

IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Mohammad Shafi Siddiqui

Suit No.B-37 of 2013

BankIslami Pakistan Limited
Versus
Fatani Impex (Pvt.) Limited & others

Date of Hearing: 09.02.2016

Plaintiff: Through Mr. Aijaz Hussain Shirazi Advocate.

Defendant No.5: Through Mr. Irfan Haroon Advocate.

J U D G M E N T

Mohammad Shafi Siddiqui, J.- By short order dated 09.02.2016 I have dismissed the leave application of defendant No.5 and decreed the suit of which following are the reasons.

2. Defendant No.5 has filed leave application on the ground that in terms of Section 133, 134 and 135 of Contract Act, the guarantee stood discharged since the Bank has restructured by providing additional facilities to Rs.80 Million to defendant No.1. Learned counsel for defendant No.5 submitted that the defendant No.5 had tendered his resignation on 30.04.2009 and on the same day Form 29 under Companies Ordinance 1984 was filed before SECP. He further submitted that previously defendant No.1 was working and availed finances as partnership firm which was subsequently converted into private limited company and by virtue of such resignation he ceased to hold the office which is incorporated in Form 29 of Companies Ordinance, 1984. He submitted that he was also one of the signatories of the guarantee however after its conversion from partnership firm into private limited

company no personal guarantee was called upon by the plaintiff from defendant No.1 or from defendant No.5 and the BPD circular dated 20.07.2002, is thus being violated.

3. Counsel submitted that these are substantial questions of law and fact hence leave ought to have been granted to the defendant No.5.

4. On the other hand, learned counsel for the plaintiff contended that the personal guarantee available at page 429 Annexure H/1 is complete and comprehensive and covers all the consequential effects including but not limited to conversion of partnership firm into private limited company. He submitted that in terms of clause 3 of the guarantee it is continued to be in effect until all sums whatsoever payable by the customer under aforesaid facilities have been finally paid to the entire satisfaction of the Bank. It is urged that defendant No.5 in his leave to defendant application has not only clearly admitted availing of finance facility but has also admitted restructuring of finance facilities. He submitted that with regard to the contents of Para 4 of the plaint, it is admitted by defendant No.5 as under:-

“Same are admitted to the extent that the defendant No.1 have availed the facility sanctioned and disbursed by the plaintiff and subsequently restructured on 24th December, 2010”.

5. Hence, in view of the submissions made counsel for the plaintiff prays that the leave application may be dismissed and the suit be decreed as prayed.

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

7. The core issue which is raised by learned counsel for the defendant No.5 is in relation to discharge of his personal guarantee. I have perused the contents of personal guarantee and in terms of clause 3 thereof it appears that the guarantee shall continue to be effective

until all sums whatsoever payable by the customer under the facilities have been finally paid in full to the entire satisfaction of the Bank (plaintiff). The conversion of a partnership firm into a private limited company is of no consequence in terms of general clauses of the personal guarantee available as Annexure H/1.

8. All the assets and liabilities were taken over by defendant No.1. A partner or a director may or may not have retired or resigned, it is the personal guarantee which would continue to be enforced insofar as his financial obligations or any other obligation incorporated therein is concerned. The personal guarantee executed by all partners shall continue to be enforce and alive after the formation of the private limited company which consists of directors who were partners in the partnership firm. The effect of retirement is insignificant in view of enforcement of certain clauses of personal guarantee. The requirement of section 133 of the Contract Act is that there should be variance without surety's consent. Firstly the defendant No.5 who was also partner is unable to show that there was any variance in the terms of finance. Secondly, defendant No.1 being considered as limited company of same partners does not amount to varying terms of finance.

9. Insofar as circular of the State Bank of Pakistan, as relied upon by defendant No.5, is concerned, it only caters for a situation where such personal guarantee for minor shareholder was not obtained. It is not the situation here where a minor shareholder of the company is insisted upon to submit a personal guarantee. As a partner/director he stood guarantor and such personal guarantee is available on record which is continued to be enforced. Hence, I do not consider the arguments of learned counsel for the defendant No.5 sufficient for the grant of leave as by raising such arguments, no substantial question of law and fact has been raised.

10. It appears that the plaintiff has filed this suit for recovery of Rs.82,231,736/- along with cost of funds, charges, costs till the date of realization of the whole amount against the defendants under section 9 of Financial Institutions (Recovery of Finances) Ordinance, 2001. Initially the finance facilities were extended to a partnership firm i.e. Fatani Impex of which defendants No.2 to 5 were partners. Defendants No.2 to 5 incorporated defendant No.1 and the entire business, accounts and liabilities of the partnership firm namely Fatani Impex were taken over by defendant No.1 which also include defendant No.5 as being director of defendant No.1. The plaintiff extended following finance facilities from time to time:-

(i) Ijarah Facilities

Ijarah facilities of Rs.12,124,290/- (Ijarah Facilities) in terms of Ijarah Agreement dated 06.10.2007 (Annexure C-2 page 95), Ijarah Agreement dated 27.11.2007 (Annexure C-3 page 137) and Ijarah Agreement dated 24.01.2008 (Annexure C-4 page 175) (Ijarah Agreements). Subsequently upon the request of the defendants a supplemental ijarah Agreement was executed for restructuring of the aforesaid three (03) Ijarah Agreement through Supplemental Ijarah Agreement dated 25.01.2010. (Annexure C-5 page 213). In terms of Supplemental Ijarah Agreement the outstanding amount was to be paid in 42 monthly Rental Payments Statement of account after restructuring is as under:-

Total Lease Amount (Principal)	4,931,458/-
Total Rental Receivables (Principal+ Profit)	6,517,212/-
Total amount received	431,884/-
Outstanding Rentals	6,085,328/-
Charity amount	1,247,570/-
Total	7,332,898/-

(ii) **Diminishing Musharaka Facility**

A Diminishing Musharaka Facility of Rs.17,550,000/- (Musharaka Facility) in pursuance of Shirkat ul Milk Agreement dated 06.12.2007 (Musharaka Agreement). Subsequently at the time of execution of Supplemental Ijarah Agreement the defendants agreed to pay outstanding amount in 42 monthly payments commencing from February 25, 2010 (Annexure D-1 to D-5).

Statement of Account	L-1 and L-3
Date of Disbursement	07.12.2007 (Annexure L-3 page 485)
Repayment	Annexure L-1 page 467-471
Total amount availed	17,550,000/-
Amount repaid	3,617,906/- (Page 471)
Principal	227,922/-
Profit	3,389,984/-
Outstanding amount	22,523,222/-
Principal	17,322,078/-
Profit	5,201,144/-
Charity amount	4,182,800/-
Total	26,706,022/-

(iii) **Istisna Facility**

An Istisna Facility of Rs.40,000,000/- (Istisna Facility) in terms of Istisna Agreement dated 11.01.2011 (Istisna Agreement). Istisna is an agreement culminates into a sale at an agreed price whereby the purchaser places an order to manufacture, assemble or construct or cause so to do anything to be delivered at a future date. Defendant No.1 failed to deliver the goods. The plaintiff would have been able to earn a profit at the rate 6 months KIBOR plus 2% on the amounts disbursed to defendant No.1 for the purpose of Istisna Facility. (Annexure E-1 to E-3 pages 307 to 377).

Istisna Transaction documents

- i. 27.01.2011 of Rs.3,000,000 - page 339
- ii. 28.01.2011 of Rs.3,500,000 - page 340
- iii. 31.01.2011 of Rs.3,000,000 - page 347
- iv. 31.01.2011 of Rs.3,295,000 - page 351
- v. 03.02.2011 of Rs.9,305,000 - page 355
- vi. 04.02.2011 of Rs.10,000,000 - page 359
- vii. 07.02.2011 of Rs.7,000,000 - page 363

STATEMENT OF ACCOUNT

Disbursements

28.01.2011 of Rs.3,000,000 - page 527
 29.01.2011 of Rs.3,500,000 - page 527
 31.01.2011 of Rs.3,000,000 - page 537
 31.01.2011 of Rs.3,295,000 - page 527
 02.03.2011 of Rs.9,305,000 - page 537
 07.02.2011 of Rs.10,000,000 - page 527
 27.01.2011 of Rs.7,000,000 - page 539

Total amount availed 39,100,000/-

Amount repaid NIL

Outstanding principal 39,100,000/-

Outstanding profit 8,428,666/-

Total outstanding 47,528,666/-

Breakup Annexure L-7 page 557 to 559

(iv) **FAPE-I Facility**

Finance Against Packing Credit Export-I (FAPE-1) from time to time up to an aggregate sum of Rs.5,000,000/- lastly extended as per application dated 16.04.2010 of defendant No.1 (Annexure F page 379 to 399).

11. I do not consider charity amount as being claimed throughout be made part and parcel of the claimed amount.

12. Accordingly, in view of the above the leave application is dismissed and the suit is decreed against defendant No.5 in terms of following table/chart:-

Facility	lease amount /Disbursed	Revisable Rentals/ Total amount payable principal + profit	Repaid	Outstanding with cost of fund date
Ijarah	4,931,458/-	6,517,212/-	431,884/-	6,085,328 26.07.2013
Diminishing Musharaka	17,550,000/-	26,687,469/-	3,617,906/-	22,751,144 01.10.2012
Istisna	39,100,000/-	47,528,666/-	NIL	47,428,666 17.02.2011
FAPE-I	500,000/-	452,465/-	452,465/-	664,150 SBP penalty
Total outstanding				76,929,288/-

13. As against defendants No.1 to 4 the suit has already been decreed in terms of order dated 14.05.2013.

Dated:

Judge