IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar** and **Agha Faisal**, **JJ**.

First Appeal 74 of 2018	:	Intakhab Hussain Shah & Another vs. National Bank of Pakistan & Another
For the Appellants	:	Syed Muhammad Abbas Haider Advocate
For the Respondent No.1	:	Mr. Suleman Hudda, Advocate
Date of Hearing	:	22.05.2019
Date of Announcement	:	31.05.2019

JUDGMENT

Agha Faisal, **J**: A suit for recovery, being Suit B-90 of 2014 ("**Suit**") was filed by the respondent No.1 bank against the appellants under the provisions of the Financial Institutions (Recovery of Finances) Ordinance, 2001 ("**Ordinance**"). Learned Banking Court rendered a judgment dated 08.08.2016 ("**Judgment**") in the Suit, in favour of the respondent No.1 bank and against the appellants. The appellants admittedly did not prefer any appeal against the Judgment during the prescribed period of limitation or at any time thereafter. Alternatively an application under Section 12(2) CPC was preferred by the appellants before the Banking Court and the same was dismissed vide order dated 07.11.2017 ("**12(2) Order**"). Once again the appellants did not assail the 12(2) Order before any forum of competent jurisdiction. Upon the proceedings in the Suit having concluded Execution 25 of 2017 ("**Execution**") was underway before the learned Banking Court when an application under Section 47 CPC was preferred by the appellants in 2018. The learned Banking Court dismissed the appellants' application vide order dated 04.07.2018 ("**Impugned Order**") and it is against this order, and not the Judgment or the 12(2) Order, that the present appeal has been filed.

2. Syed Muhammad Abbas Haider, Advocate appeared for the appellants and submitted that the entire basis of the appellants'

challenge was the quantification of the decretal amount in the Judgment. It was contended that the learned Banking Court erred in quantifying the subject amount, hence, to the extent thereof the Judgment, and the decree made in the pursuance thereof, had become in-executable. Per learned counsel, it is in this context that the appellants had made the application under Section 47 CPC before the learned Banking Court in the Execution and the appellants were aggrieved as the said application was dismissed vide the Impugned Order without appreciating the contentions of the appellants.

3. Mr. Suleman Huda, Advocate appeared on behalf of the respondent No.1 bank and submitted that the appellants had obtained finance facilities in the year 2005 and committed default in their obligation to repay the same. Learned counsel submitted that the Judgment was delivered in the year 2016 and it is an admitted position that no appeal has ever been preferred there against. Learned counsel adverted to the 12(2) Order and submitted that the same had also attained the finality as it was never challenged by the appellants before any court of law. Learned counsel submitted that the Impugned Order correctly determined the application of the appellants and the appellants were attempting to subvert the due process of law and by challenging the original Judgment in effect while predicating their appeal upon an order passed in consequent execution proceedings. Learned counsel submitted that present appeal was misconceived, hence, merited dismissal forthwith.

4. We have heard the arguments of the respective learned counsel and have also considered the documentation to which our surveillance was solicited. It is an admitted fact that neither the Judgment nor the 12(2) Order were ever challenged by the appellants, therefore, the only point for determination, per Order XLI rule 31 CPC, is whether the Impugned Order has been rendered within the meets and bounds of the jurisdiction enjoined upon the learned executing court.

5. It is considered appropriate to advert to the relevant constituents of the Judgment and orders referred to herein at the very onset. In such regard the operative part of the Judgment is reproduced herein below:

> "Accordingly the suit of the plaintiff is decreed against the defendants jointly and severally in the sum of Rs.8,077,620/- along with cost of funds from the date of default, till realization of the entire decretal amount. The prayer of the plaintiff bank with regard to cost of suit and sale of the mortgaged property are also allowed."

Notwithstanding the fact that the appellants have never filed an appeal against the Judgment, an application under Section 12(2) CPC was in fact preferred on the premise that no notice was ever served upon the appellants and that the Judgment had been obtained through fraud and misrepresentation. The application of the appellants was dismissed and no appeal was filed against the 12(2) Order, relevant constituent whereof is reproduced herein below:

> "After hearing the arguments delivered by the learned counsels of both the parties as well as gone through the entire record of the case and material placed thereon alongwith the case laws relied upon on behalf of both the parties, it reveals that the defendants/Judgment debtors have not denied for the availing of finance facility and execution of charge documents in favour of the plaintiff. As regard to the objections raised by the defendants/Judgment debtors that they never received any notice of the instant suit or they were not in knowledge about the proceedings of the suit has found no force as the summons were issued through all modes of service including publication of summons in leading newspapers daily "Jang" and "Dawn" Karachi both dated 26.04.2014 on the address as mentioned in the documents produced by the plaintiff with signature of the defendants/Judgment debtors as well as Bailiff report dated 16.07.2014. According to Section 9 (5) of the Ordinance, 2001, service upon the defendant, if effected by any one of the mode prescribed in Section 9 (5) of the Ordinance, 2001 then the service upon the defendant shall be deemed to be valid service for the purpose of this Ordinance. It is a settled principal of law that decree may be recalled, in case, and if fraud practice in the service of summons or the Judgment obtained on the basis of forged documents or by concealment of facts. In this case, the defendant has failed to point out the element of fraud, misrepresentation and concealment of facts, if made in this case, which is mandatory in nature. Under the above facts and circumstances, the defendant has not approached before this Court with clean hands and appears to be intended to obstruct the proceedings of the case rather the advance or assist the process of law and justice. As such no necessity existed at all for factual inquiry in to the allegation made in the application.

> In view of the above discussion, the application filed by the defendants/Judgment debtors, merits no consideration stands dismissed. The case laws relied upon by the learned counsel for the defendants/Judgment debtors is distinguishable and not applicable under the facts and circumstances of this case. The application under Section 151 CPC for stop the execution proceedings till decision on the application under Section 12(2) CPC, filed on behalf of the defendants/Judgment debtors also dismissed being infructuous."

The quantification of the decretal amount was undertaken vide the Judgment and the issue of service upon the appellants in respect of the Suit stands determined vide the Judgment and the 12(2) Order respectively, and the findings have attained finality as no challenge has ever been preferred there against. So the only issue remains is whether the learned Banking Court was justified in dismissing the application under Section 47 CPC, while seized of the execution proceedings. The operative constituent of the Impugned Order is reproduced herein below:

> "After hearing the arguments delivered by the learned counsels of the parties and gone through the entire record of the case alongwith material placed thereon as well as case law relied upon on behalf of both the parties, it appears that the subject property was mortgaged by the Judgment debtor at the time of availing the finance facility from the plaintiff/decree holder Bank, and due to non-payment of the dues, the decree holder Bank filed suit for recovery against the Judgment debtor and the Judgment Debtor did not contest the suit proceedings, however, exparte Judgment and decree was passed by the this court, vide Judgment and decree both dated 08.08.2016 and 13.08.2016 respectively, and admittedly the same was not challenged before the competent Court of law, it further appears that the Judgment and decree passed by the Court attained finality. During arguments, learned counsel for the Judgment debtor has failed to satisfy the Court on the point of maintainability of their application and it seems that the Judgment debtor wants to create hurdle in satisfaction of the order passed in execution application and deprive the execution proceedings. Obviously the Judgment debtor has not approached before this Court with clean hands and instead to obstruct the auction proceedings rather the advance or assist the process of law and justice. Moreover, under Section 27 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, this Court has no power or authority to revise or review or permit to called, into question any proceedings, Judgment, decree, sentence or order of a Banking Court

> of the legality or propriety of anything done or intended to be done by the Banking Court in exercise of jurisdiction under this Ordinance, therefore, under the facts and circumstances, the application filed by the Judgment debtor merits no consideration, hence dismissed accordingly. The case law relied upon by the learned counsel for the Judgment debtor is distinguishable and not applicable under the facts and circumstances of the present case."

6. It would appear that the application preferred by the appellants before the executing court was an effort to assail the Judgment, despite no appeal ever having been preferred there against. Even the present appeal has been filed ostensibly against the Impugned Order but effectively the appellants are seeking the reopening of the quantification of the decretal amount in Judgment itself. The role of the executing court does not ordinarily go beyond the decree itself and the learned Banking Court has duly adhered to the said principles while delivering the Impugned Order. Learned counsel for the appellants had referred to pronouncements of the Superior Courts in the matters where the role of the executing court was enhanced in situations where a Judgment was delivered without jurisdiction. However, the reliance is unmerited as it is patently evident that such authority is inapplicable in the present facts and circumstances as the jurisdiction of the Banking Court to deliver a judgment cannot be controverted and the entire basis of the appellants' claim is with regard to the quantification of the decretal amount undertaken vide the Judgment.

7. In view of the reasoning and rationale contained herein, we are of the deliberated view that the appellants have failed to make out a case for interference in the Impugned Order, hence, the same is hereby maintained and upheld. The present appeal, along with listed applications, is hereby dismissed with no order as to costs.

JUDGE

JUDGE

Khuhro/PA