IN THE HIGH COURT OF SINDH, KARACHI

Execution No. 36 of 2001

[M/s. Habib Bank Limited *vs*. M/s. National Fibres Limited]

Present:
Mr. Justice Zulfiqar Ahmad Khan

Decree holder	:	Through Mr. Jam Asif Mehmood, Advocate alongwith Mr. Amin Qadir, EVP, National Bank of Pakistan
Judgment debtor	:	Through M/s. Hashmat Ali Habib and Rehman Aziz Malik, Advocates
Auction Purchaser	:	Through Mr. Muhammad Vawda, Advocate
Claimant	:	Privatization Commission through M/s. Khalid Javed and Munawar Juna, Advocates
Intervener	:	M/s. Askari Bank Limited through Mr. Harish Rasheed Khan, Advocate
Employees/Interveners	:	Through Ch. Muhammad Abu Bakar Khalil, Ms.Nancy Dean and Ms. Shagufta Parveen Khan, Advocates Syed Daanish Ghazi, Advocate for NIB Bank Ms. Afshan Jamal, Advocate for Faysal Bank Ltd Mr. A.I Chundrigar, Advocate for ABL alongwith Mr. Muhammad Ilyas Muhammad Omer Pechicho, Advocate for Orix Leasing Mr. Muhammad Ali Hussain, Advocate Dr. Muhammad Waseem Chaudhry, Official Assignee
Date of Short Order	:	05.10.2018
Date of Reasons	:	17.10.2018

ORDER

Zulfiqar Ahmad Khan, J:- This CMA No.264 of 2016 is moved under section 47 read with section 144, order XXI, rules 89-90 and section 151 CPC, being second round of objections filed in the instant execution proceedings whereby the applicant/judgment debtor has sought setting aside of the entire auction proceedings including the order dated 18.03.2002 regarding acceptance of sale, and restitution of all properties

free from all charges to the applicant/judgment debtor, in the interest of justice.

By way of background, it is pointed out that a similar application under section 47 read with section 144 and order XXI, rule 90 CPC bearing CMA No.390 of 2009 was also moved in the instant execution proceedings earlier on 13.04.2009, however at that instant, the application was moved by various shareholders of National Fibres Limited. Prayers made in the said CMA were also to the same effect, i.e., *"that the Hon'ble Court may be pleased to order recall of sale proceedings, and set aside sale of property of the Defendant Company which can be revived upon restitution of the immovable property owned by it".*

Both the applications in question (i.e., CMA No.390 of 2009 and CMA No.264 of 2016) are filed in the instant execution proceedings arising out of the judgment/decree passed in Banking Suit No. B-85 of 2000, where decree is to be executed by the Court by attachment and sale of movable properties under section 18 of the Banking Companies (Recovery of Loans, Advances, Credits and Finance) Act XV of 1997, as well as, by attachment and sale of properties of the defendant/judgment debtor under section 18 of said Banking Companies Act 1997 bearing Plot Nos.13 to 20 and 37 to 44 in Sector No. 22, admeasuring 201,889 Sq.Yds or thereabout situated in Korangi Township, Karachi, with factories known as National Fibres Limited and building sheds, parts, appliances, fittings and fixtures, equipment, machinery affixed, installed and constructed thereon.

Suit No.B-85 of 2000 was filed by M/s. Habib Bank Limited against the applicant/judgment debtor National Fibres Limited for the recovery

of Rs.264,493,163.00, as the defendant upon having been provided a DA Letter of Credit in the year 1994 in the sum of Rs.200 Million opened seven letters of credit for the import of goods from different countries under the said limit, however on the maturity dates, the defendant did not make payment of the amounts with the result that the plaintiff bank created forced PAD for remitting the amounts to the foreign exporters through their bankers. After issuing process under section 9 of the Banking Companies Act 1997, when the defendant failed to appear and obtain leave to defend, the said suit was decreed on 11.12.2000. Upon filing of the execution application within statutory period in accordance with order XXI rule 22 CPC, the properties mentioned in the execution application were attached in order to be sold, and accordingly publication in newspapers was made. Nazir was appointed as receiver and was directed to proceed to have the properties sold.

While a number of applications were fixed today, the learned counsel mutually agreed that CMA No.264 of 2016, being the main application, if heard, will dispose of most of the applications. Accordingly, the said application was heard.

Mr. Hashmat Ali Habib, Advocate, argued the matter on behalf of the judgment debtor/applicant. Upon pointing out that the question of maintainability was posed by this Court in the instant application on 29.09.2016, which needed to be answered in the first instance, the learned counsel exclusively and extensively argued on this point.

The said question of maintainability was posed by this Court for the reason that the earlier CMA No.390 of 2009, wherein similar objection seeking cancellation of the auction proceedings and handing over of the properties to the judgment debtor was dismissed by this

Court through its detailed order dated 17.03.2015. Contents of paragraphs 35 and 36 of the said order are reproduced hereunder:

> 35. In my view therefore, for both the reasons given above, i.e., that the principle of restitution (an in any case s.144) does not, and ought not, to apply to a compromise decree, and that the restitution actually being sought is in fact not a reversion to or restoration of the status quo ante but the creation of a new situation, this application cannot succeed. Section 144 cannot, does not and ought not to apply. In view of the conclusion arrived at it is not necessary for me to consider the other ground taken by learned counsel for the Applicants, that the auction purchaser had knowledge of SpHCA 291/2001 and therefore was not a bona fide purchaser for value without notice. The case law cited and relied upon by the contesting sides in this regard does not therefore need to be considered.
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> 36. In my view, for all of the reasons as stated above, this application cannot succeed. It is therefore hereby dismissed.

An appeal against the said order was preferred as SpHCA No.143/2015, which this time was moved by National Fibres Limited itself, wherein National Bank of Pakistan, Zubair Motiwala and Abdul Jabbar (the auction purchasers), as well as Allied Bank of Pakistan were arrayed as respondents.

A review of the judgment rendered in the said appeal shows that the appeal was dismissed for the reason that under Order XXI Rule 90 a sale could only be set aside on the ground of material irregularity in publishing or conducting sale, and since the Hon'ble Bench found that there was no material irregularity or fraud in publishing or conducting the sale, as well as, on the ground that no action was taken within 30 days in terms of Article 166 of the Limitation Act by the party (i.e. National Fibres Limited) competent to do so. The concluding paragraph 11 of the said judgment is reproduced here:-

> 11. In terms of Order 21 Rule 90, the sale has to be set aside on the ground of material irregularity or fraud in publishing or conducting it. However any objection that is though based on grounds of material irregularity or fraud in proceedings but does not relate to the publishing and conducting the sale cannot be taken under this rule. Material irregularity would imply a course

> adopted in selling of the property that is not in conformity to the rules regulating sales in execution of a decree. Here the ground taken by the appellants in the subject application was not about any alleged material irregularity or fraud in either publishing or conducting sale of the property of the company, but it was urged therein that attachment of the property sold in execution of decree was void being opposed to section 410 of the Ordinance, and it was obtained through misrepresentation and fraud. The other ground was that HBL though was present in the meeting held on 19.08.1997, but despite that it filed the suit against the Company and got the then Chief Executive instructed not to contest the suit (B-85/2000), which resulted in passing of the ex parte decree. On these grounds admittedly a valid sale of the property in execution proceedings cannot be set aside. No action was taken within the prescribed period of 30 days in terms of article 166 of the Limitation Act, 1908 by a party competent to do so then hence filing of the subject application (CMA No.390/2009) on 13.4.2009, that is after a long time, which ex facie was time-barred, never merited consideration on merits."

Against these concurrent findings, the learned counsel stated that Civil Petition No.100 of 2016 was preferred by National Fibres Limited before the Hon'ble Supreme Court, which petition was disposed of with the following orders dated 12.05.2016.

> "After arguing the petition at some length, learned counsel for the petitioners states that this petition be disposed of by observing that the petitioners will avail remedy afresh before the High Court in terms of Section 144 CPC or under any other provision of law. **This petition, is therefore, disposed of and the petitioners may avail remedy in accordance with law."** [Emphasis supplied]

After having the said petition disposed of by the Apex Court through the above orders, the present CMA was filed as a sequel, re-agitating the same prayer to have the sale proceedings set aside, for which the earlier CMA No.390 of 2009 was moved, which was dismissed by this court's order dated 17.03.2015, and which dismissal order was maintained by this Court in SpHCA No.143/2015. In these circumstances, Court posed the question as to the very maintainability of this second round of objection/restitution. Counsel for the applicant, by placing reliance on 2013 MLD 415 and 2013 CLC 695 attempted to support his arguments to answer the question of maintainability by stating that the

Apex Court remanded the matter back so that the applicant could press a fresh restitution application under s. 144 CPC. Learned counsel stated that the Apex court has remanded the matter back to this court to be heard afresh by permitting the applicant to move an application under s.144 or under any other provision of law.

Mr. A.I.Chundrigar, learned counsel representing ABL stated that the instant (second) CMA is clearly hit by the principle of *res judicata* enshrined under Section 11 CPC, as well as the learned counsel referred to Explanation IV of the said section to substantiate his point. It was next stated that having chosen to have its petition disposed of by the Apex Court by availing remedy *in accordance with law*, would not mean that the applicant could refile an application under s.144 CPC as this would mean that the earlier orders passed by this court on CMA 390 of 2009 dated 17.03.2015 and in SP HCA No. 143/2015 dated 15.10.2015 have been set-aside by the Apex Court. Per counsel, since prayers of the instant application and those of the previous application are substantially the same, and said issue being subject matter of the earlier CMA which was dismissed and against which an appeal was also dismissed, the applicant cannot re-agitate the same prayer. Per counsel, this court in the first round has already declared that the earlier objection raised through CMA No.390 of 2009 is devoid of merit; thus considering the second application with substantially the same prayer would mean as if the Apex Court has remanded the matter to be heard afresh, which is not the case as the order of the Apex Court is very clear. Learned counsel further stated that the Apex Court's order has given no findings against the order of the Single Judge in CMA No.390 of 2009 as well as against the order of the Divisional Bench passed in SpHCA No.143/2015,

therefore these orders stand unchallenged having attained finality, and by permitting the same objections through this second application will amount to overriding these orders passed by the learned Single Judge as well as by the Divisional Bench of this Court.

With regard to the proposal surfaced on behalf of National Bank of Pakistan, that they are entering into a settlement with the judgment debtor after 17 years from the date of execution proceedings, while the property has already been sold and given in possession of the auction purchaser, Apex Court's determination in the case reported as PLD 1987 SC 512 makes that settlement attempt illegal, per counsel.

Heard the counsels, reviewed the material on record.

Admittedly, a similar application was filed under s.144 CPC, which was dismissed vide this Court's order dated 17.03.2015 against which appeal (SpHCA No.143/2015) was also dismissed on the point of limitation as well as on merit, and against which the applicant preferred an appeal to the Apex Court, which having been disposed of by allowing remedy "*in accordance with law*" clearly means that no decision on merit has come forward from the Apex Court. The Apex Court permitting the petitioner to avail *remedy in accordance with law* does not mean that the applicant has been given a right, which did not exist in the past, nor would it mean that the petitioner has been given permission to file a fresh application seeking similar relief, which has already been dismissed twice. In my humble view, *remedy in accordance with law* could not mean to override *res judicata.* Apex Court's order dated 12.05.2016 is very precise. Nothing beyond what is held therein could be read, nor could anything be subtracted from it. The Apex Court clearly did not permit the applicant file a fresh application under s.144 CPC, though a

request was made for it by the applicant. The manner in which the petition stood disposed is that *"the petitioners may avail remedy in accordance with law"*. It could never be read to mean that *"the petitioners will avail afresh remedy under s.144 CPC or under any other provisions of law"* .

There is no dispute that the applicant in its earlier CMA made similar prayers and it could not be permitted to have double dip on the same cause. Clearly, the instant application seeks restitution of the properties on which this Court has already rendered detailed judgments, and when the applicant preferred to approach the Hon'ble Supreme Court through Petition No.10 of 2016, it chose to have the same disposed of with liberty to seek remedy *in accordance with law* which could not mean that a fresh restitution application under s.144 CPC or else be permitted or heard *de-novo*.

It is an established principle of law that to have a remedy, one has to have a right, i.e., if there is no right, there would be no remedy; and converse to which is that where there is a right, there is a remedy, a fundamental principle of law known as *Ubi Jus Ibi Remedium*. Right of the applicant to have (or not to have) restitution under s.114 CPC has already been decided by this Court. No new right has been created in favour of the Applicant who was granted permission to simply avail remedy in accordance with law.

With regards the cases cited by the learned counsel for the applicant (supra), clearly both the cases relate to withdrawal of suits, with permission to file afresh. In the case at hand, the applicant was not granted permission to file its claim under s.144 afresh. As a matter of fact, order of the Hon'ble Supreme Court had no words to that effect.

The Apex Court clearly desisted from using the words put forward by the petitioner's counsel that it would avail the remedy afresh before the High Court in terms of s.144. Orders were only made that petitioners may avail remedy in accordance with law.

At best the contentions of the learned counsel for the applicant could be considered to the extent that the Apex Court remanded the matter for giving a fair opportunity of hearing to the applicant, which has been given by permitting the applicant move an appropriate application, which is being considered in this order, however, such fair opportunity could not mean a review, revision or appeal of this court's earlier orders which have attained finality.

As to the initiative to settle with one of the Banks, this belated exercise after 17 years of the commencement of this execution application wherein property has already been sold and possessed by the auction purchaser, is circumvented by the Apex Court's judgment rendered in Hudaybia Textile Mills Ltd., vs. ABPL (1987 PLD 512 SC), nonetheless a full judgment on this issue has also come in the form of this court's order dated 17.03.2015.

In view of the aforesaid facts and circumstances, the maintainability question earlier framed by this Court is answered in negative, to the effect that once having chosen not to have its appeal/petition decided by the Apex Court on merit and rather choosing to have the same disposed of by seeking remedy in accordance with law, the applicant would not be entitled to a subsequent restitution, as this would amount to having the appeal preferred against the orders of this Court being allowed by the Apex Court on merit, which clearly does not emanate from the language of the Apex Court's order dated 12.05.2016.

These are the reasons of my short order dated 05.10.2018, through which I dismissed the instant application and ordered the Official Assignee to proceed in accordance with law in the light of his Reference No.20 of 2012, as well as, the sums deposited with Nazir for the benefit of the ex-employees of National Fibres Limited who have been running from pillar to post for the last 18 years, be released to them.

Judge