

**IN THE HIGH COURT OF SINDH,
AT KARACHI**

C. P. No. D-4222 of 2018

Present:-

Ahmed Ali M. Shaikh CJ &
Yousuf Ali Sayeed, J

Petitioner : M/s. Fateh Textile Mills Limited
through Zahid Hamid, Advocate.

Respondents
Nos. 1, 2, 4 & 5 : M/s. Nabila Enterprises (Pvt.)
Limited & others through
Muhammad Saleem Thepdawala,
Advocate.

Respondent No. 6 : Muslim Commercial Bank Limited,
through Syed Danish Ghazi,
Advocate.

Mr. Khaleeq Ahmed, DAG

Date of hearing : 01.04.2022

JUDGMENT

YOUSUF ALI SAYEED, J. – The Petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution assailing the Order made by the Presiding Officer of the Banking Court No. 1 (the “**Banking Court**”) at Karachi on 23.05.2018, allowing an application moved by the Respondent/Judgment Debtor No.2 in Execution Application No. 36 of 2002 (the “**Execution**”) seeking the return of the original title documents of Plot No.114-A, Sindh Muslim Cooperative Housing Society admeasuring 1222.02 square yards (the “**Subject Property**”).

2. The Execution emanated from Suit No.543 of 1999 (the “**Banking Suit**”) filed by Muslim Commercial Bank Limited (the “**Bank**”), seeking recovery of the amounts outstanding, due and payable in respect of certain finance facilities extended to and availed by the Respondent No.1.

3. The finance facilities had been secured by way of a mortgage created in favour of the Bank over the Subject Property by the Respondent No.2, with the original title documents being deposited accordingly.
4. Judgment in the Banking Suit was entered in favour of the Bank on 21.01.2002, decreeing the claim in the sum of Rs.18,200,492/- jointly and severally against all the defendants with cost and future markup at 14% from the date of filing till realization, and the prayer for sale of the Subject Property also being allowed. A Decree was then drawn up on 04.03.2002 accordingly.
5. The case of the Petitioner is predicated on the assertion that it had transacted to acquire the Subject Property in terms of an Agreement to Sell dated 18.09.1998 for a total consideration of Rs.58,972,115/-, and made payment of Rs. 15 million in terms thereof to the Respondent No.2, and had filed Suit No.378 of 1999 (the "**Suit 378**") before this Court on the Original Side, seeking specific performance.
6. The Petitioner contends that it had transacted oblivious of the mortgage, and only became aware thereof when the summons in the Banking Suit were published in the Daily Jang, Karachi on 28.09.2000, hence it sought to intervene therein, albeit unsuccessfully, but nonetheless came forward as an objector in the Execution.
7. It is said that for 'perfecting its title' a payment of Rs.20 million was made to the Bank pursuant to an Order made in the Suit on 22.03.2004. Hence the Petitioner professes to have stepped into the shoes of the Bank and acquired a vested right, title and interest in the Subject Property, of which the Petitioner was in physical possession.

8. The Execution came to be disposed of vide an Order dated 10.09.2011, in the following terms:

“Learned counsel for the Plaintiff/D.H is present. Learned Counsel for the Defendants/J.Ds is present. Dr.Farukh Naseem, counsel for the objector has filed Vakalatnama their objection being that the property has been purchased from the J.Ds and payment to the satisfaction to the D.H. has been made in the statement moved by the counsel for the Plaintiff/D.H. It is prayed that no outstanding dues are reflected in the statement on account of the defendant as the same have been cleared/paid by the intervener/objector to the account of the J/Ds. It is further stated that a Suit has been filed before the Hon’ble High Court for specific performance and permanent injunction against the judgment debtors and the present Plaintiffs by intervener/objector. Hence it is submitted that the instance Execution Application may be disposed off subject to Plaintiff’s legal right to institute fresh proceedings for recovery in the event the suit No.378/99 pending before the Hon’ble High Court is decided against the intervener/objector. The three learned counsel have arrived at conse-sus that this Execution Application No.36 of 2002 pending before this Court be disposed of and the original title documents of the mortgaged property be kept /deposited in the custody of the Nazir of this Court, where they were filed on 7.12.2007 and be released as per order of the Hon’ble High Court. Accordingly, I dispose of Execution Application No.36 of 2002. Hence, in view of the Statement filed by the advocate for the D.H. dated 6.8.2011, I dispose off the present Execution Application No. 36 of 2002 in Suit No.543 of 1999. With no orders as to cost.”

9. As it transpires, Suit 378 was then dismissed on 16.02.2016, hence while noting such development the Banking Court allowed the application of the Respondent No.2 and directed the release of the title documents vide the impugned Order, the relevant excerpt of which reads as follows:

“7. Since the Suit No.378 of 1999 along-with all pending applications has been dismissed vide Order dated 16.02.2016 by the Hon’ble High Court of Sindh Karachi. Neither the said is restored till date nor any restraining order is in field, thus there is no reason to keep the original title documents of the property viz: Plot No.114-A, Sindh Muslim Cooperative Housing Society, Karachi, admeasuring 1222.02 square yards in the custody of Naazir of this court. In view of above

discussion the application for return of original documents of property viz: Plot No.114-A, Sindh Muslim Cooperative Housing Society, Karachi, admeasuring 1222.02 square yards dated 13.11.2017 filed by the attorney of judgment debtor No.2 is hereby allowed and Naazir of this Court is directed to release the original title documents of the property in question to the attorney of the judgment Debtor No.2 on proper receipt and verification of power of attorney.”

10. Learned counsel for the Petitioner argued that the Banking Court had erred in making the impugned Order for release of the title documents of the Subject Property to the Respondent No.2, and drew attention to the earlier Order dated 10.09.2011 so as to contend that upon culmination of the Execution that forum had become *functus officio* and even otherwise lacked the power and authority to direct the release of the title documents in view of the terms of the disposal Order. He argued that the terms of that Order envisaged that the release of the original title documents of the Subject Property was subject to such order as was to be passed in Suit 378 and further argued that the Petitioner had assailed its dismissal by filing an Application under Section 12(2) CPC (i.e. JM No.1 of 2018), which remained pending.
11. Conversely, learned counsel for the Respondents Nos. 1, 2, 4 and 5 argued that the Petition was not maintainable as an appeal lay against the impugned Order under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, and as the impugned Order had even otherwise already been complied with on 29.05.2018, with the original title documents having been released by the Banking Court and returned to the Respondent No.2. It was argued that the rights of the Petitioner were to have been determined in Suit 378, but it had failed to challenge the dismissal thereof for a period of 22 months until finally preferring the JM and had thereafter failed to press the same to any conclusion.

12. Having considered the matter, we are of the view that any rights as the Petitioner may espouse in respect of the Subject Property were to properly be determined in Suit 378 and the competing claims of the parties in relation thereto or as to performance of the Agreement to Sell cannot be adjudicated in the present proceeding under Article 199.

13. Needless to say, if the Petitioner was aggrieved by the impugned Order, it could have resorted to the remedy available by way of appeal, and in the absence of such an approach any order seeking the imposition of a restraint against the Respondents in relation to the Subject Property could at best have been sought within the framework of the JM. However, a Petition under the writ jurisdiction of this Court is not the appropriate vehicle for that purpose. That being so, the Petition accordingly stands dismissed.

JUDGE

Karachi
Dated _____

CHIEF JUSTICE