

**IN THE HIGH COURT OF SINDH, AT  
KARACHI**

**Present:**

Irfan Saadat Khan and  
Yousuf Ali Sayeed, JJ

**Spl. High Court Appeal No. 77 of 2013**

Appellant : M/s. Brekast Industries  
(Private) Limited, through  
Khawaja Shams-Ul-Islam,  
Advocate.

Respondent No.1 : House Building Finance  
Corporation, through Basil Nabi  
Malik, Advocate.

Date of hearing : 03.11.2020

**JUDGMENT**

**YOUSUF ALI SAYEED, J -** This Appeal under S.22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the “**Ordinance**”) emanates from pending Suit Number B-66 of 2009 (the “**Underlying Suit**”) filed by the Appellant before this Court on the Original Side under Section 9 of the Ordinance seeking, *inter alia*, to question the recoverability of sums claimed by the Respondent as being due in terms of a previous chain of litigation that had ensued as between the parties, culminating before the Honourable Supreme Court, as well as the legality of the Respondent proceeding with the auction of certain immovable properties under Section 19(3) of the Ordinance subsequent to the withdrawal of execution proceedings earlier instituted in that regard. Vide the Appeal, the Appellant has assailed the Order made by a learned single Judge of this Court in the Underlying Suit on 09.05.2013 (the “**Impugned Order**”), disposing of CMA No.4322 of 2009 filed by the Appellant/Plaintiff under Order 39 Rule 1 and 2 CPC as well as CMA No. 6377 of 2009 filed by the Respondent/Defendant under Section 10 of Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter individually referred to as the “**Injunction Application**” and “**Leave Application**” respectively and collectively as the “**Subject Applications**”).

2. The course of the earlier round of litigation between the parties can be charted as follows:

(a) Suit No. 2134 of 1995 was filed by the Respondent on 21.09.1995 under the Section 30 of the House Building Finance Corporation Act, 1952 (the “**HBFC Act**”), with judgment being entered in favour of Respondent by the Banking Court No. II at Karachi (the “**Banking Court**”) on 09.05.1998 for recovery of a sum of Rs.56,63,769.19 against the Appellant with future mark-up from the date of institution till realization, as well as delivery of vacant possession of certain immovable properties, including Plot No. A/3, measuring 20 acres, along with unredeemed constructed houses thereon, and a decree being prepared accordingly.

(b) First Appeal No.75 of 1999 preferred against that judgment and decree was disposed of on 19.05.1999, whereafter the Appellant then preferred Civil Petition No.K-516/1999 before the Honourable Supreme Court, which was converted into an appeal vide an Order dated 31.08.1999 and disposed of in terms of a settlement and the hon’ble Supreme Court was pleased to dispose of the matter in terms of a settlement arrived at between the parties in the following terms:-

“1. That the petitioner to pay Rs.5.5 Million to the House Building Finance Corporation within 15 days’ time from today (31.8.1999) and undertake to pay rest of the amount as per terms of deed of assignment. After this payment mortgaged property worth Rs.4 Million will remain with House Building Finance Corporation while other property will be redeemed.

2. That rest of the claim based on interest/profit is referred to the official assignee who will calculate the same with the assistance of representatives of the parties in accordance with the terms of Deed of Assignment within one month time from today.

3. That calculation of the Official Assignee will be final and any amount found due will be paid by the petitioner within two months from the date of final calculation of official assignee after this balance payment withheld property will be released.

4. In case the amount of Rs.5.5 Million is not paid within time or calculation of official assignee are not honored by payment, the House Building Finance Corporation will recover the amount per decree of court.
  5. The fee of Official Assignee is Rs.10,000/- payable by the petitioner.”
- (c) The Appellant then assailed the report of the Official Assignee dated 13.11.1999 through Civil Misc. Application No. 29-K of 2000 in Civil Appeal No. 1321 of 1999 before the Honourable Supreme Court, on the ground that the calculation of interest at the rate of 17% per annum offended the Judgment of the Federal Shariat Court reported at PLD 1992 FSC 501 whereby certain provisions of the HBFC Act had been held repugnant to the injunctions of Islam, with that judgment being upheld by the Honourable Supreme Court vide its judgment reported at PLD 2000 SC 760. It was sought that the matter be therefore be remanded for recalculation. However, the Application was found to be without merit and dismissed vide an Order dated 14.12.2000.
- (d) Execution No.202 of 1998 (the “**Execution**”) had meanwhile been initiated before the Banking Court, wherein while dismissing an Application of the Appellant under Order 21, Rule 66 CPC, the Banking Court directed the Respondent to deposit the cost for publication of the sale proclamation under Order 21, Rule 66 CPC, but the Execution was instead withdrawn by the Appellant on 07.04.2006, following which the Respondent resorted to Section 19 of the Ordinance.
- (e) Apparently, proceedings for the winding-up of the Appellant had also been commenced on application moved by another creditor before this Court on 31.01.2001, registered as J.M. No. 44 of 2001, with an Order for dissolution of the Appellant being made in that proceeding on 02.03.2005, but a subsequent Order of 07.10.2008 then being made for its revival.

3. Succinctly stated, the case that the Appellant saw fit to set up through the Underlying Suit notwithstanding this backdrop, is that the Judgment and Decree in Suit No. 2134/95 were in contravention of the judgments of the Federal Shariat Court and Supreme Court of Pakistan, and all Order made by this Court and even the Apex Court in the proceedings that ensued therefrom were also contrary to law; that the Appellant had paid amounts in excess of what was due and was entitled to recover the differential; that the charging of interest and compound interest was contrary to law; that despite the amounts recovered from the Appellant, the Respondent delayed the redemption of properties that had been mortgaged, causing loss to the Appellant in the sum being claimed; that the Respondent had taken physical possession of four immovable properties, viz. Nos. R-238 to R-241 constructed on Plot No.A-3, Sector 42/A, Gulshan-e-Omair, KDA, Scheme No.3, Gulzar-e-Hijri, Karachi (the “**Subject Properties**”) on 10.08.1999, hence could even otherwise not charge mark-up beyond that date; that the withdrawal of the Execution had the effect of extinguishing the claim, if any, of the Respondent, hence the Respondent was estopped from resorting to the procedure laid down under Section 19 of the Ordinance and putting the Subject Properties to auction.
  
4. It is in such a framework that it was prayed by way of interim relief through the Injunction Application that the auction proceedings in respect of the Subject Properties notified by the Respondent in the newspaper be suspended and that the Respondent be restrained from proceeding with the disposal thereof pending determination of the Underlying Suit.

5. Following a hearing on the Subject Applications, the learned single Judge saw fit to exercise his discretion in favour of the Appellant, and was pleased to confirm the interim orders that had earlier been made on the Injunction Application, subject to the plaintiff furnishing either cash security or a bank guarantee in the sum of Rs.1,50,00,000/- within 15 days with the Nazir. In terms of the Impugned Order, the Respondent was also granted unconditional leave to defend, with the Leave Application being treated as the written statement and as many as 8 issues being framed from an examination of the pleadings, being as follows:

- (1) Whether the suit is maintainable and not hit by the principle of constructive res judicata?
- (2) Whether the judgment of hon'ble Supreme Court (Shariat Appellate Bench) reported in PLD 2000 SC 716, which was made effective from 30.6.2000 will have any effect on the settlement dated 31.8.1999?
- (3) Whether the plaintiff is defaulter in payment of dues to the defendant?
- (4) Whether the Official Assignee has calculated the dues in accordance with settlement reached between the parties?
- (5) Whether the plaintiff is liable to pay any interest/profit to the defendant if yes, then up to which period?
- (6) Whether the plaintiff is entitled to the liquidated damages and general damages as claimed in the suit?
- (7) Whether the plaintiff is entitled for the redemption of bungalows in question?
- (8) What should the decree be?

6. For reference, the operative part of the Impugned Order, reflecting the reasoning of the learned single Judge in his assessment of the Injunction Application, reads as follows:

“21. Now I would like to take up injunction application. The contentions of both the learned counsel have already been discussed in detail alongwith case law cited at bar, so I do not need to touch it again. On 28.4.2009 the learned Single Judge of this court as an interim measure restrained the defendant from finalizing the auction proceedings by accepting bid. The plaintiff has impugned the auction proceedings initiated through public notice published in the newspapers daily Jang and Dawn for selling bungalow Nos.R-238, R-239, R-240 and R-241 and it is also the matter of record that a learned counsel for the plaintiff on 9.3.2011 without prejudice offered to pay Rs.75 lacs to HBFC for full and final settlement of the claim or in lieu of confirmation of stay order he was ready to furnish solvent surety in the sum of Rs.80 lacs with the Nazir of this court. In order to safeguard and protect the interest of the defendant as well, I feel it expedient that the plaintiff in lieu of confirmation of stay should furnish solvent surety/security with the Nazir of this court, so the claim of parties vice versa may be adjudicated upon after recording evidence and reconciling the report of Official Assignee whether he has calculated the dues in terms of settlement reached before the hon'ble Supreme Court. The defendant in its leave to defend application stated that Rs.14,796,327/- is due up to 30.4.2009 and according to them the figure of this liability has substantially increased, while the plaintiff's claim is that the four bungalows involved in the present suit was taken over by the defendant on 10.8.1999, so in my view in order to decide the controversy regarding the cutoff date, the plaintiff has made out an arguable case and if without resolving the present controversy, the interim orders are vacated or the defendant is allowed to continue the auction proceedings, the claim of redemption shall become infructuous. On the contrary, no injury will be caused to the defendant when their right if any has been secured through solvent surety/security.”

7. Professing to be aggrieved, the Appellant has assailed the Impugned Order with a host of prayers not only assailing the same but also seeking a determination of the overall dispute on merits, largely mirroring the main prayers advanced through the plaint in the Underlying Suit. Needless to say, the present Appeal does not provide such a broad canvas and on query posed, learned counsel contended that the Appellant's grievance in relation to the Impugned Order was confined at this stage to the condition thereby imposed as to furnishing of cash security or a bank guarantee.

8. Proceeding with his submissions, learned counsel for the Appellant nonetheless embarked on a detailed exposition of the overall matter at length while exhaustively tracing the course of earlier litigation between the parties and repeatedly reiterating the case set up in the Underlying Suit vide the plaint (essentially as encapsulated herein above), and sought to contend that the condition marking the grant of the Injunction Application was unwarranted under the circumstances.
9. Conversely, learned counsel for the Respondent argued with reference to the various Orders on record relating to such earlier litigation that the Underlying Suit was vexatious and misconceived, and submitted that the Appeal itself was also not maintainable in view of Section 22(6) of the Ordinance.
10. Having heard the arguments advanced at bar, it would be appropriate to firstly address the question of maintainability of the Appeal, as it would serve no useful purpose to unnecessarily burden this judgment with a protracted discussion regarding the various points otherwise raised on behalf of the Appellant as to the merits of the case without that preliminary hurdle firstly being crossed. Moreover, we are cognizant of the fact that the gamut of issues which have been framed in the Underlying Suit and obviously remain to be adjudicated at the appropriate stage encompass precisely those very points, hence we would even otherwise be wary of embarking upon any discussion beyond what is strictly necessary for purposes of the matter at hand, lest any observation prejudice the case of either party at trial.
11. Turning then to Section 22(6) of the Ordinance, it merits consideration that apart from certain stated exceptions, the same bars an appeal against an interlocutory order in the following terms:

“(6) No appeal, review or revision shall lie against an order accepting or rejecting an application for leave to defend, or any interlocutory order of the Banking Court which does not dispose of the entire case before the Banking Court other than an order passed under sub-section (11) of section 15 or sub-section (7) of section 19. “

12. From a plain reading of sub-section (6) of Section 22, it is apparent that the said provision abridges and takes away the right of appeal in respect to the species of orders specified therein, including an “interlocutory order” of the Banking Court “which does not dispose of the entire case before the Banking Court”, subject however to the exceptions made in the case of orders passed under sub-section (1) of Section 15 or sub-Section (7) of Section 19 of the Ordinance.
  
13. For better appreciation of the issue involved, sub-sections (1) and (6) of Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 are reproduced hereunder:

“22(1) Subject to sub-section (2) any person aggrieved by any judgment, decree, sentence, or final order passed by a Banking Court may, within thirty days of such judgment, decree, sentence or final order prefer an appeal to the High Court.

(Emphasis supplied)

14. The interplay of sub-sections (1) and (6) leaves no room for doubt that the legislature intended to bar interlocutory appeals (other than of the nature specifically envisaged) so as to facilitate the expeditious trial of cases before the Banking Court for their conclusion in an as short a timeframe as possible, and there is a plethora of case-law on the subject whereby the scope of such bar is well settled, including several judgments of learned Division Benches of this Court in the cases reported as Karachi Pipe Mills Limited vs.



Habib Bank Limited and another 2003 CLD 1487, Nazir Ahmed Vaid and others vs. Habib Bank AG Zurich 2005 CLD 1571, Mehr Ashiq Hussain vs. Citibank N.A through Chief Manager and another 2006 CLD 167, Messrs. Sajid Brothers & Co. vs. Manager, Allied Bank Limited and 8 others 2012 CLD 1858, Nadeem Athar and another vs. Messrs. Dubai Islamic Bank (Pakistan) Ltd 2013 CLD 805, Bank of Punjab through authorized Attorney vs. Messrs. AMZ Ventures Limited and another 2013 CLD 2033, Bank Alfalah Limited vs. Interglobe Commerce Pakistan (Pvt.) Ltd and 5 others 2017 CLD 1428, Shehryar Waqas Malik and another vs. Muhammad Zafar Ali Khan and another 2018 CLD 1040, Messrs. Textileres (Pvt.) Ltd through Authorized Representative and others vs. Meezan Bank Limited and others 2019 CLD 853, and Haji Abdul Razzak (Deceased) through legal heirs vs. Faysal Bank Limited 2020 CLD 238.

15. Suffice it to say for present purposes that the Subject Applications did not finally determine the *lis* and are clearly of an interlocutory nature not falling within the exceptional category of orders susceptible to appeal. No argument to the contrary was even advanced, and in fact, on query posed, it was specifically conceded by learned counsel for the Appellant that this was so. In response to the further query as to how the Appeal was then maintainable, the prosaic argument forthcoming was that the Appellants right to a fair trial was safeguarded under Article 10-A of the Constitution. In our view, that is scarcely a compelling argument in the present context, as a right of appeal is a creation of statute and cannot be claimed as an inherent right where the legislature does not provide for it. We are fortified in this assessment by the judgment of the Honourable Supreme Court in the case reported as State Life Insurance Corporation of Pakistan through Chairman and others v. Mst. Sardar Begum and others 2017 CLD 1080. Furthermore, in the instance case, the Appellants claim as to his civil rights and obligations still remains to be adjudicated.

16. Learned counsel for the Appellant then sought to contend that this Bench, as a High Court, could otherwise exercise supervisory jurisdiction in the matter under Article 203 of the Constitution. In our view, that contention is entirely misconceived and also overlooks the mandate of Article 199(5) of the Constitution.

17. That being so, and it being evident that the Impugned Order is of an interlocutory nature susceptible to the bar under Section 22(6) of the Ordinance, we are of the view that this Appeal is clearly not maintainable, hence stands dismissed, along with all pending miscellaneous applications.

**JUDGE**

**JUDGE**

Karachi.  
Dated: \_\_\_\_\_