

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar and Agha Faisal, JJ.**

First Appeal 203 of 2017 : Sheikh Adeel Imtiaz vs.
Faysal Bank Limited & Others

For the Appellant : Mr. Asghar Bangash, Advocate

For the Respondent No. 1 : Mr. Mujahid Bhatti, Advocate

For the Respondent No. 2 : Mr. Waqas Asad Sheikh
Advocate

For the Respondent No. 3 : Mr. Masood Anwar Ausaf
Advocate

Dates of Hearing : 24.04.2019, 27.08.2019
& 07.11.2019

Date of Announcement : 05.12.2019

JUDGMENT

Agha Faisal, J. The learned Banking Court V at Karachi delivered an order dated 26.08.2017 (“Impugned Order”), in Execution 35 of 2016 (“Execution”), arising out of Suit 812 of 2011 (“Suit”), whereby, the appellant’s application (“Objection Application”) under Section 19(7)(a) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (“Ordinance”) was dismissed. It may be appropriate to reproduce the operative constituent of the Impugned Order herein below:

“The above provision of law clearly provides that the principle should be resident within any part of Pakistan at the time of execution of power of attorney. Power of Attorney can be executed before the Registrar or the Sub-Registrar within whose jurisdiction the principle resides. Bare reading of the Power of Attorney dated 19.06.2004 appears that not only the principle/executant namely Shakir Ejaz Hussain was resident of district Gujranwala but its both witnesses were also resident of district Gujranwala. Record further reveals that on the basis of power of attorney the judgment debtor No.1 mortgaged the property with the decree holder after obtaining “No Objection Certificate” which also got verified by decree holder i.e. M/s. Faysal Bank Limited vide Letter dated 25.01.2010.

On the other hand objector failed to establish that after obtaining alleged Declaration of Gift his name ever entered in the record of the society. He has also failed to establish his locus standi before this court for the purpose of investigating of his claim as provided by law. The instant application seem to be filed at the instance of judgment debtor No.1 just to hamper the execution proceedings at this stage.

Keeping in view of the foregoing facts and circumstances, I am of humble view that the application under section 19(7)(a) of the Financial

Institutions (Recovery of Finances) Ordinance, 2001 got no substance on merit. Hence, the same is dismissed with cost as provided under section 19(7)(a) of the Financial Institutions (Recovery of Finances) Ordinance, 2001.”

2. Briefly stated, the relevant facts herein are that the Suit was decided in favour of the respondent No.1 bank vide the judgment dated 07.04.2016 (“Judgment”), followed by a decree dated 07.04.2016 (“Decree”). The Judgment and Decree entitled the decree holder to realize the properties mortgaged therewith, in the event of non-payment of decretal amount. The appellant, not party to the Suit, preferred the Objection Application, claiming title to the mortgaged property, hence, sought to exclude the said property from the execution proceedings. The learned Banking Court dismissed the application under scrutiny vide the Impugned Order, hence, this appeal.

3. Mr. Asghar Bangash, Advocate appeared on behalf of the appellant and claimed title to the mortgaged property, on the basis of an unregistered declaration of gift recorded vide instrument dated 20.08.1980 (“Gift Declaration”). It was submitted that the aforesaid Gift Declaration was made by the paternal aunt of the appellant to the appellant, who was a minor at the relevant time. Learned counsel submitted that the principle borrower, in the Suit, was real brother of the appellant and both are nephews of the paternal aunt mentioned supra. It was submitted that the executing court relied on the record of title with respect to the property, emanating from the registered documentation presented there before, however, such reliance was erroneous in the first place as the said property had already been gifted to the appellant. It was contended that the executing court committed an error by failing to investigate beyond the Judgment and Decree, hence, abjured its duty towards the appellant. It was argued that instead of acting in mechanical manner, the executing court ought to have delved into a deep inquiry into the claim/title of the appellant, notwithstanding the unchallenged findings contained in the Judgment and Decree.

4. Mr. Mujahid Bhatti, Advocate appeared on behalf of the respondent no.1 bank and submitted that the present appeal was devoid of merit. Learned counsel submitted that the Gift Declaration is forged and fabricated document employed solely to defeat the execution of the Judgment and Decree. It was further argued that in view of the said

instrument, not being registered, no weightage can be apportioned thereto. Learned counsel submitted that the mortgage was validly created and adverted to the documents on record to corroborate the said statement. Learned counsel further demonstrated from the documentation filed on record that the appellant had himself claimed to have no interest in the mortgaged property. In conclusion, it was submitted that the appellant and the principle judgment debtor are real brothers and this appeal is another attempt to frustrate the Decree and subvert the due process of the law.

5. Mr. Waqas Asad Sheikh, Advocate appeared on behalf of the respondent no.2 and disputed the claim of the appellant with regard to the mortgaged property and in such regard adverted to the registered documentation of ownership available on record. The stance of the appellant, disowning title to the property in documentation available on file, was also highlighted and it was submitted that in view thereof the appellant is, prima facie, culpable of perjury.

6. Mr. Masood Anwar Ausaf, Advocate represented the respondent No.3 and reiterated the arguments advanced by the appellant and the respondent No.2. It was submitted that entire claim of appellant is based on forged documentation, which has been employed with the mala fide intention and ulterior motive of the appellant to avoid the execution of the Decree.

7. We have heard the respective learned counsel and have considered the documentation to which our surveillance was solicited. It is apparent from the record that the appellant, or any judgment debtor, has not filed any appeal, against the Judgment and Decree, and the present proceedings merely assail the Impugned Order, whereby the Objection Application of the appellant was determined by the learned Banking Court in the Execution. Therefore, in pursuance of Order XLI rule 31 CPC, we do hereby frame the following points for determination:

- A. *Whether, in the present facts and circumstances, the learned Banking Court was required to look behind the Judgment and Decree?*

B. Whether there is any infirmity identified with respect to the Impugned Order?

8. It is an admitted fact that the Judgment and Decree have not been assailed by the appellant, or the judgment debtors, and have thus attained finality. In such a scenario it is imperative to consider the settled law with regard to the role of the executing court.

The honorable Supreme Court has consistently maintained that while executing a decree the executing court was not empowered to go beyond the decree¹. The august Court has also disapproved, *inter alia* in the *Irshad Masih*² case, of any attempt to reinterpret a decree by the executing court. This Division bench has also observed, in *Intikhab Hussain Shah*³ that the role of the executing court does not venture beyond the decree.

The learned counsel for the appellant has been unable to displace the aforesaid settled principles of law and it is thus maintained the learned Banking Court rightly confined itself to the decree, under execution, and did not venture there beyond.

9. This leads us to the issue of the Objection Application itself, which is entirely predicated upon the appellant's claim to the mortgaged property resting upon the Gift Declaration. The learned Banking Court has recorded exhaustive findings upon the said issue and concluded that the appellant failed to establish the veracity of the instrument; failed to establish how an unregistered instrument could override a registered document; failed to account for the reason why he never obtained mutation of the property in his own name; and also failed to establish his *locus standi* before the executing court.

Furthermore, it is gleaned from the record that the documentation placed before the learned Banking Court substantiated the title of the mortgagor and the validity of the mortgage to secure a finance relationship. The record also contains a no objection certificate for the

¹ *Chaudhry Ahmed Nawaz vs. Province of Punjab & Others* reported as 2015 SCMR 823.

² *Irshad Masih & Others vs. Emanuel Masih & Others* reported as 2014 SCMR 1481.

³ *Intikhab Hussain Shah & Another vs. NBP & Others* reported as 2019 CLD 1021.

mortgage of the said property issued by the society, wherein the said property is situated.

It is also of note that the appellant admits to never having filed any suit to establish or preserve his claim to the mortgaged property and no such proceedings have been filed even after the Judgment and Decree.

It is thus observed that the learned counsel for the appellant has been unable to dispel the preponderance of documentation, available on file, controverting the claim pleaded by the appellant.

10. There is yet another aspect to consider in the context of the appellant's claim to the mortgaged property and that is his denial of any such entitlement in documentation, including sworn affidavits of the said appellant, available on file.

The respondent no. 1, along with its counter affidavit, filed a copy of a tenancy agreement with respect to the mortgaged property dated 23.05.2013, in the recital whereof a third party claimed to be the sole and absolute owner of the said property. It was pointed out from the instrument that the appellant himself was a witness to the said agreement.

It was brought to our attention the tenancy arrangement with respect to the mortgaged property had been the subject of a dispute, between the landlord and tenant, and the same went into litigation. The said proceedings also included contempt proceedings, in respect whereof the appellant filed sworn affidavits stating that he is neither the landlord nor the owner of the said property. Two distinctive affidavits, dated 19.04.2018 and 28.04.2018 respectively, sworn on oath by the appellant to this effect were placed on the record by the respondent no. 1, along with its counter affidavit, wherein the appellant had disavowed ownership of the property subject matter herein. It is imperative to record that the learned counsel for the appellant categorically admitted to the genuineness of the affidavits referred to herein. It is not only the disavowal of ownership, contained in the aforesaid affidavits, which is relevant herein but also the dates upon which the said affidavits were sworn. It is manifest that while this appeal was presented on

17.10.2017, the aforesaid affidavits were sworn much thereafter, on 19.04.2018 and 28.04.2018 respectively. Therefore, it is apparent that during the very tenancy of this appeal the appellant has disowned any title to the mortgaged property.

11. It is clear from the record before us that although the appellant claims title to the mortgaged property, he has never sought to file any suit to protect the purported right. The appellant, principle judgment debtor, the alleged donor and the ostensible landlord of the mortgaged property, as denoted from the tenancy agreement are all immediate family, therefore, absence of knowledge of dealings in the mortgaged property is implausible. Even if this notion is entertained, it would follow that even after the Judgment and Decree the appellant filed no such proceedings. Moreover, it is patently evident that even after coming to know of the Judgment and Decree the appellant did not file any appeal there against. The appellant did file the Objection Application, before the executing court, and upon dismissal thereof filed the present appeal, however, during the tenancy hereof executed two sworn affidavits disavowing any title to the mortgaged property.

12. The Impugned Order has laboriously considered all aspects raised vide the Objection Application and has appropriately addressed the issue there before, hence, reiteration thereof is eschewed herein. Learned counsel for the appellant has been unable to identify any infirmity with respect to the Impugned Order, therefore, the same is hereby maintained and upheld.

13. In view of the reasoning and rationale herein contained, we are of the considered view that no case has been made out for interference in the Impugned Order, therefore, the present appeal, along with listed application/s, is hereby dismissed.

JUDGE

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