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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

EFA No.41 of 2023

United Bank Ltd.

Versus

Muhammad Amjad Hayat Khan

J U D G M E N T

Date of hearing: 18.04.2024.
Appellant by: Ch. Saleem Akhtar Warraich, Advocate.
Respondent by: Syed Tariq-ur-Rehman Hashmi, Advocate.

MUHAMMAD SAJID MEHMOOD SETHI, J.- Through instant appeal, appellant has assailed vires of order dated 02.08.2023, passed by learned Judge Banking Court-I, Multan, Camp at Vehari, whereby appellant's application under Section 47 read with Sections 151/152 CPC and Section 19(7) of the Financial Institutions (Recovery of Finances) Ordinance (**"FIO"**), 2001, praying for revisiting of judgment & decree dated 03.03.2020, was dismissed.

2. Brief facts of the case are that respondent instituted a suit for recovery of Rs. 4,73,945.21 against appellant-bank, which was decreed vide judgment & decree dated 03.03.2020 and respondent was held entitled to get Rs. 4,73,945.21 from appellant-bank with costs along with cost of funds from the date of default till realization, in the following manner:-

> "13. In view of my findings on above issues, the suit for recovery is decreed in favour of plaintiff with the direction to the defendant bank to return the amount of Rs. 4,73,945.21 with costs. Plaintiff is further held entitled to realization of cost of funds as certified by State Bank of Pakistan from the period of date of default till realization. Decree sheet be drawn accordingly."

During execution proceedings, appellant moved application under Section 47 read with Sections 151/152 CPC and Section 19(7) of the FIO, 2001, for revisiting the judgment & decree dated 03.03.2020, to the extent of award of cost of funds to the respondent / customer. Learned Judge Banking Court, after hearing arguments of learned counsel for the parties, proceeded to dismiss the aforesaid application vide order dated 02.08.2023. Hence, instant appeal.

3. Learned counsel for appellant-bank submits that impugned order regarding award of cost of funds is against facts, law and judgments of Hon'ble superior Courts on the subject. He adds that learned Executing Court did not take into consideration the objections raised by the appellant in the objection petition, therefore, impugned order is unsustainable in the eye of law. In support, he has relied upon *Ahmad Abbas v. Additional District Judge and others* **(2022 CLC 1296)**.

4. Contrarily, learned counsel for respondent defends the impugned order by contending that learned counsel for appellant-bank failed to pinpoint any illegality therein. He adds that the judgment & decree dated 03.03.2020, passed in respondent's favour has also attained finality, therefore, same is executable.

5. Arguments heard. Available record perused.

6. Record shows that initially appellant-bank instituted suit for recovery against respondent, which was dismissed vide order dated 07.11.2012 for the reason that excess amount of Rs. 4,73,945.21 belonging to respondent was lying with appellant, which order attained finality. Later on, respondent filed suit for recovery of said amount i.e. Rs. 4,73,945.21 with the contention that since the appellant-bank itself received mark-up of more than 13.50% from respondent, therefore, he is also entitled to receive profit on the aforesaid amount lying with appellant-bank. Ultimately, decree for recovery of aforesaid amount along with costs and cost of funds was passed in favour of respondent.

7. Cost of funds is basically the cost that a financial institution is entitled to recover from the borrower on account of funds which as per the terms of the 'Finance' or the law ought to have been in the custody of a financial institution but happened to be in the custody of the customer after default on the rationale that the financial institution has been deprived from placing the funds somewhere else for its financial benefit which is the core business of a financial institution. Section 3(2) of the Ordinance stipulates that where a customer defaults in the discharge of his obligation, he is liable to pay for the period from the date of his default till realization of the cost of funds of the financial institution as certified by the State Bank of Pakistan from time to time. Section 3(3) of the Ordinance further states that a judgment against the customer under this Ordinance shall mean that he is in default of his duty to fulfill his obligation and the ensuing decree shall provide for payment of the cost of funds. Since cost of funds is attached to the provisions of funds, therefore, cost of funds is not awarded to a customer even where a customer establishes a breach of obligation on the part of the financial institution. Cost of funds is granted only to a financial institution on the principle that funds are only provided by a financial institution and not by a customer. Section 17 of the Ordinance provides that the final decree shall be passed by the Banking Court with respect to payment from the date of default of the amounts determined to be payable on account of default in fulfillment of the obligation and for costs including in the case of a suit filed by a financial institution cost of funds determined under section 3 of the Ordinance. Banking Court under the provisions of Section 3(2) of the FIO, 2001 is empowered to award cost of funds in favour of financial institutions and such privilege or benefit had not been conferred by statute to the customer. This interpretation is also supported by the Latin Legal Maxims used in legal interpretation *(i) Expressio unius personae*

vel rei, est exclusio alterius – The express mention of one person or thing is the exclusion of another and *(ii) Expressum facit cessare tacitum* – What is expressed makes what is silent to cease. This view is further supported by the principle of *Casus Omissus*. In *Deputy Director Finance and Administration Fata through Additional Chief Secretary FATA, Peshawar and others v. Dr. Lal Marjan and others* **(2022 SCMR 566)**, the Supreme Court while discussing the scope of principle of *Casus Omissus* held that the said principle provides that, where the legislature has not provided something in the language of the law, the Court cannot travel beyond its jurisdiction and read something into the law as the same would be ultra vires the powers available to the Court under the Constitution and would constitute an order without jurisdiction.

8. In *Reference No.01 of 2012* (**PLD 2013 Supreme Court 279**) **=** *Nadeem Ahmed Advocate v. Federation of Pakistan* **(2013 SCMR 1062)**, the Supreme Court of Pakistan while explaining the principle of *Casus Omissus* held as follows:-

> *"A **Casus Omissus** can, in no case, be supplied by the Court of law as that would amount to altering the provision. "It is not our function, as was held by Mr. Justice Walsh, in the case of "Attorney General v. Bihari, re Australia Factors Limited (1966) 67 S.R. (N.S.W.) 150; to repair the blunders that are to be found in the legislation". They must be corrected by the legislator". A Court of law is not entitled to read words into the Constitution or an Act of Parliament unless clear reason is found within the four corners of either of them."*

In *Abdul Haq Khan and others v. Haji Ameerzada and others* **(PLD 2017 Supreme Court 105)**, the Supreme Court while discussing the doctrine of *Casus Omissus* observed that the Courts generally abstained from providing *'casus omissus'* or omissions in a statute, through construction of interpretation. The Court observed that the exception to such rule was, when there was a self-evident omission in a provision and the purpose of the law as intended by the legislature could not otherwise be achieved, or if the literal

construction of a particular provision led to manifestly absurd or anomalous results, which could not have been intended by the legislature. The Court further held that such power, however, was to be exercised cautiously, rarely and only in exceptional circumstances. In *The Collector of Sales Tax, Gujranwala and others v. Messrs Super Asia Mohammad Din and Sons and others* (**2017 SCMR 1427**), the Supreme Court held that principle of reading in or *'casus omissus'* was not to be invoked lightly, rather it was to be used sparingly and only when the situation demanded it. The Court held that the Courts should refrain from supplying an omission in the statute because to do so steered the courts from the realms of interpretation or construction into those of legislation.

9. In view of the above, it is concluded that the Banking Court has committed gross illegality in dismissing appellant's application filed under Section 47 read with Sections 151/152 CPC and Section 19(7) of the FIO, 2001. Further reliance in this regard is also placed upon *Messrs Long Term Venture Capital Modaraba v. Messrs State Life Insurance Corporation of Pakistan* **(2005 CLD 122)** and *Bank of Punjab through Attorney v. Manzoor Qadir and another* **(2021 CLD 1037)**.

10. So far as respondent's argument that judgment & decree dated 03.03.2020 has attained finality, is concerned, it suffices to say that there is no doubt about the fact that said decree has attained finality, but if the Court is satisfied that the decree is nullity / void in the eyes of law, or the same has been passed by the Court having no jurisdiction or the rights of the decree-holder would not be infringed if the decree is refused to be executed or the decree has been passed in violation of any provision of law, Executing Court under the provisions of Section 47 CPC can question executability of decree. There is no cavil to the proposition that questions relating to the executability of an order or decree can be raised even in execution proceedings and it is open to the party against whom it is sought to be executed to

show that it is null and void or had been made without jurisdiction or that it is incapable of execution. Reliance is placed upon *Islamic Republic of Pakistan v. Muhammad Saeed* **(PLD 1961 Supreme Court 192)** and *Fakir Abdullah and others v. Government of Sindh through Secretary to Government of Sindh, Revenue Department, Sindh Secretariat, Karachi and others* **(PLD 2001 Supreme Court 131)**.

11. Needless to observe that it is not for the Executing Court to decide whether the decree passed is legal or illegal or whether it is erroneous or not, but it is open to the Executing Court to consider whether the decree sought to be executed is void or not. Any decree passed by any Court or forum is void if the Court or the forum which passed it has no jurisdiction over the subject matter. Reference can be made to *V. Chinna Lakshmaiah v. Samurla Ramaiah and others* **(AIR 1991 AP 177)**.

12. In view of the above, instant appeal is ***allowed***. Consequently, impugned order dated 02.08.2023 is set aside being illegal and without lawful authority. As a result, judgment & decree dated 03.03.2020 shall not be executed to the extent of award of cost of funds, which stands set aside to this extent.

(Raheel Kamran)
Judge

(**Muhammad Sajid Mehmood Sethi)**
Judge

Approved for Reporting

Judge **Judge**

A.H.S.