JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A. No.165 of 2013
M/s Rose Associates
Versus
M/s Saudi Pak Industrial & Agricultural Investment Company Limited

Date of Hearing: 15.09.2020
Appellant by: Mr. Fahad Ikram, Advocate
Respondent by: Mr. Azid Nafees, Advocate

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular first appeal, the appellant, M/s Rose Associates, impugns the judgment and decree dated 21.11.2013 passed by the learned Judge-in-Chambers decreeing the suit for recovery of Rs.198,381,470/- along with costs, including costs of funds and other charges filed by the respondent (Saudi Pak Industrial and Agricultural Investment Company Limited) against the appellant under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 **("the 2001 Ordinance").**

2. The appellant is engaged in the business of real estate management. Vide letter dated 01.03.2006, the respondent sanctioned long term financing of Rs.150 Million for the construction of a commercial building in favour of the appellant. Pursuant to the said sanctioned, a master finance agreement was executed on 23.05.2006 between the appellant and the respondent. On the said date, the appellant also executed a demand promissory note for an amount of Rs.205,890,000/- in the respondent's favour. The finance facility was also secured by the hypothecation of the appellant's fixed assets by a letter of hypothecation dated 23.05.2006 and by execution of a personal guarantee dated 23.05.2006 by the sole proprietor of the appellant. The sole proprietor of the appellant had also mortgaged his immovable property (i.e. land measuring 10 *kanals*, 13 *marlas* and 213 square feet bearing plot No.131, survey No.299 situated at Kashmir Road/Saifullah Lodhi Road, Rawalpindi Cantt and all buildings and structures constructed or to be constructed on the said land) by way of creation of first exclusive mortgage in favour of the respondent vide

memorandum of deposit of title deed dated 23.05.2006 as well as registered mortgage deed dated 25.05.2006.

3. Vide letter dated 30.05.2008, the respondent acceded to the appellant's request to extend the outstanding facility of Rs.138 Million for a further period of three years with effect from 01.06.2008. A restructuring/rescheduling agreement was executed on 10.06.2008. The appellant executed and delivered a demand promissory note, letters of revival and continuity as well as a letter of guarantee, all dated 10.06.2008 to the respondent. Under this arrangement, the installment of mark-up was agreed to be paid by the appellant quarterly whereas the principal amount was to be paid in three equal annual installments.

4. The respondent's case was that the appellant had defaulted in its repayment obligations and as on 30.04.2010, an amount of Rs.198,381,470/- was liable to be paid by the appellant.

5. On 18.06.2010, the respondent instituted a suit for recovery of the said amount under Section 9 of the 2001 Ordinance before this Court. On 29.09.2010, the appellant filed an application for leave to defend under Section 10 of the 2001 Ordinance before this Court. In the said application, it was pleaded *inter alia* that the amount in addition to Rs.138 Million was not payable by the appellant and that penalties, mark-up, compound mark-up and monetary charges could not be imposed after the date of default i.e. 31.08.2008.

6. Vide judgment and decree dated 21.11.2013, the respondent's suit was decreed for the amount prayed for along with costs of funds at the prevailing rates fixed by the State Bank of Pakistan from the date of default to the realization of the decretal amount. The said judgment and decree has been assailed by the appellant in the instant appeal.

7. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, candidly submitted that the admitted outstanding liability of the appellant to the respondent is only the principal amount of Rs.138 Million and that the appellant is ready to pay this amount.

8. Furthermore, learned counsel for the appellant submitted that the respondent had no right to claim the mark-up rate of KIBOR plus 4% per annum with effect from the date of default i.e. 31.08.2008; that

the statement of accounts appended with the plaint does not satisfy the essential requirements of the statement of accounts as required by Section 9(3) of the 2001 Ordinance; that there should be no ambiguity or discrepancy between the statement of accounts filed with the plaint and the pleadings in the plaint; that after the issuance of the rescheduling letter dated 30.05.2008, the appellant paid Rs.20 Million on 14.06.2008 out of which Rs.12 Million was to be adjusted and Rs.8 Million was adjusted against mark-up; that the respondent had no legal basis for including liquidated damages to the tune of Rs.19,407,402/- in the statement of accounts; that there is nothing on the record to show that the respondent had suffered damages due to the default in the appellant's repayment obligations; and that in terms of Section 3(2) of the 2001 Ordinance, the respondent could not claim any mark-up or costs after the date of default (i.e. 31.08.2008) against the appellant and the learned trial Court could not have awarded any amount other than the principal amount against the appellant. Learned counsel for the appellant prayed for the appeal to be allowed and for the impugned judgment and decree to be modified so as to make it for an amount of Rs.138 Million only.

9. On the other hand, learned counsel for the respondent submitted that it is an admitted position that by virtue of the rescheduling of the long term finance facility on 30.05.2008, an amount of Rs.138 Million was outstanding against the appellant. In the said letter dated 30.05.2008, it was expressly provided for the mark-up rate to be KIBOR plus 4% per annum; that the appellant having committed default on 31.08.2008; that neither has the principal amount of Rs.138 Million nor the mark-up rate or the other costs envisaged in the master finance agreement dated 23.05.2006 being paid to the respondent by the appellant; that the said agreement dated 23.05.2006 has a provision of the payment of liquidated damages; and that the liquidated damages claimed by the respondent against the appellant in the statement of accounts is strictly in accordance with the terms of the said agreement. Learned counsel for the respondent prayed for the appeal to be dismissed.

10. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

11. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 6 above and need not be recapitulated.

12. It is an admitted position that ever since the execution of the restructuring/rescheduling agreement dated 10.06.2008 between the appellant and the respondent, the former did not pay any amount out of the outstanding amount of Rs.138 million as on the said date. Learned counsel for the appellant did not deny the appellant's liability to pay the said amount of Rs.138 million. His only grievance was that with effect from the date of default (i.e. 31.08.2008), the respondent was not entitled to charge any mark-up, liquidated damages or monitoring fee from the appellant.

13. The revised schedule, which is part and parcel of the said restructuring/rescheduling agreement dated 10.06.2008 explicitly provides for a mark-up rate of KIBOR plus 4% per annum. Neither does the said agreement nor does the law provide that the appellant would be discharged from its liability to pay markup at the agreed rate in the event it defaults in the repayment of the principal amount. The reliance placed by the learned counsel for the appellant on Section 3(2) of the 2001 Ordinance is also misconceived. The said Section provides that where the customer defaults in the discharge of his obligation, he shall be liable to pay, for the period from the date of his default till the realization of the costs of funds of the financial institution as certified by the State Bank of Pakistan from time to time, apart from other civil and criminal liabilities that he may incur under the contract or rules or any other law for the time being in force. The liability to pay mark-up is clearly a civil liability that the appellant incurred under the provisions of the restructuring/rescheduling agreement dated 10.06.2008. To absolve a customer to pay mark-up on the borrowed amount or costs of funds after the date of default would amount to adding a premium to his wrong.

14. The said restructuring/rescheduling agreement dated 10.06.2008 also has a provision for liquidated damages. The respondent, in its

statement of accounts, filed along with its suit had claimed liquidated damages amounting to Rs.19,407,402/-. Since the learned trial Court had dismissed the appellant's application for leave to defend, the occasion for framing issues or the recording of evidence did not arise. The dismissal of the appellant's application for leave to defend by the learned trial Court is not *ipso facto* proof of the respondent having suffered damages due to the appellant's default in its repayment obligations. In the absence of any evidence to substantiate the damages suffered by the respondent due to the appellant's default in its obligations, we are of the view that the learned trial Court could not have awarded liquidated damages in the respondent's favour.

15. Section 3 of the 2001 Ordinance provides that it shall be the duty of a customer to fulfill his obligations to the financial institution. The word *"obligation"* as defined in Section 2(e)(i) of the said Ordinance includes any agreement for repayment or extension of time in repayment of a finance or for its restructuring or renewal or for payment or extension of time in payment of any other amounts relating to a finance or liquidated damages. However, it has been consistently held by the Superior Courts that liquidated damages cannot be awarded by a Banking Court where there is no evidence of any damages having been suffered by the party claiming such damages. In this regard, reference may be made to the following case:-

(i) In the case of Saudi-Pak Industrial and Agricultural Investment Company (Pvt.) Limited Vs. Messrs Allied Bank of Pakistan (2003 CLD 596), the Hon'ble Supreme Court held *inter alia* that liquidated damages, as a rule, require positive evidence to show the actual loss suffered by the party claiming damages, and that even a fixed amount stipulated as liquidated damages cannot be recovered if the quantum of actual loss is not proved. In the said case, since there was no evidence brought on the record to substantiate the claim for liquidated damages, it was held that the plaintiff was not entitled to any amount as liquidated damages.

(ii) In the case of Messrs HITEC Metal Plast (Pvt.) Ltd. v. Habib Bank Limited (PLD 1997 Quetta 87), Division Bench of the Hon'ble Balochistan High Court held as follows:-

"General principle for granting compensation when beneficiary alleges breach of contract; are obviously regulated by sections 73 and 74 of contract Act. Evidently without proving actual loss, even fixed amount stipulated for liquidated damages does not become automatically payable. Record manifestly displays that respondent-Bank has not adduced an iota of evidence suggesting quantum of actual losses suffered by reasons of default on the part of appellants. We, therefore, feel that demand for specified liquidated damages by creating liability through forced finance account against the appellant was not justified."

(iii) In the case of Allied Bank of Pakistan Ltd. Vs. Messrs Aisha Garments (2001 MLD 1955), it was held as follows:-

"In case a party alleges a breach of contract and wants to enforce a claim of damages/compensation through Court of law, then such a case is obviously covered and governed by the provisions of sections 73 and 74 of the Contract Act. Under section 74 of the Contract Act; when liquidated damages are entered in a contract itself, then in case of breach of such contract, the damages are to be assessed in the ordinary way, subject to that fixed amount as a maximum. In that case the plaintiff is under a legal obligation to prove the exact amount of damages, which he has allegedly suffered, irrespective of the specified amount mentioned in the contract, which is not at all a concrete proof and in such-like cases the plaintiff, who is complaining the breach of contract and also demanding the damages, shall have to first plead and then to prove the damages under section 74 of the Contract Act, 1872, call for the proof and the person claiming suck damages is under obligation to bring sufficient material on record in order to prove that he had suffered so much of losses. Without proving the actual loss, even fixed amount stipulated as liquidated damages does not automatically become payable. In arriving the above conclusions we are supported and fortified by the principles laid down in Habib Bank Ltd. v. Messrs Farooq Composit Fertilizer Corporation Ltd. and 4 others 1993 MLD 1571; Messrs Hitec Metal Plast (Pvt.) through Chairman, Hasan Parvaiz Sindhi, Muslim Housing Society, Karachi and 3 others v. Habib Bank Limited PLD 1997 Quetta 87 and United Bank Limited v. Messrs Novelty Enterprises Ltd. and others PLD 1998 Karachi 199."

(iv) In the case of Industrial Development Bank of Pakistan Vs. Messrs Baloch Engineering Industry (Pvt.) Ltd. (2010 CLD 591), it was held as follows:-

"It is, by now, well-settled proposition of law that claiming of fine, liquidated damages or penalty solely based upon the terms of finance agreement between the parties itself will not be sufficient to grant the fine, liquidated damages or the penalty amount inasmuch as the party claiming such fine, liquidated damages or penalty has to in the first place plead such fact in its plaint or petition and thereafter to prove the same through cogent and reliable evidence and that too, the Court, if satisfied with the evidence, will not necessarily grant the specific amount of fine liquidated damages or penalty as stipulated in the finance agreement but only a reasonable compensation to be ascertained from the evidence adduced by the parties."

(v) **In the case of NIB Bank Limited Vs. Three Star Hosiery Mills (Pvt.) Ltd. (2013 CLD 534), it was held as follows:-**

> ***"31. Insofar as the claim of liquidated damages is concerned, under law the plaintiff Bank is not entitled for any liquidated damages in absence of any positive evidence. Liquidated damages in any event require evidence muchless to the effect of actual loss suffered. As a rule even fixed amount of liquidated damages cannot be awarded unless the quantum of actual loss is proved."***

(vi) **In the case of Shadman Electronics Industry (Pvt.) Ltd. Vs. NIB Bank Limited (2013 CLD 1305), the learned trial Court had decreed the respondent's suit which included a claim for liquidated damages. The Division Bench of the Hon'ble High Court of Sindh, after making reference to the Hon'ble Supreme Court's judgment in the case of Saudi-Pak Industrial and Agricultural Investment Company (Pvt.) Limited Vs. Messrs Allied Bank of Pakistan *(supra)*, held as follows:**

> ***"12. In the above cited judgment the honourable Supreme Court while examining the validity of the liquidated damages has held that liquidated damages as a rule, required the positive evidence to show that the actual loss was suffered by the party claiming damages and even fixed amount stipulated for liquidated damages could not be recovered if the quantum of actual loss was not proved. In the instant case, we have noted that admittedly no evidence whatsoever was adduced by the respondent bank in support of its claim towards liquidated damages. We have also observed that as per summary of the account furnished by the respondent bank before the learned single Judge, showing total recoverable amount against the appellant also included liquidated damages at the fix rate of 20% i.e. Rs.16,799,740 whereas in the prayer clause of the suit, in addition to decretal amount of Rs.100,798,440, prayer for grant of 20% liquidated damages was also made. From perusal of impugned judgment and decree we have noted that the learned single Judge has decreed the suit against the present appellant jointly and severally in the sum of Rs.100,798,440 along with cost of funds and the cost in the suit, however, has not granted the liquidated damages. It appears that the learned single Judge was not cognizant of the fact that the amount shown as recoverable from the appellant in the summary of accounts, filed by the respondent bank, also included the amount of liquidated damages at the fix rate of 20%.***
>
> ***13. In view of herein above facts, and by respectfully following the ratio of the judgment of the honourable Supreme Court, as referred to hereinabove, we are of the considered view that the liquidated damages, in the absence of any evidence, showing actual amount of damages sustained by any party, particularly when cost of funds, in terms of section 3 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 have already been granted along with the cost of suit, cannot be***

allowed at a flat rate. Accordingly, while upholding the impugned judgment and decree, we would modify the same by deleting the amount of liquidated damages i.e. Rs.16,799,740 claimed by the respondent bank at the flat rate of 20%."

(vii) **In the case of Muhammad Farooq Azam Vs. Bank Al-Falah Limited (2015 CLD 1439), the division bench of the Hon'ble Lahore High Court held as follows:-**

"9. Even otherwise the imposition of penalty or damages at a fixed rate is opposed to the provisions contained in section 73 of the Contract Act. In a judgment reported as Messrs Hitoc Metal Plast (Pvt.) Ltd., etc. v. Habib Bank Limited (PLD 1997 Quetta 87) it has been held by the learned Division Bench that the general principles for granting compensation, when beneficiary alleges breach of contract, are regulated by sections 73 and 74 of the Contract Act. Thus, without proving the actual loan even fixed amount, stipulated as for liquidated damages, does not become automatically payable unless actual loan, suffered by the beneficiary, is established."

(viii) **In the case of Pak Libya Holding Company (Pvt.) Ltd. Vs. Maxco (Pvt.) Ltd. (2016 CLD 1147), it was held that** *"liquidated damages cannot be granted without proving it through sufficient evidence."*

(ix) **In the case of Askari Bank Limited Vs. Saga Sports (Pvt.) Ltd. (2017 CLD 162), the Hon'ble Lahore High Court held as follows:**

"6. An amount of Rs.507,862,79/- has been claimed as liquidated damages by the plaintiff-Bank. However, no evidence has been produced in support of the said claim whereas it is trite principle that liquidated damages can only be claimed and granted when irrefutable evidence is led in support of the claim and proof is brought forth on record which would establish that the person claiming liquidated damages has, in fact, suffered those damages. Liquidated damages have to be contrasted with general damages and these are in the nature of special damages which ought to be proved in order to be brought home. The learned counsel for the plaintiff-Bank has not been able to point to any portion of the examination-in -chief or the cross-examination by which a claim for liquidated damages was asserted and oral or documentary evidence was produced in order to establish and prove the said claim. The claim for liquidated damages is, therefore, not borne out from the evidence and is, therefore, rejected."

Law to the said effect has also been laid down in the cases of National Bank of Pakistan Vs. Effef Industries Limited (2002 CLD 1431), Industrial Development Bank of Pakistan Vs. Pak Punjab Carpets (2003 CLD 1703), Hunza Packages (Pvt.) Ltd. Vs. Orix Leasing Pakistan Limited (2004 CLD 824), Agricultural Development Bank of Pakistan Vs. Muhammad Anwar (2004 CLD 1150), Agricultural Development

Bank of Pakistan Vs. Zaman Ali (2004 CLD 1649), United Bank Limited Vs. Hafiz Brothers (2005 CLD 374), Agricultural Development Bank of Pakistan Vs. Nadir alias Nadir Ali (2005 CLD 1588), United Bank Limited Vs. Sakeena (2005 CLD 1825), and United Bank Limited Vs. M. Ismail and Company (Pvt.) Ltd. (2006 CLD 394).

16. In view of the above, the instant appeal is partly allowed in that the impugned judgment and decree dated 21.11.2013 is modified to the extent of excluding therefrom only the liquidated damages amounting to Rs.19,407,402/- decreed in the respondent's favour. There shall be no order as to costs.

(LUBNA SALEEM PERVEZ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE) **(JUDGE)**

APPROVED FOR REPORTING

*Qamar Khan**