

IN THE HIGH COURT OF SINDH AT KARACHI

Execution Application No. 25 of 2012

[Askari Bank Limited *versus* A. H. International (Pvt.) Ltd. and others]

along with

Suit No.B-10 of 2007, J.M. No.33 of 2016
and Suit No.531 of 2016

- Dates of hearing : 23.01.2023, 16.02.2023 and 26.09.2023.
- Decree Holder : Askari Bank Limited, through M/s.
[in Ex. No.25 of 2012, Lubna Aman and Irfanullah Khan,
Defendant No.1 in Suit No. Advocates.
531 of 2016 and Respondent
No.1 in J.M. No.33 of 2016]
- Applicant : Mrs. Samar Rais, through M/s. Jahanzeb
[in J.M. No.33 of 2016, Awan, Shahan Karimi, Rashid Mahar,
for Plaintiff in Suit No. Sarosh Arif and Sauban Tasleem,
531 of 2016 and for Advocates.
Objector in Ex. No.25 of 2016]
- Respondent No.11 : Muslim Commercial Bank, through M/s.
[in J. M. No.33 of 2016 Rasheed Anwer and S. Mustafa Ali,
And for Defendant No.10 Advocates.
in Suit No.B-10 of 2007]

Case Law relied upon by Decree Holder's Counsel

1. **2012 S C M R 1172**
[*Abdul Majeed and another versus Shaukat Ali and others*];
2. **2016 C L D 1275**
[*Farhat Fareed Shaikh versus Messrs NIB Bank Limited and 4 others*];
3. **A.I.R. 1930 Lahore 731**
[*Punjab and Sindh Bank Ltd., Gujranwala versus Amir Chand and others*]
– **Punjab and Sindh Bank Limited Case**;
4. **2015 S C M R 319**
[*National Bank of Pakistan through Attorney and another versus Paradise Trading Company and others*] – **NBP Case**;
[It is also relied upon by the counsel for Applicant in J. M. No.33 of 2016]
5. **P L D 2002 Supreme Court 500**
[*Messrs Dadabhoy Cement Industries Ltd. and 6 others versus National Development Finance Corporation Karachi*];
6. **2016 C L D 984**
[*Messrs Shahtaj Textile Limited versus Messrs J&M Clothing Co. and others*] – **Shahtaj Textile Case**;

Reference

Corpus Juris Secundum [Volume LIX]

Case law relied upon by Counsel for Applicant in J.M. No.33 of 2016

1. **2015 S C M R 319**
[*National Bank of Pakistan through Attorney and another versus Paradise Trading Company and others*];
2. **2022 SCMR 1629**
[*Misbah Khanum versus Kamran Yasin Khan and another*]; and
3. **2016 C L D 1275**
[*Farhat Fareed Shaikh versus Messrs NIB Bank Limited and 4 others*].

DECISION

Muhammad Faisal Kamal Alam, J: The subject matter of this proceeding is a House No. G – 31, 5th Gizri Street, Karachi [“**Suit Property**”].

2. Necessary background facts are that a Suit No.B-10 of 2007 was filed by Askari Bank Ltd. concerning the financial facility, extended to private Defendants, in which they defaulted. Matter was settled between Askari Bank Ltd., to be referred as the “**Decree Holder – D.H.**”, and the private Defendants – the “**Judgment Debtors – J.Ds.**”, vide Judgment of 29-6-2009 and Decree dated 06.08.2009 [collectively referred as the “**Impugned Decision**”], challenged in J.M. No.33 of 2016, filed by Mst. Samar Raees, claiming to be the subsequent Purchaser / Owner of the above Suit Property - the **Claimant**. The above Judgment Debtors are impleaded in this J.M. as Respondents No.2 to 7. It is pertinent to mention that Ms. Seema Shirazee [present Respondent No.4] was the sole owner of the Suit Property.

3. The gist of the arguments of Mr. Jahanzeb Awan, Advocate for the Claimant, is, that the Suit Property was never part of the mortgage properties regarding which the above Impugned Decision was obtained by the Decree Holder and the Judgment Debtors. It is pointed out that the Suit

Property was never part of the Compromise Application filed under Order 23, Rule 3 of CPC [C.M.A. No.4577 of 2008] in Suit No.B-10 of 2007; that if the liabilities of the Decree Holder were not satisfied, then the same could have been recovered by liquidating other mortgaged properties with Decree Holder Bank, and not the Subject Property, which was actually mortgaged with Pakistan Industrial Credit and Investment Corporation [PICIC]. He has referred to Agreement for Settlement of Outstanding Liability dated 30.03.2012, between present Respondent No.4 [Ms. Seema Shirazee] and MCB (Muslim Commercial Bank), Memorandum of Deposit of Title Deed (13.10.2008) in respect of Subject Property with MCB; subsequent Deed of Conveyance between MCB and the Claimant, Mutation in favour of Claimant by DHA (Defence Housing Authority), Extract of General Land Registrar and CBC (Cantonment Board Clifton). These documents are available in J.M. No.33 of 2016 from pages-85 to 163. Contended that both the Decree Holder Bank and the Judgment Debtors through misrepresentation and fraud had obtained the Decree [the impugned Decision].

4. Mr. S. Mustafa Ali, Advocate for Respondent No.11 – MCB, has in fact supported the arguments of the Counsel for the above Applicant Lady – the Claimant. Contended that Judgment Debtor No.3-Ms. Seema Shirazee, in the Execution Application No.25 of 2012, preferred by the Decree Holder Bank, had also obtained loan from the erstwhile PICIC and got the Suit Property mortgaged. Subsequently under a debt swap arrangement, the loan was paid off by Muslim Commercial Bank and all this is recorded in a judicial proceeding in Banking Suit No.133 of 2016, before the learned Banking Court No.1 at Karachi, which was filed by PICIC, for recovery of its finance facility.

5. The above stance is rebutted by Ms. Lubna Aman, Advocate, representing the Decree Holder Bank – Askari Bank Limited [“**ABL**”]. She has supported the Impugned Decision, and stated that the Suit Property was illegally transferred during pendency of the proceeding and is adversely affected by the principle of *Lis pendens*, as envisaged in Section 53 of the Transfer of Property Act, besides, Sections 19 and 23 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 – **FIO 2001**. Contended that on the basis of photocopies, the Suit Property was mortgaged with ABL, which is a valid transaction, in view of the case law relied upon by her; that fraud is in fact played by MCB, as the Suit Property could not be passed on (transferred) to the above Claimant, as no loan / finance facility was extended by MCB to present Respondents No.2 to 7 [Judgment Debtors in the Execution No.25 of 2012, *ibid*], *inter alia*, as no Statement of Accounts is ever filed by MCB. Since Claimant has purchased the Subject Property after passing of Compromise Decree in Suit No. B-10 of 2007 (that is, filed by Askari Bank –the afore referred D.H) , therefore, entire transaction is void *ab initio*, in view of the above provisions so also reported judgments [*supra*]; requested that both Suit No.531 of 2016 and J.M. No.33 of 2016, preferred by Claimants, be dismissed. She has referred to the Correspondence dated 05.07.2005 of J.D.No.1 [A. H. International (Private) Limited]addressed to D.H. Bank / ABL, that the above J.D. No.1 had conveyed its consent about creation of second charge over the Subject Property; this document is available at page-2619 of Part-4 of the Banking Suit No.B-10 of 2007.

6. Précis of the case law cited by Ms. Lubna Aman, Advocate, is that above Claimant is not a *bona fide* purchaser, because the purported sale transaction in her favour for the Suit Property took place when the Banking Suit No.10 of 2007 was pending, thus, it is held by the Honourable

Supreme Court that when admittedly the transaction in question was done when the suit was pending, it is hit by the principle of *lis pendens* and the petitioner [of the reported case] cannot be held as a *bona fide* purchaser; petitioner has no *locus standi* to resist the sale in favour of a Bank pursuant to a valid judgment and decree and the transaction between petitioner / purchaser and the respondents / mortgager is not legal. Burden is on an applicant to demonstrate and prove about the alleged fraud committed by a Bank and the borrowers [that is, judgment debtors of the reported case] in entering into a compromise decree - in this case of Shahtaj Textile, *ibid*, claim of decree holder was in respect of an immoveable property, which was already mortgaged with a Bank, with which the judgment debtor entered into a settlement followed by a compromise decree. It is not necessary that every proceeding Under Section 12(2) of CPC warrants a detailed investigation or inquiry for which triable issues are framed and evidence is led, if the controversy can be decided through undisputed record; since no Appeal was filed against a consent decree, therefore, it has attained finality and does not suffer from fraud, misrepresentation or want of jurisdiction. Copy of the Relinquishment Deed was deposited with the Bank to create an equitable mortgage, which was termed as a title deed in the case of Punjab and Sindh Bank Limited [*ibid*] and it was held that it was sufficient to create an equitable mortgage. The Honourable Supreme Court in the case of NBP [*supra*], which is also relied upon by the Claimant's side, it is held that in a situation, where original Title Deeds were lost and the borrower deposited with the Bank an Evaluation Certificate, Approved Building Plan, Non-Encumbrance Certificate, issued by Sub-Registrar Lahore, Permission to Mortgage issued by Military Estate Officer, copy of the FIR that the complaint was lodged, then through these documents, equitable mortgage can be created.

7. Gist of the case law cited by counsel for the Applicant Lady, who is claiming to be a *bona fide* purchaser of the Suit Property, is, that there is no legal bar for a party to avail two or more available remedies under the law simultaneously and a decision in any one of such proceeding, would render the other as infructuous – this case law is cited to justify filing of J.M. No.33 of 2016, in addition to Suit No. 531 of 2016 by the same Applicant Lady-Mst. Sammar Raees. Even where a matter is compromised, Court has to decide its legality and genuineness and should not act in a mechanical manner. In a Banking Suit, where the sale has taken place in view of the valid Judgment and Decree, the same cannot be opposed by the petitioner (of the reported judgment).

8. Arguments heard and record perused.

9. Undisputedly, the original title documents of the Suit Property were with PICIC, which has separately extended a finance facility to the present Respondents No. 3 to 5, which are Judgment Debtors No.1 to 4 in the Execution No.25 of 2012 filed by D.H. Bank; *whereas*, the Plaint of Banking Suit No.133 of 2006 instituted by PICIC against the above private Respondents / J.Ds. is available in the record, according to which they have defaulted in re-payment of loan / finance facility availed by them and eventually the proceeding was filed under Section 15 of the FIO 2001, for recovery of Rs.44,327,306.88. **This Suit filed by PICIC was prior in time.** Memorandum of Deposit of Title Deed available in record shows that the Subject Property was mortgaged by Ms. Seema Shirazee-J.D. No.3 (present Respondent No.4 in J.M 3 of 2016) with the PICIC.

10. C.M.A. No.4577 of 2008, upon which the Impugned Decision is given, is also perused. The Application is at page-859 / 913 in the File of Suit No. B- 10 of 2007, preferred by D.H. Bank, along with the Schedule,

in which different assets including immovable properties are mentioned, which were kept as security by the J.Ds. with D.H. Bank. At page-873, Serial No.I, Suit Property is mentioned and under the Column 'Nature of Security', it is mentioned, Second Mortgage of Rupees One Hundred and Fifty Million, *whereas*, under the Remarks column, the exact wordings are reproduced herein under_

“Our bank’s charge has not been notified due to the absence of NOC from NIB (Formerly PICIC) and non co-operation of the client.”

The above remark means that no charge of Askari Bank Limited was created regarding the Suit Property.

11. The other undisputed material fact is that the Banking Suit No.133 of 2006 was settled between the PICIC and present Judgment Debtors through the Order dated 5-7-2006; this Order along with the Settlement Application is part of the Record of the Suit No. B-10 of 2007 [of D. H. Bank] and appended with the Leave to Defend Application [CMA No. 4231 of 2007] filed by PICIC [at Page 405 of the 2nd Part of Court File]. It means that the above Banking Suit was settled even before the present Lis [Banking Suit No. B-10 of 2007] was instituted by D. H. Bank. It is clearly mentioned in the above Leave to Defend Application that the Suit Property was exclusively mortgaged with the PICIC and there was **no pari passu charge or ranking charge** as averred by the D. H. Bank. Similarly, and undisputedly, in Execution No.24 of 2007 vis-a`-vis Suit No.133 of 2006 [mentioned in the foregoing paragraphs] earlier filed by PICIC against the present J.Ds., a Joint Application was filed by the PICIC [which subsequently became NIB Bank Limited] and J.D. No.3 – Seema Shirazee, who is also the same J.D. of present Execution No.25 of 2012 [preferred by D.H. Bank]. In this Application under Section 47, Order 23 Rule 3 of CPC, it is stated [**disclosed**] that the Suit Property had been sold out by above Ms.

Seema Sheerazi to one Mrs. Fatima Sarah Dawood for Rs.54,260,000/- covering the “*principal decretal amount and mark-up*”, paid to PICIC [the decree holder in its above Banking Suit] through a Pay Order drawn on MCB Bank Limited. It is further mentioned in Paragraph 2 of this Application that Ms. Sarah Dawood had obtained financing from MCB and thus the original documents were to be delivered to MCB. This Application is available at page-143 of the Execution No.25 of 2012, on which, **Order dated 14.10.2008** was passed by the learned Banking Court No.1 at Karachi, accepting the Settlement and Sale of the Suit Property. This sale has attained finality. The impugned Decision has the effect of over turning this Sale of the Suit Property, which is endorsed by the earlier Judicial Order [14-10-2008, *ibid*], prior in time to the impugned Decision; thus, the impugned Decision to this extent is contrary to law and cannot be sustained.

During the course of hearing of present Cases, on a specific query, it was not disputed by the learned Advocate representing D.H. Bank that the Title document-‘B’ Lease of the Suit Property was never handed over to the D. H. Bank.

12. The above record relating to the Banking Suit between PICIC and J.D. No.3, is available in the Execution No.25 of 2012, filed under Statement / Affidavit of the Officers of D.H. Bank. The other pertinent question, which came up during hearing, was, that if the entire decretal amount of this D.H. Bank has not been satisfied, then why D.H. Bank has not encashed the personal guarantees of the J.Ds. [above Judgment Debtors] towards satisfaction of the entire decretal amount, instead laying claim of the purported second charge on the Suit Property. This relevant question could not be satisfactorily replied on behalf of D.H. Bank, except what is submitted in the preceding paragraphs.

13. Order dated 01.07.2008 is referred, passed in Suit No.B-10 of 2007, is also relevant. In the said Order, the contention of erstwhile learned counsel for the D.H. Bank was recorded that in case the Suit Property is auctioned and after satisfaction of the loan of PICIC, the remaining balance be given to D.H. Bank; while this Court observed that if any amount remains, for which present D.H. Bank was lawfully entitled, the Banking Court may consider the request of present D.H. Bank, in accordance with law; this Order was passed on CMA No.6668 of 2008, (preferred by D.H. Bank in its Suit No.B-10 of 2007). This Application is available at page-957. Thereafter nothing has been agitated by the D.H. Bank in respect of the Suit Property, except the impugned Decision.

14. In the main Counter Affidavit to this J.M., similar stance is mentioned on behalf of D.H. Bank, but after the above Order of 01.07.2008, the stance of present D.H. Bank concerning the Suit Property, was narrowed down to the extent mentioned in the above Order, that present D.H. Bank can approach the learned Banking Court for payment of any amount left after satisfaction of decretal amount in favour of PICIC (subsequently NIB Bank), regarding which the record is silent.

15. Case law relied upon by the learned counsel for D.H. Bank, is distinguishable, *inter alia*, as in the present case, neither the title documents of the Suit Property were lost, nor any No-Encumbrance letter was obtained by D.H. Bank or the Mortgager – J.D. No.3, from MEO or Defence Housing Authority. **Conversely, the Letter dated 21.04.2008 has been issued by Defence Housing Authority, conveying its no-objection** that the Suit Property is mortgaged by Seema Shirazee-J.D. No.3 with PICIC against the loan facility; the above Correspondence is at *page-423* of the Banking Suit No.B-10 of 2007 [of the D.H. Bank]. The above endorsement

mentioned in the Schedule of Compromise Application between D.H. Bank and J.Ds., belies the entire claim of the former [Askari Bank Limited] about the purported creation of second charge, as it was never created as required. Conversely, the Suit Property was purchased by the present Claimant from MCB vide Deed of Conveyance dated 16.08.2013 [*at page-85 of J.M. No.33 of 2016 preferred by the Claimant*]. Earlier, the said Suit Property was released by a Judicial Order passed in the above Banking Suit (of PICIC), which order and proceeding has attained finality. Consequently, argument of learned Advocate for Askari Bank Limited [ABL] about the fraudulent transaction in respect of the Suit Property between MCB and the Claimant, and that no finance facility was extended to J.Ds., is misconceived in nature and untenable.

16. At all material times, D.H. Bank was aware of this factual and legal position, that the Suit Property is actually mortgaged with PICIC and not with Askari Bank Limited, and subsequently it has been sold in the above Banking Suit proceeding instituted by PICIC and disclosed in their Leave to Defend Application, yet D. H. Bank opted to include the Suit Property in the Compromise Application which was / is illegal and *void ab initio*, because, *inter alia*, in view of the earlier judicial Order dated 04.10.2008 passed by the learned Banking Court, which cannot be interfered with in a collateral Proceeding of Banking Suit B-10 of 2007, but, only through the statutory hierarchy provided in FIO, 2001. Thus, to this extent, with utmost respect, the impugned Decision is without jurisdiction. Therefore, the Subject Property could not have been part of the Compromise Decree / the impugned Decision, between D.H. Bank and J.Ds., in the Suit No.B-10 of 2007, in which neither MCB nor present Claimant were Parties. The said Compromise Order and Decree **to the extent of Suit Property** is not obtained with *bona fide* intention, but, through

misrepresentation. Similarly, the subsequent Order of 15.01.2016 passed in Execution No.25 of 2012, is also not correct, *inter alia*, in view of the above discussion; the same is recalled and the Objections of MCB will be re-heard.

17. J. M. No.33 of 2016 is allowed only to the extent that the impugned Decision is set-aside in respect of the Suit Property. *Whereas*, Suit No.531 of 2016, was already dismissed as not pressed vide Order dated 16.02.2023.

Judge

Karachi.

Dated: 13.11.2023.

Riaz / P.S.