

IN THE HIGH COURT OF SINDH, KARACHI
Ist Civil Appeal No.63 / 2018
[Asif Munawar Vs. Bank Islami Pakistan and 02 others]

Date	Order with signature of Judge
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PRESENT:

Mr. Justice Irfan Saadat Khan
Mr. Justice Arshad Hussain Khan

Appellant	Through Mr. Abbad-ul-Hasnain, Advocate
Respondent-1	Through Syed Aijaz Hussain Shirazi, Advocate
Respondent-4	Through M/s. Badar Alam and Khashif Badar, Advocates.
Date of Hearing:	01.03.2023

JUDGMENT

ARSHAD HUSSAIN KHAN, J: By means of this First Appeal under section 22 of the Financial Institutions (Recovery of Finances) Ordinance 2001, the appellant has assailed the order dated 05.05.2018, passed by III- Banking Court Karachi in suit bearing No.340/2008 [Execution No.20/2016] whereby application under section 12 (2) CPC, filed by present appellant [as applicant / intervenor] for suspension of the judgment and decree passed in the said suit was dismissed.

2. Briefly, the facts of the case are that respondent No.1 [Bank Islami Pakistan] filed suit No.340 of 2008 under Section 9 of the Financial Institution [Recovery of Finances] Ordinance, 2001 (FIO 2001), before Banking Court No.III, Karachi, for recovery of Rs.21,715,685/- against the present respondent No.2. Pursuant to the notices and summons issued in the said case, respondent No.2 (defendant in the suit) appeared before the court and contested the matter. The application for leave to appear and defend the suit filed by respondent No.2 was allowed unconditionally. Thereafter, the issues in the aforesaid suit were framed and subsequently after recording evidence, the suit of respondent No.1 was decreed against respondent No.2 for Rs.3,770,476/- with costs and costs of funds at the prevailing rate as determined by the State Bank of Pakistan from the date of default till realization of the decretal amount and the prayer of the plaintiff for sale of the mortgaged

property was also allowed, vide judgment and decree dated 10.11.2015 & 19.11.2015, respectively. After passing of the decree by the banking court, respondent No.1 filed Execution No.20 of 2016, which was also allowed and the attachment of the mortgaged property was issued, vide Order of attachment dated 02.02.2016.

Thereafter, the present appellant by filing application under Section 12(2) CPC read with Section 151 of CPC challenged the aforesaid judgment and decree and the order dated 02.02.2016, passed in the aforesaid Execution Application for attachment of the mortgaged property stating therein that the judgment and the decree have been obtained through misrepresentation and fraud by the Decree Holder-Bank (respondent No.1) in connivance with judgment Debtor (respondent No.2) upon the court. The said application, after hearing learned counsel for the parties, was dismissed by the Banking Court, vide order dated 05.05.2018, which is impugned in the present appeal.

3. Upon notice of the present appeal Objections on behalf of respondent No.1 [Bank Islami Pakistan Limited] have been filed stating therein that the appeal being misleading and misconceived is not maintainable as the appellant is not the customer nor financial institution as required under Financial Institution [Recovery of Finance] Ordinance, 2001, hence the banking court has rightly dismissed the said application filed by the Appellant. It is stated that the subject property has already been auctioned by the banking court and the entire amount has already been deposited by the auction purchaser (respondent No.4 herein) before the banking court. It is stated that once the payment of the sale price is made by the auction purchaser, in compliance with the order of the court, it is the duty of the court to confirm the auction as required by Order XXI Rule 92 CPC and further where the court had failed to pass an order of confirmation of sale that would not lead to deprivation of right of auction purchaser or cause prejudice to him and in such a case, it would be deemed that the sale stood confirmed and purchaser would be deemed to have become absolute in his title by virtue of Section 65 CPC. It has been stated that respondent No.1 created mortgage in accordance with law and the subject property was auctioned by the banking court after due process. It is also stated that in any case, if the appellant has any

grievance regarding sale of mortgaged property by his brother to respondent No.2, it is the action between two brothers and the bank being mortgagee has nothing to do with the dispute if any between the two brothers. Lastly, it is stated that the Appeal being not maintainable is liable to be dismissed with costs.

4. Learned counsel for the appellant, during his arguments while reiterating the contents of the memo of appeal, has contended that admittedly the property viz. Plot No.10, Row No.2, admeasuring 133 Sq. Yds., Sub Block-H, Block-III 2/10 Nazimabad, Karachi, belonged to his deceased mother namely Mst. Sanai Fatima @ Malika Qaiser Jehan, vide lease dated 1966. Learned counsel further contended that the said Sanai Fatima during her life time in the year 1992 had executed a General Power of Attorney in the name of her son Javed Munawar. On 16.06.2001, Mst. Sanai Fatima died, however, the attorney, in fraudulent manner after the death of mother of the appellant, by showing the deceased to be alive got the lease renewed of the subject property and subsequently sold out to respondent No.2 on 27.12.2006, without knowledge of other legal heirs, on the basis of null and void power of attorney dated 30.04.1992, which was illegal and void in the eye of law. It is also argued that the appellant is residing at the subject property and remained completely unaware about the proceedings till receipt of banking court notice issued under order 21 Rule 54 dated 03.03.2016. However, after coming to know about court proceedings, the appellant filed application which was dismissed by the banking court without appreciating the record. It is further argued that the appellant and other co-owners in the property in question have been deprived of their valuable rights and interest in the subject property due to fraudulent act of respondent Nos. 1 and 2. It is urged that the banking court erred in law while observing that the appellant has no legal right over the subject property. That the banking court has misinterpreted and misconceived the relationship of customer and bank defined under Section 2 and onward of Financial Institution Ordinance, 2001, without appreciating that the act of sale on the basis of void power of attorney, conveyance deed, subsequent mortgage with respondent No.1 lack title and is ab-initio void, illegal and unlawful, therefore, all steps including attachment of property in question is liable to be declared void. It is further

contended that the banking court while passing the impugned order has failed to take into consideration that the respondent-bank by concealing and misrepresenting the facts has obtained the judgment and decree against respondent No.2 in respect of the subject property in which the appellant and other legal heirs of the deceased Sanai Fatima have their rightful share and without hearing them a proper decree could not be passed. Lastly, he has argued that the impugned order suffers from material illegality, irregularity and infirmity, hence liable to be set aside as it has resulted in miscarriage of justice. He has prayed that instant appeal may be allowed and the impugned order may be set aside. In support of his arguments learned counsel for the appellant has placed reliance on the cases reported as 2012 CLC 1891, 2010 YLR 50, PLD 1958 SC 104, PLD 2007 Lahore 341, 2007 MLD 3551, 2007 YLR 2311, PLD 2015 SC 212, PLD 2008 SC 663, 1994 CLC 1044, NLR 1993 SCJ 290, 1993 SCMR 662, 1994 SCMR 782, 1987 SCMR 171, 2007 SCMR 922, 2015 CLD 249, 2014 CLD 390, 2011 CLC 848, 2016 YLR 2246, 2009 CLD 507, 2011 CLC 553, 2017 YLR 138, 2006 YLR 2038, 2015 MLD 57, 1991 SCMR 2063, 2007 SCMR 480, 2015 SCMR 1708, 2006 SCMR 12, PLD 2011 SC 905, PLD 2006 Kar 278 and 2020 CLC 1835.

5. Conversely, learned counsel for respondent No.1 while reiterating the contents of his objections to the present appeal, has contended that the impugned order is well within the four corners of law and equity, hence does not warrant any interference by this Court. It is contended that due to continuing default and violations of the undertaking by respondent No.2, the respondent-bank was constrained to file suit No.340 of 2008 before the Banking Court which was decreed. For satisfaction of the said decree Execution No.20 of 2016 was filed by respondent-bank, which was allowed and attachment of the mortgaged property issued. Against the said attachment, the present appellant initially filed suit before the Senior Civil Judge Karachi (Central), the plaint of which was returned to be presented before the court having jurisdiction. Against the said order, civil appeal was preferred, which too was dismissed. In the meantime, the present appellant also approached the Banking Court and filed application under Section 12(2) CPC which was dismissed through the impugned order. It is further contended that the present appellant upon publication of the auction notices by the

Banking Court filed another suit bearing No. 1268 of 2019 before Senior Civil Judge-III (Central) by taking the similar facts and ground as that of application under section 12(2) CPC. Plaint of the said suit was rejected which order having not been challenged has attained finality. It is contended that admittedly the appellant is not the customer nor financial institution under Financial Institution [Recovery of Finance] Ordinance, 2001, hence the banking court has rightly dismissed the application under section 12 (2) CPC filed by the Appellant. It is contended that neither the judgment and decree nor the order impugned in the present proceeding suffer from any illegality and infirmity as such present appeal is liable to be dismissed with cost. Besides above, It is also contended that the present appeal, even otherwise, is not maintainable and liable to dismissed as the appellant did not file the court fee as required under the law. Learned counsel in support of his arguments has relied upon the cases reported as 2022 CLC 1523, PLD 1976 Kar 414, 1988 MLD 596, 2003 CLD 552, 2007 CLD 1511, PLD 2005 SC 819, 2019 SCMR 1453 and 2019 CLC 389.

6. Learned counsel for the auction purchaser who has been impleaded as Respondent No.4, vide order dated 25.11.2020, while supporting the impugned order has contended that the application under Section 12(2) filed by the appellant challenging the attachment of mortgaged property and for impleading himself as party in Execution No.20/2016, before respondent No.3 (banking court No.III) was not maintainable. He has further contended that though in the title of application Section 12(2) CPC has been mentioned yet substance thereof is related to Order 1 Rule 10 CPC for impleading the appellant as party for denovo proceeding/trial. There is no prayer in the application for setting aside the judgment and decree dated 10.11.2015 & 19.11.2015 and the attachment order dated 02.02.2016. He has further argued that since FIO 2001 is meant to decide the disputes regarding financial institutions and their customers wherein there is no scope for impleading any stranger / third party, therefore, Order 1 Rule 10 CPC is also not applicable to suits filed under Section 9 of FIO 2001. It is also argued that the provisions of section 27 of FIO 2001, precludes any court or authority even the banking court to review or revise its own judgment, decree or final order. He has further argued that if any person / objector,

not party to suit, is aggrieved by the judgment and decree obtained by fraud, misrepresentation and want of jurisdiction, he has remedy by filing an appeal under Section 22(1) of FIO 2001. He has argued that respondent bank was not at fault in granting finance to the defendant / J.D., who had produced before the banking court a registered conveyance deed and other original documents of the subject property. Hence, no any fraud has been committed either by the Bank or the Defendant / J.D. on the banking court in obtaining the judgment and decree. He has argued that the banking court as well as this Court in its appellate jurisdiction under FIO 2001 cannot travel beyond the provisions of parent law in deciding the disputes between the Bank and its Customers, and cannot decide the rights and liabilities as well as disputes between the private parties. It is urged that the appellant, after dismissal of his application under section 12(2) CPC did not avail the relief provided under Order 21 Rule 69 CPC by getting the auction sale stopped, also did not file an application under Order 21 Rule 89 & 90 CPC for setting aside the auction sale, which as per Order 21 Rule 92 CPC has become absolute and in such situation banking court has no other option except to confirm the sale. It is also urged that the objections raised by the appellant are not maintainable after third party interest has been created on the mortgaged property, having been purchased by the auction purchaser in an open auction conducted by the banking court, who has admittedly deposited the entire sale consideration. However, when the case was fixed for confirmation of auction sale of mortgaged property, this Court restrained the banking court from confirming the auction sale and due to said ad-interim order the auction purchaser till-date is unable to enjoy the property despite payment of entire sale consideration in the year 2019. Lastly, it is prayed that instant appeal may be dismissed with heavy costs. Learned counsel in support of his argument has relied upon the cases reported as PLD 1972 Kar, 2007 SCMR 922, 2014 CLD 390, 2000 MLD 421-424, 2022 CLD 1523, 2017 YLR 1422 and SBLR 2003 Sindh 1250.

7. We have heard the learned counsel for the parties, perused the impugned order, the aforesaid judgment and decree passed by the banking court No.III and have also examined the record as well as considered the case law cited at the Bar. Although, learned counsel for

the respondents have raised question of maintainability of the application under section 12(2) CPC filed before the banking court and the present appeal, however, since filing of this appeal a considerable time has been passed, as such we deem it appropriate to decide the case on merit, rather on technicalities.

8. From perusal of the record, it appears that on the request of respondent No.2, the Bank [respondent No.1] extended a Home Finance Facility for purchase of house for a sum of Rs.3,780,000/- [**finance facility**] and in order to secure the aforesaid finance facility, respondent No.2 mortgaged House No.10, Row No.2, measuring 133 Sq. Yds, Sub Block-H, Block-III, Nazimabad, Karachi [**subject property**]. The aforesaid finance facility fully availed and utilized by respondent No.2, however, when he failed and / or neglected to repay the outstanding dues of respondent No.1, the respondent-bank filed suit No.340 of 2008 before the banking court for recovery of the amount of Rs.21,715,685/- against the defendant/ respondent No.2, which was contested by respondent No.2, however, the suit was decreed against him in the sum of Rs.3,770,476/- For satisfaction of the said decree Execution No.20 of 2016 was filed by respondent-bank, which was allowed and attachment of the mortgaged property was issued. Against the said attachment the present appellant initially filed suit No. Nil of 2016 before 1st Senior Civil Judge Karachi (Central) for declaration and injunction narrating the same facts and ground as that of application filed under section 12(2) CPC, the plaint of which was returned to be presented before the Court having jurisdiction. Against the said order Civil Misc. Appeal No.14 of 2016 was preferred which was dismissed. Meanwhile, the present appellant also approached the Banking Court and filed application under Section 12(2) CPC which was dismissed through the order dated 05.05.2018, which is impugned in the present appeal. Record also reflects that the present appellant upon publication of the auction notices by the banking court in execution proceedings filed another suit bearing No.1268 of 2019 before Senior Civil Judge-III (Central), inter alia, against his brother and respondents of the present appeal by taking the similar facts and ground as that of present appeal. However, the plaint of the said suit was rejected, vide order dated 12.12.2019, which was never appealed against.

9. Precisely, the case of the appellant is that the respondent-bank by misrepresentation and by committing fraud upon the court obtained the judgment and decree in respect of the subject property, however, when the appellant came to know about the judgment and decree he filed application under section 12 (2) CPC, which was dismissed by the Banking Court, through the impugned order.

10. Before going into any further discussion, it would be appropriate to examine the application under section 12(2) CPC filed by the appellant before the banking/executing court. From perusal of the application, it appears that the stance of the appellant was that the property belongs to his mother Sanai Fatima and after her death the decree holder bank on the basis of illegal and void conveyance deed obtained the judgment and decree. It is further stated that the Bank intentionally did not implead the applicant as party in the suit, as such, he was unaware about the suit and the execution till the receipt of attachment notice dated 03.03.2016. The applicant/intervenor being one of the residuary legal heirs is residing in the property and the attachment order was in result of misrepresentation and fraud committed by decree holder and judgment debtor. It is stated that the applicant / intervenor is adopting legal course of law to revoke/cancel void conveyance deed through court of law. For the sake of ready reference the prayer clause of the aforesaid application is reproduced as under:

“It is therefore prayed in the light of circumstances the instant application be allowed and Applicant / Intervener be declare necessary party to the suit and after giving an opportunity of hearing to contest through the suit to save his right de-novo-proceeding/trail. This will meet the ends of justice.”

11. From perusal of the application, it clearly transpires that though the appellant filed the application under the caption of section 12 (2) CPC R/w Section 151 CPC but, in fact, he sought to be impleaded as necessary party and de-novo trial of the case. There is no prayer in the application for setting aside the judgment and decree and/or the attachment order. It is a well-established principle that the heading/caption does not matter and it is only the content of the application, which has to be considered by the courts. The Supreme

Court of Pakistan in case of *Asif Raza Mir v. Muhammad Khurshid Khan* [2011 SCMR 1917] held as under:

“12.....We have already observed that it is the substance, content and context of a document which determines the nature of such document and not the label or heading alone. The nature of the document so determined represents the true intention of the parties and it is this which the courts are obliged to give effect to, not the mere form of the document.”

In such circumstances, the application filed by present appellant before the banking court under the caption of section 12 (2) CPC was nothing but a impleadment application.

12. Moreover, it is well settled principle that if fraud is alleged in an application filed under section 12(2) of the C.P.C., its necessary ingredients must be pleaded, so as to subsequently prove the same. General and bald allegations of fraud and misrepresentation could not form basis to upset a decree, validly passed by a court of competent jurisdiction. Further the applicant was required to prove that the fraud and misrepresentation was done during proceedings in the court; that the alleged fraud was due to false statement and concealment of facts and that the judgment and decree was collusively obtained on the basis of forged documents, which in the present case is missing. It may be noted that the active concealment and suppression of facts in words and deeds is an essential ingredient of fraud, which cannot be inferred by mere assertion rather it must be proved through strong, independent, clear and convincing evidence and the burden would be more heavier in the cases in which a decree or judgment has been passed by a court of competent jurisdiction under which valuable rights have accrued in favour of the opposite-party. There can be no exception to the rule of law that without bringing the essential facts on the record and the evidence in proof of the fraud the plea of ignorance and lack of knowledge simpliciter would not be sufficient to constitute fraud and dislodge the sanctity attached with the official acts and judicial proceedings. Reliance in this regard can be placed on the case of *Mst. Nasira Khatoon and another v. Mst. Aisha Bai and 12 others* [2003 SCMR 1050].

Furthermore, per settled law, it is not incumbent on the court to frame issue(s) on every application filed under section 12(2) CPC, especially when the particulars of fraud and misrepresentation are missing but it depends upon the facts and circumstances of each case. Reliance can be placed on the case of *M/s. Dadabhoy Cement Industries Limited and 6 others v. National Development Finance Corporation Karachi* [PLD 2002 SC 500].

13. Insofar as the plea of impleadment of appellant being one of the co-sharers in the property left by Sanai Fatima is concerned, in the present case there is nothing available on the record, which could show that after demise of Mst. Sanai Fatima on 16.06.2001, the Appellant or any of her legal heirs had applied for heirship or letters of administration and got the subject property mutated in his favour, so much so, the appellant did not file any document whereby it could be ascertained that he is the actual legal heir of Mst. Sanai Fatima, thus, in absence of any legal document wherein the name of the appellant could be reflected, the plea of the appellant that too in a case wherein a judgment has already been passed by a court of competent jurisdiction, which has also attained finality, cannot be entertained. It is also very interesting to note that none of the legal heirs of Mst. Sanai Fatima came forwarded to challenge the judgment and decree or to agitate his/her share in the property. In the circumstance, mere claim of the appellant that being one of the co-sharers in the subject the property and being not impleaded as a party, is not sufficient to set-aside the judgment and decree on the grounds raised by the appellant. As for the purpose of application under Section 12(2) CPC the appellant had to show that despite his name is appearing in the property documents he was not impleaded as a party through fraud or misrepresentation or the court lacked jurisdiction to decide the matter resulting in the impugned order, which is not the case in hand. Furthermore, from stance of the appellant, it appears that it is the appellant's brother namely; Jawaid Munawar who initially got extended the expired lease and subsequently sold out the property to respondent No.2, as such, if any fraud is committed, it is by the said Jawaid Munawar, not anybody else. But, the appellant had chosen not to file any criminal proceedings against him. The appellant, however, on the same facts and grounds as that of the application under section 12 (2) CPC,

filed civil proceedings, inter alia, against his brother, as referred to in the preceding para No.8 but the same were dismissed against which no appeal was preferred. In this context, the Supreme Court of Pakistan in the case of *Misbah Khanum v. Kamran Yasin Khan* [2022 SCMR 1629], inter alia, held that there is no legal bar in availing two or more available remedies even before different forums simultaneously and whichever is decided earlier would make the others as infructuous.

14. Insofar as the plea of fraud and misrepresentation of the respondent-bank is concerned, record reflects that respondent-bank extended the loan to respondent No.2, upon completion / fulfilling of all requisite formalities including deposit of original title and other relevant documents pertaining to the property and the mortgagor, as such, in absence of any convincing evidence, which in the present case is lacking, no misrepresentation or fraud could be alleged to have been contrived by the respondent-bank to obtain a decision in its favour. Moreover, a perusal of Judgment dated 10.11.2015 shows that banking court while passing the judgment has considered the material facts including the documents produced in the evidence before it. Hence, there appears no concealment of facts and/or misrepresentation on the part of the respondent-bank as alleged by the appellant.

15. Insofar as the allegation of connivance of respondent-bank and respondent No.2 for obtaining the judgement and decree is concerned, the record transpires that respondent-bank filed suit No. 340 of 2008 in the year 2008 whereas the judgement was passed in the case on 10.11.2015 and during the proceedings the leave was also granted to respondent No. 2 without any condition. For the sake of arguments, had it been a collusive suit, it would not have taken almost seven years to decide the same, which even otherwise being a banking suit was required to be decided expeditiously.

16. We have also noted that in the execution proceedings the subject property has been auctioned and the auction purchaser, pursuant to the directions of the court, has deposited the entire sale consideration as such the right and interest of the auction purchaser has been created irrespective of the fact that the order of confirmation for sale has been passed or not, such right of the auction purchaser cannot be taken away

in the manner as the appellant seeks in the present proceedings as the sanctity is attached to the judicial sale. Reliance in this regard can be placed upon the case of *Mrs. Yasmeen Yaqoob v. Messrs Allied Bank of Pakistan Ltd. and 3 others* [2007 CLD 1511].

17. The case law relied upon by learned counsel for the appellant have been considered and found distinguishable from the facts of the present case as such the same are not applicable in the instant case. In the circumstances, the upshot of the above discussion is that we do not find any illegality and/or infirmity in the impugned order as such present appeal, being devoid of any merit, is dismissed with no order as to cost. Let the banking court proceed further in order to confirm the auction proceedings.

JUDGE

Karachi;
Dated:

JUDGE

*Jamil****