

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.B-151 of 2010

Dawood Islamic Bank Limited

Versus

M/s Aftab Technologies (Pvt.) Limited

BEFORE:

Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing: 13.01.2015 and 21.0.2015

Plaintiffs/petitioner: Through Mr. Aijaz Ahmed Advocate.

Defendant/Respondent: Through Mr. Imadul Hassan Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Plaintiff has filed this suit for recovery of Rs.321,203,707.65, cost of funds under section 9 of Financial Institutions (Recovery of Finances) Ordinance, 2001 against the defendants.

In nutshell the case of the plaintiff is that the defendant No.1 was sanctioned, approved and granted various finance facilities from time to time such as:

- i) *Sale and Purchase Back Diminishing Musharakah Facility-I amounting to Rs.150 Million.*
- ii) *Sale and Purchase Back Diminishing Musharakah Facility-II amounting to Rs.18 Million.*
- iii) *Sale and Purchase Back Diminishing Musharakah Facility-III amounting to Rs.17 Million.*
- iv) *Murabaha/Restricted Mudarabah Facility amounting to Rs.93.285 Million.*
- v) *Ijarah Facility for the purchase of equipment amounting to Rs.3.700 Million.*

The defendants failed to repay the facilities as stated above hence the plaintiff has filed this suit for recovery.

After service of notices/summons the defendants filed leave to defend application and denied the claim of the plaintiff. Since the plaintiff has not disputed or questioned the maintainability of the said application being signed, sworn and verified by one Muhammad Ahmer Afzal Khan, claims to be the Managing Director of defendant No.1 company and authorized by the answered defendants, I would not touch this aspect of the case.

It is the case of the defendants that in cases of recovery, as claimed in the instant suit, approval of Shariah Council and Shariah Board is required to be obtained before filing a suit for recovery by a Islamic Bank under Islamic concept. It is further urged by learned counsel for the defendants that due to global recession and loss in the business Islamic Bank is bound to forego the profit portion of the finances and that they are bound to restructure the finance facility over a longer period on the basis of new break even years required for the plant and machinery acquired from the finances due to drastic decrease in capacity utilization. It is further argued that the recovery through the sale of collaterals is not required under the Prudential Regulations for SME Financing issued by State Bank of Pakistan. It is further argued by learned counsel for the defendants that under the Islamic Banking it is not the amount that has been financed but in fact it is to facilitate generation of funds through Murabaha, Ijarah and Musharakah and hence it is to be seen from such angle as to whether the recovery method as adopted by the plaintiff is enforceable under Islamic Banking or not. Learned counsel for the defendants lastly argued that the statement of account as shown by the plaintiff does not start from zero and in fact it was the balance which was carried forward.

On the other hand learned counsel for the plaintiff has argued that the defendants have not denied the sanctioning of the finance facilities in favour of defendant No.1 and so also signatures on all the documents annexed with the plaint. It is urged by the plaintiff's counsel that the defendants have not only executed the charged documents but other defendants also mortgaged their properties and in addition thereto rest of the defendants executed their personal guarantees favouring the plaintiff. Learned counsel relied upon the documents such as finance agreement, demand promissory note, letter of continuity and letter of pledge in addition to the charge that has been created over the assets of the company, which is duly registered.

It is further urged by learned counsel for the plaintiff that the effect of availed rollovers, rescheduling and re-arrangement was not denied or rebutted to prove the invalidity or prejudice thereof. It is contended that such objection would have carried weight in case defendants would have disputed the existing outstanding and the documents annexed with the plaint. It is further contended that such statement would not cause any prejudice as the effect of rescheduling, re-arrangement was shown in the statement of account, which is not denied by the defendants. Learned counsel further submitted that each and every facility is proved date-wise by statement of account which is not denied by the defendants.

Learned counsel for the plaintiff in support of his arguments has relied upon the cases of (i) Bank of Khyber v. Spencer Distribution Ltd. (2003 CLD 1406), (ii) Industrial Development Bank of Pakistan v. Zamco (Pvt.) Ltd. (2007 CLD 217) and (iii) Apollo Textile Mills Ltd. v. Soneri Bank Ltd. (2012 CLD 337).

Heard the learned counsel and perused the record.

Insofar as arguments of learned counsel for the defendant that under Islamic Banking such recovery in the present form cannot be made is totally contrary to the concept and injunctions of Islam itself as the defendants cannot usurp the money which is due and outstanding against them as payable.

Insofar as argument of learned counsel for the defendants in relation to the principles and injunction of Islam is concerned that in case of recession the bank/plaintiff cannot adopt such mode for its recovery, it is misconceived as the injunction of Islam are not meant to cater for the usurpation and in fact meant for those who perform in accordance with law and agreements. The injunction of Islam equally favours rights and obligation of the plaintiff/lender as well and hence I am not convinced insofar as argument of learned counsel for the defendants in relation to such Islamic concept is concerned.

Now I deal with finance facilities which are summarized in para 6 of the plaint.

Dealing with Facility No.1 i.e. Diminishing Musharakah Facility-I amounting to Rs.150 Million, record shows that Musharakah Agreement was executed on 29.11.2007 for financing of Plant and Machinery installed at Plot No.A-81 and A-82, SITE, North Karachi, along with Quarterly Payment Agreement and Undertaking of the same dates. Such documents are annexed as Annexures P/8 to P/10 to plaint.

For second facility i.e. Sale and Purchase Back Diminishing Musharakah Facility-II amounting to Rs.18 Million, the Musharakah Agreement was executed on 14.05.2007 (Annexure P/11) followed by other supported documents (Annexure P/12 to P/14). The statement of account insofar as this facility is concerned is also available as Annexure P/6 which shows the opening balance as of the same amount.

Insofar as third facility i.e. Sale and Purchase Back Diminishing Musharakah Facility-III amounting to Rs.17 Million is concerned, the documents in respect thereof are annexed as Annexures P/15 to P/17. The statement of account in relation to this facility are also available at page 613, 615 and 617 of the file.

Likewise Murabaha/Restricted Mudarabah Facility amounting to Rs.93.285 Million and Ijarah Facility for the purchase of equipment amounting to Rs.3.700 Million are also duly supported by the statement of account insofar as disbursement and the opening balance is concerned. It is also very pertinent to mention that even the defendants along with their leave to defend application have filed their own statement of account such as one available as Annexure D/38 onwards and it is in consonance with the statement of account shown by the plaintiff. Hence, I do not see any reason to disagree with the statement of account given by the plaintiff.

Even otherwise, first three facilities, as described above, are admitted by the defendants in terms of their own statement of account as Annexure D/98 to leave to defend application. So also the facilities No.4 and 5, as stated above.

The breakup summary of the finance facilities is provided in Para 11 of the plaint are in consonance with the statement of account except charity charges.

In view of the above, since no substantial question of law and fact has been raised I dismissed the application for leave to defend filed by the defendants and decreed the suit of the plaintiff to the extent of Prayer clause (a) to (g) with cost of funds in accordance with law. Insofar as the charity amount and future markup that is being claimed is concerned the same is being declined.

Insofar as other applications of the plaintiff (CMA No.9522 and 9523 of 2010) are concerned since the suit has been decreed in the above terms, as prayed, except the charity charges as well as future markup the applications filed by the plaintiffs have become infructuos and are accordingly dismissed.

Above are the reasons of my short order dated 21.01.2015 of which above are the reasons.

Dated:

Judge