is mentioned in the leave to defend application which may be treated as sufficient cause for the non-compliance of the clear provision of Financial Institutions (Recovery of Finances) Ordinance, 2001.

It is a fact that a Board Resolution of the plaintiff is attached whereby the defendants Nos.2 and 3 were authorized by the Board of Directors to negotiate for the settlement of matter with the plaintiff. A copy of letter/settlement is also attached with the replication which was duly signed by the duly authorized representatives of the defendant No.1 in which a liability was admitted. It is also a fact that suit was filed on 14th March, 2009 and leave to defend application was filed on 17th April, 2009 but the date of indenture of settlement of liabilities is dated 27th June, 2009 which shows that the defendants were fully aware with the facts of pending suit and in order to settle the controversy they signed this document subsequent to the institution of suit and filing date of leave to defend application, which shows their intention to resolve the matter amicably. Section 11 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 provides that if the Banking Court on consideration of the contents of the plaint, the application for leave to defend of the defendant and the reply thereto, is of the opinion that the dispute between the parties does not extend to the whole of the claim, or that part of the claim is either undisputed, or is clearly due, or that the dispute is mainly limited to a part of the principal amount of the finance or to any other amounts relating to the finance, it shall, while granting leave and framing issues with respect to the disputed amounts, pass an interim decree in respect of that part of the claim which relates to the principal amount and which appears to be payable by the defendant to the plaintiff. The purpose of incorporating a provision and concept of interim decree by the legislature under section 11 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 is to cut short, curtail the scope of litigation and decide the controversy between the parties expeditiously. This is also one of the reasons that under subsection (4) of the Financial Institutions (Recovery of

Finances) Ordinance, 2001, it is mandatory to state in the leave to defend application the amount of finance availed by the defendant from the financial institution, the amount paid by the defendant to the financial institution and the dates of payments, the amount of finance and other amounts relating to the finance payable by the defendant to the financial institution up to the date of institution of the suit, the amounts of finance and other amount crediting to the finance payable by the defendant to the financial institution up to the date of institution of the suit and the amount if any which the defendant disputes as payable to the financial institution and facts in support thereof. Under subsection (5), it is further made obligatory on the part of customer that the application for leave to defend shall be accompanied by all the documents which, in the opinion of the defendant, support the substantial questions of law or fact raised by him. The penal consequence for not adhering to the aforesaid sections is provided under subsection (6) of the Financial Institutions (Recovery of Finances) Ordinance, 2001, that an application for leave to defend which does not comply with the requirements of subsections (3), (4) where applicable and (5) shall be rejected, unless the defendant discloses therein sufficient cause for his inability to comply with any such requirement. The legislature has provided ample opportunity to the defendant to state all necessary facts in accordance with the provisions of section 10. Since the further proceedings in the matter are only dependent upon the grant of leave, therefore, it has become mandatory to comply with the requirements enunciated under subsections (3)(4) and (5) of the Financial Institutions (Recovery of Finances) Ordinance, 2001. The provision is not only for the benefit of defendant but also for the convenience and assistance of the Banking Court to determine and ascertain at very initial stage on a consideration of the contents of the plaint, the application for leave to defend of the defendant and the reply thereto, that the dispute between the parties does not extend to the whole of the claim, or that part of the claim is either undisputed or is clearly due, or that the dispute is mainly limited to a part of the principal amount of the finance or to any other amounts relating to the finance, it shall while granting leave and framing issues with respect to the disputed amounts, pass an interim decree in respect of that part of the claim which relates to the principal amount and which appears to be payable by the defendant to the plaintiff. I have seen in many cases in which the application for leave to defend lacks mandatory requirements and instead of filing leave to defend application in accordance with relevant provision of the law and even without filing any supporting documents, customer pleads that no amount is due, no amount was disbursed and even in some cases they plead that they have paid excess amount. All such defenses will only be possible and rational when the leave to defend application will fulfil the basic requirement of law. Leave to defend application which lacks necessary ingredients creates unnecessary complications and cast unjustified and unfair burden on the court to examine the facts and figures which is not the spirit of law unless the leave to defend applications fulfill the criteria as envisaged under subsections (4) and (5) of the Financial Institutions (Recovery of Finances) Ordinance, 2001. In many cases in order to sift grain from the chaff and to resolve the controversy between the parties, court has to appoint chartered accountants to submit the report and determine the liability which is in fact the responsibility of plaintiff under section 9 of the Ordinance, 2001 in first phase to submit statement of accounts duly certified under the Banker's Book Evidence Act, 1891 with supporting documents and thereafter, the burden is shifted upon the defendant to answer the claim keeping in view the subsections (4) and (5) of section 10 of the Ordinance, 2001. In order to avoid delay in disposal, efforts should be made to institute the banking suit and file leave to defend in the letter and spirit of law along with proper documents

relating to the disbursement of finance, facility, payments, repayments and the plaint and leave to defend must be equipped with proper break up of amount.

In the judgment reported in *Rafaqat Ali and 2 others v. Muslim Commercial Bank Limited* 2006 CLD 115, it was held that if dispute between the parties did not extend to whole of the claim and part of the claim was undisputed, Banking Court should pass interim decree in respect of undisputed amount and should decide with respect to the disputed amounts after granting leave to the defendants and framing of issues. In another judgment, reported in *Messrs Iqbal Traders v. National Bank of Pakistan* 2006 CLD 977, it was held that defendant admitting plaintiffs claim to some extent, but disputing remaining amount consisting of cushion period mark-up, mark-up over mark-up beyond contractual period, godown staff salaries and insurance charges for being excessive and illegally charged. Bank was granted interim decree to the extent of its claim admitted by defendant. Regarding rest of the claim of Bank, defendant had some case to be further investigated. Defendant was granted unconditional leave to defend suit, which would be decided after framing of issues and recording evidence of parties. In the judgment reported in *Messrs Allahwallah Printers v. The Bank of Punjab* 2004 CLD 1643, it was held that the claim of bank was partially admitted and was partially denied by the defendant. Banking Court refused leave to defend and decree the suit the extent of whole amount as claimed by the bank in plaint. Case of defendant fell under the purview of S.11 of Financial Institutions (Recovery of Finances) Ordinance, 2001. Banking Court, instead of out-rightly dismissing the application for leave to defend, should have decided the suit under S.11 of Financial Institutions (Recovery of Finances) Ordinance, 2001.

Since the part of liability was accepted in the letter/agreement dated 27-6-2009, and the said document was never disputed, further, in paragraph 38 of the replication filed by the plaintiff, it is submitted that in terms of letter dated 27-6-2009, the parties have to execute the compromise agreement and obtain compromise decree but despite number of reminders the defendants are avoiding the same. This specific plea was also not controverted or denied by the learned counsel for the defendants Nos. 1 to 4 and 6 to 8. It is also fact that though the suit was instituted on 14-3-2009, leave to defend was filed on 17th April, 2009 but the terms of Rescheduling /Restructuring/ Settlement of liabilities were accepted and agreed vide letter/agreement dated 27th June, 2009 which shows that the liability was accepted with due care and caution after institution of suit and filing leave to defend application, therefore, in view of the clear admission of liability, instead of dismissing the leave to defend application for non-compliance of requirement of subsections (4) and (5) of section 10 of the Ordinance, in all conscience, I am convinced to pass interim decree against the defendants Nos. 1 to 4 and 6 to 8 on the basis of undisputed letter/agreement produced by the plaintiff along with the replication.

The Advocate for the defendant No.5 is reported to be busy before another bench. I have seen the contents of the leave to defend application filed by the defendant No.5, (C.M.A. No.4685 of 2009) in which it has been inter alia contended that the suit is not maintainable under the law as the same has been filed without Resolution passed by the Board of Directors of the plaintiff. The suit is not maintainable against defendant No.5 who is neither the borrower or customer nor the guarantor or mortgagor in respect of the suit transaction. The defendant No.5 had resigned from the directorship of defendant No.1 in October, 2008, which is well within the knowledge of the plaintiff and therefore, the name of the said defendant is required to be deleted from the array of defendant. In fact

the Letter of Guarantee was given much earlier in bank in which the plaintiff has filled up the date and amount of its own choice and therefore, the same does not pertain to the suit transaction. The amount as claimed by the plaintiff against the defendant No.1 is exaggerated, contains unauthorized and unlawful mark-up which is prima facie evident from the annexure enclosed with the plaint i.e. the sanction advice, finance agreement and the statement of account. The learned counsel for the plaintiff argued that since interim decree is being passed against the defendants Nos. 1 to 4 and 6 to 8, hence instead of adjourning the matter to any other date for hearing of leave to defend application filed by the defendant No.5, to save the time of this court and expedite the matter, let the defendant No.5 be allowed unconditional leave to defend without prejudice the rights and claim of the plaintiff against the defendant No.5 which will be decided on its own merits.

Keeping in view aforesaid circumstances, I pass interim decree against the defendants Nos. 1 to 4 and 6 to 8 in the sum of Rs.45,963,345. Office is directed to prepare the interim decree. The leave to defend applications filed by the defendants shall be treated their written statements. The learned advocates sought time to file proposed issues. Two weeks time granted.

Vide order dated 17-3-2009, the property and shares mentioned in C.M.A. No.2444 of 2009 and 2445 of 2009 have already been attached, since the interim decree has been passed against the remaining defendants except defendant No.5 and leave to defend has been allowed to all the defendants, the attachment order passed earlier is hereby confirmed. Applications are disposed of in the above terms.

Learned counsel for the plaintiff does not want to press this C.M.A. No.8027 of 2009 filed under section 16 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 for the attachment of defendant's No.1 Corporate Membership Card issued by, Karachi Stock Exchange. The application is dismissed as withdrawn.

M.H./M-156/K Order accordingly.

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