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**Judgment Sheet**

**IN THE LAHORE HIGH COURT LAHORE  
JUDICIAL DEPARTMENT**

Case No: COS No.128/2012

**Gulistan Textile Mills          Versus          Askari Bank Ltd., etc.  
Ltd.**

**JUDGMENT**

Dates of hearing	26.12.2012 and 27.12.2012
Plaintiff by	M/s. Salman Butt, Munawar-us-Salam and Shahzad A. Elahi, Advocates.
Defendants by:	M/s Mansoor Ali Ghangro and Serjeel Mowahid, Advocates for Askari Bank Limited/defendant No.1. Barrister Hassan Nawaz, Advocate for Habib Metropolitan Bank Limited/defendant No.2 M/s Salman Akram Raja and Barrister Haroon Dugal, Advocates for Bank Al-Falah Limited/defendant No.17 in COS No.128/2012, for defendant No.13 in COS No.129/2012 for defendant No.10 in COS No.133/2012 and for defendant No.11 in COS No.134/2012. Mr. Imtiaz Rasheed Siddiqui and Barrister Shehryar Kasuri, Advocates for KASB Bank/defendant No.13 and 31 in COS No.128, for respondents No.10 and 22 in COS No.129/2012, for defendants No.8 and 14 in COS Nos. 133 and for defendants No.8 and 17 in COS No.134/2012. Mr. Akhtar Javaid, Advocate for Bank of Khyber/ defendant No.5 in COS No.128/2012. Mr. Muhammad Akram Pasha, Advocate for Burj Bank Limited/defendant No.16 in COS No.128/2012, for defendant No.12 in COS No.129/2012 and for defendant No.10 in COS No.134/2012. Mr. Ashar Elahi, Advocate for defendant No.23 in COS No.128/2012, for defendant

Mrs.

	<p>No.17 in COS No.129/2012 and for defendant No.16 in COS No.133/2012.</p> <p>M/s Salman Faisal, Umer Liaqat and Ms. Farrah Malik, Advocates for NBP Leasing Limited/defendant No.28.</p> <p>Mr. Majid Ali Wajid, Advocate for Standard Chartered Bank (Pakistan) Limited/defendant No.20 in COS No.128/2012, defendant No.15 in COS No.129/2012 and defendant No.15 in COS No.133/2012.</p> <p>Mr. Arshad Nazir Mirza, Advocate for defendants No.12, 17 and 27 in COS No.128/2012, for defendants No.7, 8 and 9 in COS No.129/2012, for defendants No.5, 6 and 7 in COS No.133/2012 and for defendants No.6, 7 and 18 in COS No.134/2012.</p> <p>M/s Abdul Majeed Chohan and Imran Muhammad Sarwar, Advocates for defendants No.4, 8, 9 and 21 in COS No.128/2012, for defendants No.5,6 and 16 in COS No.129/2012, for defendant No.4 in COS No.133/2012 and for defendant No.5 in COS No.134/2012.</p> <p>Rana Haseeb Ahmad Khan, Advocate for defendant No.18 in COS No.128/2012.</p> <p>Samia Faiz Durrani alongwith Sh. Nadeem Anwaar, Advocates for defendant/First Habib Modarba.</p> <p>Mr. Muhammad Aqeel Malik, Advocate for defendant No.4 in COS No.129/2012 and 134/2012.</p> <p>Mr. Kazim Hasan, Advocate for defendants No.14, 25 and 29 in COS No.128/2012, for defendants No.18 and 20 in COS No.129/2012, for defendant No.11 in COS No.133/2012 and for defendant No.13 in COS No.134/2012.</p>
Assisted by:	Muhammad Amir Munir, Rai Muhammad Khan and Sher Hassan Parvez Research Associates, Research Centre, Lahore High Court, Lahore.

**Syed Mansoor Ali Shah, J:-** This judgment will decide the instant case, as well as, the connected cases bearing COS Nos.129/2012, 133/2012 and 134/2012.

**Facts**

2. Plaintiff has filed a suit under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (“Ordinance”) for Redemption of Security, Rendition of Accounts, Recovery of Damages, Permanent Injunction and Ancillary Reliefs against thirty one (31) different financial institutions.

3. The suit was registered and summons were issued to the defendants on 23.10.2012 who have filed their applications for leave to defend under Section 10 of the Ordinance and are before this Court today.

4. At the very outset and before examining the defense set-up in the applications for leave to defend, perusal of the plaint, *prima facie*, does not disclose any cause of action, hence it is liable to be rejected under Order 7 Rule 11 (a) of the CPC. Learned counsel for the plaintiff was asked to explain why the instant plaint should not be rejected under Order 7 Rule 11 of CPC before considering the applications for leave to defend filed by the defendants.

**Arguments of the Plaintiff**

5. Skirting the question posed by the Court, learned counsel for the plaintiff stressed that unless the applications for leave to defend filed by the defendants are heard and decided first, the plaint cannot be considered and rejected under Order 7 rule 11 of the CPC. He buttressed his argument by drawing support from two Division Bench judgments of this Court reported as Mst. Shamim Tahira and others v. Zarai Taraqiyati Bank of Pakistan Ltd. through Manager and another (2007 CLD 778) and Messrs

Multimed Marketers through Managing Partner and 7 others v. United Bank Limited through Manager (2007 CLC 344). In the end, he unpersuasively added, that the plaintiff disclosed cause of action but failed to establish the same from the contents of the plaint or the documents attached with the plaint.

6. The questions before the Court that require determination are: a) Scope and extent of powers enjoyed by the Court under Order 7 Rule 11 CPC, b). The standard of plaint required under section 9 of the Ordinance and c). The nature of *cause of action* to be disclosed in such a Plaint in the context of Section 9 of the Ordinance.

a). Power of the Court under Order 7 Rule 11 CPC.

7. Court enjoys an independent, *suo moto* and *sua sponte*<sup>1</sup> power to examine the plaint at any stage of the suit under Order 7 Rule 11, CPC. The wisdom is that a Court can always, nip a frivolous suit in the bud, by rejecting the plaint in order to retain its docket and time for more serious claims. “In the first place it contemplates that a still-born suit should be properly buried, at its inception, so that no further time is consumed on a fruitless litigation. Secondly, it gives plaintiff a chance to retrace his steps, at the earliest possible moment, so that, if permissible under law, he may found a property constituted case<sup>2</sup>.” This power is grounded in good public policy. The Court enjoys an insular power under Order 7 Rule 11 to examine the plaint, primarily on the basis of the contents of the plaint. “The averments in the plaint are germane<sup>3</sup>” and it does not matter to the Court if the defendants have been issued summons or applications for leave to defend or written statements have been filed by the defendants or even if the

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1 In law, *sua sponte* (Latin: "of their own accord.") describes an act of authority taken without formal prompting from another party.

<sup>2</sup> PLD 1967 Dacca 190 *per Murshed CJ.*

<sup>3</sup> AIR 2003 SC 759

defendants are in Court to defend their positions. The Court can proceed unilaterally against the plaintiff alone without engaging the other party (defendants) if the Court is of the view that the plaintiff is liable to be rejected. This is the inherent power of the Court which precedes the statutory obligation of the Court under Section 10(8) of the Ordinance. This nuance is fundamental to this case.

8. The division bench judgments of this Court, cited and relied by the learned counsel for the plaintiff, are easily distinguishable. The case law cited by the learned counsel has its genesis in *Waheed Corporation Case (2003 CLD 245)*. The string of judgments (cited below) since *Waheed Corporation Case*, including the ones relied upon by the learned counsel for the petitioner, settle the same point of law and have been coincidentally authored by the same Hon<sup>ble</sup> Judge<sup>4</sup> of this Court. Careful reading of *Waheed Corporation Case* reveals that its focus has been on the scope and extent of the power to be exercised by the Banking Court under section 10(8) of the Ordinance. It proceeds on the premise that the objection under Order 7 Rule 11 CPC has been raised by the defendant bank in its application for leave to defend which can only be heard once the application for leave to defend is heard and leave granted under section 10 (8) of the Ordinance. The critical underlying assumption in *Waheed Corporation Case* is that the Court did not independently view the plaintiff to be hit by Order 7 Rule 11 CPC. The nucleus of *Waheed Corporation Case* rests on a defendant-driven objection, hence it gives weight to the leave granting power of the Court Section 10(8) of the Ordinance. It does not debate the inherent *suo moto* power enjoyed by the Court under Order 7 Rule 11, CPC, which precedes the power of granting leave to the defendants. This

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<sup>4</sup>Mian Hamid Farooq. J (as he then was)

nuance is evident from the judgment, the relevant extracts of which are as under:-

“4....we find that the approach of the learned Banking Court, to say the least, in rejecting the plaint, is perfunctory and cannot be countenanced under any stretch of imagination. By passing the impugned judgment, the learned Banking Court has infact gone outside the scope of section 10(8) of the aforesaid Ordinance. Admittedly, the respondent Bank filed an application seeking leave to defend the suit, which was to be decided by the earned Banking Court, on its own merits either way....It has no where be provided under section 10 of the aforementioned Ordinance, which deals with the application to leave to defend that while hearing the application for leave to defend the suit the Banking Court is competent to straightaway reject the plaint....

7.....Undoubtedly, after the grant of leave and treating the leave application as written statement, the respondent Bank was within its rights to have filed an application under Order VII Rule 11, C.P.C and if the Court reached the conclusion that the case falls under any of the clauses of the Order VII, rule 11 C.P.C, of course, plaint could have been rejected, but in no way before the grant of leave to defend the suit.”

9. On the whole, *Waheed Corporation case*, proceeds on the basis that an objection is being raised under Order 7 Rule 11 CPC before the Banking Court by the defendant through the application for leave to defend and on the assumption that the Court does not independently view the plaint to be liable to be rejected under Order 7 Rule 11. Second, the judgment does not rule out or debate the exclusion of the exercise of *suo moto* power of the Court under Order 7 Rule 11 of CPC in appropriate cases. Third, it places reliance on a single bench judgment of the Sind High Court in *Platinum Insurance Company case (1997 MLD 2394)* which deals with a suit filed under Order 37 Rules 1 & 2 CPC for recovery of money on the basis of a negotiable instrument. Application for

leave to defend, in the said case, raised triable issues and during the course of arguments an objection was raised by the defendants that the suit is not maintainable in its present form (without any mention of Order 7 Rule 11 or the grounds thereunder). The Court held that such an objection cannot be entertained unless the application for leave to defend is decided first. Surprisingly, the head-note relied upon and quoted from the *Platinum Insurance Company case* in *Waheed Corporation case* does not find mention in the actual judgment. The head-note and the relevant paragraph in the *Platinum Insurance Company case* are reproduced hereunder for ready reference and for future record:-

Headnote

“O.XXXVII, R.3--- Suit in summary jurisdiction---Court before grant of leave to defend suit could neither dismiss suit, nor reject plaint, nor pass any adverse order against plaintiffs on objection/assertions of defendant---Such question, however, could be considered at final hearing of suit---No case was made out for grant of unconditional leave---Defendants were, however, granted leave to defend suit subject to furnishing bank guarantee in suit amount within specified period. [p.2397] D”

Relevant extract of the Judgment

“8. It was then vehemently urged that the suit as framed is not maintainable and liable to dismissal but I would refrain from expressing any opinion as this is not a proper stage for adjudicating upon this controversy. Needless to say in the absence of grant of leave to defend the suit defendants are not entitled to raise such issue at this premature stage of the suit. They would be at liberty to agitate all grounds and contentions in their written statement after they are granted leave to defend the suit. At the moment, they are out of Court and not entitled to question the maintainability of suit on factual grounds, which is otherwise not barred.” (*emphasis supplied*)

10. The string of division bench judgments are, therefore, distinguishable and proceed on the same assumption as taken in *Waheed Corporation case: Falcon Ventures Pvt. Ltd. through Chief Executive, Iftikhar Ahmad v. Punjab Banking Court No.II, Lahore and another (2004 CLD 726), Sheikh Muhammad Kashif v. Askari Leasing Limited through Manager/Chief Executive of*

Branch/Recovery Officer (2004 CLD 1645), Manzoor Ahmad and another v. Agricultural Development Bank of Pakistan through Manager Nankana Sahib Branch and 3 others (2005 CLD 653), Muhammad Azwar Siddiqui v. Chief Executive Union Leasing Ltd. and 21 others (2006 CLD 946) Mst. Shamim Tahira and others v. Zarai Taraqiyati Bank of Pakistan Ltd. through Manager and another (2007 CLD 778) and Messrs Multimed Marketers through Managing Partner and 7 others v. United Bank Limited through Manager (2007 CLC 344).

11. The difference between the exercise of powers of the Court under Order 7 Rule 11 CPC and Section 10(8) of the Ordinance is distinct and important. The above judgments and section 10(8) of the Ordinance do not rule out the exercise of the independent, insular and *suo moto* power of the Court under Order 7 Rule 11 CPC. The Court has a primary obligation to examine the plaint and reject it, *inter alia*, if it does not disclose a *cause of action*. This power can be exercised at any stage of the suit. It matters little, if application for leave to defend or written statement, have been filed by the defendant. It cannot be over-emphasized that the power of the Court under Order 7 Rule 11 CPC read with section 7(2) of the Ordinance, precedes and prevails over the power of the Court under section 10(8) of the Ordinance. Reliance with advantage is placed on the settled view of the superior courts in Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited (PLD 2012 SC 247), Jewan and 7 others v. Federation of Pakistan through Secretary, Revenue, Islamabad and 2 others (1994 SCMR 826), Haji Allah Bakhsh v. Abdul Rehman and others (1995 SCMR 459), S.M. Shafi Ahmad Zaidi through Legal Heirs v. Malik Hassan Ali Khan (Moin) through Legal Heirs (2002 SCMR 338), Pakistan Agricultural Storage and Services Corporation Ltd. v. Mian Abdul Latif and others (PLD 2008 SC

371), *Bank Alfalah Limited v. Iftikhar A. Malik* (2003 CLD 363), *ARY Traders (Pvt.) Ltd. v. Muslim Commercial Bank Ltd.* (2003 CLD 1601), *Raja Ali Shan v. Messrs Essem Hotel Limited and others* (2007 SCMR 741), *Abdul Rehman v. Sher Zaman and another* (2004 CLC 1340), *Saleem Bhai and others v. State of Maharashtra and others* (AIR 2003 SC 759), *Samar Singh v. Kedar Nath and others* (AIR 1987 SC 1926), *I.T.C. Limited v. Debts Recovery Appellate Tribunal and others* (1998) 2 SCC 70), *P.R. Sukeshwala and another v. Dr. Devadatta V.S. Kerkar and another* (AIR 1995 BOMBAY 227) and *Burmah Eastern Ltd v. Burmah Eastern Employees' Union & others* (PLD 1967 Dacca 190).

**b). Standard of Complaint under section 9 of the Ordinance.**

12. Complaint filed in a regular suit has to meet the standards of "pleadings" and "complaint" given under Orders 6 and 7 of the Civil Procedure Code, 1908. Complaint under the Ordinance, however, has a special format, requiring a higher standard of precision. The complaint under the special law has to be tailored strictly in accordance with the statutory standards set-out given in section 9 of the Ordinance i.e., the Complaint must bring to the Banking Court a dispute between the "financial institution" and the "customer" only. It must arise out of the contractual relationship indicating default in fulfillment of any „obligations“ of "Finance." It must indicate the contractual breach which is to be monetized and reflected in the Statement of Account (certified<sup>5</sup> in case of a financial institution) which has to accompany the complaint. In addition, the complaint can carry a claim for damages if it arises out of the Finance Agreement between the parties but not tortious claims simpliciter. Such is the standard required of a complaint in a banking suit under section 9 (1) and (2) of

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<sup>5</sup> under the Bankers' Books Evidence Act, 1891.

the Ordinance, which is reproduced hereunder for ready reference:-

“9. Procedure of Banking Courts.—(1) Where a customer or a financial institution commits a default in fulfillment of any obligation with regard to any finance, the financial institution or, as the case may be, the customer, may institute a suit in the Banking Court by presenting a plaint which shall be verified on oath, in the case of a financial institution by the Branch Manager or such other officer of the financial institution as may be duly authorized in this behalf by power-of-attorney or otherwise.

(2) The plaint shall be supported by a statement of account which in the case of a financial institution shall be duly certified under the Bankers Books Evidence Act, 1891 (XVII of 1891), and all other relevant documents relating to the grant of finance. Copies of the plaint, statement of account and other relevant documents shall be filed with the Banking Court in sufficient numbers so that there is one set of copies for each defendant and one extra copy.” (*emphasis supplied*)

The “cause of action” to be pleaded in a plaint under the Ordinance must be fashioned to meet the above requirements. Narration of general allegations of breach without reference to the Finance Agreement or allegation of damages without any monetized quantification of the damage caused or absence of reference to the precise violation of the finance agreement (indicating the relevant clause) does not constitute a plaint that meets the standard of section 9 of the Ordinance.

13. Any such narration of facts also fails to muster the *cause of action* required under the Ordinance. A non-actionable plaint is a non-starter. In the interest of administration of justice and good judicial governance, it is best if such a plaint, which does not disclose a cause of action is removed from the docket of the Court at the earliest. Reliance is placed on *Nasimuddin Siddiqui and another v. United Bank Limited and others* (1998 CLC 1718), *Citi Bank N.A. v. Syed Shahansha Hussain* (2009 CLD 1564), *Apollo Textile Mills Ltd. and others v. Soneri Bank Ltd.* (2012 CLD 337)

and *M/s. United Bank Ltd., Karachi v. M/s. Mohibali Tannery Ltd., Karachi and 8 others* (PLD 1994 KAR 275).

**c). Nature of “cause of action” in a plaint filed under section 9 of the Ordinance.**

14. Cause of action is the foundation of a law suit and is the “totality of material facts which it is necessary for the plaintiff to allege and prove in order to succeed<sup>6</sup>.” “The elements of a cause of action are: first, the breach of duty owing by one person to another; second the damage resulting to the other from the breach.”<sup>7</sup> „The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse<sup>8</sup>.” “The test of cause of action is that if what the plaintiff states is taken to be correct does it entitle him to a relief or not in law.<sup>9</sup>” “It means the infringement of the right which furnishes occasion for the action.<sup>10</sup>” It must be antecedent to the institution of a suit and on the basis of it the suit must have been filed. If a plaint does not disclose a cause of action, a Court will reject such a plaint. Plaint must, therefore, be pregnant with a lawful *cause of action* for the suit to progress and fructify.

15. It would be meaningless and futile to proceed with the suit if the Court upon examination of the plaint finds it to be devoid of cause of action. “The whole purpose of the conferment of such powers<sup>11</sup> is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court...<sup>12</sup>” Such a plaint must be nipped in the bud. A

<sup>6</sup> PLD 1959 SC 356

<sup>7</sup> (2004) 3SCC 277

<sup>8</sup> *ibid.*

<sup>9</sup> 1991 SCMR 2030

<sup>10</sup> 2000 CLC 63

<sup>11</sup> Order 7 Rule 11 CPC

<sup>12</sup> In 1986 Supp SCC 315 and (1998) 2 SCC 70

still-born plaint must be buried at the very inception, so no further time is consumed in fruitless litigation<sup>13</sup>. There is no need to burden the docket of the Court or draw upon the limited time resource of the Court or unnecessarily allow litigants through a futile litigative process. It is, therefore, obligatory on the Court to judicially assess (ideally at the very beginning) if the plaint discloses a „cause of action“ and if it doesn“t to reject the same without further ado.

16. What is then the nature of the “cause of action” in a plaint filed under section 9 of the Ordinance? A plaint under section 9 must disclose a *cause of action* which spells out the “default in fulfillment of any obligation with regard to any finance.” It is for this reason that section 9(2) of the Ordinance prescribes that the plaint must be supported by statement of account, which is applicable to both the parties i.e., customer and the financial institution. There is an additional requirement for the financial institution to get their statement of account certified under the Bankers“ Books Evidence Act, 1891. The requirement of the Statement of Account is to quantify the default complained of under the Finance Agreement(s) entered between the parties. The default or breach, arising out of the contract between the parties or in fulfillment of any obligation with regard to any finance, must be numerically quantified and reflected through the Statement of Account. Section 9(2) further states that the plaint shall be supported by all other relevant documents relating to the grant of finance.

17. With the above standard of plaint required under the Ordinance, perusal of the instant plaint brings into sharp focus the glaring absence of cause of action. The prolix pleadings of the plaintiff lack specificity required of a plaint under the Ordinance.

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<sup>13</sup>PLD 1967 Dacca 190

The plaint, filed by a customer, allegedly carries a cause of action against thirty one (31) financial institutions, who have been arrayed as defendants in a single suit. Naturally, each of them (allegedly) enjoy an independent financial relationship with the plaintiff (as this is not a case of consortium financing). The „bundle of facts“ narrated in the plaint miserably fail to refer to a single Finance Agreement or to the breaches arising out of 31 Finance Agreements. It is, therefore, not surprising that the plaint is not supported by a Statement of Account or 31 different Statements of Account, quantifying the alleged defaults/breaches with regard to finance. The plaint quite inconsequentially narrates past business achievements of the plaintiff company and the consequence of post 9/11 era on Pakistan“s economy. The contents of the plaint narrates a rambling account of events which is conspicuously silent regarding the finance availed, the finance agreements entered between the parties or the breach thereof. There is no statement of account to make a quantified identification of the breach committed by each defendant. There is a general reference to the signing of “blank forms” in the plaint, but does not specify any details or consequences of having signed them. It also fails to mention whether the blank forms led to a contractual relationship between the parties relating to finance. The instant plaint is a text-book case of a vague, generalized, unspecific and a vexatious plaint. The alleged *cause of action* does not constitute a *cause* required of a plaint that necessitates an *action* under the Ordinance against the defendants. Even if the contents of the plaint are accepted to be correct the prayer made by the plaintiff cannot be granted. The plaint, therefore, hopelessly lacks *cause of action*.

18. In view of the above submissions, the plaint is rejected under Order 7 Rule 11 CPC as it fails to disclose any cause of

action. In this view of the matter there is no need for this Court to consider the applications for leave to defend filed by the defendants.

(Syed Mansoor Ali Shah)  
Judge

*M. Tahir\**

Announced on \_\_\_\_\_2013.

Judge

**APPROVED FOR REPORTING**