Form No: HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT,
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

RFA No.249/2023

M/s Pakistan Railways Advisory & Consultancy Services **Versus** Al-Barka Islamic Bank Ltd.

S.No. of order/ proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties of counsel, where necessary

17.03.2025 Mirza Anwar-ul-Haq, Advocate for the appellant.

Instant Regular First Appeal (**appeal**) in terms of Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 ('**Ordinance, 2001**') is directed against the judgment and decree dated 07.12.2022, whereby, suit seeking recovery of Rs.2,710,924/-, instituted by appellant under Section 9 of the **Ordinance, 2001**, was dismissed. We are deciding this **appeal** without considering the need to seek representation of the respondent.

2. Facts, essential for adjudication of **appeal**, are that acting upon representations of the appellant entity the respondent, *inter alia*, extended various finance facilities, however for the purposes of present appeal facility in shape of Advance Payment Guarantee (the '**guarantee**') for USD 800,000/-, valid till 09.03.2009, is relevant. One significant aspect was that the guarantee was issued pursuant to appellant's contract dated 10.09.2007 with the Democratic Socialist Republic of Sri Lanka – beneficiary being Secretary, Ministry of Transport, Government of Sri Lanka - for the supply of

Bogie Tank Wagons. Facility Offer letter dated 30.10.2007 contained broader terms of arrangement and was accepted. Pricing, consideration for the issuance of the guarantee, was 0.33% per quarter and repayment was within 1 ½ year. Out of pocket and incidental charges were on the appellant. The guarantee was secured through marking of lien on the fixed Pak-Rupee deposit of equivalent amount. Guarantee stood expired on reaching validity – without any encashament call. Appellant brought suit on 11.02.2013, after passing of almost four years of the expiry of the guarantee, claiming, firstly, that amount of commission charges charged, inclusive of domestic and foreign charges – since it involves HBL Colombo Sri Lanka, which furnished guarantee against the counter guarantee by the respondent [back-to-back guarantee for settling internationally enforceable arrangement] – were unwarranted and no charges were payable since effectiveness of the guarantee was subjected to the receipt of advance payment and advance payment was received on 15.09.2009, after the expiry of the guarantee. And, secondly that commission charged was excessive on the premise that quantum of advance payment was reduced from 40% of the CFR value to 20%, incidentally reducing the amount of the guarantee from USD 800,000/- to USD 400,000/-, therefore commission had to be charged on reduced amount. Reimbursement of excessively charged commission was claimed. Respondent contested alleged claim, whereupon leave to appear and defend was granted, issues framed and evidence was led. Upon conclusion of the trial, Court

dismissed the claim primarily on issue of limitation and alleged failure to establish an incidence of default of contractual obligation on the part of the respondent. Hence, this **appeal**.

3. Learned counsel submits that one of the fundamental condition of the facility offer letter was that the guarantee would become effective upon receiving of advance payment, which condition was not met during the shelf-life of the guarantee, therefore, no amount of commission could be charged. And without prejudice to first argument, it is pleaded that commission charged was in lieu of alleged guarantee of USD 800,000/-, despite reduction of the amount to USD 400,000/-. Learned counsel referred to Exhibits Exh-PN, Exh-PQ, Exh-PP, Exh-PR, Exh-PT – letters exchanged with respect to the claim of reduction in quantum of the guarantee. Adds that action was brought upon the failure of the respondent to perform contractual obligations undertaken. We inquired that whether original and revised guarantee(s), latter was alleged claimed to have had been executed, were produced and available on record, who responded that factum of revised guarantee was admitted by the witnesses of the respondent and even otherwise notice to admit was issued in this behalf, which was denied in vague terms. With the assistance of the counsel, we navigated through the contents of notice to admit and contents of the exhibits referred. We found submissions misconceived and tend to dismiss those for the following reasons.

4. Appellant emphasized on letters dated 31.03.2008 and 05.06.2008 (Exh-PN & Exh-PQ) to provide foundation for the argument regarding reduction in the quantum of the guarantee, which are examined. There is no cavil that reduction in the quantum of advance payment was proposed – reduction from 40% to 20% of the advance payment of CFR value – and pursuant thereto letter of 05.06.2008 was addressed to the respondent, wherein acceptance of proposed reduction, on behalf of the appellant, was conveyed. Fundamental question, in the context of the obligations undertaken by the respondent and on its behalf by HBL Colombo, Sri Lanka, is whether mere issuance of letter of 31.03.2008 would effect changes in the terms of the guarantee and alter multi-contractual commitments. It is not as simple as meets the eye. Letter of 31.03.2008 contained a core condition for effecting change in the quantum of advance payment, which is the execution of the addendum to the original agreement. No such addendum was brought on record, nor execution thereof had been specifically pleaded in the plaint. There is no document on record showing that respondent was absolved of its obligations under the original guarantee, which obligations continued till the expiry of the guarantee. Argument raised begs clarity, which is missing. It cannot be ascertained from the record of the case that whether original guarantee was cancelled and fresh revised guarantee was issued? What were the terms of the revised guarantee? Whether it provided for revision of commission charges and what was the mechanism for adjudgment of changes claimed

and adjusted upfront with respect to original guarantee. It is pertinent to mention that substitution of original guarantee, if any agreed and affected, tantamount to discharge from previous obligation under original guarantee and incurring of fresh obligation – attracting the principle of novation of the contract. Incidence of novation of contract has to be proved in terms of the requirements prescribed under section 62 of the Contract Act, 1872. We are afraid that no such compliance is made to prove or establish novation of contract. Mere issuance of notice to admit without production of the document, either by way of primary or secondary evidence, was not enough to prove default on the part of the respondent – above all there is no document to show alleged default of contractual obligation on the part of the part, less a contract. No evidence shall be given in proof of the terms of alleged revised guarantee except the document itself or secondary evidence of its contents, where admissible – attracting Articles 102 & 103 of Qanun-e-Shahadat Order 1984. It is pertinent to point that respondent had denied claim of excessive adjustment of commission charges, in which scenario it was obligatory for the appellant to prove this fact with underlying requirement of showing consensus ad idem. Even if it is assumed that officers of the respondent bank admitted factum of reduction of the amount , we are unable to place our hand on any conditions, document or any of the conditions therein, obliging respondent to refund commission charges – therefore, in absence of such proof one cannot invoke the jurisdiction of the Banking

Court in terms of section 9 of the **Ordinance, 2001**, wherein requirement of establishing default of contractual obligation forms a condition precedent for initiating action. Hence, fact-in-issue and relevant facts remained unestablished.

5. Before we decide the objection that guarantee did not become effective due to non-payment of advance payment, it is apposite to discuss the implications of notice to admit instead of seeking production of the documents in question upon issuance of the notice to produce. Notice to admit and notice to produce are dealt with under different provisions of the Civil Procedure Code, have different connotations, implications and consequences qua the merits of the case. Notwithstanding issuance of the notice to admit, the party serving the notice has to prove the existence and execution of the documents. No exemption could be claimed from establishing the existence and proving the execution of the document subject to notice to admit. Conversely, refusal to produce documents upon notice to produce may lead to negative inference, issuance of direction to produce by the court and consequences qua the burden of proof, besides opening a window for producing secondary evidence. In view of the above over-emphasis of the counsel on notice to admit and refusal on part of the respondent – in reply to notice it was stated by the respondent that notice is defective, in absence of availability of documents on record, and mere notice would not absolve applicant from the obligation to

prove – is insignificant and have little bearing on the merits of the case.

6. Learned counsel pleaded that guarantee was not effective, unless amount of advance payment was received. This clause appeared in the facility offer letter and claimed to have plausible implications for the appellant and respondent. It is not the case of the appellant that effective guarantee was not issued by HBL Colombo against the counter guarantee issued by the respondent. It is not disputed that upfront commission was adjusted against the guarantee issued. It is for the appellant to prove that guarantee was not effective. No correspondence was addressed claiming that guarantee was not effective. This argument does not bode well with the plea that excess amount of commission charges were adjusted despite reduction in the amount secured under the guarantee – if document is not effective no claim of excessive amounts is plausible but suitable course was a claim of cancellation of the guarantee. There is a pertinent question and remained unanswered, whether terms of the guarantee, which was not produced, contained any specific condition that unless advance payment was not credited no enforceable obligation under the guarantee would acrrue? It was not the case of the appellant that obligation of the respondent, in an event of encashment call, is either conditional. Failure to produce text of the guarantee, evidently the best evidence, would suggest adverse inference in terms of Article 129 (g) of Qanun-e-Shahadat Order 1984.

And with regard to alleged claim of illegal and excessive charging of commission charges it is sufficient to justify adjustment thereof in the context of the fact that the guarantee had lived its life – remain enforceable till its validity. Claim of adjustment or receipt of commission @ 0.33% per quarter was in accord with the conditions of facility offer letter, and same is chargeable upfront. No violation of any rule / enactment is alleged to prove that upfront adjustment of commission charges was unjustified or contrary to the terms of guarantee. Again, taste of the pudding is in the eating; since text of the guarantee was not produced therefore no prefer-ability could be extended to the terms of facility offer letter over the terms of the guarantee, which course is unwarranted and otherwise presumptive. Additionally, failure to raise any objection qua effectiveness of the guarantee during its validity disentitle the appellant from raising any such objection, attracting principle of acquiescence. Another aspect of the matter is that adjustment of commission charges upfront and expiry of the guarantee attracts principle of conclusion of transaction(s) – a specie of past and closed transactions – particularly upon lapse of limitation provided for seeking compensation for alleged breach of contractual obligation – in this case even the least; alleged breach was not proved. Banking Court had dealt with the issue of limitation elaborately and no further discussion is warranted when no illegality is otherwise found in the findings recorded. To sum up the decision, we hold that default of contractual obligation is

not established in the first place, therefore, no plausible and enforceable cause of action exists and suit was rightly dismissed by the Banking Court.

7. In view of the narrative, we find no merit in this appeal and same is, hereby, **dismissed** in limine.

(MIRZA VIQAS RAUF) JUDGE **(ASIM HAFEEZ) JUDGE**

Approved for Reporting.

JUDGE **JUDGE**

Imran/*