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Judgment Sheet
IN THE LAHORE HIGH COURT AT LAHORE.
JUDICIAL DEPARTMENT

W.P. No. 155 of 2015

M/s. Qadoos Brothers Poultry Farms

Versus

Judge Banking Court No.1 Gujranwala etc.

JUDGEMENT

Date of Hearing	03.05.2017, 09.05.2017 & 17.05.2017
Petitioner by:	Mr. Tariq Mehmood Bhatti, Advocate
Respondent By:	M/s. Ashar Elahi, Advocate and Muhammad Adnan Kazmi, Advocates on behalf of Faysal Bank

SHAMS MEHMOOD MIRZA, J. This Bench was constituted to render judgment, *inter alia*, on the question whether the banking court as defined in section 2 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the **Ordinance**) has the jurisdiction to restore a suit which was dismissed for non-prosecution.

This judgment shall also decide the following cases as similar question of law has been raised therein:-

(1) FAO No. 99 of 2017

(2) FAO No. 23693 of 2017

(3) CM No. 68-B of 2017 in COS No. 44 of 2013

2. For facility of reference order dated 14.03.2017 passed by a learned Division Bench of this Court requesting the Hon'ble Chief Justice to form a full bench is reproduced hereunder:

> First legal question involved in this case is whether Banking Court has jurisdiction to restore the suit which was dismissed for non-prosecution. Secondly whether restoration of suit by Banking Court will be in exercise of independent power under Order IX Rule 9 CPC or it will amount to review which is specifically barred under section 27 of the Financial Institutions (Recovery of Finances) Ordinance, 2001.
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> 2. We have noted that there are conflicting views of the learned Division Benches of this Court on these propositions of law. In unreported judgments delivered by this Court in *FAO No.455/2013 titled HBL* vs. *Youhan Sports etc. followed in FAO No. 06/2017 titled Ghulam Haider vs. Punjab Provincial Cooperative Bank etc.,* the view is that restoration of

> suit will amount to review of the order, therefore, such power is not available with the Banking Court. However, in the judgments reported in *MCB Bank Limited vs.*Messrs Baiga Paints through Proprietor and 3 others *(2008 CLD 341),* United Bank Limited vs. Messrs Khawaja Radio House through Proprietor and 2 others *(2004 CLD 1609) and* Standard Chartered Bank (Pakistan) Limited vs. Arshad Ali and another *(2014 CLD 191), the view expressed by Division Benches of this Court is that Banking Court can restore the suit which was dismissed for non-prosecution.*
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> 3. In view of above conflicting views on the same issue, it is appropriate that in line with law laid down by august Supreme Court, in *Multiline Associates vs. Ardeshir Cowasjee and 2 others* (PLD 1995 SC 423), matter be referred to Hon'ble Chief Justice for constitution of Full Bench of this Court to set this controversy to rest. The office will do the needful.

3. It is apparent from the aforementioned order that the view expressed by some judgments was that the banking court had the necessary jurisdiction to restore the suit, dismissed for non-prosecution, in terms of Order X Rule 9 of the Code of Civil Procedure 1908 (**CPC**) whereas the opinions rendered in **FAO No.455 of 2013** titled HBL v. Youhan Sports etc and **FAO No.6 of 2017** titled Ghulam Haider v. Punjab Provincial Cooperative Bank etc stated that the order for dismissal of a suit for non-prosecution is a final order against which only an appeal under section 22 of the Ordinance can be filed.

4. Apart from hearing the arguments from the learned counsel for the parties, this Court also appointed Mr. Imran Aziz, Advocate as *amicus curiae*. Mr. Muhammad Imran Malik, Advocate was also asked to render assistance to the Court on the issue pending determination before this Bench. Both the learned counsels rendered valuable assistance to the Court.

5. Section 7 of the Ordinance stipulates that the banking court in the exercise of its civil jurisdiction shall have all power available to a civil court under CPC. By virtue of section 7(2) of the Ordinance, the banking court is bound to follow the procedure provided in the Ordinance and where the Ordinance is silent, the procedure provided for in CPC shall prevail.

6. The suits under the Ordinance are instituted in terms of section 9 of the Ordinance relating to default in fulfillment of any obligation with regard to finance. Under section 9 (5) of the Ordinance, summons are required to be

issued in all the modes prescribed therein. A defendant is required to file his application for leave to defend within a period of 30 days from the date of receipt of summons through any one of the prescribed modes by virtue of section 10(1) of the Ordinance. In case of default by a defendant in obtaining leave to defend, the allegations of fact contained in the suit are deemed to be admitted and the banking court is required to pass a decree in favour of the plaintiff on the basis thereof or such other material as the banking court may require in the interest of justice. It is furthermore provided in section 10(6) of the Ordinance that if a defendant fails to comply with the requirements prescribed in sub-sections (3), (4) and (5), the application for leave to defend is liable to be dismissed.

7. Section 10(8) of the Ordinance requires the banking court to grant leave to defend to the defendants if on the consideration of the contents of the plaint and reply thereto and the questions of fact arising therefrom require evidence to be recorded.

8. In regard to the question on which determination is required to be made by this full bench, there are two conflicting views by two different learned Division Benches of this Court as well as the view expressed by the learned Sindh High Court. Judgment reported as *Messrs Makran Fisheries (Pvt.) Limited v. Platinum Co.* **(2006 CLD 52)** is rendered by the learned Sindh High Court whereas two different learned Division Benches of this Court rendered judgments in **FAO No.455 of 2013** titled HBL v. Youhan Sports etc and **FAO No.6 of 2017** titled Ghulam Haider v. Punjab Provincial Cooperative Bank etc to hold that an order dismissing a suit for non-prosecution is a final order which cannot be set aside by the banking court in view of the bar contained in section 27 of the Ordinance and that the only remedy available to the aggrieved party is to file appeal under section 22 of the Ordinance. On the other end of the spectrum there are a number of judgments rendered by this Court as well as by the learned Sindh High Court, which shall be adverted to in the later part of this judgment, which hold that an application for restoration of the suit can be filed under the provisions of CPC.

9. The discussion ought to start from section 22 (1) and section 27 of the Ordinance, which provisions are at the heart of the controversy. These provisions read as under

> **22. Appeal.-** (1) Subject to sub-section (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.
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> **27. Finality of order.-** Subject to the provisions of section 22, no Court or other authority shall ***revise or review or call***, or permit to be called, into question any proceeding, 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:
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> 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.

10. The pertinent question that requires consideration is whether the order dismissing the suit for non-prosecution amounts to "final order" coming within the scope of section 22(1) of the Ordinance. The expression "final order" has neither been defined in the Ordinance nor in CPC and has been a source of considerable controversy. The survey of case law from various jurisdictions indicates that a judgment or order is deemed "final" if it completely disposes of the action or proceeding reserving no further questions for future determination or at least terminates a particular stage of the same action. A final order, therefore, will be passed when the court consciously applies its mind to the merit of the case for deciding the particular issue brought before it. On the other hand, if the order simply decides ancillary and incidental matters leaving substantial proceedings yet to be decided for decision of the case on merits, the order shall be "interlocutory" in character. In other words, where an order decides only a particular aspect or issue involved in a case or some intervening matter, it shall be termed as interlocutory order.

11. Interlocutory orders can be classified to be falling in two categories. They can be passed on applications filed for regulating the procedural aspects of the suit designed as a step towards the final decision. The court may pass a variety of orders, in a pending case, for summoning of witnesses, discovery, production and inspection of documents, issue of a commission for examination of witnesses, fixing a date of hearing and the admissibility of a document or the relevancy of a question. These orders by their very nature relate to the regulation of procedure and are steps taken by a court for final adjudication of the case. Interlocutory orders, however, are also passed on applications seeking provisional remedies in incidental proceedings for making the judgment effective if and when it is passed. The instance of such an order was given by Arnold White, C.J., in *T.V. Tuljaram Row vs M.K.R.V. Alagappa Chettiar* (1912) ILR 35 Mad 1.

> I think, too, an order on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment but with a view to render the judgment effective if obtained) e.g., an order on an application for an interim injunction, or for the appointment of a receiver is a 'judgment' within the meaning of the clause.

Some other instances of the interlocutory orders, which are interim in nature, are mentioned in section 94 of CPC.

12. The famous case of Pakistan Fisheries Limited, Karachi and others v. United Bank Limited **PLD 1993 SC 109** was concerned with the availability of the remedy of revision against an order conditionally granting leave to defend passed under the provisions of the Banking Companies (Recovery of Loans) Ordinance, 1979. The proviso to section 12 of the Ordinance stipulated that "*Provided that no appeal shall lie from an interlocutory order which does not dispose of the entire case before the Special Court.*" Although the expression "case decided" was in issue in the said judgment and the observations made therein will have to be seen in the light thereof, the following description of interlocutory order given therein is still quite apposite.

> For the purposes of the Ordinance, an interlocutory order may be described as the order which is incidental to or a step in aid of the final decision of the suit.

13. The judgments from Indian jurisdiction show that the Courts have developed the following tests for determining whether an order is final or interlocutory (see *Jarnail Singh v. State Of Rajasthan* 1991 (1) WLN 476).

(1) Was the order made upon an application such that a decision in favour of the either party would determine the main dispute?

(2) Was it made upon an application upon which the main dispute could have been decided?

(3) Does the order as made determine the dispute?

(4) If the order in question is reserved would the action have to go on?

14. On this rather ticklish question, the judgments from English jurisdiction fall into two categories. The first approach looks at the order passed to ascertain whether it has conclusively and finally determined the proceedings. In case the proceedings are finally concluded, the order is treated as final and not as interlocutory [see White v Brunton (1984) QB 570 and Shubrook v Tufnell (1882) 9 QBD 621]. In the second category, the application which led to the passing of the order is looked at to see if it could have led to an order finally disposing of the matter or on rejection the matter would have continued. In the former case, the order would be final whereas in the latter case it would be interlocutory [see Salaman v Warner (1891) 1 QB 734]. Be that as it may, the distinction between final and interlocutory orders continues to bedevil the Courts and the legal practitioners alike. Lord Denning in *Salter Rex & Company v Ghosh (1971) 2 QB 597* stated the dilemma facing Courts in the following words.

> The question of final or interlocutory is so uncertain that the only thing for practitioners to do is to look up the practice books to see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way.

15. Halsbury's Laws of England (3rd Edition) states the difference between final and interlocutory as under:

> ... a judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part. The meaning of the two words must therefore be considered separately in relation to the particular purpose for which it is required.

It was furthermore stated therein that

> An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declaration of right already given in the final judgment, are to be worked out, is termed "interlocutory". An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.

16. In *Corpus Juris Secundum*, the distinction between final judgment and interlocutory judgment is described on the following terms:

> A final judgment is one which disposes of the cause both as to the subject-matter and the parties as far as the court has power to dispose it of, while interlocutory judgment is one which reserves or leaves some further question or direction for future determination.... Generally, however, a final judgment is one which disposes of the cause both as to the subject-matter and the parties as far as the court has power to dispose of it, while an interlocutory judgment is one which does not so dispose of the cause, but reserves or leaves some further question or direction for future determination.... The term 'interlocutory judgment' is, however, a convenient one to indicate the determination of steps or proceedings in a cause preliminary to final judgment, and in such sense the term is in constant and general use even in code states."

17. In the case of *V.C. Shukla v. State through CBI* **AIR 1980 SC 962**, the Indian Supreme Court after relying upon various texts held as under:

> We have, therefore, first to determine the natural meaning of the expression 'interlocutory order.' To begin with, in order to construe the term 'interlocutory', it has to be construed in contradistinction to or in contrast with a final order. We are fortified by a passage appearing in the Supreme Court Practice, 1976 (Vol. I. p. 853) where it is said that an interlocutory order is to be contrasted with a final order, referring to the decision of Salaman v. Warner (1891) 1 QB 734. In other words, the words 'not a final order' must necessarily mean an interlocutory order or an intermediate order. That this is so was pointed out by Untwalia

> J. speaking for the Court in the case of Madhu Limaye v. State of Maharashtra, as follows:
>
> > Ordinarily and generally the expression 'interlocutory order' has been understood and taken to mean as a converse of the term, final orders'.

This view is consistent with the 1903 judgment of Justice Alverstone in *Bozson v Altrincham Urban Council* [1903] 1 K.B. 547

> It seems to me that the real test for determining this question ought to be this: does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

18. Simiarly in *Godfrey Waterhouse v. Robert John Waterhouse* **[2013] NZCA 151**, the distinction between interlocutory order and final order was given in the following terms:

> Third, as a matter of principle, a High Court decision, including one made on an interlocutory application, that constitutes a final disposition of the rights of the parties would not ordinarily be considered to be an interlocutory decision. A decision determining the rights of the parties and bringing a proceeding or claim to an end, in whole or in part, is a final decision in that respect as far as the parties are concerned, whether or not there has been a full hearing on the merits. It is a final judgment of the High Court against which, in the absence of any other restriction, the unsuccessful party would expect to have a general right of appeal to this Court. On the other hand, a High Court interlocutory decision is ordinarily understood to be a decision made in the course of a proceeding leading to or facilitating the hearing of the claim and its ultimate disposition following the hearing. An interlocutory decision would not normally be understood as one that finally determines the rights of the parties and brings the proceeding to an end.

19. The afore-mentioned judgments bring out the following essential features of an interlocutory order:-

(a) The expression interlocutory order refers to all orders passed by the court in between the initiation of the trial up to its final

conclusion relating to intervening procedural matters necessary for the progress of the suit and on collateral issues concerning the main cause.

(b) Interlocutory order does not finally decide the right of the parties or brings the trial to an end but only concerns the determination and adjudication of incidental and ancillary issues. Such an order, however, is conclusive as to the (subordinate) matters which it deals.

(c) Interlocutory orders may also be categorized as those deciding incidental proceedings for making effective the judgment that is ultimately to be passed.

The concept of interlocutory order has to be viewed in contradistinction to a final order. Thus any order which is not final would be an interlocutory order. The incidents, character and nature of interlocutory order as demonstrated by the judgments referred to above provide sufficient guidelines to interpret the scope of final order as used in section 22 of the Ordinance.

20. Having laid down the contextual framework of the distinction between the final order and interlocutory order, we can proceed to look at the reasons offered by the two Division bench judgments holding that the order for dismissal of the suit for non-prosecution is a final order. In FAO No.455 of 2013 titled "*M/s Habib Bank Limited v. Youhan Sports etc*", a learned Division bench of this Court was faced with a case in which the appellant bank's suit was dismissed for non-prosecution and so was the application for its restoration. The appellant bank then filed another application for restoration which was dismissed. The learned Division bench while referring to the definition of "final order" in Blacks law dictionary held as under:

> The upshot of the reference made to Section 27, Section 22 and the term "final order" is that once an application filed by the appellant was dismissed. It would not be restored by the Banking Court as it amounted to terminate the action itself and the appellant could have only filed an appeal under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 as

> after passing of the order of dismissal the learned Single Judge in Chambers was divested of powers in terms of Section 27 of the Financial Institutions (Recovery of Finances) Ordinance, 2001.

It was further held in the said judgment that

> We are of the view that Section 27 of Financial Institutions (Recovery of Finances) Ordinance, 2001 provides for finality of orders passed by the Banking Court and has been made subject to Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 which manifests that the final order of the Banking Court is appealable under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001.

Similarly, in the judgment reported as Messrs Makran Fisheries (Pvt.) Limited v. Platinum Co. **2006 CLD 52**, the facts of the case were that the plaintiff filed a suit before the banking court, which suit was dismissed for non-prosecution. The plaintiff thereafter filed an application under Order IX Rule 9 CPC for recalling of the said order. The learned Judge hearing the matter dismissed the application for restoration by making reference to sections 22 and 27 of the Ordinance. It was held thus

> In the present case, by order dated 7-12-2004, the Court has finally disposed of the suit as dismissed for non-prosecution. As such after passing such order, the suit is no more pending before the Banking Court. Hence, it is a final order in respect of the parties concerning the suit. Therefore, the same should have been challenged before the Appellate Court and not before this Court.

The perusal of these judgments shows that the true import and scope of the term "final order" was not explored by the Courts and no effort was made to deal with the true character of an order dismissing the suit for non-prosecution.

21. It was held in the afore-mentioned judgments that only the remedy of appeal is available against the order dismissing the suit for non-prosecution and reliance upon section 27 of the Ordinance was placed in arriving at this conclusion. Now section 27 of the Ordinance by its terms simply debars the Court or any other authority from altering or reviewing any proceeding, judgment, decree, sentence or order of a Banking Court except for correction of clerical and arithmetical mistakes in the orders. The question, however,

remains whether the order dismissing the suit for non-prosecution can be termed as a final order. The jurisprudence developed in our jurisdiction has long made a distinction between a review application and an application seeking recall of an order. In the former case, the right must be conferred by the statute and the court is required to consider whether there was an error apparent on the face of the record whereas in the latter case the court does not delve into the merits but recalls the order on the ground that it was passed in the absence of the party affected by it. In Messrs Baghpotee Services (Private) Limited and others v. Messrs Allied Bank of Pakistan Ltd. **2001 CLC 1363**, a learned Division bench of Sind High Court rightly held that

> …….we are of the considered opinion that there is a clear distinction between review of an earlier order and recalling one passed on account of non-appearance of a party. In the former the merits of an earlier order are considered but in the latter only the cause of non-appearance is to be taken into consideration. In the former case the power must be conferred by statute but in the latter it stems from the principles of natural justice required to be read into every law. The former is excluded by section 27 but the latter continues to remain available.

Similarly, in a judgment rendered by a learned Division bench of this Court reported as Awan Electronics (Pvt.) Limited v. National Bank of Pakistan **2005 CLD 1660**, while dealing a similar situation it was observed thus

> We are afraid, this is not a case of review rather for setting aside ex parte decree, and the appellants, on showing "sufficient cause" for their non-appearance, could seek its setting aisde. Thus, if the provisions of section 12 of the Act, were not applicable, the Court should have exercised its powers under Order IX, rule 13, C.P.C., which by virtue of section 7(2) of the Act, was duly applicable.

Likewise, a learned Division bench of this Court in Rab Nawaz Shahid and 3 others v. Bank of Khyber etc **2007 CLD 1236** once again refused to accept the argument that the banking court does not retain the power to restore the suit/application for leave to defend dismissed for non-prosecution. It was held "*Learned counsel for respondent No.1 has not been*

able to show as to under what provision of the Banking Ordinance, the Court proceed to pass an order for the dismissal of the PLAs. When asked, he submitted that under inherent jurisdiction. If that being so, obviously the Court has the inherent powers to restore the application also…."

22. The order passed by a court dismissing the suit for non-prosecution partakes the character of an intermediate order which relates to the procedure and not to the substance of the dispute involved in case. By its very nature, it does not finally dispose of the rights of the parties on merits and it also does not deal with ancillary and incidental matters. CPC has granted power to the courts to dismiss for non-prosecution any suit in which the plaintiff does not appear and has also provided a remedy to the delinquent plaintiff to approach the court for recall of the said order in case he was prevented by sufficient cause from appearing on the appointed date. Such an order and the remedy provided in CPC relate purely to the procedure and do not entail any adjudication by the court of the rights of the parties. In this view of the matter, it cannot be said that the order dismissing the suit for non-prosecution comes within the definition of "final order" as contemplated by section 22 of the Ordinance. The bar contained in section 27 read with section 22 of the Ordinance, therefore, cannot have any application for excluding the powers that inheres in the banking court to make use of the provision of Order IX Rule 9 CPC for recalling of an order dismissing the suit for non-prosecution.

23. There is another way of looking at the proposition in issue. The source of power for dismissing a suit for non-prosecution admittedly is not located in the Ordinance. The banking court necessarily has to fall back on the provisions of Order IX CPC for passing the order for dismissing the suit for non-prosecution. If that is so, the banking court by any cannon of construction would also retain the power to recall the said order by virtue of the provisions of contained in CPC for that purpose. This was the reasoning on the basis of which scores of judgments passed by the Courts allowed applications seeking recall of orders for dismissal of the suit (see Muhammad Anwar and another v. National Bank of Pakistan (DB) **2013 CLD 2102**).

24. The legislature while providing the remedy of appeal against a variety of orders in section 22 of the Ordinance has nevertheless placed a bar on the availability of appeal in relation to interlocutory orders. This bar is not without purpose. In Messrs Ahmad Autos and another v. Allied Bank of Pakistan Limited **PLD 1990 SC 497**, while stating the object and purpose behind promulgation of Banking Companies (Recovery of Loans) Ordinance, 1979, it was stated as follows

> It is a matter of common knowledge that defaulter borrowers in suits brought against them particularly by the financial institutions used to delay the disposal of suits by avoiding service of the summons. In order to expedite the disposal of the suits to be brought by the Banking Companies the Ordinance was promulgated, which contains special provisions and which inter alia provide that a suit brought by a Banking Company for the recovery of loan is to be tried in summary manner under Order XXXVII.

These observations clearly show that speedy disposal of the trial of banking cases was one of main objectives for enacting the Ordinance and also the banking laws that were enacted previously. The interpretation of the provision of the Ordinance must necessarily involve elimination of all possible eventualities through which the trial of the suit is delayed. The text of section 22 and the purpose for which the Ordinance was promulgated clearly show that the legislature intended to restrict the right to appeal which is otherwise available against interlocutory orders under CPC. The object appears to be to secure the expeditious completion of the interlocutory stages of a case and to curtail delays in its ultimate disposition. It is a generally accepted position of law that filing of interlocutory applications in a suit under the Ordinance is barred pending decision of the leave application, save in exceptional circumstances. In any event, all interlocutory orders generally subsume in the final judgment and are thus appealable (see section 105 CPC). This is one more reason for circumscribing the right of appeal against interlocutory orders. Conversely, the right of appeal is available in circumstances where the order/judgment/decree finally determines substantive rights of the parties. The term "final order" appearing in section 22 of the Ordinance should therefore be interpreted in a manner that is

consistent with the purpose, context and principle for which the Ordinance was promulgated. An order through which the suit or the application for leave to defend is dismissed for non-prosecution does not fall in either of the two categories of orders. On a proper construction, it is an intermediate order which falls in between the two. By following the rule of harmonious construction, we are of the opinion that the bar contained in section 27 of the Ordinance is not applicable to such kind of intermediate orders.

25. We, therefore, hold that the banking court as defined in the Ordinance has the necessary power and jurisdiction to allow an application to restore the suit/application for leave to defend dismissed for non-prosecution on sufficient grounds being shown for non-appearance of the counsel/party in terms of Order IX Rule 9 CPC. This writ petition is accordingly **dismissed.**

(AMIN-UD-DIN KHAN)
JUDGE

(SHAMS MEHMOOD MIRZA)
JUDGE

(MUZAMIL AKHTAR SHABIR)
JUDGE

APPROVED FOR REPORTING.

JUDGE **JUDGE**

JUDGE

Awais/