

**IN THE HIGH COURT OF SINDH,
AT KARACHI**

Present:

Irfan Saadat Khan and
Yousuf Ali Sayeed, JJ

1st Appeal Nos. 74 and 75 of 2016

Appellant : Parveen Akhtar and others,
through Ghulam Haider Sheikh,
Advocate.

Respondent No.1 : MCB Bank Limited, through,
Danish Ghazi, Advocate.

Respondents
Nos. 2 to 5 : Nemo

Dates of hearing : 11.11.2020, 25.11.2020 and
08.12.2020

JUDGMENT

YOUSUF ALI SAYEED, J - The genesis of the dispute underpinning these Appeals preferred under S.22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the “**Ordinance**”) apparently lies in a Running Finance Facility (the “**Facility**”) sanctioned by the Respondent No.1 bank in the account of the Respondent No.2, namely M/s. Mumtaz Electronics, a proprietary concern of one Syed Naeem Ahmed, involved in the business of trading/retailing of electronic items, with a sum of Rs.4,695,720.07 said to have been availed and only a solitary repayment of Rs.200,000/- being made, resulting in an outstanding liability of Rs.5,010,738.89.

2. Suit Number 393 of 2010 (the “**Bank’s Suit**”) was then filed by the Respondent No.1 for effecting recovery of that sum along with cost of funds, with the Respondent No.2 being arrayed as the Defendant No.1 and the Appellant No.1 and her late husband, namely Muhamad Bashir Javed Chaudhry, the Appellant No.2, being arrayed as the Defendants Nos. 2 and 3 in the capacity of sureties and mortgagors, it being averred that they had executed personal guarantees for purpose of securing the obligations of the Respondent No.2 for repayment of the Facility and also created a mortgage over two immovable properties, bearing Plot No. A-22, Sector 1-A/4, KDA Scheme 33, Gulshan-e-Hijri, Karachi and Plot No.A-23, Sector 1-A/4, KDA Scheme 33, Gulshan-e-Hijri, Karachi (the “**Subject Properties**”). In terms of its plaint, the Respondent No.1 set out the computation of the amount claimed and accordingly prayed for a decree in that sum jointly and severally against the defendant along with sale of the stocks and equipment said to have been hypothecated by the Respondent No. 2, as well as the sale of the Subject Properties, with the proceeds to be applied towards satisfaction of the decretal amount.

3. The Appellants disavowed the personal guarantees as well as the mortgage of the Subject Properties, with it being contended that they never stood surety on account of the Respondent No.2 or created a mortgage of the Subject Properties in relation to the Facility. They took the plea that the documents on which the Respondent No.1 based its claim against them had been maneuvered with the connivance of the Respondent No. 2 and that an employee of the Respondent No.1, namely G.M. Shahid, holding the designation of Vice President, had received the original title documents of the Subject Properties for purpose of valuation and verification in the context of a finance facility to be extended to them but had instead shown the Subject Properties as security for the Facility

sanctioned in favour of the Respondent No.2. On that basis, they also filed Suit Number 285 of 2011 (the “**Counter Suit**”), *inter alia* prayed for a declaration that the Subject Properties had not been mortgaged and were liable to be released/redeemed, and that the amount due under the Facility was payable by the Respondent No. 2.

4. The Applications for leave to defend filed by the Respondent No.2 in both the Suits were dismissed by the Banking Court No.1 at Karachi (the “**Banking Court**”), with an interim decree in the sum of Rs.4,695,729.07 along with costs and costs of funds from date of default till realization of the decretal amount being drawn up against him in the Bank’s Suit pursuant to an Order made on 11.09.2013, whereas the Application for leave to defend filed in the matter by the Appellants as well as the like Application made by the Respondent No.1 in the Counter Suit were allowed unconditionally, with both Suits subsequently being consolidated and the Bank’s Suit being designated as the lead suit and the following consolidated Issues being framed:-

- “1. Whether the defendant No.1 availed a Running Finance Facility from the Plaintiff for an amount of Rs.6,000,000/- which was fully availed and utilized by the defendant?
2. Whether as security for the finance facility disbursed, the defendant No.1 signed, executed and delivered to the Plaintiff Bank the following charge/security documents:
 - a. Agreement for finance dated 1.4.2008 for the sum of Rs.6,000,000/-.
 - b. Personal guarantee dated 1.4.2008 for a sum of Rs.6,000,000/-.
 - c. Letter of Hypothecation dated 1.4.2008 for the sum of Rs.6,000,000/-.
3. Whether the defendant NO.2 executed a personal guarantee letter, as security for the finance facility disbursed to the defendant No.1, dated 1.4.2008?
4. Whether the defendant No.3 executed a personal guarantee letter, as security for the finance facility disbursed to the defendant No.1 dated 1.4.2008?

5. Whether the defendant No.3 as attorney and husband of defendant No.2 to further secure the interests of the Plaintiff bank created a registered as well as equitable mortgage over property bearing Plot No.A-22, measuring 276.66 Sq. Yds from land planned in Sector 1-A/4, Scheme No.33, Gulzar-e-Hijri, Karachi?
6. Whether the defendants No.1 to 3 are jointly and severally liable to satisfy the suit amount as prayed?
7. Whether the instant suit is maintainable against defendant No.2 and 3 under the Financial Institutions (Recovery of Finances) Ordinance, 2001 as this is a counterblast suit and in presence of Preliminary Decree against the defendant No.1?
8. Whether the defendant No.2 and 3 mortgaged the properties to the Plaintiff against the amount disbursed to the defendant No.1, after filing of Execution No.41 of 2014 against defendant No.1, why hypothecated stock is still lying in possession of defendant No.1?
9. Whether the Plaintiff approached or disbursed any amount to the defendant No.2 & 3 against mortgage properties and whether defendant No.1 has submitted property documents of defendant Nos.2 & 3?
10. Whether Plaintiffs claim sustainable against defendant No.2 and 3 in law and claim in plaint is excessive and exaggerated?
11. Whether the Plaintiff can charge against defendant No.2 and 3 inspite of mortgage properties fraudulently?
12. What should the decree be?"

5. Evidence was then recorded in the Bank's Suit, where an Affidavit-in-Evidence was filed on behalf of the Respondent No.1, with various material documents being produced, including the Credit Proposal, Approval of Finance, Agreement for Financing, Guarantees, Letter of Hypothecation, Mortgage Deeds, Memoranda of Deposit of Title Deeds, Conveyance Deed, Legal Notice and reply thereto, as well as the Statement of Account, whereas the Appellant No.2 filed an Affidavit-in-Evidence on his own behalf and on behalf of the Appellant No.1 in his capacity as her attorney, and produced the Irrevocable General Power of Attorney, certain Mortgage Deeds, as well as certain Letters dated 15.12.2008, 19.02.2009, 16.04.2009 and 05.10.2009.

6. Following a hearing, the Banking Court found against the Appellants on the aforementioned issues and was pleased to enter judgment in favour of the Respondent No.1 in both the Suits on 29.02.2016 (the “**Impugned Judgment**”), decreeing the Bank’s Suit, while dismissing the Counter-Suit. Being aggrieved, the Appellants preferred the captioned Appeals, with 1st Appeal No. 75/2016 being directed against the decree made in the Bank’s Suit and 1st Appeal No. 74/2016 against the dismissal of the Counter-Suit. Whilst the Appellant No. 2 passed away during the course of these Appeals, with his legal heirs being brought on record, for purpose of reference, the use of the term “Appellants” connotes the original parties.

7. The case advanced on appeal proceeds on the same plane as that set up at first instance, with it being averred by the Appellants that in rendering the Impugned Judgment, the Banking Court had failed to properly consider their defense and to appreciate that they had no relationship with the Respondent No.2, but had on the contrary applied for a finance of Rs. 2 Million in their own name and executed personal guarantees and relevant mortgage documents whilst submitting the documents of the Subject Properties for that purpose, but the concerned employee of the Respondent No.1, namely G.M Shahid, had instead fraudulently approved the Facility in the sum of Rs.5.00 Million in favour of the Respondent No.2 by misusing those documents, which, per the Appellants, had been blank at the time their signatures were obtained. Indeed, while proceeding with his arguments, learned counsel for the Appellants regurgitated this very stance and argued that the documents had thus been maneuvered to benefit the Respondent No.2. He argued that the findings of the Banking Court were therefore not sustainable and the Impugned Judgment was bad in law and ought to be set aside.

8. Conversely, learned counsel for the Respondent No.1 submitted that the stance of the Appellants was completely false and that the Appellants had in fact acted in concert with the Respondent No.2 for purpose of obtaining the Facility in as much as they had consciously executed their personal guarantees and other documents in relation to the mortgage of the Subject Properties for purpose of the Facility as they apparently had a private arrangement as between themselves for sharing the benefit. He submitted that this was established from the Appellants own correspondence, which demonstrated the falsity of the plea raised by them. He invited attention to the letters dated 01.02.2008, 16.04.2009 and 05.10.2009, which read as follows:

The Letter dated 1st February 2008

“The Manager,
MCB Bank Limited,
1345 – North Karachi Industrial Area
Karachi

Attention Mr. Muzammal Faiz Siddiqui,

Dear Sir,

Opening of Account No.1000022 through introduction of M/s. Progressive Engineering Associates for carrying out Business on the Running Finance sanctioned amount of Rs.2.00 Million Through M/s. Mumtaz Electronics A/C No.3421 on my Collateral No.A-22 & A-23, Sector 1A/4, Gulzar-e-Hijri Scheme-33, Karachi

Kindly refer to the subject and mortgaging of my property for execution of running finance.

Your Regional Chief Mr. G.M. Shahid has sanctioned verbally Rs.2.00 Million to me through M/s. Mumtaz Electronics and its modus apprandi has been decided by him which must have been received by you as sanction advice.

The above is submitted in writing for your awareness and acknowledgment in this regard.

With kind regards,

Very truly yours,
For Alsharf Enterprises

M. Bashir Javed Chaudhry
Proprietor”

The Letter dated 16th April, 2009

“The Manager,
MCB Bank Limited
North Karachi Industrial Area,
Karachi.

ACCOUNT # 33812 – MUMTAZ ELECTRONICS

Dear Sir,

This is further to my letter dated 19th February,
2009 enclosed here as ready reference

It has come to my notice that M/s. Mumtaz Electronics have defaulted in the payment of mark up for the period from October, 2008 till date. In spite of your reminders and requests they have paid no heed to deposit the mark up.

In the above circumstances and misconduct of M/s. Mumtaz Electronics has forced us to review the arrangements made in the disbursement of loan.

Kindly ask M/s. Mumtaz Electronics to clear the total amount within seven (7) days time or else in the event of non-compliance the matter will be brought to the notice of higher hierarchy of MCB Bank.

Thanking you with regards,

Very truly yours,

(M. Bashir Javed Chaudhry)”

The Letter dated 5th October, 2009

“The Than Regional Chief,
MCB Bank Ltd, Karachi
Now General Manager (Commercial),
Circle Office, Attention Mr. G. M. Shahid
47-A, District Jail Road,
Multan.

Mr. Naeem Ahmed, Attention Mr. Naeem Ahmed
M/s. Mumtaz Electronics,
R-72, Sector 15-A-4,
Buffer Zone
North Karachi

Running Finance sanctioned to M/s. Mumtaz Electronics On the collateral of Mr. M. Bashir Javed Chaudhry

Dear Sirs,

The subject letter is addressed to you for immediate action as required to be done/taken by a General Manager of MCB Bank in order to protect the prestige at stake of the bank where he is serving presently.

Kindly read this letter carefully and consciously.

I, M Bashir Javed Chaudhry was introduced to you by your valuable client M/s. Progressive Engineering Associates. You agreed to finance Rs.2.00 million to me against mortgaging my following two residential properties where I am residing through your known client for giving coverage of banking procedure for new finance. You selected Mr. Naeem Ahmed proprietor of M/s. Mumtaz Electronics. All proceedings were held through his account under your supervision and guidance. Rs.2.00 million was sanctioned by mortgaging my property House # A-22 & A-23, Sector 1A/4, Gulzar-e-Hiri, Scheme-33. Karachi. Assessed value Rs.9.00 million.

Accordingly, I received the following three cheques of MCB Bank, North Karachi Industrial Area, of Account #.34821 totaling Rs.1.940,000.00

- 1.Cheque # 8999026 dated 4th July 2008 for
Rs.1,000,000.00
- 2.Cheque # 3581029 dated 7th Aug. 2008 for
Rs.500,000.00
- 3.Cheque # 3581030 dated 16th Aug. 2008 for
Rs. 440,000.00
Total Rs.1,940,00.00

It came to my knowledge about 6 months back that you actually sanctioned 5.00 million on my property to M/s. Mumtaz Electronics, when this was revealed by the Branch Manager on non payment of mark up by M/s Mumtaz Electronic due to them on their portion of amount. I spoke to you and the introducer of my account. You promised to settle this issue. It is more than 6 month have passed and no action has been taken. You made a promise to me and to my introducer that on your Eid visit you will thrash out the issue and resolve it once for all. It was my surprise that you came to Karachi and I made several contacts on telephone as I wanted to visit you but you deliberately avoided and did not act responsibly. Even after your departure from Karachi to Multan I contacted you but you kept me on false promises and did not realize the situation which carries the stake of my residence because of your maladministration and wrong doing, misuse of your power while sitting as Regional Chief of MCB Bank Karachi. You sanctioned Rs.3.00 million on your discretion to M/s. Mumtaz Electronic without informing me or to the introducer.

This is not the first time that you acted in this disgusting manner. You are habitual of such filthy acts. You very cunningly obtained Rs.2.2 million from MCB Bank Maisam Plaza, Karachi. A/c. No.100357 of Mr. Shakeel who happened to be your friend and neighbor by mortgaging property of Mr. Salahuddin of North Nazimabad. Out of this 2.2 million you eat away a major portion of the sanctioned amount. Due to your obnoxious acts Mr. Salahuddin is running from pillar to post, must be cursing to you and your family. When you will realize and will come out from this wrath?

Keeping in view the above, please arrange through your associate to deposit back Rs.3.00 million original amount drawn dubiously and its mark up accrued up to 30-09-2009 Rs.542,797.00 within 10 days from the date of receipt of this letter. In the event of your failure which is apparent in this case, we keep our all options open to take the matter at any forum including electronic media.

I inform you accordingly

Thanking you

Truly yours,
For Alsharf Enterprises

M. Bashir Javed Chaudhry
Proprietor" [sic]

9. Furthermore, attention was drawn to the registered Mortgage Deeds and it was pointed out that the Approval of Finance dated 26.04.2008 issued by the Respondent No.1 in respect of the Facility had formed an adjunct thereto, when executed by the Appellants before the concerned sub-registrar, hence served to belie the contention of the Appellants that they had no nexus with the Respondent No.2 and the Facility. In point of fact, the aforementioned document conspicuously bears the stamp of the sub-registrar and thus reflects that the Subject Properties were being mortgaged by way of security/collateral for the Facility extended to the Respondent No. 2.

10. Having considered the aforementioned documents/ correspondence, the Banking Court then proceeded to address the issues that were material from the standpoint of determining whether the Appellants bore liability, and in doing so, concluded that:

“The Defendants No.2 and 3 have not denied execution of the charge documents. It is alleged by them that documents in question were signed in blank and the same have been misused. The Defendant No.3 in Para-5 of his reply dated 17.12.2009 Ex.P/23 to legal notice dated 12.11.2009 Ex. P/22 admitted to have received amount of Rs.1.940 (M) from Defendant No.1 and also shown his willingness to adjust to same subject to clearance of balance amount by the Defendant No.1. The Defendants No.2 and 3 in Para-4 of Suit No.285 of 2011 Re: Muhammad Bashir Javed Choudhry versus MCB Bank Limited & others admitted that Syed Naeem Ahmed sole proprietor of Mumtaz Electronics is his friend. The perusal of the letters dated 15.12.2008, 19.02.2009, 16.04.2009, 05.10.2009 produced by the Defendant No.3 as Ex.A-5 to A-8 reveals that Defendants No.2 and 3 were well aware since inception of grant of facility in favour of Defendant No.1 by the Plaintiff and Defendant No.3 also admitted to have been benefited to the tune of Rs.1.940(M) from Defendant No.1, therefore all the allegations of the Defendants No.2 and 3 are baseless and afterthought thus untenable under the law. In light of the above discussion, I have no hesitation to say that the Defendants No.2 and 3 executed personal guarantee and registered mortgage deeds as well as MODTs Ex.P/8, P/9, P/15 & P/20 to secure the debts of Defendant No.1 in favour of the Plaintiff. Issue No.3, 4 and 5 answered in affirmative.”

11. As such, the Banking Court went on to find that the Appellants were jointly and severally liable in the matter, with Issue Number 6 also being answered in the affirmative. Indeed, from a reading of the aforementioned letters and an examination of the Mortgage Deeds, we are similarly of the view that the same explicitly and undeniably evince that the Appellants had a relationship and understanding with the Respondent No.2 in respect of the Facility, from which they obtained a pecuniary benefit and for which purpose they had stood surety and mortgaged the Subject Properties. That being so, it is

manifest that their disavowal of the nexus between them and the Respondent No.2 as well as their denial that the personal guarantees and mortgages over the Subject Properties were in relation to the Facility are duplicitous and the entire defense mounted by them on that basis is completely bereft of substance.

12. As such, it was our considered assessment that the Banking Court rightly decreed the Bank's Suit while dismissing the Counter Suit, and that the Impugned Judgment did not warrant any interference on either score, hence we had dismissed the Appeals vide our short order dictated in Court upon culmination of the hearing on 08.12.2020.

JUDGE

JUDGE

Karachi
Dated _____