

IN THE HIGH COURT OF SINDH KARACHI

**Present:**

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Adnan Iqbal Chaudhry.

**First Appeal No. 95 of 2015**

[The Lake City Holdings (Pvt) Ltd. v. United Bank Ltd. and another]

Appellant : The Lake City Holdings (Private) Limited  
through Mr. Amar Shaikh, Advocate.

Respondent 1 : United Bank Limited through  
Mr. Ijaz Ahmed, Advocate.

Respondent 2 : Nemo.

Dates of hearing : 10-09-2018 & 03-10-2018

Date of decision : 24-12-2018

**JUDGMENT**

**Adnan Iqbal Chaudhry J.** - This appeal under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 assails the order dated 06-10-2015 passed by the Banking Court No.IV at Karachi in Suit No.06/2011, whereby the Appellant's application under Section 12(2) CPC to set aside the judgment and decree dated 23-05-2012, was dismissed. With the consent of learned counsel, this appeal was heard by us for disposal at the *katcha peshi* stage.

2. The Respondent No.2 was an employee of the Respondent No.1 (the Bank), and during such employment he availed a finance facility of Rs.10,000,000/- from the Bank for purchasing an immovable property at Lake City, Lahore. Along with a Finance Agreement, the Respondent No.2 also executed an Agreement to Mortgage dated 24-05-2007 in favor of the Bank. Thereafter the Respondent No.2 entered into an Agreement for Purchase dated 06-09-2007 with the Appellant to purchase a Villa on Plot No.BVS-M1-A-R-551, measuring 2 Kanals in Lake City, Lahore (the subject

property), in a housing scheme being developed by the Appellant. Pursuant to the Agreement for Purchase, the Appellant issued to the Respondent No.2 an Allocation Letter dated 06-09-2007 in respect of the subject property.

3. In 2008, the Respondent No.2 resigned from the employ of the Bank. In 2011, the Bank filed Suit No.06/2011 against the Respondent No.2 (only) in the Banking Court No.IV at Karachi for recovery of the finance facility. In filing the Suit the Bank contended that the finance facility had been secured by the Respondent No.2 by depositing the Agreement for Purchase and the Allocation Letter dated 06-09-2007 in respect of the subject property. Per the plaint, the deposit of such documents constituted an equitable mortgage of the subject property, hence the prayer for sale of the subject property as mortgaged property. The Suit was decreed against the Respondent No.2 for Rs.9,810,621 plus cost of funds vide judgment dated 23-05-2012. A decree was also passed for sale of the subject property as mortgaged property.

4. It appears from the impugned order that the Bank moved for execution of the decree on 07-02-2013 and prayed for sale of the subject property as mortgaged property, but at the auction held on 27-03-2014 no bid was received and the sale proclamation was re-issued fixing the auction for 08-05-2014. On 30-04-2014 the Appellant, who was not a party to the Suit, moved an application under Section 12(2) CPC before the Banking Court in Suit No.06/2011, alleging that the judgment and decree to the extent of sale of the subject property, had been obtained fraudulently, collusively and by misrepresenting that the subject property was the property of the Respondent No.2 when the Respondent No.2 had never paid the agreed sale consideration to the Appellant, and therefore it was contended that the subject property continued to be the property of the Appellant. However, such application under

Section 12(2) CPC was dismissed by the Banking Court vide the impugned order dated 06-10-2015.

5. In passing the impugned order, the Banking Court held that there was no fraud or misrepresentation in obtaining the decree as the Allocation Letter of the subject property issued by the Appellant in favor of the Respondent No.2 had never been cancelled; that such Allocation Letter coupled with a non-encumbrance certificate provided by the Appellant to the Bank sufficiently demonstrated title of the Respondent No.2 to the subject property; and that under Clause 11 of the Agreement for Purchase of the subject property, the Respondent No.2 was entitled to transfer his rights and obligations to the Bank.

Thus, the question raised for our determination in this appeal is whether the Respondent No.2 was competent to mortgage the subject property, and if so, was such mortgage created ?

6. The relevant clauses of the Agreement to Mortgage dated 24-05-2007 between the Bank and the Respondent No.2 read as under:

*"1. In consideration of the Bank having agreed/agreeing to, at the Employee's request, grant a Housing Finance under the Markup Agreement for Housing Finance dated \_\_\_\_\_ the Employee hereby declares that on the completion of the transaction of purchase of the said Property the Employee shall have full unencumbered legal title and interest and full power and absolute authority to create an equitable mortgage in respect thereof in favour of the Bank to secure the finance.*

*2. The Employee shall obtain the requisite Permission to Mortgage, Valuation Certificate and Extract/Fard from the City Survey Department/Revenue Department and Other Certificate(s) and documents, if any, required for the purpose of creation of the Equitable Mortgage in favour of the Bank in respect of the said Property.*

*4. The Employee shall execute, in favour of the Bank, a Memorandum Acknowledging Creation of Mortgage by Deposit of Title Deeds in respect of the said Property together with all existing and future constructions and fixtures thereon to secure the repayment of the aforesaid Housing Finance.*

*5. In the event of the Employee failing to acquire full unencumbered legal title and interest in the said Property or failing to acquire allotment/lease of the House/Flat constructed by a builder and/or otherwise failing to create Equitable Mortgage of the said Property in favour of the Bank, and /or in case of dismissal or termination of his services from the Bank, the Bank may at its sole discretion require the immediate payment of the entire Housing Finance together with accrued mark-up forthwith as may then be outstanding against the employee,*

*together with all other charges, taxes, levies that may fall due in respect of the said property and interest at such rate as may be determined by the Bank."*

7. Under the Agreement for Purchase dated 06-09-2007 between the Appellant as seller and the Respondent No.2 as purchaser of the subject property, the sale consideration was agreed at Rs.21,050,552/- payable in 10 installments. The other relevant clauses of the Agreement for Purchase read as under:

*"1. Upon completion of the Scheme and upon receipt of payments hereinafter detailed, The Lake City shall transfer to the Purchaser the Allocated Villa measuring [2-Kanal] covered area 6876 sqr ft of Royale Finishing in fully developed and complete condition in the Scheme on the terms and subject to the conditions set out herein below.*

*5. The Allocated Villa shall be transferred by The Lake City to the Purchaser only after the Completion Date and upon payment of both the Plot Price as well as the Development Charges in their entirety and Villa Price.*

*11. The Purchaser may transfer to any person ("the Transferee") its rights and obligations under this Agreement without, in any manner, altering the rights and obligations of The Lake City hereunder. Provided that a valid transfer may only be made on payment of Rs. 25,000/- per kanal by Pay Order in the name of Lake City and deposition of his/her next installment due in advance and execution of a Termination Letter by the Purchaser in person, or in the case of companies by an authorized attorney, at the Registered Office of The Lake City and execution of a fresh agreement (hereinafter referred to as The Subsequent Agreement for Purchase) by the Transferee in person at the aforesaid Registered Office with The Lake City in terms that are identical to the terms of the present agreement. No transfer will be registered or recognized by The Lake City unless the finger prints and scanned pictures of the Purchaser has been matched with such data of the Purchaser already stored in the electronic database of The Lake City. Unless such data was stored prior to the date of this Agreement, it is the obligation of the Purchaser to cause his/her finger print and scanned pictures to be stored in the electronic data base of The Lake City at the earliest after the execution of this agreement. The finger print and scanned pictures of the Transferee will be recorded as a condition precedent to the execution by The Lake City of The Subsequent Agreement for Purchase with the Transferee and the registration of the transfer.*

*14. This Allocation Letter and Agreement for Purchase consisting of three typed pages has been executed in duplicate, each page having been signed by both the parties, and each instrument shall be an original for all purposes."*

The aforesaid Agreement for Purchase was coupled with an Allocation Letter dated 06-09-2007 which stated that:

*"These documents constitute transferable title instruments that can be transferred as per the procedure laid down by The Lake City Holdings (Pvt.) Ltd. The same will be filed and registered in our office."*

8. The Respondent No.2 resigned from the employment of the Bank w.e.f. 06-03-2008 and it was thereafter that by letter dated 20-05-2009 the Bank requested the Appellant to “create charge/lien” on the subject property in favor of the Bank. By a letter in reply dated 27-05-2009, the Appellant informed the Bank that a sum of Rs.14,776,952 was still payable by the Respondent No.2 towards the agreed sale consideration of the subject property out of which Rs.11,564,490 was over-due; and since the Respondent No.2 has yet to pay the sale consideration of subject property to the Appellant, “..... the marking of lien shall only be PROVISIONAL in favor of the Bank in the relevant records subject to full and final payment of the Total Price of Villa. However, in the meantime no right(s) shall accrue to the Bank and the Bank shall have no rights(s) and/or claim(s) against Lake City and The Lake City shall stand absolved against any or claim(s), whatsoever, in any eventuality.”

9. Mr. Amar Sheikh, learned counsel for the Appellant contended that since the Respondent No.2 had failed to pay the sale consideration of the subject property as agreed by him under the Agreement for Purchase dated 06-09-2007, the subject property had never been transferred to the Respondent No.2, and consequently he had no title to the subject property so to mortgage the same. Learned counsel took us through the terms and conditions of the Agreement to Mortgage reproduced in para 6 above to submit that such agreement envisaged a mortgage only after transfer of the subject property to the Respondent No.2; and the terms and conditions of the Agreement for Purchase dated 06-09-2007 reproduced in para 7 above to submit that the such agreement had never transferred title of the subject property to the Respondent No.2. Learned counsel submitted that in obtaining the decree, the Bank had suppressed from the Banking Court the letters dated 20-05-2009 and 27-05-2009 (discussed in para 8 above) exchanged between the Bank and the Appellant which would have shown that the subject property was never mortgaged to the Bank; that the Bank had knowledge that it

was the Appellant who was owner of the subject property and thus a necessary party to the Suit; hence fraud and misrepresentation. In support of his case, learned counsel for the Appellant relied on the cases reported at *Bolan Bank Ltd. v. Al-Aslam International* (2002 CLD 702); *Shahzada Akhtar v. Bank Alfalah Ltd.* (2013 CLD 416); and *Rasheeda Begum v. Muhammad Yousaf* (2002 SCMR 1089).

10. On the other hand, Mr. Ijaz Ahmed, learned counsel for the Bank submitted that the Allocation Letter dated 06-09-2007 that followed the Agreement for Purchase of the subject property clearly stipulated that “*These documents constitute transferable title instruments that can be transferred as per the procedure laid down by The Lake City Holdings (Pvt.) Ltd.....*”; that Clause 11 of the Agreement for Purchase also envisaged the same; that such documents had never been cancelled by the Appellant for non-payment by the Respondent No.2; that such documents coupled with the non-encumbrance certificate provided by the Appellant to the Bank, were sufficient to constitute a transferable title in the subject property in favor of the Respondent No.2; therefore the deposit of these documents by the Respondent No.2 with the Bank constituted an equitable mortgage of the subject property. In the alternative Mr. Ijaz Ahmed submitted that the transaction was, in the very least, a “charge” on the subject property within the meaning of Section 100 of the Transfer of Property Act, 1882. Mr. Ijaz Ahmed also drew our attention to the order dated 10-11-2015 in this appeal which recorded that the Appellant’s counsel had sought time to seek instructions to deposit the decretal amount in Court to save the subject property from auction.

11. Exercising rebuttal, learned counsel for the Appellant submitted that the non-encumbrance certificate relied upon the Bank had never been issued for the subject property and the letter of the Appellant that purports to enclose the said certificate had been doctored to mislead the Court. He submitted that the words “*These*

*documents constitute transferable title instruments.....”* appearing in the Allocation Letter, and the transfer envisaged under Clause 11 of the Agreement for Purchase of the subject property, was a transfer of the file of the subject property and not the transfer of the property itself. As regards the order dated 10-11-2015 in this appeal, learned counsel submitted that in fact he had sought time to seek instructions to deposit the installments received from the Respondent No.2 in respect of the subject property, and that the mention of the ‘decretal amount’ in the said order was obviously a typographical error. On being queried by us as to what his instructions were, learned counsel replied that the Appellant was willing to pay to the Bank the sum of Rs.6,639,452/- that it had received from the Respondent No.2 in installments towards the sale consideration of the subject property.

12. The clauses of the Agreement to Mortgage dated 24-05-2007 reproduced in para 6 above manifest that it was not an instrument of mortgage in the *praesenti*, but an agreement to mortgage once the sale of the property was completed in favor of the Respondent No.2 and once he acquired legal title in the property so as to be competent to mortgage. That was obvious also for the reason that at the time of the Agreement to Mortgage, the Respondent No.2 had yet to enter into the Agreement for Purchase of the subject property. Once the property was transferred to the Respondent No.2, then the Agreement to Mortgage further required the Respondent No.2 to obtain the requisite permits, certificates, Fard, and to execute a further document, a Memorandum of deposit of title deeds, in respect of the property in favor of the Bank.

13. The clauses of the Agreement for Purchase dated 06-09-2007 reproduced in para 7 above, coupled with the fact that it was an unregistered document, that too executed in duplicate, manifest that it was not an instrument of conveyance or title of the subject property in favor of the Respondent No.2, but it was only an

agreement to sell the subject property conditioned *inter alia* on payment of the agreed sale consideration by the Respondent No.2 to the Appellant.

Apparently, the Respondent No.2 did not pay the agreed sale consideration to the Appellant and therefore the subject property was never transferred to him so as to make him competent to mortgage or charge the same in favor of the Bank. Consequently, the subject property remained the property of the Appellant. It is settled law that a person can only transfer such interest in property which he possesses himself. The following excerpt from the case of *Bolan Bank Ltd. v. Al-Aslam International* (2002 CLD 702) decided by a learned Division Bench of this Court clinches the matter of competency to mortgage/charge a property as follows:

“..... Nevertheless we are clearly of the view that no such mortgage can be created in respect of property the title whereof does not vest in the mortgagor or the mortgagor does not have any explicit authority to create a charge upon such property. In *V.E.R.M.A.R. Chettyar Firm v. Ma Joo Teen and others* (AIR 1933 Rangoon 299), a Full Bench of the Rangoon High Court held that “a document of title to immoveable property mentioned in section 58(f) of the Transfer of Property Act, 1882, must disclose an apparent title of the property in the mortgagor or to some interest therein.” The same view was followed by this Court in *Australasia Bank Ltd, v. Faruqui Housing Building Corporation Ltd. and 2 others* (PLD 1975 Karachi 870) with which were entirely agree.”  
“Even otherwise the proposition that one person cannot create a charge on the property of another is too obvious to require any sophisticated legal argument.”

14. The reliance placed by learned counsel for the Bank on the text of the Allocation Letter and on Clause 11 of the Agreement for Purchase (both reproduced under para 7 above) to contend that these documents conferred on the Respondent No.2 a transferable title in the subject property, is completely misconceived. The transfer envisaged by the said documents was not a transfer of the subject property, but only a transfer, rather an assignment of the Agreement for Purchase, whereby the transferee would step into the shoes of the Respondent No.2 as purchaser subject to the procedure laid



down in Clause 11 of the Agreement for Purchase. But it is not the case of the Bank that it succeeded the Respondent No.2 as purchaser of the subject property under the Agreement for Purchase, nor is it their case that the subject property had been mortgaged or charged by the Appellant for the debt of the Respondent No.1; but it is the case of the Bank that the subject property was the property of the Respondent No.2 which he mortgaged himself to the Bank.

15. The fact that the subject property was never mortgaged or charged to the Bank by the Respondent No.2 was acknowledged by the Bank in writing the letter dated 20-05-2009 to the Appellant and requesting the Appellant to "*create charge/lien*" on the subject property. Such letter did not assert that a mortgage or charge was existing over the subject property. Had the subject property been mortgaged or charged by the Respondent No.2 to the Bank, the Bank would not have been requesting the Appellant to create a charge/lien thereon. The letter dated 27-05-2009 written by the Appellant to the Bank in reply shows that the Appellant did not agree to create a charge on the subject property, rather it marked a provisional lien on the subject property, effective only if the sale consideration of the subject property was paid by the Respondent No.2. Such conditional lien was not, and could not be a 'charge' created by the Appellant within the meaning of Section 100 of the Transfer of Property Act, 1882 or within the meaning of Section 2(e) of the Financial Institutions (Recovery of Finances) Ordinance, 2001, and for this reason the Appellant was never made party by the Bank in the Suit to enforce any charge or lien over the subject property. Since the subject property had never been mortgaged or charged, nothing turns on the non-encumbrance certificate relied upon by the Bank, and the questions whether such certificate was issued for the subject property or not, or whether it was doctored, are irrelevant to the case.

16. The letters dated 20-05-2009 and 27-05-2009 discussed in paras 8 and 15 above, that had been exchanged between the Appellant and the Bank clearly demonstrate the Bank's knowledge that the deposit of the Agreement for Purchase and Allocation Letter in respect of the subject property by the Respondent No.2 with the Bank did not constitute a mortgage or a charge and that the subject property vested in the Appellant. The fact that the Bank still went on to portray to the Banking Court that the subject property was mortgaged, apparently to overcome absence of security, was clearly a misrepresentation if not a fraud. It appears that in dismissing the Appellant's application under Section 12(2) CPC, the Banking Court has not even bothered to peruse the contents of the application.

17. In view of the foregoing, and on the condition that the Appellant pays to the Bank the sum of Rs.6,639,451/- conceded to under para 11 above, the appeal is allowed, the impugned order dated 06-10-2015 passed by the Banking Court No.IV at Karachi in Suit No.06/2011 is set aside, the Appellant's application under Section 12(2) CPC moved in the said Suit is granted by setting aside the judgment and decree passed in the said Suit to the extent of sale of the subject property. After adjusting the aforesaid sum of Rs.6,639,451/- towards the decree, the Bank is free to execute the decree for the remaining amount against the Respondent No.2.

**JUDGE**

**JUDGE**

Karachi

Dated: 24-12-2018