

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Justice Naeem Akhter Afghan
Justice Muhammad Shafi Siddiqui
Justice Shakeel Ahmad

Civil Appeal No.164 of 2025

(On appeal against the judgment dated 13.01.2025 of the Lahore High Court, Lahore passed in RFA No.116017 of 2017)

MCB Bank Limited

.... **Appellant**

Versus

Uzma Tehreem & others

.... **Respondents**

For the Appellant : Mr. Salman Aslam Butt, Sr. ASC
Syed Rifaqat Hussain Shah, AOR

For the Respondent : Mr. Muhammad Imran Malik, ASC
Nos. 1 to 4

For the Respondent : Nemo
Nos. 5 & 6

Date of Hearing : 23.04.2025

JUDGMENT

Naeem Akhter Afghan, J. Respondent Nos. 1, 2 & 3 are the Directors of respondent No. 4 [**Tanveer Weavings (Private) Limited**]. In January 2004 Respondent No.4 through respondent Nos. 2 & 3 approached Pakistan Industrial Credit and Investment Corporation Commercial Bank Limited (**PICIC Commercial Bank**) for grant of a short-term finance facility for the purpose of meeting its capital requirements. In all the relevant documents, deeds, Sanction Letters and Agreements with the Banks, the respondent No. 4 has been mentioned as "**the Customer**". Respondent No.2, being one of the Directors and authorized agent, is the Chief Executive Officer (**CEO**) of respondent No. 4.

2. After complying with all due formalities/requirements, Running Finance (**RF**) facility for the sum of Rs.50,000,000/- (Rupees Fifty Million) for one year and another facility of Rs.19 million was sanctioned on 29th January 2004 for respondent No. 4 and in this regard Finance Facility Agreement dated 31st January 2004 was executed between the parties. The parties also executed a Finance Facility Agreement on markup basis in the sum of Rs.19,000,000/- (Rupees Nineteen Million). The respondent Nos. 2 & 3 furnished securities by hypothecation of moveable properties, hypothecation of receivables, creation of equitable mortgages and execution

of irrevocable power of attorney in respect of different properties. Respondent No.2 also submitted continuing Personal Guarantee *vide* Letter of Guarantee dated 31st January 2004.

3. In October 2004, on the request of respondent No.2, the RF facility of Rs.50 million was enhanced to Rs.70 million for respondent No. 4 for a limited period and in this regard Running Finance Enhancement Sanction was also made on the basis of terms and conditions agreed by respondent No.2.

4. The RF facility (as enhanced) expired in the year 2005. By that time the other facility (of Rs.19 million) was discharged however default was made in making repayment of the Principal, markup and other amounts due in respect of RF facility of Rs.70 million. Respondent Nos. 2, 3 & 4 requested for renewal of the Enhanced RF facility which was accepted by the PICIC Commercial Bank *vide* 2nd Sanction Letter whereafter renewed Running Finance Agreement dated 12th may 2005 was executed and RF facility of Rs.70 million on markup basis was renewed for period of one year. Supplementary letter of hypothecation of moveable properties and supplementary letter of hypothecation of receivables, memorandum of deposit of title deeds, and continuing Guarantee were furnished by respondent No.2.

5. Despite continuous default in making repayments of the Principal, markup and other amounts due in respect of the renewed RF facility, in October 2005, the respondent No.2 sought further enhancement in the existing credit package which was not materialized.

6. On 18th April 2006, while acknowledging the liabilities, respondent No.2 sought indulgence by the PICIC Commercial Bank for release of one of the mortgaged properties for clearing the outstanding dues. On the basis of assurance/commitment by respondent No.2 for payment of the obligations, the PICIC Commercial Bank released one of the mortgaged properties i.e. Plot No.400/D-11 & III, Peoples Colony, Faisalabad.

7. On expiry of renewed RF facility and due to continuous and willful default in repayment of the Principal, markup and other amounts, respondent No.2, while admitting the liability, requested the PICIC Commercial Bank to rollover/renew the RF facility. The request of respondent No.2 was accepted and 3rd sanction letter dated 24th February 2007 was issued by the PICIC Commercial bank whereby the RF facility in the sum of Rs.70 million was further renewed. Respondent Nos.1, 2 & 3

executed the 2nd renewed RF agreement with PICIC Commercial Bank. Apart from furnishing the requisite securities for due performance of obligations under the 2nd renewed RF agreement, the respondent Nos. 1, 2 & 3 executed continuing Guarantees in favour of PICIC Commercial Bank *vide* Separate letters of Guarantee dated 24th February 2007.

Note: The continuing letter of Guarantee dated 24th February 2007 duly signed and executed by respondent No.1, being relevant for decision of the instant appeal, is available at page 375 to 378 of paper book (Part-III).

8. Pursuant to Amalgamation Scheme duly sanctioned by the State Bank of Pakistan on 31st December 2007, the NIB Bank Limited (**NIB Bank**) stood amalgamated/merged with PICIC Commercial Bank and Pakistan Industrial Credit and Investment Corporation Limited (**PICIC**). The entire undertaking of PICIC Commercial Bank and PICIC including all properties, assets, liabilities and all rights and obligations of PICIC Commercial Bank and PICIC stood amalgamated with and vested into the NIB Bank.

9. In December 2007 partial payment of outstanding markup was made in pursuance of 2nd renewed RF facility. Keeping in view the expiry of 2nd renewed RF facility, respondent No.2 approached NIB Bank with request for further renewal of RF facility for another term with undertaking for appropriate utilization of the funds for respondent No.4. The request so made by respondent No.2 was accepted by the Board of Directors of NIB Bank in pursuance whereof 4th sanction letter and 3rd renewed RF facility was sanctioned for respondent No.4 in the sum of Rs.70 million subject to furnishing securities and execution of 3rd renewed RF agreement. Respondent Nos. 1, 2 & 3 executed the 3rd renewed RF agreement dated 2nd January 2008 with NIB Bank on the same terms as of the 2nd renewed RF agreement. The respondent Nos.1, 2 & 3 also executed a promissory note dated 2nd January 2008 as a continuing security for payment of the ultimate balance in pursuance of 3rd renewed RF agreement dated 2nd January 2008 which is available at page 386 of the paper book (Part-III).

10. The respondent Nos. 1 to 4 continued willful default and made only partial payments in pursuance of 3rd renewed RF facility. On expiry of 3rd renewed RF facility, while acknowledging and admitting the obligations for repayment under the 3rd renewed RF facility, the NIB Bank was approached by respondent No.2 on behalf of respondent No. 4 with request to convert/restructure the outstanding renewed RF facility into a long term facility. The Board of Directors of NIB Bank accepted the request and *vide*

Restructuring Sanction Letter dated 15th June 2009, the NIB Bank sanctioned the conversion/restructuring of the 3rd renewed RF facility into a Term Loan (**TL**) facility for respondent No. 4 subject to execution of Restructuring Agreement which was executed on 15th June 2009.

11. In partial fulfilment of obligations under the TL facility an amount of Rs.5 lakhs was paid on 22nd December 2009 but the minimum monthly payments due from 15th July 2009 till 15th November 2009 were not made by respondent Nos. 1 to 4 despite availing opportunities. The NIB Bank, left with no other option, filed suit against respondent Nos.1 to 4 in October 2013 before Lahore High Court (**LHC**) under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (**Ordinance of 2001**) read with all relevant and other enabling provisions of law for recovery of Rs.108,516,398.30/- (Rupees One Hundred and Eight Million five Hundred and Sixteen Thousand Three Hundred and Ninety eight and thirty Paisas only) as on 25th February 2013 alongwith cost of funds through sale of mortgaged and charged properties.

12. In the suit the NIB Bank also arrayed Bank Alfalah Limited, Muslim Commercial Bank (**MCB**) Limited and Askari Commercial Bank Limited as defendant Nos. 5, 6 & 7 respectively on the ground that Bank Alfalah Limited holds a *pari passu* charge alongwith the NIB Bank over the current assets of respondent No. 4 and MCB Limited as well as Askari Commercial Bank Limited also have charges over the moveable and immovable assets of respondent No.4.

13. Respondent Nos. 1 to 4 submitted a joint application on 29th November 2013 under section 10 of the Ordinance of 2001, in the form of written statement, for grant of unconditional leave to defend the suit and recording evidence while denying the liabilities claimed by the NIB Bank.

14. Being plaintiff, the NIB Bank submitted replication dated 8th May 2014 to the application/written statement of respondent Nos. 1 to 4.

15. While dismissing the application of respondent Nos.1 to 4 for leave to defend the suit, the suit filed by the NIB Bank was decreed by the learned Single Bench (**SB**) of LHC *vide* judgment and decree dated 14th April 2017 in the sum of Rs.108,516,398.30/- together with costs of funds as contemplated by section 3 of the Ordinance of 2001 and with costs of the suit on the ground that respondent Nos. 1 to 4 had failed to raise any dispute on facts requiring its determination through recording of evidence.

16. Feeling aggrieved of the judgment and decree dated 14th April 2017 passed by the learned SB of LHC, respondent Nos. 1 to 4 filed RFA No. 116017/2017 against NIB Bank and others before the learned Division Bench (**DB**) of LHC.

17. RFA was dismissed by the learned DB of LHC *vide* judgment and decree dated 13th January 2025 to the extent of respondent Nos. 2 to 4, however, the same was partly accepted to the extent of respondent No.1 and by overruling the objection of the appellant about the RFA being barred by time, the Respondent No.1 was granted leave to defend the suit on the basis of the contention of learned counsel that the respondent No.1 did not furnish fresh Guarantee in pursuance of the Restructuring Agreement dated 15th June 2009 and on the ground that substantial question of law and fact to the extent of respondent No.1 has been raised by the learned counsel which requires recording of evidence.

18. Feeling aggrieved of the judgment and decree dated 13th January 2025 passed by learned DB of LHC in favour of respondent No.1, the MCB Limited has filed the instant Appeal as in pursuance of order dated 13th June 2017 passed by State Bank of Pakistan, NIB Bank stood merged with and amalgamated into MCB Limited. The MCB Limited is the successor in interest of NIB Bank in respect of its all assets, liabilities, rights and obligations.

19. Learned counsel for the appellant contended that while partly accepting the appeal to the extent of respondent No.1, the learned DB of LHC has failed to appreciate that respondent No. 1 and respondent Nos. 2 to 4 had jointly filed appeal against the judgment and decree dated 14th April 2017 passed by SB of LHC on 9th June 2017 without affixing the requisite court fee on the memo of appeal; office objection was raised and three days time was afforded to respondent Nos. 1 to 4 for compliance of the office objection but memo of appeal was refiled by respondent Nos. 1 to 4 by affixing the requisite court fee on 4th December 2017 and as such the appeal of respondent Nos. 1 to 4 was time barred by 173 days. While referring to the case of **Siddique Khan v. Abdul Shakur Khan**¹, learned counsel contended that the conduct of respondent Nos. 1 to 4 was contumacious and as such RFA, being time barred, was liable to be dismissed by the learned DB of LHC.

¹ PLD 1984 SC 289

According to learned counsel, the objection of time barred appeal filed by respondent Nos. 1 to 4 before the learned DB of LHC has not been dealt with by the learned DB of LHC in accordance with the settled principles of law.

20. Learned counsel for the appellant further contended that the Restructuring Agreement dated 15th June 2009 was signed by the three Directors of respondent No.4 including respondent No.1 and the Guarantees of all the Directors of respondent No.4 i.e. respondent Nos.1, 2 & 3 were continuing/subsisting; there exists no substantial question of facts or law requiring evidence to be recorded; there was no occasion for the learned DB of LHC to grant respondent No.1 leave to defend the suit.

21. Learned counsel for respondent Nos. 1 & 4 contended that the appeal filed by respondent Nos. 1 to 4 before the learned DB of LHC has rightly been entertained/partly accepted to the extent of respondent No.1 as the office objection was vague and not specific; the conduct of the respondent Nos.1 to 4 was not contumacious as in compliance of office objection, the requisite court fee was affixed while refiling the appeal.

Learned counsel for respondent Nos. 1 to 4 further contended that the respondent No. 1 did not furnish any fresh Guarantee in pursuance of Restructuring Agreement dated 15th June 2009; the Guarantee furnished by respondent No. 1 in pursuance of 2nd renewed RF agreement of year 2007 stood discharged under section 133 of the Contract Act 1872 (**Contract Act**) due to variance in terms of the contract by execution of Restructuring Agreement dated 15th June 2009 i.e.; the grant of leave to respondent No.1 for defending the suit by the learned DB of LHC in the above circumstances is not suffering from any illegality.

22. In rebuttal, learned counsel for the appellant contended that the Guarantee furnished by respondent No.1 in pursuance of 2nd renewed RF agreement of year 2007 is continuing; the same was never revoked by respondent No.1; moreover, the respondent No. 1 had also signed the Restructuring Agreement dated 15th June 2009 as a Guarantor due to which section 133 of the Contract Act 1872 is not attracted and in this regard learned counsel referred the case of **Aftab A. Sheikh v. Trust Leasing Corporation Limited**².

23. After hearing learned counsel for the parties, we have perused the available record which reveals that respondent Nos.1 to 4 filed appeal

² 2003 CLD 702

against the judgment and decree dated 14th April 2017 passed by learned SB of LHC on 9th June 2017 without affixing the requisite court fee on the memo of appeal. The *office objection proforma* of LHC is available at page 3 of CMA No.1535/2025. At the bottom of said *proforma*, at Serial No.27, the office of LHC had raised objection on 9th June 2017 on the appeal of respondent Nos. 1 to 4 in the words "**incomplete**". In the end of the *proforma*, it has been written as follows:

*"Return with objections at Sr. Nos. _____.
To be re-submitted after removal of these objection(s) within
03 three day(s) subject to limitation."*

24. It has specifically been mentioned in the *office objection proforma* that the office objections have to be removed/complied with within three days subject to limitation. It was very much in the knowledge of respondent Nos. 1 to 4 and their counsel that the appeal is incomplete due to non-affixation of the requisite court fee. Neither the requisite court fee was filed within three days of the office objection nor any application was filed before the court for extending time to affix the requisite court fee on the memo of appeal. The appeal was refiled by respondent Nos. 1 to 4 with requisite court fee on 4th December 2017 i.e. after delay of 173 days whereas under sub-section 1 of section 22 of the Ordinance of 2001 it was to be filed within thirty days. The same was not accompanied with any application for condonation of delay in filing the appeal.

The above portrays that the conduct of respondent Nos. 1 to 4 was contumacious.

25. According to the settled principles, if the objections raised by the office are not removed during the period allowed by the office and in the meanwhile the limitation period expires and the conduct of the appellant is considered to be contumacious, the appeal has to be rejected being time barred. Reliance in this regard is placed on the cases of "**Siddique Khan**" (referred by learned counsel for the appellant), **Asad Ali v. Bank of Punjab**³, **Controller Land Acquisition v. Fazal-ur-Rehman**⁴ and **Lahore Development Authority v. Muhammad Rashid**⁵

26. In the joint application for leave to defend the suit/written statement, the respondent No.1 has denied execution of Letter of Guarantee dated 24th February 2007. She has also denied submission of Security to secure the restructured TL facility with the contention that the

³ PLD 2020 SC 736

⁴ 2009 SCMR 767

⁵ 1997 SCMR 1224

Restructuring Agreement dated 15th June 2009 is based upon fake and forged documents.

27. Contents of letter dated 22nd October 2009 written by respondent No.2 as CEO of respondent No.4 to the NIB Bank, available at page 403 of the paper book (part-III), confirms the execution of Restructuring Agreement dated 15th June 2009 and it belies the contention of respondent No. 1 that the Restructuring Agreement dated 15th June 2009 is based on fake & forged documents.

28. Para Nos. 1, 2, 3 & 7 of the Letter of Guarantee dated 24th February 2007 duly signed and furnished to the PICIC Commercial Bank by respondent No. 1 as one of the Director of respondent No.4 in pursuance of 2nd RF agreement, being relevant, are reproduced hereinbelow:

"1. My/Our liability under this guarantee shall be that of principal debtor and you may at your option hold me/us primarily responsible for the liabilities of the customer.

2. This guarantee shall continue to remain binding on me/us until receipt by you of written notice of discontinuance thereof and notwithstanding such notice I/we shall continue to remain liable to you for all sums due and owing to you by the customer whether certain or contingent upto the time of receipt by you of such notice and also for any credits established for the customer and/or all instrument drawn on you or accepted by you, for the benefit of the customer and purporting to be on a date on or before the date of receipt of such notice, even though actually paid or honoured after that date.

3. This guarantee shall not be discharged or prejudiced by any partial payments or settlements of account or existence of a credit balance of the customer at any time or by discharge of the customer by operation of law or for any other reason.

4.....

5.....

6.....

7. Any account settled between you and the Customer or any demand by you on the Customer or his agent or any judgment or award obtained by you against the Customer or any statement from you stating the amount due to you at any time from the Customer shall be accepted by me/us as conclusive evidence or my/our liability under this guarantee and shall be binding on me/us and I /we hereby waive all rights to question and or challenge the same."

From the above it reveals that the Guarantee furnished by respondent No. 1 on 24th February 2007 in pursuance of 2nd renewal RF facility is continuing as no notice of discontinuance thereof was ever issued by respondent No.1 to the appellant or NIB Bank or PICIC Commercial Bank:

29. Section133 of the Contract Act reads as follows:

"Discharge of surety by variance in terms of contract. Any variance, made without the surety's consent, in the terms of the contract between the principal [debtor] and the creditor, discharges the surety as to transactions subsequent to the variance."

Clause 5.11(f) of the Restructuring Agreement dated 15th June 2009 duly signed by respondent No. 1 as a Guarantor, being relevant, reads as follows:

"5.11 Securities

Any and all securities created by the Customer in favour of the Bank are in full force and effect. Without prejudice to the generality of the aforesaid, the following securities already created in favour of the Bank shall continue to subsist and secure all amounts becoming due or payable by the Customer to the Bank under this Agreement or under any other documents executed by the Customer pursuant to this Agreement:

- (a)*
- (b)*
- (c)*
- (d)*
- (e)*
- (f) personal guarantees of all directors of the Customer guaranteeing all obligations of the Customer."*

30. Being signatory of the Restructuring Agreement dated 15th June 2009 as a Guarantor, the respondent No.1 has made the following acknowledgment which is annexed at page 401 of the paper book (part-III):

"The Guarantors hereby, jointly and severally, confirm and acknowledge the aforesaid terms and the guarantees executed by them will continue to remain effective and in force until all amounts payable by the Customer are fully paid to the satisfaction of the Bank."

31. In view of all the above, we have no hesitation to conclude that the Guarantee furnished by respondent No.1 on 24th February 2007 as one of the Directors of respondent No.4 in pursuance of 2nd renewed RF facility to secure all amounts becoming due or payable by respondent No.4 is continuing with consent of respondent No. 1 and same does not stand discharged under section 133 of the Contract Act 1872 due to variance in terms of contract i.e. execution of Restructuring Agreement dated 15th June 2009 which has also been signed by respondent No. 1 as a Guarantor.

32. According to the settled principles, if variation or composition of the loan or time etc. as to its repayment was allowed by the creditor to the borrower and consent/assent in advance thereto was given by the guarantor in the letter of guarantee, subsequent to the date of guarantee, such variation, composition, extension, change or indulgence being within the contemplation of the parties at the time of execution of guarantee did not affect discharge of the surety/guarantee from obligations under the guarantee. And as such surety continued to be bound by the terms of the

guarantee despite moratorium, enlargement of time, composition and variations between the creditors and principal borrower. Reliance in this regard is placed on the cases of “**Aftab A. Sheikh**” (referred by learned counsel for the appellant) and **Industrial Development Bank of Pakistan v. Hyderabad Beverage Co. (Pvt.) Limited**⁶.

33. Since no substantial question of facts or law, requiring evidence to be recorded, had arisen to the extent of respondent No.1, therefore there was no occasion for the learned DB of LHC to grant respondent No.1 leave to defend the suit *vide* impugned judgment dated 13th January 2025.

34. It is concluded that while partly accepting appeal to the extent of respondent No.1 after holding the same as not barred by time and granting leave to defend the suit to respondent No. 1, the learned DB of LHC has erred in facts as well as law.

35. For the above reasons, the instant appeal is accepted with no order as to costs. The impugned judgment and decree dated 13th January 2025 passed by the learned DB of LHC in favour of respondent No. 1 is set aside and RFA No. 116017/2017, being barred by time and having no merits, stands dismissed to the extent of respondent No.1 as well.

Judge

Judge

Judge

Announced in the open Court on 29th of May 2025 at Islamabad.

Islamabad:
29.05.2025
Atif/Zohaib Afzal
APPROVED FOR REPORTING

⁶ 2016 CLD 560