

2012 C L D 1623

[Sindh]

Before Muhammad Shafi Siddiqui, J

NIB BANK LIMITED---Plaintiff

Versus

TERRY TOWELLERS (PVT.) LIMITED and 2 others---Defendants

Suit No.B-65 of 2009, decided on 13th August, 2012.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

---Ss. 9 & 15---Civil Procedure Code (V of 1908), O. XXI, Rr. 58 & 62---Suit for recovery was decreed and machinery of judgment-debtor was to be auctioned--Objection Application to enforcement of decree---Contention of the objector inter alia was that he was the landlord of the premises where the machinery was kept; that arrears of rent had been due to him and that he on his own expense moved the machinery to a godown and had incurred rent for the same---Contention of the objector was that he be compensated for the costs incurred by him from the sale proceeds of the machinery---Validity---Claims of the objector were flimsy and he had not kept record of the accounts or payments by cash for the godown and it was inconceivable that he was incurring expenditures on a person who in arrears of rent and with whom he was litigating---Machinery was hypothecated/pledged with the decree holder Bank and even otherwise it was the preferential right of the decree holder Bank to auction the machinery against their claim---Claim of objector was without merit---Application was dismissed, in circumstances.

Naveedul Haq for Plaintiff.

Muhammad Farooq for Objector.

Abdul Rehman for Defendant.

Date of hearing: 9th August, 2012.

ORDER

MUHAMMAD SHAFI SIDDIQUI, J.---1. Deferred for the time being as the date of hearing is not mentioned in the notice.

2.& 5. By consent deferred.

3. & 4: This is an application under Order XXI, Rules 58 and 62, C.P.C. It is contended by the learned Counsel for the objector that by order dated 23-4-2010 it was ordered that the landlord may file his claim before the Nazir who shall submit his report in the shape of a reference with regard to the claim after verifying the same. The Nazir has submitted his reference/report on 16-9-2010 at serial No.3 and at serial No.4 is an application of the objector.

The main contention of the learned Counsel for the objector is that he is the owner of the premises bearing No.L-33, C Block-22, Scheme No. 16, F.B. Area, Karachi and one Zaryab Hassan son of Ghulam Sadiq was his tenant in a portion of the said premises at monthly rent of Rs.14,000. He filed an ejectment application against this tenant namely Zaryab Hassan bearing Ejectment Application No.240 of 2004 before the 1st Rent Controller, Karachi Central for ejectment which was decided in favour of the objector by judgment dated 13-7-2006. Against this, the tenant namely Zaryab Hassan filed FRA bearing No.200 of

2006 in the Court of District Judge, Karachi Central which was subsequently transferred to the IIIrd Additional District Judge, Karachi Central and was ultimately decided on 31-1-2008 in favour of the tenant. Subsequently the Objector/Landlord challenged the judgment before this Court in C.P. No.111 of 2008 and it was decided in favour of the landlord whereafter an Execution Application bearing No.1 of 2009 was filed. In the meantime the tenant filed a Civil Petition No.94-K of 2009 in the Hon'ble Supreme Court at Karachi, Registry which was ultimately dismissed by the Hon'ble Supreme Court vide order dated 11-3-2009. Pursuant to the execution application, notices were served through all modes including publication but he did not appear whereafter the execution was allowed by the 1st Rent Controller and 24 hours notice was served on tenant to vacate the premises which he failed and thereafter writ of possession was issued on 30-7-2009.

The Bailiff, pursuant to the writ of possession reached at site, however, one Razzak Shah came out who requested for time to contact Zaryab Hassan and stated to be back in sometime. He did not reach site, however one Mujtaba Hassan came and asked about the warrants. However, he was of no help or assistance to the bailiff. Subsequently the looms and machines lying in the premises were removed outside, counted by the bailiff and one Razzak Shah in presence of the Police personnel. Thereafter the physical vacant possession of the premises was handed over to the objector. This fact of handing over of physical vacant possession to the objector after removing the machines in question is mentioned in para 6 of the application under Order XXI, Rules 58 and 62. He further submitted that no one came to collect these machines therefore, he being respectable law abiding citizen arranged a godown at a Plot No.NC-01, Suparco Road, Mouch Goth, Karachi on the monthly rent of Rs.30,000 per month and shifted all looms, machines and also bore expenses of lifters, trucks and labour of Rs.1,01,000. He also submitted that the tenant was in arrears of rent since January 2009 @ Rs.14,000 per month. He submitted that he has issued notices to the tenant at his office 305, 3rd Floor, Muhammadi House, I.I. Chundrigar Road, Karachi for removal of the looms and machines but did not turn back whereafter he filed an application under Order XXI, Rule 43, C.P.C. for auction of the looms. He submitted that pursuant to the delivery order dated 1-4-2010 in Suit No.B-65 of 2009 between the bank and one Terry Towellers Pvt. Ltd, the machines were handed over despite objection. He submitted that he has no interest in looms and machines but he has a right to claim the expenses incurred on shifting of looms from his premises to Plot No.NC-01, Suparco Road, Mouch Goth, Karachi on rent of Rs.30,000 per month since August 2009. He therefore, prayed that his claim of rent and the expenses incurred be adjusted and paid to him out of the sale proceeds of machines. Learned Counsel for the objector has also relied upon the report of the bailiff which is filed along with mashirnama prepared in Execution Application No.1 of 2009. He has also relied upon the receipt of rent issued by one Tauseef Ahmed in respect of the premises situated at Mouch Goth and also on the receipt of the transporter.

As against this, the learned Counsel for the plaintiff has argued that there is no privity of contract between the plaintiff and the alleged tenant. He submitted that the claim of the objector is based on false documents and it is collusive application between the objector and the Judgment Debtor. He submitted that the machineries were auctioned only for Rs.10,00,000 and that the objector had no reason to take pain and taking care of the machineries after getting the physical vacant possession the premises. He submitted that the application is liable to be dismissed as he has not made out any case in his favour.

I have heard the learned Counsel and perused the record. It appears that there was litigation between the objector and one Zaryab Hassan which was ultimately ended up in Hon'ble Supreme Court of Pakistan and in execution proceedings the objector got the physical vacant possession of the premises. It appears that he himself got interested in shifting of looms and machineries and as submitted by him he himself has arranged a go-down at Plot No.NC-01, Suparco Road, Mouch

Goth, Karachi to keep these machineries. It is not conceivable that when the machineries were removed from the premises of the objector and he hired another godown for Rs.30,000 per month although he was loosing Rs.14,000 per month in case he continued to keep the machineries at his own premises. It is also inconceivable that he rented out another premises at Mouch Goth at the monthly rent of Rs.30,000 per month which was paid by him. This amount of Rs.30,000 throughout was paid in cash. Learned counsel for the objector was asked whether he can prove otherwise the payment of such a huge amount of Rs.30,000 through his Bank statement if he has taken out such amount, he declined that he has any statement of account although he is doing business. The claim of the objector which is based on these documents appears to be flimsy as no businessman would incur such expenses on a person with whom he has undergone litigation for such a long period and that too without keeping record of the account and payment in cash. It is also inconceivable that he is incurring expenditures on a person who was in arrears of rent and with whom he was litigating. The machineries were hypothecated/pledged with the plaintiff/Decree Holder and even otherwise it is the preferential right of the plaintiff/ Bank to auction the machineries against their claim, hence in view of the above facts and circumstances, there is no justification or merit in the claim of the objector and accordingly the C.M.A. No.3171 of 2010 is dismissed and Nazir reference/report is also taken on record.

KMZ/N-22/K
dismissed.

Application