IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar** and **Agha Faisal**, **JJ**.

First Appeal 82 of 2018	:	Asma Hassan & Another vs. Askari Bank Limited
For the Appellants	:	Mr. Saathi Ishaq & Mrs. Shabana Ishaque, Advocates
For the Respondent	:	Mr. Mohammad Ishaq Ali Advocate
Date of Hearing	:	20.05.2019
Date of Announcement	:	31.05.2019

JUDGMENT

Agha Faisal, **J**: The present appeal was filed assailing the judgment dated 10.04.2018 ("**Impugned Judgment**"), and decree prepared in respect thereof, delivered by the learned Banking Court IV at Karachi in Suit 36 of 2013 ("**Suit**"). The learned Banking Court decreed the Suit in favour of the bank and the present appeal has been filed by the respective judgment debtors therein.

2. Mrs. Shabana Ishaque, Advocate appeared on behalf of the appellants and submitted that the learned Banking Court had failed to appreciate the provisions of the Financial Institutions (Recovery of Finances) Ordinance, 2001 ("**Ordinance**"), and that the Impugned Judgment had been delivered against the principles contained therein. Learned counsel argued that the Suit was predicated upon forged documents and the learned Banking Court failed to consider the same. Learned counsel also argued that once the certain constituents of mark-up were disallowed to the respondent bank it was imperative that no cost of funds to be recovered from the appellants as there is no provision for recovery of cost of funds in addition to the mark-up. It was thus argued that the present appeal may be allowed and the Impugned Judgment and decree be set aside.

3. Mr. Ishaq Ali, advocate appeared on behalf of the respondent bank and submitted that the obligation and liability of the appellants had

been duly admitted and same was recognized in the Impugned Judgment. It was argued that only plausible contention of the appellants was adjustment of mark-up, which was duly allowed by the Banking Court and same is manifest from the Impugned Judgment. It was further argued that the appellants had failed to make out any case for interference, therefore, the present appeal merited dismissal forthwith.

4. We have heard the arguments of the respective counsel and have also considered the record demonstrated before us. The primary question for determination before this Court, in pursuance of Order XLI rule 31 CPC, is whether there was any infirmity demonstrated from the Impugned Judgment that merited interference in appeal.

5. It may be pertinent to initiate this deliberation by adverting to the plaint filed in Suit wherein the entire case of the respondent was anchored upon paragraphs 1 till 5 thereof. The said paragraphs stipulate *inter alia* that the appellants availed the finance facility from the respondent which was renewed from time to time. The relevant finance and security documentation are listed in said paragraphs, stated to have been executed between the parties inter se. A bare perusal of the leave to defend application filed by the present appellants before the learned Banking Court demonstrates that paragraph 1 till 5 of the plaint were admitted. In this context, the leave to defend application filed by the appellants was dismissed vide order dated 23.04.2015, the operative constituent whereof is reproduced herein below:

> "After hearing arguments I have perused the record from which it reveals that defendants filed one breakup which is available on record in which admitted finance facility and availed amount therein. As regard Article 10-A of the Constitution of Islamic Republic of Pakistan, present suit has been filed under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 which is special enactment and Banking Courts have been established under the said Ordinance, therefore are legally bound to act upon the said enactment. Defendants have not comply mandatory requirement of Section 10(3)(4) and (5) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 defendants would not absolved from obligation under Section 10 of the Ordinance by simply disputing or denying amount claimed in the suit or by stating amount towards repayment in general or vague terms. Reliance is placed upon 2015 CLD 227 Sindh. There is no denial regarding utilization of finance facility

> and leave to defend application not fulfilling mandatory requirement of Section 10(2)(3) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 though defendants disputed markup but under same circumstances leave to defend was dismissed by the Honourable High Court in 2010 CLD 635 Karachi.
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> In these circumstances application is dismissed and parties are directed to file their breakup statements alongwith supporting documents for adjudication of actual amount due by defendants to bank."

6. The matter subsequently culminated in the Impugned Judgment and it is duly noted therefrom that the learned Banking Court considered the issue of principal and mark-up adjustment elaborately therein prior to decreeing the Suit The operative constituent of the Impugned Judgment is reproduced herein below:

> "14. It has been discussed in the preceding paragraph No.12 that the plaintiff vide agreement at Annexure-D renewed/extended the finance facility without clearance of markup liability of previous tenure ending on 31.12.2010, hence for the purpose of markup the agreed period will be considered as up to 31.12.2010 and not 31.3.2012. It has been discussed in the preceding paragraph No.13 that the outstanding markup up to 31.12.2010 was Rs.842,345.58 and the total adjustment of markup up to 24.8.2011 comes to be Rs.1,500,000.00. In these circumstances I hold that finance facility for the purpose of markup expired on 31.12.2010 and payable markup up to 31.12.2010 was Rs.842,345.58 and thus amount of Rs.657,654.42 has been adjusted in excess and this excess amount shall be adjusted towards principal. I further hold that date of default for the purpose of cost of fund shall be 31.12.2010.
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> 15. The defendants in their breakup statement filed on 11.1.2016, referred in the preceding paragraph No.6, have claimed that they have paid markup of Rs.842,345.56 and that amount of Rs.4,827,566.00 has been charged/adjusted in excess. It is admitted position that the initial tenure/period of the finance sanctioned on 14.2.2008 was for the period of one year and it was subsequently extended from time to time up to 31.12.2010. It is clear from the statement of account available at Annexure-F that the entire outstanding markup of Rs.900,108.73 was adjusted on 24.2.2010. The agreement dated 3.10.2010 available at Annexure-B/4 shows that the renewal/extension of finance facility up to 31.12.2010. This renewal/extension was made only after adjustment/clearance of the outstanding markup on 24.2.2010, hence the previous markup paid/cleared upto 24.2.2010 was for the previous renewal/extensions made from time to time and that adjustments cannot be

> considered for the renewal/extension allowed vide agreement dated 3.3.2010 (Annexure-B/4). It has been discussed in the preceding paragraph No.14 that markup payable upto 31.12.2010 was Rs.842,345.58 and against that amount of Rs.1,500,000.00 has been adjusted. In these circumstances I do not agree with the breakup statement filed by the defendants to the extent of excess amount of Rs.4,827,566.00 and I hold that excess amount is only of Rs.567,654.42 and not Rs.4,827,566.00 as claimed by the defendants.
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> 16. In view of above discussions and reasons given in the preceding paragraph No.5 to 15 it is directed that the plaintiff bank is entitled to the unpaid principal amount. This will be calculated as discussed in the preceding paragraph No.14. The suit is decreed accordingly. Let the preliminary decree be prepared and final decree shall be prepared after the revised breakup statement is filed by the plaintiff bank. The plaintiff bank is directed to file revised breakup statement within one week from today showing the outstanding principal amount which remains payable after adjustment of excess amount wrongly credited towards markup as already discussed. The prayer of plaintiff bank regarding attachment and sale of mortgage property is also allowed.
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> 17. The plaintiff is also entitled to the cost of funds after the date of default i.e 31.12.2010 as given in the preceding paragraph No.14 till the realization of the outstanding amount at the rate as determined by the State Bank of Pakistan envisaged under sub section (2) of Section 3 of the Financial Institution (Recovery of Finances) Ordinance, 2001 and also costs of the suit."

7. Learned counsel for the respondent had drawn our attention to an order dated 08.10.2015, passed by the learned Banking Court, wherein admission of the appellants with regard to the principal amount of the finance was recorded. The learned counsel for the appellants did not deny the veracity of the observation so recorded. It is thus apparent that after establishing the quantum of the principal amount, the measure of mark-up was duly addressed by the learned Banking Court and the same was manifest from decree passed in Suit. The appellants' objection with regard to the apportionment of cost of funds is not sustainable as cost of funds is permissible to a decree holder under the provisions of Section 17 of the Ordinance.

8. In view of the reasoning and rationale contained herein, we are of the deliberated view that the appellants have failed to make out a case

for interference in the Impugned Judgment, hence, the same is hereby upheld and maintained. The present appeal, along with listed applications, is hereby dismissed with no order as to costs.

JUDGE

JUDGE

Khuhro/PA