IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE FAISAL ARAB
MR. JUSTICE IJAZ UL AHSAN

CIVIL APPEAL NO.1447 OF 2016 CRL. ORIGINAL PETITION NO.220 OF 2016 IN CIVIL APPEAL NO. 1447 OF 2016
(Against the order dated 16.2.2016 of the High Court of Sindh at Karachi passed in Spl.H.C.A.No.2/2016)

Gulistan Textile Mills Ltd. In C.A.1447/2016
Soneri Bank Ltd. In Cr.O.P.220/2016
...Appellant(s)/Petitioner(s)

VERSUS

Soneri Bank Ltd. In C.A.1447/2016
Naseer Ahmed In Cr.O.P.220/2016
...Respondent(s)

For the Appellant(s): Mr. Salman Aslam Butt, Sr. ASC
Syed Rifaqat Hussain Shah, AOR
(In C.A.1447/2016)

Ms. Sofia Saeed, ASC
Mr. Tariq Aziz, AOR
(In Cr.O.P.220/2016)

For the Respondent(s): Ms. Sofia Saeed, ASC
Mr. Tariq Aziz, AOR
(In C.A.1447/2016)

Mr. Salman Aslam Butt, Sr. ASC
Syed Rifaqat Hussain Shah, AOR
(In Cr.O.P.220/2016)

Date of Hearing: 2.1.2018

JUDGMENT

MIAN SAQIB NISAR, CJ.- The facts pertaining to this appeal, with the leave of the court, are that the respondent *(bank)* filed a suit for recovery and sale of pledged stocks under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 *(Ordinance)* before the learned Banking Court pursuant to which the appellant *(customer/borrower)* filed its application for leave to defend, which is currently pending adjudication. During the course of proceedings in the suit, the respondent filed an application

(C.M.A. No.11483/2012) inter alia seeking the sale of the goods allegedly pledged in favour of the respondent, which was dismissed by the learned Banking Court *vide* order dated 16.4.2013: on the ground that such application was premature as the application for leave to defend was yet to be decided and the respondent's apprehension regarding misappropriation of goods was unfounded since the keys of the godown were with the *muccadam* and additionally a status quo order passed in a civil suit filed by the appellant, against *inter alia* the respondent, before the learned Lahore High Court, was in the field and stood in the way of grant of said application. This order remained unchallenged and has since attained finality. Thereafter, the respondent filed another application *(C.M.A. No.16530/2015),* again *inter alia,* seeking the same relief as in its previous application. This second application was allowed by the learned Banking Court *vide* order dated 4.12.2015 *(the appellant was proceeded against ex-parte and this order was an ex-parte order)* primarily on the ground that the goods in question were likely to be devalued and this happenstance necessitated sale. The appellant unsuccessfully challenged this impugned order before a Division Bench of the learned High Court and thereafter approached this Court. Leave was granted on 13.5.2016 in the following terms:-

> *"Learned counsel for the petitioner states that per the provisions of Section 16 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, the learned Banking Court has no jurisdiction to direct the sale of the goods belonging to the petitioner allegedly pledged with the respondent-bank. It is further argued that on account of the specific provisions ibid the general law envisaged by*

> *Order 39 Rule 6 of the CPC empowering the sale of security by the court as an interim measure shall not be available or invoked. It is further submitted that the goods for which the sale has been directed by the learned Banking Court are not the ones which are pledged with the respondent-bank, rather those are hypothecated. There is an earlier application filed by the respondent-plaintiff for the sale of the property which has been rejected, thus the principle of res judicata shall be applicable. Reliance in this behalf is placed upon* ***Messrs Lanvin Traders, Karachi Vs. Presiding Officer, Banking Court No.2, Karachi and others*** *(2013 SCMR 1419). Leave is granted to consider the above."*

2. Learned counsel for the appellant submitted that the respondent admitted in its replication *(paragraph No.16)* to the application for leave to defend that the security was not pledged but rather hypothecated, and having so admitted it cannot take advantage of Section 176 of the Contract Act, 1872 which allows a pawnee to sell pledged and not hypothecated goods. Further, he stated that interim sale of goods is not permitted by the Ordinance. In this respect he referred to and read out the provisions of Sections 7, 16, 19 and 23 of the Ordinance. According to the learned counsel, the purpose of Section 16 of the Ordinance is to preserve property and the legislature's intent is revealed by the use of the word 'preventing' therein. Section 16(4) specifically saves sub-sections (1) and (3) and additionally the powers under Order XXXVIII Rule 5 and 6 of the Code of Civil Procedure, 1908 *(CPC)* have also been bestowed upon the Banking Court with regard to property which may not form a part of the

security mentioned in Section 16(1) of the Ordinance. According to him, whatever powers the legislature wanted to bestow upon the Banking Court have been specifically mentioned in Section 16. Learned counsel submitted that Section 23(2) of the Ordinance does not give the power to sell, whereas Section 19(3) specifically provides for sale, therefore wherever the legislature wanted to give the Banking Court the power to sell, it did so expressly. He went on to argue that although the Banking Courts have been given the powers of a Civil Court under the CPC by virtue of Section 7 of the Ordinance, the use of the words "subject to the provisions of this Ordinance..." in sub-section (1) thereof means that where specific provisions in the special law, i.e. the Ordinance, cater to a particular situation the general law would cede. Learned counsel for the appellant further contended that the second application for sale of allegedly pledged goods filed by the respondent was barred by the principle of *res judicata* which also applied to applications. In this respect he relied upon the judgment reported as **Hashir Ahmad Vs. Kamaluddin etc. (1981 SCMR 1180)**. He further stated that the appellant did not receive notice of the second application filed by the respondent and was therefore not heard when the impugned order dated 4.12.2015 was passed. He argued that the learned Division Bench of the Banking Court failed to advert to/decide this question relating to the said application as the same was decided without giving an opportunity of hearing to the appellant.

3. On the other hand, learned counsel for the respondent referred to various documents including the plaint filed by the respondent, letters, reports and orders of the Official Assignee in order to establish that the goods were in fact pledged and not

hypothecated. With respect to the respondent's apparent admission in their replication to the application for leave to defend that the goods were hypothecated and not pledged, she averred that it was simply a typographical error. Learned counsel further submitted that the circumstances surrounding the filing of both the applications were different, in that with respect to the second application, the keys were no longer with the *muccadam* leading to the apprehension that the goods were likely to be misappropriated which in turn justified sale of the goods *vide* order dated 4.12.2015.

4. Heard. It is pertinent to mention at the very outset that throughout this opinion, we have deliberately refrained from commenting or adjudicating upon the factual aspect as to whether the goods in question were pledged or hypothecated as this would involve a detailed factual exercise and determination in a matter arising out of an interlocutory order, which in turn would have a direct impact on the suit filed by the respondent and the application for leave to defend filed by the appellant, pending before the Banking Court. In order to determine whether the Banking Court has the power to direct interim sale of goods under the provisions of Section 16 of the Ordinance we find it expedient to briefly discuss the history and purpose of banking laws in Pakistan. Initially the resolution of banking disputes was by means of filing a civil suit, with the CPC governing the proceedings. In 1978, a special law was enacted; the Banking Companies (Recovery of Loans) Ordinance, 1978 *(Ordinance of 1978)* which created Special Courts and moreover provided a special procedure for the disposal of matters pertaining to banking companies and recovery of loans which fell within the ambit of the

said Ordinance. It was followed by the Banking Companies (Recovery of Loans) Ordinance, 1979 which repealed and re-enacted with certain modifications the Ordinance of 1978. Thereafter, the Banking Tribunals Ordinance, 1984 *(Ordinance of 1984)* was promulgated which created the Banking Tribunals and provided a machinery for recovery of finances provided by banking companies. Then the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Ordinance, 1997 which eventually culminated into the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 *(Act of 1997)* created the Banking Courts to resolve disputes pertaining to defaults in terms of fulfilling of their obligations by the customer, borrower or banking company as defined by the said Act. Finally, the Financial Institutions (Recovery of Finances) Ordinance, 2001 was promulgated which repealed and re-enacted with certain modifications the Act of 1997. The aforementioned banking statutes in general and the Ordinance in particular were essentially enacted to be complete and comprehensive codes. This special law postulates the procedure for the resolution of disputes between financial institutions and customers pertaining to recovery of finances falling within the domain of the Ordinance. A special triumvirate of jurisdiction has been conferred upon the Banking Courts created by the Ordinance : territorial, party based and subject matter based. Territorial jurisdiction refers to the geographical reach to which the jurisdiction of the Banking Court is extended *(Sections 1(2) and 5 of the Ordinance)*. With respect to parties, the Banking Courts only have jurisdiction over a matter which involves a financial institution and a customer *(Section 9(1) of the Ordinance)*, and both terms have been defined in Sections 2(a) and

(c) of the Ordinance respectively. The subject matter over which the Banking Courts have jurisdiction is the default *(by a customer or financial institution)* in fulfillment of any obligation with regard to any finance *(Section 9(1) of the Ordinance)*, where the terms finance and obligation have been defined in Sections 2(d) and (e) of the Ordinance respectively. Undoubtedly the jurisdiction of the Banking Courts is special and exclusive and this is bolstered by Section 7(4) of the Ordinance which provides as follows:-

> *"Subject to sub-section (5), no Court other than a Banking Court shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of a Banking Court extends under this Ordinance, including a decision as to the existence or otherwise of a finance and the execution of a decree passed by a Banking Court."*

5. It is in this backdrop that we proceed to examine the various provisions of the Ordinance, the relevant parts whereof are reproduced below for ease of reference:-

> ***Financial Institutions (Recovery of Finances) Ordinance, 2001***
>
> *"**7. Powers of Banking Courts.**-(1) Subject to the provisions of this Ordinance, a Banking Court shall:*
> *(a) in the exercise of its civil jurisdiction have all the powers vested in a civil Court under the Code of Civil Procedure, 1908 (Act V of 1908);*
> *(b) ……*

(2) A Banking Court shall in all matters with respect to which the procedure has not been provided for in this Ordinance, follow the procedure laid down in the Code of Civil Procedure, 1908 (Act V of 1908), and the Code of Criminal Procedure, 1898 (Act V of 1898).

(3) ……

(4) ……

(5) ……

(6) ……

(7) ……

16. Attachment before judgment, injunction and appointment of Receivers.-*(1) Where the suit filed by a financial institution is for the recovery of any amount through the sale of any property which is mortgaged, pledged, hypothecated, assigned, or otherwise charged or which is the subject of any obligation in favour of the financial institution as security for finance or for or in relation to a finance lease, the Banking Court may, on application by the financial institution, with a view to preventing such property from being transferred, alienated, encumbered, wasted or otherwise dealt with in a manner which is likely to impair or prejudice the security in favour of the financial institution, or otherwise in the interest of justice—*

*(a) **restrain** the customer and any other concerned person from transferring, alienating, parting with possession or otherwise encumbering, charging, disposing or dealing with the property in any manner;*

*(b) **attach** such property;*

*(c) **transfer possession** of such property to the financial institution; or*

*(d) **appoint one or more Receivers** of such property on such terms and conditions as it may deem fit.*

(2) An order under sub-section (1) may also be passed by the Banking Court in respect of any property held benami in the name of an ostensible owner whether acquired before or after the grant of finance by the financial institution.

(3) In cases where a customer has obtained property or financing through a finance lease, or has executed an agreement in connection with a mortgage, charge or pledge in terms whereof the financial institution is authorized to recover or take over possession of the property without filing a suit, the financial institution may, at its option:

(a) directly recover the same if the property is movable; or

(b) file a suit hereunder and the Banking Court may pass an order at any time, either authorising the financial institution to recover the property directly or with the assistance of the Court:

Provided that in the event the financial institution wrongly or unjustifiably exercises the direct power of recovery hereunder it shall be liable to pay such compensation to the customer as may be adjudged by the Banking Court in summary proceedings to be initiated on the application of the customer and concluded in thirty days.

(4) Nothing in sub-sections (1) to (3) shall affect the powers of the Banking Court under Order XXXVIII Rules 5 and 6 of the Code of Civil Procedure, 1908 (Act V of 1908) to attach before judgment any property other than property mentioned in sub-section (1).

19. Execution of decree and sale with or without intervention of Banking Court.-*(1) Upon pronouncement of judgment and decree by a Banking Court, the suit shall automatically stand converted into execution proceedings without the need to file a separate application and no fresh notice need be issued to the judgment-debtor in this regard. Particulars of the mortgaged, pledged or hypothecated property and other assets of the judgment-debtor shall be filed by the decree-holder for consideration of the Banking Court and the case will be heard by the Banking Court for execution of its decree on the expiry of 30 days from the date of pronouncement of judgment and decree:*

Provided that if the record of the suit is summoned at any stage by the High Court for purposes of hearing an appeal under section 22 or otherwise, copies of the decree and other property documents shall be retained by the Banking Court for purposes of continuing the execution proceedings.

(2) ……

*(3) In cases of mortgaged, pledged or hypothecated property, the financial institution may **sell** or cause the same to be **sold** with or without the intervention of the Banking Court either by public auction or by inviting sealed tenders and appropriate the proceeds towards total or partial satisfaction*

of the decree. The decree passed by a Banking Court shall constitute and confer sufficient power and authority for the financial institution to sell or cause the sale of the mortgaged, pledged or hypothecated property together with transfer of marketable title and no further order of the Banking Court shall be required for this purpose.

(4) Where a financial institution wishes to sell mortgaged, pledged or hypothecated property by inviting sealed tenders, it shall invite offers through advertisement in one English and one Urdu newspaper which are circulated widely in the city in which the sale is to take place giving not less than thirty days time for submitting offers. The sealed tenders shall be opened in the presence of the tenderers or their representatives or such of them as attend:

Provided that the financial institution shall be entitled in its discretion, to purchase the property at the highest bid received.

(5) ……

(6) ……

(7) Notwithstanding anything contained in the Code of Civil Procedure 1908 (Act V of 1908), or any other law for the time being in force:

(a) the Banking Court shall follow the summary procedure for purposes of investigation of claims and objections in respect of attachment or sale of any property, whether or not mortgaged, pledged or hypothecated, and shall complete such investigation within 30 days of filing of the claims or objections;

> *(b) if the claims or objections are found by the Banking Court to be malafide or filed merely to delay the sale of the property, it shall impose a penalty upto twenty percent of the sale price of the property.*
>
> *(c) the Banking Court may, in its discretion, proceed with the sale of the mortgaged, or pledged or hypothecated property if, in its opinion the interest of justice so require:*
>
> *Provided that……."*
>
> *(Emphasis added)*

Code of Civil Procedure, 1908

> *"**Order XXXIX Rule 6. Power to order interim sale.—**The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property being the subject-matter of such suit or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once."*

In case of a suit for the recovery of any amount through sale of property which has been pledged, hypothecated, etc. in favour of a financial institution as security for finance *(or for or in relation to a finance lease)*, Section 16 of the Ordinance empowers a Banking Court to pass an order before judgment, upon an application by the financial institution, to prevent such property from being transferred, alienated, encumbered, wasted or otherwise dealt with in a manner which is likely to impair or prejudice the security in

favour of the financial institution or otherwise in the interests of justice. The types of orders that the Banking Court could pass are provided for in Section 16(1) of the Ordinance:- it may (a) **restrain** the customer *(and any other concerned person)* from transferring, alienating, parting with possession or otherwise encumbering, charging, disposing or dealing with the property in any manner; (b) **attach** the property; (c) **transfer possession** of such property to the financial institution; and (d) **appoint one or more Receivers** of such property on such terms and conditions as it may deem fit. Section 16(2) of the Ordinance empowers the Banking Court to pass similar orders to those mentioned in Section 16(1) *ibid* with respect to any property held *benami* in the name of an ostensible owner. Where movable property is concerned, Section 16(3) allows for direct recovery by a financial institution in cases where a customer has obtained property/financing through a finance lease or in those situations where the financial institution has been authorized to recover or take over possession of the property without filing a suit. The relevant provision for the purposes of the instant case is Section 16(1) of the Ordinance, a plain reading of which makes clear that the Banking Court does not have any power to **sell** goods which are pledged, hypothecated etc. prior to passing of the judgment in a suit for recovery through sale filed by the financial institution. The qualified powers given to the Banking Courts in this respect have been specifically mentioned in parts (a) to (d) of Section 16(1) of the Ordinance which are essentially orders of restraint, attachment, transfer of possession and appointment of Receiver(s).

Section 16 *ibid* can be compared with Section 19 of the Ordinance, which provides for execution of decree and sale. In

juxtaposition with Section 16, Section 19(3) has **specifically** used the words **sell/sold** with respect to mortgaged, pledged or hypothecated property in terms of what the financial institution *(with or without the intervention of the Banking Court)* may do for the purposes of total or partial satisfaction of the decree. The use of the word **sell** in this Section [and the failure to use it in section 16 ibid] is indicative of the fact that the legislature used such word only where it intended that sale be permitted. Thus the legislature has permitted a financial institution to sell goods only after it has attained a decree in its favour, for total or partial satisfaction thereof. Therefore, we are sanguine in our view that the absence of the words ***sale*** or ***sell*** *(or any variant thereof)* coupled with the specificity of the types of orders that a Banking Court can pass under Section 16, speaks to the legislative intent; that sale **not** be permitted during the pendency of a suit for recovery by sale before the Banking Court.

6. This brings us to a discussion of Section 7 of the Ordinance. Sub-section (1) part (a) of Section 7 *ibid* provides that in exercise of its civil jurisdiction a Banking Court shall have all the powers vested in a Civil Court under the CPC. One may argue that since, in exercise of its powers under the CPC, a Civil Court is empowered to pass an order for interim sale of property, furnished as security to a financial institution, before the final determination of the case under Order XXXIX Rule 6 of the CPC or whilst exercising its inherent jurisdiction under Section 151 of the CPC, therefore by virtue of Section 7(1)(a), which is legislation by reference, the Banking Court too would possess such power. This view is incorrect because according to the principle of harmonious interpretation the special law would take precedence over the

general law *(generalia specialibus non derogant)*. The Ordinance is a special law, and therefore its specific provisions will displace the general law which shall be deemed to be inapplicable. Reference in this regard may be made to the judgment reported as **Neimat Ali Goraya and 7 others Vs. Jaffar Abbas, Inspector/Sargeant Traffic through S.P., Traffic, Lahore and others (1996 SCMR 826)**. This position is also supported in Section 4 of the Ordinance which provides that *"the provisions of this Ordinance shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force"*. The reason behind this is logical in that the legislature, having devoted attention to a special subject and provided for all the peculiar circumstances that may arise in respect thereof *(the legislature is presumed to know the law when enacting legislation)*, it cannot intend to derogate from such special enactment by allowing the general law to override the special law, unless it does so through express and specific mention of its intention to that effect. Thus when Section 16 of the Ordinance has provided a comprehensive list of the specific types of orders *(which do not include sale of property)* that a Banking Court is empowered to pass with respect to property that is pledged, hypothecated etc. prior to the final judgment of a suit for recovery by sale, there is no doubt that such provision was intended to be all-inclusive, leaving no room to read in the power to sell by means of applying the general provisions of the CPC, i.e. Order XXXIX Rule 6 or the inherent powers under Section 151 of the CPC. However, the legislature did intend that nothing in sub-sections (1) to (3) of Section 16 should affect the powers of the Banking Court under Order XXXVIII Rules 5 and 6 of the CPC to attach before judgment any property other than property mentioned in sub-section (1) and therefore

specifically provided for the above in Section 16(4) of the Ordinance. The saving of certain provisions of the CPC within Section 16, as done through Section 16(4), augments the view that the said section was meant to be comprehensive and it does not permit sale before judgment.

This opinion is further bolstered by the fact that Section 7(1) of the Ordinance itself begins with the words *"Subject to the provisions of this Ordinance, a Banking Court shall..."*. Section 7(2) further clarifies and provides that:-

> *"A Banking Court shall in all matters with respect to which the procedure **has not been provided for in this Ordinance**, follow the procedure laid down in the Code of Civil Procedure, 1908 (Act V of 1908), and the Code of Criminal Procedure, 1898 (Act V of 1898)."*
>
> *(Emphasis supplied)*

Therefore a Banking Court is to follow the procedure laid down in the CPC in all matters **with respect to which the procedure has not been provided for in the Ordinance**, whereas the procedure to prevent property which has been pledged or hypothecated etc. from being transferred, alienated etc. has been duly and exhaustively provided for in Section 16 of the Ordinance*(save for Section 16 (4) thereof)*. Therefore, to this extent the application of the CPC has been excluded.

7. We now consider whether the second application filed by the respondent was liable to be dismissed on the ground of *res judicata.* There are several aspects to this issue. First, whether the principle of *res judicata* applies to applications or not; and second,

if the answer to the first question is in the affirmative, what is the scope of the application of such a principle? *Res judicata* is the Latin term for *"a matter (already) judged"* and entails the concept of claim preclusion; once a matter has been decided and adjudicated on merits by an adjudicatory body, the same cannot be raised again. The purpose of this principle is to create repose and to prevent multiple and possibly contradictory findings on the same issues and to curb unnecessary delays in proceedings. As regards civil proceedings, this concept is codified in Section 11 of the CPC. However, the said section specifically refers to 'suits' and therefore restricts the application of the principle thereto. Interlocutory applications can **not** be regarded as 'suits'; hence, strictly speaking Section 11 of the CPC would not be attracted to such applications. Nevertheless, the general legal principles of *res judicata* would most certainly apply. Therefore an order passed pursuant to any interlocutory application at one stage of the proceedings would operate as a bar upon similar interlocutory applications made at a subsequent stage of the proceedings based on the general principles of *res judicata.*[1] However this general rule will not apply where the order on such interlocutory application does not involve any adjudication. Examples of such instances are:- where there is no decision on merits, but a mere expression of opinion not necessary for the disposal of the application;[2] where a matter, though in issue has, as a fact, not been heard and decided, either actually or constructively;[3] where a matter in issue has been

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[1] The Code of Civil Procedure (1908) as amended by Act 104 of 1976 by W. W. Chitaley and V. B. Bakhale.
[2] Aruguma Thamviran and others Vs. Namasivaya Pandara Sannadhi and others (AIR 1926 Mad 162).
[3] Jairam Kissan Vs. Chandrakaladevi and others (AIR 1974 Bom 49).

expressly left open and undecided;[4] where the suit is not pressed; or where the suit is withdrawn.[5] A further exception is highlighted in the case of **Amanullah Khan and others Vs. Khurshid Ahmad [PLD 1963 (W.P.) Lah 566]**, which holds that where an application has been decided once, but subsequently a fresh application is made on facts and circumstances different from those which existed earlier, res judicata would not apply. In this context the case reported as **Mst. Sarkar Khano A. Molo Vs. Abdul Malik Rehmanah20tullah Kasim Lakha through L.Rs. and others (2016 YLR 1506)** is germane which holds that the change of the status of a suit property, even during the pendency of a suit, could be pressed as a fresh ground to re-present an application, even in the event of the existence of an earlier order on an application of the same nature or title. We find it pertinent to make reference to the case of **Arjun Singh Vs. Mohindra Kumar and others (AIR 1964 SC 993)** wherein it was held that interlocutory orders such as orders of stay, injunction or receiver which are designed to preserve the status quo during the pendency of the litigation and to ensure that the parties may not be prejudiced by the normal delay occasioned in the proceedings before the Court, do not decide in any manner the merits of the controversy in issue in the suit and are capable of being altered or varied by subsequent applications for the same relief, but only on proof of new facts or new situations which subsequently emerge. The Indian Supreme Court drew a fine but elegant distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a different order. It held that if the decision on a

[4] Parsotam Gir Vs. Narbada Gir [(1899) ILR 21 All 505].
[5] Ghulam Nabi and others Vs. Seth Muhammad Yaqub and others (PLD 1983 SC 344); Muhammad Akram and others Vs. Member, Board of Revenue and another (2007 SCMR 289).

particular issue of fact is based on the principle of res judicata **even if** fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issue, whereas in the other case, on proof of fresh facts, the court would be competent, indeed would be bound to take those into account and make an order in conformity with the new facts. Thus in our view, the proof of new facts or circumstances is necessary in order to exclude the application from the bar of *res judicata* in respect of interlocutory applications during the pendency of a suit. A further exception is where an application is dismissed as being premature; this is not a decision on merits and would not operate as *res judicata.* A case in point is **Banwari Lal Radhe Moham Vs. Punjab State Co-operative Supply and Marketing Federation Ltd. (AIR 1983 Delhi 86)** wherein it was held that the application for injunction against encashment of bank guarantee did not bar the second application seeking the same relief as the first application was premature and held to be not maintainable for the reason that no demand for encashment of guarantee had been made at the time of the first application.

In the instant matter, the order dated 16.4.2013 dismissing the first application filed by the respondent seeking sale of the goods did not adjudicate on merits, rather the Banking Court specifically termed the said application premature. This clearly leaves the matter to be decided at a later stage. Further, the subsequent application filed by the respondent seeking sale of the goods indicates a development in that the keys of the godown where the goods were located were no longer with the *muccadam* of the bank, hence their apprehension that the appellant might misappropriate the goods, which circumstances did not prevail at

the time of the first application. We are of the view that the argument by the learned counsel for the appellant that the second application was barred by the principle of *res judicata* is misconceived. The case of **Hashir Ahmad** *(supra)* relied upon by the learned counsel for the appellant is a leave refusing order and is thus not the law laid down by this Court.

8. In light of the above, the order for sale of the goods in question passed by the learned Single Judge-in-Chambers and the order upholding such order of sale in appeal passed by the learned Division Bench of the Banking Court are illegal, being in violation of the provisions of Section 16 of the Ordinance. Therefore, this appeal is allowed and the impugned order is set aside.

9. Before parting it may be observed that the matter is pending before the Court for the last five years, yet leave application has not been decided. We direct the Banking Court *(where the case is statedly pending now)* to decide the matter within one month from the date fixed for hearing before the Court without fail. Till the final decision upon the leave application, Mr. Salman Aslam butt, learned counsel for the appellant has undertaken that the stocks lying in godown Nos.9 and 11 shall not be removed or disposed of. The criminal original petition is accordingly disposed of.

CHIEF JUSTICE

JUDGE

JUDGE

Islamabad, the
2nd of January, 2018
Approved for reporting
Waqas Naseer