

IN THE HIGH COURT OF SINDH KARACHI

I.A. No. 74 of 2014

[Abu Bakar v. First Women Bank Ltd. and others]

Date of hearing : 10-08-2018
Date of decision : 05.10.2018
Appellant : Abu Bakar through Mr. Azhar Faridi,
Advocate.
Respondent No. 1 : First Women Bank Limited through
Mr. Muhammad Zia Qureshi, Advocate.
Respondents 2-4 : Nemo.

JUDGMENT

ADNAN IQBAL CHAUDHRY J. -

1. This judgment decides an appeal under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 against judgment and decree dated 04-08-2014 passed by the Banking Court No.II at Karachi, whereby Suit No.114/2013 filed by the Respondent No.1 (hereinafter 'the Bank') against the Appellant and the Respondents 2 to 4 under Section 9 Financial Institutions (Recovery of Finances) Ordinance, 2001 was decreed for a sum of Rs. 42,897,194/- along with cost of funds and for sale of the mortgaged property.

Since this appeal was an old matter which had yet to be admitted to regular hearing, on the request of learned counsels we heard this appeal for final disposal at the pre-admission stage.

2. Before the Banking Court, the Respondent No.2 (Big W Import & Export Pvt. Ltd.) was sued as the principle borrower; the Respondents 3 and 4 who were also Directors of the Respondent No.2, were sued as sureties (personal guarantors); and the Appellant was sued both as surety and mortgager. The Respondents 2 to 4

were proceeded *ex-parte*. Only the Appellant filed an application for leave to defend the suit, which application was dismissed vide order dated 07-07-2014, followed by judgment and decree as aforesaid.

3. Towards the end of the hearing of this appeal, learned counsels brought on record the fact that pending this appeal before the High Court, the Appellant had also moved an application before the Banking Court under Section 12(2) CPC for setting aside the same judgment/decree that is impugned herein. Such application was dismissed by the Banking Court on 27-03-2018, not on the ground that an appeal is pending, but essentially on the ground that the application was not maintainable when the Appellant had failed to appeal the decree. It appears that none of the parties brought to the notice of the Banking Court that an appeal against the decree was pending before this Court. Though it is unfortunate that the parties did not assist the Banking Court properly, we are of the view that the dismissal of the application under Section 12(2) CPC by the Banking Court would not prejudice this appeal; firstly, because the application under Section 12(2) CPC was not dismissed on the merits, but as being not maintainable; and secondly because this being a statutory appeal, it is available to the Appellant by way of right. However, this should not be taken as endorsing the action of the Appellant in trying to invoke the remedy under Section 12(2) CPC when he had already invoked the statutory remedy of an appeal.

4. Before the Banking Court it was the case of the Bank that the Respondent No.2 was extended an Export Refinance facility of Rs.33,100,000 pursuant to an Offer Letter dated 30-06-2012 followed by finance agreements, including a markup agreement dated 30-06-2012; that the Respondent No.2 was then extended an Over-Draft facility of Rs.5,000,000 pursuant to an Offer Letter dated 02-08-2012 followed by finance agreements, including a markup agreement

dated 02-08-2012; that the Appellant and the Respondents 3 and 4 executed personal guarantees for the repayment of the said finance facilities; that additionally, the Appellant also mortgaged his Plot No. 4/7, measuring 750 sq. yds., Maniya Co-operative Housing Society, Karachi (the mortgaged property), by way of an equitable mortgage to secure the said finance facilities. The documents said to be executed by the Appellant to secure the said finance facilities were relied upon by the Bank as follows:

- (i) Registered Mortgage Deed dated 08-03-2010 as evidence of the equitable mortgage;
- (ii) General Power of Attorney dated 08-03-2010 in favor of the Bank in respect of the mortgaged property;
- (iii) Personal guarantee dated 30-06-2012 as security for the Export Refinance facility;
- (iv) Personal guarantee dated 02-08-2012 as security for the Over-draft facility;
- (v) Memorandum of Deposit of Title Deeds (MOTD) dated 02-08-2012 to acknowledge the equitable mortgage already made;
- (vi) Letter of Continuity dated 02-08-2012 to acknowledge the mortgage also for the Over-draft facility.

5. In his leave-to-defend application it was the case of the Appellant that his signatures on the two personal guarantees, the MOTD and the Letter of Continuity dated 02-08-2012 were forged, and thus the matter ought to be referred to a hand-writing expert to determine such signatures. However, the Appellant admitted his signatures on the Registered Mortgage Deed and General Power of Attorney dated 08-03-2010. It was the case of the Appellant that though he had mortgaged his property to the Bank, such mortgage was made pursuant to an agreement between the Appellant and the Respondent No.3 (Waseem Riaz) to secure a finance facility extended by the Bank in the year 2010 to a "Vancouver Enterprise", and not to secure the finance facility extended by the Bank in the year 2012 to Big W Import & Export (Pvt.) Ltd. (Respondent No.2); that when a dispute arose between the Appellant and the Respondent No.3 (Waseem Riaz), such dispute was referred to a

third-party for arbitration, where the Respondent No.3 agreed under an award dated 11-05-2012 that he would not use the mortgaged property for borrowing any further.

6. The Banking Court after considering the grounds raised by the Appellant in his leave-to-defend application, concluded that the documents on the record sufficiently established that the Appellant had in fact mortgaged his property to the Bank not for any Vancouver Enterprise, but for the debt of Respondent No.2, and therefore the allegation that signatures on some of the documents were forged was without substance, especially when the Appellant had never ever asked the Bank to redeem the mortgage. Therefore, the Banking Court held that no substantial question of law or fact was raised that required evidence and refused leave to defend the suit. However, in decreeing the suit the Banking Court denied the Bank the claim for SBP penalties and insurance charges on the ground that such claim was not borne from the finance agreements.

7. The grounds of this appeal are essentially the same as the ones taken by the Appellant in his leave-to-defend application discussed in para 5 above. Learned counsel for the Appellant contended that the fact that the Appellant had alleged that the personal guarantees, the MOTD and the Letter of Continuity dated 02-08-2012 (not the Registered Mortgage Deed and General Power of Attorney dated 08-03-2010) were forged with his signatures, that was a ground sufficient to grant leave to defend the suit, inasmuch as such question could not have been decided without recording evidence. In support of such submission, learned counsel relied on the case of *Akhtar Begum v. Muslim Commercial Bank Ltd.* (2009 SCMR 264). In *Akhtar Begum's* case the facts were that on discovering that her property was under auction in execution of mortgage decrees, the petitioner/mortgagor moved under Section 12(2) CPC on the ground that she had never mortgaged her property; that her signatures on the mortgage documents were forged; that the counsel

purporting to represent her in the suit had never been appointed by her; and that her signatures on the vakalatnama were also forged. When the Honourable Supreme Court summoned that counsel and confronted him with the disputed vakalatnama, it surfaced that such counsel had never seen the mortgagor and that he had actually been engaged by the counsel for the principal borrowers through whom the vakalatnama had been delivered. Therefore, only when a suspicion had arisen, the Honourable Supreme Court proceeded to compare the mortgagor's disputed signatures and her admitted signatures and found a substantial variation, which then warranted the making of a reference to a hand-writing expert. For such purpose the matter was sent to the Banking Court with the order that till a report is received from the hand-writing expert, the auction of the mortgaged property shall be on hold. However, if then the decree was not set-aside.

8. Coming to the facts of the instant case and as noted above, here the creation of the equitable mortgage, the Registered Mortgage Deed and the General Power of Attorney dated 08-03-2010 in favor of the Bank are all admitted by the Appellant, *albeit* it is the Appellant's case that these were not executed for the debt of the Respondent No.2 but for the debt of another. Therefore, *Akhtar Begum's* case (*supra*) is of no help to the Appellant. In the circumstances where the creation of the mortgage is admitted, the bald allegation that some of the other documents were forged, is not *per se* a "substantial question of fact in respect of which evidence needs to be recorded" within the meaning of Section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. The primary question for determination in this appeal is whether the Appellant's contention that he had mortgaged his property for the debt of Vancouver Enterprise and not for the debt of the Respondent No.2, required the recording of evidence. If the answer to such question is in the negative, then the allegation that some of the other

documents were forged, lose not only credence but also all force, for then, even if the disputed documents are ignored, the Appellant still remains liable for the mortgage money as mortgagor.

9. The agreement dated 04-06-2009 between the Appellant and the Respondent No.3 (Waseem Riaz) pursuant to which the Appellant claims to have mortgaged his property to the Bank, is annexed to the Appellant's leave-to-defend application, so also the agreement dated 11-05-2012 arrived between them before the arbitrator *albeit* the annexure to the latter has not been filed.

The aforesaid agreement dated 04-06-2009 shows that both "Big W Import & Export (Pvt.) Ltd." (Respondent No.2) and "Vancouver Enterprise" were businesses of the Respondent No.3 (Waseem Riaz); that the Appellant had approached the Respondent No.3 for finance for the Appellant's business namely 'Cordial Trading Corporation'; that it had been agreed between them that the Respondent No.3 will procure such finance as a loan from a bank in the name of his business "Vancouver Enterprise", which loan when sanctioned would be transferred to the bank account of 'Cordial Trading Corporation' (the Appellant's business); it was agreed that as collateral for such loan, the Appellant will mortgage his property (the mortgaged property); and that repayments of the loan would be made by the Appellant but routed to the Bank through Vancouver Enterprise. Though the said agreement envisaged that the loan would be obtained from National Bank of Pakistan, it appears that subsequently that loan was obtained from the Respondent No.1 Bank as it is acknowledged by the Appellant in his leave application that the mortgage was created in favor of the Respondent No.1 Bank.

The agreement arrived between the Appellant and the Respondent No.3 (Waseem Riaz) before the arbitrator, rather mediator (allegedly on 11-05-2012), also recites that the Appellant had taken a loan through the Respondent No.3 by mortgaging his

property. This agreement does not mention 'Vancouver Enterprise', rather the business of the Respondent No.3 is described in it as 'Big W Import & Export (Pvt.) Ltd.' (Respondent No.2). This agreement before the arbitrator/mediator recites that after such agreement the Respondent No.3 (Waseem Riaz) would not obtain any "further finance" from the Bank against the property mortgaged by the Respondent No.3; and that the repayments owed by the Appellant to the Respondent No.3 for onward payment to the Bank were settled for the period ended "March 2012".

10. The aforesaid agreements *interse* the Appellant and the Respondent No.3 (Waseem Riaz), are actually destructive of the case set-up by the Appellant. The discussion in para 9 above of the said agreements goes to show that though the initial understanding between the Appellant and the Respondent No.3 (Waseem Riaz) in 2009 was that finance would be obtained from National Bank of Pakistan in the name of 'Vancouver Enterprise', it was subsequently obtained from the Respondent No.1 Bank in the name of 'Big W Import & Export (Pvt.) Ltd.' (Respondent No.2), also the business of the Respondent No.3; and that the Appellant had mortgaged his property for the finance extended to 'Big W Import & Export (Pvt.) Ltd.' (Respondent No.2), not for any 'Vancouver Enterprise' as alleged. The Registered Mortgage Deed dated 08-03-2010, which the Appellant admits to have executed, also bears the name of "Big W Import & Export (Pvt.) Ltd." (Respondent No.2) as the principle borrower, and not "Vancouver Enterprise". To sum up, nothing on the record suggests that the Bank ever extended any finance to any "Vancouver Enterprise".

There is yet another document annexed to the plaint which goes against the Appellant and which has not been contradicted by him. The record shows a NOC cum Undertaking dated 26-05-2010 executed by the sons of the Appellant and addressed to the Bank acknowledging that their father (the Appellant) had mortgaged his property to the Bank for finance extended to "Big W Import &

Export (Pvt.) Ltd.” (Respondent No.2). This NOC cum Undertaking appears to have been given by the sons of the Appellant as a comfort to the Bank that in the event the Appellant passed away, his sons would settle the mortgage debt.

11. As regards the Appellant’s contention that the mortgage had been created to secure a finance facility extended in the year 2010 and not for the finance facilities extended in 2012, the statement of account shows that Big W Import & Export (Pvt.) Ltd. (Respondent No.2) had been availing finance from the Bank since December 2011. The agreement arrived between the Appellant and Respondent No.3 before the arbitrator also manifests that on the date of such agreement, the Appellant had already availed finance through the Respondents 2 and 3 against the mortgage of his property, inasmuch as under such agreement the Appellant and the Respondent No.3 also adjusted their accounts for the period ending 30-03-2012, which period related to the previous finance facility availed by the Respondent No.2 from the Bank. The equitable mortgage created by the Appellant was a continuing security to secure repayment of finances extended to the Respondent No.2 from time to time. That is also stated so in the Registered Mortgage Deed dated 08-03-2010 see fourth recital, clauses 9 and 11) which was executed by way of evidence of the equitable mortgage. For the said reason the contention of the Appellant that under the Registered Mortgage Deed his liability was capped, is also misconceived. It is not the case of the Appellant that he ever moved for redemption of the mortgage. In fact, the absence of an explanation by the Appellant why he never sought redemption of the mortgage runs against his contention.

12. Having concluded that a mortgage was in fact created by the Appellant for the debt of Big W Import & Export (Pvt.) Ltd. (Respondent No.2), the Appellant is liable for the mortgage money, which liability is independent of his liability under the disputed

documents. The Registered Mortgage Deed dated 08-03-2010 also states that the mortgage is "*independent of and without prejudice to other securities*" (clause 9). Therefore, the case of the Appellant does not turn on the documents being disputed by him.

13. In view of the foregoing, we find no ground to interfere with the judgment and decree passed by the Banking Court. Therefore, this appeal is dismissed.

JUDGE

JUDGE

Karachi
Dated: 05-10-2018