

IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:

Mr. Justice Muhammad Shafi Siddiqui

Suit No.B-08 of 2015

Dubai Islamic Bank Pakistan Limited
Versus
Gulistan Textile Mills Limited & others

Date of Hearing: 14.01.2016
Plaintiff: Through Mr. S. Aijaz Hussain Shirazi Advocate
Respondent: Through Mr. Farqan Naveed Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Plaintiff has filed this suit for recovery of Rs.79,881,537-46 against the defendant. On service of notice the defendants have put their appearance and moved application for leave to defend to which replication has also been filed by the plaintiff.

2. Learned counsel for the defendant in relation to leave application has raised grounds for two sets of defendants one for the principal borrower i.e. defendant No.1 and the other relate to defendants No.2 to 4, the guarantors.

3. For defendants No.2 to 4 learned counsel for defendants has raised a solitary ground that such guarantee, as available at page 717 Annexure G, does not relate to subject Istisna Agreement dated 04.05.2010 as the subject guarantee relates to a period of July 2007 and the plaint is silent as to the amount financed prior to 2010.

4. Insofar as the grounds agitated by the learned counsel for the defendants in relation to principal borrower i.e. defendant No.1, he submits that there is no document to establish the disbursement of the amount and as the statement of account filed by the plaintiff does not show disbursement in its true sense. Per learned counsel, this statement is not as required in terms of section 2(8) of Bankers Books Evidence Act,

1891 and Section 9(2) of Financial Institutions (Recovery of Finances) Ordinance, 2001. He denied that any amount was disbursed in relation to which the plaintiff has claimed the amount in the instant suit from defendant No.1.

5. Learned counsel further submits that the Istisna Agreement is contrary to the regulation/circular issued by the State Bank of Pakistan. It provides that in case of a default, the margin of profit is to be reduced in terms of clause (ix) of the State Bank Shariah Board approval which has not been done by the plaintiff while claiming the amount as prayed in the suit.

5. On the other hand, learned counsel for the plaintiff insofar point raised in relation to the guarantors are concerned has relied upon clause 5 of the Guarantee which stipulates it to be a continuing guarantee in relation to any security to be provided to the principal borrower, which may be in addition to the earlier and this also is not to be considered as any substitution for any other security only. Counsel submits that since this is a continuing guarantee for any additional financial facility to be provided to the principal borrower therefore the guarantors are liable in relation to the agreement, which is a financial facility provided in addition.

6. Insofar as denial of the disbursement of the amount is concerned, learned counsel for the plaintiff has relied upon numerous transactions from C/1 to C/28 which are substantially offer letters issued to the Bank by defendant No.1, to avail Istisna Financial Facilities. For assistance purpose the counsel has relied upon one set of documents, which starts from page 107 and ends at 113. He submits that one transaction of Rs.25 Million was disbursed in four tranches as shown in page 113. Such amount was disbursed in four tranches of 6.25 million each and it also shows selling price of commodity and is in fact earned the profit of

approximately above Rs.6 Million which is to be shared. Counsel has further shown the request of the disbursement of the amount and also the authority letter issued by the Bank for the sale of these finished products at the said minimum rates. One set of such documents is filed as Annexure C/C-1 as above. Learned counsel submits that this amounts to admission for the disbursement. All the sets of documents are similar in terms of modality.

7. Learned counsel further relied upon statement of account which shows 42 transactions based on individual contracts as above, which shows booking date, maturity date, installments principal overdue, installment profit overdue, total overdue amount, amount paid and pay date. He further relied upon section 2(8) of Bankers Book Evidence Act 1891 and submits that the requirement to consider it as a certified copy are satisfied and hence it fulfills all the requirement to consider it as a statement of account in terms of section 9(2) of Financial Institutions (Recovery of Finances) Ordinance, 2001 also.

8. Counsel further submits that out of these 42 transactions, 24 have been settled whereas 19 remain unsettled. He has provided the chart in para 5 of plaint which relates to the settled transactions and in paragraph 6 of plaint, 19 transactions are those which are unsettled.

9. He further submits that insofar as circular of State Bank of Pakistan relied upon by learned counsel for the defendants is concerned, it nowhere forms part of the agreement. Even otherwise, he submits that the goods have already been sold at a price agreed upon and hence there is no question of establishing that the goods have not fetched the appropriate price. The offer letters, which include the purchase price and selling price, were given by the defendants themselves.

10. I have heard the learned counsel and perused the material available on record.

11. Insofar as the ground taken by the defendants No.2 to 4, which relates to applicability of personal guarantee is concerned, I am of the view that clause 5 of the guarantee posed a prominent role in deciding as to whether this guarantee covers the present facility provided by the plaintiff to the defendants. Clause 5 reads as under:-

“5. This Guarantee is a continuing guarantee and is in addition to and not in substitution for any other security which the Bank may now or hereafter hold for the Customer’s Obligations under the Agreement and may be enforced without the Bank first having recourse to any such other security and/or without the Bank first taking any steps or proceedings against the Customer.”

12. It appears that this guarantee is continuing guarantee and is also not in substitution for any other security which plaintiff bank would have granted to the borrower to discharge the customer’s obligation. This clause is sufficient to cover all other additional finance facilities to be provided to the customers, which the defendant No.1 has availed. Hence, I am of the view that this guarantee would cover the instant Istisna Finance Facility. It does not matter that the subject guarantee was executed on 27.07.2007 nor the plaintiff has claimed any amount prior to the period of 2010, therefore, they are not required to show any amount prior to 2010. The subject guarantee was executed on 27.07.2010 and hence in view of the aforesaid clause this being a continuing guarantee would apply to all such financial transactions.

13. Insofar as the denial of disbursement of the amount is concerned, I am in agreement with the contention of the plaintiff’s counsel that the documents available as Annexure C/1 to D/1 and onwards shows that after the approval of this financial facility the defendants themselves have offered to purchase the commodity to be disposed of at a price agreed. The statement of account needs not to be in a particular

format. The statement of account needs to include all those required heads to establish that such an amount was disbursed and availed and paid and such amount was overdue, which include principal amount as well as interest/profit, as the case may be.

14. The statement of account available on record at page 743 fulfills all such requirement. It is also signed by the Manager/Branch Manager of the concerned bank which is a prerequisite in terms of section 2(8) of Bankers Book Evidence Act, 1891. The documents which relate to earlier 24 transactions, which have been availed are not in dispute since for these financial facilities they have paid the amount.

15. Insofar as the claim of non-payment, which according to him would trigger the circular in relation to the reduction in the specific amount of the transaction per day, is also not borne out of the agreement. The defendants have not challenged the execution of such Istisna Agreement; it is only by way of mere denial that they stated to have not executed the same. This would not substantially to be considered as “challenge” based on any violation of the circular. This would only show that they have been in an agreement to such terms and earlier 24 transactions were achieved in view of the detailed transactions and correspondences shown, which include repayments. Hence, no substantial question of law and fact has been made out in the application. Accordingly, the leave application is dismissed.

15. A perusal of pleadings and the prayer clause reveals that the claim of the plaintiff is only to the extent of the principal amount along with profit agreed and no interest has been claimed in the plaint in relation to period it remain overdue. Hence I do not see any impediment in decreeing the suit. Accordingly, the suit is decreed as prayed.

Dated: 14.01.2016.

Judge