

2014 C L D 1343

[Sindh]

Before Faisal Arab and Muhammad Shafi Siddiqui, JJ

Messrs THARPARKAR SUGAR MILLS LIMITED through Authorized Representative and 7 others---Appellants

Versus

BANKERS EQUITY LIMITED through Official Liquidator---Respondent

High Court Appeal No.7 of 2013, decided on 4th January, 2014.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

---Ss. 27 & 22---Interpretation of S.27 of the Financial Institutions (Recovery of Finances) Ordinance, 2001---Suit for recovery was decreed in terms of compromise between the parties, and subsequently, the defendant filed another suit seeking to take advantage of a State Bank Circular---Contention of the defendant was inter alia, that till such time the proceedings of the second suit culminate, status quo with regard to mortgaged property had to be maintained---Held, defendant had sought indirect relief for setting aside or modification of the judgment and decree passed in the first suit, against which defendant had not filed appeal and decree had obtained finality---Under S.27 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 no court or authority was prohibited to revise, recall, call or permit or call into question the judgment and decree of Banking Court or the legality or propriety of anything done by the Banking Court, subject to provisions of S.22 of the Ordinance---Legislature in its anxiety to protect orders of the Banking Court had gone to the extent of ordaining that no authority other than the appellate forum shall even allow to throw a challenge to the validity of orders of the Banking Court and the same could not be assailed before any forum except by the way of appeal---Only possibility in which an injunction or restraining orders against execution of decree and sale of mortgaged property could be granted, would be on the presumption that decree in the first suit might be modified, altered and or set aside, which could not be presumed under provisions of S.27 of the Financial Institutions (Recovery of Finances) Ordinance, 2001--- Appeal was dismissed, in circumstances.

Marhaba Textile Ltd. v. Industrial Development Bank of Pakistan 2003 CLD 1822 rel.

Abid S. Zuberi along with Umer Lakhani for Appellants.

Ijaz Ahmed for Respondent.

Qadir Buksh Umrani, Official Assignee.

Date of hearing: 15th May, 2013.

ORDER

MUHAMMAD SHAFI SIDDIQUI, J.---The appellant in this appeal has challenged the short order dated 10-1-2013 and the reasons followed on 14-1-2013 whereby the application bearing C.M.A. No.1219 of 2010 filed by the appellant and other Judgment Debtors seeking recalling of the order dated 12-10-2010 passed in Execution Application No.217 of 2000, whereby the office was directed to send the file to the Nazir for compliance of the Court order, was dismissed, the appellant preferred this appeal.

The brief facts of the case are that the appellant being a public limited company obtained financial facility from respondent No.1 and the respondents Nos.2 to 8 executed their personal guarantees as security. The respondent No.1 filed a Suit bearing No.1507 of 1998 under section 9 of the Banking Companies (Recovery of Loans, Advances, Credits and Finances,) Act, 1997 (hereinafter referred to as the Act, 1997) for the recovery of outstanding loan. The said suit was compromised on 15-5-1999 in terms of the compromise application and the decree was drawn in terms thereof. Accordingly the Execution Application No. 217 of 2000 against the appellant was filed for sale of the mortgaged properties of appellant No.1, all measuring 122.24 acres situated at Deh 331, Taluka Kot Ghulam Mohammad, District Mirpurkhas together with equipment and machinery installed at Tharparkar Sugar Mills Limited etc. Nazir in terms of the order dated 19-2-2001 passed in Execution Application No.217 of 2000 was directed to prepare inventory as stated above and submit report. Such report was submitted on 20-3-2001, which was taken on record subject to all just exceptions.

It is the case of the appellant that the State Bank of Pakistan issued a BPD Circular No.29/2002 on 15-10-2002 and the appellant applied under aforementioned BPD Circular No.29/2002 to avail its benefits which benefits were refused and a Suit No.B-29/2005 was filed by the appellant against other defendants and financial institutions including respondent No.1. The primary relief sought in said suit is that the appellant qualified to be processed under the BPD Circular No.29/2002 dated 15-10-2002. Along with the said suit an injunction application bearing No.5611/2006 was also filed seeking orders to restrain the defendants mentioned therein including respondent No.1 from taking any coercive action to effect any recovery from the appellant other than the amount due and payable under the BPD Circular No.29/2002 and further sought restraining orders staying the proceedings in Execution Application No.6/2006 and Execution Application No.30/2005 i.e. apart from the Execution Application No. 217/2000, the subject property was also subject matter of Execution Application No.6/2006 and Execution Application No. 30/2005.

Learned Counsel for the appellant submitted that in view of the contentions raised, the status quo orders were passed in respect of the subject property pending disposal of the aforesaid proceedings. It is the case of the appellant that the said order is still in the field as C.M.A. No.5611 of 2006 is pending adjudication. Learned Counsel further argued that no action whatsoever can be taken against the subject property as "outstanding" of the appellant is yet to be determined in view of the pendency of Suit No.B-29 of 2005. Learned Counsel further submitted that the decretal amounts are also said to be outstanding amount under BPD Circular No. 29/2002 and hence he qualified to be processed thereunder to avail any benefit if available. Learned Counsel further submitted that an application seeking amendment in the aforesaid application has also been filed as present proceedings i.e. Execution Application No.217/2000 was not included in prayer clause and also amendment to the extent whereby the judgment and decree was challenged which was passed in Suit bearing No.1507 of 1998 was sought. He urged that unless such proceedings are culminated the auction proceedings would be against the interest of the appellant and also against the orders passed in the aforesaid Suit No. B-29 of 2005. Learned Counsel submitted that during the proceedings in Execution Application No.217/2000 learned single Judge vide order dated 12-10-2010 directed the office to send the execution application to the Nazir for the auction of mortgaged property. Aggrieved with this the appellant filed C.M.A. No.1219 of 2010 in the said execution application for recalling the order, however after hearing the parties, the application was dismissed vide short order dated 10-1-2013 and reasons followed on 14-1-2013 which orders are impugned herein this appeal.

On the other hand, though no reply or counter affidavit appears to have been filed by the respondent but it is argued that the application bearing C.M.A. No. 1219 of 2010 in the shape of objections to the execution application are not maintainable in view of the facts and circumstances of the case. Learned Counsel for the respondent submitted that the appellants have not approached the Court

with clean hands and suppressed the material facts from this Court. He further submitted that a consent judgment and decree was passed on 15-5-1999 and it has been more than 14 years since passing of the judgment and decree that the appellants are avoiding. Learned Counsel further submitted that the appellants remain in commercial production of sugar and other allied products continuously as evident from the report of the sugar production issued by Pakistan Sugar Mills Association but has not made any payment and has been purposely and deliberately delaying the execution proceedings. Learned Counsel further submitted that in view of the provision of sections 22 and 27 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as the Ordinance, 2001) the relief claimed is barred and even the Suit bearing No.B-29 of 2005 is not maintainable.

We have heard the learned counsel and have perused the record. The only question that requires consideration is as to whether after passing of the judgment and decree in Suit bearing No.1507 of 1998 this Court could stay the proceedings by itself despite the fact that no appeal is preferred by the appellant against the said judgment and decree which in fact is a consent decree. The appellants' case is that since they have preferred a Suit bearing No.B-29 of 2005 wherein they have sought declaration that the appellant is entitled for the benefit available to them under BPD Circular No. 29/2002 would be frustrated in case the auction of the subject property is continued to proceed and that in view of the status quo order passed in the Suit No. B-29 of 2005 the Nazir may not be allowed to continue the auction proceedings. In order to resolve the controversy we have to see as to what relief the appellant is seeking. The deeper scrutiny of the Suit No. B-29 of 2005 and miscellaneous application filed therein reveals that appellant is seeking indirect relief for setting aside and recalling and/or modification of the judgment/decree passed in Suit bearing No.1507 of 1998 which is to be decided in consideration of provisions of sections 22 and 27 of the Ordinance, 2001. In order to get benefit of the said provisions, we would like to reproduce the same as under:--

"22. Appeal (1) Subject to subsection (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.

(2) The appellant shall give notice of the filing for the appeal in accordance with the provisions of Order XLIII, Rule 3 of the Code of Civil Procedure (Act V of 1908) to the respondent who may appear before the Banking Court to contest admission of the appeal on the date fixed for hearing.

(3) The High Court shall at the stage of admission of the appeal, or at any time thereafter either suo motu or on the application of the decree-holder, decide by means of a reasoned order whether the appeal is to be admitted in part or in whole depending on the facts and circumstances of the case, and as to the security to be furnished by the appellant:

Provided that the admission of the appeal shall not per se operate as a stay, and nor shall any stay be granted therein unless the decree holder has been given an opportunity of being heard and unless the appellant deposits in cash with the High Court an amount equivalent to the decretal amount inclusive of costs, or in the case of an appeal other than an appeal against an interim decree, at the discretion of the High Court furnishes security equal in value to such amount; and in the event of a stay being granted for a part of the decretal amount only, the requirement for a deposit in cash or furnishing of security shall stand reduced accordingly.

(4) An appeal under subsection (1) shall be heard by a bench of not less than two Judges of the High Court and, in case the appeal is admitted, it shall be decided within 90 days from the date of admission.

(5) An appeal may be preferred under this section from a decree passed ex parte.

(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 subsection (11) of section 15 or subsection (7) of section 19.

(7) Any order of stay of execution of a decree passed under subsection (2) shall automatically lapse on the expiry of six months from the date of the order whereupon the amount deposited in Court shall be paid over to the decree-holder or the decree-holder may enforce the security furnished by the judgment-debtor."

"27. Finality of order.---Subject to provisions 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 legality or propriety of anything done or intended to be done by the Banking Court in exercise of jurisdiction under this Ordinance:

Provided that the Banking Court may, on its own accord or on application of any party, and with notice to the other party or, as the case may be, to both the parties, correct any clerical or typographical mistake in any judgment, decree, sentence or order passed by it."

Thus section 22 of the Ordinance, 2001 provides that 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 whereas section 27 of the Ordinance, 2001 provides that subject to provisions 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 legality or propriety of anything done or intended to be done by the Banking Court in exercise of jurisdiction under this Ordinance. The proviso of section 27 is only to the extent of correction of any clerical and typographical mistake in the judgment and decree.

Thus as is apparent section 27 prohibits any Court or authority to revise, review, call or permit to be called into question the judgment and decree of the Banking Court or the legality or propriety of anything done by the Banking Court. Although the judgment and decree in Suit No.1507 of 1998 was obtained by the respondent No.1 at the time when the Act of 1997 was in existence, however suit filed by the appellant bearing Suit No. B-29 of 2005 was under the Ordinance, 2001 which suit has to be weighed on the touch-stone of sections 22 and 27 of the Ordinance, 2001, No doubt the appellant has not sought any direct relief for setting aside the judgment and decree passed in Suit bearing No.1507 of 1998 but in fact has sought that they are entitled for the benefit under BPD Circular No. 29/2002 and in that case it would amount to an indirect revise, review or recall of the judgment and decree which otherwise is subsisting in accordance with law and available to be implemented. Section 27 of the Ordinance, 2001 attaches finality to the orders and categorically lays down that subject to provisions of appeal no Court or any authority shall revise or review or call or permit to be called in question any order or judgment of a Banking Court. In case of *Marhaba Textile Ltd. v. Industrial Development Bank of Pakistan* reported in 2003 CLD 1822 the learned Division Bench is of the view that the legislature in its anxiety to protect the orders of Banking Court, has gone to the extent of ordaining that no Authority other than the appellate forum shall even allow to throw a challenge to the validity of such order. Combined effect of these provisions is that judgment and orders passed by a Banking Court cannot be assailed before any forum except by way of appeal. We would not like to comment much about the application and implication of sections 22 and 27 of the Ordinance, 2001 on the proceedings of Suit No. B-29 of 2005 as it might prejudice the case of either party however, as

far as the compliance of the judgment and decree passed in Suit bearing No.1507 of 1998 is concerned it cannot be made subservient to be outcome of Suit No.B--29 of 2005 in view of sections 22 and 27 of the Ordinance, 2001.

The arguments of the appellant that the outstanding loan is yet to be determined is not tenable under the law as in view of the judgment and decree passed in Suit bearing No. 1507 of 1998, this question has already been answered as the decree speaks for the outstanding loan determined, therefore it does not lie in the mouth of the appellant to urge that the outstanding amount is yet to be determined. Perhaps the appellant intended to argue that they are entitled for the benefit under BPD Circular No. 29/2002 but such would only be an amnesty and would not vitiate the legal proceeding followed by judgment and decree and would not frustrate the proceedings initiated in pursuance of consent decree in terms of Execution Application No. 217 of 2000.

They may pursue their application i.e. C.M.A. No.5611 of 2006 which they have filed in Suit No. B-29 of 2005 which shall be considered in accordance with law on the touch stone of the relevant provisions of the Ordinance, 2001, however the appellant cannot seek such restraining order in the instant proceedings. The only possibility that an injunction and/or restraining orders be passed/granted would be on presumption that the decree in Suit No.1507 of 1998 might be modified, altered and/or set aside which could not be presumed under section 27 of the Ordinance, 2001. The stance of the learned counsel for the appellant which they have also mentioned in para-10 of their application bearing C.M.A. No.1219 of 2010 that in case the prayer in Suit No. B-29 of 2005 is granted the decree to be implemented in present execution application will be modified is also not tenable under law as this assertion would be against the provisions of sections 22 and 27 of the Ordinance, 2001.

In view of these reasons, we have dismissed this appeal by a short order dated 15-5-2013, however we have provided some additional reasoning in addition to the reasoning given by learned Single Judge.

KMZ/T-2/Sindh
dismissed.

Appeal