

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
J. C. M. NO. 45 / 2000

DATE

ORDER WITH SIGNATURE OF JUDGE

For hearing of main petition.

30.10.2018.

Mr. Nabeel Kolachi Advocate for Petitioner.
Syed Kassim Raza Respondent No. 6 present in person.

This J. M. has been filed under Section 39 of the Industrial Development Bank Ordinance, 1961 (“**Ordinance**”) for recovery of Rs. 32,106,099.86. On 23.10.2000, the properties of Respondents mentioned in Para 18 & 19 of the Petition were attached ad-interim, whereas, on the same date orders for preparing inventory was also passed.

Learned Counsel for the Petitioner submits that finance facility was granted to Respondent No.1 by way of running finance and in lieu thereof, as security, promissory note was executed and property was also mortgaged, whereas, Respondent No.2 to 6 had executed guarantees for repayment of the amount due from Respondent No. 1. He further submits that some property was also mortgaged by Respondent No. 6. Per learned Counsel, earlier J. M. No. 47/1994 was filed and after passing of interim attachment order, the same was made absolute on 09.05.1997. Thereafter, a compromise was reached and vide order dated 30.06.1999 in the said J. M; the attachment order was vacated but despite this Respondents No. 1 to 6 again defaulted and once again notice under Section 138 of the Ordinance was issued and upon failure to honor their commitment, this fresh J. M. was filed which is pending since 2000. He further submits that no one is appearing on behalf of Respondents except Respondent No. 6 who appears in person and had earlier filed an application under Section 133 of the Contract Act whereby, he contended that after passing of the compromise order, the terms and conditions were modified and he no more remains a guarantor. He submits that such application was allowed by a learned Single Judge which was maintained in High Court Appeal; however, the Hon’ble Supreme Court vide order dated 25.02.2014 passed in Civil Appeal No. 42-K/2010 now reported as *Industrial Development Bank of Pakistan V. Hyderabad Beverage Company Private Limited and others (2016 S C M R 451)* has been pleased to set aside the order of the Appellate Court as well as the learned Single Judge by dismissing the application of Respondent No. 6. As to filing of a fresh Petition instead of continuing with the earlier one, he submits that since that Petition was already disposed of, whereas, per settled law in these proceedings after disposal of the Petition, no fresh execution is to be filed and in fact present proceedings are more in nature of execution of the earlier orders as through compromise the

Respondents have conceded to the claim and cannot contest the same anymore. He submits that the order for ad-interim attachment be made absolute with further directions to appoint Official Assignee and proceed further. In support Counsel for Petitioner has relied upon *Industrial Development Bank of Pakistan V. Haji Moosa A. Karim and another (1983 C L C 284)*, *Industrial Development Bank of Pakistan V. Hyderabad Beverage Company Private Limited and others (2016 S C M R 451)*, *Mrs. Ishrat Malik V. Jamil Ahmed Manj and another (2017 Y L R 1788)*, *Mst. Niaz Bibi through L.Rs. Ghulam Mustafa and others (P L D 2011 SC 520)*, *Meraj Begum V. Abdul Sattar (1989 M L D 4820)*, *Peer Dil and others V. Dad Muhammad (2009 S C M R 1268)*, *Industrial Development Bank of Pakistan V. Allied Bank of Pakistan and another (P L D 1968 SC 74)*, *Messrs Taufiq Textile Mills (Pvt) Ltd and 4 others (P L D 1999 Karachi 71)*, *Industrial Development Bank of Pakistan V. Messrs Vinder Textile Mills Limited and 15 others (1997 C L C 1495)*.

On the other hand, Respondent No. 6 present in Court submits that it is only he who has been dragged in these proceedings, whereas, the other Respondents after compromise have sold out properties and such fact has always been in the knowledge of the Petitioner, therefore, at least to his extent he may be excluded from any further proceeding.

I have heard the learned Counsel for Petitioner and Respondent No. 6 in person. No one else has appeared on behalf of other Respondents however, comments have been filed on behalf of Respondent No. 1, 2 and 3 which have been considered while passing this order. The facts have been briefly stated as above and it appears that in earlier proceedings in J. M. No. 47/1994 the ad-interim attachment order was made absolute on 09.05.1997. Relevant part whereof reads as under:-

“From the averments made in the Petition which are adequately supported by documentary evidence and the circumstances that the respondent company has not parted with a single penny in favour of the Petitioner, I am fully convinced that no sufficient cause has been shown against ad interim order of attachment in terms of section 39(7) of the Ordinance. I am therefore inclined to make the interim order absolute and direct the sale of the attached properties in order to satisfy the claim of the Petitioner Bank. Needless to say, there is hardly any substance in the grounds taken in support of the CMA which on the face of it is completely misconceived and fallacious. While dismissing the CMA, I allow the Petition with costs as prayed.”

The aforesaid order reflects that while confirming and making absolute the ad-interim attachment order, the Petition was also allowed with costs as prayed. It further appears that thereafter, at the request of the Respondents some compromise was reached and CMA No. 1189/1999 was filed before this Court on 16.06.1999 and an order was passed on 30.06.1999 and the same reads as under:-

“30.6.1999

Mr. Ainuddin Khan Advocate for the Petitioner.
Mr. Ch. Abdul Rasheed Advocate for Res: No. 1 to 6.

- 1) Granted.
- 2) Through this application Petitioner and Respondent Nos: 1 to 6 have proposed some terms upon which they have prayed for disposal of instant proceedings. Terms and conditions proposed in this application appears to be genuine and legal. Accordingly this matter is disposed of in terms thereof in so far as the Petitioner and Respondent No. 1 to 6 are concerned. This disposal is without prejudice to the rights and claim of respondent No. 7, namely, Agricultural Development Bank of Pakistan.”

It further appears that as stated that the said compromise was not honored as per the agreement and the Petitioner being aggrieved once again filed this present JCM and on 23.10.2000 once again ad-interim attachment orders for attachment of the properties was passed as stated in Para 18 & 19 of the Petition.

As to the contention of Respondent No. 6 that after the compromise he was no more liable, it may be observed that this cannot be considered presently in view of the order passed by the Hon’ble Supreme Court, as above, whereby, his application under Section 133 of the Contract Act stands dismissed; hence, this ground is of no help. The Hon’ble Supreme Court in the said case has been pleased to hold as under;

13. Guarantee of Respondent No.6 was continuing guarantee, consideration of which was original finance agreement dated 25.5.1993. Appellant-IDBP, successfully demonstrated and established that the claim in J.M. No.45/2000 had arisen out of original finance agreement, which was subsequently negotiated for a settlement as offered by the appellant Bank to which the Respondent No.6 was also a party thus, Respondent No.6 was liable under his guarantee being continuing guarantee. Such word of honor of Respondent No.6 as guarantor under the original guarantee and subsequent supplemental agreement/guarantee dated 3.12.1998 was for the benefit of principal borrower arising out of original finance agreement. In the case in hand as admitted by the Respondent No.6, in paragraph No.6 of his application under section 133 of Contract Act, per incentive scheme the Appellant-IDBP rescheduled the loan amount that had swollen to Rs.33.50 million and had agreed to accept Rs.9.00 million in satisfaction of entire outstanding liability in installments. The Respondent No.6 as guarantor had given his approval and consent in anticipation thereto, in most unequivocal terms in the letter of guarantee dated 3.12.1994 as reproduced above. Any rescheduling, composition or manner of repayment in installment or any grace shown by the Appellant-IDBP was with the concurrence and within the sight and contemplation of the borrowers as well as of Respondent No.6, at the time of supplemental agreement and guarantee as noted above. It is now well established that liability of surety is co-extensive with the principal borrower. Therefore, the respondent No.6 continued to be bound by the terms of the guarantee. Record further shows that the incentive dated 19.7.2003 offered to the Respondents was not availed and same was withdrawn by the Appellant-IDBP on July 22, 2005. Even otherwise, any abortive or attempted variation in terms of contract, which does not become effective, will not absolve the guarantor/surety of original contracted liability. Once the incentive package is withdrawn parties including the surety/guarantor are relegated to their respective original position as before the incentive offer was made and or acted upon. The Courts below have overlooked such aspect of the case.

In fact the Hon’ble Supreme Court has categorically held that once the incentive package offered by the petitioner and which was not availed, the same stands withdrawn

and parties are relegated to their respective original position as before the incentive offer was made and or acted upon.

As to the other grounds raised by him that Respondents No. 1 to 5 are not coming up before the Court and have allegedly sold certain properties after reaching compromise, once again it may be observed that presently such aspect of the matter is not before the Court and it will only turn up once the property is being sold and execution is undertaken. As to the contest in respect of this Petition is concerned, it may be observed that admittedly all Respondents entered into the compromise thereby accepting their liability and also sought an order from this Court for de-attachment of their properties. Once this has been done the liability stands admitted, whereas, default has occurred in honoring such compromise agreement. On perusal of the written reply of Respondents No. 1, 2 & 3 it further appears that there is no justifiable ground which could be entertained by this Court except that some further finance was being sought from Respondent No. 7 (proforma party in this case), which was delayed, and therefore, I am of the view that since this petition is pending since long without further progress after passing of ad-interim attachment orders on 23.10.2000 under Section 39(3) of the Ordinance, whereas, no case of indulgence is made out on behalf of the respondents as they have failed to show any cause for passing of an order otherwise, the same must be made absolute in terms of Section 39(7) & (10) of the Ordinance and directions be issued for sale of the attached properties.

As to the query of the Court, regarding filing of execution application instead of filing a fresh petition, learned Counsel seems to be fully justified in arguing that by now the same also stands settled and it is not of much relevance, even if at this stage the subsequent JCM is treated as an execution application for the earlier attachment, or the same may be treated as a fresh cause case, pursuant to default on compromise. (*See Industrial Development Bank of Pakistan v Haji Moosa A. Karim and others-1983 CLC 284*).

Accordingly, the Petition is allowed and the ad-interim order of attachment is made absolute in respect of the properties mentioned in Para 18 & 19 of the Petition, whereas, Official Assignee is directed to execute sale of the attached properties in accordance with rules.

J U D G E

ARSHAD/