

Judgement Sheet

IN THE HIGH COURT OF SINDH KARACHI

First Appeal No. 73 of 2011

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| Date | Order with signature of Judge |
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Present :

1. Mr. Justice Nadeem Akhtar
2. Mr. Justice Syed Muhammad Farooq Shah

1. Katcha Peshi :
2. For hearing of C.M.A. No.1653/2011 :

Date of hearing : 09.10.2013.

Appellant : Mustafa Ahmed and 3 others, through
M/S Raja Mir Muhammad and Mansoor Mir advocates.

Respondent No.1 : M/S Allied Bank Ltd., through Mr. Ghulam Ali Abbas
advocate.

Respondent No.2 : Khizar Khan, called absent.

J U D G M E N T

NADEEM AKHTAR, J. – This First Appeal has been filed by the appellants under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance XLVI of 2001, against the judgment delivered on 21.02.2011 and the decree drawn on 25.03.2011 by the learned Banking Court No.IV at Karachi in Suit No. 115 of 2008, filed by respondent No.1 against the appellants and respondent No.2.

2. The relevant facts of the case are that the aforementioned Suit was filed by respondent No.1, a bank, against respondent No.2 and one Mst. Parveen Ansari, for recovery of Rs.1,044,947.95. The case of respondent No.1 / plaintiff was that a Demand Finance Facility of Rs.858,240.00 was sanctioned and disbursed by respondent No.1 in favour of respondent No.2, which was to be repaid in 72 equal monthly instalments of Rs.11,920.00 each. An agreement dated 14.11.1998 in respect of the said facility was executed by respondents 1 and 2. In consideration of the said facility and as security for the repayment thereof, respondent No.2 executed in favour of respondent No.1 a Promissory Note and a Letter of Hypothecation. It was averred by respondent No.1 that in order to further secure the repayment of the said facility, the said Mst. Parveen Ansari mortgaged in favour of respondent No.1 her immovable property ;

namely, Flat No.211, 2nd Floor, Ashfaque Plaza, Sub-Plot No. S-1, Plot No. J.M. 714/5, Jamsheed Quarters, M.A. Jinnah Road, Karachi (**'the said property'**). It was further averred that the original title documents of the said property were deposited with respondent No.1, which were the Indenture of Lease Deed dated 24.09.1987 in favour of the said Mst. Parveen Ansari and the General Power of Attorney dated 14.11.1998, purportedly executed by the said Mst. Pavreen Ansari in favour of respondent No.1.

3. Respondent No.2, being the principal borrower, was sued by respondent No.1 as the customer, and the said Mst. Parveen Ansari was sued as the mortgagor. It was claimed by respondent No.1 in its Suit that the said Mst. Parveen Ansari was also a customer of respondent No.1 by virtue of the purported mortgage created by her. The Suit was filed by respondent No.1 by alleging that respondent No.2 had committed default, and as such it was entitled to recover the entire amount claimed in the Suit by selling the said property. After issuance and publication of summons, respondent No.2 / principal borrower did not come forward to file his application for leave to defend. It is mentioned in the impugned judgment that the learned Banking Court was informed during the pendency of the Suit that the said Mst. Parveen Ansari (defendant No.2 in the Suit) had died on 31.08.1999, that is, much prior to the filing of the Suit. Accordingly, her legal heirs, the present appellants, were brought on record in her place, and notices were published in newspapers on 05.10.2009. The appellants filed their application for leave to defend, which was dismissed for non-prosecution on 29.09.2010. The application filed by them for restoration of their application for leave to defend, which was supported by the personal affidavit of their counsel, was also dismissed on 21.02.2011 for non-prosecution. Thereafter, the learned Banking Court proceeded to examine the claim of respondent No.1, and decreed the Suit through the impugned judgment and decree.

4. At the very outset, the learned counsel for the appellants submitted that the appellants were condemned unheard by the learned Banking Court as their application for leave to defend was not decided on merits, but was dismissed for non-prosecution. He further submitted that the Suit was filed against a dead person, as Mst. Parveen Ansari (**'the deceased'**) had died on 31.08.1999, that is, nine (09) years prior to the filing of the Suit. He contended that the alleged General Power of Attorney in respect of the said property was never executed by the deceased, and her purported signatures thereon were forged and fabricated. He pointed out that the deceased was a *parda nashin* lady, and she used to sign in the English script, but her purported signature on the alleged General Power of Attorney is in Urdu. Without prejudice to his above

submissions, the learned counsel further submitted that if it is assumed for the sake of argument that the alleged Power of Attorney was executed by the deceased, even then respondent No.1 could not sue the deceased as the alleged Power of Attorney ceased to have any effect upon the death of the deceased. It was contended that the deceased never availed any finance facility from respondent No.1 nor had she ever deposited the original title documents of the said property with respondent No.1 with the intention to create mortgage, or otherwise. It was further contended that neither the deceased or her legal heirs / the appellants were aware of any mortgage of the said property, or the alleged deposit of the original title documents, which in any event were lost in the year 1996. In the end, it was submitted by the learned counsel that the Suit was not maintainable against the deceased, and after her death against the appellants, as they were not the customers of respondent No.1. The learned counsel prayed that, in view of his above submissions, the impugned judgment and decree be set aside.

5. The learned counsel for respondent No.1, supported the impugned judgment and decree, and strongly opposed the submissions made on behalf of the appellants. He submitted that the defect, if any, in filing the Suit against a dead person was cured when the legal heirs of the deceased were brought on record. He further submitted that the facts that the original title documents of the said property were deposited with respondent No.1 and the deceased executed the General Power of Attorney in favour of respondent No.1, are sufficient to show not only that the said property was mortgaged with respondent No.1, but also that the deceased was, and after her death, the appellants are the customers of respondent No.1. He denied the assertion that the General Power of Attorney was a forged document. It was conceded by the learned counsel that the deceased executed only the said General Power of Attorney, and no Memorandum of Deposit of Title Deeds and / or Deed of Mortgage were executed by her in favour of respondent No.1. It was prayed on behalf of respondent No.1 that this Appeal be dismissed.

6. It is an admitted position that the deceased, and after her death the appellants, were sued by respondent No.1 as mortgagors, even though the appellants have denied the mortgage all along. It is also an admitted position that, except for the disputed General Power of Attorney purportedly executed by the deceased, there was no other document on which respondent No.1 had relied upon in its Suit to show that the deceased had created a mortgage in its favour. It is a matter of record that the purported General Power of Attorney and the alleged mortgage were seriously disputed by the appellants. We have noticed with concern that the impugned judgment and decree are completely

silent with regard to the veracity and genuineness of the alleged mortgage. The dismissal of the application for leave to defend does not mean that the entire claim of the plaintiff should be decreed as prayed by the plaintiff without examining the claim of the plaintiff. In such an event, there is no doubt that the plaintiff becomes entitled to a decree under Section 10(11) of the Ordinance of 2001, but only to the extent which is permissible in law, and the Court is duty-bound to examine the claim of the plaintiff before passing the decree. In the instant case, the valuable vested rights, title and interest of the appellants in the said property were involved, which were neither considered nor decided by the learned Banking Court. The learned Banking Court ought to have given its findings and reasons for passing the mortgage decree in respect of the said property. The question of the relationship of financial institution and customer, and the effect of the purported General Power of Attorney after the death of the executant / deceased, which were essential in order to determine the jurisdiction of the learned Banking Court, have also not been examined or discussed in the impugned judgment. The learned Banking Court ought to have decided the appellants' application for leave to defend on merits instead of dismissing the same for non-prosecution. We are, therefore, of the view that the impugned judgment and decree to the extent of the appellants, are not sustainable in law.

7. Foregoing are the reasons for the short order announced by us on 09.10.2013, whereby this appeal was allowed with no order as to costs ; the impugned judgment and decree were set aside to the extent of the appellants ; and, the matter was remanded back to the learned Banking Court with the direction to decide the application for leave to defend filed by the appellants within a period of thirty (30) days from the date of receipt of these reasons, on merits, strictly in accordance with law, and after affording adequate opportunity to both the parties. It is clarified that the learned Banking Court shall not be influenced with any of the observations made herein. C.M.A. No.1653 of 2011 also stands disposed of.

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