

AMENDED TITLE OF THE PLANT
PURSUANT TO ORDER DT 16.9.2004

IN THE HIGH COURT OF SINDH AT KARACHI
(Original Civil jurisdiction under the Financial Institutions
(Recovery Ordinance, 2001

SUIT NO. B-69 OF 2001

KASB BANIK LIMITED,

A banking company , having its principal,
Office at Business & Finance Trade Centre,
I.I. Chundrigar Road,
Karachi, and a Branch, among others,
Known as Main Branch at
Business & Trade Centre,
I.I. Chundrigar Road,
Karachi

..... **Plaintiff**

Versus,

1. M/s. Mekran Fisheries (Pvt) Ltd,
A Private Limited Company incorporated
Under the Companies Act, 1913 and
Companies Ordinance, 1984, having its
Registered /Principal Office at Plot No. B/2 & B/4,
Fish Harbour, West Wharf, Karachi
2. Mr. Azharul Haq Butt S/o Muzaffaruddin Butt,
Muslim, adult, resident, of A-245, Block-6,
P.E.C.H, Society, Karachi
3. Mr. Taswarul Haq Butt S/o Muzaffaruddin Butt,
Muslim, adult, resident of Plot No. 151-B, Phase VII,
Khayaban-e-Behria, DHA,
4. Mr. Tanvirul Haq Butt S/o Muzaffaruddin Butt,
Muslim, adult, resident, of A-245, Block-6,
P.E.C.H, Society, Karachi
5. Mrs. Ruksana Butt W/o Taswarul Haq Butt,
Muslim, adult, resident of Plot No. 151-B, Phase VII,
Khayaban-e-Behria, DHA,
6. Mrs. Imrana Azhar Butt W/o Azharul Haq Butt,
Muslim, adult, resident, of A-245, Block-6,
P.E.C.H, Society, Karachi
7. Mrs. Lubna Imtiaz W/o Imtiazul Haq Butt,
Muslim, adult, resident of A-245, Block-6,
P.E.C.H.S. Society, Karachi

..... **Defendants**

Suit for Recovery of Rs. 105,700,703.16

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
SUIT NO. B-69 OF 2001

Order with signature of judge

1. for orders on statement dated 28.12.2005
2. for hearing of CMA No. 7636/2001
3. for hearing of CMA No. 7637/2001
4. for hearing of CMA No. 1307/2004
5. for hearing of CMA No. 2128/2004

Date of hearing: 16.3.2006

Mr. Nadeem Ahmad, Advocate for the plaintiff

Mr. Syed Mazharul Haq, Advocate for the Defendants
Nos. 1 to 4

Mr. Asim Mansoor Khan, Advocate for the Defendants No. 5, 6, & 7

- (1) Statement dated 28.12.2005 is taken on record subject to all just exceptions.
- (2) & (3) this is a banking suit in which the Plaintiff KASB Bank Limited has sought recovery of Rs. 105,700,703.16 from the Defendants.

Brief facts of the matter as pleaded in the plaint are that defendant No. 1 to 4 in collusion and in connivance with Mr. Salimuddin Kazi, the Chief Manager of the plaintiff's I.I. Chundrigar Road Branch, Karachi have availed unauthorized banking facilities at plaintiff's Main Branch, Karachi i.e. Temporary Running Finance/Overdraft and of negotiating export shipping documents. Such unauthorized banking facilities were detected on 29.11.2000 when it was found that as against Temporary Running Finance/Overdraft, the defendant No. 1 has availed an amount of Rs. 100,333,372.34 and against Foreign Bills Purchase the defendant No. 1 has availed an amount of Rs. 306,536,650-00 out of which Rs. 138, 432,507.00 were realized leaving a balance of which outstanding of Rs. 168,104,103-00. The defendant No. 1 acknowledged these liabilities in an undertaking dated 2.12.2000 wherein it undertook to deposit the liabilities owned by it and to provide equitable mortgage of properties and also bank guarantees. The defendant No. 1 partially complied with the undertaking by making payment of Rs. 40.00 Million whereon the plaintiff approached the State Bank of Pakistan as a result. Whereof another Memorandum of Undertaking dated 25.1.2001, the defendant No. 1 signed an Agreement of Finance dated 25.1.2001 for a sum of Rs. 81,540,945,-61, Promissory Note for Rs. 81,540,945,-61. Latter of Continuity dated 25.1.2001. as a further security, the defendant No. 2, 3, and 4 signed and executed personal guarantee dated 25.1.2001 guaranteeing payment of Rs. 81,540,945,-61 while defendant No. 5,6 and 7 signed, executed and delivered to the plaintiff Memorandum of Deposit of Title Deeds whereby the defendant No. 5 mortgaged with the plaintiff her property being plot of land bearing No. 151-B, Survey Sheet No. 26, measuring 1000 Sq. yds situated in Khy-e-Bheria, Phase VII, DHA, for a maximum amount of Rs. 42,700,00/- while defendant No. 6,7 signed, executed and delivered to the plaintiff Memorandum of Deposit of Title Deeds mortgaging with plaintiff their property being plot no. 245-A measuring 739 sq.yds in Block 6, P.E.C.H.S Society, Karachi along with construction thereon for a maximum amount of Rs. 21,300,00/-. The defendant No. 5 to 7 also executed and registered General Power of Attorneys respectively dated

1.3.2001 and 18.4.2001 in respect of mortgaged properties in favor of the plaintiff. The defendant no. 5, 6 and 7 also signed and executed separate Mortgaged Deeds respectively dated 1.3.2001 and 18.4.2001 mortgaging their said properties with the plaintiff in the sum of Rs. 10,000/- each. The defendant no. 1 also signed and executed Letter of Hypothecation dated 23.2.2001 which was registered with the Registrar of Companies vide certificate dated 26.3.2001. plaintiff has alleged that in respect of Foreign Bills Purchase, an amount of Rs. 42,405,000/- is outstanding against the defendant while in respect of Temporary Running Finance (Overdraft) converted into demand finance in terms of the Memorandum of Undertaking dated 25.1.2005. the defendant No. 1 has paid to he plaintiff an amount of Rs. 0.500 million on 26.2.2001 and Rs. 5 million on 03.3.2001 towards first installment and thereafter no payment has not been made. It is alleged that on 21.2.2001 a sum of Rs. 65,558,219.16 was due in the Running Finance Account while an amount of Rs. 40,142,484.00 was due in respect of Foreign Bills Purchase Account total being Rs. 105,700,703.16. the plaintiff has prayed for the decree in the above sum along with markup 18% per annum from the date of the suit till payment and for final decree for sale of mortgaged properties as well as cost of the suit.

The defendants were served with summons who filed applications for leave to defend the suit under Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act 1997 (Act No. XV of 1997). On promulgation of the Financial Institution (Recovery of Finance) Ordinance, 2001 (the Ordinance), the defendant No. 1 to 4 as well as the defendant No. 5 to 7 separately filed applications for leave to defend the suit on 6.10.2001. plaintiff has filed replication to both the applications for leave to defend the suit.

I have heard the arguments of Mr. Nadeem Ahmad, learned Counsel for the plaintiff, Mr. Syed Muzharul Haq, learned Counsel for the defendants No. 1 to 4 and Mr. Asim Mansoor Khan learned Counsel for defendant No. 5 to 7

The first submission of the learned Counsel for the defendants No. 1 to 4 is that the plaintiff's case based on the allegation of fraud which is to be proved by evidence on this ground alone the said defendants are entitled to the grant of their application for leave to defend the suit. No law in support of such submission was cited by the learned Counsel. The plaintiff does not show that defendant No. 1 was allowed to unauthorized banking facilities in collusion and connivance of Mr. Salimuddin Kazi, Chief Manager of plaintiff's I.I. Chundrigar Road Branch, Karachi. The plaintiff further shows that the unauthorized banking facilities allowed to the defendant No. 1 was detected by plaintiff's principal office on 29.1.2004 when the following liabilities were found against the defendant No. 1

- (i) Temporary Running Finance (Overdraft. A/C) ----- Rs. 100,333,372.34
- (ii) Foreign Bills Purchase ----- 168,104,103.00

It appears that on detection of the unauthorized banking facilities, on 2.12.2000 the defendant No. 1 gave unauthorized acknowledging the liability in respect of Temporary Running Finance and undertook to deposit with plaintiff an amount of Rs. 40 million by 4.12.2000 and in respect of remaining Rs. 60 million the defendant No. 1 undertook to deposit the amount with the plaintiff latest by 18.12.2000 and in the meanwhile agreed to furnish to the plaintiff title documents of the two properties already mentioned above. It was further provided in this undertaking that in the event the defendant No. 1 fails to pay the amount of Rs. 60 million by 18.12.2000, it will provide a bank guarantee for payment of this amount to the plaintiff which bank guarantee will remain valid for a period of 3 months. On furnishing of the bank guaranteeing the title documents of the two properties will be released. It appears that pursuant to this undertaking, the defendant No. 1 deposited with the plaintiff the amount of Rs. 40 million but did not comply with the remaining commitments in the undertaking. The plaintiff approached the Credit Advisory Committee of the State Bank of Pakistan whereof a joint meeting was held between the plaintiff and defendant. No. 1 under the chairmanship of the Chief Manager, State Bank of Pakistan on 25.1.2001 when a memorandum of Understanding was made between the

plaintiff and defendant No. 1 in which the defendant No. 1 acknowledged the liability in the sum about of Rs. 63.1 million towards the Temporary Running Facilities converted into Demand Finance and undertook to secure the same by equitable mortgage of property and by hypothecation of stock and to complete all other formalities and documents within 7 days . The defendant No. 1 agreed to repay the said acknowledged amount within one year in equal monthly installments with markup at 18% per annum. In respect of short payments against export bills the defendant No. 1 agreed to pay the same within a period of one month. Pursuant to this Memorandum of Understanding, the defendant No. 1 signed, executed and delivered to the plaintiff Agreement of Finance on markup basis dated 25.1.2001, Promissory Note and Letter of Continuity. Defendants No. 2, 3, & 4 separately signed Letter of Guarantees all dated 25.1.2001 guaranteeing payment of sum of Rs. 81,540,942.61 to the plaintiff. The defendant No. 5 deposited title documents of her property with Memorandum of Deposit of Title Deeds dated 1.3.2001. Defendant No. 6 & 7 also deposited the title documents of their property along with Memorandum of Deposit of Title Deeds dated 18.4.2001. Defendant No. 5 so also defendant Nos. 6 & 7 separately signed Irrevocable General Power of Attorneys and these defendants also signed and executed Deed of Mortgage, as stated above. The defendant No. 1 also signed a Letter of Hypothecation which was registered by Registrar of Companies vide his certificate dated 26.3.2001. It appears that the defendant No. 1 made payment of Rs. 5.5 million to the plaintiff as first installment and thereafter did not pay any sum to the plaintiff. The fact of signing of Memorandum of Understanding dated 25.1.2001 is not disputed. The signing of the Agreement of Finance, Promissory Note, Letter of Continuity, Letter of Hypothecation, Letters of Guarantee, deposit of Title Deeds of the properties and signing of Memorandum of Deposit of Title Deeds, Deeds of Mortgage and Irrevocable General Power of Attorneys are also not disputed. Further that the banking facilities were availed by the defendant No. 1 from the plaintiff without complying with requirement of entering into agreement and making of other documents and providing security is also not disputed by the defendant No. 1. The only defence in this respect taken by the defendants No. 1 to 4 in their application for leave to defend is that such banking facilities were availed by it until a formal sanction advise is prepared by the plaintiff. It may be noted that in the first place defendant No. 1 has not disputed or denied its liability to the plaintiff as is alleged in the plaint and so also the fact that the banking facilities were availed by the defendant No. 1 from the plaintiff without obtaining regular sanction from the plaintiff and signing, executing documents of bank facilities and providing security for the same. In view of the above facts and circumstances, there appears to be no room for pressing argument that the plaintiff needs to prove the fact of availing of unauthorized banking facilities by the defendant No. 1.

The next submission of the learned Counsel for the defendants No. 1 to 4 was that undertaking and Memorandum of Understanding were obtained by the plaintiff from the defendant No. 1 under duress, undue influence and coercion. It may be noted that though such plea is taken in the application for leave to defend the suit but the record shows that the defendant No. 1 at no time after signing the said undertaking and Memorandum of Understanding made complaint to the plaintiff or to the State Bank of Pakistan that these documents have been obtained by the plaintiff from it under duress, undue influence or coercion. The defendants No. 1 to 4 have attached with their application their own letter dated 20.3.2001 addressed to Mr. Abid Ali Siddiqui, Deputy Chief Manager/Secretary, State Bank of Pakistan as Annexure-D/5 in which the defendant No. 1 has admitted making of the said Memorandum of Understanding dated 25.1.2001 and informed that it has made compliance of it. Yet again through letter dated 27.4.2001 defendant No. 1 has admitted making payment of Rs. 45.5 million to the plaintiff towards settlement of its liability and with further information that it has completed remaining formalities pertaining to the mortgage of the property. Yet further the defendant No. 1 has again acknowledged its liabilities through letter dated 23.6.2001 addressed to the plaintiff Annexure-D/7 to the application. Nowhere in these letters, the defendant No. 1 has complained that the undertaking or the Memorandum of Understanding was obtained from it under duress, undue influence or coercion. The facts appear to show that the defendant No. 1 has made partial compliance of the initial undertaking by making payment of Rs. 40 million and partial compliance of the Memorandum of Understanding by providing mortgage, by signing

documents of finance, guarantees and mortgage of properties and also making payments of Rs. 5.5 million. This argument therefore also has not force in the facts and circumstances of the matter.

The third argument of the learned Counsel for the defendants No. 1 to 4 was that the plaintiff has obtained signatures of the defendants on blank documents. It may be noted that the defendant No. 1 in its letter which are already noted above has made no complaint with regard to the signing of blank documents of finance so also of guarantees nor the defendants have disputed any material fact mentioned in these documents. Subsection (3) of Section 18 of the Ordinance excludes the application of provision of subsections (1) and (2) of the said Section and save the documents obtained by the Financial Institutions in blank prior to the date of enforcement of this Ordinance. This Ordinance was published in Gazette of Pakistan on 30.8.2001 while the documents were signed by the defendants in January 2001.

The last submission of the learned Counsel for the defendants No. 1 to 4 was that the defendants are not liable to pay markup. The defendants No. 1 to 4 have claimed that plaintiff has recovered an amount of Rs. 2,550,520.05 as markup from the Running Finance Account and an amount of Rs. 4,806,412.00 as markup from the Foreign Bills Purchase Account. So far the recovery of Rs. 2,550,520.05 as markup is concerned, the same is reflected in the statement of account filed by the plaintiff with the plaintiff and this amount is shown to have been recovered/debited to the account of defendant No. 1 on 30.11.2000. Admittedly there was no agreement between the plaintiff and the defendant No. 1 for charging of markup at that time.

The accord shows that the defendant No. 1 was availing finance facility from the plaintiff since June 1999. The Agreement of Finance was made on 25.1.2001. Consequently from June 1999 upto 24.1.2001 there was not agreement between the plaintiff and the defendants for charging of markup and in the absence of such agreement, in my respectful view, not markup can be charged by the bank as the charging of markup is a matter of agreement between the bank and the borrower and until a categorical agreement in this respect is made, there will be no levy or charge of markup. Consequently I hold that the charging of markup of Rs. 2,550,520.05 by the plaintiff as shown in its statement of account was not legal and proper as on the date of charging of the said markup there was not agreement between the plaintiff and the defendants to do so. As regards the amount of Rs. 4,806,412.00 alleged to have been charged as markup from the Foreign Bills Purchase Account, a statement of account filed with the plaintiff as Annexure-T does not show that such markup has been charged. Even otherwise the defendant's Counsel has not been able to point out from the record charging of such markup by the plaintiff.

Mr. Asim Mansoor Khan, learned Counsel for defendants No. 5, 6 & 7 who are the mortgagors has also argued on merits of the case to demonstrate that the claim made by the plaintiff in the suit is not tenable. The main emphasis of his arguments was that the plaintiff has made a claim towards short payment of export bill but has given no particulars about such bills nor has filed their copies. He has argued that the plaintiff has failed to observe the procedure as provided in Chapter VIII of the Negotiable Instruments Act in respect of dishonoring of the bills of exchange and that the defendants have raised substantial question of fact for grant of application for leave to defend the suit. He has further stated that as there has been no disbursement after the Agreement of Finance was made therefore, the mortgagors are not liable for the amount mentioned in the agreement. He has relied upon large number of case laws in support of his submissions.

As regards the first submission of the learned Counsel, it may be noted that the defendant No. 1 in its application for leave to defend the suit have in categorical terms admitted the fact of availing of Foreign Bills Purchase Facilities from the plaintiff. In para-9 of the said application, the defendant No. has admitted that such facility was availed by it up to a tune of about Rs. 300 million during the period of 14.9.2000 to 8.11.2000. The said defendant has stated that most of the bills negotiated by the plaintiff have been adjusted against the foreign exchange proceeds while the balance is in the process. The plaintiff in para-16 of the plaint has given a chart

containing details of the foreign export bills against which it has received short payment, total amounting to Rs. 42,405,000/-. The chart shows that there are in all 8 foreign bills against which short payment has been received. The defendant No. 1 in para-29 of its application has categorically admitted that 8 foreign bills are outstanding and that their differences would be realized by the end of December 2001. The defendant No. 1 has not disputed in its application for leave to defend the suit about the correctness of the chart which is reflected in para-16 of the plaint. The averments of the plaint as well as the application for leave to defend the suit filed by the defendant No. 1 in categorical terms show that there are 8 foreign bills against which the plaintiff has received short payment and the defendant No. 1 has acknowledged such liability and undertaken to have it adjusted. In the light of the above facts and circumstances, this argument advanced by the learned Counsel has no bearing to the case in hand.

As regards the second submission that there has been no disbursement after the signing of the Agreement of Finance dated 25.1.2001, it may be noted that the fact and circumstances of the present case are of peculiar nature. On defendant No. 1's own admission, it has come on the record that it has availed from the plaintiff banking facilities without obtaining proper sanction from the plaintiff's principal office and without entering into proper finance agreement and providing of such unauthorized banking facilities by the defendant No. 1 came to the knowledge of the plaintiff, the plaintiff immediately took steps in the first instance for recovery of all the outstanding dues from defendant No. 1 and with the consent of the defendant No. 1 entered into Agreement of Finance so also obtained other security documents from the defendants. The case in hand is not the one where the Agreement of Finance was made for restructuring or rescheduling the facilities granted to the borrower in order to extend the time for the payment of bank dues rather it is a case where the borrower has availed banking facilities without altogether obtaining its sanction and entering upon proper documentation and providing security. The plaintiff's action of making Finance Agreement and obtaining securities was a measure not only to secure the bank's interest but also to certain extent put the unauthorized banking facilities availed by the defendant No. 1 on proper legal track to which the defendants have agreed and therefore have signed these documents. Consequently, it is not a case where the argument of non-granting of finance after the signing of the agreement can be pressed. The case laws relied upon by the learned Counsel in support of the submissions are either not relevant or are distinguishable from the present case.

For the forgoing reasons, I find that the defendants have failed to make out a case for grant of their applications for leave to defend the suit. Both the applications are therefore, dismissed.

Consequently, the suit is liable to be decreed in terms of Section 10(11) of the Ordinance.

In respect of Running Finance Account, the plaintiff has claimed Rs. 65,558,219.16 from which the amount of Rs. 2,550,520.05 which has been charged as markup without agreement has to be excluded. The plaintiff on this account is entitled to payment of Rs. 63,007,699.16 while on account of Foreign Bills Purchase it is entitled to payment of Rs. 40,14,484.00. The total of which comes to Rs. 103,150,183.16. The plaintiff's suit is therefore, decreed in the sum of Rs. 103,150,183.16 with cost of funds in terms of subsection (2) of Section 3 of the Ordinances and cost of the suit against defendants No.1 to 4 jointly and severally. The defendants No. 5 to 7 are only liable to the extent of the amount of mortgage. Therefore, decree for sale of mortgaged property is also passed for recovery of maximum amounts mentioned therein. The suit in the above terms stands disposed of.

(4) & (5): In view of the above order these applications have become infructuous and are dismissed as such.