

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
 Ex. No.08 of 2012

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. For Orders on CMA No.92 of 2017.
2. For hearing of CMA No.152/2012.
3. For hearing of CMA No.153/2012.

02.03.2017

Mr. Neel Keshav, Advocate for Decree Holder.
 Mr. Syed Muhammad Abbas and Mr. Atif Hafeez, Advocates for J.D.

1. Through this application, the Judgment Debtor has prayed for suspension of further proceedings of this Execution Application for four weeks enabling the Judgment Debtor to avail remedy of filing a review petition before the Hon'ble Supreme Court against the Order dated 03.02.2017 passed in C.P No.825-K/2016, whereby, the petition was dismissed and leave to appeal was refused. At the very outset, learned Counsel for the Judgment Debtor was confronted as to how this application is maintainable before this Court as on merits the Appeal before the Appellate Court as well as Hon'ble Supreme Court stands dismissed and the orders, if any, which were in field were passed by a learned Division Bench of this Court in Special High Court Appeal. To this learned Counsel could not satisfactorily respond. In the circumstances, I am of the view that the application is misconceived and not maintainable before this Court. Accordingly, the same is dismissed in limine.

2-3. Through application bearing CMA No.152/2012, under Section 12(2) CPC, the Judgment Debtor seeks setting aside of Orders dated 31.01.2012 and 14.03.2012 on the ground that both these orders have been obtained by misrepresentation, whereby, the Execution Application was allowed and sale of hypothecated assets after attachment was ordered. Learned Counsel for Judgment Debtor submits there are no hypothecated assets of the Judgment Debtor insofar as the present proceedings are concerned, and therefore, neither they could be attached nor sold in this Execution application. He submits that Executing Court cannot go beyond the Judgment

and Decree and since the decree in question is not in respect of hypothecated assets, therefore, the Execution Application has been allowed by misrepresenting the facts, hence same be set-aside. In support of his contention he has relied upon the cases reported as **1994 MLD 1877** (*Hassan Masood Malik v. Additional District Judge and others*), **2004 CLC 1449** (*Lahore Development Authority through Director General, 7-Egerton Road, Lahore and another v. Muhammad Saleem and another*), **1989 MLD 3602** (*Allied Bank of Pakistan Ltd. v. Rashid Hyder Rizvi*), **PLD 2005 Lahore 331** (*Muhammad Ali v. Zakir Hussain*), **2006 CLD 115** (*Raheel Ikhlas v. Messrs Citibank, N.A.*), **2007 CLD 618** (*Messrs Zahid Industries through Managing Partner and 10 others v. Habib Bank Ltd. through Manager*).

On the other hand, learned Counsel for Decree Holder submits that the Judgment and Decree was passed in this matter after appointment of a Chartered Accountant by consent and such Judgment and Decree was impugned in Spl. HCA No.32/2016, which was also dismissed vide Judgment dated 10.10.2016 and thereafter the Judgment Debtor filed C.P No.825-K/2016 before the Hon'ble Supreme Court, which has also been dismissed vide Order dated 03.02.2017 and leave has been refused. He further submits that neither in the leave to defend application, nor at the appellate stage, such objection was raised that there is no hypothecation of assets by the Judgment Debtor. Per learned Counsel the applications are misconceived and the Judgment Debtor has delayed the execution for the last more than four years on one pretext or the other, whereas, the Chartered Accountant, who determined the liability of Judgment Debtor was appointed with the consent of the parties. He submits that the Application U/S 12(2) C.P.C being misconceived should be dismissed with heavy cost.

I have heard both the learned Counsel and perused the record. Insofar as merits of the Judgment and Decree are concerned admittedly the Judgment Debtor has failed to get any relief either from the Division Bench of this Court in Spl. High Court Appeal nor from the Hon'ble Supreme Court through Petition No.825-K/2016, therefore, insofar as, the Judgment and Decree is concerned, the same has attained finality, notwithstanding the fact that the Judgment Debtor intends to file a review petition. Insofar as Application under Section 12(2) CPC is concerned, the only

argument, which has been addressed and raised is that since there are no hypothecated assets of the Judgment Debtor, therefore, the order dated 31.01.2012 and subsequent orders have been obtained by mis-representation. I am afraid this line of argument of Judgment Debtor's Counsel is wholly misconceived. It appears that the Judgment Debtor while responding to the claim of decree holder regarding hypothecation of assets has not made any specific denial in the leave to defend application, and has rather made a generic denial of the entire Para 5 of the plaint, but there is no specific denial of the hypothecation letter specifically. Moreover, on merits the appeal up to the Hon'ble Supreme Court stands dismissed, therefore, the objection, if any, stands decided against the judgment debtor, hence of no avail. Nonetheless, there is admittedly a letter of hypothecation duly signed and executed as can be seen from the Suit File (summoned in Chambers while dictating the Order), as well as its compliance before SECP as required under the Companies Ordinance, 1984. Hence the objection appears to be fallacious and frivolous in nature.

Even otherwise, after passing of the orders by the Appellate Court as well as the Hon'ble Supreme Court, it is now established that finance facility was availed by the Judgment Debtor and it is not conceivable that such finance was granted either without any mortgage or pledge of property or for that matter hypothecation of the assets. Nonetheless, this a money decree and in terms of Order 21 Rule 30 CPC, the Executing Court can proceed with the execution by detention in Prison of the Judgment Debtor or by the attachment and sale of his property or by both. Even if it is assumed (though not substantiated by the record) that there are no hypothecated assets, the Power of Executing Court for attachment and sale of the property of Judgment Debtor is not taken away, therefore, there appears to be no misrepresentation to the effect that there are no hypothecated assets of the Judgment Debtor. The Executing Court for the purposes of Execution can attach and sell all assets, which may include hypothecated assets. Such powers are also available with the Executing Court under Special Law i.e. Section 19 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, which includes sale of mortgaged, pledged or hypothecated property as well as any other property of the Judgment Debtor.

In view of such position, application appears to be misconceived and frivolous in nature. Accordingly, the same is dismissed with cost of Rs.25,000/- to be deposited in the account of Sindh High Court Clinic.

In view of Order passed on CMA No.152/2012, the application bearing CMA No.153/2012 has become infructuous and is accordingly dismissed having become infructuous. The Nazir of this Court is directed to proceed further with the orders already passed in this matter regarding attachment and sale of the hypothecated assets in question.

J U D G E

Ayaz P.S.