

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

1st APPEAL NO.39 of 2014

Date	Order with signature of Judge
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1. For Katcha Peshi
2. For hearing of CMA No.1286/14
3. For hearing of Misc.No.1876/15

10.08.2015

Mr. Rana Azeem, Advocate for the Appellant.
Mr. Tasawwar Ali Hashmi, Advocate for Respondent Bank.

Instant appeal has been preferred against order dated 21.4.2014 passed by the Banking Court No.1, at Karachi, in Execution Application No.134 of 2000, whereby, the application filed by the appellant Under Section 151 CPC read with Order 21 Rule 1 & 2 CPC has been dismissed, whereas, the application filed by the respondent Bank for carrying out Sale of Mortgaged property, as well as adjustment of the amount lying with the Decree Holder Bank has been allowed.

After hearing of both the learned Counsel at some length, on 3.8.2015, the following order was passed:-

03.08.2015.

Mr. Rana Azeem Advocate for the Appellant.
Mr. Tasawwar Ali Hashmi Advocate for the Respondent.

The controversy in the instant appeal appears to be that a decree in the sum of Rs. 44,68,131/- was passed against the appellant which amount under a settlement scheme was accepted to the extent of Rs. 31,91,858/- as evident from the bank's letter dated 10th July, 2002. It appears that since the amount which was paid to the bank was lying with the Nazir of this Court in some other proceedings belonging to one of the partners who objected to such adjustment and ultimately this Court vide its order dated 28.3.2003 in High Court Appeal No. 41/2002 directed the Banking Court to make an inquiry as to whether this amount could have been lawfully adjusted towards the decretal amount and till such inquiry is made, though the bank had to retain this amount, but be invested in some profitable scheme for the benefit of the party who ultimately succeeds. This position continued as the parties litigated up to the apex Court and finally on 8.12.2010 in Civil Appeal No. 40 of 2006 filed by Respondent No. 3 the dispute was finally resolved by holding that the money was rightly adjusted. Now the dispute is the bank asserts that the compromise was undone by the order of this Court dated 28.3.2003 whereby it directed the Financial Institution to invest the amount for the ultimate benefit of the party who succeeds. Therefore, now the appellant is entitled to all the profit which on the amount lying with the Bank has accrued and on the other hand it has to pay the decretal amount with up to date mark-up.

The figures which have been placed before us are (i) decretal amount Rs. 4,468,131/- (ii) up to date mark-up Rs. 4,857,752/- total Rs. 9,346,399/-. On the other hand, the amount which was available with the bank and was invested under the directions of this Court is Rs. 3,637,186/- profit from 9.5.2003 to 20.6.2014 Rs. 1,407,394/- total Rs. 5,044,580 and a sum of Rs. 4,301,819/- has been shown as balance payable. Now the question arises, once the decree was satisfied, the Financial Institution could still claim the mark-up on the rate mentioned in the decree not only on the principal amount but also on the mark-up which was accrued till the decree was passed. Secondly, the difference between rate of mark up / interest charged by the bank and allowed on the investment appears to be at vast difference. In the circumstances, we direct the Financial Institution to place on record the then rate of mark- up on the basis whereof they were charging it on the loans and also the rate of mark up on investments. Let such statement be filed within seven days. To come up on 10.8.2015”.

Pursuant to the aforesaid order, Counsel for Respondent No.1 has filed a Statement today and has brought on record the mark-up rates for loans as well as for six monthly Term Deposit Receipts (TDR) and has contended that since the decree passed by the Banking Court was not fully satisfied, whereas, the amount of Rs. 36,37,186/- lying with the decree holder bank was invested on the directions of this Court dated 28.3.2003 in 1st Appeal No.41 of 2002 and such amount was not at the disposal of respondent Bank, therefore the Bank is entitled to recover the decretal amount with mark up till realisation of the same.

We have heard both the learned Counsel at some length today also and have perused the record and material placed before us. In our considered view, the contention so raised on behalf of the respondent bank does not seem to be correct or justified, in view of the fact that vide letter dated 10.7.2002 (pg: 57) through an internal communication, it has come on record that the Bank after receiving the principal amount Rs. 31,91,858/- had fully adjusted the account of the Judgment debtor/appellant and the differential amount of Rs. 445,328/-, was credited in the borrower's Account No. 402401-46 and thereafter the Branch Manager had requested the Head Office to initiate a write-off proposal. It would be advantageous to refer to the relevant portion of the said letter, which reads as under:-

Dear Sir,

ADJUSTMENT OF OUTSTANDING PRINCIPAL AMOUNT UNDER SBP INCENTIVE SCHEME THROUGH COURT A/C M/S DOLHIN AUTO INDUSTRIES.

“As per intimation already given over phone earlier, was confirmed that we have received a cheque of Rs.3, 637,186/- retained by the Banking Court No.1 in our favour for adjustment of outstanding liability of Decree

account of M/s Dolphin Auto Industries and have been credited in CD A/C 402401-46 on 5th of June, 2002 of the borrower. The amount of Rs.3,637,186/- has been released by the order of Banking Court No.1 under Execution No.134/2000 Suit No.209 of 1997 on 06.07.2002 between HBL Versus M/s Dolphin Auto Industries, Chaudhery Muhammad Ashraf, Dr. Malik Muhammad Arshad Khan & Raja M. Arif Directors. As such the principal amount of Rs.31,91,858/- has been fully adjusted on 09.07.2002 and the difference amount of cheque Rs.445,328/- is lying credit in borrower's account No.402401-46 for further disposal. We, therefore request your good self to please allow us to submit write off proposal and Chok List for full and final settlement of the A/c.

Thanking you

Yours faithfully,

Sd/-

(MUHAMMAD YUNUS KHAN)
MANAGER

CC:-

The SVP & Head of Litigation Department
HBL Litigation Deptt, 2nd
Muhammadi House, Karachi for information.

The above proposal appears to have been made in view of the settlements entered into with the borrower under its Incentive Scheme Circular No P/INST/1937 dated 20.04.2002 read Respondent Banks letter dated 15.5.2002 and principal borrowers acceptance of such offer vide letter dated 20.5.2002. In view of such position, we are of the view that after having received the principal amount, and crediting the borrower's account with the excess amount of money amounting to Rs.445,328/-, it cannot be said or argued that the decree passed by the Banking Court was not fully satisfied, merely on the ground that during pendency of 1st Appeal No.41 of 2002 before this Court and consequent to passing of order dated 28.3.2003 in the aforesaid appeal, whereby, while disposing of the same, in the intervening period, it was ordered that *the amount in question shall remain with the Decree Holder Bank, who shall invest it in some profit bearing scheme at their Bank for the ultimate benefit of the succeeding party, whereas, the documents of mortgage property available with them shall not be returned/released*, as the said order was only to the extent of securing interest of the principal borrower and their partners i.e. appellant as well as respondents No.2 to 4 and not with regard to the interest of the Decree Holder Bank as they had a dispute in respect of the said amount, which ultimately stands resolved in favor of the appellant as noted in our order dated 3.8.2015. Once the Bank had received the amount and after adjustment of the principal outstanding against the appellant as well as respondent No.2, excess amount

had been credited in the borrower's account, there is no question of the decree being un-satisfied till date. The present stance appears to be an attempt by the Decree Holder Bank to retract from its earlier stance; terms as well as settlement of dispute with the appellant on the basis of its own Circular as well as letters as referred to hereinabove. It is also pertinent to mention that all along this period, the said amount was with the Bank and was invested with it as a matter of convenience for the Bank, otherwise the Court while passing order dated 28.3.2003 in 1st Appeal No 41 of 2002, could have directed the Bank to deposit the same with the Nazir of this Court for further investment, until resolution of dispute amongst appellant and Respondent No. 2 to 4. Similarly, the respondent Bank never came with any application on its own to return the amount either to the appellant or to this Court for any further action.

In view of hereinabove, we are of the view that instant appeal merits consideration, therefore, while setting aside the impugned order, we hold that the decree in question stands satisfied, whereas, the documents of the property in question are to be released to the appellant who is also entitled for issuance of full and final settlement Certificate and Redemption of Mortgage property as well as refund of the excess amount available with the Decree Holder Bank, after adjustment of the principal amount of Rs. 31,91,858/- as well as the profit so earned till date. The appeal stands allowed in the above terms.

Office is directed to send copy of this order immediately to the Banking Court No. 1 at Karachi for compliance.

JUDGE

JUDGE