

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A. No.34 of 2000
MCB Bank Limited
Versus
M/s Highland Shoes Limited and others

Dates of Hearing: 11.05.2022 and 13.03.2023.
Appellant by: M/s Muhammad Munir Paracha and Nauman
Munir Paracha, Advocates.
Respondents by: Khawaja Muhammad Farooq Mehta,
Ms. Moona Hussain, Qazi Muhammad
Siddique and Malik Awais Haider, Advocates.

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular first appeal the appellant, MCB Bank Limited, seeks the modification of the judgment and decree dated 08.12.1999 passed by the Hon'ble Lahore High Court in the suit instituted by the Pakistan Industrial Credit and Investment Corporation ("P.I.C.I.C.") and Netherland Finance Company for Developing Countries ("F.M.O.").

2. The facts essential for the disposal of the instant appeal are that pursuant to the loan agreement dated 16.11.1981 an amount of Rs.13 million was given to respondent No.1 (M/s Highland Shoes Limited) (by F.M.O. The provisions of the said loan agreement provide for P.I.C.I.C. to *inter alia* supervise the borrower for the fulfillment of its obligations under the said loan agreement. Apparently, a cooperation agreement had been executed between P.I.C.I.C. and F.M.O. on 14.01.1981 which provided for the manner in which P.I.C.I.C. was to exercise the said supervision. A change in the management of respondent No.1 caused the execution of a supplementary agreement dated 31.10.1990 between the parties to the loan agreement dated 16.11.1981.

3. In order to secure the repayment of the loan, several documents were executed including a mortgage by the deposit of title deeds of the land measuring 20,711 square yards (4 *acres* and 2.5 *kanals*) comprising plots No.4, 5 and 6 situated at Kahuta Industrial Triangle, Kahuta Road, Islamabad including buildings, factory, workshops, plants and the entire superstructure built thereon along with access thereto and the right to use the essential utilities as fully detailed in the memorandum of title deeds ("the Mortgaged Property").

4. Default on the part of Highland Shoes caused F.M.O. to file a petition (C.O.No.8/1994) on 25.05.1994 under Section 309 of the erstwhile Company Ordinance, 1984 for the winding up of the said company before the Hon'ble Lahore High Court, Rawalpindi Bench. On 12.04.1997, an application under Order I, Rule 10 C.P.C. was filed by Malik Tabarak Hussain for his impleadment as a party in the said petition. The ground taken in the said application was that the Mortgaged Property had been purchased by him in an auction conducted in execution of a decree in the amount of Rs. 11,46,070/- passed by the Banking Tribunal, Rawalpindi in favour of Habib Credit and Exchange Bank Limited ("HC&EBL").
5. On 19.06.1997, C.O.No.8/1994 was dismissed for non-prosecution and the civil miscellaneous applications (including the said application under Order I, Rule 10 C.P.C.) were disposed of as having become infructuous. The application (C.M.No.37-L/1997) for restoration of C.O. No.8/1994 was also disposed of vide order dated 17.06.2002 as having not pressed by the applicant.
6. Apparently, on 10.02.1993 HC&EBL had filed a suit for recovery of Rs.12,14,566/- against *inter alia* Highland Shoes before the Banking Tribunal, Lahore. The proceedings in the said suit culminated in *ex-parte* judgment and decree dated 30.03.1993 for an amount of Rs.11,46,077/- in favour of HC&EBL. It may be mentioned that the Mortgaged Property had not been mortgaged by Highland Shoes with HC&EBL.
7. On 03.07.1995, HC&EBL filed a petition for the execution of the said *ex-parte* judgment and decree before the Banking Tribunal, Rawalpindi. In the said petition, HC&EBL had prayed for the attachment of the movable and immovable properties of the judgment debtors (i.e., Highland Shoes and its Directors). The learned Executing Court had issued notice dated 26.03.1996 to the Directors of Highland Shoes about settling the terms and conditions of the auction of the Mortgaged Property on 22.04.1996. As per the report of the Court Auctioneer, Malik Tabarak Hussain had submitted the highest bid of Rs.12,00,000/- for the Mortgaged Property during the auction conducted on 30.05.1996. On 11.07.1996, learned Banking Tribunal, Rawalpindi issued a sale certificate. In the said sale certificate, the schedule of property comprised the Mortgaged Property.
8. On 05.09.1996, the Directors of Highland Shoes filed an application under Section 47 C.P.C. praying for the auction to be set-aside. The Directors of Highland Shoes claimed to be unaware of the auction

proceedings. In the said application, it had been pleaded that a very expensive factory had been auctioned for very little amount. Vide order dated 19.09.1996, the said application was dismissed by the Executing Court on the ground that the application was time barred, and that after the confirmation of the sale of the auctioned property, the Executing Court had become *functus officio*. The said order dated 19.09.1996 was challenged by the Directors of Highland Shoes in an appeal (F.A.O. No.96/1996) before the Hon'ble Lahore High Court, Rawalpindi Bench. Vide order dated 24.02.1997, the said appeal was dismissed as withdrawn. In the said order, it has been mentioned that P.I.C.I.C. and F.M.O. in the said appeal had also filed an application under Section 12(2) C.P.C., and that permission had been sought for the withdrawal of the appeal so that the said application is pursued. The application under Section 12(2) C.P.C. filed by the Directors of Highland Shoes is not on the record.

9. On 19.09.1996 Malik Tabarak Hussain filed an application for the possession of the auctioned property / Mortgaged Property. Possession of the auctioned property was handed over to Malik Tabarak Hussain on the very same day on which he had filed the said application. On 26.09.1996, the Highland Shoes filed application under Section 151 C.P.C. before the Banking Tribunal for restoration of the possession of Mortgaged Property. In the said application, Highland Shoes had pleaded that the said property was mortgaged in favour of F.M.O. The learned Executing Court vide order dated 21.10.1996 dismissed the said application filed by Highland Shoes primarily on the ground that after confirmation of the sale and delivery of possession to the auction purchaser, the Court had been rendered *functus officio*. There is nothing on the record to show that the said order dated 21.10.1996 was assailed any further.

10. F.M.O. had also filed an application under Section 12(2) C.P.C. against the *ex-parte* judgment and decree dated 30.03.1993 as well as the auction proceedings in execution before the Banking Tribunal, Rawalpindi. In the said application, it was pleaded *inter alia* that F.M.O.'s charge over all the movable and immovable assets of Highland Shoes had been registered as a first charge with the Registrar, Joint Stock Companies, Lahore and that Highland Shoes' entire property was mortgaged with F.M.O. It was also pleaded that this material fact had been concealed from the Banking Tribunal which had passed the *ex-parte*

judgment and decree dated 30.03.1993. It is an admitted position that P.I.C.I.C. or F.M.O. were not impleaded as defendant in the suit for recovery instituted by HC&EBL before the Banking Tribunal against Highland Shoes etc.

11. Vide order dated 06.06.2001, F.M.O.'s application under Section 12(2) C.P.C. was dismissed by the learned Judge Banking Court, Rawalpindi. The sole ground on which the said application had been dismissed was that in the suit for recovery instituted by P.I.C.I.C. and F.M.O., an order had been passed to strike out the names of HC&EBL and Malik Tabarak Hussain from the array of the defendants. There is nothing on the record to show that this order has been assailed by P.I.C.I.C. or F.M.O. any further.

12. Now, on 06.11.1997, P.I.C.I.C. and F.M.O. had filed a suit (C.O.S.No.32/1997) for recovery of Netherlands Guilders ("NLG") 57,41,700.11 before the Hon'ble Lahore High Court, Rawalpindi Bench against (i) Highland Shoes (ii) HC&EBL and (iii) Malik Tabarak Hussain. HC&EBL and Malik Tabarak Hussain filed applications (C.M.No.10/B and 11/B of 1998) praying for striking out their names from the array of defendants on the ground that they were neither necessary nor proper party in the matter. Vide order dated 03.06.1999, the said applications were allowed by the Hon'ble Lahore High Court, Rawalpindi Bench. In the said order, it was observed that if a decree is passed in favour of P.I.C.I.C. and F.M.O., it could be executed by attachment of Highland Shoes' properties but the consequence of the decree dated 30.03.1993 passed by the Banking Tribunal in favour of HC&EBL could not be undone. The proceedings in the said suit culminated in the judgment and decree dated 08.12.1999 according to which the suit was decreed for an amount of NLG 55,41,700.11 (equivalent to Rs.12,34,46,550/- at the exchange rate of Rs.21.5 per NLG). P.I.C.I.C. and F.M.O. were also awarded costs in addition to interest at the rate of 10% per annum from the date of the institution of the suit till realization of the decretal amount.

13. The instant appeal was filed on 24.02.2000 by P.I.C.I.C. and F.M.O. against the said judgment and decree dated 08.12.1999 passed by the learned Single Judge of the Lahore High Court. After the establishment of this Court, Rawalpindi Bench, the file of the instant appeal was transferred from the Lahore High Court to this Court. During the pendency of the instant appeal, the management of P.I.C.I.C. was taken over by NIB

Bank which in turn was taken over by MCB Bank. The memo of the parties was amended and presently the appeal is pursued by MCB Bank on its own right and on behalf of F.M.O.

14. Learned counsel for the appellants, after narrating the facts leading to the filing of the instant appeal, submitted that pursuant to the loan agreement dated 16.11.1981, NLG 20,91,633.23 was disbursed to Highland Shoes; that the said loan was secured through a fixed charge over all the movable and immovable properties belonging to Highland Shoes; that the mortgage over Highland Shoes' assets had been duly registered with the Registrar, Joint Stock Companies, Lahore; that after Highland Shoes had defaulted in its repayment obligations to F.M.O., the latter and P.I.C.I.C. (as F.M.O.'s agent) filed a petition for the winding up of Highland Shoes before the Hon'ble Lahore High Court; that in the said proceedings, an application was filed by HC&EBL and Malik Tabarak Hussain for their impleadment as respondents in the said petition; that it was at this stage that P.I.C.I.C. and F.M.O. came to know that an *ex-parte* judgment and decree dated 30.03.1993 had been passed in favour of HC&EBL and in execution of the said decree, the Mortgaged Property had been auctioned by the Executing Court and a sale certificate had been issued in favour of Malik Tabarak Hussain; that P.I.C.I.C. and F.M.O. withdrew the petition for winding up so as to pursue the application under Section 12(2) C.P.C. filed for the setting-aside of the said *ex-parte* judgment and decree dated 30.03.1993; that the Directors of Highland Shoes had also filed an application under Section 47 C.P.C. for the setting aside of the auction proceedings held on 30.05.1996 which was dismissed by the learned Banking Tribunal vide order dated 19.09.1996; that the appeal filed by the Directors of Highland Shoes against the said order was also dismissed by the Hon'ble Lahore High Court vide order dated 24.02.1997; that P.I.C.I.C. and F.M.O. had also filed a suit for recovery against Highland Shoes etc. before the Hon'ble Lahore High Court; that HC&EBL and Malik Tabarak Hussain were also impleaded as defendants in the said suit; that the applications of the said defendants for striking out their names from the array of defendants were allowed by the Hon'ble Lahore High Court vide order dated 03.06.1999; that the deletion of the said respondents from the array of the defendants had become the primary reason for the dismissal of P.I.C.I.C. and F.M.O.'s application under Section 12(2) C.P.C.; that vide interim order dated 03.06.1999

passed by the Hon'ble Lahore High Court in the suit for recovery instituted by P.I.C.I.C. and F.M.O., it was observed that if the said suit is decreed, the decree could be enforced by attachment of properties belonging to Highland Shoes other than the property which had been auctioned in favour of Malik Tabarak Hussain in execution of the *ex-parte* judgment and decree dated 30.03.1993; and that the said observation was not lawful inasmuch as the Mortgaged Property had been duly mortgaged in favour of P.I.C.I.C. and F.M.O. whereas the said property had not been mortgaged in favour of HC&EBL and Malik Tabarak Hussain.

15. Learned counsel for the appellant further submitted that P.I.C.I.C. and F.M.O. simply want the modification of the judgment and decree dated 08.12.1999 so that the decree could be satisfied by the learned Executing Court to determine the rights of the auction purchaser; that the appellant could not be penalized for the failure of the learned Executing Court to perform its duty of mentioning the mortgage in the proclamation for sale; that this Court can determine that the Mortgaged Property (which has been purchased by Malik Tabarak Hussain through auction) is subject to the mortgage executed in favour of F.M.O.; that the Mortgaged Property auctioned in favour of Malik Tabarak Hussain is subject to the lien which F.M.O. has over the said property; that under Order XXI, Rule 66(2)(c) C.P.C., it was obligatory on the Executing Court to have issued a proclamation for the sale of the Mortgaged Property specifying any encumbrance to which the said property was liable; that under Order XXXIV, Rule 12 C.P.C., the Executing Court could not have subjected the Mortgaged Property to sale in execution of the *ex-parte* judgment and decree dated 30.03.1993 without the consent of F.M.O.; that the proceeds of the sale of the Mortgaged Property ought to have been paid first to F.M.O. in terms of Order XXXIV, Rule 12 C.P.C.; and that the appellant has not filed an execution petition due to the pendency of the instant appeal. Learned counsel for the appellant prayed for the appeal to be allowed and for the judgment and decree dated 08.12.1999 to be modified such that the Mortgaged Property sold in auction to Malik Tabarak Hussain in execution of the judgment and decree dated 30.03.1993 would be subject to the mortgage executed in favour of F.M.O.

16. On the other hand, learned counsel for respondents No.2 (HC&EBL) and 3 (Malik Tabarak Hussain) submitted that the grounds taken by the appellant in the instant appeal could be agitated by them through an

application under Section 47 C.P.C. before the learned Executing Court; that the Mortgaged Property had been mortgaged in favour of HC&EBL; that the suit for recovery of Rs.11,46,007/- instituted by HC&EBL against Highland Shoes was decreed vide *ex-parte* judgment and decree dated 30.03.1993; that in execution of the said decree, the Mortgaged Property was put to auction; that the highest bid submitted by Malik Tabarak Hussain during the auction was accepted and a sale certificate was issued in his favour; that the possession of the Mortgaged Property had also been handed over by the learned Executing Court to Malik Tabarak Hussain; that the Capital Development Authority had transferred the Mortgaged Property to Malik Tabarak Hussain on 04.12.1996; that Malik Tabarak Hussain has raised construction over the Mortgaged Property; that the objections filed by the Directors of Highland Shoes before the learned Executing Court had been dismissed vide order dated 19.09.1996 and their appeal against the said order was dismissed as withdrawn; that after dismissing the objections filed by the Directors of Highland Shoes, the learned Executing Court had been rendered *functus officio*; that HC&EBL and Malik Tabarak Hussain had also been impleaded as defendants in the suit for recovery filed by P.I.C.I.C. and F.M.O. against Highland Shoes before the Hon'ble Lahore High Court; that the order of the Hon'ble High Court whereby the names of HC&EBL and Malik Tabarak Hussain were deleted from the array of the respondents, it was mentioned that if a decree was passed in favour of P.I.C.I.C. and F.M.O., it could not be executed against the Mortgaged Property which had been acquired by Malik Tabarak Hussain in the auction proceedings; and that the Mortgaged Property has, during the pendency of the instant appeal, been sold many times over. Learned counsel for respondents No.2 and 3 prayed for the appeal to be dismissed.

17. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 13 above and need not be recapitulated.

18. In the prayer clause of the appeal, P.I.C.I.C. and F.M.O. do not seek the setting aside of the decree dated 08.12.1999 which was passed in their favour by the learned Single Bench of the High Court, but want to seek its modification so that the sale of the Mortgaged Property in favour

of Malik Tabarak Hussain is made subject to the mortgage executed in favour of the F.M.O. by Highland Shoes.

19. As per the record, Highland Shoes and its Directors assert that they were totally unaware of the suit for recovery of Rs.12,14,566/- instituted by HC&EBL against them before the Banking Tribunal at Lahore or the *ex-parte* judgment and decree dated 30.03.1993 for an amount of Rs.11,46,077/-. Highland Shoes or its Directors never filed an appeal or an application under Section 12(2) C.P.C. against the said judgment and decree when they gained knowledge thereof. Highland Shoes however filed an application under Section 47 C.P.C. after the Mortgaged Property had been put to auction by the learned Executing Court and a sale certificate had been issued in favour of the auction purchaser / Malik Tabarak Hussain. In the said application, it is asserted that Highland Shoes gained knowledge of the auction on 01.09.1996 when "*a gentleman came to the factory*" and disclosed that he had purchased the factory in an auction. This application had been dismissed on the grounds that it was time barred and that after the confirmation of the sale, the learned Executing Court had become *functus officio*. The appeal (F.A.O. No.96/1996) filed by Highland Shoes was dismissed after the counsel representing Highland Shoes sought permission to withdraw the appeal so as to pursue the remedy under Section 12(2) C.P.C. There is nothing on the record to show that Highland Shoes or any of its Directors had filed an application under Section 12(2) C.P.C. seeking the setting aside of the *ex-parte* judgment and decree dated 30.03.1993 or any order passed by the learned Executing Court.

20. It is an admitted position that neither P.I.C.I.C. nor F.M.O. was a party in the suit for recovery filed by HC&EBL against Highland Shoes and its Directors. It is most pertinent to mention that Highland Shoes, in its application under Section 47 C.P.C. or its appeal against the order dated 19.09.1996 passed by the learned Executing Court, did not mention that the Mortgaged Property had already been mortgaged in favour of F.M.O. through a deposit of title deed or that a first charge on all the assets of Highland Shoes had been registered with the Registrar, Joint Stock Companies, Lahore. This was a concealment of a material fact by Highland Shoes from the learned Executing Court as well as the Hon'ble Lahore High Court. Had this fact been mentioned in the application under Section 47 C.P.C., the learned Executing Court would not have enforced

the *ex-parte* judgment and decree dated 30.03.1993 (which was a simple money decree) by subjecting the Mortgaged Property to an auction. If not that the learned Executing Court would certainly have issued notice to P.I.C.I.C. and F.M.O.

21. Bearing this scenario in mind, whatever reservations that this Court may have against the manner in which the proceedings in the suit for recovery instituted by HC&EBL culminated in the *ex-parte* judgment and decree dated 30.03.1993 and the execution of that decree through auction of a property that was never mortgaged by Highland Shoes with HC&EBL, the vital question that needs to be determined is whether this Court, while hearing and deciding the instant appeal (which is against the judgment and decree dated 08.12.1999 passed by the Hon'ble High Court in a suit for recovery instituted by P.I.C.I.C. and F.M.O. against Highland Shoes) collaterally interfered with the said *ex-parte* judgment and decree or any of the orders passed by the Court executing the said decree. The answer to that is an obvious 'no.' In the case of Muhammad Ibrahim Vs. Province of Sindh (2018 MLD 1099), it has been held as follows:-

“Principle of collateral proceedings is a settled rule, under which, a final decision made by a competent Court of jurisdiction cannot be upset or interfered with in some parallel or collateral proceedings, as the plaintiff has attempted to do through present suit.”

22. The instant appeal is against the judgment and decree dated 08.12.1999 whereby P.I.C.I.C. and F.M.O.'s suit for recovery of NLG 57,41,700.11 was decreed. The decree was passed more than two decades ago. Till date, P.I.C.I.C. or F.M.O. has not filed any execution proceedings against Highland Shoes or any of its Directors. This is because the major assets of Highland Shoes have already been sold in auction to Malik Tabarak Hussain in execution of the *ex-parte* judgment and decree dated 30.03.1993 passed in favour of HC&EBL. P.I.C.I.C. and F.M.O. want an order from this Court which would make the sale in favour of the auction purchaser subject to the mortgage that had been created over the auctioned property by Highland Shoes in favour of F.M.O. F.M.O. bases this plea on Order XXI Rule 66(2)(c) C.P.C. as well as Order XXXIV, Rules 12 and 13 C.P.C.

23. Where any property is ordered to be sold by public auction in execution of a decree, Order XXI, Rule 66(2)(c) C.P.C. makes it obligatory for the Executing Court to issue a proclamation of the intended sale specifying any encumbrance to which the property is liable. P.I.C.I.C. and

F.M.O.'s grievance is that the proclamation for the auction of the Mortgaged Property issued during proceedings for the execution of the *ex-parte* judgment and decree dated 30.03.1993 should have mentioned the fact that the Mortgaged Property was encumbered by a mortgage in favour of F.M.O. This grievance pertains to an event in the execution proceedings for the execution of the said *ex-parte* judgment and decree and this Court, while hearing an appeal against the judgment and decree dated 08.12.1999, cannot collaterally examine or set-aside any order passed by the Executing Court during the said execution proceedings.

24. As regards the contention of the learned counsel for the P.I.C.I.C. and F.M.O. that under Order XXXIV, Rule 12 C.P.C., the Executing Court could not have subjected the Mortgaged Property to sale in execution of the *ex-parte* judgment and decree dated 30.03.1993 without the consent of F.M.O. or that under Order XXXIV, Rule 12 C.P.C., F.M.O. had a right to receive the proceeds of the sale on account of holding a prior mortgage, suffice it to say that these objections also pertain to the execution proceedings for the execution of the *ex-parte* judgment and decree dated 30.03.1993. If this Court were to hold that F.M.O. had a right to receive the proceeds from the auction of the Mortgaged Property on the basis of holding a prior mortgage, it would amount to interference with the sale certificate issued in favour of Malik Tabarak Hussain on conclusion of the execution proceedings. It ought to be borne in mind that these were all the grounds available to P.I.C.I.C. or F.M.O. in their application under Section 12(2) C.P.C. seeking recall of the *ex-parte* judgment and decree dated 30.03.1993 as well as the orders passed by the learned Executing Court. The said application was dismissed by the learned Banking Court vide order dated 06.06.2001 which was not assailed any further by P.I.C.I.C. or F.M.O. Therefore, for all intents and purposes, the *ex-parte* judgment and decree dated 30.03.1993 as well as the execution proceedings culminating in the issuance of a sale certificate in favour of Malik Tabarak Hussain had attained finality.

25. The said interim order dated 03.06.1999 cannot be set aside by this Court in these appellate proceedings with the main judgment and decree dated 08.12.1999 remaining intact. As mentioned above, P.I.C.I.C. and F.M.O. have not sought the setting aside of the said judgment and decree.

26. P.I.C.I.C. and F.M.O. are also aggrieved by the interim order dated 03.06.1999 passed in C.O.S. No.32/1997 wherein the Hon'ble High Court

observed that if the suit (C.O.S.No.32/1997) is ultimately decreed in favour of P.I.C.I.C. and F.M.O. against Highland Shoes, the decree could be executed through attachment of other properties of Highland Shoes but the consequence of the *ex-parte* judgment and decree dated 30.03.1993 passed in the suit filed HC&EBL against Highland Shoes could not be undone. What this means is that if C.O.S.No.32/1997 were to be decreed, the decree could not be satisfied with the Mortgaged Property. The main asset through which the decree could have been satisfied that would have been passed in their favour would have been the Mortgaged Property. With the Hon'ble High Court ordering that if a decree was passed in the P.I.C.I.C. and F.M.O.'s favour in C.O.S.No.32/1997, the consequence of the *ex-parte* judgment and decree dated 30.03.1993 could not be undone, the Mortgaged Property did not remain available for P.I.C.I.C. and F.M.O. to satisfy a decree that would have been passed in their favour. As mentioned above, P.I.C.I.C. and F.M.O. have not even filed an execution petition to enforce the judgment and decree dated 08.12.1999 passed in C.O.S.No.32/1997 perhaps due to the remaining assets of Highland Shoes, if at all any, not being sufficient to satisfy the said decree.

27. Through the above said interim order dated 03.06.1999, the Hon'ble High Court had allowed applications (C.Ms. No.10/B and 11/B of 1998) filed by HC&EBL and Malik Tabarak Hussain seeking the deletion of their names from the array of defendants in C.O.S.No.32/1997. Consequently, C.O.S. No.32/1997 remained to be contested only by Highland Shoes, whose application for leave to defend the suit was dismissed causing the said suit to be decreed. P.I.C.I.C. and F.M.O. want a modification of the judgment and decree dated 08.12.1999 so it could be satisfied by recourse to the Mortgaged Property (which by virtue of the execution proceedings for the execution of the *ex-parte* judgment and decree dated 30.03.1993 stood transferred to Malik Tabarak Hussain with the issuance of the certificate for confirmation of sale). In other words, the said appellants seek the creation of interest in the Mortgaged Property or its proceeds which would impinge on the rights created in favour of HC&EBL and Malik Tabarak Hussain by virtue of the *ex-parte* judgment and decree dated 30.03.1993 and the satisfaction of the said decree through auction of the Mortgage Property. After the order dated 03.06.1999 was passed, HC&EBL and Malik Tabarak Hussain were no longer parties in C.O.S.No.32/1997 and had no opportunity to defend the suit. After the

deletion from the array of the defendants, the suit was defended only by Highland Shoes *albeit* unsuccessfully. Since the appellant/MCB Bank has not sought the setting aside of the judgment and decree dated 08.12.1999 passed in C.O.S.No.32/1997 but only a modification therein (which if permitted would adversely affect the rights created in favour of HC&EBL and Malik Tabarak Hussain by virtue of the *ex-parte* judgment and decree dated 30.03.1993 and orders passed in execution proceedings), such modification cannot be allowed.

28. In view of the above, the instant appeal is dismissed with no order as to costs.

(ARBAB MUHAMMAD TAHIR)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 27.03.2023.

(JUDGE)

(JUDGE)