Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

COS No.28 of 2014.

JUDGMENT

Faysal Bank Limited.

V E R S U S

M/s Dynasel Limited and others

Date of hearing 18.03.2024

Plaintiff by:	M/s Ashar Elahi and Syed Majid Ali Bukhari Advocates.
Defendants by:	Mr. Haq Nawaz Chattha Advocate for defendants No.1 to 8. Mr. Zaki ur Rehman Advocate for defendant No.9.

SHAMS MEHMOOD MIRZA, J.- This suit is brought by the plaintiff bank under the provisions of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the **Ordinance**) seeking recovery of Rs.522,894,646/- from the defendants due under two finance facilities namely Finance Against Trust Receipt (**FATR**) facility and Running Finance (**RF**) facility.

2. On contest by defendants No.1 to 8 (the **defendants**), their application for leave to defend was partially allowed on 02.11.2017 while an interim decree was passed in the sum of Rs.108,487,916/- representing the principal amount of RF facility. Leave to defend was granted to the extent of amount due under FATR facility and mark-up due under RF facility. Defendant No.9 was also allowed leave to defend in respect of the entire amount of the suit. The reasons for which leave to defend was partially allowed to the defendants are contained in

paragraphs 10 and 12 of the leave granting order which read as follows:

> **10.** ……The plaintiff bank has appended a number of statements of accounts with the plaint and it is difficult to pinpoint as to which document pertains to the statement of mark up of RF account. Be that as it may, even the statement of account termed by the learned counsel to be the statement of mark up account clearly shows that after the expiry of the RF facility, the plaintiff bank continued charging mark up and also receiving the amounts from the defendants. It prima facie appears that the defendant bank has received more amount as mark up than was due to it up to the date of expiry of the RF facility.
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> **12.** The statement of account shows that there were 97 transactions carried out under the FATR facility. The manner in which statement of account of the FATR facility is prepared is not confidence inspiring. For instance, the first statement of account shows Rs.3,388,465.94 as outstanding balance on 28.06.2011. There is a debit entry of the similar amount on 24.12.2011 but the balance on 24.12.2011 still remains Rs.3,388,465.94. Same is the case with all the other entries in the statement of account of FATR facility. The statement of account of FATR facility in the manner it prepared cannot form basis of a summary judgment. Besides the necessary corroboration is also not available on the record in the shape of the statement of account of LC/PADS. The defendants have, therefore, made out a case for grant of leave in respect of the claim of the plaintiff bank under the FATR facility. (Emphasis Added)

3. The defendants, it may be pointed out, completely denied having availed the RF and FATR facilities. The leave granting order, as is apparent, encompassed only the amount of mark up under RF facility and the entire amount of FATR facility. Notwithstanding the complete denial of availment of the FATR and RF facilities, it is implicit in the leave granting order that the stance taken by the defendants was not accepted and a preliminary decree was passed in respect of the principal amount of RF facility. Also evident is the fact that leave was granted not on the substantive merits of the case but on the form of the documents presented before this Court which were found to be lacking clarity required for a summary judgment. The issues that were framed by this Court also bear testimony to the fact that the parties were not found to be at issue on the availing of the FATR and RF facilities and the finance documents that were executed by the defendants in respect thereof.

4. Out of the divergent pleadings of the parties, this Court on 07.03.2018 settled the following issues.

1. Whether the plaintiff bank is entitled for the recovery of outstanding amount in FATR facility? OPP
2. Whether the plaintiff bank is entitled for the mark up of the running finance facility? OPP
3. Whether this Court has territorial jurisdiction over defendant No.9 and whether a decree could be passed against him by this Court? OPD
4. Relief

5. After framing of the issues, the plaintiff bank filed C.M. No.2 of 2018 under Order VII Rule 18 CPC for placing on record additional documents relating to FATR facility for their

production in evidence. This application was resisted by the defendant but this application was allowed on 24.01.2019 with the observation that the proof of the documents so produced in evidence shall be determined at the time of final arguments as also the question whether the evidence in this regard was beyond the pleadings.

6. The plaintiff bank examined Shahryar Tiwana as PW-1 who produced in evidence the documents Exh.P-1 to Exh.P-29. Defendants No.1 to 8 opted not to produce any evidence before the learned local commission appointed by this Court which aspect of the matter shall be touched upon later in the judgment. The evidence led by defendant No.9 is of no significance as the execution of corporate guarantee is not in dispute and only the legal question of territorial jurisdiction is involved.

7. This case was heard at length on various dates of hearing as is apparent from orders starting from 10.06.2021 to 27.05.2022 but the decision could not be announced for one reason or the other.

8. The findings on the issues are as follows:

> **ISSUE No.1:** (Whether the plaintiff bank is entitled for the recovery of outstanding amount of FATR facility? OPP)

9. Learned counsel for the plaintiff bank submits that all the documents relating to FATR facility including the letters of credit have been produced in evidence which duly substantiate the draw-downs by defendant No.1 under the said facility.

10. Learned counsel for defendants argued that leave to defend was granted, *inter alia*, on the ground that the statement of FATR facility was not properly prepared and yet the plaintiff bank did not produce in evidence a fresh statement of FATR facility. It was accordingly contended that no reliance

can be placed on the statement of account of FATR facility. In regard to the concise statement of FATR (Mark-A) produced in evidence, it was stated that PW-1 himself admitted in cross-examination that the said document was not a proper statement of account. The defendants accordingly submit that the mode and manner of payments under the letters of credit was not substantiated in evidence by the plaintiff bank. It was also the case of the defendants that the documents produced in evidence pursuant to order dated 24.01.2019 were not mentioned in the plaint and the necessary facts in regard thereto were also not pleaded in the plaint. The implication being that the evidence produced in respect to those documents cannot be considered by this Court.

11. This Court would firstly deal with the stance put forward by the defendants in their application for leave to defend outrightly denying the availment of any amount under the FATR and RF facilities. The following paragraph from the application for leave to defend would suffice to substantiate this point.

> (j) That no facility pursuant to the alleged agreements dated 08-03-2011 and 07-07-2011 was ever actually provided by the plaintiff to the applicant No.1. In this regard, it is further submitted that the defendant No.1 did not avail any LC facility or FATR facility from the plaintiff bank pursuant to the said agreement……

Again, while providing the details in terms of section 10 (4) of the Ordinance, it was stated as under:

> No amount availed under the agreement dated 08-03-2011 or 07-07-2011. However, the defendants availed the facility upto 26-08-2009, which stands adjusted even according

> to the documents attached by the bank with the plaint.

12. The plaintiff bank in paragraph 48 of the plaint mentioned the details of the finance documents executed by the defendants. In reply to this paragraph, the defendants in their application for leave to defend gave an evasive reply by stating that "*The contents of the previous paragraphs are reiterated here.*" The defendants, however, nowhere in their application for leave to defend specifically denied execution of the finance documents under the FATR facility.

13. In the case of Saudi Pak Industrial Limited **v.** B.A Rajput Steel etc **2016 CLD 465**, this Court in relation to the requirements of the pleadings held as follows:

> 13. Notwithstanding the special requirements the Ordinance stipulates the plaintiff and the defendant need to fulfill in their pleadings, the general law on the subject is also not materially different. Order 8 Rules 3, 4 and 5 CPC deal with the manner in which allegations of fact in the plaint should be traversed in the written statement and also the legal consequences that flow from its non-compliance (see Badat & Co. v. East India Trading Co. 1964 AIR 1964 SC 538). It is clearly stipulated in the said Rules that it shall not be sufficient for a defendant to deny generally the grounds alleged by the plaintiff but he must be specific with each allegation of fact. When the defendant denies any fact stated in the plaint, Rule 4 stipulates that he must not evasively answer the point of substance. Similarly, if it is alleged in the plaint that the defendant has received a certain sum of money, it shall not be sufficient for the defendant to deny that he received that particular amount, but he must deny that he received that sum or any part

> thereof, or else set out how much he received, and that if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances. It can thus be seen that Rule 4 lays down requirements that are not very different from those that are stipulated in section 10 (4) of the Ordinance. Rule 5 deals with specific denial and clearly lay down that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted against him.

In view of the evasive reply of the defendants, they shall be taken to have admitted to having executed the finance documents under the FATR facility. Needless to point out that FATR and RF facilities were granted through offer letter dated 08.03.2011 (Exh.P-1). The fact that a preliminary decree was passed on 02.11.2017 for the principal amount of RF facility militates against the position taken by the defendants. It may further be highlighted that the defendants did not challenge the decree passed by this Court on 02.11.2017 which has since attained finality.

14. The objections of the defendants that the necessary facts regarding the documents tendered in evidence by the plaintiff pursuant to order dated 24.01.2019 were not pleaded and that the evidence produced was beyond the pleadings cannot be accepted. Under the rules of pleadings, a party is only required to state the necessary and material facts. The plaintiff bank duly pleaded the finance facilities in the plaint availed by the defendants from time to time which included the FATR facility. According to the plaint, defendant No.1 lastly availed the said facilities through plaintiff bank's offer letter dated 08.03.2011 (Exh.P-1) which was duly accepted by defendant

No.1 by appending its signatures thereon. The parties thereafter executed Master Agreement for Financing on 08.03.2011 (Exh.P-2) and Demand Promissory Note (Exh.P-3). According to the contents of the plaint, the parties thereafter further executed Master Agreement for Financing on 07.07.2011 (Exh.P-5) and Demand Promissory Note (Exh.P-6). It is thus evident that the plaintiff mentioned all the material facts about the FATR facility and accordingly the requirements of the law were fulfilled. Beyond those facts, it was not necessary for the plaintiff to give the details of all the transactions and the documents executed under the FATR facility. FATR is a well understood term in the banking context which stands for a facility granted for payment of amounts due, amongst others, under a letter of credit after execution of the trust receipt. After the execution of the Master Finance Agreements on 08.03.2011 and 07.07.2011, the payment under the FATR facility was to be made on the terms mentioned therein. The plaintiff was compelled to adduce evidence in respect of the underlying transactions on account of the fact that the necessary corroboration in relation to the entries of the statement of account was not made and also in view of the fact that the defendants flatly denied having availed the FATR facility or disbursement of funds thereunder.

15. Let us draw our attention towards the evidence led by the plaintiff bank. PW-1 in his affidavit stated that defendant No.1 established a number of letters of credit/contracts from various banks and that at its asking the amounts thereof were disbursed under the FATR facility for repayment thereof after execution of trust receipts by defendant No.1. PW-1 deposed that FATR facility was fully utilized by defendant No.1. He also produced in evidence all the relevant documents which include the request letters by defendant No.1, the contracts

executed by it, shipping documents, trust receipts. He also tendered in evidence a concise statement of account in regard to the FATR facility which on the objection of the learned counsel for the defendants was allowed to be brought on the record as Mark A. It is the case of the plaintiff that Mark A is not a statement of account rather it was meant to explain the entries of the statement of account of FATR facility (Exh.P-11). The learned counsel also submitted a chart regarding the transactions executed under the FATR facility. He submits that the plaintiff bank is placing reliance on the original statement of FATR facility (Exh.P-11) which contains all the entries of the 97 drawdowns and that the entries thereof stand corroborated by the documents (Exh.P-12 to Exh.P-21) tendered in evidence.

16. The finance documents tendered by the plaintiff bank relating to FATR facility were received in evidence without any objection by the defendants. As noted above, the plaintiff bank through its witness also tendered in evidence all the necessary documents (Exh.P-12 to Exh.P-21) relating to the various draw downs through which defendant No.1 availed the amounts of the FATR facility which include the request letters of defendant No.1 addressed to the plaintiff bank for retirement of the import documents under various contracts. These documents consisted of letters addressed to the plaintiff bank by Silk Bank Limited and Barclays Bank PLC, Pakistan informing it to retire from the proceeds of FATR facility the import documents drawn by defendant No.1 under the contracts. Just to understand the basic contours of the transaction, the details of the first draw-down may be stated. The documents regarding the first drawdown include letter dated 24.06.2011 received by the plaintiff bank from Silkbank Limited on behalf of defendant No.1 seeking payment in

respect of the contracts under the FATR facility. On the same date, defendant No.1 also addressed letter to the plaintiff bank for remitting payment to Silkbank Limited. The documents including contract, bill of lading, packing list were also tendered in evidence. The payment of the first draw-down was accordingly made and debit of that amount was shown in the statement of account. This pattern follows in respect of all drawdowns.

17. Notwithstanding the objection on the form of the statement of account (PW-11), it was tendered in evidence and reflected an amount of Rs.273,249,111.65 due as principal and Rs.104,859,065.66 as mark up. Although section 4 of Banker's Book Evidence Act, 1891 grants presumption of truth to the entries of the statement of account, the said presumption is rebuttable. In the event leave is granted, the entries of the statement of account are required to be proved in accordance with law. In this regard, it may be stated that by virtue of Article 48 of the Qanun-e-Shahadat, 1984 entries in books of account regularly kept in the course of business have been made relevant whenever such entries refer to a matter into which the Court has to enquire but such a statement of account *per se* is not considered sufficient to charge any person with liability. Under the said provision, such entries though relevant are only corroborative evidence and it is to be proved by further independent evidence. The person on whom the onus lies in required producing relevant evidence in support of the entries in the statement of account (see Sri Sri Raja Lakshmi Narayan Jew and others v. The Province of East Pakistan **1969 SCMR 898**). In order to substantiate the entries of the statement of account of FATR facility, the plaintiff bank also produced in evidence all the requisite documents relating to the transactions mentioned in the statement of account. Needless

to mention that the defendants did not impugn even a single entry of the statement of account either in the application for leave to defend or in their cross-examination of PW-1. The plaintiff thus discharged the burden that was placed on it on Issue No.1.

18. The averment in the plaint that an amount of Rs.378,108,177.30 is due under the FATR facility was corroborated by oral evidence of PW-1 produced by the plaintiff bank coupled with the documents (Exh.P-12 to Exh.P-21). The plaintiff bank is relying upon documentary evidence which demonstrates that defendant No.1 not only delivered the import documents to the plaintiff bank from Silk Bank Limited and Barclays Bank PLC Pakistan but also delivered the trust receipts in which the necessary particulars of the import documents and their value is mentioned. The contracts and bills of ladings and the amount thereof were duly mentioned in the letters of the two banks and of defendant No.1. The very fact that the import documents were delivered to the plaintiff bank by defendant No.1 substantiates payment under FATR facility to the two banks on behalf of defendant No.1.

19. The plaintiff bank having discharged the burden that was placed on it, the defendants should have led rebuttal evidence. It is settled law that parties prove the facts stated in the pleadings. The statement of account is simply the ledger maintained by the plaintiff bank reflecting the outstanding amount of a finance facility but its entries are required to be proved by the underlying documents which as noted earlier stood proved by the evidence led by the plaintiff bank. The defendants were, therefore, required to lead evidence to prove that FATR facility was never utilized or availed by them to substantiate their averment in the application for leave to defend and to negate the inference that arose out of the

documentary evidence tendered by the plaintiff bank. It is apparent that the defendants deliberately opted not to produce their witnesses in order to avoid their cross-examination on the documents that the plaintiff bank tendered in evidence in respect of the FATR facility.

20. This Court in the case of Mst. Bakht Bibi v. Muhammad Aslam Khan and others **2016 MLD 1411** dealt with the issue of standard of proof as extrapolated by the definitions of "Proved", "Disproved" and "Not Proved" contained in Qanun-e-Shahadat, 1984. This Court cited the judgment of the Court of Appeal of Singapore in *Loo Chay Sit v. Estate of Loo Chay Loo* (2010) 1 SLR 286 which interpreted section 3 of the Singapore Evidence Act (pari materia to section 2 of the Qanun-e-Shahadat, 1984). The relevant portion of the said judgment is reproduced hereunder:

> In so far as the statutory definitions in section 3 of the Evidence Act are concerned, we would also add the following observations. First, where the party asserting a particular fact has discharged his burden of proof on a balance of probabilities (in civil suits) to allow the court to make the finding that a particular fact exists, that fact is "proved".
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> Secondly, where the party seeking to challenge a particular fact sought to be proved by the opposing party adduces sufficient evidence to allow the court to make the finding that the fact does not exist, the said fact is "disproved". Now, it is equally possible that the party seeking to the challenge the particular fact, sought to be proved by the opposing party has proved a fact mutually exclusive from the fact sought to be proved by the opposing party. In this case, the fact sought to be proved by the opposing party has also been disproved. In

> other words, the party adduces sufficient evidence for the court to make a finding the Fact X exists and since Fact X and the fact sought to be proved by the opposing party, Fact Y, are mutually exclusive, Fact Y has been disproved.
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> Thirdly, a finding that a particular fact is "not proved" is not the same as a finding that the fact is "disproved"……The finding that a particular fact has been "disproved" is an affirmative finding as to the nonexistence of that fact. Likewise, the finding that the fact has been "proved" is an affirmative finding as to the existence of the fact. It follows that the finding that the fact is "not proved' means that no affirmative pronouncement as such is made by the court as the either its existence or non-existence.... In a case where a fact is said to be "not proved", the court is unable to say precisely how the matter stands because of a lingering doubt as to the existence and non-existence of the fact; put simply the court is unable to decide one way or the other. The court thus refrains from making an affirmative pronouncement as to the existence or non-existence of the fact.

This Court in the case of *Bakht Bibi* also held that the term "evidence" does not only include the testimony of the parties and the documentary evidence led by them by holding as under:

> 10. The definition of "proved" in Qanun-e-Shahadat, 1984 stipulates that the court must consider the matters before it. The expression matters being a term wider than "evidence", the court has to necessarily go through the entire record before it including the pleadings and the demeanour of the witnesses before arriving at

> its conclusions. After considering the matters before it, the court may (a) either believe that the fact exists or (b) consider its existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists. It appears that there are two standards of proof to be found in the definition of "proved" which would satisfy the court of the existence of the fact upon consideration of the matters before it; one is the belief of the court and the other is the standard of a prudent man which can be adopted to consider the existence of the fact so probable as to proceed on the supposition that it exists. The definition of the expression "proved", it would appear, controls the standard of proof for both the civil and criminal trials. It is also apparent that the first standard of satisfaction of the court contained in the expression "proved" would operate in a situation where the court itself believes that one of the parties has convincingly proved that the fact in issue it is required to prove exists and the second standard would operate where the evidence led by both the sides is so evenly balanced that the court has to enter into the realm of supposition and probability by adopting the standard of prudent man to consider the existence of the fact. (Emphasis Supplied)

21. In Muhammad Luqman v. The State **PLD 1969 Lahore 257**, this Court defined the application of the standard of proof by holding as under:

> Reference at this stage can be usefully made to the terms "evidence" "proved" and "disproved" as given in the Evidence Act, 1872. In spite of the juggleries that our witnesses

> may perform, the ultimate responsibility to come to the necessary findings of fact rests with the Court and when the case is not tried with the help of jurors, this responsibility is undivided and complete. The term "evidence" is defined in the Evidence Act to include oral and documentary evidence and out of the two categories more weight is attached to the documentary evidence for the unfortunate reason that men may perjure but documents may not. The definitions of the words "proved" and "disproved" however do not make the findings of the Court dependent upon "evidence" alone. The authors of the Evidence Act in their wisdom did not mention the term "evidence" while defining the words "proved" and "disproved" and according to the definition of the term "proved", a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". The definition of the word "disproved" proceeds on similar lines. The Court is therefore not bound to look for its findings on the "evidence" alone as defined in the Evidence Act, but has to see to the high probabilities regarding the existence or non-existence of a fact after considering "the matters before the Court". (Emphasis added)

22. The totality of evidence produced by the plaintiff bank on balance of probabilities proved, that defendant No.1 duly availed the FATR facility and that the amounts thereunder were also disbursed at the specific requests made by it from time to time. The defendants while

categorically denying the availing of the FATR facility on their turn chose not to adduce any evidence, oral or documentary, to rebut the version of the plaintiff bank. The learned counsel for the defendants before the local commission appointed by this Court recorded his statement on 19.04.2019 to the effect that the burden of proof of none of the issues is on the defendants and as such the defendants shall not lead evidence. He simply referred to the fact that the concise statement of account was not a statement of account and that the mode of payment to the other banks by the plaintiff bank has not been proved and closed the right of the defendants to lead evidence.

23. On the basis of available evidence, it is the considered opinion of this Court that the plaintiff bank has succeeded in proving that defendant No.1 was availing the import bill facility from Silkbank Limited and Barclays Bank PLC Pakistan and that the amounts of the said bills were repaid through the proceeds of the FATR facility availed from the plaintiff bank at the request of defendant No.1. The disbursal of amounts and entries of the statement of account thus stood proved.

24. It may relevantly be pointed out that the corporate guarantee by defendant No.9 was provided in terms of Master Finance Agreement dated 08.03.2011 (Exh.P-2) which was executed, *inter alia*, in respect of FATR facility. The corporate guarantee itself was executed on 20.06.2011 much after the execution of Master Finance Agreement dated 08.03.2011. Defendant No.9 does not dispute the furnishing of the corporate guarantee. This fact itself militates against the stance of the defendants that they did not avail the FATR and RF facilities.

25. For what has been stated above, Issue No.1 is decided in favour of the plaintiff bank and it is held that amount of

Rs.378,108,177.30 is due against the defendants under the FATR facility.

Issue No.2 (Whether the plaintiff bank is entitled for the mark up of the running finance facility? OPP)

26. The learned counsel submits that the statement of mark up under RF facility (Exh.P-10) is available at pages 2378 to 2385 and that the outstanding mark up as at 30.03.2012 reflected therein comes to Rs.12,600,335.37. It is stated by the learned counsel that he has instructions to claim this amount and to relinquish the rest of the amount of mark up. At this juncture, learned counsel for the defendants points out that the title of the statement of account is "Current Account" and it cannot be construed as statement of RF account. The submission so made by learned counsel for the defendants is not tenable. The title appearing on the statement of account cannot determine its nature. The statement of account contains only mark-up entries and PW-1 in his evidence clearly stated that this is the statement of mark-up account. No question was put to him in this regard by the defendants. The plaintiff has accordingly proved the statement of mark up account which reflects the outstanding balance of Rs.12,600,335.37 which is due as mark up under the RF facility. This issue is accordingly decided in favour of the plaintiff bank and against the defendants with the result that an amount of Rs.12,600,335.37 is found to be due towards the defendants under the RF facility.

Issue No.3 (Whether this Court has territorial jurisdiction over defendant No.9 and whether a decree could be passed against him by this Court? OPD

27. The plaintiff bank submits that although the corporate guarantee (Exh.P-8) was executed at Karachi, this Court has the jurisdiction by virtue of the law laid down in the case of High Noon Textile Limited etc v. Saudi Pak Industrial and Agricultural Investment Company (Pvt.) Limited and four others **2010 CLD 567**. It is also contended that the plaintiff bank has a joint cause of action against all the defendants which cannot be split in view of the provisions contained in Order II Rule 2 CPC.

28. The authority of this Court to entertain and adjudicate upon the case in respect of the corporate guarantee was challenged by defendant No.9 on the ground that this Court lacked the territorial jurisdiction. In support of his contention, the learned counsel submitted that defendant No.9 being a body corporate has its place of business exclusively at Karachi and that the corporate guarantee was also executed at Karachi. The Corporate Guarantee, it is contended, also stipulated that the Courts at Karachi shall have exclusive jurisdiction over the subject matter of the guarantee. Reliance in this regard is placed on the case of State Life Insurance Corporation of Pakistan v. Rana Muhammad Saleem **1987 SCMR 393** which was followed in the case Messrs Kadir Motors (Regd). Rawalpindi v. Messrs National Motors Ltd., Karachi and 3 others **1992 SCMR 1174**. It is stated that the law laid down in *High Noon's* case is distinguishable from the facts of the present case. In order to counter the plaintiff bank's contention about splitting of cause of action, it is argued that the cause of action against defendant No.9 is based upon an independent contract on which a separate suit can be founded. The Explanation to Order II Rule 2 CPC, it was argued, is not applicable to the present case as the Corporate Guarantee does not come within the ambit of "collateral security". Learned

counsel for defendant No.9 states that the plaintiff bank relied upon two Finance Agreements (Exh.P-2 and Exh.P-5) executed on 08.03.2011 and 07.07.2011 respectively. PW-1, it is alleged, categorically stated that the amount under the FATR facility was disbursed under finance agreement dated 08.03.2011 (Exh.P-5) whereas the corporate guarantee (Exh.P-8) was executed in relation to finance agreement dated 07.07.2011 (Exh.P-5). It is accordingly contended that the corporate guarantee executed by defendant No.9 stood discharged. An alternate submission is made to the effect that if any liability of defendant No.9 is made out the same cannot exceed 50% of the liability of defendant No.1 under finance agreement dated 08.03.2011 (subject to maximum liability of Rs.385 Million).

29. We may now deal with the first limb of the argument put forward by defendant No.9 regarding the territorial jurisdiction of this Court. In this connection, it would be useful to analyze what was held by the Supreme Court in *State Life Insurance* case. The issue in the said case related to the insurance contract between the parties according to which the civil courts at Lahore would have jurisdiction on a dispute arising out of the said contract. The objection to the jurisdiction raised by the insurance company was repelled by the civil court as well as this Court and consequently the matter went before the Supreme Court which laid down the law that where two or more courts have jurisdiction to try a suit, the agreement between the parties for holding trial by any such court will not violate the public policy or contravene the provisions of the Code of Civil Procedure provided that court would otherwise also have jurisdiction under the law over the parties and subject matter of the contract.

30. The *State Life Insurance* case involved a bilateral contract between the insurance company and the insured. In the present case, what is in issue is the contract of guarantee that necessarily envisages a pre-existing principal debtor and as such it involves three parties namely the creditor, the principal debtor and the surety in terms of section 126 of the Contract Act. This provision states that a contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. A contract of guarantee, therefore, requires concurrence of three persons namely the principal debtor, the surety and the creditor. Where a guarantor furnishes its guarantee at the request of the principal debtor, there is an implied agreement between principal debtor and guarantor that the latter should be indemnified in respect of its liability toward the creditor. The law laid down in the case of *State Life Insurance* is only applicable to cases in a bilateral contract and as such it is not applicable to the peculiar facts of this case. This aspect of the matter shall be dealt with in detail in the succeeding paragraphs.

31. The necessary question to be answered is whether the facts alleged in this case present a unified and joint cause of action and if so whether splitting of cause of action is permissible and whether a separate suit could be founded on the cause of action the plaintiff bank has against defendant No.9. This question can be approached from several angles.

32. The corporate guarantee (Exh.P-8) was admittedly furnished by defendant No.9 in respect of Finance Agreement dated 08.03.2011 (Exh.P-2) to which it made a specific reference. The corporate guarantee has its genesis in Finance Agreement dated 08.03.2011 which was executed in respect of both the RF and FATR facilities. The corporate guarantee was thus one of the securities furnished in respect of FATR and RF

facilities. The plaintiff bank was entitled to make demand on all the defendants for payment of the outstanding amounts under the FATR and RF facilities and in consequence of their default could file the suit against all of them. The learned counsel for defendant No.9 accepts this proposition but submits that the suit against defendant No.9 alone ought to have been filed at Karachi. This Court put the query to the learned counsel whether defendant No.1 being the principal debtor would be impleaded as a party in case a separate suit is filed at Karachi against defendant No.9 to which he replied in negative by stating that only the suit against defendant No.9 shall suffice. This Court does not agree with the stance of defendant No.9. Defendant No.1 being the principal debtor would be a necessary party to the suit if one were to be filed at Karachi for enforcement of the corporate guarantee.

33. The existence of a debt is a *sine qua non* for an action against the surety even if it is separately and independently brought against it. In other words, the foundation or basis of the claim even in the suit against the surety is the liability of the principal debtor. Supposing in an action for enforcement of debt against the surety the defence put up is that there is no default on the part of principal debtor then how would the court adjudicate upon the matter in the absence of latter. If the contention of the learned counsel is accepted that the action against defendant No.9 could only be brought before the courts at Karachi, the presence of defendant No.1 would be necessary to establish its liability under Finance Agreements dated 08.03.2011 and 07.07.2011. In such a case, there will have to be instituted two suits; one at Lahore and the other at Karachi and in both the suits defendant No.1 will be a party. And what if both the courts seized of the matter arrive at divergent verdicts in respect of the liability of defendant No.1. These

questions, to which there is no plausible answer in the precedents, would naturally crop up if a suit against defendant No.9 were to be filed at Karachi. Moreover, defendant No.1 shall be vexed twice for the same cause of action, a mischief against which the provisions of Order II Rule 2 CPC were incorporated.

34. The learned Sindh High Court in the case of National Construction Limited v. Standard Insurance Co. Limited **1984 CLC 286** while expounding the principle contained in section 128 of the Contract Act viz., the liability of a surety is co-extensive with that of the principal debtor held as follows:

> 9. This expression clearly means that in the first instance the existence of a liability must be established. The liability cannot occur until there is a default or failure or beach on the part of the principal debtor. Once such a failure is established, the creditor's right or cause of action is born and a right for claiming a relief has accrued. From this point of time and not before this, the creditor has a right to pursue his remedy against both the principal debtor as well as against the surety. Now it is his choice to sue both in one action, to first seek a redress against the principal debtor and failing there chase the guarantor or directly launch an action against the guarantor totally by-passing the principal debtor. If he chooses to adopt the last of the three courses it would be no defence in such an action to plead that the creditor ought to have first exhausted his remedies against the principal debtor. It is in this context that the expression "the liability of a surety is co-extensive with the principal debtor" is freely and so frequently used. (Emphasis added)

35. There is yet another aspect of the matter relating to clause 11 of the corporate guarantee (Exh.P-8) on which this issue can be decided. The stipulation in clause 11, which is one of the payment covenants, reads as under:

> Our obligations under this Guarantee shall be joint and several, notwithstanding anything to the contrary, which may be construed from this Guarantee.

The joint and several arrangements envisaged by clause 11 meant that defendant No.9 undertook to repay the liability under the FATR and RF facilities jointly with the defendants and made a separate undertaking to repay the same individually. A "joint and several" contract is a contract with each promisor and a joint contract with all, so that parties having a joint and several obligations are bound jointly as one party, and also severally as separate parties at the same time [see *Williston on Contracts* § 36:1 (4th ed.)]. In the case of a joint liability of two or more persons arising under a contract there is only one obligation, and they are each liable for the performance of that obligation. A stipulation of joint and several liability in a contract of suretyship is for the benefit of the creditor which can demand payment in accordance with the terms of the instrument for performance of the obligation from any one or a combination of the promisors. The principle of joint and several liability, which has its genesis in section 43 of the Contract Act, dictates that in the event of default the creditor may opt for an action joining the promisors together or to pursue either of them individually at its choice. A plaintiff who has obtained judgment against several co-defendants who are jointly and severally liable can take execution proceedings against any one of the co-defendants, or any combination of them or all of them. The legal characterization of the relationship between the parties under a joint and several arrangements is important but perhaps more significant is the nature of the remedy available for breach of obligation. The key difference between joint and several liability relates to the remedy and by extension the

mechanics of suing for liability. Put another way, the distinction between 'joint' and 'several' obligations is primarily remedial and procedural in nature [Restatement (Second) of Contracts § 288]. If liability is joint, the plaintiff shall have to bring a single action against all who share liability in the same proceeding. If liability is joint and several, the plaintiff has the option to bring actions against the defendants separately. The Court can of course order to join other persons who share liability if their participation is necessary in the proceedings, which aspect of the matter regarding the principal debtor has already been discussed above. Defendant No.9 voluntarily chose to be jointly liable with the defendants who were all residing within the territorial jurisdiction of this Court thereby allowing the plaintiff bank to join it as a party in its action against the defendants for seeking payment of the amount of the FATR and RF facilities subject to the terms of the corporate guarantee. Any defence by defendant No.9 requiring a separate action against it for recovery of claim for money would defeat the stipulation contained in clause 11 of the corporate guarantee and would render it superfluous which is not permissible. In the opinion of this Court, the language in which clause 11 is couched (*notwithstanding anything to the contrary, which may be construed from this Guarantee*) grants it precedence over the jurisdiction clause of the corporate guarantee.

36. The issue can also be resolved by looking at the provisions of the Code of Civil Procedure which are attracted to the facts of the present case.

37. Order I of the Code of Civil Procedure, 1908 deals with parties to the suit. Rule 1 is concerned with persons who may be joined as plaintiffs whereas Rule 3 deals with persons who may be joined as defendants. It reads as under.

> **3. Who may be joined as defendants.--** All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

Order I Rule 9, on the other hand, stipulates that no suit shall be defeated by reason of misjoinder or non-joinder of parties. This provision reads as under.

> **9. Misjoinder and nonjoinder.--** No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

38. The most relevant provision is Order II CPC. Its Rule 2 reads as under:

> **2. Suit to include the whole claim.** - (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) **Relinquishment of part of claim.** -Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) **Omission to sue for one of several reliefs.** -A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

> **Explanation. -** For the purposes of this rule an obligation and collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Similarly, Rule 3(1) of Order II which deals with joinder of causes of action stats that "*Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly in the same suit.*"

39. The present suit for recovery of amounts under FATR and RF facilities would necessarily include the enforcement of the corporate guarantee which forms an integral part of plaintiff's claim. That being so, the plaintiff bank was right to have arrayed defendant No.9 as a party to the suit by virtue of the afore-mentioned provisions. On the same analogy, the claim for recovery of amounts under FATR and RF facilities could not be split up by filing two suits, one at Lahore and the other at Karachi. This Court in the case of Kamila Aamir and another v. Additional District & Sessions Judge and others **PLD 2023 Lahore 601** interpreted the provisions contained in Order II Rule 2 CPC and pointedly differentiated between the terms "claim", "cause of action" and "relief" as used in that provision. In doing so, this Court extensively relied upon judgments from our jurisdiction and from foreign jurisdictions. The relevant portions of the judgment are reproduced hereunder

> 15. ……. This Court shall not make an attempt to define the term cause of action in recognition of the fact that the scope thereof is vague and that it must be applied broadly to carry out the functions of the Code which are designed to achieve convenience and

efficiency in trial of the suits. This policy of the Code is indubitably brought forth by Order II Rule 1 according to which all matters in dispute between the parties relating to the same transaction be disposed of in a single suit……..

17. Order II, Rule 2 requires that a plaintiff must join all claims arising from the same set of facts in a single proceeding instead of bringing successive actions. The bar contained in the rule is against splitting the claim in respect of the cause of action and not the cause of action itself……..

19. The rule prevents the plaintiff from splitting the claims and the reliefs which are based on the same cause of action with the aim that a single cause should not be segregated among several suits. The objective appears to safeguard against the defendant being vexed twice in respect of the same cause of action underpinning the claim. In case of omission to sue or intentional relinquishment of a claim, the rule places a bar on bringing a subsequent action in regard thereto. Similarly, the rule compels a plaintiff to sue for all reliefs arising from the same cause of action and in case of his omission to do so he shall be barred from that relief in a subsequent suit except where he took the leave from the court.

25. The principle underlying Order II CPC cannot be properly grasped without considering the principle of joinder of parties and joinder of causes of actions. The two suits filed by the petitioners involved joinder of plaintiffs and defendants. The provisions of Order I Rules 1 and 3 provide guidelines for who may be joined as plaintiffs and defendants…….Rule 3 is a similar provision regarding the joinder of defendants…These

> provisions illustrate that two or more causes of action and remedies may now be secured in a single action and by extension making it permissible for joinder of parties. The rule of joinder of parties and causes of actions informs that any narrow interpretation limiting the scope of cause of action to a single legal claim may limit or even prevent the effective operation of these provisions.
>
> 26. It can thus be seen that the Code provides a fairly liberal regime for joinder of parties and causes of action. The Code made these provisions not on account of any problem relating to pleading rather what was aimed at was that all the matters at issue between the parties or set of parties should be settled as shortly and speedily as possible through one action. (Emphasis Supplied)

40. The law settled by this Court in the afore-mentioned judgment is fully applicable to the facts of the present case. Even if the contract of guarantee by its terms makes the guarantor not jointly liable and the cause can be said to be separate the creditor can bring an action by joining the principal debtor and surety as defendants.

41. The explanation to Order II Rule 2 CPC stipulates that an *obligation* and a *collateral security for its performance* and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action. "Collateral" is a term of art and its meaning is well understood generally and in the context of banking. A collateral simply means "….a valuable asset that a borrower pledges as security for a loan" (see https://www.investopedia.com/terms/c/collateral.asp). In *Bank of Bihar Ltd. v. Damodar Prasad and another* [1969] 1 SCR 620, the Indian Supreme Court was

dealing with the question whether the execution of decree against surety can be postponed till after exhaustion of remedies against principal debtor. The following observations notably held the guarantee to be a collateral security.

> It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under Section 140 of the Indian Contract Act, and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down. (Emphasis added)

Going by the Explanation to Order II Rule 2 CPC, the corporate guarantee executed by defendant No.9 is included in, and constitutes part of, the single cause of action to the extent the plaintiff bank seeks to enforce its claim under FATR and RF facilities against all the defendants.

42. The upshot of the above discussion is that the suit for recovery of amounts due under FATR and RF facilities would necessarily include the enforcement of the corporate guarantee (Exh.P-8) being an integral part of the claim of the plaintiff bank. The plaintiff bank rightly filed the present suit under the law against defendant No.9 as the facts of the case presented a joint cause of action against all the defendants in respect to the claim under the FATR and RF facilities. The plaintiff bank by the provisions of Order II Rule 2 CPC was precluded from splitting the claim which had its foundation in a joint cause of action against all the defendants. Moreover, the Explanation to Order II Rule 2 CPC also supports the case of the plaintiff

bank in treating the cause of action against all the defendants as unified and joint.

43. Defendant No.9 also pleaded discharge of its obligations by stating that the corporate guarantee was executed in respect of finance agreement dated 08.03.2011 whereas the amounts under the finance facilities were disbursed under Finance Agreement dated 07.07.2011. This stance of defendant No.9 is found to be not tenable by having a cursory look at clauses 1 and 3 of the corporate guarantee which have the effect of making it a continuing guarantee. The liability undertaken by defendant No.9 under the terms of corporate guarantee, therefore, did not come to an end by execution of Finance Agreement dated 07.07.2011.

44. Section 128 of the Contract Act stipulates that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. The word "coextensive" in section 128 refers to the extent to which the surety is liable towards the creditor and simply means that surety shall not be liable for more than what is due from the principal debtor. This provision, however, recognizes that surety may impose limits on restricting its liability by entering into a special contract. In the present case, the corporate guarantee limits the liability of defendant No.9 by way of the following stipulation.

> AND WHEREAS, in consideration of your having at our request extended/agreed to extend the Facilities to the Customer, we hereby guarantee to you repayment within four days from demand of all outstanding Facilities and/or all amounts due and payable to you by the Customer up to a maximum amount of Rs.385,000,000/- plus fees, charges, expenses, costs and liquidated damages as may be provided in the Finance Agreement dated March 08, 2011.

> AND WHEREAS the obligations under this corporate guarantee of M/S. VMFG (Private) Limited will be 50% of the total amounts due and payable by the Customer to you.

The corporate guarantee clearly provided for a contract to the contrary and the liability of defendant No.9 was not co-extensive with that of defendant No.1 as it was restricted to "*50% of the total amounts due and payable..*" The arguments put forward by defendant No.9 that its liability is restricted by the terms of the corporate guarantee is plausible.

45. In the result, this issue is decided against defendant No.9 and it is held that the suit against defendant No.9 is maintainable before this Court. The liability of defendant No.9 under the FATR and RF facilities is declared to be restricted up to 50% of total claim the plaintiff bank has against the defendant No.1. This Court has already passed the decree on 02.11.2017 in the sum of Rs.108,487,916/- against the defendants in respect of principal of RF facility. The amount for which decree is now being passed exceeds Rs.385 Million and as such it is held that defendant No.9 owes Rs.192.500 Million to the plaintiff bank on the terms mentioned in the corporate guarantee (Exh.P-8).

46. Learned counsel for the defendants also argued that the personal guarantees of defendants No.1 to 8 were not tendered in evidence and as such no decree can be passed against the said defendants. By the same token, it is asserted that the interim decree too needs to be modified by this Court. This argument is fallacious and has no basis. This Court after hearing the arguments of the parties at the leave stage passed the decree against defendants No.1 to 8, jointly and severally, on 02.11.2017. This decree against defendant No.2 to 8 was passed obviously on the basis of their personal guarantees. It is

apparent from the tenor of order dated 02.11.2017 that the defendants did not raise any dispute regarding the due execution of their personal guarantees as alleged in the plaint. In terms of section 11 of the Ordinance, if the Court is of the opinion at the leave stage 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. This provision implies that the dispute on which leave shall be granted must be specified in the leave granting order and that evidence shall only be adduced by the parties on the disputed question of fact. This Court, however, made no observations in order dated 02.11.2017 with regard to the execution of the personal guarantees. The issues framed by this Court on 07.03.2018 do not pertain to the personal guarantees of defendants No.2 to 8. The due execution of the personal guarantees by defendants No.2 to 8 is thus an admitted fact. In the circumstances, the contention of the defendants regarding their personal guarantees is not tenable.

47. For what has been discussed above and the findings rendered on the issues, the plaintiff bank has proved its case against the defendants for recovery of amounts under FATR facility and the mark-up under the RF facility in addition to the decree that has already been passed on 02.11.2017.

48. In the result, a decree is hereby passed in favour of the plaintiff bank and against defendants No. 1 to 8 in the sum of Rs.390,708,512.67 and against defendant No.9 in the sum of

Rs.192,500,000/-, jointly and severally. The cost of funds are granted in terms of section 3 of the Ordinance. Costs of suit are also granted. This decree shall be in addition to the decree that has been passed on 02.11.2017.

49. The suit is converted into execution by force of section 19 of the Ordinance. Office shall put the file of the execution before this Court after expiry of 30 days. The plaintiff bank shall also file the Fard Taaliqa.

(Shams Mehmood Mirza)
Judge

Announced in open Court on 13.05.2024**.**

Judge

Approved for reporting.

Judge

Ihsan