

(Appellate Jurisdiction)

Mr. Justice Anwar Zaheer Jamali
Mr. Justice Dost Muhammad Khan
Mr. Justice Umar Ata Bandial

(On appeal from the judgment/order dated 05.11.2003 passed by Lahore High Court, Lahore in FAO No. 189 of 1994)

United Bank Limited	Appellant.
Versus			
Fateh Hayat Khan Tawana & others	Respondents.

For the appellant : Ms. Raisa Sarwat, ASC.

For respondents (5&6) : Syed Najamul Hassan Kazmi, ASC.

Respondents (1-4, 7, 8) : *Ex-parte*.

Date of hearing : 13.04.2015.

UMAR ATA BANDIAL, J. – By order of this Court dated

26.12.2008 leave to appeal was granted to examine whether a second execution application filed on 16.01.1989 by the appellant during the pendency of its first execution application for the enforcement of a money decree dated 20.01.1981 suffers a time bar under Section 48 CPC read with Article 181 of the Limitation Act, 1908?

2. Briefly stated the facts of the case are that an *ex-parte* judgment/decreed was passed on 20.01.1981 by a learned Special Judge Banking in favour of the appellant and against the

respondents/judgment debtors for the amount of Rs.4.205177 million together with costs in the sum of Rs.35,127/-. The first execution application for the enforcement of the said decree was filed by the appellant on 27.06.1983 before the learned High Court under the Banking Companies (Recovery of Loans) Ordinance, 1979 (**"Ordinance"**). That application was registered and numbered as Ex.A.7-B/1983. Another application by the appellant seeking attachment of properties in the said execution proceedings was withdrawn at its first hearing vide order dated 23.11.1983 to *"make an appropriate application after seeking proper instructions from his client."* The main execution application bearing Ex. A.7-B/1983, however, continued to remain pending.

3. On 16.01.1989, the appellant filed an application under Order XXI Rule 11 CPC read with Section 8(3) of the Ordinance containing updated particulars for execution of the aforementioned decree dated 20.01.1981. This application mentions its file number as Ex.A. 7-B/1983 and refers the contents of the order dated 23.11.1983, allowing the appellant to file an appropriate application after seeking instructions from the client (decree holder). Its contents add accrued interest of Rs.6.268 million to the outstanding amount payable under the decree and attaches revenue record of properties subject to attachment and realization pursuant to the aforementioned decree. Thereafter, the order of the Court dated 07.02.1989 passed in the first execution application bearing

Ex.A.No.7-B/1983 records the following statement by the learned counsel for the appellant:

"7.2.1989 Mr. Ayyaz Hassan, Adv. For the decree holder.
States that the decree holder-Bank has filed a fresh Execution Application giving all the details of the properties sought to be attached and sold in execution of the decree and therefore this Ex. Application may be consigned to record. Order accordingly."

4. Simultaneously, the learned Executing Court on 07.02.1989 issued notice to the respondents/judgment debtors in the above mentioned second execution application which was, however, registered and numbered by the office as Ex.A.1-B/1989. In reply thereto, the respondents/judgment debtors filed objections. The first of these is that the second execution application filed more than 8 years after the passing of the decree under execution is time barred in terms of limitation period provided in Section 48 CPC read with Article 181 of the Limitation Act, 1908. Meanwhile, the pecuniary jurisdiction of the Banking Court was enhanced; accordingly the said execution matter was transferred to the said Court. The learned Banking Court at the outset took up for adjudication the objection of limitation raised by the respondents/judgment debtors. Vide order dated 14.07.1994, the Banking Court held that the pending execution proceedings of decree dated 20.01.1981 were time barred. The view taken by the learned Special Judge Banking, Lahore was affirmed by the learned High Court in exercise of its appellate jurisdiction vide judgment dated 05.11.2003. That judgment is presently impugned before us in this appeal.

5. It is a common ground between the parties that the limitation period for filing the first execution application of a money decree passed by a Court of original jurisdiction is three years from the date of the decree under the residuary Article 181 of the Limitation Act, 1908. Therefore, the first execution application submitted by the appellant bearing No.7-B/1983 is admittedly filed within time. However, both the learned Courts below have taken the view that the second application filed by the appellant on 16.01.1989 is, according to its own terms, a “fresh” execution application. Having been filed beyond the period of six years prescribed in Section 48 of the CPC, this application has been held to be time barred. Both sides rely on the judgment given by this Court in **Mahboob Khan vs. Hassan Khan Durrani** (PLD 1990 SC 778) to canvas their opposing stands on the said finding. The whole controversy revolves around the meaning of the expression “fresh application” used in Section 48 of the CPC in the context of a second execution application being filed by the appellant during the pendency of its first execution application.

6. The learned counsel for the appellant contends that the second application was filed bearing the same number Ex.A.7-B/1983 that is given to the first application but it was registered by the office and wrongly assigned a new number Ex.A.1-B/1989. This application is filed in continuation of the original execution application and contains, *inter alia*, updated particulars of the properties subject to attachment in terms of the order dated

23.11.1983 by the learned Executing Court. Since the original application was filed within time, therefore, the additional particulars contained in the second execution application filed on 16.01.1989 are in elaboration of and ancillary to the first application. Therefore, the impugned finding that the execution proceedings of decree dated 20.01.1981 are time barred is erroneous.

7. On the other hand, the contention on behalf of the respondents/judgment debtors is that the contents of the para-5 of the second execution application by the appellant acknowledge the withdrawal of the first execution application. Also, the order dated 07.02.1989 passed in Ex.A.7-B/1983 records the statement of the counsel for the appellant that a fresh execution application has been filed and consequently the only application in the field is the second execution application filed by the appellant.

8. During the course of hearing it became apparent that the impugned judgments have treated the order dated 07.02.1989 passed in Ex.A.7-B/1983, consigning the said application to the record as amounting to disposal of such application. To fortify this view the learned counsel for the respondents/judgment debtors has relied on **Muhammad Yaqoob v. Qudsia Kishwar** (1988 MLD 1379). In the facts of that case, the expression "consigned to record" has been interpreted to mean "dismissal for non-prosecution." It is clear in the present case that the second execution application was filed on 16.01.1989 during pendency of the first execution application. The order sheet in Ex.A.7-B/1983 does not record any

default by the appellant in complying any judicial order. Therefore, the consignment to record of Ex.A.7-B/1983 vide order dated 07.02.1989 cannot be presumed to be its dismissal for non-prosecution or disposal otherwise. Accordingly, the precedent relied by the respondents has no relevance to the present case.

9. Significantly, the terms of the order dated 07.02.1989 are amenable also to the rival interpretation given to it by the appellant. It is urged that the said order of the learned Executing Court treats the second execution application to be a substitute or a continuation of the first execution application. This is because the second application contains better particulars for the already prayed mode of execution of the decree. Accordingly, the learned Executing Court has consigned the first application to record and proceeded with its substitute. The argument has some force. The question of time bar is not considered by the order dated 07.02.1989. It arose for determination after the respondents/judgment debtors were issued notices on the second execution application. Whilst examining that objection, the learned Courts below were obliged to consider whether the first execution application could at all be terminated without an order dismissing or disposing of the same. This aspect of the matter was ignored on the presumption that the consignment of an application to the record amounts to its dismissal. The fact is that in the absence of a clear order disposing of the first execution application there is no justification for treating the proceedings

therein to have been concluded. The fate of an execution proceeding in similar situations is explained by a learned full Bench judgment of the High Court of Sindh in Amir Begum vs. Mir Fateh Shah (PLD 1968 Karachi 10) wherein *Wahiduddin J.* (as he then was) opined as follows:

“... It is a well settled rule of law that an execution application must be deemed to be pending so long as no final order disposing it of judicially has been passed thereon. A subsequent application in such a case for execution will be deemed to be one merely for the continuation of the original proceedings. In this connection the Privy Council in *Qamar-ud-Din Ahmed vs. Jawahirlal* (32 I A 102) observed as under:--

“Their Lordships are of opinion that the execution proceedings commenced by the petition of the 24th August 1888 were never finally disposed of and that the application now under consideration was in substance, as well as in form, an application to revive and carry through a pending execution, suspended by no act or default of the decree-holder, and not an application to initiate a new one.”

....

This principle has also been applied in cases where the application is dismissed or struck off or consigned to the record room or returned. Such order is not to be regarded as finally disposing of the petition and a subsequent application will be regarded as one of revival and continuation of the original proceedings. ...” (*underlining supplied*).

10. The judgment in Mahboob Khan's case *ibid* is relevant in laying down that where the first execution application has been filed within a period of three years from the date of decree under execution, then any fresh application for execution of the said decree may be filed within a period of six years from the date of the said decree. According to the said judgment a fresh application is

conceived to be filed “after disposal of the first execution application.” Therefore, an application that is filed during the pendency of a timely first execution application cannot be considered a ‘fresh application.’ This is because it elaborates or amends the pending first execution application. For that reason the subsequent application is liable to be treated as a continuation of or ancillary to the pending execution application. In such a case, quite obviously the objection of limitation cannot have any relevance.

11. On the other hand, when a subsequent execution application has been filed after the disposal of the first execution application, the objection of limitation may be relevant. However, even in such a case, the subsequent execution application may survive notwithstanding its belated institution beyond six years after the decree under execution, if it satisfies the test and criteria of amendment of a previously disposed of execution application that had been filed timely. In such event, the subsequent application shall be treated as a continuation of or ancillary to the decided execution application. In the present case, the first execution application has not been disposed of by a judicial order. Therefore, the second execution application filed on 16.01.1989 should plausibly be treated as a continuation thereof or ancillary thereto. Indeed, for ascertaining the legal status and effect of proceedings before a Court of law, it is the content and meaning of judicial orders about such proceedings that are determinative and not the

description or name given to the proceedings by a party thereto. Therefore, in the light of the legal position of the pending execution proceedings in the present case, the descriptions given thereto by the appellant or its learned counsel are inconsequential.

12. For the forgoing discussion, we allow this appeal. The subsequent execution application filed by the appellant shall be deemed to be pending before the learned Executing Court which shall decide the same on merits but subject to the outcome of any other preliminary objection already taken by the respondents/judgment debtors to the executability of the decree dated 20.01.1981. No order as to costs.

Islamabad,
13.04.2015.
*Irshad Hussain /**

APPROVED FOR REPORTING.