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Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE.

(JUDICIAL DEPARTMENT)

E.F.A No.22133 of 2023

M/s G.A Traders (Sole Proprietorship)

vs.

Allied Bank of Pakistan

JUDGMENT

Date of Hearing	03.05.2023
For Appellant	Syed Zeeshan Haider Zaidi, Advocate.
For Respondent	Mr. Moiz Tariq, Advocate.

MUHAMMAD RAZA QURESHI, J. Through this Execution First Appeal under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the "**Ordinance of 2001")**, the Appellant has questioned the legality and propriety of Order dated 07.03.2023 passed by Banking Court No.IV, Lahore, pursuant whereto the Objection Petition under section 19 of the Ordinance of 2001 filed by the Appellant, *inter alia*, seeking dismissal of Execution Petition was dismissed.

2. Learned counsel for the Appellant submits that Impugned Order is illegal and unlawful and is liable to be set aside. While reiterating the grounds canvassed in the instant Appeal, learned counsel submits that the Decree Holder Bank while realizing the Judgment and Decree is selling the properties of the Appellant/Judgment Debtor at a throwaway price. Additionally, learned counsel contends that there is a fundamental flaw in the calculation of the Decree Holder Bank as though the Judgment and Decree was passed in year 1999 when the applicable law in field was the Banking Companies

(Recovery of Loans, Advances, Credits and Finances) Act, 1997 (the **"Act of 1997"**), but at the time of commission of default in year 2002 the applicable law in field was Ordinance of 2001, pursuant whereto the only remedy against recovery of debt due was through charging cost of funds instead of mark-up beyond the contractual stipulation. Learned counsel for the Appellant has referred to Order dated 31.03.2016 passed by Supreme Court of Pakistan in Civil Petition No.632-L of 2016 and contends that Supreme Court of Pakistan ordered the Decree Holder Bank to recover cost of funds from the Appellant for the period from the date of decree until the date of full payment in cash. According to learned counsel, the said Order was passed with the consent of the parties and now the Decree Holder Bank cannot be allowed to take a somersault and betray the direction passed by the Supreme Court of Pakistan. Lastly submits that the Decree Holder Bank fraudulently adjusted an amount of Rs.25,500,000/- against the decree of Rs.35,523,413/- on 01.06.2016, whereas the said amount had already been recovered on 07.03.2009.

3. Conversely, Mr. Moiz Tariq, Advocate appearing on behalf of Decree Holder Bank has ably assisted this Court that despite having a Judgment and Decree in its favour in year 1999, the Decree Holder Bank is running from pillar to post to seek its realization and despite lapse of more than 23 years, the Decree Holder Bank could not reap the benefits of consent decree passed in favour of the Decree Holder Bank. Learned counsel submits that the matter has gone up till Supreme Court of Pakistan, where the Judgment Debtor misrepresented its position and subsequently resiled from the consent order passed by the Supreme Court of Pakistan. According to learned counsel, the Appellant is misusing the process of law and

in garb thereof is dragging the process of realization of subject matter Judgment and Decree. According to learned counsel, in terms of law, the decree passed in the matter will be governed by the law applicable at the time of passing the Decree. Since the Act of 1997 was the applicable law and Appellant itself consented to the recovery of mark-up till realization of said Decree, the Appellant cannot be permitted to craft a misconceived position of law by seeking a declaration that only cost of funds can be recovered from it. Learned counsel lastly contends that the Impugned Order is in consonance with the position of law as well as facts, therefore, this Appeal is liable to be dismissed with exemplary cost.

4. The arguments of learned counsel have been heard and record of the case has been minutely perused with their able assistance. It appears from the record that on account of a default towards financial obligations, the Respondent Bank through its Suit bearing C.O.S. No.121/1998 sought recovery of an amount of Rs.44,914,833/- along with liquidated damages of Rs.8,982,966.60 accumulating to a sum of Rs.53,897,799.60 along with future mark-up. During the pendency of Suit, the parties entered into a settlement and pursuant to an Application bearing C.M.No.456-B/1999, the Settlement Agreement was placed on record as Mark ‘A’ and through Order dated 13.09.1999, the Decree was passed on the basis of Settlement Agreement. By executing the Settlement Agreement/Deed of Compromise, the judgment debtors including the Appellant admitted the outstanding liability and sought extension in the recovery thereof subject to levy of 17% mark-up contained in Clause-8 of the Agreement.

5. On account of default of liabilities under the Settlement Agreement, the Respondent Bank was constrained to initiate recovery proceedings through Execution Petition on 26.10.2002 and thereafter, the miseries of Decree Holder Bank started which are prolonging on one pretext or the other to date.

6. Initially, the Appellant in order to wriggle out of Settlement Agreement and Decree challenged their executability before the Banking Court and upon dismissal of their Application filed E.F.A No.523/2006. The said E.F.A was dismissed by the learned Division Bench of this Court through Judgment dated 06.12.2006. Subsequently, the other Judgment Debtors along with Appellant filed applications challenging Execution Petition on the ground of executability and through the applications filed before the learned Executing Court, *inter alia*, questioned the recovery of mark-up under the Settlement Agreement and Decree passed by learned Single Judge in year 1999. The said applications were decided against the Appellant by the Banking Court and culminated into E.F.A No.868/2011, wherein another learned Division Bench of this Court through Judgment dated 14.01.2015 dismissed the said appeal along with connected appeals. The Appellant along with other Judgment Debtors challenged the Judgment before the Supreme Court of Pakistan through Civil Petition No.464, 476-478 of 2015. The Supreme Court of Pakistan through its Judgment dated 14.03.2016 dismissed the Civil Petition, *inter alia,* on the following terms:

> "……..From the perusal of the Compromise Deed it appears that the petitioners acknowledged and admitted outstanding amounts against them and undertake to pay the same in installments and further to secure the fresh finance facilities the petitioners

had to execute various charged documents including equitable mortgage on present and future assets of customers, pledge goods etc. Clause 8 of the Compromise deed read as under:-

"8. ……

(a) ……
(b) ……
(c) ……
(d) ……

From the above referred clause, it appears that in case the Petitioner/Customers fail to comply with condition of the deed of compromise, the entire package/ concessions given by the respondent/Bank to the petitioners under the Compromise Deed shall stand automatically withdrawn and the Respondent/Bank shall be entitled to recovery of all the outstanding liabilities of the Customer mentioned in para 1 of the Compromise Deed and to file application for execution of the consent decrees passed in various suits for the full amounts decreed including future mark-up from the dates of institution of suits till full payment, less any payment made by the customers for liquidation of their liabilities mentioned in para 1 of Compromise Deed.

5. There is neither on record nor our attention is drawn to any document that the petitioners have fulfilled all the terms of the compromise deed and not committed any default. On the other hand it appears that after filing execution petitions petitioners tried to avoid their liabilities under the decree by filing various applications on one ground or other which were dismissed by the Courts with cost."

[Emphasis added]

7. Through the Settlement Agreement and consent decree, the Appellant had admitted the liability for payment of rescheduled/renewed finance facilities along with 17% mark-up payable in the grace period as stipulated in the Settlement Agreement/Deed of Compromise. It has not been contended before us nor any material in support has been produced that the outstanding liability towards finance facilities under the Settlement Agreement stood satisfied, therefore, the default towards the liabilities rescheduled/ restructured or renewed through Deed of Compromise culminating into

Consent Decree cannot be termed as inexecutable by seeking a declaration that under the Ordinance of 2001 it is only recoverable through cost of funds, more specifically when the matter already stood adjudicated by the Executing Court up till Supreme Court of Pakistan.

8. In our opinion the legal as well as factual points now being agitated before us are clearly hit by *res judicata* as the controversy *inter se* parties stood finally decided up till Supreme Court of Pakistan and at this stage if the Appellant coins a logic that the instant controversy was never agitated earlier in that case the present controversy will be hit by constructive *res judicata* as there are chain of decision thereon by the Banking Court as well as by learned Division Benches of this Court and the Supreme Court of Pakistan. In the instant case any challenge to the Compromise Agreement or Consent Decree that once raised and finally decided will either be hit by principle of *res judicata* and if omitted or relinquished to be raised earlier will surely be hit by principles of constructive *res judicata*.

9. The Supreme Court of Pakistan in a case reported as *Khushi Muhammad and 2 others v. The Province of the Punjab through Secretary to Government of the Punjab and 2 others* **(1999 SCMR 1633)** while discussing the principle of constructive *res judicata* has observed as under:

> "It has been urged that many of the questions, which surfaced, pursuant to the memorandum dated 10.08.1982 and which thereupon came up again before the High Court, were not raised during the previous litigation and, therefore, could freely be re- agitated, The premise is erroneous both on the factual and legal planes. Thus, it does not seem that any of the crucial questions were not raised in the earlier round of litigation. Besides, even if there were some such questions, each one of the same ought to have been

> raised in the previous adjudication and in the event any of them was not raised, such, as well, attracted the principle of constructive res judicata".
>
> [Emphasis added]

10. Now adverting to the contention of learned counsel for the Appellant that Supreme Court of Pakistan through its Order dated 31.03.2016 with the consent of the parties had directed the recovery of realizable amount through cost of finds. Needless to mention that the said Order of Supreme Court of Pakistan is annexed at page 18 wherein the consent of the parties was recorded and Supreme Court of Pakistan couched its decision in the concluding paragraph by holding as follows:

> "In case, the full payment is not made by the Petitioners within the stipulated period, this Petition shall be deemed to have been dismissed. This Petition stands disposed of in above terms."
>
> [Emphasis added]

11. It appears that the Supreme Court bracketed the consent with the consequence and Banking Court while passing the Impugned Order rightly held that on account of default and resiling from the consent given before Supreme Court of Pakistan, the Petition filed by the Appellant was deemed to have been dismissed and commission of default by the Appellant made the said consent order inoperative.

12. The contention of the Appellant that mark-up cannot be recovered as at the time of initiation of execution proceedings, the Ordinance of 2001 was applicable and Bank can only recover cost of funds, we hold that the said argument is not only flawed and meritless, but is also misconceived. It may be wishful thinking of the Appellant but the position of law emerging after the promulgation of the Ordinance, 2001 is that in addition to the contractually chargeable mark-up, a financial institution cannot now claim from Court

any additional mark-up except the cost which it had to bear for its finance stuck up with its defaulting customer. Thus the concept of earning further income in the shape of mark-up was replaced with the concept of compensating financial institutions with the cost of funds and that too is determinable by State Bank as envisaged under section 3 of the Ordinance of 2001. Thus the change in law i.e. withdrawal of Court's power to award mark-up beyond contracted period under the provisions of Act of 1997 with the award of cost of funds under the Ordinance of 2001 was clearly intended to remove the perception that the award of mark-up beyond the contracted mark-up is in the nature of interest.

13. Coming to the facts of the present case, as at the time of passing of the decree in question the Act of 1997 was in force, therefore, notwithstanding the harshness of the Act of 1997, which permitted award of continuous mark-up beyond the contracted mark-up, the court being an Executing Court cannot now extend the benefit of the new law by replacing the mark-up awarded by the Court under Act of 1997 with the award of only cost of funds permitted under the Ordinance of 2001. This would amount to empowering the Executing Court to amend the decree. Reliance in this regard is placed upon "*Habib Bank Ltd versus Karachi Pipe Mills Ltd.*" **(2006 CLD 842).**

14. In our view the instant case is true example of observations made in previous judgments of this Court as well as Supreme Court of Pakistan that agony and miseries of the decree holder starts when it institutes execution petition seeking realization of judgment and decree. Having raised the controversy time and again before the Executing Court whose orders were merged up

till Supreme Court of Pakistan and at times omitting to raise certain objections, the Appellant has misused and abused the process of law by tactically delaying the realization of subject matter Judgment and Decree and this agony cannot be allowed to be prolonged to curb fraudulent litigation and waste time of this Court which could have been spent in resolving legitimate disputes. The Supreme Court of Pakistan has already observed that such litigations must be curbed by imposing heavy cost. Reliance in this regard is placed upon "*Commissioner Inland Revenue Vs. Packages Limited"* **(2022 SCMR 634),** "*Muhammad Akbar versus Major Taj-ud-Din"* **(2007 SCMR 140)** and "*Capital Development Authority, CDA, through its Chairman, CDA, Islamabad Vs. Ahmad Murtaza and another"* Civil Petition No.3709 of 2022.

15. As a consequence of what has been discussed and held above, we do not consider that Impugned Order passed by Banking Court warrants any interference and this Appeal being meritless is **dismissed with special cost of Rs.300,000/-** which is directed to be recovered by the Banking Court while realizing the subject matter Judgment and Decree. The amount of special cost shall be deposited with any charity designated by the Executing Court.

(Mirza Viqas Rauf)
Judge

(Muhammad Raza Qureshi)
Judge

Ashfaq*