IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:

Mr. Justice Mohammad Shafi Siddiqui

Suit No.B-55 of 2010

IGI Investment Bank Limited
Versus
M/s DHA Cogen Limited

Date of Hearing: 25.01.2016

Plaintiff: Through Mr. Abdul Sattar Lakhani Advocate.

Defendant: Through Mr. Naveed-ul-Haq Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Plaintiff has filed this suit for recovery of Rs.220,493,671 against the defendant on the strength of Agreement of Finance dated 28.11.2007 (Annexure 'B'). The defendant on service of the notices has filed an application (CMA No.8419 of 2010) under section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, seeking leave to defend the suit.

2. Learned counsel for defendant in support of his application at the very outset submits that the plaint is not supported by statement of accounts duly certified in terms of Section 2(8) of the Banker's Books Evidence Act 1891. He submits that the statement of account is a prime document for considering the outstanding amount, as claimed by the plaintiff.

3. Learned counsel has taken me to the documents available as Annexure 'H' at page 65, which is titled as 'Customer Temporary Statement', which, per learned counsel, relates to the principal amount only. He submits that in terms of Section 9(2) and 9(3) of Financial Institutions (Recovery of Finances) Ordinance, 2001 it is utmost

responsibility and duty of the plaintiff/financial institution to have filed plaint duly supported by the statement of account and should also contain the particulars as to the amount financed, the amount paid by the defendant and other amounts relating to the finance paid and payable by the defendant to the financial institutions up to the date of institution of the suit. Hence, learned counsel submits that on this score alone the defendant is entitled to defend the case.

4. Learned counsel further relied upon Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 and submits that in view of fair trial, as guaranteed under the law, and without prejudice to the merits of the case the defendant is even otherwise entitled to such relief.

5. Learned counsel for the defendant in support of his contentions has relied upon the cases reported in 2012 CLD 1036, 2002 CLD 276, 2006 CLD 217, PLD 1989 Peshawar 191, 2005 CLD 581, PLD 1983 Peshawar 31, 2002 CLD 1270, 1999 YLR 323, 2012 CLD 337, 2002 CLD 93, 2001 MLD 1351, 2012 CLD 1670, 2014 CLD 1985, 2014 CLD 1367 and PLD 1989 Peshawar 191.

6. On the other hand, learned counsel for the plaintiff submits that the leave application, as filed by the defendant, is in violation of section 10(4) of the Financial Institutions (Recovery of Finances) Ordinance, 2001. The defendant has neither disclosed the amount of finance availed nor has given any statement as to the amount payable to the plaintiff by the defendant. Hence, on this score, per learned counsel, the leave application is liable to be dismissed.

7. Learned counsel for the plaintiff further submits that the amount financed in terms of the finance agreement dated May 2007 is not denied. The defendant has disputed the outstanding amount only as to

the claim of markup as the question of disbursement of the amount under the aforesaid finance agreement is not disputed at all. He further submits that the statement available as Annexure 'H' at page 65 is sufficient in this regard. In view of the present controversy since the defendant has not denied as to the principal outstanding, insofar as the claim of markup is concerned, learned counsel concedes that the same could only be reduced to the extent of one year and that too at buy back price, which is incorporated in agreement as Rs.184.885 Million.

8. Heard the learned counsel and perused the material available on record.

9. Insofar as the point relating to the Article 10-A of the Constitution is concerned, no right of defendant is taken away while hearing the leave to defend application. There is a substantial compliance of Article 10-A while hearing the leave application and it cannot be presumed under any stretch of imagination that the defendant is being condemned unheard. Defendant is given a chance to place a triable case and that is sufficient requirement which also fulfills the requirement of Article 10-A of the Constitution. I have already given reasoning as to the applicability of Article 10-A of the Constitution in the case titled as Suit No.B-63 of 2007 titled as Raja Traders (Pvt.) Limited v. National Bank of Pakistan and others. Indeed, under the parameters of Financial Institutions (Recovery of Finances) Ordinance, 2001 the defendant is entitled for a relief if question of law and fact is being established. Article 10-A of the constitution of Islamic Republic of Pakistan no doubt provides an opportunity of fair trial but it does not amount to a trial of a suit where neither any question of law nor a fact was established. Article 10-A of the constitution of Islamic Republic of Pakistan also provides for the determination of a civil right and the obligation. Once the due process as required in terms of Financial Institutions (Recovery of Finances)

Ordinance, 2001 is adopted and the defendant is before the Court for redressal of his grievance, all he has to do is to establish the question of fact and law for determination of civil right and obligation, which is to be determined by the Court. In terms of Section 10(3) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 the application for leave to defend is supposed to be in the form of written statement which shall be containing summary of substantial question of law as well as fact in respect of which in the opinion of defendant, evidence needs to be recorded. As I have observed earlier that the questions as raised by the defendants have been answered categorically and a due process of law was adopted. Hence, in view of the above I would score off implication of Article 10-A as suggested by defendant's counsel that leave ought to have been granted in consideration of Article 10-A alone.

10. Insofar as the leave application on merits is concerned, at first application is to be tested on the touchstone of Section 10(4) of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Such section and/or the requirements, as mandated, therein are as under:-

> *"**10. Leave to defend.** (1) In any case in which the summons has been served on the defendant as provided for in subsection (5) of section 9, the defendant shall not be entitled to defend the suit unless he obtains leave from the Banking Court as hereinafter provided to defend the same; and in default of his doing so, the allegations of fact in the plaint shall be deemed to be admitted and the Banking Court may pass a decree in favour of the plaintiff on the basis thereof or such other material as the Banking Court may require in the interests of justice.*
>
> *(2) The defendant shall file the application for leave to defend within thirty days of the date of first service by any one of the modes laid down in subsection (5) of section 9:*
>
> *Provided that where service has been validly effected only through publication in the newspapers, the Banking Court may extend the time for filing an application for leave to defend if satisfied that the defendant did not have knowledge thereof.*

> *(3) The application for leave to defend shall be in the form of a written statement, and shall contain a summary of the substantial questions of law as well as fact in respect of which, in the opinion of the defendant, evidence needs to be recorded.*
>
> *(4) In the case of a suit for recovery instituted by financial institution the application for leave to defend shall also specifically state the following:-*
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> *(a) the amount of finance availed by the defendant from the financial institution; the amount paid by the defendant to the financial institution and the dates of payments;*
>
> *(b) the amount of finance and other amounts relating to the finance payable by the defendant to the financial institution up to the date of institution of the suit;*
>
> *(c) the amounts of finance and other amount crediting to the finance payable by the defendant to the financial institution up to the date of institution of the suit;*
>
> *(d) the amount if any which the defendant disputes as payable to the financial institution and facts in support thereof.*

11. When read in line with the above reproduced section, it appears that the defendant has neither shown any amount that was availed of by it nor shown the amount which is to be returned/repaid. Hence, there is a non-compliance of the mandatory requirement of Section 10(4) of Financial Institutions (Recovery of Finances) Ordinance, 2001. The consequence provided in default thereof is dismissal of the leave application.

12. As to the question that relates to the statement of account, since the defendant has not at all disputed the amount of finances and the amount of markup to be paid back under the finance agreement of 2007 there is not much of a burden that is shifted upon the plaintiff. The finance agreement, as available on record as Annexure 'B' at page 27, leads to conclude that an amount of Rs.150 Million was availed by the

defendant and the agreed markup for the subject period as buy-back price, which include markup amount is also incorporated at Rs.184.885 Million.

13. In terms of Para 10 of the plaint as to the markup, amount of Rs.19,959,534/- was paid back whereas a balance amount of Rs.15 Million towards markup during the subsistence of the subject agreement was outstanding and that is the only amount towards markup in addition to the principal amount, which is payable to the plaintiff. Insofar as the subsequent claim of markup is concerned, the plaintiff has not placed on record any agreement to claim such amount after expiry of the aforesaid agreement. The plaintiff however is entitled for the cost of funds till realization of the amount. The plaintiff is therefore entitled as under:-

Principal amount	Rs.150 Million
Balance markup	Rs.15 Million
Total	Rs.165 Million

14. In view of the above since the defendant has failed raise any substantial question of law and fact the leave application is dismissed and the suit of the plaintiff is decreed in the sum of Rs.165 Million with cost of funds from date of default till realization of the amount.

25.01.2016 **Judge**