

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

1st.Appeal.No.D- 17 of 2011

Present:

Mr. Justice Syed Hassan Azhar Rizvi.

Mr. Justice Abdul Maalik Gaddi.

1. For Katcha Peshi.
2. For hearing of CMA 207/2011.

Date of hearing: 16.09.2015.

Date of order: 16.09.2015.

Mr. Abdul Qayoom Pirzada, Advocate for appellant.
Mr. Hakim Ali Siddiqui, Advocate for respondent No.1.
Mr. Aghis-u-Salam Tahirzada, Advocate for respondent No.4.

ORDER

ABDUL MAALIK GADDI, J: Through this 1st Civil Appeal, the appellant has assailed the legality and propriety of the order dated 21.09.2010 passed by learned Presiding Officer of Banking Court No.1, Hyderabad, in Civil Suit No.20/1993 and Execution Application No.1619/1995, whereby the learned trial Court after hearing the learned counsel for the parties, dismissed the applications under Section 12(2) C.P.C. and Under Order 41 Rule 5 C.P.C filed by the appellant.

2. Briefly, facts necessary for the disposal of instant appeal are that respondent No.1/Decree Holder filed a Civil Suit for recovery of loan amounting to Rs.62,03,277/- against the respondents No.2 to 4 and others being Civil Suit No.20/1993. After admission of the suit, the summons were issued to all the defendants (party in the suit) including the respondents No.2 to 4 of the instant appeal through all modes of service including publication made in daily "Hilal-e-Pakistan" on 09.02.1993 and after publication, the defendants in the suit were appeared before the trial Court

and also filed their written statement on 17.02.1993 through Mr. Muhammad Ibrahim Soomro, Advocate. Thereafter, they did not appear before the trial Court and the trial Court after examining the exparte proof filed by representative of Decree Holder, decreed the suit of respondent No.1 on 07.04.1994. Consequently, Execution Application No.1619/1995 was filed by Decree Holder which was also contested by J.Ds through their Advocate namely Mr. Nadir Khoso and mortgaged property of the J.Ds was ordered to be auctioned. However, on 03.03.2010, the present appellant who was neither party in the suit nor in execution proceedings filed application u/s 12(2) as well as Under Order 41 Rule 5 C.P.C, which were contested by respondent No.1 and the same were dismissed through impugned order.

3. It is contended by Mr. Abdul Qayoom Pirzada, learned counsel for the appellant that appellant is the owner of property mortgaged by the J.D/respondent No.2 with the D.H/respondent No.1 bank; that property in question was leased out to the J.D/respondent No.2 for 99 years on certain terms and conditions which lessee / J.D failed to comply with hence the lease deed stood cancelled and the property in question could not be mortgaged but the J.D/respondent No.2 in collusion with D.H. mortgaged the property of the appellant and obtained loan from the D.H. bank with malafide intention and the D.H. bank obtained the decree by way of fraud and misrepresentation of facts; that the Bank was not authorized to grant loan to the respondent No.2 on the basis of lease documents; according to him the impugned order passed by the trial Court is not sustainable in law and liable to be set aside.

4. On the other hand, Mr. Hakim Ali learned counsel for respondent No.1 mainly contended that the order passed by the learned trial Court is well reasoned and passed in accordance with law; the applications filed by the appellant before the trial Court were time barred hence the same were rightly dismissed; no fraud or misrepresentation has been committed by the respondent No.1/D.H bank; the loan was obtained by J.D/respondent No.2 on his mortgaged property for which he was holding lease hold rights for 99

years and such registered lease deed was also surrendered by the J.Ds. Lastly, he contended that the present appeal having no merits for consideration is liable to be dismissed.

5. Mr. Aghis-u-Salam, learned counsel appearing for respondent No.4 during his arguments has only narrated the history of the case and could not point out any illegality or material irregularity in the impugned order.

6. Heard learned counsel for the parties and perused the material available on record with their able assistance.

7. From the perusal of record, it appears that the suit was filed by the respondent No.1/Bank bearing Suit No.20/1993 against the respondents No.2 to 4 and others which was decreed in his favour on 07.04.1994. Thereafter, execution application was filed by J.D. and after adopting due process of law, the mortgaged property of the J.Ds was ordered to be auctioned. It is also an admitted fact that the present appellant filed application u/s 12(2) C.P.C. on 03.03.2010 after expiry of sixteen years of the decree and no plausible explanation or cause has been brought on record that why the appellant remained mum for a long period. It may be mentioned here that it is not the case of appellant that he came into knowledge of decree on some late stage, nor any application for condonation of delay was filed and in such a situation, the learned trial Court has rightly taken the view that application u/s 12 (2) C.P.C. was barred by time. In this behalf, we are supported with the case of **Mst. Amtul Kabir and others v. Safia Khatoon and others (1991 SCMR 1022)**. In this authority, it has been held that the period of limitation in filing of application u/s 12(2) C.P.C. is three years under Article 181 of the Limitation Act, 1908.

8. Admittedly, the lease deed in respect of property mortgaged by J.D. was in favour of J.D. and was registered one. It is also an admitted position that said lease deed is still intact and has not been cancelled by any competent Court. The appellant claiming the ownership of the mortgaged property with the Bank, if it is believed that the appellant was the owner of the property in question after execution of registered lease deed for 99 years

in favour of J.D, the J.D. was very much competent to apply for loan with the Decree Holder Bank on the basis of such registered lease deed. Even otherwise, the proposed auction was in respect of the lease hold rights of the J.D. in the property in question and no right of appellant if any will be effected. Since the contention of learned counsel for appellant that the Bank was not authorized to grant loan to the respondent No.2 on the basis of lease documents is concerned, in this respect we have gone through the case law reported as **Messers United Bank Ltd. v. Muhammad Majeed alias Abdul Majeed (1991 CLC 1102 Karachi)**. In this case law almost identical situation was arisen and the Honourable Division Bench of this Court decreed the suit of Bank by observing as under:-

“Suit for recovery of house building loan. Mortgage suit filed by plaintiff-Bank against defendant who had taken house building loan by depositing title deed by way of mortgage of house leased out to him by City Developed Authority, was dismissed on ground that property leased out to defendant by lessor Authority could not have been mortgaged because terms of lease agreement had restrained defendant borrower from transferring his rights under lease without previous written consent of lessor Authority. Transaction of mortgage between defendant borrower and plaintiff-Bank in respect of house in dispute, was not void on account of terms and conditions mentioned in lease agreement between defendant and lessor Authority. Authority under terms of lease agreement had a right of re-entry on house in dispute in certain situations, but such right of re-entry would not invalidate mortgage in questions.”

We have examined the record and it appears that no fraud or misrepresentation in obtaining the decree is established by the appellant. The appellant appears to be set up person by the J.D.

9. In view of above facts and circumstances of the case, no perversity, illegality and incorrectness has been found in the impugned order. Learned trial Court while passing the impugned order has appreciated all points involved in this case. No illegality or material irregularity has been pointed out. We, therefore, under the facts and circumstances of the case find no merits in this appeal which is accordingly dismissed alongwith listed application. Since the matter is old one pertaining to year 1993, the trial Court is directed to dispose of the execution application within a period of

60 days from the date of receipt of this order and compliance report be submitted to this Court through Additional Registrar. Office is directed to return the R&Ps to the trial Court immediately.

10. Above are the reasons of our short order dated 16.09.2015, whereby the instant Ist Appeal was dismissed.

JUDGE

JUDGE

Tufail

