IN THE HIGH COURT OF SINDH CIRCUIT COURT, LARKANA

Civil Appeal No.D- 01 of 2013.

Present:

Mr.Justice Muhammad Junaid Ghaffar.

Mr. Justice Syed Irshad Ali Shah.

Appellant No.1	**Dr. Bhagwan Dass present in person.**
Appellant No.2	**Dr.Bhagwanti Devi through her Counsel Mr.Muneer Ahmed Khokhar, Advocate.**
Respondent:	**Habib Bank Limited through Mr. Ahmed Hussain Khoso, Advocate.**
Date of hearing:	16.09.2020.
Date of Judgment:	16.09.2020.

J U D G M E N T

Muhammad Junaid Ghaffar-J:- Through this Civil Appeal, the Appellants have impugned judgment dated 15.11.2012 in Suit No.43 of 2002 (old) and Suit No.18 of 2009 (new) passed by Banking Court No.1 Larkana through which Suit filed by them has been dismissed.

2. Learned Counsel for the Appellant No.2 submits that the Banking Court was not justified in dismissing the Suit of the Appellants; that in the first round of litigation, the Appellants being purchasers of the property from the borrower / mortgagor had approached the Banking Court No.1 in Execution Application, and being unsuccessful, this Court, and while disposing of 1st Civil Appeal No.D-03 of 2001 vide order dated 19.07.2001, certain directions were given to the respondent Bank in respect of payment of decretal amount and the mark up in accordance with law; however, respondent Bank has recovered the entire markup which is against the Circulars of State Bank of Pakistan; that the Appellant was compelled in the facts and circumstances to pay such amount under protest; however, thereafter filed Suit for recovery of the excess amount so recovered; that the bank statements relied upon by the respondent Bank are

false / incorrect and respondent Bank ought to have considered the calculations made by the Appellant and therefore, impugned order is liable to be set aside.

3. Appellant No.1 is appearing in person and has been permitted by us to assist the Court. According to him, in the order dated 19.7.2001, directions were given to calculate the markup amount in accordance with law, whereas the respondent Bank has charged compound interest which is illegal and a fraud; that the Chartered Accountant produced as witness has given its calculation which has been ignored by the Banking Court, therefore, Appeal merits consideration and the impugned order be set-aside.

4. Learned Counsel or the respondent Bank submits that the judgment and decree had attained finality and in Appeal against an order of the Executing Court, amount was agreed to be paid by the plaintiffs/Appellants, therefore, they had no cause of action to file a fresh Suit and seek refund of the amount of markup already paid.

5. We have heard both learned Counsel as well as Appellant No.1 in person and have perused the record placed before us.

6. The facts as they appear are that borrower of the Bank namely Shah Muhammad Pasha Khuhro had defaulted in making repayment of the finance facility, after which Suit No.795 of 1997 was filed by the Bank and the borrower contested the Suit and even leave to defend was granted. Thereafter the present Appellants filed application under Order 1 Rule 10 CPC which was dismissed vide order dated 04.7.1998 which admittedly was not impugned any further. Subsequently, the Suit of the respondent Bank was dismissed on 05.6.1999 against which Civil Appeal No.07 of 1999 was preferred; stood allowed by a remand order of this Court dated 23.12.1999 and thereafter judgment dated 14.6.2000 and decree dated 22.6.2000 was passed by the Banking Court. It appears that the judgment and decree as above has attained finality as the borrower never impugned the same. However, the Appellants stepped into the proceedings on the ground that they had already purchased

the property from the borrower during pendency of the recovery proceeding and their rights were protected under section 92 of the Transfer of Property Act, 1882, whereas, the borrower had also executed a registered Sale Dee in their favor. They then filed an application in the Execution proceedings for making payment of the amount which was dismissed by the Executing Court and against that, Civil Appeal No.D-03 of 2001 was preferred before this Court which was disposed of by a consent order dated 19.7.2001 in the following terms:

> "In view of the above, the following Order is passed with the consent of both the Learned Counsel.
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> 1. Appellants agree to make payment of the entire amount due against the mortgage with respect to the mortgaged property together with such costs which the respondent No.1 is entitle to recover according to law. However, if entitled benefit under any scheme is available, the same may be allowed as on the date of this order.
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> 2. The Appellants agree to make the payment of the entire amount within four weeks from the date of this order. The exact amount will be conveyed to the Appellant by respondent No.1 within three days which will be forwarded at their address through TCS and copy of the same shall also be filed in this Court. The amount so specified shall be deposited by the Appellants in the Banking Court in satisfaction of the decree. Respondent No.1 undertakes to hand over all the original documents in their possession with respect to the mortgaged property with the banking Court together with the list of documents. Copy of the list will also be provided to the Appellants.
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> 3. On receipt of the entire amount the Appellant shall be entitled to obtain the original documents from the Banking Court and shall have all the rights of mortgagor as available to them within the meanings of Section 92 of the Transfer of the Property Act and the property mortgaged shall stand subrogated in their favour. The Appellant shall move the separate application before the Trial Court where the Suit is presently pending between the Appellants and the respondent No.2. After hearing the parties, the learned Civil court shall decide the matter as to possession within four weeks. The possession shall be handed over to the party in pursuance to the Order of learned Civil Court. This arrangement has been specifically made to afford further opportunity to the respondent No.2 to avail the right of hearing, which, in spite of notice was not availed coupled with the fact that the property is liable to be auctioned and the Appellants are keen to save the property from being auctioned. The possession of the property shall then be handed over by the Banking Court in pursuance in the Order of learned Trial Judge. This Appeal stands disposed of in the above terms."

7. It appears that after this judgment the amount was calculated by the respondent Bank and as per plaintiffs' own version, the said amount was paid; but under protest, and subsequently the Appellants filed Suit No.43 of 2002 (old) and Suit No.18 of 2009 (new) before the Banking Court No.1,

Larkana which has been dismissed vide impugned judgment. The Banking Court settled the following issues for deciding the Suit of the Appellants:

"Issue No.1	Whether the Suit is maintainable according to law?
Issue No.2	Whether the plaintiff has cause of action to file the Suit?
Issue No.3	Whether the plaintiff is entitled for the relief claimed?
Issue No.4.	What should the decree be?

8. The learned Banking Court came to the conclusion that Suit is maintainable and so also that the plaintiffs/Appellants have a cause of action to file the Suit. However, issue No.3 *"that whether the plaintiffs are entitled for the relief claimed"* was decided against the plaintiffs/Appellants by dismissing the Suit. Insofar as issue No.1 and 2 are concerned, though respondent Bank is not aggrieved as no Appeal has been filed; but since this Appeal is under a special law i.e. Financial Institutions (Recovery of Finances) Ordinance,2001 (***"FIO 2001"***), and our jurisdiction to decide this Appeal is dependent on this very question that whether the Suit was even competent before the Banking Court; therefore, we intend to decide the same as well. Notwithstanding that Bank has not filed any Appeal in respect of Issue Nos.1 & 2, as above, decided in favor of the Appellants; however, at the same time there is no absolute bar on such adjudication by this Court as it goes to the root cause of the matter. We are conscious of the fact that this is an appeal arising out of the judgment and decree and jurisdiction that is being exercised by us is in continuation of the original suit and as such the Court is empowered to pass any order that can be made by a trial Court[1]. Order 41 Rule 33 of CPC read with section 107 CPC, deals with this situation and has provided that the powers of the Appellate Court in this situation are not curtailed and is affirmative having a non-obstante clause. In cases where only part of the judgment and decree (here Issue No.3 only) has been challenged, the Appellate Court, notwithstanding that no appeal has been preferred by the other party, may exercise its powers in favor of any respondent

[1] Crescent Leasing Corporation Limited v Sahad Goods Transport Company (2013 CLD 854)

although such respondent may not have filed an appeal. The question that this Court while hearing an Appeal under s.22 of FIO, 2001 can exercise such powers under CPC or not is, in our view, not an obstacle inasmuch as there is no complete bar on this at the same time. Moreover, the Appeal is being heard by the High Court and insofar as the provisions of s.22 ibid are concerned, there are no fetters as such in the FIO, 2001, as it is only the Banking Court which has been established under s.5 ibid, as being creature of a special law. The High Court as such is not defined in the FIO, 2001. It may however be noted that in large number of cases decided by this Court it has been repeatedly held that provisions of C.P.C. may not be applicable in rent proceedings (here a Banking case) in stricto sensu but the equitable principle of said Code will always be applicable in order to do complete justice between the parties and also to meet the ends of natural justice[2]. And lastly, it is settled law that these provisions are a matter of procedure, and as and when needed can be invoked by the High Court, whereas, at the same time are not inconsistent with the provisions of FIO, 2001, insofar as these Appellate proceedings under s.22 ibid are concerned. In the case reported as ***Crescent Leasing Corporation Limited v. Sarhad Goods Transport Company (2013 CLD 854)***, exactly in somewhat similar situation in a Banking matter, a learned Division Bench while exercising these powers under CPC has been pleased to set-aside the order of the Banking Court. It is well-settled that Courts are duty-bound to decide fundamental questions that may affect the legality of the proceedings before them, such as jurisdiction and limitation, at the earliest possible stage even if an objection to this effect has not been raised. In any event, the question of jurisdiction, being a legal one, can be raised even at the appellate stage[3]. The language used in the provision, according this, dictum, is affirmative and the rule is further strengthened by NON-OBSTANTE clauses giving the clear impression that the intention is beneficial, so that no legal right should be denied which the appellate Court considers should be

[2] Sheikh Saleem v Ataullah Khan (2014 SCMR 1694)
[3] Pakistan General Insurance Company Limited v Muslim Commercial Bank Limited (2015 CLD 600)

allowed within the framework of the suit[4]. To put the matter more lucidly, whereas upon the strict terms in Order 41, Rule, 22, C.P.C., a challenge or other partisan objection to a decree or order arises only on an appropriate filing of an appeal or lodging of cross-objections, such technicalities are confined to parties alone and the appellate Court, by virtue of Rule 33 in the same Order, has been rendered free to fashion relief according to the requirements of a case, irrespective of absence of requisite appeal or cross objections contemplated in Rule 22 of Order 41. The object of arming the appellate Court with such an extensive and wide ranging power seems to be none other than, to ensure prompt; and ready relief in cases of hardship as also generally, to redress wrongs and to do complete justice in the case[5]. The Hon'ble Supreme Court in the case reported as ***S. M. Yousuf & Bros v Mirza Muhammad Mehdi Pooya*** (PLD 1965 SC 15) has also dealt with this aspect in the following terms;

> **The terms employed to confer the power are of the widest amplitude to enable an appellate Court to pass decrees according to the justice of the case. The language used is affirmative, and the rule is further strengthened by non-obstante clauses, giving their clear impression that the intention is beneficial, so that no legally right should be denied which the appellate Court considers should be allowed within the framework of the suit. The non-obstante clauses are particularly significant. The fact that the appeal is as to apart only of the decree will not, by itself, restrain the appellate Court's power. Here the whole decree was before the appellate Court, but the other non-obstante clause is directly relevant, for it totally avoids any condition that a party seeking the benefit of the rule should itself have filed an appeal or objection. Therefore, the mere fact of the plaintiff not having filed an appeal against the failure of the trial Court to grant a decree against Amanullah Kirmani would not by itself be sufficient to justify refusal to exercise the power under the rule. The principle as stated in the judgment of the High Court, namely, that "in the absence of a counter appeal being filed a decree against another defendant cannot be given" not only constitutes a fetter upon the extremely wide power given to the appellate Court by the Code, but may also be thought to be in direct contravention of a clear provision in the rule.**

9. Coming to the very issue of maintainability of the Suit in question It is by now settled that for maintaining a Suit before a Banking Court under FIO 2001, there are certain prerequisites which are to be fulfilled and complied with. The Appellant was never a customer of the Bank within the meaning of section 2(c) ibid, and therefore, had no locus standi to file and maintain its Banking Suit. The

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[4] Pakistan International Airlines Corporation v Khalid Brothers (PLD 1992 Kar.78)
[5] Pakistan International Airlines Corporation v Khalid Brothers (PLD 1992 Kar.78)

learned Banking Court has neither appreciated the law itself; nor the precedents of the various High Courts on such aspect of the matter. There is a series of judgments which have now decided this issue that until and unless the person suing the Bank is a Customer as provided in FIO 2001, the Suit filed by such person would be incompetent before a Banking Court. This is besides the fact that even if a person is a customer, he has to fulfill other conditions such as availing of ***finance*** [s.2(d)] from a ***financial institution*** [s.2(a)]. In the case reported as ***Procter & Gamble Pakistan (Pvt.) ltd., Karachi v Bank Al-Falah Limited, Karachi (2007 CLD 1532)*** a learned Single Judge of this Court has decided this issue after a thread bare examination of FIO, 2001. The relevant finding reads as under;

> 15. The second category of persons who come within the definition of "customer" are the persons, who avails non-fund based financial facility such as Guarantee or Letter of Credit i.e. the persons on whose behalf a Guarantee or a Letter of Credit has been issued by a financial institution. The persons for whose benefit such instruments are opened i.e. the beneficiary of such instruments are not included within the definition of section 2(c) of the Ordinance, 2001 as it, includes within its ambit as "customer" only such person on whose behalf a Guarantee or a Letter of Credit has been issued. The persons who are entitled to receive finance from a Financial Institution without any obligation to repay, such as a beneficiary of a Guarantee or better of Credit or a person who is entitled to receive payment from a financial institution in order to make supplies to a customer of a financial institution cannot be treated as a `customer' of the financial' institution. There is no room for including the beneficiary of the non-fund based facility to be included in the definition of "customer". A beneficiary cannot be treated a customer of a financial institution as financial institution is not concerned as to who is the beneficiary of its Guarantee or Letter of Credit. It may not even come in contact with the beneficiary of a Guarantee or a Letter of Credit. The beneficiary has merely figured in at the instance of the person on whose behalf the financial institution has issued a Guarantee or a Letter of Credit. Extending the meaning of the word "customer" to the beneficiary of an instrument would amount to doing violence to the provisions of section 2(c) and section 9 of the Ordinance, 2001.
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> 16. The third and the last category of persons who fall under the definition of "customer" are those who stand surety or indemnifier before a financial institution on behalf of direct customers of financial institutions. This last category of persons though not the direct customers of a financial institution, as is the case with the first two categories of persons, but through a deeming provision of section 2(c) of the Ordinance, 2001 they too have been made customers of the financial institutions as they have taken upon themselves the obligation to discharge the liability of a customer, who availed the financial facility from a financial institution.
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> 17. The above analysis of the meaning of the word "customer" as defined in section 2(c) of the Ordinance clearly leads to the conclusion that the word "customer" means and includes (a) a person to whom finance has been extended directly by a financial institution; (b) a person on whose behalf a financial "institution undertakes to make payment to a third party e.g. under a Guarantee or a Letter of Credit; and (c) a person who has taken upon himself the obligation to repay to the financial institution the defaulted sum in his capacity as surety or

indemnifier. Therefore, only these three categories of persons come within the definition of "customer" and only they can sue or be sued under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. No person, no matter in what other capacity he is connected with a financial facility, if he does not fall within the definition of a "customer" as defined under section 2(c) of the Ordinance, 2001, he can neither sue nor be sued under section 9 of the Ordinance, 2001 and the legal remedy for and against, him lies before ordinary Civil Court.

18. From the above discussion it is also evident that the definition of "customer" as provided under section 2(e) of Financial Institutions (Recovery of Finances) Ordinance, 2001 includes within its ambit only such persons against whom a Financial Institution has recourse in the Event of default in repayment of finance provided by it i.e. the persons, upon whom obligation is created to repay in case of default in repayment and no one else and it is for this reason that section 9 of the Ordinance envisages only a financial institution and its customer as party to a banking suit. Thus, the persons who ultimately become liable to make payment to a financial institution in case of a default in the repayment of finance are the persons who fall under the definition of "customer" and none else.

10. In the case reported as *Haji DAD MUHAMMAD V MUSLIM COMMERCIAL BANK LIMITED* (2011 C L D 785) a learned Division Bench of the Baluchistan High Court has been pleased to hold as under;

In the above definitions, the word "customer" is limited to a person to whom finance has been extended and includes a person on whose behalf a guarantee or letter of assurance has been issued by a financial institution. It means, the persons, other than defined in section 2(c) of the Ordinance, do not come within the definition of a "customer". Merely being account-holders of the respondents, the Appellants cannot be considered as customers. And the amount allegedly deposited by the Appellants also does not come within the purview of "finance". Similarly, any facility defined in the definition provided by a financial institution covers within the ambit of "finance". Hence, opening of an account and deposition of amount by an account holder would not be considered as finance.

After the promulgation of Financial Institutions (Recovery of Finances) Ordinance, 2001, Special Banking Court has been constituted. Section 9 of the Ordinance which provides the procedure to approach Banking Court, is reproduced as under:--

> 9. Procedure of Banking Court. (1) Where a customer or a financial institution commits a default in fulfilment of an obligation with regard to any finance, the financial institution or, as the case may be, the customer, may institute a suit in the Banking Court by presenting a plaint which shall be verified on oath, in the case of a financial institution by the Branch Manager or such other officer of the financial institution as may be duly authorized in this behalf by power of attorney or otherwise.

Reading of above section clearly shows that all the claims relating to advancement of "loan" or defaults in fulfilment of an obligation pertaining to any "finance", is triable by a Banking Court. The law has not permitted any other claim to be tried by a Banking Court.

11. In the case reported as *INVEST CAPITAL INVESTMENT BANK LIMITED V Messrs HOUSE BUILDING FINANCE CORPORATION* (2015 CLD 1828) one of us

namely *Muhammad Junaid Ghaffar, J*, speaking for the bench has observed as under;

> 8. "Insofar as the legal objection, as raised by the learned Counsel for the Appellant with regard to the relationship of the respondent as a Customer in terms of section 2(c) of the 2001 Ordinance is concerned, we may observe that no such objection/plea was raised before the learned Banking Court, whereas no issue was framed in this regard, however, even otherwise, we are of the view that the Appellant which itself is an Investment Bank had sought funds/finance from the respondent and had issued a Certificate of Investment as a promissory note. It will not be out of place to mention that for a Suit to be maintainable before a Banking Court in terms of the 2001 Ordinance, there must exists a relationship of Customer and Financial Institution between the parties, whereas there must have been a finance facility, which must have been availed by the Customer and the dispute must have arisen between the Customer and the Financial Institution with regard to violation or breach of any obligation required to be performed or honored by any of them as defined in section 2(e) of the 2001 Ordinance, which again must be in respect of the Finance as defined in section 2(d) of the 2001 Ordinance. Though the learned Counsel for the Appellant has only raised the objection with regard to the extent that the respondent does not fall within the definition of Customer, hence, cannot file a Suit under the 2001 Ordinance before Banking Court and can neither claim markup or cost of funds. However, the matter is not that simple and in our view requires a deeper appreciation and understanding of the definition of Customer, Financial Institution and Finance as spelt out in section 2(a), (c) and (d) of the 2001 Ordinance and it would be advantageous to refer to the said provisions which read as under:-....."
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> 9. Perusal of the aforesaid definition of section 2(c) of the 2001 Ordinance reflects that a Customer includes a person to whom finance has been extended by a Financial Institution and also includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution, as well as a surety or an indemnifier. From the aforesaid definition it emanates that there are in fact three categories of persons who can be called or termed as a Customer within the contemplation of the 2001 Ordinance. First, a person to whom finance is extended by a financial institution; second a person who avails non-fund based financial facility such as letter of credit; third and last a person who stands surety or indemnifier before a financial institution on behalf of a direct customer of the institution and in fact is somewhat different from a Customer of first two categories. These three categories of Customer as defined in Section 2 (c) of the 2001 Ordinance, have been elaborately explained by a learned Single Judge of this Court in the case of Procter and Gamble Pakistan (Pvt.) Limited, Karachi v. Bank AL-Falah Limited, Karachi and 2 others (2007 CLD 1532).

12. Similar view has been expressed by another Division Bench of this Court in the case reported as ***Pakistan General Insurance Company Limited v Muslim Commercial Bank Limited (2015 CLD 600)***. In view of the above settled proposition of law we are unable to understand as to how the learned Banking Court could have come to the conclusion that the Suit of the Appellants was maintainable and they had a valid cause of action as well. The learned Banking Court while placing reliance on the cases referred to in the impugned judgment, has clearly fallen into error as the said cases had no relevance to the issue in

hand before the Banking Court. Therefore, in our considered view the Suit of the Appellants was itself not maintainable and was liable to be dismissed on this ground alone.

13. We may also add that even if the Appellants are treated as a "customer" (which in fact they are not), the remedy of a Banking Suit challenging the amount of mark-up payable pursuant to a judgment and decree is unheard of. For that a fresh Banking Suit is not at all a remedy which could be held to be maintainable. Besides this the Appellants in the earlier proceedings had already exhausted the remedy before the Executing Court as well as this Court wherein attempt to challenge the quantum of the decretal amount had failed and stood settled; hence, they had no lawful justification to further impugn it in any manner, including a fresh Banking Suit. The quantification of the amount of default once settled by way of a judgment and decree having attained finality cannot be altered in the manner as has been agitated. Reliance in this regard may be placed on the case reported as ***INTAKHAB HUSSAIN SHAH*** *v.* ***NATIONAL BANK OF PAKISTAN*** (2019 C L D 1021).

14. Coming to issue No.3 "*that whether the plaintiffs had any case for seeking such relief*" pertaining to merits of the case, it would suffice to observe, that the Appellants had, by their own conduct, no cause of action or grievance at least to initiate any fresh proceedings by way of a Banking Suit. Their case had attained finality after passing of a consent order by this Court in Civil Appeal No.D-03/2001 as reproduced above. Not only this, the Appellants, even after disposal of the Appeal, on not less than four occasions at least, attempted to get the order implemented in their favor by filing contempt applications against the Bank officials. Such fact has been concealed not only from the Banking Court but so also before this Court, as the memo of plaint as well as the memo of present Appeal are silent to this effect. We had summoned the original file of the earlier case bearing Civil Appeal No.D-03/2001, and on perusal of the same it appears that on 9.8.2001, CMA Nos.86 and 87 of 2001 were dismissed. On 15.8.2002 CMA Nos.133 and 109 of 2001 were dismissed. On 12.12.2002 CMA

Nos.150 and 160 of 2002 were dismissed and finally on 12.12.2004 CMA No.06/2004 was also dismissed. The order of 12.12.2002 is elaborative and explicitly decides the very issue now raised once again through filing of the Suit and this Appeal. It reads as under;

> We have considered the contentions raised by the Appellant and Mr.Abdul Khalique Bhutto. We are persuaded to agree with the submissions of Mr.Bhutto for the reason that a decree has already been passed by the Banking Court and the Appeal preferred by the Appellant has been disposed of by consent. The question of any calculation does not arise as it would amount to initiate proceedings which is beyond the scope of the decree. More over all the questions arising in respect of execution of the decree are to be decided by the Banking Court and not by any other court as provided in section 47 of the C.P.C. which contains that all questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.
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> In the above circumstances there is no question of any contempt of the Court and if the Appellant has any grievance, he may approach the executing Court for the redress of the grievance. The Appellant has stated that he has already deposited the entire decreetal amount under protest. Mere lodging of the protest is not a ground for subsequent submission of the application for contempt of the Court.
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> *The applications are absolutely frivolous and in ordinary course the cost ought to have been imposed but taking lenient view and considering that the entire decreetal amount has been deposited with the Banking Court, the cost is not being imposed, although a lot of precious time of this Court has been wasted in hearing of these frivolous applications. Both the applications stand dismissed."*

15. Perusal of the aforesaid order clearly reflects that the Court had in very clear terms, explained its order of disposal of the main Appeal dated 19.7.2001, by holding that after passing of a decree and a consent order against the impugned order of the Executing Court, ***the question of any calculation does not arise as it would amount to initiate proceedings which is beyond the scope of decree***. It was further held that there is no question of any contempt of the Court and if the Appellant has any grievance, he may approach the executing Court for the redress of the grievance as the Appellant has already deposited the entire decretal amount under protest. It was further observed that mere lodging of protest is not a ground for subsequent submission of the application for contempt. And finally the Court observed ***that applications are absolutely frivolous and in ordinary course cost ought to have been imposed but taking lenient view and***

considering that the entire decretal amount has been deposited cost is not imposed, although a lot of precious time of this Court has been wasted in hearing of the frivolous applications. This order was never impugned any further and in our view after passing of such order, there was no further grievance left for the Appellants to agitate any further, including a Banking Suit. We correctly remember, that while hearing this Appeal, the Appellant No.1 as well as Counsel for Appellant No.2 were confronted that why instead of filing any application in the disposed Appeal, they had preferred the Suit in question, and both of them had failed to assist us that this was already done and such attempt had failed as above. Such conduct on the part of the Appellants is not at all appreciable; rather needs to be deprecated. Moreover, perusal of order dated 19.7.2001 reflects that it was passed with the consent of the Appellants, and they had agreed to make payment of the entire amount due against the mortgage with respect to the mortgaged property together with such cost which the respondent Bank is entitled to recover *according to law*. Learned Counsel for Appellant No.2 as well as Appellant No.1 in person, both have vehemently argued that in *accordance with law* required the respondent Bank to claim the mark up amount as contended by them read with Circulars of State Bank of Pakistan and even on the basis of Chartered Accountant's report. This contention appears to be wholly misconceived inasmuch as the judgment and decree had attained finality long ago, whereas the Appellants were never party to such proceedings wherein the judgment and decree was passed, and thereafter their attempt to seek such relief before the executing Court also failed. In Appeal before this Court, they were lucky to get an order of consent for its disposal and according to our view, the learned Bench had, as an indulgence and on the basis of their submission that they had purchased the property from the borrower, and in the interest of justice not only entertained the Appeal of the present Appellants; but also passed a consent order as apparently the very maintainability of the Appeal was questioned on the very first date of hearing by the Bench. On perusal of the entire order it has also transpired that it was never the contention of the Appellants Counsel before the Court that they intend to dispute the decretal

amount with the Bank, whereas, they only sought indulgence and wanted the Bank to accept them as valid purchasers of the property having right of subrogation stepping into the shoes of the borrower / mortgagor, entitled to receive the original title documents of the property from the Bank. The said contention is in the following terms so recorded by this Court;

> Learned counsel for the Appellants further states that in addition to his anxiety regarding the auction of property the claim of respondent is subject to markup which continues to pile up day by day with the passage of time and as such Appellants are anxious to clear this liability and get the matter of title decided by the Civil Court where the dispute between the Appellants and respondent No.2 is already pending and the sale deed of the property has been already registered in favour of the applicants. The amount paid would be recovered from respondent No.2 in case the suit is decided in favour of the Appellants and in case of decision otherwise they are prepared to enter in the shoes of the mortgagor of the property in place of the bank and enjoy all the rights available to the bank with respect to the said property. He further stated that this was necessary to protect the property now owned by the Appellants."

16. Not only this it is also pertinent to observe that even in the first round of litigation when Appeal No.D-07/1999 preferred by the Bank against the borrower (predecessor in interest of the present Appellants) was decided on 23.12.1999 while remanding the matter, it was categorically held by the Court that ***"it is clarified that Mark-up/interest shall continue to accrue in accordance with law on the outstanding amount until it is paid by the respondent"***. Mere use of the word in accordance with law does not ipso facto means to review / modify the judgment and decree as is now being contended by the Appellants by placing reliance on State Bank of Pakistan's Circulars. In fact, *in accordance with law* here means that according to the judgment and decree which stood finalized way back in 2000.

17. Now coming to the conduct of the Appellants it may be observed that after passing of the consent order in their Appeal on 19.7.2001, and even after dismissal of at least four contempt applications on different occasions, the Appellants started another round of litigation independently by way of a Banking Suit which apparently was not at all maintainable which has now culminated into the present Appeal. Their entire effort now is to modify the judgment and decree which has attained finality in the earlier proceedings, whereas, without prejudice, at most they had stepped into the shoes of the borrower, and as

stated had agreed to initiate proceedings of recovery against it; but instead came up with a fresh Suit and that too against the Bank. In fact, the original borrower also could not have dreamt of or attempted so, after the judgment and decree had attained finality. This Court, or for that matter, even the Banking Court or the Executing Court, has no jurisdiction to alter or amend / modify the judgment and decree in question as of now. Appellants taking leverage of the legal proceedings and its availability without incurring of costs commensurate with such luxury, have burdened the Court below as well as this Court with frivolous and vexatious litigation against the Bank. In fact, once they were let off by this Court while deciding the contempt application as above through order dated 12.12.2002; however, instead of showing obedience, they have ventured into this expedition exercise taking advantage of permission to appear in person. This deleterious tendency of the Appellants to launch frivolous cases one after the other, is an attempt to stultify the Court process; restraining it from taking up more urgent and important cases. It is high time that the long arm of the law must throttle such litigative behavior to restore confidence and credibility of the judicature amongst the masses. The Appellants have fully exploited the Court's generosity by way of a very clever adventure of abuse of the process of the Court. They have been undaunted by the orders of the Court dismissing their claims, and have made attempts after attempts to grossly abuse the process of the Court repeatedly and unrepentantly. It is high time for the Courts to take effective measures to curb the menace of uncalled for and frivolous litigation by imposition of costs as one of the deterrent modes to curb such litigation[6]. Reliance may also be placed on the cases reported as **Moiz Abbas v Mrs. Latifa (2019 SCMR 74) Province of Baluchistan v Murree Brewery Company Limited (PLD 2007 SC 386) Sadruddin Shaikh v Sajjadullah Qureshi (PLD 2006 SC 341) Muhammad Rafiq v Ataullah (1985 SCMR 1226).** Notwithstanding these very undeniable facts and circumstances we, after hearing the Appellant and its Counsel, and before

[6] S.M.Sohail v Mst Sitara Kabir-Ud-Din (PLD 2009 SC 397)

announcing our short order, had given a concession that whether they intend to withdraw the Appeal, failing which it would be dismissed with cost(s); however, they have chosen to press the same.

18. In view of hereinabove discussion, the Appeal was dismissed by means of a short order on 16.9.2020 with cost of Rs.50,000/= (Fifty Thousand Only) to be deposited equally with the Clinic at Circuit Court Larkana and High Court Bar Association Larkana recoverable as arrears of, and under the Land Rand Revenue Act. The above are the reasons thereof.

JUDGE
21.9.2020

JUDGE

No matter:

Directions

- Cost/amount of fine Rs. 50000/- not deposited as per Order dt: 16-9-2020. applicant counsel not Complied above Orders.

* *

- Notice issued to appellant No.1 and Counsel for appellant No.2.
- Statement dt: 28-08-2021 filed by appellant No.1.

09.02.2022. None present.

Issue notice again. Re-appellants for adverse in office.

Judge

Judge.