IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO. B-34 / 2014

Plaintiff:	**Faisal Bank Ltd. through Mr. Abdul Sattar Lakhani Advocate.**
Defendants:	**Gulistan Spinning Mills Ltd. and another Through Mr. Furqan Naveed and Shahid Rana Advocates.**

For hearing of CMA No. 12702/2018.

Date of hearing:	**26.04.2018.**
Date of order:	**26.04.2018.**

O R D E R

Muhammad Junaid Ghaffar, J. This is an application under Section 151 read with Order IX Rule 7 CPC, seeking restoration / recall of Leave to Defend Application which was dismissed vide order dated 31.03.2015 as being hopelessly time barred.

2. Learned Counsel for the Defendant submits that admittedly summons were issued in this matter in terms of Section 9(5) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (**FIO, 2001**) on 16.05.2014 and the period of 30 days for filing of Leave to Defend Application was to expire on 14.06.2014 whereas, on such date the Court's summer vacations had already started and therefore, the Leave to Defend Application was filed on the first opening day i.e. 4.8.2014 and was within time. He further submits that when Leave to Defend Application was filed, it was assigned CMA No. 9464/2014 by the office and no objection was ever raised as to its being time barred. However, subsequently the Additional Registrar (O.S.) in his note dated 27.3.2015 observed that the same was time barred and without confronting the Defendants or any intimation notice to their Counsel

who is an out station Counsel, the impugned order was passed and the Leave to Defend Application was dismissed. He submits that till date no further proceedings have taken place and the Suit is still pending whereas, pursuant to Leave to Defend Application even no replication was filed. According to the learned Counsel, the said order is not a final order which could be appealed under Section 22 of the FIO, 2001; hence, the bar contained in Section 27 ibid would not be applicable. Therefore, the Leave to Defend Application be restored to its original position and be decided on merits. In support he has relied upon ***2016 CLD 449 (Askari Bank Limited V. DCD Services Limited and 3 others).***

3. On the other hand, Learned Counsel for the Plaintiff submits that insofar as the present application is concerned, this was filed after much delay, whereas, no appropriate reasoning has come on record for condonation of such delay. He further submits that the Defendants remained absent without any justification and pursuant to the orders of this Court a breakup statement has already been filed and suddenly this application has come on record. Per learned Counsel this Court cannot review or modify the order dated 31.3.2015 in view of bar contained in Section 27 of FIO, 2001 which is a Special Law; therefore, the application be dismissed.

4. I have heard both the learned Counsel and perused the record. Insofar as the merits of the Defendants case is concerned, it appears that the Leave to Defend Application was filed on 4.8.2014 whereas, according to the diary sheet of the Additional Registrar dated 27.3.2015 the Defendants were served through publication dated 16.5.2014 and it is further observed that Leave to Defend the Suit Application has been filed after expiry of the statutory period and the matter was fixed in Court on 31.3.2015. On such date the said application was dismissed

as hopelessly time barred. However, it appears to be a matter of record that no intimation notice was issued to the Counsel for Defendants who comes from Lahore. It is but a normal practice of this Court that when matters of Advocates coming from out station are fixed, an intimation notice is always issued to them by the office as and when their cases are fixed before the Court. This procedure has not been followed admittedly. It is also a matter of record that on the very first date the impugned order was passed and no further opportunity was extended by ordering issuance of any notice to the Defendants to satisfy the objection of limitation. As to the question that the application was within time, and benefit of Section 4 of the Limitation Act, 1908, is to be extended, it may be observed that the practice as is prevailing before this Court (more specifically in cases on the Original Side as well as Banking) is that if the period of limitation for filing any case is expiring during vacations, then the office receives such cases on the first opening day without raising any objection as to limitation and the benefit of Section 4 ibid, being statutory in nature is granted in all such cases. To that perhaps there appears to be no cavil insofar as the present facts are concerned. The Hon'ble Supreme Court in the case of ***Fazal Karim and another v Gulam Jilani and others*** (**1975 SCMR 452**) has put the controversy in hand at naught in the following manner;

> "9. Having careful considered the contentions raised by the Counsel for the parties; we are convinced that the view taken by the learned Judge of the High Court was unexceptionable. From the plain reading of Section 4 of the Limitation Act, it becomes abundantly clear that the period during which the Court remains closed on account of vacations has to be excluded for the computation of limitation and the notification cannot be taken precedence over the statutory provision. Even otherwise, we find that there is no conflict between the notification and the provision contained in section 4 of the Limitation Act. According to the notification, the Office was to remain open for receipt of petitions from persons who might choose to file. Surely, the word "Office" as used in the notification is not anonymous with "Court" as used in Section 4 of the Limitation Act. The Court may be closed and yet the Office might still be open. Even otherwise, the notification merely gives the petitioners an

> option to file petitions. Such an option cannot be construed so as to take away a statutory right. Even otherwise, it is doubtful that the word "Petition" as used in the notification will cover a memorandum of appeal. I am therefore, clearly of the view that the appeal even though filed during the vacations cold be field on the reopening of the Court and was, therefore, well within time. The authorities relied upon by the appellants are in point and the position is well settled. The only authority pressed into service on behalf of the appellants Nuchtyappa Mudali and others v. Ayyasami Ayyar referred to earlier proceeds en distinguishable facts. In that case the relevant Notification was in the following terms:-
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> "The Courts will be open between the hours of 4 and 5 p.m. on Tuesdays and Fridays during the recess for the reception of plaints, petitions and other miscellaneous papers."
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> The difference in the terminology employed in the two Notifications is very material. The Notification pressed into service on behalf of the appellants uses the word "Office" which as stated earlier is not the same thing as "Court".

5. This judgment was followed later by a Division Bench of this Court in the case reported as ***Habib Bank Limited v Haider Ladhu Jaffer*** (**2016 CLC 592**). Therefore, as to the merits of the case I am of the view that it appears to be in favor of the defendant.

6. However, notwithstanding that perhaps, a case is made out on merits; it needs to be appreciated that once order dated 31.3.2015 was passed by the Court; the same cannot be reviewed as is being sought on behalf of the Defendants. This Court is working as Banking Court under the FIO, 2001 which is a Special Law and insofar as the provisions of FIO, 2001 are concerned, they will have to be applied as special provision vis-à-vis. general provisions of law. Section 27 of the FIO, 2001 provides that subject to the provision of Section 22, no court or other authority shall revise or review or call or permit to be called into question any proceedings, judgment, decree, sentence or order of a Banking Court or the illegality or proprietary of anything done or intended to be done by the Banking Court in exercise of jurisdiction under this Ordinance. This provision puts a restriction on the Banking

Court to review or recall any order whereby, the Leave to Defend Application has been dismissed; and the order in question, (notwithstanding the above observations) is an order on merits and after considering the case of the Defendant the office objection regarding limitation has been sustained. Insofar as the order in question is concerned, it is at least a final order to the extent of dismissing the Leave to Defend Application; but at the same time it may not be an order of which an appeal may be preferred as the Court while doing so has not passed any judgment or decree and has kept the matter for filing of the breakup of accounts. Though, ordinarily in view of Section 10(11), of FIO, 2001, where the leave to defend is rejected or where a defendant fails to fulfill the conditions attached to the grant of leave to defend, the Banking Court ought to have forthwith passed a judgment and decree in favor of the plaintiff. (Again this has not been done in this matter, resultantly, listed application). But this does not entitles the defendant to seek review of that order, nor an appeal can be preferred, as the judgment is yet to be passed, and once a judgment and decree is passed finally by the Court, the Defendant would be within its right to file an appeal not only against the judgment and decree; but so also against the order dated 31.3.2015, whereby, the Leave to Defend Application was dismissed for being time barred. However, this Court is not vested with any such powers to recall or review its own order at this stage of the proceedings. The case law relied upon by the Counsel for the Defendants in the case of ***Askari Bank Limited*** supra is perhaps, not relevant in the present facts as in that case the Court had only recalled an order of dismissal of a Leave to Defend Application on non-prosecution. It is but a settled law that dismissal of non-prosecution is not an order on merits, and therefore, the Court while exercising its inherent powers and so also for the fact that an order of dismissal for

non-prosecution cannot be appealed had recalled such order. That case was not of a review, as the order was not pertaining to determination of the rights and the liabilities of the parties nor it could be called a speaking order. It is an admitted position that the inherent powers of the Court for restoring an application which was dismissed for non-prosecution without touching merits is an act different from the power of review which could be applied for in respect of an order which has been passed on merits. It is not material as to whether the case of the Defendants is that such order was passed mistakenly or otherwise and merely for such reason it cannot be reviewed. A learned Division Bench of this Court in somewhat similar facts [though in respect of Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997], in the case reported as ***Bagphpotee Services (Private) Limited v Allied Bank of Pakistan Limited*** (**2001 CLC 1363**) has been pleased to hold as under, which is relevant for the present purposes;

> 7. In view of the above discussion, we are of the considered opinion that there is a clear distinction between review of an earlier order and recalling one passed on account of non-appearance of a party. In the former the merits of an earlier order are considered but in the latter only the cause of non-appearance is to be taken into consideration. In the former case the power must be conferred by statute but in the latter it stems from the principles of natural justice required to be read into every law. The former is excluded by section 27 but the latter continues to remain available.
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> 8……..Nevertheless once it is acknowledged that the power to review must be expressly conferred by law no question of any such implied power can possibly arise. We are clearly of the view that the power to recall an ex parte order is an altogether different rower than one of review and emanates from a different source, therefore, nothing turns on section 27 in the present context.

7. In view of hereinabove facts and circumstances of this case, I am of the view that the bar contained in Section 27 of the FIO, 2001 fully applies on the Defendants case putting restriction on this Court to

review its order dated 31.3.2015 and therefore, this application is liable to be dismissed. Order accordingly. Since the leave to defend application already stands dismissed, matter be listed for final disposal on the next date for passing of judgment and decree. To come up after three weeks.

J U D G E

ARSHAD/