

THE HIGH COURT OF SINDH, KARACHI

Suit No. B-15 of 2017

[National Bank of Pakistan versus Pakistan Textile City Limited & others]

Plaintiff : National Bank of Pakistan through
M/s. Muhammad Khalid Shaikh and
S. Amir Ali, Advocates.

Defendants 1, 2 & 4 : Nemo.

Defendant 3 : Port Qasim Authority (Industrial
Management Department), through
Mr. Abid Hussain, Advocate.

Dates of hearing : 17-01-2020 & 04-02-2020.

Date of decision : 22-04-2020.

ORDER

Adnan Iqbal Chaudhry J. - This order decides CMA No. 8814/2017 and CMA No. 8827/2017 which are leave-to-defend applications under section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (FIO).

2. The Defendant No.1, Pakistan Textile City Ltd. (PTC), was incorporated in furtherance of a project of the Government of Pakistan to set up an industrial zone called Pakistan Textile City. It appears that 45% of the share capital of PTC is held by the Government of Pakistan, while the other 55% by financial institutions, public sector companies and others. The land for the project, an area of 1250 acres, was made available by the Port Qasim Authority (PQA - Defendant No.3). Accordingly, vide registered lease deeds dated 13-09-2006 and 25-08-2008, land measuring 700 acres and 550 acres respectively in the Eastern Industrial Zone of Port Qasim Area was leased by the PQA to PTC for an initial period of 50 years. The scheme was that the PTC would then develop the infrastructure of the Textile City and sub-lease plots to textile units.

3. The Plaintiff (NBP) extended finance facilities to PTC for the purposes of the project. To secure the finance, the Defendant No.2 (Federal Government) issued letters of guarantee to NBP, and PTC mortgaged part of the project land. The mortgage money was repayable by PTC from proceeds of sub-leases of the project land. It appears that the project could not materialize and PTC defaulted in repayment of its debt to NBP; hence this suit by NBP for recovery of finance amounting to Rs. 3,038,443,121/-. The PTC (Defendant No.1) has been sued as principal borrower and mortgagor; the Federal Government (Defendant No.2) has been sued as surety; while the PQA (Defendant No.3), who is the lessor of the mortgaged land, has been sued for an injunction to restrain it from determining/revoking the lease of the mortgaged land. A prayer has also been made for the sale of that part of the project land which is mortgaged with NBP.

4. Leave applications were filed by PTC and PQA. The Federal Government did not seek leave to defend and filed para-wise comments only. Thus, vide order dated 22-02-2019, the suit was ordered to proceed *ex-parte* against the Federal Government.

5. The leave application of PTC states that since the project of Pakistan Textile City could not materialize, the Federal Government decided on a voluntary winding-up of PTC. On the other hand, learned counsel for NBP submitted that the winding-up never commenced and he drew attention of the Court to the minutes of the meeting of the Board of Directors of PTC dated 17-11-2016 which read as under:

“Resolved that due to non-availability of required infra-structure including natural gas, and non-availability of financial resources, the Company is unable to continue its existence and as decided by the Committee of winding-up formed earlier by the Federal Government, the process of voluntary winding up be started as laid down in the Companies Ordinance, 1984.

Further, resolved that the General Meeting of the stakeholders be convened after completing of all formalities and the Chairman is authorized to fixed the date of General Meeting of shareholders of the Company for this purpose”.

Though the above minutes show that the Board of Directors of PTC had decided to call a general meeting of the shareholders of PTC for passing a resolution for voluntary winding-up, there is nothing on the record to show that such general meeting was ever called, or that if it was called, a special resolution thereat was ever passed under section 358 of the erstwhile Companies Ordinance, 1984 for the voluntary winding-up of PTC. A query raised in that regard to the Securities & Exchange Commission of Pakistan also does not reveal any special resolution filed for the voluntary winding-up of PTC nor a winding-up petition before the Company Court. In these circumstances, this Court can only go by the statement in the replication by NBP, who is also a shareholder of PTC, and by the statement made at the Bar by learned counsel for NBP that so far winding-up of PTC has not commenced. Therefore, I proceed further with the matter.

6. The claim of NBP for recovery of finance is under the heads of (a) Equity Participation; (b) Running Finance; and (c) Demand Finance.

NBP claims that Rs. 100,000,000/- was extended to PTC as Equity Participation by subscribing to the share capital of PTC and NBP is entitled to recover such sum.

As regards Running Finance (RF) and Demand Finance (DF), the following finance facilities were extended to and availed by PTC:

(i) A limit of Rs. 250 million as RF was provided vide sanction letter dated 05-03-2008, Finance Agreement dated 20-03-2008 and a Supplemental Agreement dated 05-01-2009 uptill 13-04-2009. That limit was renewed and enhanced to Rs. 500 million vide sanction letter dated 28-03-2009 and Finance Agreement dated 14-04-2009 uptill 31-12-2009; and again renewed and enhanced to Rs. 1.00 billion vide sanction letters dated 09-12-2009 and 14-12-2009 and Finance Agreement dated 02-01-2010 uptill 31-12-2010.

(ii) Vide sanction letter dated 28-01-2011, the limit of RF was reduced from Rs. 1.00 billion to Rs. 200 million (RF-I) and renewed

uptill 31-12-2011; and the outstanding amount of Rs. 800 million was converted to Demand Finance (DF-I) payable by 31-12-2017 under Finance Agreement dated 02-01-2010.

(iii) By the above sanction letter dated 28-01-2011 and four Finance Agreements dated 28-02-2011, NBP also provided a fresh limit of RF of Rs. 100 million (RF-II) uptill on 31-12-2011; and further Demand Finance (DF-II) of Rs. 400 million payable by 31-12-2017.

(iv) By sanction letter dated 28-06-2012 and two Finance Agreements of even date, NBP provided a fresh limit of RF of Rs. 150 million (RF-III) uptill 31-12-2012; and additional Demand Finance (DF-III) of Rs. 350 million payable in 6 years.

(v) Vide Finance Agreement dated 27-08-2012, the limit of RF was renewed and enhanced to Rs. 400 million uptill 31-12-2012; and then to Rs. 550 million vide Finance Agreement dated 20-02-2013 uptill 31-12-2013.

(vi) Vide sanction letter dated 01-12-2013, the limit of RF was renewed and enhanced to Rs. 1080 million uptill 31-12-2014; the repayment of the principal amount of DF-I, DF-II and DF-III was deferred; and fresh Demand Finance (DF-IV) of Rs. 635 million was sanctioned for 6 years. Finance Agreements dated 01-12-2013 were executed for the RF and DF-IV facilities, and Supplemental Finance Agreements dated 01-12-2013 were executed to extend the dates of repayment of DF-I to DF-III.

(vii) Vide Supplemental Finance Agreements dated 31-12-2014 and 01-02-2015, the expiry of the limit of RF was extended uptill 31-12-2015.

7. Per NBP, the repayment of finance was secured by the following:

- (i) Promissory Notes executed by PTC;
- (ii) PTC mortgaged part of the project land to NBP by way of deposit of title deeds. From the mortgage agreements, it appears that

out of the project land of 1250 acres, NBP's charge is over 726.40 acres;

(iii) the Federal Government issued letters of guarantee dated 07-09-2011, 04-02-2014 and 07-01-2015, guaranteeing to NBP repayment of Rs. 1,500,000,000/-, Rs. 500,000,000/- and Rs. 1,165,000,000/- respectively, totaling Rs. 3,165,000,000/-. Correspondence on the record shows that the subsequent letters of guarantee were not by way of substitution and clause 7 of each guarantee states that the same constitutes additional security.

8. Heard the learned counsel and perused the record.

9. The leave application of PTC does not comply with the provisions of section 10(4) of the FIO, nor did anyone turn up on behalf of PTC to pursue the leave application. However, in *Ali Khan and Company v. Allied Bank of Pakistan Ltd.* (PLD 1995 SC 362), a case under the Banking Companies (Recovery of Loans) Ordinance, 1979, the Supreme Court has held that notwithstanding the refusal to grant leave to defend, or the failure of the defendant to comply with conditions of a leave application, the Court is still required to apply its mind to the case of the plaintiff before passing any order/judgment. Further, in *United Bank Ltd. v. Mehmood Ilyas Khan* (2012 CLD 1372), this Court held that "Once a leave application is filed, it is the statutory duty of the Court to consider the same regardless of whether the defendant concerned or learned counsel appearing on his behalf is present or not. In other words, the order disposing of a leave to defend application must show on the face of it that there has been some application of mind to the application and the contents thereof." Therefore, notwithstanding the absence of PTC, I have gone through its leave application, so also the plaint and its supporting documents so as to examine the merits of NBP's claim.

10. As regards NBP's claim for recovery of Equity Participation of Rs.100 million, admittedly that money was paid by NBP to PTC to subscribe towards the share capital of PTC, and in consideration

thereof NBP was issued 10 million shares of PTC vide two jumbo share certificates of 5 million shares each. Therefore, learned counsel for NBP was queried whether the Equity Participation of Rs. 100 million could be recovered under the FIO when that amount does not appear to have been extended to PTC as 'finance' and when NBP had in consideration thereof received shares of PTC. Learned counsel submitted that the definition of 'finance' in section 2(d) of the FIO includes 'equity support' and the facility of Equity Participation is the same. But then NBP has not filed any contract to show that PTC was under a corresponding 'obligation' within the meaning of section 2(e) of the FIO to repay that Equity Participation. Therefore, the question that arises for determination is whether the Equity Participation of Rs. 100 million received by PTC from NBP for the issue of PTC's shares, was by way of 'finance' with an 'obligation' to repay within the meaning of the FIO? That, to my mind, is a mixed question of law and fact which will require evidence for its determination.

11. Per the plaint, the amount of Running Finance (RF) disbursed to PTC was Rs. 935,747,493.17/-. The statement of account of RF (page 1941) shows that that amount is in fact the outstanding balance of the RF account as on 31-07-2015 as distinct from the amount disbursed. Nonetheless, to the extent of that outstanding there is a presumption of correctness that attaches to the statement of account of the RF facility by reason of section 4 of the Bankers' Books Evidence Act, 1891. The leave application of PTC does not raise any question to such statement of account. However, NBP has a further claim of Rs. 205,269,260.80/- as markup outstanding in respect of the RF facility, in support of which NBP has not filed a statement of account. The omission to file the statement of account of markup with the plaint is a non-compliance of section 9(2) of the FIO, a mandatory provision, the effect of which is to be examined independent of the defense set-up¹. The case-law shows that in cases where the plaint of the bank is not supported by any statement of account, the Courts have ordinarily rejected the plaint. However, in cases where the

¹ See *Elbow Room v. MCB Bank Ltd.* (2014 CLD 985); and *Soneri Bank Ltd. v. Classic Denim Mills (Pvt.) Ltd.* (2011 CLD 408).

statement of account filed by the bank with the plaint is in part or incomplete, and a leave application has been filed, then the Courts have ordinarily resorted to granting leave to defend on the ground that where a mandatory document is not filed by the bank to set-up the best case possible, then the defense should not be prejudiced, and then it is for the plaintiff to prove such part of the claim for which no statement of account is filed². In the instant case, since NBP's claim of outstanding markup of Rs. 205,269,260.80/- in respect of the RF facility is not supported by a statement of account, it will have to prove the same, and to that extent PTC is entitled to leave to defend.

12. Per the plaint, the following principal amount was disbursed to PTC as Demand Finance (DF) and it is alleged that the following amount inclusive of markup is outstanding in that regard:

	Amount disbursed	Outstanding with markup
DF-I	Rs. 800,000,000/-	Rs. 951,839,943.94/-
DF-II	Rs. 300,000,000/-	Rs. 360,095,999.97/-
DF-III	Rs. 349,074,700/-	Rs. 459,953,322.21/-
DF-IV	Rs. 21,004,421/-	Rs. 25,537,101.19/-
Total	Rs. 1,470,079,121/-	Rs. 1,797,426,367.31/-

Per the plaint, nothing was repaid by PTC towards the principal amount of DF-I to DF-IV and that much is supported by statements of account. However, NBP also claims Rs. 327,347,246.31/- as markup outstanding on DF-I to DF-IV, that figure being the difference between the amount disbursed and the amount said to be outstanding in the table above. But the plaint does not annex the statement of account of markup charged on DF-I to DF-IV. While the schedule to the respective Supplemental Finance Agreements dated 01-12-2013 mentions the marked-up installment, that appears only to be an estimate, inasmuch as the actual markup was to be calculated based on KIBOR applied to the amount actually disbursed from time to time. Therefore, and in view of the law already discussed in para 11 above, PTC is also entitled to leave to defend with regards to

² See *Pakistan Kuwait Investment Company (Pvt.) Ltd. v. Active Apparels International* (2012 CLD 1036).

NBP's claim of outstanding markup of Rs. 327,347,246.31/- on the facilities of DF-I to DF-IV.

13. I now turn to the question raised to NBP's prayer for sale of the mortgaged property which is part of the project land. Both the leave application of PTC and that of PQA contend that notwithstanding the mortgage, the project land cannot be put to sale and NBP will have to content itself with the remaining securities.

The leave application of PTC contends that since the project Pakistan Textile City did not materialize, the Federal Government has issued instructions to transfer the project land (which includes the mortgaged property) back to the PQA, and has required the PQA to pay the liabilities of PTC. Said instructions of the Federal Government find mention in a letter dated 12-05-2016 issued from the office of the Prime Minister as follows:

"Subject: Sale of 200 acres of land by Pakistan Textile City Ltd. (PTCL), Karachi to K-Electric for installation of 700 MW Coal Based Power Project

The Prime Minister has seen and is pleased to order as follows:

- i. The recommendations of the Committee are approved in principle. Accordingly, Finance Division shall immediately take the lead for voluntary winding-up of the Company, after meeting all necessary pre-requisites;*
- ii. Simultaneously, all assets of the Company shall be disposed off through an order of transfer to Port Qasim Authority, which originally leased the land to Pakistan Textile City Ltd., since the terms of lease do not allow its further sale or transfer to a third party; and*
- iii. Port Qasim Authority shall be responsible to settle all liabilities of the Company out of its own resource since it will have beneficial use of the land from now onwards."*

On the other hand, learned counsel for NBP submitted that any instruction issued by the Federal Government to transfer the mortgaged land to the PQA without the consent of NBP is contrary to law.

14. The leave application of PQA also contends that the PQA had leased the said land to PTC for a special purpose, viz., the setting-up of the Pakistan Textile City; that such purpose was not achieved; that the PTC also defaulted on lease rentals amounting to Rs. 240,201,427/- inclusive of markup; and therefore, the PQA

contends that is entitled to revoke the lease. Such contention is of course without conceding to the jurisdiction of the Banking Court under the FIO, and it was submitted at the outset by learned counsel for PQA that since the PQA is not a 'customer' within the meaning of section 2(c) of the FIO, the suit is not maintainable against it.

15. Clause II(l) of the lease of the mortgaged land restricts use of the land to the purpose of Pakistan Textile City. Clause II(p) stipulates that any sub-lease or mortgage by the lessee (PTC) shall be without affecting the title and ownership of the lessor (PQA). Clause IV stipulates that on default in payment of lease rentals, or on the breach of any condition of the lease by the lessee (by PTC), the lessor (PQA) shall be entitled to take possession of the land and thereupon the lease shall cease. Clause VI stipulates that should the lessee (PTC) go into liquidation in any manner, or commit any act of insolvency or bankruptcy, then the lessor (PQA) will be entitled to re-enter the land. Clause XIII(a) of the lease provides that if the purpose of allotment is not being fulfilled, then the lessor (PQA) reserves the right to cancel the allotment.

16. The terms of the lease of the mortgaged land highlighted above manifest that the land was leased to PTC for a special purpose, i.e., for developing the infrastructure for a Textile City and then sub-leasing plots thereat to textile units. In its replication the NBP does not dispute the said special purpose of the lease. Admittedly, that special purpose has not been achieved. The PQA also asserts that the PTC has not paid the lease-rentals. The lease envisages a re-entry by the lessor on breach of its terms. Under section 111 of the Transfer of Property Act, 1882, a lease of immovable property can be forfeited (after notice) by the lessor where the lessee breaks an express condition of the lease which provides that on breach thereof the lessor may re-enter the property. Perhaps for that reason the Federal Government, the controlling shareholder of PTC, was of the view that the lease of the project land should be surrendered to the PQA and therefore the PQA did not feel the need to forfeit the lease. Nonetheless, the PQA has been able to demonstrate *prima facie* that it

has cause to forfeit/determine the lease both on the count of failure of its purpose and for non-payment of lease-rentals.

17. This brings us to the question whether NBP as mortgagee can prevent the PQA from forfeiting the lease of the mortgaged land.

Section 65(d) of the Transfer of Property Act, 1882 provides that where the mortgaged property is a lease, then in the absence of a contract to the contrary, there is an implied contract by the mortgager that as long as the mortgaged property is not in the possession of the mortgagee, the mortgager will continue to pay the lease-rentals and perform the conditions of the lease, and indemnify the mortgagee against all claims sustained by reason of non-payment or non-performance of the conditions of lease. Under section 108(j) of the Transfer of Property Act, while the lessee has the right to mortgage his interest in the property, the lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. Thus, sections 65(d) and 108(j) of the Transfer of Property Act entail that notwithstanding the mortgage of the project land to NBP, the mortgagor (PTC), remains liable to the lessor (PQA) for any breach or non-performance of the conditions of lease; and that if the lessor (PQA) forfeits the lease, the remedy of the mortgagee (NBP) is against the mortgagor (PTC) for indemnification, and not against the lessor (PQA). That is so because there is no privity of contract between the mortgagee (NBP) and the lessor (PQA). Needless to state that the security of the mortgagee (NBP) in the mortgaged property can be no better than the interest given to the mortgagor by the lease.

18. Given the legal position discussed above, there is force in the argument that where the PQA (lessor) has cause to forfeit the lease of the mortgaged property, then NBP (mortgagee) may not be entitled to a sale of the mortgaged property. Since a determination of that question will impact the PQA, who in turn contends that it is not a 'customer' under section 2(c) of the FIO, as a prequel it will be necessary to examine whether this Court as the Banking Court can exercise jurisdiction to determine a question that may impact the PQA.

19. In view of the foregoing, CMA No. 8814/2017 and CMA No. 8827/2017 are allowed and leave to defend the suit is granted to PTC and PQA (Defendants 1 and 3) but only to the extent of the following issues:

- (i) Whether the Equity Participation of Rs. 100 million received by PTC from NBP for the issue of shares of PTC was by way of a 'finance' with an 'obligation' to repay within the meaning of the FIO ?
- (ii) Whether NBP (Plaintiff) is entitled to markup of Rs. 205,269,260.80/- in respect of the RF facility ?
- (iii) Whether NBP (Plaintiff) is entitled to markup of Rs. 327,347,246.31/- in respect of the facilities of DF-I to DF-IV ?
- (iv) Whether the suit is maintainable against the PQA (Defendant No. 3) as lessor of the mortgaged property ?
- (v) Whether in the circumstances discussed in paras 16 to 18 above, is NBP (Plaintiff) entitled to a sale of the mortgaged property ?
- (vi) What should the decree be ?

The leave applications of the Defendants 1 and 3 shall be treated as their written statement. The parties are allowed to file list of documents within 3 week.

JUDGE

Karachi:

Dated: 22-04-2020