

Order Sheet
 IN THE LAHORE HIGH COURT
 BAHAWALPUR BENCH, BAHAWALPUR
 Judicial Department

F.A.O.No. 41 of 2024/BWP

M/s. Wazir Cotton Giners & Oil Mills, etc. Vs. Bank of Punjab.

<i>Sr. No. of order/ Proceedings</i>	<i>Date of order/ Proceeding</i>	<i>Order with signature of Judge, and that of Parties' counsel, where necessary</i>
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10.10.2024. Mr. Muhammad Naveed Farhan, Advocate for appellants.
 Ch. Riaz Ahmed, Advocate for respondent-Bank.

Muzamil Akhtar Shabir J. The appellants, through this First Appeal Against Order have called in question order dated 10.5.2024 passed by learned Judge Banking Court, Bahawalpur, whereby their application for restoration of an earlier application filed by them for setting-aside ex-parte judgment and decree dated 30.7.2017 passed by the learned Judge, Banking Court, Bahawalpur, has been dismissed with costs of Rs.100,000/-.

2. The contention raised by the learned counsel for the appellants is that the appellants earlier had challenged the said decree by filing R.F.A.No. 41 of 2019/BWP before this Court, however, the said Appeal had been withdrawn to pursue the remedy of application under Order IX Rule 13 of C.P.C, which was also treated as an application under Section 12 of Financial Institutions (Recovery of Finances) Ordinance, 2001, for setting-aside ex-parte judgment and decree pending before the Banking Court, without knowledge that the said application had already been dismissed for non-prosecution by the Banking Court, hence, necessitating in filing of application for its restoration, which application from the date of knowledge was within time but still had been dismissed by holding that this case is

an example of hide and seek along with abuse of process of court by the judgment debtors and without force, which observation by the Banking Court is not sustainable and the application should have been decided on the basis of merit instead of technicalities.

3. On the other hand, learned counsel for the respondent-Bank states that the instant Appeal is not maintainable as the impugned order dated 10.05.2024 is an interlocutory order and not a final order.

4. The appellants had challenged the ex-parte decree passed by the Banking Court by seeking two remedies side by side i.e. one by filing an application under Order IX Rule 13 CPC for setting aside ex-parte proceedings and judgment and decree before the Banking Court and another by filing R.F.A.No. 41 of 2019/BWP before this Court. The said appeal was later on withdrawn vide order of this Court dated 17.02.2021, reproduced below:

“ It is contended by learned counsel for the appellants that in order to pursue the remedy of application under Order IX Rule 13 of C.P.C for setting aside exparte judgment and decree, he does not want to press this appeal for time being.

2. *Disposed of accordingly.”*

5. The appellants claim to have thereafter approached the Banking Court for decision their application under Order IX Rule 13 CPC, where it transpired that the same had also been dismissed for non-prosecution vide order dated 07.02.2019 resulting in filing of restoration application.

6. The impugned order dated 10.05.2024 passed by the learned Judge Banking Court, Bahawalpur, whereby application for restoration of earlier application of the appellants has been dismissed, is reproduced below:-

"5. In this case the loan was disbursed in 2007. The suit was instituted in the year 2009. The petitioners and their predecessor namely Zamir Ahmed were defendant Nos. 1 & 2. The defendants submitted application for leave to appear and defend the suit which was accepted but thereafter the suit was dismissed for non-prosecution after which an application for restoration of the suit was made by the plaintiff/Bank. The petitioners/defendants did not appear despite service and the suit was restored. Thereafter nobody appeared on behalf of the petitioners/judgment debtors for long time and ex-parte judgment and decree was passed on 03/10/2017. The petitioners made the application for setting aside ex-parte decree on 13/12/2017 which was beyond the period of limitation. Said application was also dismissed vide order dated 07/02/2019. The petitioners/judgment debtors also referred RFA No. 41/2019/BWP which was withdrawn on 17/02/2021 with the contention that the applicants/petitioners wanted to pursue application setting aside ex-parte decree. The main point to be considered here is that application for setting aside ex-parte decree was dismissed for non-prosecution on 07/02/2019 but on 17/02/2021 learned counsel for the applicants/petitioners made statement before Honorable Lahore High Court, Bahawalpur Bench, Bahawalpur that he wanted to pursue application for setting-aside ex-parte decree. Said application did not exist on 17/02/2021 and on 15/07/2021 the petitioners made the application in hand. This case pertains to suit for recovery based upon Financial Institution (Recovery of Finances) Ordinance, 2001. The purpose of said Ordinance was to effect the recoveries in a fast way that is way in the presence of Ordinance procedure Special Courts were continued. This case is an example of hide and seek along with abuse of process of Court by the petitioner/judgment debtors. The application are without force same are dismissed with Rs. 100,000/- cost which shall be deposited by the petitioner/judgment debtors on next date of hearing. The judgment debtor is also directed to deposit the decretal amount on next date of hearing. Now to come up for payment of cost and decretal amount by the judgment debtors on 01/06/2024."

The afore-referred order does not show that proper consideration has been given to the facts of the case while dismissing application on technical grounds solely for the reasons that the appellants had sought to pursue remedy by filing application for setting-aside ex-

parte decree before the Banking Court, which application already stood dismissed for non-prosecution on 07.02.2019 and subsequent application filed on 15.07.2021 for its restoration was held to be not maintainable, which reason is not sustainable in view of facts of the instant case for the reason that the appellants had filed the second application for restoration of the first application, which has been dismissed through the impugned order without discussing its merits.

7. Perusal of the record also shows that application for restoration of earlier application has been dismissed by the learned Banking court on technical grounds, which had finally disposed of the matter agitated through the said application, therefore, finality is attached to the said order and the same cannot be treated as interlocutory order. The Appeal in terms of Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, is available against all final orders and if it be a decree in the shape of Regular First Appeal before this Court and against all final orders in shape of an Appeal against Order, therefore, objection of the learned counsel for the respondent is not sustainable as no other remedy against the said order except through filing of appeal against said order is available to the appellants.

8. Next question for determination is whether the said application for restoration of earlier application, which was dismissed for non-prosecution on 17.02.2019 was maintainable or not. The appellant had challenged the decree dated 03.10.2017 by availing two remedies; first by filing Regular First Appeal against the said decree on 08.12.2017 before this Court and another by filing an application for setting-aside ex-parte decree

on 13.12.2017 before the Banking Court. Although generally in terms of principle laid down in judgment reported as **2024 SCMR 518** (*CHIEF EXECUTIVE OFFICER NPGCL, GENCO-III, TPS MUZAFARGARRAH versus KHALID UMAR TARIQ IMRAN*), wherein it has been held that when an aggrieved person intends to commence any legal action to enforce any right and/or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and/or choose from amongst the actions or remedies available under the law. Choice to initiate and pursue one out of the available concurrent or coexistent actions or remedy from a forum of competent jurisdiction vests with the aggrieved person. Once the choice is exercised and the election is made then the aggrieved person is prohibited from launching another proceeding to seek relief or remedy contrary to what could be claimed and/or achieved by adopting other proceeding/action and/or remedy, which in legal parlance is recognized as '*doctrine of election*' yet there was no bar under the law for availing the said two remedies simultaneously in view of the principles laid down by the Supreme Court in judgment reported as **PLD 2018 Supreme Court 828** (*Trading Corporation of Pakistan versus Devan Sugar Mills Limited and others*), however, the conclusion of one remedy would have resulted in the other remedy as having become infructuous.

9. The remedy of filing application for setting-aside ex-parte decree initiated on 13.12.2017 resulted in dismissal of the said application for non-prosecution on 07.02.2019 in the manner that the Banking Court observed that the case had been repeatedly called since morning and even thrice, every time but none had entered appearance on behalf of defendants No. 4. The

time of the court was almost over, therefore, the application for setting-aside decree and extension of time on behalf of defendant No. 4 was dismissed due to non-prosecution.

On the other hand in the R.F.A.No. 41 of 2019/BWP, which was pending before this Court it had not been pointed out by either of the parties or their counsel, despite their availability before this Court that the afore-referred application had already been dismissed and on being confronted with the question of availability of remedy before the Banking Court, the Appeal was withdrawn to further pursue the said remedy. Hence, withdrawal of RFA with permission to pursue other remedy could not be treated to have rendered the remedy of pursuing his application for setting-aside ex-parte decree as infructuous, however, it appears that on the said date none of the parties was aware of dismissal of the application before the Banking Court and when the appellants approached the said court for availing the said remedy in terms of permission sought from this Court, it transpired that the said application had been dismissed. Had it been pointed out by the counsel for the respondent or was within the knowledge of the appellants that the said application had already been dismissed, they may have asked for this Court to decide the Appeal on its own merits instead of permitting them to pursue the remedy before the Banking Court for the reason that withdrawal of Appeal from this Court had also deprived them of seeking further remedy against the order passed in R.F.A. No 41 of 2019/BWP before any higher forum and in such a situation, such an order may cause prejudice to the rights of the appellants to seek remedy available to them under

the law and an act of court cannot be allowed to stand in the way of remedy available to a person for the reason that act of court should prejudice no one. Reliance is placed on **2023 SCMR 334** (*Abdul Quddous versus Commandant Frontier Constabulary, Khyber Pakhtun Khawa, Peshawar and another*). In this view of the matter, when both parties were ignorant of fact of dismissal of application for non-prosecution, the conduct of the appellants seeking withdrawal of appeal to seek remedy though application for setting aside ex-parte decree could not be treated as contumacious to disentitle the appellants for pursuing the remedy for its restoration. Generally, when both the parties had not appeared in the court when a petition/application is dismissed for non-prosecution, the courts liberally allow application for restoration, for which reliance may be placed on **2023 CLC 963** (*KHALID IQBAL and others Versus Mst. YASEEN and others*), **PLD 2019 Lahore 723** (*SAEED AHMAD Versus Mst. GHULAM FATIMA*), **2020 CLC 1318** (*SARDAR TABARIK ALI and another Versus ADMINISTRATOR MUNICIPAL CORPORATION, MUZAFFARABAD and 6 others*), **2012 MLD 812** (*JAN Versus. ABDUL RAZZAQ*) and **PLD 2008 Karachi 103** (*Messrs FATEH TEXTILE MILLS LTD Versus. WEST PAKISTAN INDUSTRIAL DEVELOPMENT CORPORATION*). Furthermore, limitation for filing application for restoration of an earlier application, which has been dismissed for non-prosecution is governed by Article 181 of the Limitation Act, 1908, providing for limitation of 3-years and the application for restoration had been filed prior to its expiry, therefore, the same was within time, hence, we have refrained ourselves to comment upon the merits of

application for condonation of delay filed by the appellants along with the application for restoration.

10. In view thereof, we are inclined to set-aside the impugned order dated 10.05.2024 passed by Judge Banking Court, Bahawalpur, with the result that the order of dismissal of application for restoration application is set aside and the said application is allowed with observation that the application for setting-aside ex-parte decree shall be deemed to be pending before the Banking Court along with its accompanying application, if any filed, which shall be decided on its own merits in accordance with law. This Appeal is **allowed** in the foregoing terms.

(Muhammad Sajid Mehmood Sethi)
Judge

(Muzamil Akhtar Shabir)
Judge

Approved for reporting

(Muhammad Sajid Mehmood Sethi)
Judge

(Muzamil Akhtar Shabir)
Judge