

IN THE HIGH COURT OF SINDH AT KARACHI

J.M No.40 of 2016

M/s. Waterlink Pakistan (Pvt) Ltd.-----Applicant

Versus

**Ms. Bank Mandiri (Europe) Ltd.
& others-----Respondents**

Dates of hearing: 22.11.2016 & 07.12.2016.

Date of Order: 23.12.2016.

**Applicant: Through Mr. Shaikh Nasrullah Mushtaq,
Advocate.**

Respondent No.1 Through Mr. Taha Ali Zai, Advocate

J U D G M E N T

Muhammad Junaid Ghaffar, J. Through this Application under Section 12(2) CPC, it has prayed by the applicant that proceedings of Execution Application No.12/2016 filed and claimed by respondent No.1 may be set-aside with further directions to the Nazir of this Court to struck [strike] off the amount being claimed by respondent No.1 from the sale proceeds of M.V ALFULLQ-7 i.e. Respondent No.2.

2. Precisely, the facts as stated appears to be that the applicant filed an Admiralty Suit No.06/2008 against respondent Nos.2 & 3, wherein, a Compromise Decree dated 04.11.2008 was passed, whereby, the respondents No.2 & 3 had undertaken to pay an amount of US\$ 180,000/- to the applicant as full and final settlement of their claim within 90 days, whereas, such commitment was not honoured and in that regard an Execution Application bearing No.17/2009 is pending in this Court. It is the applicant's case that though the respondents No.2 & 3 had agreed for a compromise with the applicant, however, in Admiralty Suit

No. 15/2009 filed by respondent No.1, they made certain admissions, whereafter the respondent No.1 filed an Application Under Order 12 Rule 6 CPC, on which this Court has passed judgment dated 27.01.2010 and Decree dated 22.12.2015. Thereafter the applicant filed an Admiralty Appeal No.01/2010 against the said Judgment dated 27.01.2010, which was disposed of vide Order dated 20.08.2015, wherein, by consent of the applicant and respondent No.1 it was observed by the Court that the claim of the present applicant would be considered by the Executing Court while determining the priority amongst the decree holders. Subsequently, the applicant approached the Executing Court but of no avail and apprehending that the amount lying with the Nazir of this Court being sale proceeds of respondent No.2 would be released to respondent No.1, hence instant J.M.

3. Learned Counsel for the applicant has contended that respondent No.1 was never a registered mortgaged holder of respondent No.2 and therefore, the Judgment and Decree obtained in Admiralty Suit No.15/2009 filed by respondent No.1 on the basis of admission made by respondents No.2 & 3 has been obtained by fraud and misrepresentation. Per Learned Counsel, the respondent No.1 had no lien on respondent No.2 and therefore could not have filed the Admiralty Suit as respondent No.1 was never a bonafide claimant, whereas, respondent No.2 was under a Time Charter Agreement with the applicant. Learned Counsel has further contended that on the one hand, respondents No.2 & 3 had entered into a compromise for settling the claim of the applicant and on the other, they also admitted the liability of respondent No.1 in their Suit and therefore fraud has been played with this Court. Learned Counsel has also referred to Panama Regulations for registration of the Vessel and has contended that as per documents available on record, the respondent No.1 was never a Mortgagee of the Vessel i.e. respondent No.2, therefore, their entire claim is based on fraud and misrepresentation. Learned Counsel in support has relied upon the cases reported as **2016 SCMR 1 (Muhammad Ijaz Ahmed Chaudhry v. Mumtaz Ahmad Tarar and others), PLD 1961 Supreme Court 192 (Islamic Republic of**

Pakistan v. Muhammad Saeed, 1993 SCMR 618 (***Muhammad Younus Khan and 12 others v. Government of N.W.F.P and others***) and an unreported Judgment dated 04.07.1997 passed by the Honourable Supreme Court in the case of ***Khushi Muhammad v. Mst. Zakiya Mushtaq Ahmed and others*** (Civil Petition for Leave to Appeal No.1637-L of 1996).

4. On the other hand, learned Counsel for respondent No.1 has raised certain preliminary objections and has contended that instant J.M has been filed by M/s. Waterlink Pakistan (Pvt) Ltd., whereas, the compromise Decree is in favour of some other Company. Per Learned Counsel even otherwise instant J.M is hopelessly time barred under Article 181 of the Limitation Act as it has been filed after six years of passing of the impugned Judgment, which was in the knowledge of the applicants since day one. Learned Counsel has contended that respondent No.1 is a registered Mortgagee of the Vessel i.e. respondent No.2 since 2008, which continued and extended from time to time in favour of respondent No.1 till passing of the impugned Judgment. Per Learned Counsel it is only in the year 2013 that the Mortgage has not been extended further as the Vessel in question had already been sold by this Court in some other litigation and therefore, there is no need or question of getting the Mortgage extended any further as the Vessel is no more available being already scraped after its sale. Learned Counsel has further contended that there were several claims against respondent No.2 through various Admiralty Suits and the Suit of respondent No.1, as well as of the applicant, were being heard together and it was always in the knowledge of the present applicant that a Judgment has been passed in favour of respondent No.1 and the present application is just to delay the Execution Proceedings as the claim of respondent No.1 being a Mortgagee has priority in the Execution Proceedings as against claims of other parties, including the applicant. Per Learned Counsel this is clearly an abuse of the process of the Court as the applicant in Admiralty Appeal No.01/2010 had consented to contest its claim in the Execution Proceedings and after having realized that their claims will not have priority, has filed instant

application belatedly. Learned Counsel has further contended that since passing of the impugned Judgment till disposal of Admiralty Appeal No.01/2010 on 20.08.2015, there was no restraining order in field, whereas, suddenly instant application has been filed by challenging the Execution Proceedings and Ex-parte restraining order has been obtained. Learned Counsel has further submitted that material facts have been suppressed by the applicant inasmuch as the applicant had also filed a fresh Admiralty Suit bearing No.03/2014 for Declaration, Injunction and Specific Performance against respondents No.1 & 3 and such fact has not been disclosed before this Court. Therefore, the applicant is not entitled to any relief in the present proceedings. Per Learned Counsel, the said Admiralty Suit of the applicant notwithstanding the fact that the same for specific performance of an agreement was otherwise not maintainable in Admiralty jurisdiction of this Court, was disposed of by consent vide Order dated 04.02.2016 by observing that insofar as the Agreement and its enforcement is concerned, the plaintiff may initiate Arbitration Proceedings and it was further agreed by the parties that their claims either independent or through a Decree of the Court may be considered by the Executing Court in terms of their priority as observed by the learned Division Bench in the aforesaid Appeal, therefore, per learned Counsel there appears to be no fresh Cause of Action to file instant Application. In support learned Counsel has relied upon the cases reported as **2013 CLC 746 (Fauji Foundation v. Raja Ghazanfar Ali and others)**, **2008 SCMR 666 (Ahmed Nawaz v. Government of the Punjab and others)**, **2006 SCMR 71 (Muhammad Hussain v. Mukhtar Ahmad)** and **1993 CLC 1336 (Rana Muhammad Sarwar v. Additional District Judge, Sahiwal and 3 others)**.

5. I have heard both the learned Counsel and perused the record. The facts as discussed hereinabove more or less appear to be admitted and therefore need not to be reiterated except to the extent that the applicant and respondent No.1 had certain claims against respondents No.2 & 3 for which they independently filed Admiralty Suits before this Court. The Vessel in question i.e.

respondent No.2 was arrested pursuant to certain orders passed by this Court in other proceedings (which are not material and relevant for present purposes) and thereafter was sold through Nazir of this Court and sale proceeds are lying with him. The parties having claims against respondents No.2 have filed their Execution proceedings, including the applicant and respondent No.1, which are pending before this Court. The present applicant after having obtained a Compromise Decree could not realize its claim from Respondent No.3, and thereafter has filed Execution Application and so also filed an Admiralty Appeal No.01/2010 against the Judgment dated 27.01.2010 passed under Order 12 Rule 6 CPC in favour of respondent No.1. The said Appeal was disposed of vide Order dated 20.08.2015 with the consent of the applicant that they will agitate their claims before the Executing Court. Similarly, they also filed an Admiralty Suit No.03/2014, which was also disposed of with their consent to the effect that insofar as specific performance of agreement with respondent No.3 is concerned they will pursue Arbitration Proceedings, however, their claim could be agitated in the Execution Proceedings and would be decided in the light of observation passed by the learned Division Bench of this Court in Admiralty Appeal No.01/2010. In short now it appears that the applicant has realized that perhaps in the Execution Proceedings there may be a situation, wherein, the claims are to be settled by deciding the priority of the claimants and since there are claims of the Port Authorities as well as the Mortgagee i.e. respondent No.1, the present applicant and other decree holders would be left without any amount to be paid from the sale proceeds. Perhaps on such realization, the applicant has now come before this Court by filing present Application under Section 12(2) CPC and has contended that the Judgment in favour of respondent No.1 is based on fraud and misrepresentation.

6. The precise contention of the learned Counsel for the applicant is based on the ground that respondent No.1 was never a Mortgagee of the Vessel i.e. respondent No.2 and therefore, has no lien on the said Vessel. And on this ground it has been argued that no admission, conferring jurisdiction on this Court to pass a

judgment under Order 12 Rule 6 CPC, could have been made by Respondent No.3. The other argument is that since the lien/mortgage, if any, was on temporary basis, therefore, even otherwise they had no claim against respondent No.2. However, on perusal of the material placed before this Court, it reflects that such argument on behalf of the present applicant is fallacious and misconceived. The impugned Judgment passed in favour of respondent No.1 is based on the admission of respondent No.3 and perhaps has no concern with the present applicant, insofar as any fraud and or misrepresentation with the present applicant is concerned. It is perhaps for this reason that the applicant has purposely not challenged the impugned judgment and decree passed in Suit, but from the prayer clause of instant J.M. it reflects that the applicant's only challenge is in respect of the Execution proceedings arising out of the impugned judgment. This objection, as discussed hereinabove, has only been raised belatedly after realizing that in the Execution Proceedings perhaps the respondent No.1 will have priority. Record further reflects that it has always been in their knowledge that respondent No.1 is the Mortgagee of respondent No.2 and such objection as to their bonafides was never raised by them since 2008. In this regard reliance may be placed on the Mortgage Agreement dated 10.04.2008 entered into by respondent No.3 with respondent No.1 for securing a loan amount of US\$ 1,335,000/-. Such Agreement and Mortgage have never been denied by respondent No.3 before this Court and it is only the applicant, which has raised such an objection. It may also be noted that the present applicant also entered into an Agreement dated 27.10.2008 with respondent No.1 and respondent No.3 of which the Specific Performance was also sought by the applicant in Admiralty Suit No.03/2014 and perusal of such Agreement very clearly reflects that in its recitals it has been stated that respondent No.1 has a registered mortgage of the Vessel in question, and being signatory to such agreement, the doctrine of acquiescence would equally and squarely apply on the present applicant who cannot be permitted to raise any such objection as to the lien and claim of Respondent No.1 on Respondent No.2. Neither the said agreement has been denied by the present

applicant, or for that matter, cannot be denied as they have by themselves sought Specific Performance of the said Agreement. Such claim of respondent No.1 as a Mortgagee of the Vessel is in knowledge since 2008 and they have never objected to such fact as agitated through instant J.M.

7. Notwithstanding the above observations, even otherwise, they had already filed Admiralty Appeal No.01/2010 impugning the same judgment dated 27.1.2010, and in order dated 20.08.2015, they conceded for disposal of the same by agreeing to pursue their claim before the Executing Court while determining the priority amongst the decree holders. Therefore, even if they had any such objection, they abandoned it by consenting to agitate their claim in the Execution proceedings, which they are still at liberty to pursue. In such circumstances, there appears to be no valid ground or reason to file present application on the ground of misrepresentation or fraud.

8. In view of hereinabove facts and circumstances of the case, I am of the view that present application being misconceived in fact and law is liable to be dismissed as the applicant besides being unable to point out any fraud or misrepresentation with this Court was always in knowledge that respondent No.1 is the registered Mortgagee of the Vessel in question and atleast at the relevant time when their claim was being adjudicated, they had a lien on the Vessel, whereas, thereafter same has been sold and scrapped and therefore, was not required to continue their mortgage of the Vessel. Accordingly, instant J.M is dismissed alongwith pending applications, if any.

Dated: 23.12.2016

JUDGE

Ayaz P.S