

ORDER SHEET
IN THE HIGH COURT OF SINDH KARACHI

Execution No. 46 of 2011
(In Suit No. B-69 of 2009)

| DATE | ORDER WITH SIGNATURE OF JUDGE |
|-------------|--------------------------------------|
|-------------|--------------------------------------|

| | | |
|--|-------|---------------|
| House Building Finance Corporation Limited | | Decree Holder |
|--|-------|---------------|

VERSUS

| | | |
|--------------------------------------|-------|-----------------|
| First Dawood Investment Bank Limited | | Judgment Debtor |
|--------------------------------------|-------|-----------------|

Dates of hearing: 06-03-2018; 16-03-2018 & 30-03-2018

Mr. Waqar Ahmed, Advocate for Decree Holder.

Mr. Abdul Qayyum Abbasi, Advocate for Judgment Debtor.

Mr. Muhammad Rizwan-ul-Haque, SEVP.

Syed Muhammad Ali, Chief Executive Officer & Company Secretary.

ADNAN IQBAL CHAUDHRY J. :-

1. Vide judgment dated 5-11-2010 the suit was decreed in the sum of Rs.75,000,000/- along with cost of funds from the date of default till realization. Cost of the suit was also awarded at Rs.15,058/-.

2. Pending this Execution Application, the decree was appealed by the Judgment Debtor without success. The judgment dated 21-8-2013 dismissing Special HCA No.79/2011 was assailed by the Judgment Debtor before the Honourable Supreme Court vide Civil Petition No.599-K/2013 which too was dismissed vide short order dated 31-3-2016 *albeit* in the following terms:

“For reasons to be recorded later, this petition is dismissed. However, on account of the concession granted by the respondent’s counsel upon instructions, the decretal amount shall be paid by the petitioner in 12 monthly installments, which shall be paid every month commencing from April 2016. It is directed that 10% of the decretal amount shall be deposited by the petitioner by 5th of April 2016 towards the first installment. The

remaining 11 monthly installments shall be equally divided and deposited by the 10th of each month. In case of default of any two consecutive monthly installments, the concession of making payment in installments shall stand withdrawn and the Executing Court shall proceed to recover the entire outstanding decretal amount. Taking into consideration the deposits made through installments, the security tendered by the petitioner shall be proportionately released."

3. This Execution Application was filed on 9-5-2011. Vide order dated 13-5-2011 an attachment order was passed, and vide order dated 18-10-2011 the Execution Application was allowed as prayed. Pursuant to the attachment order, certain securities owned by the Judgment Debtor were attached and some of them were remitted to the Nazir's Central Depository Account [CDC Account] on or about 30-8-2011. The securities remitted to the Nazir's CDC Account were put up for public auction in 2013 and then again in 2015 but did not attract any buyer. By CMA No.248/2017 the Decree Holder has prayed for a re-auction of said securities.

4. Amongst the securities remitted to the Nazir's CDC Account were certain TFCs which matured during attachment. Therefore the issuer thereof (Gharibwal Cement Ltd.) remitted the maturity amount of Rs.6,000,000 to the Nazir on or about 15-10-2015. By CMA No.249/2017 the Decree Holder has prayed for the release of the said Rs.6,000,000 to the Decree Holder in execution of the decree.

5. The Judgment Debtor has opposed both the aforesaid CMA No.248/2017 and CMA No.249/2017 on the ground that if cost of funds are calculated as per the Judgment Debtor and if value of securities (movables) are deducted/adjustments as per the Judgment Debtor, then the decree has been satisfied.

6. Per the Decree Holder, after applying cost of funds to the amount decreed, the total amount recoverable under the decree stood at Rs.148,910,437/- at the relevant time; that pursuant to the abovementioned order dated 31-3-2016 passed by the Honourable Supreme Court, the said amount was payable by the Judgment Debtor in installments as follows; but the Judgment Debtor failed miserably to make the required payments as follows :

| Payable on | | Paid on | |
|--------------|--------------------|------------|-------------------|
| Date | Rs. | Date | Rs. |
| 5-4-2016 | 14,891,044 | 8-6-2016 | 7,500,000 |
| 10-5-2016 | 12,183,581 | 8-6-2016 | 7,771,387 |
| 10-6-2016 | 12,183,581 | 27-6-2016 | 242,774 |
| 10-7-2016 | 12,183,581 | 28-7-2016 | 371,387 |
| 10-8-2016 | 12,183,581 | 26-8-2016 | 248,397 |
| 10-9-2016 | 12,183,581 | 21-9-2016 | 371,387 |
| 10-10-2016 | 12,183,581 | 26-10-2016 | 371,387 |
| 10-11-2016 | 12,183,581 | 23-11-2016 | 371,387 |
| 10-12-2016 | 12,183,581 | 29-12-2016 | 371,387 |
| 10-1-2017 | 12,183,581 | 4-1-2017 | 371,387 |
| 10-2-2017 | 12,183,581 | 3-2-2017 | 371,387 |
| 10-3-2017 | 12,183,583 | - | - |
| Total | 148,910,437 | | 18,362,267 |

7. Thus, per Mr. Waqar Ahmed Advocate, the Judgment Debtor was in default from day one of the order dated 31-3-2016 passed by the Honourable Supreme Court. He pointed out that vide letter dated 28-4-2016 and again by letters dated 26-5-2016 and 16-6-2016 the Decree Holder informed the Judgment Debtor that the latter's computation of the installments was by far less and incorrect and they provided them with a correct computation of the installments payable, but that the Judgment Debtor persisted with its ill conceived computation. Mr. Waqar Ahmed contended that since the Judgment Debtor had defaulted on two consecutive installments, the concession recorded in the order dated 31-3-2016 passed by the Honourable Supreme Court was withdrawn and the Decree Holder is entitled to continue with this Execution; hence CMA No.248/2017 and CMA No.249/2017.

8. On the other hand, Mr. Qayyum Abbasi Advocate for the Judgment Debtor submitted that if the correct rate of cost of funds is applied and if the securities of the Judgment Debtor are factored into the repayments, then there is no default of the Supreme Court's order dated 31-3-2016. From the record it appears that cost of funds certified by the State Bank of Pakistan [SBP] for the Decree Holder was as follows:

- (i) as on 15-12-2008 it was 6.02% ;
- (ii) on 24-10-2009 it was again fixed @ 6.02% which was revised on 3-12-2009 to 13.37% retrospectively from 24-10-2009 on account of a calculation error;

- (iii) on 5-10-2010 it was fixed @ 12.43% ;
- (iv) on 5-7-2011 it was fixed @ 12.74% ;
- (v) on 1-10-2012 it was fixed @ 14.33% ;
- (vi) on 1-4-2016 it was fixed @ 11.33% ;

From the above it appears that the SBP did not certify/revise cost of funds for the Decree Holder in the years 2013 to 2015 and the cost of funds fixed on 1-10-2012 @ 14.33% continued till 1-4-2016 when the rate thereof was revised and certified as 11.33%.

9. Mr. Qayyum Abbasi Advocate contended that since determination of the rate of cost of funds is based on the bank's financials for a particular financial year, such rate is relevant only for that financial year and cannot be made applicable to or carried forward to a subsequent financial year. Therefore, he submitted that the charge of cost of funds @ 14.33% for financial years 2013 to 2015 was unlawful. Mr. Qayyum Abbasi contended that for the years 2013 to 2015 the rate of cost of funds applicable to the Decree Holders would be 7.56% that had been computed by JCR-VIS, a credit rating agency engaged by the Decree Holder and whose report appeared on the web-site of the Decree Holder. The other submission of Mr. Qayyum Abbasi was that the Decree Holder was required by the Supreme Court's order dated 31-3-2016 to release securities in proportion to the payments made by the Judgment Debtor, which the Decree Holder did not do and therefore the Judgment Debtor was entitled to adjust/deduct the value of the securities from the amount of the installments due. He pointed out that by its letter dated 4-5-2016 the Judgment Debtor had raised such issue with the Decree Holder.

10. Adverting to the alleged missing rates of cost of funds for the years 2013 to 2015, Mr. Waqar Ahmed in rebuttal explained that from the year 2012 the Board of the Decree Holder, a public sector financial institution, was not duly constituted due to vacancies, which were eventually filled/notified by the Ministry of Finance on 28-7-2014, and thus the financials of the Decree Holder for the years 2012 to 2014 could not be finalized until 2016, and that is why the SBP could not certify cost of funds for the Decree Holder during the years 2013 to 2015. Although the SBP's letter dated 1-4-2016 seems to suggest that cost of funds determined thereby

was based on the financials of 2014 only, Mr. Waqar Ahmed submitted that in fact the SBP took into account financials for three years, 2012 to 2014, all three of which had been sent by the Decree Holder to the SBP at the same time. Mr. Waqar Ahmed then submitted that nothing turns on the so called missing rates of cost of funds for the years 2013 to 2015 as SBP's letter dated 1-10-2012 fixing cost of funds @ 14.33% categorically states that such rate *".....shall continue to be applicable till such time the next financial accounts are finalized and new cost of funds is certified and notified by State Bank of Pakistan"*. He submitted that that was in line with Section 3(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 which states that cost of funds shall be certified by the SBP "from time to time" as opposed to from year to year. He further submitted that the question of releasing proportionate securities did not arise because the Judgment Debtor had paid the agreed installments.

11. The case of the Judgment Debtor as advanced by Mr. Qayyum Abbasi is built on presuppositions, i.e. if cost of funds @ 7.56% are applied on the outstanding amount for the years 2013 to 2015, and further if the value of the securities is adjusted/deducted from the installments, which value being a unilateral assessment of the Judgment Debtor, then the Judgment Debtor cannot be said to be in default of the Supreme Court's order dated 31-3-2016. Indeed the break-up of repayments filed by the Judgment Debtor is based on such presuppositions. But these presuppositions are completely alien, rather contrary to the decree and to the Honourable Supreme Court's order dated 31-3-2016.

Per the calculation of cost of funds filed by the Decree Holder, on the date of the first installment fixed by the Honourable Supreme Court (viz. 5-4-2016), the cost of funds calculated from the date of default (15-12-2008) stood at Rs.69,971,322/- which made the total decretal amount Rs.144,971,322 (as on 5-4-2016 and not counting cost of the suit). 10% of that (in line with the Supreme Court's order) was at that time Rs.14,497,132 which was payable as the first installment on 5-4-2016. Assuming that the concession afforded by the Decree Holder to the Judgment Debtor (as recorded in the Supreme Court's order) entailed that cost of funds stood frozen on 5-4-2016, the subsequent monthly installments commencing 10-5-2016 would have been Rs.11,861,290/-. However as against the first

installment the Judgment Debtor paid only Rs.7,500,000 and as against the second installment the Judgment Debtor paid only Rs.7,771,387. Therefore, I agree with Mr. Waqar Ahmed Advocate and I hold that the Judgment Debtor had never adhered to the conditions of installments recorded in the Supreme Court's order dated 31-3-2016; thus the Decree Holder is entitled to continue with the execution of the decree, and the question of a proportionate release of securities does not arise. In these circumstances the question whether cost of funds were frozen on 5-4-2016 also does not arise and the Decree Holder is entitled to charge cost of funds till realization.

12. As regards Mr. Qayyum Abbasi's contention that the rate of cost of funds is only relevant for the financial year of the underlying financials/books and cannot be made applicable to or carried forward to a subsequent financial year, I do not see how that submission is relevant when it is not the case of the Judgment Debtor that but for the disputed rate of cost of funds (for 2013 to 2015) the Judgment Debtor was in compliance. Nonetheless, I refrain myself from considering such submission in these proceedings, for as a Banking Court I am bound by Section 3 of the Financial Institution (Recovery of Finances) Ordinance, 2001 to accept the certificate of the SBP as to cost of funds as being true and correct, which certificate categorically states that cost of funds being fixed thereby shall continue to be applicable till such time the next financial accounts are finalized and new cost of funds is certified and notified by the SBP. Section 3 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 reads:

"3. Duty of a customer.---(1) It shall be the duty of a customer to fulfill his obligation to the financial institution.

(2) Where the customer defaults in the discharge of his obligation, he shall be liable to pay, for the period from the date of his default till realization of the cost of funds of the financial institution as certified by the State Bank of Pakistan from time to time, apart from such other civil and criminal liabilities that he may incur under the contract or rules or any other law for the time being in force.

(3) For purpose of this section a judgment against a customer under this Ordinance shall mean that he is in default of his duty under sub-section (1) and the ensuing decree shall provide for payment of the cost of funds as determined under sub-section (2)."
(Underlining supplied for emphasis)

In my view, Section 3 of the Financial Institutions (Recovery) of Finances Ordinance, 2001 excludes the jurisdiction of a Banking Court from entertaining any challenge to the rate of cost of funds certified by the SBP.

13. In view of the foregoing, **CMA No.248/2017 is allowed** in the terms that the Nazir shall sell those securities of the Judgment Debtor that are lying in the Nazir's CDC Account, which sale be made through a stock broker as permitted by Order XXI Rule 76 CPC, and thereafter the sale proceeds be released by the Nazir to the Decree Holder after deducting his fee of Rs.25,000. Such mode of sale is being ordered keeping in view that a public auction of the said securities twice has not borne any fruit.

14. As regards the prayer of the Decree Holder in CMA No.249/2017 for release of the maturity amount of Rs.6,000,000 of the TFCs of Gharibwal Cement Ltd. lying with the Nazir, the opposition of the Judgment Debtor to the same is absurd when it claims to have included/adjusted such amount in the repayments made it. Thus **CMA No.249/2017 is allowed as prayed.**

15. By CMA No.258/2017 the Judgment Debtor had sought permission to place reliance on certain proceedings/documents. In view of the foregoing, **CMA No.258/2017 has served its purpose and is disposed off as such.**

J U D G E

DATE: 09-06-2018