

IN THE HIGH COURT OF SINDH KARACHI

Suit No. B-15 of 2011

[MCB Bank Ltd. versus M/s. Venus Chemicals (Pvt.) Ltd. and others]

Plaintiff : MCB Bank Ltd. through Mr. Syed Hamid Ali Shah Advocate.

Defendants No. 1 : Venus Chemicals (Pvt.) Ltd. through Mr. Khaleeq Ahmed, Advocate.

Defendant No. 2 : Mohsin Ashraf Tabani through Mr. Imtiaz Agha Advocate.

Defendant No. 3 : Nemo.

Date of hearing : 21-02-2020

Date of order : 01-06-2020

ORDER

Adnan Iqbal Chaudhry J. - This order decides leave-to-defend applications moved by the Defendants under section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (FIO).

2. The claim of the Plaintiff/Bank is under the heads of (i) Term Loan Finance-I (TF-I); (ii) Term Loan Finance-II (TF-II); and (iii) Running Finance (RF). The Defendant No.1 has been sued as principal borrower while the Defendants 2 and 3 have been sued as surety.

3. By offer letter dated 05-04-2004 followed by Finance Agreement dated 15-04-2004 the Bank extended to the Defendant No.1 a Term Finance (TF-I) facility of Rs. 300,000,000/- repayable in installments by 31-03-2007 along with markup @ KIBOR. The repayment of the TF-I facility was rescheduled from time to time, last by a 3rd Rescheduling Agreement dated 16-08-2010 where under the outstanding principal amount of Rs. 13,679,000/- was made payable in installments up till 30-06-2011.

4. By Finance Agreement dated 15-12-2009, the Bank extended to the Defendant No.1 a fresh Term Finance (TF-II) facility of Rs. 50,000,000/- repayable by 31-05-2012 with markup @ KIBOR.

5. By offer letter dated 12-11-2008, followed by Finance Agreement dated 23-01-2009, the Bank extended to the Defendant No.1 a Running Finance (RF) limit of Rs. 50,000,0000/- valid uptill 30-09-2009. The said limit was renewed up till 31-03-2011 vide offer letter and Finance Agreement dated 06-05-2010.

6. The aforesaid finance facilities were secured by the Defendants as follows:

(i) by the Defendant No.1 by equitable mortgage of property described in para 10 of the plaint. The Defendant No.1 also executed a Memorandum of Deposit of Title Deeds dated 16-04-2004 and a General Power of Attorney dated 24-09-2004 in favour of the Bank;

(ii) by the Defendant No.1 by hypothecation of its movable assets including finished goods, merchandise, products, stocks, plant and machinery, spares, equipment, tools, furniture and fittings, book debts and receivables;

(iii) by the Defendant No.1 by Promissory Notes;

(iv) by the Defendants 2 and 3 by Personal Guarantees, the last one 06-05-2010, *albeit* to the extent of the amount mentioned in the Guarantee.

7. Mr. Khaleeq Ahmed, learned counsel for the Defendant No.1 and also holding brief for counsel for the Defendant No.3, submitted that the certification on the statement of account does not mention the name and designation of the signatories, and thus such statement of account is not certified as per the Bankers' Books Evidence Act, 1891 which is a non-compliance of section 9(2) of the FIO. He submitted that the amount claimed in the plaint as markup over the subject finance facilities is also not borne from the statement of account. He

submitted that when the Plaintiff Bank had not complied with the mandatory provision of section 9(2) of the FIO, the non-compliance of section 10(4) by the Defendants becomes secondary.

Mr. Imtiaz Khan, learned counsel for the Defendant No.2 adopted the arguments of Mr. Khaleeq Ahmed Advocate.

8. Mr. Hamid Ali, learned counsel for the Plaintiff submitted that when the Defendant No.1 does not deny disbursement, and when the leave applications do not comply with section 10(4) of the FIO, then there is no case for leave to defend; that the liability is admitted in Annexures F, F-1 and F-3; and that the leave applications do not specifically challenge any entry in the statement of accounts.

9. Heard the learned counsel and perused the record.

10. Though the leave applications do not comply with section 10(4) of the FIO, 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. Therefore, notwithstanding non-compliance by the Defendants of section 10(4) of the FIO, I have gone through the plaint and supporting documents.

11. The Bank's claim under the TF-I facility is for a principal sum of Rs. 13,679,000/- and markup of Rs. 771,259.48/-. However, as highlighted by Mr. Khaleeq Ahmed, the statement of account filed in support thereof does not bear the name and official title of the persons certifying the same. The signatories are described only as 'authorized signatory'. Further, with regards to the markup on the TF-I facility, the statement of account (page 569) shows only an outstanding amount of Rs. 10,343/- as on 07-01-2011 and not Rs. 771,259.48/- as claimed by the Bank in the plaint.

12. Section 9(2) of the FIO requires the Bank's statement of account to be certified as per the Bankers' Books Evidence Act, 1891. Under section 2(8) of the Bankers' Books Evidence Act, one of the requirements of a 'certified copy' of a statement of account is that the certification thereon should be "dated and subscribed by principal accountant or manager of the bank with his name and official title". It is then, by virtue of section 4 of the Bankers' Books Evidence Act, that such 'certified copy' is *prima facie* evidence of the existence of the entries it reflects. In other words, if the statement of account of the Bank is not a 'certified copy' as per section 2(8) of the Bankers' Books Evidence Act, then it does not attract a presumption of correctness and the bank will have to prove the same as any other document. In the cases of *Soneri Bank Ltd. v. Compass Trading Corporation* (2012 CLD 1302) and *Pak Kuwait Investment Company (Pvt.) Ltd. v. Active Apparels International* (2012 CLD 1036) one of the grounds for the grant of leave to the customer was that the statement of account did not specify the name and official title of the person who had certified it, and the person who had certified it was not amongst the officers contemplated under section 2(8) of the Bankers' Books Evidence Act or their modern day equivalent. In *Elbow Room v MCB Bank Ltd.* (2014 CLD 985), a learned Division Bench of this Court reiterated that section 9(2) of the FIO was mandatory; and held that the amount claimed by the bank in the plaint has to be supported by a statement of account duly certified as per section 2(8) of the Bankers' Books Evidence Act, 1891; and that if the statement of account is not certified by an officer contemplated under section 2(8) of the Bankers' Books Evidence Act, the same cannot be received as *prima facie* evidence of the transactions therein.

13. The upshot of the above discussion is that the statement of account filed by the Bank in support of its claim for the TF-I facility is not a 'certified copy' within the meaning of section 2(8) of the Bankers' Books Evidence Act, 1891 and thus not in compliance of section 9(2) of the FIO. Resultantly, the Bank will have to prove its

statement of account for the TF-I facility. Further, as discussed above, since the statement of account does not show Rs. 771,259.48/- to be markup outstanding on the TF-I facility, the Bank will also have to prove the same.

14. Per the Bank, the outstanding amount of the TF-II facility is a principal sum of Rs. 46,000,000/- and markup of Rs. 4,005,784.84/-. However, the statement of account of the principal amount of the TF-II facility (page 589) reflects a zero balance. It appears that the Bank has arrived at the figure of Rs. 46,000,000/- by deducting certain debit entries from the amount disbursed. In my view, if the outstanding amount claimed by the Bank is not reflected in a statement of account and has to be computed therefrom, then that is a question of fact requiring evidence. As regards the Bank's claim for markup on the TF-II facility, the statement of account (page 593) again reflects a zero balance and not Rs. 4,005,784.84 as claimed by the Bank in the plaint. Furthermore, the statement of account filed by the Bank in support of its claim for the TF-II facility does not bear the name and official title of the persons certifying the same, and as already discussed in para 12 *supra*, such a statement of account is not in compliance of section 9(2) of the FIO and does not attract a presumption of correctness. The entire amount claimed by the Bank under the head of TF-II will have to be proved by it.

15. Per the Bank, the outstanding principal amount of the RF facility is Rs. 49,294,337.61/-. But again, the statement of account filed by the Bank in support of its claim (page 667) does not bear the name and official title of the persons certifying the same, and thus the consequences discussed in para 12 *supra* follow. Furthermore, the statement of account of markup over the RF facility (page 597) reflects a zero balance and not Rs. 3,868,087.13/- as claimed by the Bank in the plaint. Resultantly, the Bank will have to prove its statement of account for the RF facility and it will also have to prove that the markup outstanding on the RF facility is Rs. 3,868,087.13/-.

16. As regards the leave applications of the sureties, the Defendants 2 and 3, though they have not denied executing the personal guarantees or demonstrated a case for discharge of their guarantees, they have raised the ground that the Bank's statement of account does not comply with section 9(2) of the FIO. Given the consequences of such non-compliance as discussed in para 12 above, the Defendants 2 and 3 are also entitled to leave to defend the suit *albeit* to the extent of the issues settled below.

17. For the foregoing reasons, CMA No. 2656/2011, CMA No. 2657/2011 and CMA No. 2658/2011 are allowed in terms that leave to defend the suit is granted to the Defendants to the extent of the following issues only:

- (i) What is the principal amount outstanding in respect of the finance facilities of TF-I, TF-II and RF ?
- (ii) Whether a sum of Rs. 771,259.48/- is outstanding as markup over the TF-I facility ?
- (iii) Whether a sum of Rs. 4,005,784.84 is outstanding as markup over the TF-II facility ?
- (iv) Whether a sum of Rs. 3,868,087.13/- is outstanding as markup over the RF facility ?
- (v) What should the decree be ?

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

JUDGE

Karachi
Dated: 01-06-2020