Order Sheet

IN THE HIGH COURT OF SINDH, KARACHI

Execution Application No. 39 of 2020

[National Bank of Pakistan v. Mrs. Batool Begum & another]

Date	Order with signature of Judge

FOR HEARING OF EXECUTION APPLICATION.

Decree Holder — Through Ms. Naheed A. Shahid, Advocate
Judgment Debtor — Through Mr. Asghar Bangash, Advocate
Date of Hearing — 03.02.2025

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ARSHAD HUSSAIN KHAN, J.- Through present Execution Application, the decree holder National Bank of Pakistan seeks execution of the interim decree dated 15.09.2011 and the final decree dated 10.11.2011, passed in Suit No. B-23/2009 against the judgment debtors namely; Mrs. Batool Begum wife of Ishaq Jugnu and Muhmmad Shahid Jugnu by sale and attachment of the judgment debtor's moveable and immovable properties.

2. The facts in brevity are that the decree holder / plaintiff filed suit No.23/2009, under Section 9 of the Financial Institution [Recovery of Finances] Ordinance of 2001 (the **Ordinance of 2001**) for recovery of **Rs.63,420,918/- along with cost of funds**, Sale of Mortgaged Properties, Pledged and Hypothecated Machinery, Goods and other relief(s), which was decreed, **vide interim decree dated 15.09.2011 and the final decree dated 10.11.2011** against which Special High Court Appeals No. 183 of 2011 and No.11 of 2012 have respectively been preferred by the judgment debtors, which were dismissed by a Division Bench of this Court, vide a common judgment dated 18.03.2024, hence the present execution application, which was filed during pendency of the Special High Court Appeals.

3. Upon issuance of notice to the judgment debtors, Objections to the Execution Application on behalf of judgment debtor No.1 have been filed stating therein that Article 181 provides residuary clause of three years for filing execution application but in the instant matter the execution application has been filed to implement the interim decree dated 15.09.2011 and the final decree dated 10.11.2011 after a lapse of 09 years as such instant execution application is miserably time barred.

Further the decree holder unilaterally added the cost of fund in the decretal amount though it was never awarded to the decree holder, as such, the same is untenable in law. It is stated that a suit No.B-79 of 2008 has been filed by judgment debtor No.2 against the decree holder for Declaration, Accounts and other reliefs in which evidence is partly recorded and the matter is still subjudice before this Court. It is further stated that instant execution is not maintainable as it has been filed by an incompetent person and the very institution of execution is barred by Order 29 CPC, as such the execution, on this sole ground, is also not maintainable and liable to be dismissed.

4. Learned counsel for the decree holder has argued that as far as the interim decree is concerned, the judgment debtor had admitted their liability and the banking court had rightly decreed the suit to the extent of **admitted amount of Rs.55,743,026/-** and as far as the final decree is concerned, the judgment debtor did not fulfill the condition and / or furnished any surety, the banking court was well within its powers to decree the suit for the **balance amount of Rs.7,677,892/-.** She has further argued that the appellate court has also maintained both the decrees challenged in the Special High Court Appeals No. 183 of 2011 and No.11 of 2012. She has further argued that once a decree is passed it was to be converted automatically into an execution under section 19 of the Ordinance, 2001, therefore, the execution application is not barred by time. Insofar as the objection with regard to cost of fund is concerned, learned counsel while referring to section 3 and 17 of the Ordinance 2001, submits awarding of cost of fund is mandatory in nature from the date of commission of default by the borrower/customer in fulfilment of the obligation. She further submits that non awarding of cost of funds in the present case was merely an error/omission on the part of the court as nowhere the court has observed that decree holder /plaintiff was not entitled for the cost of fund, as such the error /omission may be rectified by allowing the cost of fund. Lastly, she has prayed that the present execution application may be allowed and the cost of fund from the date of default till realization of the entire decretal amount. In support of his contention, she has relied upon the cases reported as *Habib Bank Limited v. Tauqeer Ahmed Siddiqui and another* [2009 CLD 312], *Saeedullah Parachi v. Habib Bank Limited and others* [2014 CLD 582] and an

unreported judgment passed by the Lahore High Court in the matter of *MCB vs. M/s. Mushtaque & Company & 02 others in Execution First Appeal No.01/2020*.

5. Learned counsel for the judgment debtor while reiterating the contents of the **Objections** filed on behalf of judgment debtor No.1 has argued that apart from the legal objections the interim decree was passed for a sum of Rs.55,743,026/- and final decree was passed for the amount of Rs.76,77,892/-, which makes a total sum of Rs.63,420,918/- but the total amount of execution as prayed by the decree holder is Rs.112,590,987/- which is without any justification and/or any basis. He has further argued that the decree holder has unilaterally calculated the cost of fund from the date of default, allegedly from 30.06.2007 till 11.11.2020 as Rs.49,170,069.39/- as such the same is not maintainable in the eye of law as this Court did not allow the cost of fund. He has argued that except the amount of interim decree i.e**. Rs.55,743,026/-** and the amount of final decree i.e. **Rs.76,77,892/-** no other relief was granted by the banking court. He has finally argued that the alleged cost of fund calculated by the decree holder is beyond the decree and this Court being the executing court cannot go beyond the same. In support of his contention, he has relied upon the cases reported as *Habib Bank Limited and another vs. Wasim Enterprises and others* [2007 CLD 473], *Khalid Latif v. United Bank Limited* [2006 AC 960] and *Allied Bank Limited v. Messrs Fazal Vegetable Ghee Mills and others* [2019 CLD 441].

6. I have heard the learned counsel appearing for the parties, perused the record and the relevant law.

From perusal of the record, it appears that the aforesaid suit of the decree holder / plaintiff was decreed, vide interim decree dated 15.09.2011 and the final decree dated 10.11.2011, against which Special High Court Appeals No. 183 of 2011 and No.11 of 2012 have respectively been preferred by the judgment debtors. However, during pendency of the above Special High Court Appeals the decree holder filed present execution application. Subsequently, the division bench of this Court on 18.03.2024, while dismissing the said appeals and upholding the orders and / or decrees of the banking court, has observed as follows :

> "11. The impugned judgment and decree dated 15.09.2011 and 10.11.2011 have been passed on proper appreciation of facts and law. The Learned Single Judge has not fallen into any error while passing the impugned judgment and decree which require interference".

7. As far as the contention of learned counsel for the judgment debtor that the execution is miserably time barred is concerned, undeniably, the appellant instituted the suit under the provisions of the Financial Institutions (Recovery of Finances) Ordinance 2001 and the decrees in this case were passed under the Ordinance 2001. The Ordinance also provides a complete mechanism to carry out the execution. Section 19(1) of the Ordinance mandates that upon pronouncement of the judgment and decree by the Banking Court, the suit shall automatically stand converted into execution proceedings without filing a separate application in this regard. Under the Ordinance 2001, there is no requirement for decree holder bank to file separate execution petition and it is the duty of the Court itself to convert the decree into execution without waiting for separate application for execution from the decree holder.

The Divisional Bench of this court while dealing with somewhat identical issue in the case of **Faysal Bank Limited** *through Authorized Attorney* v. **Masood Asghar and another** [2024 CLD 744 (Sindh)], has held as under:

> "4. Financial Institutions (Recovery of Finances) Ordinance, 2001 ("FIO, 2001") is a special law and covers all proceedings upto execution. In the previous law that is Act of 1997, it enabled the Court to convert the proceedings into execution application on preferring an application whereas the frame of instant law is different as can be seen in terms of Section 19 of the FIO, 2001. It provides that upon announcement of Judgment and decree the suit shall automatically convert into execution application. Thus no sooner the Judgment and Decree is passed the proceedings stand converted into execution application and the act does not provide a way to file a fresh execution application, as inadvertently did by the appellant. At the most, since an appeal was pending before this Court and the machinery of execution was not triggered, the application that was inadvertently moved as an execution application could at the most be considered for triggering machinery of the Banking Court where the suit was decreed and converted into execution application.
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> 5. Surprisingly, the Banking Court did not discuss Section 19 of the FIO, 2001, which is described above. Section 24 of the FIO, 2001 thus cannot be conceived to have its application on the execution proceedings as the suit proceedings automatically stands converted into execution leaving no room for limitation. Since the FIO, 2001

> does not recognize the scheme of filing fresh execution application, thus we deem it appropriate to allow this appeal and refer the matter to the Banking Court to club the execution application with suit which is deemed to be converted into execution. The appeal is allowed in the above terms."

Similar view was also taken by the divisional bench of Lahore High Court in the case of *Saeed Ullah Paracha v. Habib Bank Limited and others* [2014 CLD 582 (Lahore)].

In view of the above dicta the present execution application cannot be considered as time barred, as such the objection of the judgment debtor in this regard is discarded.

8. Insofar as the issue of cost of fund is concerned, Sections 3 and 17 of the Ordinance, 2001, indicate that cost of funds is a statutory entitlement of the financial institution from the date of default. However, as the decree does not explicitly award the cost of funds, this Court, as an executing Court, cannot modify or extend the terms of the decree beyond its scope. The cost of funds claimed unilaterally by the decree holder cannot be allowed, the total amount claimed in the execution**,** must be limited to the amount decreed, i.e. Rs.63,420,918/- as any additional amount beyond the decretal amount, unless explicitly awarded by the decree, cannot be enforced in execution.

In view of the above discussion, the execution application to the extent of decretal amount of **Rs.63,420,918/-** [viz.Rs.55,743,026/- towards interim decree and Rs.76,77,892/- towards final decree] is allowed. The Nazir of this Court is directed to proceed with the attachment and sale of the judgment debtors' mortgaged properties, pledged and hypothecated machinery and goods in accordance with the law to satisfy the decretal amount.

JUDGE