

IN THE HIGH COURT OF SINDH, KARACHI

Execution Application No.25 of 2012

Date of hearing 18.12.2015

Decree Holder: Through Mr. Amanullah Khan and
Mr. Irfanullah Khan Advocates

Objector : Through Mr. Jaffer Raza, Advocate.

ORDER

MUHAMMAD FAISAL KAMAL ALAM, J: Objection has been filed on behalf of Muslim Commercial Bank (MCB) to the main Execution Application No.25 of 2012, before the learned Official Assignee, which was placed before the Court through his Reference No.1 of 2014.

2. Mr. Jaffer Raza, learned counsel, appearing for the Objector (MCB), prayed that the auction of the **subject property**-House No.G-31, 5th Gizri Street, Phase-IV, Defence Housing Authority (DHA), measuring 2234 Square yards be halted, as the same has been purchased by the Objector (MCB) by the Deed of Conveyance dated 30th March, 2012, a copy whereof has been filed with the objections as Annexure “D”. A perusal of the said Conveyance Deed shows that the same has been entered into between Objector and Judgment Debtor No.3-Seema Shirazee wife of Adnan Shirazee (as owner of the subject property).

It was further argued on behalf of the Objector Bank that the above Conveyance Deed is basically in pursuance of an Agreement for Settlement of Outstanding Liabilities of same date viz. 30th March, 2012, (Annexure “**B**” of the Objections and at page-27 of the case file), between the Objector and said Seema Shirazee / Judgment Debtor No.3, who agreed to convey / transfer the above subject property to MCB / Objector against settlement of full and final liability of Rs.87,549,832/15 (Rupees Eight Crores Seventy Five Lac Forty Nine Thousand Eight Hundred Thirty Two and Fifteen Paise Only). Learned counsel for the Objector (MCB) has also placed on record Memorandum of Deposit of Title Deed dated 22.07.2009 to further fortify his arguments that the subject property was earlier kept as mortgaged with the Objector Bank by way of the said Memorandum of Deposit of Title Deed against a finance facility of Rs.115,224,658/= (Rupees Eleven Crores Fifty Two Lac Twenty Four Thousand Six Hundred and Fifty Eight Only).

3. As per learned counsel for Objector Bank that since the subject property now vests in the Objector Bank by virtue of a registered instrument, viz., the above mentioned Deed of Conveyance (of 30.03.2012), therefore, the subject property cannot be a subject matter of the present execution proceedings. It is further submitted that the Decree Holder-Askari Commercial Bank Limited, cannot roll back the sale transaction between the above mentioned Judgment Debtor No.3 and Objector Bank, except by way of an independent

Civil Suit as according to learned counsel, the registered Conveyance / Sale Deed can only be cancelled through an independent proceedings in terms of Section 39 of the Specific Relief Act, 1877 and not otherwise. Further contended that the subject property has been duly mutated in the name of Objector (MCB), as evident from various official documents, viz. Cantonment Board Clifton Letter of 31.08.2013, DHA Mutation Letter dated 21.11.2013 and Extract of GLR (General Land Register) dated 02.08.2013, filed as Annexure “D/1” to “D/4” with its Objection. In this regard, he has placed reliance on the following Judgments_

- (i) 2013 CLC 507 Page-511 (d).
- (ii) 2011 SCMR 1023 Page-1025) (b) & (c).
- (iii). 2013 YLR Page-727.
- (iv). PLD 1998 Karachi 348 Page-351 (a).

4. Lastly, Mr. Jaffer Raza, the learned counsel argued that even provision of Section 23 of the Financial Institutions (Recovery of Finances), Ordinance, 2001, (**Banking Law**) is not applicable to the subject property because the same (subject property) was never “mortgaged, pledged, hypothecated, charged and lien” with the Decree Holder Bank, inter alia, as the original title documents of the subject property was with the Objector-(MCB).

5. Subsequently, Objector Bank has also filed a synopsis dated 31.12.2005 after the case was reserved for orders.

6. In rebuttal, Mr. Amanullah Khan, alongwith Mr. Irfanullah Khan, the learned counsel for the Decree Holder argued that since the Decree Holder Bank has a mortgage decree in its hands, which is to be given priority over any other transaction in question.

7. He argued that it is a matter of record that the Compromise Decree, which includes the subject property, is of 29.06.2009, whereas, the purported sale transaction in pursuance of a Settlement Agreement between Objector and MCB and Judgment Debtor No.3-Seema Shirazee is of subsequent date, that is, 30th March, 2012, therefore, since the very Settlement Agreement is illegal, therefore, the subsequent Deed of Conveyance of the same date is also void ab-initio, besides, the executing Court cannot go beyond the decree.

8. It was contended that before the above sale transaction, a public notice dated 22.01.2012 was published by the Objector Bank in respect of the subject property, (Annexure “**C/1**” to the main Objection), which was responded to by the present counsel of the Decree Holder by their letter / objection of 26th January, 2012, which has been appended as Annexure “**DH/1**”, which is available at page-99 of the case file, (with Decree Holder reply to the main objections), yet the Objector Bank concluded the sale transaction instead of staying its hands from the subject property.

9. It was further argued that the ownership of the Objector Bank in respect of the subject property is subject to the mortgage of the present Decree Holder / Askari Commercial Bank Limited, and the above Mortgage Decree dated 29.06.2006 passed in Banking Suit No.B-10 of 2007. In addition to the above arguments, the Decree Holder has referred to a Statement in the form of an Affidavit (available at page-87) by its attorneys / officers in order to bring certain documents relating to the subject property on record, which are as follows: -

- i). A sale agreement dated 04.06.2008 between the above named Judgment Debtor No.3 and one Fatima Sarah Dawood wife of Mr. Dawood Gilani by virtue of which the subject property was purportedly sold out to said Fatima Sara Dawood for Rs.50 Million (Rupees Fifty Million Only), to satisfy another compromise decree passed in Suit No.133 of 2006 by the Banking Court No.1, Karachi, in favour of NIB Bank Limited, as the subject property was kept as mortgage with the NIB Bank Limited.
- ii). Another joint application under Section 47 Read with Order XXIII Rule 3 of CPC is also available at page-143, jointly filed by the above named Judgment Debtor No.3 and her counsel as well as NIB Bank Limited (Decree Holder) in the above mentioned Suit No.133 of 2006, whereby, inter alia, it was agreed that the NIB Bank Limited had accepted an amount of Rs.54,260,000/- (Rupees Five Crores Forty Two Lac Sixty Thousand Only)

towards full and final settlement of its liability. Para-2 of this application specifically mentions that the subject property was purchased by Fatima Sarah Dawood, who obtained a financial facility from the present Objector (MCB), and, therefore, it was requested that the original documents of the subject property be handed over directly to the representative of the present Objector Bank.

- iii). Another document, which is Annexure “**F**” at page-51, which in fact the order dated 14.10.2008, passed by the learned Judge of the Banking Court No.1, whereby, on a joint request of the present Judgment Debtor No.3 and the Decree Holder of the above suit / Execution No.24 of 2007, viz. NIB Bank Limited, title documents of the subject property was handed over to said Judgment Debtor No.3.

10. From the above documents, the learned counsel of present Decree Holder (Askari Commercial Bank Limited) attempted to demonstrate that the sale transaction in question is shrouded in mystery as there are four different parties, two private persons, the present Judgment Debtor No.3 and one Fatima Sarah Dawood and two Banks in between whom the subject property spun hastily to frustrate the proceeding of Banking Suit No.B-10 of 2007, filed by the present Decree Holder Bank, which, was subsequently decreed in terms of the Settlement Agreement dated 4th June, 2009, and the said decree is sought to be executed through

the instant Execution proceedings. It was further argued on behalf of present Decree Holder that since admittedly the Deed of Conveyance is of subsequent date, therefore, not only in terms of Section 23 of the Banking Law (ibid), but also under Section 53 of the Transfer of Property Act, 1882, the above transfer / conveying of the subject property to Objector (MCB) is illegal and fraudulent and, therefore, voidable at the option of the present Decree Holder.

11. In support of the above submissions, Mr. Amanullah Khan, Advocate has cited number of judicial precedents both from Pakistani and Indian jurisdiction.

12. In support of his arguments that the subject property is to be disposed of for satisfying the decree dated 29.06.2009 and if the objector has any grievance he should have filed an appeal against the said decree instead of preferring the instant objections, learned counsel has cited P L D 1969 S.C. Page 65 (H.M. Saya case) and 2000 M L D Page 421.

13. The Plaintiff's side has also placed reliance on P L D 2011 S.C. Page 241, in support of his contention that the above mentioned conveyance deed dated 30.03.2012 was not properly executed and is, therefore, of no legal effect.

14. Since no rebuttal or affidavit has been filed from the Objector side to the Reply of the Decree Holder, which is on an affidavit, therefore, per learned counsel, the contents of the above Reply to Objections of MCB be taken as proved and consequently the stance of Objector-MCB merits dismissal. In

this regard, he has placed reliance on PLD 2003 Karachi page 691, relevant page 697 (B).

15. In support of his contention, Mr. Amanullah Khan, the learned counsel for the Decree Holder, that the charge or mortgage runs with the property, unless redeemed and even subsequent transferee of property steps into the shoes of the debtor, he has relied upon the following case law;

- i) 2004 Civil Law Judgments (C L J) page 448.
- ii) 1978 S C M R Page 264, relevant page 265.
- iii) 2003 C L D Page 888 and at page 897, paragraph-5 (E), it was held that the mortgagee transferee with the property and any person and the transferee of the previously incumbent property steps into the shoes of the debtor.
- iv) 1997 S C M R Page 237. In this case a well-settled principle of law has been reiterated, that the Executing Court cannot go behind the decree.
- v) S B L R 2003 Sindh page 1534. In this Case learned Division Bench of this Court after considering the number of judicial precedents of Indian jurisdiction have held that the objections under Order XXI Rule 58 of C.P.C. is not maintainable by an stranger to the proceedings.
- vi) Lastly, A I R (All Indian Reports) 1935 Allahabad page 897, in which the above mentioned principle that stranger cannot prefer objection under order XXI Rule 58 of C.P.C, has been expounded.

16. As against the facts available on record, if the transaction between Objector (MCB) and Judgment Debtor No.3 (Seema Shirazee) is compared from the available record, shows that two Memorandum of Deposit of Title Deeds have been annexed with the Objections of MCB, as Annexures “**A**” and “**A/1**” dated 22.07.2009 and 13.10.2008 respectively, but no record of any finance facility Agreement has been placed on record. The afore mentioned Agreement for Settlement of Outstanding Liabilities (Annexure “**B**” to the Objections at Page-27) and the Deed of Conveyance (ibid) are of same date, that is, 30th March, 2012. In the intervening period, two Public Notices for purchasing the subject property were issued by the Objector (MCB); of January 22, 2012 (Annexures “**C**” and “**C/1**” respectively to the Objections), which were responded / objected to by the present Decree Holder vide its correspondence of January 26, 2012 (as already mentioned in paragraph 08 above), but, despite this, the Objector (MCB) concluded the sale transaction in question by the above Deed of Conveyance. The second set of facts with regard to subject property can be examined from the record of Banking Court No.1, as mentioned in the preceding paragraphs and leads to the conclusion that aforementioned Deed of Conveyance dated 30.03.2012 is admittedly subsequent to the passing of mortgage decree dated 29.06.2009 and, therefore, Section 23 of the Banking Law will be applicable and in terms thereof, the transaction

entered into, through the said registered Deed of Conveyance dated 30.03.2012, is void and of no legal effect.

17. For the sake of reference, Section 23 of the Banking Law is reproduced hereunder: -

23. Restriction on transfer of assets and properties. (1) *After publication of summons under subsection (5) of section 9, no customer shall, without the prior written permission of the Banking Court transfer, alienate, encumber, remove or part with possession of any of his asset or property furnished to the financial institution as security by way of mortgage, pledge, hypothecation, charge, lien or otherwise pending final decision of the suit filed by the financial institution under this Ordinance, and any such transfer, alienation, encumbrance or other disposition by the customer in violation of this subsection shall be void and of no legal effect:*

Provided that the customer may sell any such asset or property which has been retained by or entrusted to him for purposes of dealing with the same in the ordinary course of business subject to the terms of the letter of hypothecation or trust receipt or other instrument or document executed by him, or for purposes of effecting their sale and depositing the sale proceeds with the financial institutions:

Provided further that the customer before making the sale shall file in the Banking Court a statement supported by affidavit, containing full particulars of such asset or property, and within three days after the sale shall submit a full account thereof to the Banking Court and the financial institution.

(2) After pronouncement of judgment and decree by the Banking Court, including an interim decree under section 11, no judgment-debtor shall without the prior written permission of the Banking Court transfer, alienate, encumber or part with possession of any assets or properties and any such transfer, alienation, encumbrance or other disposition by a judgment-debtor in violation of this sub-section shall be void and of no legal effect. (underlining to add emphasis).

(3) The provisions of sub-section (1) shall also apply to a person who has furnished any security on behalf of a customer to the financial institution on the basis of which finance was granted, provided such person is a defendant in the suit filed under section 9 or is added as a defendant thereafter.

18. The case law cited by the Objector (MCB) in respect of his main plea that since subject property now vests in Objector (MCB) by virtue of a registered Deed of Conveyance dated 30th March, 2012, therefore, the present Decree Holder should first get the said Deed of Conveyance adjudged as cancelled before praying for the sale of the subject property to satisfy the decree of 29.06.2009 in favour of Decree Holder, in my considered view is clearly distinguishable from the facts and issues in hand, because the said Deed of Conveyance of 30th March, 2012, is hit by Section 23 of the Banking Law for the reasons, which are very much apparent from the record; that the Summons of the Banking Suit No.B-10 of 2007 was published on 05.03.2007 and eventually the Decree has been passed on 29.06.2009, whereas the sale transaction by virtue of above Deed of Conveyance has been entered into between

the Objector (MCB) and the said Judgment Debtor No.3 on 30th March, 2012, much after the proceedings of Banking Suit No.B-10 of 2007 and, therefore, both basics conditions as mentioned in Section 23, particularly, in Sub-Sections (1) and (2) of Banking Law (reproduced hereinabove), are available in the present case of Decree Holder. By operation of law or in other words Section 23 of the Banking Law, which is a provision of a special statute, the defence and submissions of the Objector (MCB) is not tenable. Even otherwise, if a transaction in question is prohibited under an express provision of a statute, then the said transaction cannot be saved on the ground that since it is under a registered instrument, therefore, to give effect to an express provision of law, an independent proceeding under Section 39 of the Specific Relief Act, 1877, is to be instituted. This would destroy the very purpose of Section 23 of the Banking Law and if a transaction does take place through a registered instrument but in violation of above referred provision of the Banking Law, the same can be dealt with in the proceeding under the Banking Law, without instituting a separate proceeding.

19. Once the liability of earlier Mortgagee-NIB Bank Limited was discharged, as evident from the afore mentioned record of Execution No.24 of 2007, filed in Suit No.133 of 2006 before the learned Banking Court No.1, at Karachi, and particularly order dated 14.10.2008 of the said learned Banking Court (Annexure “**F**” with the Statement / Affidavit of present

Decree Holder, available at page-151 of the present execution file), that the Compromise Decree of NIB Bank Limited has been satisfied, it is the present Mortgage Decree of 29.06.2009 regarding which, the present Execution Proceeding (Execution No.25 of 2012) is pending, has to be satisfied. Consequently, the judicial precedents cited above on the point of law that the mortgage travels with the property and not the person and the transferee of the previously encumbered property steps into the shoes of the debtor, is applicable to the case in hand. Rather it is an exposition of Section 58 of the Transfer of Property, Act (1882) relating to mortgage. Similarly, decisions mentioned above and cited by the present Decree Holder in respect of its contentions that Objector (MCB) being stranger to the present proceedings and is not entitled to any relief, except by way of an appeal as envisaged in Section 22 of the Banking Law, as laid down in SBLR 2003 Sindh page-1534 and that of Allahabad High Court (ibid) as well as Division Bench of Lahore High Court in 2000 MLD page-421, are squarely applicable to the instant case and consequently the Objections of Objector (MCB) is hereby dismissed being not maintainable.

20. Before parting with this order, it is necessary to mention here a famous case of our Court reported in PLD 1997 Karachi Page-62 (Abdur Raheem Versus United Bank Limited), wherein, inter alia, certain directions were issued for all the Financial Institutions, inter alia, to the effect that they should streamline their banking transaction in a transparent

manner as these Banks / Financial Institutions have fiduciary relationship vis-à-vis their customers / public at large.

21. It is, however, clarified that the present order should not be construed to prejudice or, in any way, curtail the right and interest of Objector (MCB) for recovery of its outstanding liabilities, if any, including as mortgagee, against the Judgment Debtor No.3-Seema Shirazee.

There is no order as to costs.

Karachi.

Dated : 15.01.2016

JUDGE

M.Javaid.PA