

IN THE HIGH COURT OF SINDH AT KARACHI

Execution Application No.39 of 2015

Judicial Miscellaneous Application No.62 of 2015

Date of hearing	26.11.2015
Decree Holder	through Mr. Syed Ali Ahmed Tariq, Advocate
Judgment Debtors	through Mr. Irfan Haroon, Advocate
Applicant	through Mrs. Soofia Saeed Shah, Advocate.
Objector Chartered Bank (Pakistan) Limited	through Mr. Syed Aijaz Hussain Shirazi, Advocate

JUDGMENT

MUHAMMAD FAISAL KAMAL ALAM, J: Since the issues involved in the listed CMAs, filed in Execution Application No.39 of 2015 in Suit No.175 of 2013 and Judicial Miscellaneous (JM) Application No.62 of 2015, filed in the Banking Suit No.B-38 of 2013, are interlinked, rather intertwined, therefore, they have been adjudicated upon by this single Order.

2. Relevant facts of the case are that Shahtaj Textile Limited, (the Plaintiff in Suit No.175 of 2013) had business relationship with the Defendant M/s. J & M Clothing Co; a partnership firm, which was impleaded through its partners, namely, Mohsin Ayub son of Ayub Mirza and his wife Mrs. Zareen Mohsin (Defendants No.1 and 2 respectively). For the sake of reference,

the said defendants hereinafter will be referred to as “**Judgment Debtors**”.

3. As per the plaint of Suit No.175 of 2013, the above Judgment Debtors have issued five cheques in connection with some business transactions to the Plaintiff- Decree Holder, which for the sake of reference will be referred to as “**STL**”, and though the Judgment Debtors, made a part payment, but on account of dishonoring of five cheques, the STL (Decree Holder) filed the above Suit No.175 of 2013 under Summary Chapter (Under Order XXXVII Rule 2 of CPC) for Recovery of US Dollars 374,000/- (Three Hundred Seven Four Thousand Only) with markup. The said suit was contested by the Judgment Debtors, but their leave to defend application was refused and the suit was ultimately decreed for US Dollars 374,000/- (Three Hundred Seven Four Thousand Only). Since no appeal was preferred by the said Judgment Debtors, therefore, STL filed the above Execution Application being Execution Application No.39 of 2015 in its Suit No.175 of 2013. The above Judgment and Decree was passed on 05.03.2015. The Judgment Debtors resisted the above Execution Application and filed its Objections thereto in which it was disclosed that the property-residential Plot No.44-L, measuring 1000 Square Yards, Block-6, PECHS, Karachi, (**subject property**) regarding which STL is seeking execution of decree through sale, was already mortgaged with Standard Chartered Bank (Pakistan) Limited, way back in 2011. In addition to this, the Judgment Debtors have made further disclosure of their other collaterals lying with Standard Chartered Bank (Pakistan) Limited alongwith relevant

documentary evidence. From this Objection, it has also transpired that the Standard Chartered Bank (Pakistan) Limited, **(the Bank)** has also instituted a Banking Suit No.B-38 of 2013 against the present Judgment Debtors as well as their other Companies, viz. Joe's Fashion Export (Pvt.) Limited, Raphael's Creations (Pvt.) Limited and Ayub Garments Industries (Pvt.) Limited, and the said Banking Suit (No.B-38 of 2013) has been decided in terms of a compromise decree (dated 29.05.2015). Therefore, it was prayed by the Judgment Debtors that the instant Execution Application No.39 of 2015 should be dismissed. If on the one hand, the present Decree Holder / STL filed the Application under Order XXI Rule 30 of CPC-CMA No.278 of 2015, for seeking the attachment and sale of the subject property, to satisfy the money Decree dated 05.03.2015, in favour of STL (Decree Holder in Suit No.175 of 2013), then on the other hand, the Judgment Debtors have filed application under Section 114 of CPC-CMA No.292 of 2015, seeking review of order dated 03.09.2015, where under, interim injunction was granted against the Judgment Debtors from selling the above subject property.

4. Similarly, even the Bank (Standard Chartered Bank) has also entered in the Execution Proceedings of STL (Decree Holder) in Execution No.39 of 2015, by preferring objections under Order XXI Rule 58 of CPC, primarily with prayer, inter alia, that the subject property may be deleted from the purview of present execution proceedings.

5. The second set of facts are that in the intervening period, the present Decree Holder / STL has filed a petition in the form

of Judicial Miscellaneous Application No.62 of 2015-under Section 12(2) of CPC, in the suit filed by the Bank, assailing the above mentioned Compromise Decree dated 29.05.2015, in which the subject property was also included for the purposes of sale and satisfying the claim of Bank for a sum of Rs.381,910,926.88 (Rupees Thirty Eight Crores Nineteen Lac Ten Thousand Nine Hundred Twenty Six and Eighty Eight Paisa Only) against the above named Judgment Debtors and their aforementioned associated companies and undertakings, in respect of different financial facilities, which the latter has availed from time to time for their businesses.

6. The third set of facts are that the present STL-Decree Holder had earlier filed a Suit in the Court of learned Vth Additional District & Sessions Judge, Karachi (South) under the Summary Chapter, being Suit No. 08 of 2013, which was also decreed though exparte against the present Judgment Debtors for a sum of Rs.12,832,780/- (Rupees One Crore, Twenty Eight Lac Thirty Two Thousand Seven Hundred and Eighty Only), Execution Application No.08 of 2013 was also allowed on 16.10.2014 in respect of above Decree.

7. All the learned counsel addressed their arguments in support of their stance, gist of which is mentioned herein under:

Mr. Ali Ahmed Tariq, learned counsel, representing STL (Shahtaj Textile Limited) has argued that

a. since admittedly the decree in the suit filed by the Decree Holder / STL is prior in time (of 05.03.2015), therefore, subsequent Judgment and Decree dated 29.05.2015 (the

impugned compromise decree) passed in the Banking Suit No.B-38 of 2013, has been obtained through misrepresentation and fraud.

- b. The Judgment Debtors did not disclose before this Court that two Judgments and Decrees have already been passed are standing against them, one of US Dollars 374,000/- (Three Hundred Seventy Four Thousand Only) in the above Suit No. 175 of 2013 and other of Rs.12,832,780/- (Rupees One Crore Twenty Eight Lac Thirty Two Thousand Seven Hundred and Eighty Only) passed in the earlier proceedings in the shape of a Summary Suit No.08 of 2013, and both decrees remained unsatisfied, which should be satisfied at the first instance.
- c. Since STL (Decree Holder) money decrees are prior in time, therefore, they should have been satisfied first through the sale proceeds of the subject property, but by including the same in the impugned Compromise Decree, a collusive effort has been made by the Bank (Plaintiff in its Banking Suit No.B-38 of 2013), Judgment Debtors as well as the auction purchaser, to deprive the Decree Holder / STL from reaping the benefit from their decrees.
- d. Though the subject property stands in the name of Company-Joe's Fashion, but the Company is wholly owned by the above named Mohsin Ayub and his wife Mrs. Zareen Mohsin-the said Judgment Debtors, who are personally liable to pay off the decretal amount to STL,

that is, clients of Mr. Ali Ahmed Tariq. Therefore, there is no impediment in disposing of (sale of) the subject property and from its sale proceeds the decree in favour of the present Decree Holder-Shahtaj Textiles Limited (STL) can be satisfied; In this regard, learned counsel has also referred Public Notice dated 27.08.2015 appended with CMA No.278 of 2015 filed by STL (Decree Holder) (Page-63 of IInd Part of case file), showing that subject property is put up for sale, through no other, but above named Mohsin Ayub Mirza-Judgment Debtor No.1, which further endorses STL stance that whether partnership firm or private limited companies against which different decrees have been passed, are wholly owned by the above named Judgment Debtors and the above entities are just a shield, which if pierced, would reveal that actually the Judgment Debtors are the real beneficiaries of all business income and profits and thus they are also personally liable for the debts as well. Secondly, a search Inspection Report [available at page-211 of Judicial Miscellaneous Application No.62 of 2015 case file] in respect of entities owned by above Judgment Debtors has been appended by STL (Decree Holder) alongwith its Affidavit in Rejoinder (to CMA No.13238 of 2015), inter alia, in support of the above contention.

8. The above submissions of Mr. Ali Ahmed Tariq, has been seriously controverted by Mr. Irfan Haroon, the learned counsel representing the Judgment Debtors' side. His line of arguments is as follows: -

- (i). That his clients/ Judgment Debtors have not committed any fraud and the impugned Compromise Decree has been passed in due course and there is no element of haste, that could entail adverse consequences.
- (ii). It is an admitted fact that the subject property was mortgaged on 30th September, 2011 with Bank against a financial facility. In this regard, he has referred to a Deed of deposit of title deeds dated 30th September, 2011, available at page No.123 of case file of Execution No.39 of 2015 as well as Certificate of Registration of Mortgage issued by Securities and Exchange Commission of Pakistan (SECP) in respect of Joe's Fashion Exports (Pvt.) Limited, (the company owned by the above named Judgment Debtors) and its assets, viz. the subject property.
- (iii). The above mortgage was created in the ordinary course of business activity of Judgment Debtors and at that relevant time admittedly there was no lis pending from the side of Decree Holder / STL in respect of the subject property.
- (iv). As per clauses 3 and 4 of Compromise Decree, if an amount of Rs.310,000,000/- (Rupees Three Hundred and ten Million), which is a major portion of the total liability, is paid by 29th November, 2015, the Judgment Debtors will get a waiver for the rest of the liability, but due to restraining orders, the Judgment Debtors as well as the Bank are unable to sell the assets mentioned in the

impugned Decree and particularly the subject property, therefore, the said Judgment Debtors have been seriously prejudiced besides facing the continuous hardship.

- (v). Learned counsel also refers other documentary evidence that after publication of above sale notice dated 27.08.2015 in the Daily "DAWN"; the Bank subsequently issued a No Objection Certificate to sell the subject property and one other property-Plot No.22, Sector 27, Korangi Industrial Area, (not part of present dispute).
- (vi). The Judgment Debtors and other parties have moved forward in due course for settlement of liability and neither misrepresented any fact nor played any fraud upon the Court. Mr. Irfan Haroon, learned counsel also submits that his clients-Judgment Debtors contested the Banking Suit No.B-38 of 2013 by filing Leave to Defend Application and various hearings took place, and it's a wrong impression that the Judgment Debtors immediately surrendered before the Plaintiff Bank by way of the assailed Compromise Decree.
- (vii). If the Decree Holder (STL) had knowledge of public notice for sale of subject property, from which the said STL / Decree Holder stated to have acquired knowledge about the impugned Compromise Decree, then the latter should also have filed objections within seven days as mentioned in the above public notice, which was never done, and therefore, has no legal standing to file the proceedings of the nature, under Section 12(2) of CPC.

9. Syed Aijaz Hussain Shirazi, learned Advocate representing Standing Chartered Bank (**the Bank**) has referred three paragraphs of its Counter Affidavit to the main application under Section 12(2) of CPC to point out that_

- a. the subject property in addition to other properties and assets owned by the Judgment Debtors was mortgaged with Bank against a financial facility of Rs.305,000,000/- (Rupees Thirty Crores Fifty Lac Only) pursuant to a finance agreement dated June 28, 2011, in terms of Financial Institutions (Recovery of Finances) Ordinance, 2001. It was next argued by the Bank's counsel that admittedly there was no litigation between the present Decree Holder and the Judgment Debtors at the time of creation of mortgage by depositing of title deeds (as mentioned above), has been executed on behalf of a Private Limited Company, namely, Joe's Fashion Export (Pvt) Ltd., and not by the Judgment Debtors in their personal capacity and it is a settled legal principle that private limited company has a distinct and independent entity from its shareholders and directors.
- b. Learned counsel referred to Section 58 of the Transfer of Property Act, 1882, to further argue that interest in the subject property was transferred in favour of his client- Standard Chartered Bank (Plaintiff of Banking Suit No.B-38 of 2013) way back in 2011 when the mortgage was created in respect of subject property as mentioned above,

and the said Bank being a secured creditor has a first charge on the subject property.

10. Mr. Shirazi, learned counsel has cited the following Judgments-

- i. 1995 CLC Page 99 (relevant Page 119),
- ii. 1999 PTD page 2940 (relevant page 2943).

11. Ms. Soofia Saeed Shah, learned counsel for the auction purchaser, namely, Arshad Younus, mainly argued on the point of law by citing the following decisions_

- i. 2006 CLC Page 415 (relevant page)
- ii. 1994 SCMR Page 2248 (relevant page 2252)

12. Last one is the famous case of Maida Limited, handed down by the Hon'ble Supreme Court in which sequential order of priority amongst various claimants has been laid down.

Ms. Soofia Saeed Shah, learned counsel mainly relied upon the above case laws to argue the point that even for the sake of argument, if in the impugned Compromise Decree factum of money decree in favour of Decree Holders has been mentioned and the Judgment Debtors would have apprised this Court while entering into the impugned Compromise, even then it would be of no consequence for the reasons_

- (i) that the Bank having a mortgage Decree in its favour (the impugned Compromise Decree) has a preferential status for satisfaction of decree;
- (ii) that the subject property was mortgaged way back in 2011 against a financial facility, therefore, the

Bank is a secured creditor and is on a higher footing than the present Decree Holder/STL, which admittedly is not a secured creditor but has a money decree in its hands;

- (iii) Sale proceeds from all assets owned by the Judgment Debtors have to be distributed in accordance with the law laid down by the Hon'ble Apex Court in Maida Limited case (ibid) and consequently the Bank will first satisfy the impugned Compromise Decree;
- (iv) STL/Decree Holder should be vigilant and keep trying to search for other movable and immovable assets of Judgment Debtors for satisfaction of its above money decree.

13. I am inclined to first decide the Judicial Miscellaneous No.62 of 2015. Since triable issues are not involved, which require leading and recording of evidence, therefore, it is not mandatory to frame issues in the instant Judicial Miscellaneous No.62 of 2015. In this regard, a reported judgment of our Hon'ble Supreme Court – PLD 2002 SC page 500 (M/s Dadabhoy Cement Industries vs. National Development Finance Corporation Karachi) is of relevance. At page 507, paragraph-7, the Hon'ble Apex Court held that_

“Where the Court finds that further inquiry is required, it would frame issues and record evidence of the parties and if it is of the opinion that no inquiry is required, it can dispense with the same and proceed to decide the application. So, it is not incumbent on the trial Court to

frame, issues in each every case but it depends upon the facts and circumstances of each case”

14. Therefore, the instant J.M can also be decided on the basis of undisputed facts and record available. One of the main undisputed facts is that the subject property was mortgaged by the present judgment debtors with the Bank way back in, 2011, as security against a financial facility, which was availed by the judgment debtors. In this regard, a Memorandum Acknowledging Creation of Mortgage by depositing title deed is available in case record and has been filed by Judgment Debtors as well as Bank in Execution No. 39 of 2015 (available at Page 117). The other irrefutable document is the Certificate of Registration of Mortgage dated 30-09-2011, under Section 127 of the Companies Ordinance, 1984, issued by the Deputy Registrar of S.E.C.P (available at Page 123) of above Execution No. 39 of 2015, is a conclusive evidence that the subject property as asset of the Company Joe’s Fashion Export (Pvt.) Limited, has been mortgaged with the Bank. Admittedly, ownership of the subject property also vests in the above named Company-Joe’s Fashion as is evident from the record of the title documents, which starts from pages 315 to 419 in Execution No. 39 of 2015 as well as page(s) 87 to 181 in instant J.M No. 62 of 2015, in particular, the registered Conveyance Deed is available at page 143, endorsing the fact that the subject property by virtue of above said Conveyance Deed was transferred to Joe’s Fashion Export (Pvt.) Limited on 8th August, 1989.

15. If a comparative examination of the two litigation is done it becomes apparent that the above named STL (Decree Holders) filed the Suit No. 175 of 2013 against the partnership firm J&M, for recovery of US\$ 3,74,000/= with markup with regard to the dishonored cheques only and the aforementioned subject property nowhere figures in the above said proceedings instituted by the present Decree Holders/STL against Judgment Debtors. Similar was the situation when the present Decree Holders/STL obtained earlier money decree (exparte) dated 21.08.2013 for Rs.12,832,780/= (Rupees One Crore, Twenty Eight Lac Thirty Two Thousand Seven Hundred and Eighty Only) as mentioned in the preceding paragraphs, the subject property was not dragged into the execution proceeding. Thus it is a matter of record that the subject property was never a cause of dispute between STL/Decree Holder and present Judgment Debtors, but, for the first time became part of dispute rather a common battle ground for the two decree holders, viz. STL and Bank together with Judgment Debtors when former (STL) filed the instant execution proceedings (Execution No.39 of 2015) on 27.06.2015 for the enforcement and satisfaction of money decree (of 5th March, 2015) passed in its above Suit No. 175 of 2013. As against this, if the aforementioned second set of facts are analyzed, that is, when the said Bank (Standard Chartered Bank) filed a Banking Suit No. B-38 of 2013 against the present Judgment Debtors, in respect of different financial facilities extended to the Judgment Debtors, which, (Suit No. B-38 of 2013) was filed on 25th February 2013, subject property has been mentioned as one of the collaterals / mortgage property and it is one of the prayer(s) of the Plaintiff Bank that the

subject property besides other listed mortgage properties be sold and sale proceeds thereof be adjusted towards liability of the present Judgment Debtors towards the Bank. However, the present Judgment Debtors resisted the above Banking suit by filing leave to defend application under Section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. This Court passed the restraining order dated 01-03-2013 in aforesaid Banking Suit No. B-38 of 2013, in respect of mortgaged properties including the subject property. Admittedly all this happened prior to the restraining order obtained by STL (decree holder) on 03-09-2015, that too for the first time. Even before this, Plaintiff Bank and the Judgment Debtors entered into the impugned compromise dated 29-05-2015 followed by the impugned decree (of same date).

16. With regard to the contention of the learned counsel appearing for STL that the present Judgment Debtors in collusion with Plaintiff / Bank has by way of misrepresentation and playing fraud upon the Court has obtained the impugned compromise decree, as the Judgment Debtors, have not mentioned the dispute between said Judgment Debtors and STL, in leave to defend application, filed by Judgment Debtors in the above Banking Suit, is, not tenable, as admittedly the leave to defend application in above Banking suit was filed on 26-03-2013, when admittedly the subject property, as stated above, was not a disputed issue between the present Judgment Debtors and STL (Decree Holder). About this aspect, in paragraph-7 of the affidavit-in-rejoinder filed by the present Judgment Debtors in their CMA No. 292 of 2015 (Under Section 114 of CPC)

seeking review of above order dated 03.09.2015, whereby stay has been granted in favour of STL, with regard to the subject property, it has been categorically mentioned that the subject property has been added by STL / Decree Holders at a later stage of its Execution proceeding (No.39 of 2015), when the public sale notice dated 27-08-2015 was published in daily "DAWN" (as mentioned in preceding paragraph). Considering the next contention of the learned counsel for STL/Decree Holders that by not disclosing the subject property in the above compromise agreement dated 29.05.2015, both Judgment Debtors and Plaintiff / Bank have played fraud upon the Court in collusion with each other, as the subject property should have been taken out of the purview of the impugned compromise decree, inter alia, as the money decree in favour of STL/Decree Holder is prior in time, this argument too, I am afraid, does not bring home the case of STL/Decree Holder for the reasons that, even for the argument sake, the subject property would have been mentioned in the impugned compromise agreement which became the impugned compromise decree, the same would be of no consequence, considering the settled legal principle that mortgaged decree in respect of a property, in the instant case, the subject property, has a preferential status over a money decree. That is, the mortgage decree in the hands of Plaintiff Bank being a secured creditor has a preference over the money decree (dated 05.03.2015) in the hands of STL/Decree Holder.

17. On the above point of law, learned counsel for the parties cited number of judgments, which have been already mentioned in the foregoing paragraphs. The case cited by Ms. Soofia Saeed; 1994 S.C.MR Page-2248, famously known as Maida case, is of

relevance here, which has laid down the law that from the sale proceeds of an auction property, inter alia, first priority is to be given to all expenses incurred on sale or any attempted sale and then comes the claim of the prior mortgage and cost incurred. In the cited case different claims of government departments were rejected on the ground that claims do not fit in any of the categories of priority as provided by Order 34 Rule 13 of Civil Procedure Code. However; in this case an exception was created for the claim of Excise & Taxation Officer (ETO) under Urban Immovable Property Tax Act, 1958, for the reason that Section 16 of the above Act (of 1958) expressly contains a provision that any dues under the above Act (of 1958) shall be a first charge upon such land or building. Coming back to both **the title**/present cases, it is an admitted position that STL (Decree Holder) does not have a first charge in respect of the subject property, nor a mortgage in respect thereof was ever created prior in time, that is, before September 2011, or, there is any written contract between STL and present Judgment Debtors about creation of first charge on the subject property **prior to** the subject property was mortgaged, which otherwise, would have attracted the above cited decision of Hon'ble Supreme Court [in Maida case] in favour of STL/Decree Holder. In a well known judgment of Hon'ble Division Bench of this Court reported as Habib Bank Limited Versus M/s. Rudolf Donhill & others, 1999 PTD page 2940, authored by Mr. Justice (Late) Sabihuddin Ahmed (as he then was), the above point of law was further expounded in the following words:-

“We have gone through all these judgments and have found that the consistent principle of law laid down

therein is only to the effect that Government liabilities arising subsequent to a charge on the properties cannot have preference over the claims of secured conditions. Indeed except for the case of Sundaram Finance Limited decided by the Kerala High Court claims of the Government had arisen after the charge on the property having been created. Nevertheless we are unable to follow the Kerala precedent in view of the clear enunciation of law in the unreported D.B.Judgment of this Court in H.C.A. No. 85 of 1987, authored by Ajmal Mian, J, (as his Lordship then was) to the following effect:---

“The legal position which has emerged is that if an Income-tax liability is created prior to a mortgage, the Income-tax Department, will have preferential right to the extent of the said Income-tax liability but in case income-tax liability is created subsequent to the mortgage, the secured creditor will have preferential right in respect of his claim”

18. The above case law is applicable to the issues at hand, as, admittedly the mortgage in respect of the subject property was created way back in September 2011, (as mentioned in detail in the foregoing paras) and thus the Plaintiff / Bank having a mortgage decree, with first charge on the subject property, has priority to receive sale proceeds towards satisfaction of above mortgage decree in the same manner as mentioned in the cited cases **ibid**. In the above cited judgment of Habib Bank Limited, it has also been held, which though, is a settled legal position, that a Company being a corporate entity has a distinct personality from its Directors and shareholders. Significance of Certificate of Mortgage issued by SECP in respect of the subject property is highlighted in another cited judgment of Hon'ble Lahore High Court-PLD 1996 Lahore Page 99, in the following words_

“That a mortgage created in favour of Company having been certified under the provisions of section 127 of the Companies Ordinance (underlining to add emphasis) shall be deemed to be a registered transaction and, hence, shall create a first charge on the property satisfaction whereof cannot be objected to by a person in whose favour either subsequent charge is created or a subsequent agreement for sale has been executed”

19. If the subject property is taken out from the purview of execution proceedings filed by STL then the interlinked disputed issues are delinked with each other. Since it is the application under Section 12(2) of CPC in the form of Judicial Misc. No.62 of 2015 is under consideration, therefore, it is also necessary to further analyze the issue in the light of Judicial pronouncements on the very point of ‘fraud’ and ‘mis-representation’. Two decisions, one of learned Division Bench of our Court, reported in 1994 MLD page 1441 (Mobina Begum Versus The Joint Secretary, Ministry of Religious and Minority Affairs, Government of Pakistan, Islamabad and 2 others) and the other one of the Hon’ble Apex Court-1992 SCMR page 2184, provide ample guidance in the matter. The first decision of Mobina Begum (supra) is authored by Mr. Justice Wajihuddin Ahmed (as his lordship then was) and writing for the Court, has explained the terms of fraud and misrepresentation in the following words_

“...Needless to add that, primarily, distinction between fraud and misrepresentation is one of knowledge and intention, for whereas fraud proceeds on the basis of a fact or assertion or omission to assert such fact, with knowledge as to its falsity, in the context of misrepresentation the assertion or its

omission may lack both knowledge or intention.”

In the second decision (ibid) Hon’ble Supreme Court has held;

“The appellants have challenged the decree passed by the competent Court of law on the ground of fraud and collusion under Section 12(2) of the Civil Procedure Code and the burden heavily lay upon them to establish that the fraud had been practiced by the decree-holders on the Court in the obtaining of the impugned decree. Fraud means and includes, inter alia, the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; and the active concealment of a fact by one having knowledge or belief of the fact...” (underlining is mine to add emphasis).

20. From the above judgments it is clear that burden is on the applicant, in the instant case, STL, to demonstrate that the said Judgment Debtors and the Bank [Standard Chartered] played any fraud upon the Court and mis-represented facts. Analysis of the above discussion brings forth the conclusion that neither Judgment Debtors nor Bank has actively concealed a fact, or, misrepresented certain facts in such a fraudulent way, which, had it not been made or done, would have not resulted in passing of the impugned Compromise Decree. Consequently, element of fraud is also not present in the instant cases as explained in the above judicial pronouncements.

21. In view of the undisputed facts, irrefutable relevant record and point of law, the finding is that the Judgment Debtors and Bank have not played any fraud nor committed mis-representation in obtaining the afore mentioned impugned Compromise Decree of 29.05.2015. Accordingly, application under Section 12(2), of Civil Procedure Code, filed by STL /

Decree Holder, as Judicial Misc.No.62 of 2015 is hereby dismissed.

22. One of the arguments that the Decree Holder / STL should keep running and searching for other assets of the said judgment debtors, is not tenable at all. This plea is even contrary to a provision of law; Order XXI, Rule 41 of CPC and a celebrated decision of Hon'ble Apex Court reported in PLD 1962 Supreme Court page 119 (Mohiuddin Versus (i) the Province of East Pakistan and others). It would be advantageous to reproduce the relevant portion of the cited decision_

“The jurisdiction of the Court to attach the property of the Defendant truly arises from the fact that the Court has power to grant relief. A power to grant relief necessarily implies power to take all such steps as may be needed to ensure the grant of relief to the plaintiff. Full relief is not granted to a plaintiff by a paper decree. It is only when the decree is satisfied that he gets full relief and the Court has power to pass all such orders as may be required for the satisfaction of the decree unless any such order be expressly or by necessary implication prohibited. Order XXXVIII, Rule 5, should be regarded as a provision which recognizes a power rather than a provision which confers a power. The Civil Procedure Code, generally speaking, does not create new powers but regulates the exercise of power already, possessed by the Court. Even before the Civil Procedure Code was enacted the Civil Court possessed powers of the kind mentioned in the Civil Procedure Code. It possessed these powers because the Civil Court has jurisdiction to determine and protect civil rights and for the protection of those rights the exercise of such powers is essential.”

23. The above cited case has laid down that a Court has all the powers to execute its decision / decree, in order to provide an effective relief. Even otherwise, decree confers certain rights upon a decree holder and here in addition to other remedies,

principle of '***Ubi Jus ibi remedium***' (*where there is a right there is a remedy*) will also apply.

24. In view of the above main Execution Application No.39 of 2015 preferred by STL/decreed holder, will survive and shall be adjudicated upon its own merits and since order dated 29.09.2015 for depositing the decretal amount has not been complied with and the said order is still holding the field, thus, Objections (dated 01.10.2015) filed by the judgment debtors to the main Execution Application No.39 of 2015, is not sustainable.

25. Another CMA No. 413 of 2015, inter alia, for attachment of export rebate, which was not contested by the learned counsel of Judgment Debtors, is allowed. Judgment Debtors to disclose particulars about export rebate and / or other movable or immovable assets, so that STL / Decree Holder should get fruits of Decree dated 05.03.2015. Therefore, Judgment Debtor No.1 Mohsin Ayub is directed to appear in person before this Court on 16.01.2016, inter alia, to disclose other assets; movable and immovable both, so that the money decree of STL can be satisfied. In this regard, the Judgment Debtors shall also furnish specific details about the export rebate receivable by them or any other receivable(s), so that appropriate orders may be passed.

26. It is further ordered that Plaintiff Bank and Judgment Debtors shall make sincere efforts that all mortgage properties are sold simultaneously and in this regard, Nazir of this Court shall have a supervisory role in order to ensure that once mortgage decree is satisfied and all other expenses are met, as

provided in Section 73 of CPC and explained in detail in the above reported decisions, remaining or surplus, if any, portion of sale proceeds shall be paid to STL towards satisfaction of its money decree passed in Suit No.175 of 2013.

27. CMA No.292 of 2015, filed by the Judgment Debtors, inter alia, seeking the review of order dated 03.09.2015, whereby the stay was granted in respect of the subject property, in view of the above decision, has become infructuous and the aforesaid CMA No.292 of 2015 is accordingly dismissed.

28. Since the Judicial Miscellaneous (JM) Application No.62 of 2015 has been dismissed, therefore, the application being CMA No.402 of 2015, filed by Plaintiff's Bank under Order XXI Rule 58 of CPC is also disposed of in the above terms. Accordingly, CMA No.13238 of 2015, filed by Decree Holder / STL, seeking restraining orders against the above mentioned impugned compromise decree dated 29.05.2015, is dismissed.

29. By analogy a cardinal principle of administrative law, which, time and again has enunciated by the courts and later enacted as Section 24A of the General Clauses Act, 1897, inter alia, that an authority should act reasonably, fairly and justly, is also applicable to the financial institutions and the Bank [Standard Chartered Bank]. In all fairness, the incentive extended to the said Judgment Debtors in terms of Clauses 3 and 4 of the above Compromise Decree [of 29-5-2015], inter alia, relating to payment of major portion of liability within a certain time frame, should be extended, as, due to restraining order the sale proceeds of subject property could not be realized and as

such, the attending circumstances were beyond the control of present judgment debtors. Even, the Bank itself entered the present lis, with its Objections to the main Execution Application, in order to agitate its interest and anxiety. Thus, due to ***force majeure***, **at least** the time spent when the stay was granted in respect of the subject property till the present decision, has to be deducted from the above mentioned time frame mentioned in the compromise decree.

There is no order as to costs.

Dated _____

JUDGE

M.Javaid.PA