

ORDER SHEET  
**IN THE HIGH COURT OF SINDH AT KARACHI**  
EXECUTION No. 33 / 2012

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DATE	ORDER WITH SIGNATURE OF JUDGE
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- 1) For hearing of CMA No. 248/2014.
- 2) For hearing of CMA No. 266/2014.

16.03.2017

Mr. Abid Hussain Advocate for Decree Holder.  
M/s Khalid Latif and Naveed Ahmed Advocates  
for Intervener.

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1 & 2) These are two applications filed on behalf of the judgment debtor under Order 21 Rule 25 and 58 CPC, whereby, the Onjector /Intervener seeks de-attachment of the property bearing Bungalow on Plot No. 50/III, 14<sup>th</sup> Lane, Phase VII, DHA, Karachi.

Learned Counsel for the judgment debtor submits that the bungalow in question was purchased by the objector from the judgment debtor on 23.1.2010 through a registered Sale Deed, whereas, the judgment and decree in this matter was passed subsequently on 24.8.2010; hence, the property does not belong to the judgment debtor and could not have been attached. Learned Counsel has referred to the Sale Deed as well as Section 23 of The Financial Institutions (Recovery of Finance) Ordinance, 2001 (“**FIO, 2001**”).

On the other hand, Learned Counsel for the Decree Holder submits that in view of Section 52 of the Transfer of Property Act, the property in question has been rightly attached, whereas, the Sale Deed in question has been executed to avoid recovery of the decretal amount and therefore, the application be dismissed. He further submits that despite a Sale Deed the property is still in the name of the judgment debtor in the records of Defence Housing Authority (**DHA**) and Military Estate Office (**M.E.O.**).

I have heard both the learned Counsel and perused the record. it appears that the judgment debtor was granted a running finance facility of Rs. 300 million which was further extended and such facility was against hypothecation and pledge of shares and upon default, the

decree holder as stated in the plaint sold out the pledged / hypothecated shares for an amount of Rs. 37,248,003/-. It is an admitted position that the property in question was never mortgaged, pledged or hypothecated in any manner. The recovery Suit under the Banking Jurisdiction was filed by the decree holder on 16.10.2009 and the judgment debtor failed to seek leave to defend, whereafter, judgment and decree was passed on 24.8.2010. The present Execution Application was filed on 7.9.2012 and through order dated 3.8.2015 the property in question was attached. Insofar as the property in question is concerned, though in the record of DHA and MEO it is still in the name of judgment debtor as alleged however, notwithstanding this, the same has been transferred in the name of objector through a registered Sale Deed dated 23.1.2010. The change in the record of DHA and MEO is not fatal or relevant insofar as the ownership of the objector is concerned, as a valid registered document i.e. the Sale Deed exists in his favour. The change in the record of DHA and MEO is procedural in nature and it is not necessary that every owner of the property must immediately effect such change and again notwithstanding, let alone this change cannot ipso facto decide or be made basis as to ownership rights of a person.

Insofar as present proceedings are concerned, they are governed by FIO, 2001 wherein, Section 23 provides the restriction on transfer of assets and properties of the borrower. The same reads as under:-

“23. Restriction on transfer of assets & properties.-(1) After publication of summons under sub-section (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 financial institution under this Ordinance, and any such transfer, alienation, encumbrance or other disposition by the customer in violation of this sub-section 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 institution:

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.

(3) .....

Perusal of the aforesaid provision clearly provides in sub-section (1) that 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 financial institution under this Ordinance, and any such transfer, alienation, encumbrance or other disposition by the customer in violation of this sub-section shall be void and of no legal effect. This provision clearly restricts the applicability of this Section only to mortgage, pledge, hypothecation, charge, lien or other claim offered by the customer to the financial institution. It nowhere provides that all assets of the customer cannot be sold or disposed of after issuance of summons as provided in Section 9 of the FIO, 2001. Whereas, sub-section (2) provides that after pronouncement of judgment and decree by the Banking Court, 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. Perusal of sub-section (2) of Section 23 reflects that restriction not only applies on the mortgaged property or assets but all other assets as well. However, it would only come into force after pronouncement of judgment and decree and not merely upon filing of a Banking Suit and issuance of summons thereof. The legislative intent is clear that insofar as the mortgaged or otherwise secured assets are concerned, they cannot be sold out or disposed of after issuance of summons as provided in Section 9 *ibid*. Whereas, once a judgment and decree has been passed, then the judgment debtor cannot sell or dispose of any of his assets whether be it mortgaged or not. It is an admitted position in this matter that though the Suit was filed on 16.10.2009 and summons were issued before the sale deed was executed i.e. 23.1.2010 however,

the judgment and decree was passed in this matter much later i.e. 24.8.2010. Therefore, the property in question does not fall within the ambit of sub-section (2) of section 23 *ibid* having no such restrictions. In the case of ***Zohair Zakaria V. National Bank of Pakistan (2009 C L D 915)***, a learned Division Bench of this Court while interpreting Section 23 of the FIO, 2001 has been pleased to hold as under:-

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“Before we discuss section 23 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and its effect, we would like to discuss section 53 of the Transfer of the Property Act. From bare reading of the section 53 of the Transfer of the Property Act, it appears that transfer of immovable property made with intent to defeat or delay creditors of transferor is not void transaction but is voidable at the option of the creditor. The proviso of section 53 of the Transfer of Property Act protects right of bona fide transferee in good faith against valuable consideration. The creditor has to exercise his right of option to declare transfer of the property with intent to defeat and delay its recovery by filing of suit or manifest his intention to avoid transaction such as by attachment of property transferred. Onus of proving that the deed of transfer was fraudulent is on the person alleging it.

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The restriction put by subsection (1) of section 23 on customer, relates only to the assets or properties furnished to the Financial Institutions ***as a security by way of mortgage, lien, etc. whereas under subsection (2) of section 23 transfer or alienation of any property by the judgment debtor is void transfer and of no legal effect.***”

In view of hereinabove facts and circumstances of this case, I am of the view that the property did not vested in the judgment debtor when judgment and decree was passed in this matter, whereas, there was no restriction on its sale in view of the express provision of Section 23 of FIO, 2001, and therefore, cannot be attached. The judgment in the case of ***Zohair Zakaria supra***, squarely applies as well in this case. Accordingly, both these applications are allowed and order dated 3.8.2015 whereby, the property in question was attached is recalled. The learned Official Assignee is directed to withdraw any notice issued by him to the concerned authorities for attachment of the property in question, if any. Both applications are disposed of in the above terms.

JUDGE