

IN THE HIGH COURT OF SINDH AT KARACHI

J.M No.12 of 2016.

Nasir Jamal & another-----Applicants
Versus
NIB Bank Limited & others-----Respondents

Date of hearing: 29-03-2016

Date of Order: 29.03.2016

Applicants: Through Mr. Rafiq Ahmed Kalwar, Advocate.

Respondents No.2 to 4: Through Mr. Ali T. Ebrahim, Advocate.

ORDER

Muhammad Junaid Ghaffar, J. Through this application under Section 12(2), CPC, (“**J.M**”), the applicants have impugned the compromise Decree dated 17.05.2013, passed pursuant to an application under Order 23 Rule 3 CPC, (CMA No.619/2013) in Suit No.B-14/2012 to the extent of property bearing House No.19-A, IInd Gizri Street, Phase-IV, D.H.A., Karachi.

2. Briefly, the facts as stated are that respondent No.1 upon default by respondents No.2,3 & 4 filed a Suit against them for recovery under Financial Institution (Recovery of Finances) Ordinance, 2001 bearing Suit No.B-14 of 2012 including the present applicants, and after issuance of notices/summons as well as publication, the respondents No.2 to 4 filed their leave to defend application, whereafter, a compromise application under Order 23 rule 3 C.P.C. was filed jointly by respondent No.1 and respondents No.2 to 4, which was granted through the impugned Order dated 17.05.2013.

3. Learned Counsel for the applicants submits that though the compromise decree, passed in this matter was against respondents No.2 to 4, whereas, the Suit against the present applicants was dismissed, however, the applicants’ property has been attached in Execution

Application No.06 of 2014, hence this J.M. He further submits that once the Suit was dismissed against the present applicants, their property could not have been attached in the Execution proceedings, whereas, respondents No.2 to 4 in connivance with respondent No.1, while filing the compromise application had also included the applicant's property as a mortgaged property, and per Learned Counsel such mortgage is fraudulent as it has not been executed by the applicants. He further submits that the property in question already stood attached in some proceedings before the Narcotics Court, and therefore in the circumstances, no further mortgage was permissible. Per Learned Counsel, the property of the applicants cannot be auctioned as there is no decree against them, whereas, until and unless the Suit to the extent of the applicants is adjudicated upon merits, the property in question cannot be auctioned. He further submits that as soon as it came to their knowledge, they have filed Suit for declaration and damages against the respondents bearing No.2179 of 2014, which is pending before this Court and in the circumstances, the applicants have no other remedy except instant application under Section 12(2) C.P.C. as fraud has been committed with the Court as well as with the applicants. In support of his contention he has relied upon the case reported as *2005 YLR 1795 (Muhammad Ashraf versus District and Sessions Judge, Toba Tek Singh and 5 others)* and *PLD 2014 Supreme Court 283 (National Bank of Pakistan and 117 others versus SAF Textile Mills Ltd. and another)*.

4. On the other hand, Counsel for respondents No.2 to 4 submits that though notice has been served upon respondent No.2, which is a Private Limited Company, whereas, respondents No.3 & 4 are out of country and therefore he has no instructions on their behalf, however, since he had appeared in the Suit, he can assist the Court, which is hearing this J.M. on its maintainability. On permission from the Court, he submits that the applicants owed money to respondents No.2 to 4, and in lieu thereof they had given the entire property documents in original, which were mortgaged with the Bank with their permission through a Memorandum of Deposit of Title Documents duly signed by them, therefore, per Counsel the present application is misconceived. He further submits that though the applicants were not a party to the compromise application, however, the property was mortgaged with their permission and consent as they owed money to the respondents, therefore, it has been mentioned in Para 2(v) of the compromise application that upon payment of amounts mentioned in Para 2(i) to (v),

this property would be redeemed in favour of the respondents No.2 to 4 and if the applicants want to get back their property documents, they are at liberty to make such payment owed to respondents No. 2 to 4. In the circumstances, he submits that instant J.M. is misconceived and is liable to be dismissed.

5. I have heard both the Learned Counsel and perused the record. While issuing notices on 18.03.2016 on this J.M, Counsel for the applicant was put to notice as to maintainability and I have heard both the Learned Counsel today on the question of maintainability of this J.M.

6. Perusal of the record reflects that a proper Memorandum of Deposit of Title Deeds was executed by the applicants on 04.01.2010 and along with this they had also surrendered the original "A" Lease as well as "B" Lease and the Conveyance Deed. Though the Counsel for the applicants has argued that no such document was signed by them, however, conceded that the applicants at present are not in possession of the original property documents. It further appears that though the Suit insofar as the present applicants are concerned was dismissed to their extent while passing the compromise decree on the application of respondents, however, it is pertinent to observe that even such dismissal of the Suit does not *ipso facto* redeems the mortgage. Once the property has been mortgaged with the Bank, the same has to be redeemed upon payment of liability. Merely for the fact that applicants did not sign any compromise application would not in any manner discharge their liability as mortgagors. This is an Application under Section 12(2) C.P.C., which could only be entertained, wherein the validity of a judgment / decree has been challenged on the plea of fraud or misrepresentation or for want of jurisdiction, which according to me are lacking in this matter. Applicants may have a case against respondents No.2 to 4 insofar as their property is concerned, but on the basis of record available before this Court, at least no finding can be given in respect of any fraud committed with the applicants through instant proceedings. It is not that the property documents are not available with the Bank as a Mortgage, whereas, the challenge to such a mortgage is an independent cause of action available to the applicants. Moreover, the decree which has been passed in this case is to the extent of defendants No.1, 2 & 3 and the reference in respect of the property of the applicants is because of the fact that the same was mortgaged by respondents No.2 to 4 being in possession of the property documents as well as the Mortgaged Deed,

duly signed by the applicant. It would not be out of place to mention that such Mortgage Deed was signed in the year 2010 and it is but natural upon signing such Mortgage Deed, the property documents were surrendered. In the circumstances, if a person, who owns a property, surrenders his property documents and signs a Mortgage Deed, it cannot be presumed that his liability discharges without any legal recourse by him, merely upon dismissal of Suit against him on a compromise application. The fact that the Suit stood dismissed against the applicants through the compromise decree, would not in any manner absolve the applicants from their liability to the extent of the Mortgage Deed. If the applicants have any grievance against the respondents No.2 to 4, they are at liberty to seek such remedy, however, this is not a case of any misrepresentation and fraud with the Court so as to exercise jurisdiction in terms of Section 12(2) C.P.C. Moreover, under any situation, the applicants are required to redeem the mortgage property from the Bank or in the alternative as contended, if some fraud has been committed while signing such mortgage, they may seek appropriate remedy in accordance with law and as permitted.

7. In the facts and circumstances of the case I am of the view that present application is not maintainable, whereas, the remedy, if any, available to the applicants is either in the Execution Application by raising / filing objections to the attachment of the property as provided in Law or through an independent claim against the respondents No.2 to 4 as may be advised. Accordingly the main application under Section 12(2) CPC, (J.M) is dismissed as being not maintainable along with pending application(s).

Judge