ADJUDICATION OF ISLAMIC BANKING DISPUTES INBANKING COURTS HISTORICAL DESCRIPTIVE ANALYSIS

Thesis for the Partial fulfillment of LLM Islamic Commercial Law

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DEDICATION

I DEDICATE THIS WORK TO MY ESTEEMED SHEIKH FOR HIS SPIRITUAL GUIDANCE AND TO THE MEMORY OF MY FATHER AND MOTHER WITH ALL MY LOVE (MAY ALLAH BE PLEASED WITH THEM), AND TO MY WIFE AND CHILDREN WHO SACRIFICED THEIR RIGHTS FOR COMPLETETING THIS WORK.

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I WOULD LIKE TO EXPRESS MY SINCERE GRATITUDE TO MY SUPERVISOR, PROF. ATTA ULLAH KHAN MEHMOOD, FOR HIS SUPPORT, PERSONAL GUIDANCE. HE GAVE A LOT OF HIS VALUABLE TIME TO HELP ME ON EVERY SECTION OF MY THESIS. I AM PARTICULARLY MINDFUL OF HIS LOGICAL WAY OF THINKING, WHICH HELPED ME IN THE ANALYSIS OF MY DATA. I GIVE MY HEARTFELT THANKS TO MY ACADEMIC INSTITUTIONS FOR PROVIDING ME WITH HIGHLY CONDUCIVE WORKING ENVIRONMENT. I OWE THANKS TO DR. TAHIR MANSOORI, DR. TAHIR HAKEEM, DR. ZIA-UL-HAQ YOUSEF ZAI, MAULANA FAZALUR REHEEM, DR. FIDA MUHAMMAD KHAN, MY ELDER BROTHERS DR. KHALEEQ-UZ-ZAMAN, DR. SHAFEEQ AHMAD AND MANSOOR AHMAD SHEIKH FOR THEIR SUPPORT FOR THIS INTELLECTUAL VENTURE.

ABSTRACT

This thesis investigates the unique features of Islamic Banking based on principles of Islamic Sharia which promote risk sharing between investor and the entrepreneur. The objective of the research is to highlight the importance of Islamic Banking related disputes; to realize the need of Islamic Banking Courts; to explore the need of Islamic Banking Laws in Pakistan. This paper strongly advocates a proper legal framework and infrastructure as well as the substantial support of the legal fraternity are the pre-requisites for the advancement and significant growth of Islamic Finance Industry.

Chapter One is an introduction to the thesis. Chapter two pertains to History of Islamic Banking emergence, development, impetus behind Islamic Banking in Pakistan. Chapter three relates to the reality of Islamic Banking while describing its salient features. Theory and practice of Islamic Banking i.e. Mudarabah, Musharakah, Ijarah, Bay-Salam, Bay-Istisna, Sukuks, Takaful have also been discussed at length. Chapter four manifests legal framework of Islamic Banking in the perspective of 1999 Supreme Court Judgment. The Riba case has also been discussed in this chapter. Chapter five discusses about cases related to Islamic Banks decided by Banking Courts their critical analysis has been given. Chapter six highlights the importance of alternate disputes resolution mechanism for economic harmony. Chapter seven sums up the whole work and gives recommendations.

Kashif Qayyum Sheikh

CHAPTER-I

INTRODUCTION

1.1 Introduction

With rapid development of Islamic Banking Sector there is immense need of Banking Tribunal based on the Principle of Islamic Jurisprudence. Most Islamic Financial Institutions operate in an environment where the legislative framework consists of mixed legal systems where the Shariah (Islamic Law) co-exist with common law and civil law systems. As such, every transaction, product, document and operation must comply with the Shariah principles as well as relevant laws, rules and regulations. In the case where Islamic law is the ultimate legal authority, any issue in Islamic banking cases may not pose a big problem; whilst in the countries of mixed legal systems, the issue is very significant. This inherent issue will be more complicated if Islamic finance disputes involve parties from different jurisdictions in cross border transactions. This leads to the question of how Shariah principles apply together with the laws of the jurisdiction and how a case will be adjudicated in a Court. In view of this unresolved issue, this paper attempts to critically review and analyze the Courts' decisions on Islamic finance disputes. This paper strongly advocates that a proper legal framework and infrastructure as well as the substantial support of the legal fraternity are the prerequisites for the advancement and significant growth of the Islamic finance industry.

Islamic banks are based on the principles of Islamic Shariah. It promotes risk sharing between provider of capital (investor) and the user of funds (entrepreneur). It also aims at maximizing profit but subject to Shariah restrictions. In the modern Islamic banking system, it has become one of the service-oriented functions of the Islamic banks to be a Zakat Collection centre and they also pay out their Zakat. Participation in partnership business is the fundamental function of the Islamic banks. The Islamic banks have no provision to charge any extra money from the defaulters. Only small amount of

compensation and these proceeds is given to charity. Rebates are given for early settlement at the Bank's discretion. It gives due importance to the public interest. Its ultimate aim is to ensure growth with equity. For the Islamic banks, it must be based on a Shariah approved underlying transaction. Since it shares profit and loss, the Islamic banks pay greater attention to developing project appraisal and evaluations. The Islamic banks, on the other hand, give greater emphasis on the viability of the projects. The status of Islamic bank in relation to its clients is that of partners, investors and trader, buyer and seller. Islamic bank can only guarantee deposits for deposit account, which is based on the principle of al-wadiah, thus the depositors are guaranteed repayment of their funds, however if the account is based on the mudarabah concept, client have to share in a loss position.

In Pakistan the efforts for the islamization of banking system is in progress. Pakistan was created out of Islamic ideology. Therefore, Islamic Banking gets support for its development. Quaide-e-Azam Muhammad Ali Jinnah, father of the Nation, while inaugurating the State Bank of Pakistan on July 01, 1948 had guided Research Department of SBP to help develop Islamic Economic System which is based on equality and brotherhood.

Constitution of Pakistan; Article 38 (f) of the constitution of Pakistan is quoted below:

"The state shall eliminate riba as early as possible"

Current banking laws are not compatible with principles of Islamic laws. This paper shall analyze the Pakistani Courts decision on Islamic finance disputes. In Pakistan no one has given the analytical study of decided cases by the Pakistani Courts. Moreover, this paper shall briefly analyze the law of banks available in Pakistan for settling the banking disputes.

Is Islamic banking really Islamic?

The matter is drawn from two aspects; First, what is the difference in the methodology the common man can see when he deals with an Islamic bank in comparison to a

conventional commercial bank? And Second, whether interest is completely weeded out, even at the benchmarking level, from the Islamic banking system?

Regardless of the fact that many Islamic banking products have some embedded components of fixed return, there is another issue that is more objectionable of the current Islamic banking system. And, that is the use of interest rates as a benchmark. Being an investment banking professional of an Islamic bank in 2006, (prepared many term sheets based on KIBOR for benchmarking diminishing Musharika profits. It made me feel that we were working under the same capitalist system by giving it a different name for our own satisfaction i.e. Islamic. The real issue is that we cannot establish an Islamic Banking System of the truest form without having a true Islamic Economy and we cannot establish a true Islamic Economy without surrendering our non-Islamic lifestyles and societies.

1.2 OBJECTIVES OF RESEARCH

To highlight the importance of Islamic banking related disputes; to realize the need of Islamic banking Courts; to explore Whether there is any need of Islamic banking laws in Pakistan; to identify the loopholes in already develop legal literature in the shape of case laws related to the Islamic banking disputes by Pakistani Courts.

1.3 HYPOTHESIS

1. Are the current Pakistani Courts sufficient to deal with Islamic banking related dispute and there is no need of any Islamic banking Court?
2. Are the current banking Courts not sufficient, there is need of Islamic banking Courts?

Understanding of principles of fiqh al-mumalat is limited in the lawyer and the judges. Most of the contractual agreements are drafted by lawyers that are heavily influenced by English legal drafting techniques. This leads to the conclusion that Islamic finance faces lake of legal expertise in both Islamic and conventional finance. At this juncture the expansion of the human capital development initiative, particularly in lawyers, judges and any individual or institution and the legal fraternity is necessary. There

must be appropriate and sufficient measures to ensure that players within the legal fraternity are properly trained in Islamic finance.

Islamic financial contracts should be prepared, documented and examined not only within the context of the law of national and international finance but also within the Shariah Rules and principles. With the assumption that Islamic finance cases are likely to increase in the future in parallel with the significant growth of this industry, the risk of Shariah non-compliance then should be mitigated through having a sound Shariah governance framework. In order to foster confidence in investors and consumers, there must be an enabling environment that accommodates and facilitates its implementation. Secondly the enabling legal environment must be supported by a clear and efficient system that guarantees the enforceability of Islamic financial contracts. Thirdly, Islamic finance needs a credible and reliable legal avenue fro settlement of legal disputes arising from Islamic finance transactions. At this point, alternative dispute resolution seems to be the best alternative to Court proceedings which can streamline the resolution of disputes and avoid the need for Court proceedings. Finally, a sound legal framework is dependent on the instrumental function of its legal framework is dependent on the instrumental function of its legal fraternity. Lawyers, judges, legal advisors, Shariah scholars and other professionals in Islamic finance should acquire sufficient knowledge on the traditional Islamic legal concepts and be able to apply them in the context of modern finance and the law of international finance. All of theses features are the prerequisites of a solid legal framework for the Islamic finance industry. As Islamic finance grows towards market maturity and product sophistication, more disputes and lawsuits are also likely to occur and this will be a grater challenge to the industry.

1.4 RESEARCH METHODOLOGY

It is an analytical study in which I shall try to analyze the issues related to the Islamic banking such as its legitimacy, feasibility of its application in Pakistan and a need proper laws and Courts to deal with the relevant cases.

In this regard I shall also refer to the case law and in the simple words I shall follow in my research I-R-A-C method of legal research in my theses.

1.5 OUT LINE OF THE THESIS

1. Chapter one as already discussed, is an introduction to the thesis.
2. Chapter two pertains to History of Islamic Banking emergence, development, impetus behind Islamic Banking in Pakistan.
3. Chapter three relates to the reality of Islamic Banking while describing its salient features. Theory and practice of Islamic Banking i.e. Mudarabah, Musharakah, Ijarah, Bay-Salam, Bay-Istisna, Sukuks, Takaful have also been discussed at length.
4. Chapter four manifests legal framework of Islamic Banking in the perspective of 1999 Supreme Court Judgment. The Riba case has also been discussed in this chapter.
5. Chapter five discusses about cases related to Islamic Banks decided by Banking Courts their critical analysis has been given.
6. Chapter six highlights the importance of alternate disputes resolution mechanism for economic harmony.
7. Chapter seven sums up the whole work and gives recommendations.

1.6 CONCLUSION

The objective of this study is to highlight the importance of Islamic banking related disputes. The need of Islamic banking Courts and to explore Whether there is any need of Islamic banking laws in Pakistan. This work shall identify the loopholes in already developed legal literature in the shape of case laws related to the Islamic banking disputes by Pakistani Courts

CHAPTER-2
BANKING IN ISLAM

2.1 INTRODUCTION

Islamic Banking is governed by the principles enunciated by Islamic Shariah. Islamic Banking is transaction based avoiding unethical and unsocial practices. It is paradigm change of money lending into transactions based system on assets and real services. The overwhelming domination of the interest based system in the world's economic and monetary affairs, does not necessarily mean that it is the best mechanism, or that any future attempt to replace it with another system would seriously disrupt the prospect for business, investment and economic growth worldwide. Though conventional finance falls far short of perfection there are some grave reservations and strong caveats concerning the moral and market based credentials of the conventional system.

> Al-Jarhi and Iqbal (2001) defined Islamic bank as a banking institution conducting all known banking activities including borrowing and lending without interest. It mobilizes funds on the basis of Mudarrbah or Wakalah and may accept demand deposits as interest free loan. It deploys funds on profit and loss basis or may advances on debt creating basis according to the principles of Sharia'h being an investment manager. It is evident that Islamic banks are more focused towards just and equitable distribution of resources as compared to conventional banks[1].

2.2 THE QUR'ANIC VERSES DEALING WITH RIBA - AN OBJECTIVE STUDY

These are verses relating to riba revealed on different occasions.

[1] Al-Jarahi, A.M., & Iqbal, M. (2001). Islamic Banking: Answers to some Frequently Asked Questions, Occasional paper No. 4, Islamic Development Bank, Islamic Research and Training Institute

وَمَآ ءَاتَيْتُم مِّن رِّبًا لِّيَرْبُوَا۟ فِىٓ أَمْوَٰلِ ٱلنَّاسِ فَلَا يَرْبُوا۟ عِندَ ٱللَّهِ

Riba finds mention in Surah Ar-Rum:

"And whatever riba you give so that it may increase in the wealth of the people, it does not increase with Allah." [2]

Riba is used in Surah Al-Nisaa:

وَأَخْذِهِمُ ٱلرِّبَوٰا۟ وَقَدْ نُهُوا۟ عَنْهُ

"And because of their charging riba while they were prohibited from it."[3]

Riba is used in Surah Al-i-'Imran:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوا۟ لَا تَأْكُلُوا۟ ٱلرِّبَوٰٓا۟ أَضْعَٰفًا مُّضَٰعَفَةً

"O those who believe do not eat up riba doubled and redoubled."[4]

Riba in Surah Al-Baqarah:

[2] Ar-Rum 30:39
[3] An-Nisaa 4:161
[4] Al-i-'Imran 3:130

ٱلَّذِينَ يَأْكُلُونَ ٱلرِّبَوٰا۟ لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ ٱلَّذِى يَتَخَبَّطُهُ ٱلشَّيْطَٰنُ
مِنَ ٱلْمَسِّ ۚ ذَٰلِكَ بِأَنَّهُمْ قَالُوٓا۟ إِنَّمَا ٱلْبَيْعُ مِثْلُ ٱلرِّبَوٰا۟ ۗ وَأَحَلَّ ٱللَّهُ ٱلْبَيْعَ
وَحَرَّمَ ٱلرِّبَوٰا۟ ۚ فَمَن جَآءَهُۥ مَوْعِظَةٌ مِّن رَّبِّهِۦ فَٱنتَهَىٰ فَلَهُۥ مَا سَلَفَ وَأَمْرُهُۥٓ
إِلَى ٱللَّهِ ۖ وَمَنْ عَادَ فَأُو۟لَٰٓئِكَ أَصْحَٰبُ ٱلنَّارِ ۖ هُمْ فِيهَا خَٰلِدُونَ ﴿٢٧٥﴾ يَمْحَقُ
ٱللَّهُ ٱلرِّبَوٰا۟ وَيُرْبِى ٱلصَّدَقَٰتِ ۗ وَٱللَّهُ لَا يُحِبُّ كُلَّ كَفَّارٍ أَثِيمٍ ﴿٢٧٦﴾
إِنَّ ٱلَّذِينَ ءَامَنُوا۟ وَعَمِلُوا۟ ٱلصَّٰلِحَٰتِ وَأَقَامُوا۟ ٱلصَّلَوٰةَ وَءَاتَوُا۟ ٱلزَّكَوٰةَ لَهُمْ
أَجْرُهُمْ عِندَ رَبِّهِمْ وَلَا خَوْفٌ عَلَيْهِمْ وَلَا هُمْ يَحْزَنُونَ ﴿٢٧٧﴾ يَٰٓأَيُّهَا
ٱلَّذِينَ ءَامَنُوا۟ ٱتَّقُوا۟ ٱللَّهَ وَذَرُوا۟ مَا بَقِىَ مِنَ ٱلرِّبَوٰٓا۟ إِن كُنتُم مُّؤْمِنِينَ
﴿٢٧٨﴾ فَإِن لَّمْ تَفْعَلُوا۟ فَأْذَنُوا۟ بِحَرْبٍ مِّنَ ٱللَّهِ وَرَسُولِهِۦ ۖ وَإِن تُبْتُمْ فَلَكُمْ
رُءُوسُ أَمْوَٰلِكُمْ لَا تَظْلِمُونَ وَلَا تُظْلَمُونَ ﴿٢٧٩﴾ وَإِن كَانَ ذُو عُسْرَةٍ
فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ ۚ وَأَن تَصَدَّقُوا۟ خَيْرٌ لَّكُمْ ۖ إِن كُنتُمْ تَعْلَمُونَ ﴿٢٨٠﴾
وَٱتَّقُوا۟ يَوْمًا تُرْجَعُونَ فِيهِ إِلَى ٱللَّهِ ۖ ثُمَّ تُوَفَّىٰ كُلُّ نَفْسٍ مَّا كَسَبَتْ
وَهُمْ لَا يُظْلَمُونَ ﴿٢٨١﴾

"Those who take interest will not stand but as stands whom the demon has driven crazy by his touch. That is because they have said: 'Trading is but like riba'. And Allah has permitted trading and prohibited riba. So, whoever receives an advice from his Lord and stops, he is allowed what has passed, and his matter is up to Allah. And the ones who revert back, those are the people of Fire. There they remain for ever.

Allah destroys riba and nourishes charities. And Allah does not like any sinful disbeliever. Surely those who believe and do good deeds, establish Salah and pay Zakah, have their reward with their Lord, and there is no fear for them, nor shall they grieve.

Those who believe fear Allah and give up what still remains of the riba if you are believers. But if you do not, then listen to the declaration of war from Allah and His Messenger. And if you repent, yours is your principal. Neither you wrong, nor are wronged. And if there be one in misery, then deferment till ease. And that you leave it as alms is far better for you, if you really know. And be fearful of a day when you shall be returned to Allah, then everybody shall be paid, in full, what he has earned. And they shall not be wronged."[5]

Historical Analysis of the Verses of Riba

This chronological order shall help facilitate us to understand the prohibition of riba.

Surah Ar-Rum

As per Ibn Abbas, Radi-Allahu anhu, and several Tabi'in like Saeed Ibn Jubair, Mujahid, Tawoos, Qatadah, Zahhak, and Ibrahim Al-Nakha'i the word riba means gift. As per Hasan Al-Basri as reported by Ibn Al-Jawzi the word Riba means usury. There is no specific prohibition against it in the verse. This verse does not contain a prohibition against riba.

Surah An-Nisaa

The revelation of this verse would have been revealed before the 4th year of Hijra. Verse 153 of the Surah Al-Nisaa is as follows:

[5] Al-Baqarah 2:275-281

يَسْـــَٔلُكَ أَهْـــلُ ٱلْكِـــتَٰبِ أَن تُـــنَزِّلَ عَلَيْهِـــمْ كِتَٰبًـــا مِّـــنَ ٱلسَّـــمَآءِ

"The People of the Book ask you to bring down upon them a Book from the heaven."[6]

Riba here used as usury.

Surah Al-i-'Imran

The third verse would have been revealed sometime in the 2nd year after Hijra. As per Hafidh Ibn Hajar Al-Asqalani, the most famous commentator of Sahih Al-Bukhari, has opined that the prohibition of riba was declared sometime around the battle of Uhud.

Surah Al-Baqarah

The severity of the prohibition of riba has been elaborated in Surah Al-Baqarah. Following verses of Surah Al-Baqarah were revealed:

يَٰٓأَيُّهَـا ٱلَّـذِينَ ءَامَنُـوا۟ ٱتَّقُـوا۟ ٱللَّـهَ وَذَرُوا۟ مَـا بَقِـىَ مِـنَ ٱلرِّبَـوٰٓا۟ إِن كُـنتُم مُّـؤْمِنِينَ ﴿٢٧٨﴾ فَـإِن لَّـمْ تَفْعَلُـوا۟ فَـأْذَنُوا۟ بِحَـرْبٍ مِّـنَ ٱللَّـهِ وَرَسُولِهِۦ ۖ وَإِن تُبْتُمْ فَلَكُمْ رُءُوسُ أَمْـوَٰلِكُمْ لَا تَظْلِمُـونَ وَلَا تُظْلَمُـونَ

[6] An-Nisaa 4:153

"O those who believe fear Allah and give up what still remains of the riba if you are believers. But if you do not, then listen to the declaration of war from Allah and His Messenger. And if you repent, yours is your principal. Neither you wrong, nor be wronged."[7]

2.3 Emergence, development, impetus behind Islamic banking in Pakistan.

Islamic Shariah is the basis of Islamic banking. Islamic baking cannot deal in transactions involving interest gharar, maiser, the subject matter of which is invalid. Islamic banks generate returns through investment. Sharing the risk and investment are the functions of Islamic banks through Islamic modes of finance.

2.4 Islamic Banking in Pakistan.

Objective resolution passed in 1949; Islam declared as official religion in the 1956 constitution; establishment of council of Islamic ideology in the constitution of 1962 and elimination of interest from economy as mentioned in 1973 constitution is the brief banking history of Pakistan.

As per objective resolution passed in 1949 Government of Pakistan is bound to follow the ordains of Almighty Allah. As per 1956 constitution Islam was declared the official religion of Pakistan. As per the constitution of 1962 council of Islamic Ideology was established to eliminate the interest from the economy. 1973 constitution requires the elimination of Riba from the economy.

"The Constitution of Pakistan 1973, in its article 227 provides that all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah. Article 31 states that steps should be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the

[7] Al-Baqarah 2:278-279

> fundamental principles and basic concepts of Islam. Article 37 dealing with Principles of Policy enjoins upon the State to eliminate riba as early as possible. There is complete unanimity among all schools of religious thought that the term riba covers interest in all its manifestations."[8]

All the three Pakistani constitutions retain a clause for the elimination of interest. These constitutions show the supreme objective of achieving financial independence, prosperity and equitable sharing of the benefits of growth of its economy. Efforts were launched in 1977 to shape institutions for Islamic economic teachings. The task was assigned to the council of Islamic Ideology. The CII obtained assistance of economists and bankers to develop model of the Islamic economy by June 1980. The model was to be adopted by 1984. Some initiatives were taken in this regard but the impetus waned and everything was discarded eventually. In 2002, the government abandoned its Islamization policy and started patronizing private IBF institutions in the overwhelming conventional market environment of Pakistan

The history of banking in Pakistan can be summarized as humble beginning from 1947 - 1970, legacy of public control 1970 to 1980; business as usual 1980 to 1990; privatization 1990-1997; era of reforms 1997-2006; the post reform era 2006-present.

1947-1970.

For nearly a year after partition, Pakistan had no central bank. Habib Bank was established in 1941 this filled gape until State Bank of Pakistan was setup in 1948. The SBP was initially mandated to develop commercial banking channels and monitory stability, so trade and commerce could flourish.

1970-1980.

Nationalization policy enforced by Zulfiqar Ali Bhutoo's government 13 banks were brought under government control and merged into 6 nationalized banks. Pakistan Banking Council was established to monitor nationalized banks. The role of SBP as a regulator was marginalized.

1980-1990.

[8] Report of The Council of Islamic Ideology on The Elimination of Interest from the Economy, June 1980

The financial sector grew to serve large corporate business, politicians and the government. Lending decisions were not commercially motivated and billions of rupees were funnelled out of the financial system as "bad loans".

1990-1997.

The bank nationalization act was amended by 1991 and 23 banks was established. Administered interest rate was stream lined. Bank wise credit ceilings removed and system of auctioning government security was established.

1997-2006.

After privatization central banks regulatory powers were restored via amendments to the banking companies' ordinance 1962 and the State Bank of Pakistan Act 1956. Legal impediments and delays in recovery of bad loans were stream lined in 2001. The scope of prudential framework setup in 1989 was enhanced.

2006- PRESENT.

By 2010 there were 5 public commercial banks, 25 domestic private banks, 6 foreign banks and 4 specialized banks.

2.5 CONCLUSION

The nutshell of this chapter transpires the viability of Islamic Banking as investment portfolio is the basis of Islamic Banking to sustain loss and to gain profit for the individual on account of pooling of risks obviating the transactions involving interest, gharar, maiser.

CHAPTER 3

ISLAMIC BANKING - ITS REALITY

3.1 Introduction.

In this chapter, we shall make the analysis "Whether the Islamic Banking is really Islamic". This cherished dream translated into practice by Islamic Banks who came forward with a firm resolution to make all transactions in conformity with Shariah and to Shun Interest from all such transactions. Interest free banking is based on distributive justice. The rich industrialists borrow huge amounts from the bank, invest the same in their huge profitable projects. They earn profits without letting the depositors share these profits except a meager rate of interest and this is also taken by adding it to the cost of their products.

3.2 Salient features of Islamic Banking.

Money can be sold at the price of its face value. Profit can be earned through trade or from charging on providing service. Islamic banking promotes market efficiency with justice. In Islamic system of distribution of wealth the entrepreneur as a regular factor has been excluded from the list of factors of production in only three factors have been recognized capital, land and labor instead of four. But this does not imply that the very existence of the entrepreneur has been denied. What it does mean is just that the entrepreneur is not an independent factor, but is included in any one of the three factors. It is not interest but profit that has been considered as the reward for capital. Capital includes only those things which cannot be utilized without their being wholly consumed, or which cannot be let or leased i.e. money. Land includes all those things which do not have to be wholly consumed in order to be used. Machinery too falls under this category. Labour includes mental labour and planning. The ability to take the risk of a loss should in reality inherent with capital itself and that no other factor should be made to bear the burden of this risk. There are three ways in which capital can be invested in a business

venture: private business, partnership, co-operation of capital and organization (Mudarabah).

3.2.1 Value based paradigm.

The Islamic bank is a trustee of wealth of depositors for its beneficial use of the community. Interest, gambling, speculation, hoarding, monopoly, profiteering, black marketeering, bribery, embezzlement, misappropriation, fraud, and making or selling wine in Islamic banking are prohibited. [9]

3.2.2. Market based credentials.

Islamic Banking establishes the relationship through PLS instruments rather than interest between the savers and borrows. It undertakes business and investment venture alone resulting gains or loses with its depositors. [10]

3.3 THEORY AND PRACTICE OF ISLAMIC BANKING

The Islamic Banking model is based on PLS instruments, namely, Mudarabah and Musharkah; some secondary interest-free instruments, including Murabah, Ijarah, Bai Salam and Bai Istisna.

3.3.1. MUDARABAH

In Mudarabah one party provides the funds (Rub-ul-Maal) while other party provides the expertise (Mudarib). The profit is shared at an agreed ratio whereas loss is born by Rub-ul-Maal only. In Mudarbah Al-Muqayyada Rub-ul-Maal specifies a particular business or a particular place for muadarib where he shall invest the money. In

[9] Some Islamic jurists and economists argue that it is against the Islamic spirit to allow the lender to investor to demand collateral or security from the partner as a precondition for investing his funds (Saleh, 1986).

[10] Karsten, I 1982 "Islam and financia intermediation.

Mudarbah Al-Mutlaqah Rub-ul-Maal gives full freedom to the Mudarib to undertake whatever business he deems fit. In Mudarbah agreement, the agreement cannot allow a lump sum amount of profit for any party nor can it determine the share of any party at a specific rate tied up with the capital.

> In the first step, the Islamic bank accepts funds from depositors under the risk-sharing arrangement. In the second step, the Islamic bank either directly invests these funds in profitable investments or extends them to entrepreneurs to engage in business enterprises by becoming partners of the Islamic bank on a risk-sharing basis. In the third step, the Islamic bank shares with depositors the profit or loss earned from *Mudarbah* undertakings and investments. This model is also known as the *Mudarbah* banking model or PLS model (Ahmad, A, 1987: Uzair 1978).[11]

3.3.2. MUSHARAKAH

Musharkah is a contract for sharing profit and loss in joint business. The profit is distributed among the partners in pre-agreed ratio while the loss is borne by each partner strictly in a proportional in a restricted contribution.

> As per the saying of Syedna Ali ibn Talib (R.A) "Loss according to the ratio of investment and profit according to the agreement of partners is distributed".[12]

> In Musharkah bank contributes towards losses in proportion to its investment and profit according to the agreed ratio.[13].

[11] Development and problems of Islamic Banks, Islamic Development Banks (IDB), Islamic Research and Training Institute (IRTI), Jeddah.
[12] (Abu-Saud, 1980; Udovitch, 1970).
[13] (Bendjilali and Khan, 1995)

3.3.3. Interest-free modes: Murabah

In ***Murabaha*** seller sells the goods to buyer after adding an agreed profit margin.

> The early Islamic jurists, Imam Malik and Imam Shafi approved Murabaha sales but did not refer to price increase in deferred payments. Whereas Sarakhsi, Marghinani and Naawi allowed the seller to charge a higher price in a deferred payment sale.[14]

Basic rules of a valid Murabaha Transactions

The subject matter must exist at the time of sale. It should be in the ownership and possession of the seller at the times of sale. The sale must be instant and absolute. A sale contingent on a future event is void. The certainty of the sold commodity and the price is a necessary condition.

Purchase of raw material goods, equipments, import of goods, export financing are the uses of Murabaha.

3.3.4. IJARAH

In Ijarah arrangement, the lessor authorizes lessee to use the usufruct of his assets for a specified period in exchange for rent. Shariah enjoins upon the lesser in relation to the leased asset to bear all costs of repairs, insurance, depreciation, damages and to bear the risk of uncertainty.

> Leasing arrangements can be successfully applied in industrial, manufacturing and other sectors of the Islamic economy for meeting their short-and long-term financing needs. Presently IFIs are engaged in retail finance for home mortgages, cars and household needs. There are some good reasons for the increasing popularity of leasing in IBF worldwide. In fact, IFIs mostly rely on lease financing

[14] (Saadullah, 1994; Vogel and Hayes, 1998)

known as *Ijarah-wa-Iqtina*, which enjoys strong support among Shariah scholars. It bears a close resemblance to conventional leasing, and therefore relies on the established conventional infrastructure in practice (Iqbal, 1998)[15]

Bay Salam & Bay Istisna

In Bai Salam the whole sale price is paid by the seller of the goods liable to be delivered to him at the specified future date. This instrument was used at the time of the holy Prophet Muhammad (PBUH) in the agricultural sector. Muslim farmers used to meet their short-term financial needs such as for buying seeds and fertilizer, by selling their future produce to the seller at the time of cultivation. Bai Istisn is the sale of manufactured goods at the future date of delivery at an agreed price.[16]

Shriah lays emphasis to determine precisely terms and conditions such as price, quantity and quality of goods of Bai Salam and Bai Istisna contracts to avoid element of riba, gharar (speculation) or dubious sale. (Gari, 1997; see Chapter 2).[17]

3.3.5. Sukuks

Sukuk are substitutes for conventional securities or bonds. Sukuks have created opportunities for long-term Islamic investment and broadened the liquidity investments for IFIs. Its holder acquires ownership assets, and receives rents until the maturity date approaches. Sukuks based on Ijarah, Mudarabah and Murabaha are very commonly used for financing infrastructure, development and industrial projects in the Islamic world. [18]

3.3.6. Takaful

Takaful literally mean's joining guarantee'. Takaful institutions are based on either Mudarabah or Wakalah or both, a mixed mode.

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[15] Islamic banking, in M Kahf (ed), Lessons in Islamic Economics, Islamic Development Bank (IDB) Islamic Research and Training Institute (IRTI), Jeddah, pp.493-524
[16] Gari, MA 1997, 'A short-term financia industries based on the salam contract.
[17] Gari, MA 1997, 'A short-term financia industries based on the salam contract.
[18] Alvi I 2006, The state of the Islamic capital market, paper presented at the IIFM Workshop Sukuk.

In the Mudarba Mode, Takaful institutions act as managers. The amount paid by policyholders contain two parts i.e first part tabarru – to create wakfh and other part is the other part is invested in Shariah-Compliant avenues. The total income derived is shared by Takaful institutions and policyholders as per mutually agreed ratios whereas loss is borne by policyholders while Takaful institutions receive no rewards returns.[19]

3.4 KIBOR as Bench Mark and Islamic Banking.

The Islamic Banking is using the available benchmark for determining the profit of any permissible transaction. It does not render the transaction as invalid. The nature of the transaction determines its validity.[20]

3.5 CONCLUSION

In the light of supra salient features we can analyze "whether the Islamic banking is real Islamic". I do not subscribe to the view of those people who do not find any difference between the transactions of Conventional Banks and Islamic Banks. This cherished dream translated into practice by Islamic Banks who came forward with a firm resolution to make all transactions in conformity with Shariah and to shun interest from all such transactions.

Interest-free banking, is based on distributive justice. The rich industrialists, borrows huge amounts from the bank, invest the same in their huge profitable projects. They earn profits without letting the depositors share these profits except a meager rate of interest, and this is also taken by adding it to the cost of their products. In Musharakah profits and losses are shared by both the parties in equal proportion. Profits are determined after the sale of the commodity. The profits paid can not be added to the cost of production, unlike the interest based system. I do not subscribe to the view of those people who do not find any difference between the transactions of conventional banks and Islamic banks.

[19] Kassim, Z A M 2006, 'The Islamic way to Insurance', Islamic Finance News.
[20] Islamic Development Bank, Islamic research and training institute, Islamic Banking.

CHAPTER-4

LEGAL FRAMEWORK OF ISLAMIC BANKING

4.1 Introduction

Current banking laws are not compatible with principles of Islamic laws. This chapter shall give analysis of the Pakistani substantive and procedural laws for settling the banking disputes in the perspective of 1999 Supreme Court Judgment.

4.2 Substantive and procedural laws for settling the banking disputes

Before going to analyze the substantive and procedural laws for settling the banking disputes I feel it expedient to give the list of those laws which shall help facilitate in analyzing the same. Here is the list of the Laws for settling the banking disputes as substantive and procedural law i.e. Financial Institutions (Recovery of Finances) Ordinance, 2001, Banking Companies Ordinance, 1962, Banking Companies Rules, 1963, State Bank of Pakistan Act, 1956, SBP Banking Services Corporation Ordinance, 2001 National Bank of Pakistan Ordinance, 1949, Bank of Punjab Act, 1989, Bank of Khyber Act, 1991, Sindh Bank Act, 1995, Industrial Development Bank of Pakistan Ordinance, 1961, Industrial Development Bank of Pakistan (Registered sale deed-Organization and Conversion) Ordinance, 2006, Agricultural Development Bank of Pakistan (Reorganization and Conversion) ordinance, 2001, guidelines for Islamic Microfinance Business By Financial Instructions, Offences in Respect of Banks (Special Courts) Ordinance, 1984, The Banks (Nationalization) Act, 1974, The Banks (Nationalization) (Payment of Compensation) Rules, 1974, Anti-Money Laundering Act, 2010, Anti-Money Laundering Rules, 2008, Anti-Money Laundering Regulations, 2008, The Foreign Currency Accounts (Protection) Ordinance, 2001, Punjab Prohibition of Private Money Lending Act, 2007, Payment Systems and Electronic Fund Transfers Act, The electronic Transactions Ordinance, 2002, The Bankers' Books Evidence Act, 1891, The establishment of the Federal Bank For co-operatives and Regulation of Co-operative

- Banking Act, 1977, The Federal Bank for Co-operatives & Regulation of Co-Operative Banking (Accounts) Rules, 1977, The Board of Directors of the Federal Bank for Co-Operatives & Regulations of Co-Operative Banking (Meetings) Rules, 1977, Advisory Committee of Federal Bank For Co-Operatives and Regulation of Co-Operative Banking (Meetings) Rules, 1990, (Azad J & K) Federal Bank For Co-Operatives and Regulation of Co-operative Banking (Meetings) Rules, 1980, The Punjab/ Sindh/ N.W.F.P./ Baluchistan/Co-Operatives Societies and Co-Operative Banks (Repayment of Loans) Ordinance, 1966, The co-operative Societies and Co-operative Banks (Repayment of Loans) Order, 1972, Banking Companies (Lahore High Court) Lahore Rules 1973, Banking Companies (Court) Rules (Sindh) 1972, Banking Companies (Peshawar High Court) Rules 1972.

4.3 EXISTING LAWS IN THE PERSPECTIVE OF 1999 SUPREME COURT JUDGMENT

The August Supreme Court started hearing the appeals against the 1991 FSC judgment on riba, and declared its verdict on 23 December 1999. The SC unanimously confirmed the order of the FSC declaring riba to be repugnant to the injunctions of the Holy Quran. The SC ordered that all existing laws and rules containing the provision of interest would cease to have effect as on and from 30 June 2001, and therefore, the government should make efforts to transform the economy of Pakistan on Islamic lines by this time.

4.4 THE INTEREST ACT, 1839.

This enactment confers power on the Court to allow interest to the creditor upon the debts. The Federal Sharia'h Court and the council of Islamic Ideology recommended its repeal.

4.5 THE GOVERNMENT SAVINGS BANK ACT 1873

It was held by the August Federal Shariat Court that the word interest appearing in Section 10 of the Government savings Bank Act 1873 is repugnant to the

Injunctions of Islam and the same be substituted with the word Shariah compliant returns.

4.6 NEGOTIABLE INSTRUMENTS ACT, 1881.

The discussion on various provisions of the Negotiable Instruments Act, 1881 is contained in paragraphs 242 to 278 of the impugned judgment. Sections 79 and 80 of this Act, as amended, adopted the concept of 'mark up' system, which system is in vogue has been held to be repugnant to the injunctions of Islam and the direction made is that the words 'mark up' be deleted from the provisions of section 79 and 80 of the Act.

> "The SC resolved that Section 79 of the 1881 Contract Act contains the stipulation that any further return that the financier was entitled to receive over and abovethe debt created through PLS modes and other interest-free modes of financing was nothing but interest." [21]
>
> "The SC resolved that Section 79 of the 1881 Contract Act was against Shariah in its entirely."[22]

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"It is apparent that errors of omission and commission which crept into the PLS operation have been the cause for suggesting removal of bai' mu'ajjal from the list of permissible methods following the principle that anything leading to that which is prohibited stands itself prohibited".[23]

"The SC affirmed the view of the FSC that the purchase of bills, debentures; bonds and other commercial instruments on the basis of interest was contradictory to the injunctions of Islam."[24]

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[21] The 1999 SC Judgment on Riba, Para No. 38
[22] The 1999 SC Judgment on Riba, Para No. 481-82.
[23] Hamdard Islamicus, Quarterly Journal of Studies and Research in Islam Published by Hamdard Foundation Pakistan
[24] The 1999 SC Judgment on Riba, para No. 500

"The SC explained that a 'bill of exchange' was a debt agreement payable by the debtor to the holder in a future date. The bill's endorsement to a third party should be based on its face value. Therefore, the SC resolved that the prevalent practice of discounting bills or promissory notes or cheques was an interest-based activity."[25]

It was held by the learned Federal Shariat Court that any return on the promissory note and bill of exchange is riba as contemplated in Section 79 of the Negotiable Instrument Act 1881.

4.7 HIRE-PURCHASE:

The learned Federal Shariat Court did not define the agreement of hire-purchase correctly and has confused it with the concept of 'diminishing partnership'.

The payment of a 'return' on the p-note or a bill is the question showing the obligation to pay rent in a hire-purchase agreement.

4.8 THE INDEXATION SYSTEM:

" The SC resolved that prohibition of riba essentially requires that all types of loans should be settled on an equal basis in terms of the unit of loan or object."[26]

" Shariah recognizes the time value of money only through the pricing of goods in trading operations."[27]

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[25] The 1999 SC Judgment on Riba, para No. 39
[26] The 1999 SC Judgment on Riba, Para Nos. 251-53
[27] The 1999 SC Judgment on Riba, Para Nos. 23,369 and 473-77

The payment of a 'return' on the p-note or a bill is the question showing the obligation to pay rent in a hire-purchase agreement.

4.9 SERVICE CHARGES

Service charges can be claimed. The debtor is liable to pay the return at the same rate at which original service charge was calculated on promissory note or the bill of exchange.

4.10 CODE OF CIVIL PROCEDURE, 1908

Sections 34(1) and (2); 34-A (I) and (2); and 34-B(I)(a) of the Code of Civil Procedure were declared repugnant to the injunctions of Islam following the discussion on the question of prohibition of the interest.

> "Section 34, provides that where a decree is for the payment of money, the Court may, in the decree, order "interest" at such rate as the Court deems reasonable to be paid on the principal amount adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further "interest" at such rate as the Court deems reasonable on the aggregate amount so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit"[28].
>
> Section (2) of section 34-A deals with a different situation. It provides that if the court is of opinion that the recovery of any public dues from the plaintiff was unjustified, the Court may, while disposing of the suit, make an order for payment of interest on the amount recovered at the rate of two percent, above the bank rate.

[28] Code of Civil Procedure by Amer Raza

Section 34-B has been newly added by Ordinance LXIII of 1980. It deals with interest on dues of a banking company. It provides that where a decree is for payment of money due to a banking company in repayment of a loan advanced by it, the court shall, in the decree, provide for interest or return, as the case may be, on the debt from the date of decree till payment. It further provides that in case of interest-bearing loans, the Court shall award a decree for interest at the contracted rate or at the rate of two percent, above the bank rate, whichever is the higher.

Clause (b) of the said section provides that in the case of loans given on the basis of mark-up in price, lease, hire-purchase or service charges for the contracted rate of mark-up, rental, hire or service charges, as the case may be, the Government shall provide for interest or return at the contracted rate or at the latest rate of the banking company for similar loans, whichever is higher.

Clause © of section 34-B provides that in the case of loans given on the basis of participation in profit and loss, for return at such rate, not being less than the annual rate of profit for the preceding six months paid by the banking company on term deposits of six months accepted by it on the basis of participation in profit and loss, the Court shall in the decree provide for such return and at such rate, not less than the annual rate of profit for the preceding six months as stated above, which the Court may consider just and reasonable in the circumstances of the case.

Section 34-B (b) and (c) relate to the recovery of money owed to a banking company by a client who entered into a transaction of mark-up leasing, hire-purchase, service charge or profit and loss sharing. The learned Federal Shariat

Court has subjected these provisions to the same comment as it has made in relation to sections 79 and 80 of the Negotiable Instruments Act. These provisions of the Code are meant in more express terms for the recovery of the previous obligations.

Consequently, sub-sections (b) and (c) of section 34-B of the Code were held to be repugnant to the Injunctions of Islam.

The provisions of section 34, and 34-A conferred a power on the court to grant additional sum over and above the decree amount and the sums to be allowed have been named as interest.

Therefore, any additional amount contemplated in these provisions does fall within the definition of riba.

The provisions of the Code of Civil Procedure are, therefore, to be viewed in the afore-noted perspective in addition to the legal question whether the power conferred by these provisions on a Court to grant additional amount is called interest, falls within the definition or riba.

It may be noted that the power conferred on the court by law to grant additional sum is not premised on any act of the party to the transaction yet this grant of additional sum is without a counter value and is a payment receipt of which law permits over and above the principal amount. Thus indirectly riba al-nasiah has been allowed to be practiced as it is riba that is paid and received in a loan transaction and this is the riba that has been prohibited by the Holy Quran.

4.11 THE INSURANCE ACT, 1938.

"The following provisions of the Insurance Act, 1938, were challenged before the Federal Shariat Court and the same to the extent that these provide for range or rate or interest, guarantee as to the interest, guarantee as to the interest amount, payment of interest on installments and other conditions as to interest, were held to be repugnant to the Injunctions or Islam in paragraphs 322 to 324 of the impugned judgment:

S.BB (I) (b): Prepare statement of yield indicating the range or rates of interest or yield on the investment of the insurers' funds".[29]

"Sub-section (3) of section 27: In computing the assets required by the section to be kept invested by an insurer, a sum equal to the amount of his liabilities to persons who are not citizens of Pakistan in respect of life insurance policies issued in Pakistan in favour of such persons but expressed in a currency other than the Pakistan rupee may, If such sum is invested in securities of and guaranteed as to principal and interest by, the government of the country in whose currency such policies are expressed, be taken into account".[30]

4.12 STATE BANK OF PAKISTAN ACT, 1956

"Section 22(1) of the State bank of Pakistan Act, 1956 has been scrutinized in paragraphs 325 to 328 of the impugned judgment and purchase of bills and other commercial instruments like Debentures, Bonds etc, on the basis of interest has been declared to be repugnant to the injunctions of Islam by the Federal Shariat Court. This view is maintained and upheld".[31]

These laws pertaining to money lending have been declared repugnant to injunctions of Islam

(X) "The N.W.F.P Money Lenders Ordinance, 1960".

(XI) "The West Pakistan Money Lenders Rules, 1965".

(XII) "The West Pakistan Money Lenders Ordinance 1960

(XIII) "The Sindh Money Lenders Ordinance, 1960".

(XIV) "The Punjab Money Lenders Ordinance, 1960"

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[29] The 1999 SC Judgment on Riba para No. 322-24
[30] The 1999 SC Judgment on Riba para No. 322-24
[31] The 1999 SC Judgment on Riba para No. 325-28

(XV) The Balochistan Money Lenders Ordinance, 1960".

4.13 AGRICULTURAL DEVELOPMENT BANK RULES, 1961.

In the impugned judgment the vires of the Rule 17 of the Agricultural Development Bank Rules, 1961 have been dealt with. As per Rule 17 the bank can get interest on the advance loans on such rates as may be prescribed by the board. The charging of interest can not be allowed to continue the lieu of Shariah prohibition.

4.14 BANKING COMPANIES ORDINANCE, 1962

Section 25(2) of the Banking Companies Ordinance 1962 empowers the state bank of Pakistan to give directions to the banking companies about the rates of interest charges on markup. This section has been declared as repugnant to injunctions of Islam.

4.15 BANKING COMPANIES RULES, 1963.

Relevant part of Rule 9 reads as under:

R.9. Interest on deposits.

> "Interest on foreign approved securities shall on realization be credited, if so desired by the banking company concerned, as soon as possible, to an account at the place where the office of the National Bank of Pakistan holding the securities under sub-rule (1) of rule 5 is located, subject to the usual charges; and, in other case, such interest shall be remitted by the office of the National Bank of Pakistan to the principal office of the State Bank at

the prevailing rate of exchange, after deducting the usual charges".[32]

The principal office of the State Bank shall credit, the current account of the company with the interest realized on rupee securities, subject to the usual charges.

Sub-rules (2) and (3) or rule 9 have been declared as repugnant to the Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (P.B.U.H).

4.16 THE BANKS NATIONALIZATION) PAYMENT OF COMPENSATION RULES, 1974.

Instead of deleting the word 'interest' from rule 9, a new rule should be framed inconsonance with the judgment.

4.17 THE BANKING COMPANIES (RECOVERY OF LOANS) ORDINANCE, 1979

Section 8(2) (a) relating to interest and section 8(2)(b) relating to mark up have been declared repugnant to the Shariah injunctions".

> "These provisions should be dealt with on the lines indicated in this judgment while discussing the relevant provisions of Code of Civil Procedure".[33]

Four major engines of economy identified by the economists which fuelled the West's economic growth are following:

(i) Banking/Financial Sector;

(ii) Share market;

(iii) Debt/Bond Market; and

(iv) Government Borrowing/Lending.

[32] Banking Companies Rules 1963
[33] The Banking Companies (Recovery of Loans) Ordinance, 1979

4.18 INDIVIDUAL'S CREDIT HISTORY

An individual can get loan if his credit report is clean access by credit bureau.

4.19 INDUSTRIES' RATING

Before extending loan credit rating report (i) Moody's (ii) Standard and Poor's (iii) Fitch-IBCA (iv) DCR, has been considered as necessary.

These ratings are instituted on the philosophy of right to know.
Even in England various statutes provide for prudential regulations and disclosure of necessary information. The Financial Services Act, 1986, and the regulations framed thereunder provide protection for the investors, with the 'securitization' of the investment industry in order to provide a system intended to make effective and to enhance London's position as a financial centre.

The Serious Fraud Officer (SFO), was established as an integral part of the criminal justice system. The SFO is responsible for investigation and prosecution of some of the biggest cases of fraud in British history.

The SFO is an independent government agency headed by a director who exercises his powers under the superintendence of the attorney-general, maintains liaison with government departments and regulatory bodies such as the department of trade and industries, Bank of England, International Stock Exchange, Securities and Investment Board, etc.

It is through such measures that the west has effectively adopted Islamic teachings of justice, fair play and proper disclosure to minimize Gharar. These measures are

to be adopted by providing proper legal framework so as to bring about fundamental changes in the fabric of our society as transparency will put the economy on the right track quickly.

It is due to absence of this regulatory, legal framework and transparency and prudential measures that the investors in Pakistan were deprived of billions in the shape of Taj Company and Co-operatives scams.

There has been a quick growth of companies at stock exchange as the corporate managers are least bothered to take investors into confidence by sharing company information and do not feel any moral obligation to share profits with investors.

All this is due to absence of strict regulations, third party ratings and risk assessment. A comparison between the size of the economy and number of listed companies can be a guide to the loose regulatory framework that encourages rogues to fleece investors and creditors in the disguise of 'Limited Liability' Laws.

Unlike western countries there are no laws in Pakistan against insider trading (trading in share by owners) by major share holders, which is conflict of interest, a crime in the West.

The market indexes in the West like DOW Jones (USA), FTSE (UK), and Nikkei (Japan) were developed by third parties. In Pakistan the KSE (Karachi Stock Exchange) 100 indexes is maintained by the stock market itself and has come under adverse comments from minister of finance due to its speculative characteristics.

It is said that this index serves the purpose of few players in the market by luring innocent investors into investment thus cyclically depriving them of their hard-earned money. This also requires transmission by introducing independent transparency.

4.20 DEBT MARKET IN PAKISTAN

Reliance on banks can be reduced if the concept of Islamic debt through Musharaka certificates is adopted. A lot of equity/funds can be made available through developed debt markets.

4.21 RECOVERY SYSTEM

The laws pertaining to recovery of the defaulted loans are to be streamlined alongwith establishment of requisite number of courts presided over by competent judges of unquestioned integrity. These judges should not be over burdened and only such number of cases should be assigned to them which can be disposed of within a period of three months.

The tendency to institute recovery proceedings only when the borrowing company or the individual have almost squandered away their assets requires to be curbed and defaulters must be brought to book by institution proper proceedings within reasonable time of default when the borrower as well as his assets is still traceable and realizable.

Such an education will be objective oriented and should inculcate commitment with the objectives of Shariah.

4.22 AUDIT AND ACCOUNTS

The independent system of audit and accounts in conformity with the Islamic Injunctions to achieve Shariah objectives is necessary.

4.23 THE 2002 RIBA (INTEREST) CASE REVIEW

The SC remanded the riba case to FSC for re-examination in the light of observations made supra and further directed to give finding on all issues came up for determination.

4.24 Conclusion

Undeniably development of Islamic Banks depends much by having a comprehensive legal frame work. The successes of implementation of Islamic Banking hinges upon the correct approach of its legal facilities. The Banks have not only duties to meet Shariah Compliance, statutory laws either substantive or procedural but also to comply with States Bank directives as well.

CHAPTER NO.5

CONVENTIONAL BANKS APPROACH IN DECIDING IN ISLAMIC BANKING DISPUTES

5.1 Introduction.

Many Islamic financial institutions work in an atmosphere where common law and Islamic law co exist. In the countries where Islamic law is ultimate legal authority, any problem raised in Islamic banking is not a big issue. Whereas the matter is complicated in countries having dual legal system The gravity of the issue will be more complicated if Islamic finance dispute involves parties from different jurisdictions in cross-border transactions. This chapter shall give the analysis that the banking Courts in Pakistan are deciding Islamic Banking Disputes by adopting common law approach. The judges are not well versed with the Shariah compliants. The characteristics of Islamic modes of finance Musharakah, Mudaharbah, Salam, Istisna, Ijarah are not completely known to the legal fraternity. In this chapter, a few cases have been given as precedents to show the approach employed while deciding these cases.

5.2 CASE NO. 1

Messrs Hotel Kashmir palace (pvt.) limited through major (retd.)
Versus
Messrs first elite capital modaraba (1)[34]
Before Maulvi Anwar ul Haq and pervez Ahmad, JJ

The respondent filed a suit on 6.11.1997 for recovery of Rs.11,962,287 against the appellants. In the plaint, it was stated that two Musharka facilities were provided to appellant No.1 vide two investment agreements, dated 19.7.1992 and 12.7.1993 for Rs.5 Million and Rs.4 Million, respectively; that these facilities were availed by the said

[34] **2002 C L D 983 [Lahore]**
Regular first appeal No. 415 of 1998, heard on 8th April 2002

appellant No. 1 one after the other. It was stated that the appellant No. 1 has committed a default in the payment of principal amount and the provisional profits under the agreement and upon the demand of the respondent, the appellant No. 1 had been writing letters to pay off the liability but the same had not been done and that the s.uit amount is payable as per the statement of accounts attached with the plaint. It was also stated that under the orders of this Court, dated 16.10.1997, passed in C.O. No.57 of 1997 the appellant No.1 has made a deposit of Rs.25,00,000 with the respondents. With these averments, a decree for the suit amount along with damages at the rate of 20% per annum and future profit till the date of final release of the decleretal amount was prayed for. The appellant put in appearance and filed an application for the grant of leave to defend the suit. It was stated that the principal amount stands paid and that the dispute is regarding the entitlement of the appellant to recover the alleged provisional profit without rendition of accounts. The precise plea was that interest on the Musharka Investment cannot be charged in the garb of the said provisional profit. The matter was referred to an Arbitrator who has given an Award on 20.7.1997. Execution of the two agreements was admitted. It was then stated that investment was made on the basis of profit and loss sharing and detail was given of the losses suffered during the various periods in para.13 of the said application. The matter was taken up by the learned Banking Court on 19.10.1998. It was noted that a total sum of Rs.88,00,000 stands paid by the appellants to the respondent and a sum of Rs.2,00,000 is outstanding. The opinion formed by the learned Banking Court was that in terms of the said agreement the appellants cannot ask the respondent to share the alleged losses. Ultimately the decree for the recovery of Rs.81,62,207 was passed in favour of respondent and against the appellants with costs along with mark up till realization of the declaretal amount.

The Court examined the agreement being relied upon by the respondent and admitted to have been executed by the appellants. Having gone through the said agreement, The Court find that the learned Banking Court while passing the impugned judgment and decree has not cared to read the said document. The agreement does make provision for a final rendition of accounts with reference to profit and loss and further the loss relatable to the mismanagement by the Company i.e. the appellant No.1 may also lead to consequences mentioned in the agreement. Besides, it has to be taken note of that the

investment was made with a condition that the appellant No.1 would be using the same only for working capital requirements for the construction of the proposed buildings mentioned in the agreement. The court finds that the matter has not been approached properly by the learned Banking Court.

Be that as it may, it has been affirmed the respondent that the entire principal amount stands paid besides another sum of Rs.1 Million has since been deposited by the appellants with the respondent. This being so, the court find that the questions raised in the application for leave to defend the suit do constitute substantial questions to be resolved by the Court. The court, therefore, while allowing this R.F.A., grant leave to the appellants to defend the suit. This will be subject to a further deposit of Rs.3 Million by the appellants with the respondent within one month of this order i.e. on or before 7.5.2002. In case the deposit is not made, this leave granting order shall stand recalled and the decree passed by the learned Banking Court shall hold field.

Shariah appreciation of the Judgment

Musharkah is sharing of profit and loss in joint business under mutual contract. The profit is distributed in pre-agreed ratio while the loss is borne by each partner strictly in a proportion to the contribution.

In the supra case financial institution admitted that the entire principal amount has been paid by the borrowed decided and other some one millions deposit by the borrower. The conventional of the borrowed was that the banking court had not taken into account the agreement between the parties whereby the financial institution was to share the loss in the business. The centennial of borrower did constitute subsection question to be resolve by the banking court. High court granted leave to defend to suit with the condition of depositing Rs. 3 millions with in one month of the passing of the order. The parties are bound to the terms and conditions in common law approach. The court applied this approach.

5.3 CASE NO. 2

Sh. ALTAN AZMAT---Appellant

Versus

HABIB BANK LIMITED through Chief Manager and another---Respondents[35]

Brief facts giving rise to the filing of the instant appeal are that the appellant/plaintiff filed a suit for declaration with a consequential relief against the respondents/ defendants. It was averred in the plaint that the appellant being a benami owner purchased one Deposit Growth Certificate amounting to Rs.10,000 on 28-12-1983 in the name of Mst. Nazir Begum and two Deposit Growth Certificates of Rs.5,000 each purchased on 28-12-1983 and 19-1-1984 in the name of one Sheikh Mohammad Amin Thapur. Thus, a decree was sought to be passed in favour of the appellant against the respondents to the effect that the appellant is the actual owner and holder of the above mentioned Deposit Growth Certificates. It was further prayed that the appellant may be declared to be entitled to receive the entire amount along with the mark up/interest and a decree for mandatory injunction was also sought directing the respondents to make payment in respect of the above mentioned three certificates along with the interest/mark up for the last twenty years till the date of encashment.

It was submitted by the respondent/defendant Bank that the appellant does not fall within the definition of a customer as given in section 2(c) of the Financial Institutions (Recovery Finances) Ordinance, 2001 and, therefore, the suit was not maintainable under section 9 of the Financial Institutions (Recovery Finances) Ordinance, 2001. The learned Judge Banking Court through the impugned order dated 29-1-2010 dismissed the application for leave to defend the suit moved by the respondents being filed after stipulated period; and disposed of the suit upon the statement made by the respondent Bank Manager that the certificates are in the name of Mst. Nazir Begum and Sheikh Muhammad Amin Thapur with the observations that the appellant should either obtain a

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[35] 2014 C L D 1636 [Lahore]
R.F.A. No. 251 of 2010, heard on 29th September, 2014

succession certificate in respect of Deposit Growth Certificates from the Court of competent jurisdiction or he may seek a decree for declaration on the ground that the appellant is a benami owner of the disputed certificates. Hence, this appeal.

The accumulative effect of sections 2(c), 2(d), 2(f) and section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 would be that where a customer or a financial institution commits a default pertaining to finance, the case may be instituted in the banking court In the present case if the-argument of learned counsel for the appellant is accepted that Deposit Growth Certificates fall within the definition of finance as given in section 2(d) of the Financial Institutions (Recovery of Finances) Ordinance, 2001; it remains as an undeniable fact that Deposit Growth Certificates are in the name of Mst. Nazir Begum and Sheikh Mohammad Amin Thapur. It is an established proposition of law that a Court or Tribunal, established under a special law, is a Court of limited jurisdiction and all the jurisdictional facts must exist before invoking the jurisdiction of a special Court or a Tribunal. If any of the jurisdictional fact is missing, the assumption of jurisdiction by special Court would amount to defective or excessive exercise of jurisdiction. In the present case, the appellant has failed to establish that he is a customer as defined in section 2(c) of the Ordinance, 2001. The suit under section 9(1) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 is only maintainable by a customer if a financial institution commits a default in fulfillment of any obligation with regard to any finance.

To attract the jurisdiction of the Banking Court under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 the appellant has to establish that he is a customer but in the present case the Deposit Growth Certificates are in the name of Mst. Nazir Begum and one Sheikh Mohammad Amin Thapur and it has been rightly observed by the Banking Court that the appellant should either obtain succession certificate from the competent Court of law or he may seek a decree for declaration to the effect that the appellant is the benami owner of the said certificates from the Court of plenary jurisdiction. The appellant sought indulgence of the Banking Court to obtain a decree for declaration to the effect that the appellant be declared a benami owner of the Deposit Growth Certificates which declaration, in court opinion, cannot be given by the Banking Court established under section 5 of the Financial Institutions (Recovery of

Finances) Ordinance, 2001. It is correct that section 7(1)(a) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 provides that in exercise of its civil jurisdiction the Banking Court shall have all the powers vested in a Civil Court under the Civil Procedure Code 1908 but subsection (1) also provides that subject to the provisions of this Ordinance the Banking Court shall have these powers meaning thereby at the first instance the appellant is to establish that all other jurisdictional facts exist to invoke the jurisdiction of the Banking Court, and where the Banking Court has jurisdiction to adjudicate upon the matter it shall, in that case, have all the powers vested in a Civil Court.

Shariah appreciation of the Judgment

Musharkah is sharing of profit and loss in joint business under mutual contract. The profit is distributed in pre-agreed ratio while the loss is borne by each partner strictly in a proportion to the contribution.

In Mudarabah one party provides the funds (Rub-ul-Maal) while other party provides the expertise (Mudarib). The profit sharing ratio is determined at the time of entering into Mudarbah agreement whereas in case of loss it is borne by Rub-ul-Maal only. In Mudarbah Al-Muqayyada Rub-ul-Maal specifies a particular business or a particular place for muadarib where he shall invest the money. In Mudarbah Al-Mutlaqah freedom to undertake whatever business he deems fit is given by Rub-ul-Maal. In Mudarbah agreement, a lump sump amount of profit can not be given to any party. Specific share tied up with capital can not be given to any party.

In the supra case appellant sought the degree and holder of the Deposit Growth Certificates and was entitled to receive the amount of the certificates along with markup/interest and a direction against the bank to make the said payment. Court observed that as the certificates were being claimed by the appellant to the names his deceased his relatives, therefore the apple ant obtain succession certificates in respect of deposit growth certificates or hen may seek a degree for deceleration from the court of competent jurisdiction on ground that appellant is a benami owner of these certificates . Appellant filled and appeal before the High Court. Validity-accumulative effect of section 2c 2b 2f and 29 of the ordinance financial institutions(recover of finances

Ordinance 2001) was that where a customer or financial institutions committed as default in fulfillment of any obligation with regard to any finance the financials intuition or such as the case may be. The customer may institute a suit in banking court. The parties are bound to the terms and conditions in common law approach. The court applied this approach.

5.4 CASE NO. 3

DAWOOD ISLAMIC BANK LIMITED---Plaintiff

Versus

ADMORE GAS (PVT.) LIMITED and 6 others---Defendants[36]

The case of the plaintiff was that the defendant No.1 are its principal borrower to whom it (plaintiff) sanctioned, approved and granted various finical facilities from time to time which were as under:--

(i) Murabah Facility amounting to Rs.47 Million

(ii) Ijarah Facility amounting to Rs.9.170 Million

(iii) Inland LC Sight Facility amounting to Rs.130 Million. (Hereinafter referred to as, "the Facilities")

The summary of Statement of account filed by the plaintiff was examined, wherein Murabaha Facility/principal outstanding amount is shown to be Rs.39,996,266.92 and agreed profit thereon is calculated and shown as Rs.377,417.73. In addition to these two amounts, an amount of Rs.12,980,141.62 is shown to be towards Charity; whereas an amount of Rs.8,536,325.82 was shown as cost of funds, calculated at the rate of 15.51% and 15.29% as per State Bank of Pakistan notified rate vide letter No. BPRD/BLRD-06/811/20618/2009-7069 dated 24-10-2009 and BBRD/BLRD-06/811/17979/2010-7382 dated 5-10-2010. Besides Murabaha Facility breakup, Ijarah

[36] 2012 C L D 263 [Sindh]
Before Salman Hamid, J

Facility breakup is also mentioned in the summary of Statement of account, wherein principal outstanding amount is shown as Rs.9,171,548.00. Agreed profit against this Ijarah Facility is calculated at Rs.752,305.00 and Charity is calculated in terms of the Agreements to the extent of Rs.806,692.00. Cost of funds towards this Ijarah Facility is calculated at Rs. 15.51% and 15.29% as per State Bank of Pakistan notified rate vide letter No.BPRD/BLRD-06/811/20618/2009-7069 dated 24-10-2009 and BBRD/BLRD-06/811/17979/2010-7382 dated 5-10-2010, which comes to Rs.1,328,237.59.

The court held that there is nothing on record whereby it can be deduced that these amounts are not due and payable by the defendants to the plaintiff, more particularly when the legal notice that was sent despite receipt by the defendants was not responded and liability mentioned therein not disputed or denied. Only it was mentioned that they (defendants) will revert back to it in due course of time. Under the circumstances, the principal outstanding amount and agreed profit together with cost of funds as calculated by the plaintiff is accepted against Murabaha Facility and Ijarah Facility. However, Charity of Rs.12,980,141.62 against Murabaha Facility and Charity of Rs.806,692.00 against Ijarah Facility is declined inasmuch as that according to me it is nothing but markup on markup and cannot be allowed in any form. The relevant provision which is available in the Murabaha and Ijarah Facility Agreements would show that such amounts are charged at 22% of the contract price and it is mentioned that this amount would be utilized by the bank for charitable and religious purposes, "as well as for providing interest free loans". The bare reading of the stipulations of the Agreements would show that these Charities charged at 22% on the contract price are nothing but markup under the guise of Charity. These two amounts are therefore declined. Under the circumstances, and looking at the above unrebutted position from the side of the defendants, the suit of the plaintiff is decreed to the extent of prayers (a) for which the amounts mentioned in Statement of summary of Accounts minus Charity, mentioned against Murahaba and Ijarah Finance are allowed. Prayer (b), (c), (d) and (e) are also granted. The plaintiffs shall also be entitled to the attachment and sale of personal properties of the guarantors for recovery of balance declared amount. The plaintiff is also allowed cost of funds in terms of section 3 of Ordinance 2001, minus the cost of funds already shown by the

plaintiff in the summary of statement of account. The plaintiffs are also entitled for the cost of the suit.

Shariah appreciation of the Judgment

In ***Murabaha*** seller sells the goods to the buyer adding an agreed profit margin. In deferred payment the seller can charge higher price.

Basic rules of a valid Murabaha Transactions

The subject matter must exist at the time of sale. It should be in the ownership and possession of the seller at the times of sale.

Murabaha is used to purchase raw material goods, purchase of equipments, import of goods, export financing or the uses of Murabaha.

In the supra case principal outstanding amount and agreed profit together with cost of funds as calculated by plaintiff was accepted against Murabaha facility and Ijara facility. Charity against Murahaba and Ijarah facility was declined in as much as the same was nothing but mark up on mark up and could not be allowed in any form. The court did not consider that in case of default in making the payment the client may be asked to pay a certain amount as a charity.

5.5 CASE NO. 4

ANZ GRINDLAYS BANK LTD. ---Plaintiff

versus

SAADI CEMENT COMPANY LIMITED and 2 others---Defendants[37]

[37] P L D 2001 Karachi 143
Before Sabihuddin Ahmed, J

The defendant, Pakland Cement Company Limited was allowed running finance facility of Rs.80 millions under the Finance Agreement dated 17-11-1994 on mark-up basis by the plaintiff, repayable on or before 16-11-1995 in five installments in the sum of Rs.102,696,000 being the purchase price confirmed by the facility advice dated 16-2-1995. The defendant utilized the said facility. It was restructured to enable the defendants to complete the project. To secure repayment of the above amount defendant executed, inter alia, a demand payment note, letter of hypothecation creating second charge on the assets of the company detailed in the hypothecation deed. The defendant No.1 failed to comply with the terms and conditions of the mark-up agreement and at their request it was restructured through Restructured Finance Agreement dated 27-5-1998 with repurchase price in the sum of Rs.99,982,466. The defendant No.1 also executed inter alia, the following documents:--

1. Demand promissory note, letter of hypothecation, creating first ranking pari passu charge and defendant No.2 executed guarantee dated 27-5-1998. The defendant No.1 deliberately and intentionally violated the terms and conditions of the restructured financial agreement. Hence the suit was filed by the plaintiff for decree against the defendants Nos. 1 and 2 jointly and severally with following prayers:--

"(a) The outstanding amount of Rs.307,019,107.72 with future mark-up as per the rates prescribed by the State Bank of Pakistan from the date of institution of this suit till realization of decretal amount.

(b) Enforce and execute the said decree for the above sum against the defendants Nos. 1 and 2 jointly and severally, by attachment and sale of their movable and immovable properties, including hypothecated materials goods arid such other properties of defendants Nos. 1 and 2 whether movable and immovable or individually on their names.

(c) Restrain, under section 1.6 of the Act XV of 1997 the sale, creation or transfer of any interest, right, charge, lease, dispose or disposition of the properties (movable and immovable) of the defendants Nos. 1 and 2 pending adjudication of the present suit and further may be pleased to attach and sell the hypothecated plant, machinery equipment and other goods material lying at defendant's Nos. 1 and 2 premises.

(d) The plaintiff may be allowed liquidated damages against the defendants Nos. 1 and 2 jointly and severally, being 20% of the aggregate amount claimed against the defendants resulting from the default in payment of outstanding amount and further liquidated damages of 2% per month resulting from legal proceeding for the recovery of the outstanding amount.

(e) The plaintiff may also be allowed costs of the suit.

(f) Any other or further relief or reliefs against the defendants Nos. 1 and 2 that this Hon'ble Court may consider just and proper in the circumstances of the case."

The court observed that the argument of Mr. Ch. Muhammad Iqbal, `learned counsel for the defendants that the Term Finance Agreement dated 27-5-1998 in the nature of Musharakah Agreement is misconceived. Musharakah is a relationship established by parties to undertake some specific business venture or to undertake business generally as partners with agreed profit and sharing of loss in proportion to the ratio of capital. The provisions of the Term Finance Agreement forming the basis of the relationship between the parties clearly show that it is not a Musharakah (partnership agreement) as the parties to the agreement have no where stated that they are entering into a relationship as partners and would share or distribute the profits of the business in agreed proportion.

A bare perusal of the Finance Agreement dated 27-5-1998, shows that said document is Murabahah (Bai Mu'ajjal or Sale on deferred Payment Basis which is also termed as Agreement for Sale on Credit), wherein the defendants agreed to pay the marked-up price of the goods in quarterly installments over a period in terms of Schedule "A" to the said agreement. Mr. Ch. Muhammad Iqbal was not able to show any provision whatsoever in the agreement from which it could be inferred or deduced that it was a (Partnership Agreement) as asserted by him. The argument of learned counsel for the defendants is thus not tenable.

The plea of force majeure was raised by the defendant but the court further observed that the plea is not based upon correct understanding of law and added that there is no clause relating to Force Majeure in the arguments which is normally expressly included, if the parties wish to specify the unusual contingencies and circumstances which they contemplate could occur during the existence of the agreement and its effect and

consequences on the contract. He also referred view taken by Mr. Justice S. Ahmed Sarwana in Askari Commercial Bank Limited and others v. Pakland Cement and others PLD 2000 Karachi 246, wherein the similar plea was rejected with following observations:--

"The argument of Mr. Hussain that the imposition of Customs Duty, Sales Tax and Regulatory Duty on the import of machinery frustrated the contract is not based upon correct understanding of law. He did not show any provision from the Contract Act, 1872 or any other law or reported judgment on the basis of which it could be argued that the Customs Duty, Sales Tax and/or Regulatory Duty is imposed on import of goods, an agreement between the buyer and seller which requires payment of the price in installment over a period of time becomes frustrated and the buyer is absolved from his obligation to perform his part of the contract i.e. to pay the price of the goods which have been received by him. The learned counsel also did not show any provision in the Term Finance Agreement or any law to support his argument that if a banking company fulfils its commitment and provides finance to the customer, the latter is discharged from his obligation to pay back the finance/loan to the bank which has advanced credit to him. No doubt under section 56 of the Contract Act, a contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. In the present case the plaintiff bank provided finance to Pakland and fulfilled its part of the contract, the only thing that remained to be done was for Pakland (Customer) to fulfill its obligation of paying the installments on the agreed dates. It cannot be argued that because the Government imposed Customs Duty, Sales Tax and Regulatory Duty on the import of machinery and/or certain other financial institutions backed out from their commitment to provide finance to Pakland, the Term Finance Agreement between the plaintiff and Pakland became impossible and, therefore, void thereby absolving Pakland from performing its part of the contract i.e. to pay the installments of the marked-up price as promised."

In absence of a Force Majeure clause in the agreement such plea is not available to the defendants. Thus, the plea of Force Majeure is not available to the defendants.

The court find that no serious and bona fide dispute has been raised on behalf of the defendants for the grant of leave to defend as the availing of the facility, execution of document, liability to pay have not been disputed, as such. I am of the view that defendants have failed to make out a case for leave to defend; therefore, the applications were dismissed.

SUIT NO.B-60 OF 2000

The court further held that the loan was restructured by Term Finance Agreement dated 27-5-1998, whereby amount due was shown at Rs.93,629,921 (purchase price) with marked-up price in the sum of Rs.113,845,898 (repurchase price). In the statement, the plaintiff-bank has claimed the mark-up to the date of the filing of the suit, though they are not entitled under the law for the any amount access of repurchase price.

Defendant, Tariq Mohsin has executed the guarantee in the sum of Rs.113,845,898 as such his liability cannot exceed the amount of the guarantee. The relevant portion of the letter of guarantee whereby the liability has come to be affixed on defendant No.3 reads as under:--

"1. That the liability under this Guarantee is limited to the payment Rs.113,845,898 together with the amounts specified above as per schedule of payment attached herewith and not for the lump sum payment of the full facility.

2. The liability of the Guarantor under the Guarantee shall be only for payments to ANZ for the amount of financial obligations of the Principal-debtor arising under the Agreement on the due dates mentioned therein subject to a maximum liability for the total amount to Rs.113,845,898 as per schedule attached to the Agreement. This Guarantee shall stand reduced proportionately with the payment of each instalment under and in terms of the agreement. "

The plain reading of the above extract indicates that the ultimate limit of the defendant No.3 was of the amount specified therein. The liability of the guarantor is limited to the amount of the guarantee. In this regard, the observations made are reproduced with advantage in Mian Munir Ahmed v. United Bank Ltd. and 3 others PLD 1998 Karachi 278:

"A plain reading of the above extract, which forms the opening words of the letter of guarantee, should indicate that the ultimate limit of liability of the appellant-guarantor was a sum of Rs.40 million. The learned counsel for the respondent-Bank has, however, urged before us that such figure relates only to the principal amount and not to the accruing interest and other charges on the loan, which was guaranteed. The objection does not seem to be supported on the phraseology of the relevant provision. The limit of the guarantee, as will readily be seen, is spelled out twice over, first positively and then in negative language, with, apparently, clear intendment. More than this we would not like to §ay on the subject."

Thus, the liability of the defendant Tariq Mohsin is to the extent of amount of guarantee, which is also repurchase price. Therefore, the suit of the plaintiff against the defendants is decreed in the sum of Rs.113,845,898 with mark-up 2% above State Bank rate from the date of suit till realization.

The court held that the loan was restructured by term finance agreement dated 27-5-1998, whereby amount due was shown at Rs.70.220,734 (purchase price) with marked-up price in the sum of Rs.87,096,622 (repurchase price). In the statement, the plaintiff Bank has claimed the mark-up to the date of the filing of the suit, though they are not entitled under the law for the any amount access of repurchase price from the defendant No.1. The liability of defendant No.2 is to the extent of guaranteed amount, which is also equivalent to the repurchase price. Therefore, the suit of the plaintiff against the defendants is decreed in the sum of Rs.87,096,622 with mark-up 2% above State Bank rate from the date of suit till realization

Shariah appreciation of the Judgment

Musharkah is sharing of profit and loss in joint business under mutual contract. The profit is distributed in pre-agreed ratio while the loss is borne by each partner strictly in a proportion to the contribution.

In the supra case court held where no such laws of force majeure was present in the agreement, the plea of force majeure was not available to the borrower. No serious and benefited dispute has been raised by the borrower for the grant of relief of

suit. Availing of facility, execution of documents and liability to pay had not been disputed by the borrower. The parties are bound to the terms and conditions in common law approach. The court applied this approach.

5.6 CASE NO. 5

BANK OF PUNJAB through Authorised Officer---Plaintiff

versus

Messrs KNK INFRASTRUCTURE (PVT.) LTD. through Chief Executive Officer and 2 others---Defendants[38]

The plaintiff advanced an amount of Rs.78 million under Murabaha finance agreement dated 10-10-2005 to the defendant No.1 company. The purchase price of the goods transacted was fixed at Rs.90 million payable on 15-1-2006. The disbursement of the principal amount is admitted at page 8 of the PLA. After expiry of the facility an amount of Rs.32.074 million has been repaid until 11-2-2008. The plaintiff entered into a rescheduling agreement which extended term of finance till 30-6-2010 but levied service charges @ Rs.16.88 per cent for the extended term. On the foregoing basis the plaintiff claims Rs.78 million as principal amount and Rs.54.592 million on account of mark-up the balance whereof after adjustment of repayments made in the amount of Rs.22.518 million, is stated to be outstanding.

2. The defendants filed their PLA wherein the only substantial plea taken is that markup has been charged beyond contract period in the suit. After filing their PLA the learned counsel for the defendants stopped appearing in these proceedings. Accordingly, the defendants were proceeded against ex parte on 26-11-2009. Nevertheless on the touchstone of Ali Khan's case (PLD 1995 SC 362), the pleas taken in the PLA are examined below.

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[38] 2012 C L D 961 [Lahore]
Before Umar Ata Bandial, J
C.O.S. No.72 of 2009, decided on 21st September, 2011

3. The Murabaha facility agreement has purchase price of Rs.90 million payable on 15-1-2006. The rescheduling agreement dated 10-9-2007 claims service charges @ Rs.16.88% per annum till 30-6-2010. Such charge is clearly in the nature of interest and cannot accrue either under law or on the terms of the Murabaha facility. Consequently, the rescheduling agreement is not enforceable with respect to service charges. On the other hand, from the date of default, namely, 15-1-2006 until date of realization, the FIO 2001 creates for unpaid creditor/financial institutions an entitlement to compensation through cost of funds as determined under the provisions of section 3 of the said Ordinance.

4. Accordingly, the plea taken in the PLA with respect to accrual of mark up under the rescheduling agreement is upheld. As a result, this suit is decreed in the amount of Rs.57.926 million against the defendants jointly and severally along with payment of cost of funds w.e.f. 15-1-2006 till realization in terms of section 3 of the FIO, 2001.

Shariah appreciation of the Judgment

In ***Murabaha*** seller sells the goods to the buyer adding an agreed profit margin. In deferred payment the seller can charge higher price.

Basic rules of a valid Murabaha Transactions

The subject matter must exist at the time of sale. It should be in the ownership and possession of the seller at the times of sale.

Murabaha is used to purchase raw material goods, purchase of equipments, import of goods, export financing or the uses of Murabaha.

In the supra case principal outstanding amount and agreed profit together with cost of funds as calculated by plaintiff was accepted against Murabaha facility and Ijara facility. Charity against Murahaba and Ijarah facility was declined in as much as the same was nothing but mark up on mark up and could not be allowed in any form. The court did not consider that in case of default in making the payment the client may be asked to pay a certain amount as a charity.

5.7 CASE NO. 6

Messrs AL-BARKA ISLAMIC BANK LTD.---Plaintiff

Versus

Messrs JAVED NAZIR BROTHERS---Defendant[39]

This PLA is filed in a suit for recovery of Rs.81.5062 million filed in respect of finance extended to defendant No.1 Company for which the defendants Nos.2, 3 and 4 are mortgagors as well as guarantors. The sanction advice dated 14-1-2000 granted four facilities to the defendant company three of which were fully adjusted but one facility allegedly remains outstanding, namely a Murabaha Facility of Rs.50.0 million. The said facility is reflected in a General Finance Agreement dated 14-1-2000 which was renewed/rolled over from time to time as is evident in the plaintiffs sanction advices dated 25-10-2000, 13-2-2001 and 10-6-2002. Fresh security documents were executed for the first two sanction advices but not in respect of the latest one.

The Murabaha Facility is reflected in two heads of account in the books of the plaintiff bank, namely, "Murabaha Finance Facility" and "AMI Pool Murabaha Facility." The statement of account filed with the suit reflects the entries in the said two heads of finance availed by the defendant company. The picture about utilization of funds by the defendants is completed by the statement of current account present on record which lists all transactions made by the defendant company dealing with and utilizing the finance availed.

On the question whether the suit is filed without proper authorization, the learned counsel for the plaintiff has referred to pages 44 and 48 of the plaint at which two powers of attorney in favour of the officers signing the plaint are attached. These registered powers

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[39] 2014 C L D 1228 Lahore]
Before Umar Ata Bandial, C.J.
P.L.A. No.18-B and C.O.S. No.6 of 2005, decided on 30th May, 2014

of attorney are executed by one Mr. Shafqaat Ahmed who is Regional General Manager of the plaintiff-bank and authorized by its Board of Directors empowering him to confer authority on officers of the bank. The powers of attorney of the signatory officers are available on record. Relies on Haji Saghir Ahmed v. United Bank Ltd. (2004 CLD 1334) which excludes a Court from going behind the registered power of attorney. The explanation is satisfactory. The suit is accordingly competently filed.

Addressing the next objection that there is no finance agreement available on record to sustain the claim made in respect of Morabaha Facility, the learned counsel for the plaintiff has submitted that the General Finance Agreement dated 14-1-2000, valid until 30-9-2000, reflects the commencement of the finance relationship between the parties. The facility was renewed from time to time thereafter. The last such renewal was made vide General Finance Agreement dated 13-2-2001 pursuant to sanction advice which is also dated 13-2-2001. According to the said sanction advice dated 13-2-2001 the general finance facility extended to the defendant company in the amount of Rs.200.0 million is differentiated into sub-heads. One of these is the presently relevant Morabaha Finance in the amount of Rs.50.0 million. The different sub-heads of finance granted to the defendant company have identical terms of repayment. It is explained that therefore one General Finance Agreement dated 13-2-2001 deals with all sub-heads of finance cumulatively amounting to total finance of Rs.200.0 million. Except for Morabaha Finance of Rs.50.0 million which forms the subject matter of the instant suit, all other finance facilities availed by defendant company under the General Finance Agreement have been duly repaid. Therefore learned counsel submits that it is incorrect to allege that no finance agreement containing the terms of subject matter Morabaha Finance is available on record.

Learned counsel for the plaintiff has thereafter explained that the Morabaha Finance of Rs.50.0 million is depicted on record through two statements of account one carrying the description "Morabaha AMI Pool" and the other titled "Morabaha Finance." He submits that the reflection of the facility in two statements of account does not constitute the creation of two different finances. The descriptive nomenclature is merely for internal purposes of the plaintiff bank. The statement of account of the AMI Pool Morabaha was active on 7-2-2005 when a credit was made in the Morabaha Finance Account No.452.

the terms of sanction advice which is the General Finance Agreement. To the mind of the Court additional markup outside the validity of the Murabaha agreements cannot be incorporated to impose liability on the defendants. Accordingly, in so far as the objection of interest being charged is concerned, it is allowed to the extent that the claim by the plaintiff bank is sustained on the basis of buyback price of Rs.55.199 million settled in the thirteen Murabaha Agreements signed by the defendants. For the period thereafter the plaintiff bank is entitled to cost of funds in accordance with section 3 of F.I.O., 2001 commencing from the date of default under the thirteen Murabaha Agreements till realization of the amount due.

Learned counsel for the defendants has raised the objection that photocopies of only eight out of thirteen Murabaha Agreements signed by the defendants are available on record. Accordingly, Murabaha Finance under the five absent agreements cannot be included for the purposes of liability. The objection taken is inconsistent with the stand of the defendants that no financing has been availed by them from the plaintiff bank. Moreover, the PLA does not contain any objection on the foregoing lines simply for the reason that the plea of denial has been adopted whereas the present stand being taken admits the execution of eight Murabaha Agreements.

The fact of the matter is that Murabaha Finance has been extended from time to time by the plaintiff to the defendant company under the General Finance Agreement dated 13-2-2001. Each of the Murabaha Finance Agreements pertains to a portion of sanctioned Murabaha Finance under the General Finance Agreement. These Murabaha Finance Agreements are made on the defendants' requests for disbursement of the sanctioned finance. The eight agreements available on record are indicative of an arrangement between the parties. In the absence of denial of any specific Murabaha Agreement and in view of a bald and clearly false denial of all sanctioned finances generally, there is no need in this case for the remaining agreements to be placed on record. Consequently this objection is rejected. Reference may be made to Zeeshan Energy Ltd. and 2 others v. Faisal Bank Ltd. (2004 CLD (Lahore) 1741) wherein the Murabaha Finance was affirmed by the Court when its existence was evident from the General Finance Agreement and not under any specific Murabaha Agreement. The present case has better facts because eight out of thirteen agreements are available on record and the remaining five are stately

attached to the replication which the Court has not read in deference to the objection by the learned counsel for the defendants that their admissibility must be subject to opportunity to rebut the said documents.

The said statements of account have been perused and it is correct that the disbursement made under 13 claimed murabaha agreements are evident as credit entries in these statements on the pages highlighted by the learned counsel for the plaintiff. The principal amount disbursed tallies with the principal amount shown in the aforementioned table at page 297 of the suit file. However, the said table also includes profit for duration of each Murabaha agreement in respect of which such disbursements were made. Eight of the corresponding Murabaha agreements have been filed with the suit and remaining with the replication. Learned counsel for the defendants objects that such documents should not be considered as part of the record unless the defendants are given an opportunity to rebut the same. In the circumstances, learned counsel for the plaintiff withdrew reliance on the said documents for purposes of present PLA.

The profit element is reflected in the buyback price contained in each of the Murabaha Agreements. This amount can easily be verified by applying the agreed markup to the disbursed principal amounts under the said murabahas and the duration of the murabahas. However, the amount of markup accrued beyond the contracted murabaha period cannot be assessed or determined merely by reference to the statement of account. Therefore, the buyback amount of Rs.55.199 million reflected in the statement of account is duly established. However, the claimed overdue profit of Rs.5.981 million due until expiry of facility on 31-12-2002 and profit for subsequent period in the amount of Rs.19.868 million cannot be granted because these are beyond the contract terms of the murabahas.

Learned counsel for the plaintiff has again sought to justify the additional claim of markup on the basis of terms of general finance agreement dated 13-2-2001 read with sanction advice dated 10-6-2002 which extends Murabaha finance until 13-2-2002. The contention raised by the learned counsel for the plaintiff has already been considered. The charging of markup is a contractual matter based upon transaction in goods. Markup is not interest that can be charged by a bank solely with reference to the passage of time. In the present case, the general finance agreement dated 13-2-2001 does not contain any

provision relating to markup. Markup amount is contained in the respective Murabaha agreements through the buyback price settled therein. Consequently neither the general finance agreement dated 13-2-2001 nor sanction advice dated 10-6-2002 can lawfully authorize charging of markup or nominate the amount thereof without reference to a Murabaha agreement. Consequently, accretion of markup for extended period beyond the life of a Murabaha agreement is not justified. The Murabaha agreements filed by the plaintiff bank along with replication to the PLA have for reasons given not been read presently by the Court. However, with respect to the plaintiff bank's claim of markup accruing for the period following the expiry of the said murabaha agreements, unconditional leave to defend is granted to the defendants for determination of the claim on evidence led by the parties.

Shariah appreciation of the Judgment

In ***Murabaha*** seller sells the goods to the buyer adding an agreed profit margin. In deferred payment the seller can charge higher price.

Basic rules of a valid Murabaha Transactions

The subject matter must exist at the time of sale. It should be in the ownership and possession of the seller at the times of sale.

Murabaha is used to purchase raw material goods, purchase of equipments, import of goods, export financing or the uses of Murabaha.

In the supra case principal outstanding amount and agreed profit together with cost of funds as calculated by plaintiff was accepted against Murabaha facility and Ijara facility. Charity against Murahaba and Ijarah facility was declined in as much as the same was nothing but mark up on mark up and could not be allowed in any form. The court did not consider that in case of default in making the payment the client may be asked to pay a certain amount as a charity.

5.8 CASE NO. 7

MUHAMMAD SHOAIB---Petitioner

versus

MUHAMMAD IBRAHIM and 4 others---Respondents[40]

Petitioner seeks leave to appeal against the judgment of Division Bench of Peshawar High Court, Peshawar, dated 30th May, 1994 in Writ Petition No. 1120 of 1992.

Muhammad Ibrahim respondent No. 1 through receipts dated 9-6-1974, 10-8-1973 and 24-1-1979 received a sum of Rs.16,454 on the ground that he will mortgage a piece of land (Sholgari) situated at Haibtgram Malakand Agency to the petitioner. It was further agreed that the mortgagor (Muhammad Ibrahim) would cultivate the land on payment of Rs.700 per year as Ijara. His failure to pay the required `Ijara' amount compelled the petitioner to file a suit for recovery of `Ijara' amount and further prayed for the respondent's ejectment from the land. This suit was filed on 1~-8-1979 before the A.PA. Malakand. During pendency of the suit on 6-11-1978 a compromise was effected and it was agreed that respondent will pay Rs.5,754 to the petitioner before 30-11-1979 failing which the possession will be delivered to the petitioner. Respondent did not pay the amount within the stipulated period where after the Assistant Commissioner vide his order dated 11-1-1981 found that. the compromise had no validity and the case was revived for decision on merits after recording the evidence of the parties. This order was challenged in appeal before the Collector/Political Agent, Malakand but the appeal was dismissed on 4-3-1981. Thereafter, revision petition was filed before the Additional Commissioner-which was accepted by setting aside the orders dated 11-1-1981 and 4-3-1981 and it was directed that Assistant Collector 1st Grade should summon the appellant and give him a notice of 10 days to deposit the amount of Rs.5,754 plus Rs.1,000 as agreed in the statement, dated 2nd December, 1979, failing which the land in dispute will stand transferred to the petitioner. This order was passed on 13-1-1982. That against

[40] P L D 1995 Supreme Court 403
Present: Fazal Ilahi Khan
and Muhammad Bashir Khan Jehangiri.JJ
Civil Petition No.259-P of 1994, decided on 28th February. 1995

judgment and order the petitioner filed a revision petition before the Additional Home Secretary but the same was dismissed. The petitioner thereafter filed Writ Petition No.278 of 1983 which was dismissed in liming on 25-9-1984.

The court observed that the it is painful to note that the parties are locked up in litigation since the year 1979 over a petty amount of Rs.6,754, as observed by the High Court. In the background of the facts of the case as given above the matter had finally concluded by order, dated 20th April, 1985 but this was reopened at the behest of the parties by order dated 27-2-1989. The order dated 20-4-1985 was passed on failure of the respondent to pay a sum of Rs.6,754 and when during the execution proceedings the said amount was paid it was duly received without any objection on behalf of the petitioner regarding which a receipt was executed and placed on file and in pursuance thereof possession restored to the respondent. Contention of the learned counsel for the petitioner, now raised before us, that petitioner neither received the amount nor did authorise any person as special attorney to receive such amount on his behalf has been considered by the learned High Court in its judgment. The learned High Court, from the record, 'observed that the amount was received by Fazat A Ahmed special attorney of the petitioner and it was not only attested by A.PA. Batkhela but also by Mr. Faridullah Khan, Advocate. The question; as to whether Fazal Ahmad was special attorney to the petitioner, the fact is that the amount was paid to him before the A.PA. and whether it was paid to the petitioner or not, are the questions, which could not be gone into, as rightly observed by the learned High Court, in writ jurisdiction. We, therefore, find no infirmity in the judgment of the learned High Court refusing to interfere with the orders of the forums below in Constitutional jurisdiction. Leave to appeal is, therefore, refused.

If the petitioner is defrauded of the amount he can seek remedy in proper forum, if so advised.

Shariah appreciation of the Judgment

In Ijarah arrangement, lessee enjoys the usufruct for a specified period in exchange of rent. All costs of repairs etc are to be borne by the lesser.

In the supra case the court was observed that compromise between parties during pendency of suit whereby mortgagor agreed to pay specified amount to mortgagee

claimed that consent amount had not been paid to him and thus, he was entitled to receive possession of land in question.... High Court from record had observed that special attorney of mortgagee had received the amount and receipt of payment was attested not only by Assistant Political Agent but also by the Advocate of mortgagee--- Question as to where special attorney was authorized to receive said amount on behalf of mortgagee and whether he was duly constituted attorney or not, could not have before gone into by the High Court in exercise of its Constitutional jurisdiction.

5.9 Conclusion

Perusing the supra cases and their analysis in Shariah perspective it comes to the surface that the common law approach has been applied or deciding the supra cases. The characteristic of Islamic mode of finance has not been kept in mind. Moreover, Islamic banking and finance related transactions have not been drafted in consonance with principles of fiqhul muamlat.

CHAPTER - 6

DISPUTE RESOLUTION IN ISLAMIC BANKING

6.1 Introduction.

The Islamic banking and finance is witnessing global boom which may be jeopardized due to inefficient legal framework for the decision of disputes arising from Islamic banking and financial industry. In the present judicial system most of the judges do not have proper knowledge of the technical terms and products introduced by the Islamic Banks. In this backdrop the Alternative Dispute Resolution can be the panacea for all economic disputes. Sulh, tahkim, muhtasib and a hybrid of some of the processes are the modes to resolve disputes through ADR. Decisions of Islamic banking cases by Civil or common law courts are counter productive.

6.2 Current Trends in litigating Islamic Banking Disputes:

The current litigating trends do not augur well with the diagnosis of Islamic banking and finance. The presiding officers do not possess requisite knowledge essential for the resolution of Islamic banking disputes. More over the procedure involves for the resolution of disputes is complicated and lengthy wasting the time and money of the litigants. There is need of the hour either to simplify the complicated procedure or to switch over to the ADR techniques. The

conventional system for dispute resolution has put clog in the implementation of Shariah compliant products.

6.3 Relevant ADR Processes in Islamic Law:

The Islamic legal history is replete with processes for the settlement of dispute such as Sulh, Tahkim, Muhtasib and hybrid processes.

6.3.1 Sulh:

Sulh is amicable settlement of disputes to negotiations, conciliation, and mediation and even extends to compromise of actions. Sulh takes the nature of binding contracts on the parties involves by an agreement with a view to end the dispute. All types of Sulh are permissible except those Sulh that make lawful prohibited and the vice versa.

6.3.2 Tahkim:

Tahkim means arbitration where two or more parties submit there dispute to a third party called a hakam or muhakkam. Reference of dispute to a third party for settlement based on Islamic provisions is sent which occupies an important position in dispute resolution within the context of Islamic law. The Quran gives approval for arbitration. If you fear a breach between a man and wife appoint to arbitrators from each side if they both wish for peace, Allah will cause there reconciliation.

6.3.3 MED-ARB:

It is mixture of two processes mediation and arbitration properly known in the ADR. The instance can be cited from the Quarn i.e If you fear a breach

between a man and wife appoint two arbitrators from each side if they both wish for peace, Allah will cause there reconciliation.

6.3.4 Muhtasib:

Muhtasib is to regulate commercial activity safeguarding the interest of the entrepreneurs and consumer alike with much emphasis on administrative justice. Muhtasib is to perform duties of hisbah.

6.4 SETTING THE SCENE FOR INSTITUTIONALIZED LEGAL FRAMEWORK OF DISPUTE RESOLUTION

In order to avoid lengthy, expensive, stressful and organizing litigation, Alternate Dispute Resolution has since long, engaged the attention of the civil society. Various modes and techniques have been adopted and followed for dispute resolution from time to time. For instance direct negotiations to settle a dispute is an ideal mode leaving all the parties happy with the outcome of such amicable settlement. Mediation, conciliation and arbitration are some of the other modes engaging third party intervention of appointing neutral person to bring about settlement of disputes. The society and set-up in which we live, since long the efforts used to be made to settle the disputes at local levels. All of must have observed of heard of 'punchayats'. 'Punchs and the 'Qazi' in our villages and 'Gali/Mohallas' of town, settling disputes of people at local levels. Though such modes had no specific statutory backing, their verdicts and decisions used to be accepted and considered as binding. In our country, those at the helm of the affairs appear to have paid attention to this aspect. In 1961, conciliation courts

ordinance was promulgated providing conciliation courts for this purpose. Specified civil disputes and minor offences could be resolved through these courts. Provisions were also made in the Family Laws making it incumbent for the Family Court to strive for bringing about reconciliation for settling family dispute. For the resolution of labour disputes were to act as a link between the workers and the employers to help workers in the solution for their problems connected with the work. The appointment of conciliators was visualized by the Industrial Relations Ordinance 1969 to negotiate and bring about amicable settlement of the dispute. Some laws have been enacted in the recent past, such as provisions in the Punjab Local Government Ordinance 2001 constituting ' Mosalehat Anjuman' and 'Insaf Committees' for resolving local disputes. For settling fiscal disputes relevant Laws have been amended. Addition of Rules 231-C has been made in the Income Tax Rules, encouraging the resolution of dispute through Alternate Dispute Resolution Committee.

It is important to set the scene for an institutionalized legal framework for dispute resolution in the Islamic banking and finance. It may be necessary to establish regional such centers across the world with branches in all the countries.

There will be an urgent need of qualified experts as the pioneering staff in the offices across the world. Thereafter, institutional training and standardization of best practices will be required which may be achieved through proper initial training; initial post-training supervision; formal accreditation; on-going review and/or continuing education.

6.4.1 THE HYBRID ADR PROCESSES IN ISLAMIC BANKING AND FINANCE DISPUTES

. Where the parties have not reached a consensus, it is apposite to hybridize the process by bringing in a binding third party decision such as arbitration, expert determination or even the ombudsman.

No individual, entrepreneur or financial institution will want to take any huge financial risk. For the settlement of Islamic banking and finance disputes hybrid processes are proposed. The first is an amalgam of the triad consisting of mediation (sulh), expert determination (fatāwā) and ultimately, arbitration (tahkīm). On the other hand, parties may opt for the Med-Muh hybrid procedure which is more appropriate for the settlement of disputes between a customer and his/her financial service provider.

6.4.2 MED-EX-ARB

Sulh is a first step towards the amicable resolution of any dispute. For a well reasoned decision, it is proposed that such good faith negotiation-cum-mediation should be supported by a binding Expert Determination.

6.4.3 MED-MUH

MED-MUH, Mediation (sulh) and muhtasib is more relevant in the resolution of administrative-cum-financial disputes, claims or complaints which generally arise out of bank-customer relationship.

6.5 CONCLUSION

It is time for the regional or international regulating bodies to gain inspiration from the Islamic law, practice of dispute resolution based on the hybrid processes explained above. It will be a giant leap in the direction of easy settlement of claims within the industry.

CHAPTER - 7

CONCLUSION AND RECOMMENDATIONS

7.1 PRESERVATION OF PROPERTY IS THE AIM OF SHARIAH

The aim of the Shariah is to preserve religion, life, intellect, progeny and property. Preservation of property is the fundamental interest of human being and Islam regards the property of a man as sacred. Theft usurpation and all impressible means of acquiring wealth have been prohibited by Islam. The gharar transactions where parties become a victim of excessive ignorance have not been given validity by the Islam.

The Holy Prophet (s.a.w.s) also forbade certain market practices such as withholding of food items in times of scarcity, collusion to bid up prices, purchase from the farmers at lower prices keeping them ignorant about market prices, sale of something which one does not possess and the sale of food stuff before taking it into possession.

Thus, Quran and Sunnah embody some very basic and important rules with regard to transaction. The purpose of all such injunctions is to preserve and the material wealth of the people.

It is worth mentioning here that the Quran and Sunnah have not laid down a detailed law of contract and transaction. They have only provided broad guidelines for economic and commercial activity. It is fuqaha, who developed a comprehensive system of contract and transaction seeking guidance from Quran and Sunah. They classified contracts into different and assigned those different nomenclatures. They discussed the element and condition of contract together with the other necessary characteristics and attributes by exercising Ijtihad in the domain of transactions to frame new rules.

SUGGESTIONS

Most Islamic financial institutions work in mixed legal system. Every transaction must comply with Shariah principals. The issue becomes more complicated if the parties involve in Islamic Finance Disputes hails from different jurisdiction in cross border transaction. This raised the question how Shariah principals shall apply together with the law of jurisdiction and how a case will be decided in a court. Courts in Pakistan decide the cases with common law approach. When the learned judges are not well versed with the Shariah complaints then it becomes incumbent upon the authority to established Shariah Board. The proposition pertaining to Shariah should be referred to the Shariah Board for their recommendation and in the light of those recommendations the case should be got exhibited by the Shariah experts while appearing in the witness box facing the cross-examination of other parties as well.

It is the need of the time that the transactions pertaining to Islamic banking and finance transactions should be incorporated in Shariah context. It is also noteworthy that it has been a common practice for Islamic Banking and Finance related transaction to be governed by English Law. Infect as part of business strategy many Islamic Finance deal especially those involving cross border transaction are governed by English Law. It is time that these transactions should also be incorporated and enshrined in the Shariah contexts. The contract should be governed or subject to the glorious Shariah principles.

Judges are trained in English Law, there decisions have been influenced by common law approach

The lawyers who draft Islamic Financial contexts are not well versed with the principles of fiqhalmua mlat. This leads to the conclusion that Islamic Finance industry is deplete with legal experts. Islamic financial contracts should be documented on Shariah rules. Enabling legal environment to guarantee the enforceability of Islamic financial contexts must be maintained. Islamic finance needs a reliable legal system for the settlement of disputes and at present alternative dispute resolution seems to be the best alternative to the court proceedings. A sound legal frame work depends on the sound legal fraternity having sufficient knowledge of the Islamic legal contexts and be able to apply them the context of modern finance.

7.3 CONTRIBUTION OF THE STUDY.

This study is an attempt to critically review and analyze the Courts' decisions on Islamic finance disputes. It strongly advocates that a proper legal framework and infrastructure as well as the substantial support of the legal fraternity are the prerequisites for the advancement and significant growth of the Islamic finance industry.

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