

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Justice Ms. Sana Akram Minhas.

First Appeal No.24 of 2018

Standard Chartered Bank Limited
Versus
Mr. Syed Mohammad Babar and another
.....

Date of hearing: 30.04.2024

Ms. Naheed A. Shahid, Advocate for the Appellant.

Mr. Haris Rashid Khan, Advocate for the Respondent No.2.
.....

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Appellant considered itself as mortgagee and the Respondent No.1 as mortgager of plot, description of which is provided in the transfer order issued by the City District Government Karachi [CDGK] (as it then existed), available at page-111, hereinafter referred as mortgaged property.

2. A banking suit No.1200/2009 was filed against the Respondent No.1 for the recovery of house finance facility on Diminishing Musharaka basis. The house finance facility was granted in the sum of Rs.9.3 million against the security of the mortgaged property, the transfer letter of which was provided to the bank as the only title document available “at that point in time”. Finance was sanctioned on 06.08.2007 and disbursed on providing security. The suit was decreed vide judgment dated 30.11.2010 and the final decree was drawn accordingly. Execution application No.29/2012 was filed before the Banking Court No.1 and the attachment was sought; the terms of the auction claimed to have been settled in terms of Order-XXI Rule-66 CPC, available at page-129 of the appeal.

3. The objector/intervener Saeeda Begum wife of Jamal Ahmed Khan (Respondent No.2) then filed an application under Section-12 of the Financial Institutions (Recovery of Finance) Ordinance, 2001 [FIO, 2001] read with Section-12(2) CPC along with another objection petition/application under Section-19(7) of the FIO, 2001. The impugned order dated 09.01.2018 apparently is passed on a subsequent application that is under Section-19(7) of the FIO, 2001 read with Order-XXI Rule-58 and 60 CPC. The objections are to the extent that the intervener/ objector is a bonafide purchaser without notice of any such dispute as to the mortgage of the property/ plot described in the transfer letter referred above available at page-111, hence the property is neither available for the attachment nor for a consequential auction.

4. Learned counsel for the intervener/objector at the time of arguments has placed before us a series of documents describing chain of title from the date of the first allotment uptill the issuance of search certificate dated 07.01.2016. We have taken the statement on record, which per learned counsel, not available on record.

5. We have heard learned counsel and perused the material available on record.

6. The solitary contention of the appellant's counsel is that the Banking Court should not have withdrawn the attachment order on the strength of affidavits in support of applications. It requires an investigation and probe as to whether the Respondent No.1 created an equitable mortgage in respect of the plot in question disclosed in the transfer order available at page-111 and that whether subsequent transfers were only malafide in order to deprive the appellant from

the fruits of the decree. It is to be seen whether earlier transfer order was surrendered or required to be surrendered.

7. The original of the transfer/mutation order of the Respondent No.1 is with the bank in response to a claim of equitable mortgage. Mortgager Syed Mohammad Babar (Respondent No.1) claimed to have obtained the lease deed from CDGK on 29.04.2008 without surrender of transfer/allotment order; the lease deed is available at page-163. Syed Mohammad Babar then sold the property to Syed Liaquat Ali Zaidi son of Syed Maqbool Ali through a sale deed dated 28.05.2008 who then by virtue of a registered instrument sold it to Mst. Sobia Parvez wife of Mr. Pervez on 1st September, 2008. The present objector/intervener (Respondent No.2) claimed to have purchased the property through Mst. Sobia Pervez by virtue of a sale deed dated 10.09.2015. Except last transfer in favour of Saeeda Begum wife of Jamal Ahmed Khan, all the transfers took place in April, May and September, 2008, whereas, finance was sanctioned on 06.08.2007 on security of subject plot by way of equitable mortgage, retaining original transfer order of plot.

8. It is however admitted by Ms. Naheed A. Shahid, learned counsel for the appellant that at the time when the original transfer order of 15.01.2008 was presented to the bank to avail house finance, the lien was not immediately marked with CDGK. It is claimed that the lien was marked by virtue of a letter dated 10.02.2012 available at page-359, whereas last sale deed was registered on 10.09.2015. This is apparently subsequent to the judgment of the Banking Court dated 30.11.2010, apparently at the time of execution. Surreptitious transfer of the property in the year 2008 is quite visible, whereas, the claim of the present objector/

intervener is on the strength of a registered instrument dated 10.09.2015; this is apparently after the lien was physically marked over the property. No doubt the original transfer order available at page-111 may have been with the bank but it is on the strength of subsequent lease executed by the CDGK whereby the property changed hands in the year 2008. It is to be seen whether such transfers of 2008 and in particular of 2015 when the objector acquired the property, were all bonafide transfers without notice of the pendency of the dispute as well as of the lien over the mortgaged property.

9. The question of law that is before us is whether such probe requires investigation or should be on the basis of affidavits in support of applications. Order-XXI Rule-58 requires investigation and probe and there is no cavil to such understanding of law that the court may undergo the process of investigation of claims and objections under Order-XXI Rule-58 CPC, if the circumstances so requires which in the instant case does, however, learned counsel for the Respondent has taken us to Section-19(7) of the FIO, 2001 and he insisted that he has moved an application under the relevant provisions which does not require investigation rather requires a “summary probe”. We have read the contents of Section-19(7) of the FIO, 2001 and reproduce as under for convenience:-

19. *Execution of decree and sale with or without intervention of Banking Court.—(1).....*

(7) *Notwithstanding anything contained in the Code of Civil Procedure 1908 (Act V of 1908), or any other law for the time being in force-*

(a) *the Banking Court shall follow the summary procedure for purposes of investigation of claims and objections in respect of attachment or sale of any property, whether*

*or not mortgaged, pledged or hypothecated,
and shall complete such investigation within
30 days of filing of the claims or objections;*

(b)

(c)

10. This provision primarily is in support of the execution proceedings and it gives a privilege to the court to apply summary procedure for the subjects mentioned therein. The options for summary proceeding is with the court, however, summary procedure does not exclude trial (if so required on presentation of such case) but requires expeditious conclusion.

11. As far as present controversy and case in hand is concerned, the property changed many hands at the time when the transfer letter was presented to avail house finance. Once an equitable mortgage apparently was created by memorandum of deposit of title (transfer order) and execution of irrevocable general power of attorney coupled with undertaking to purchase the subject property, in the year 2008 was done to benefit bank; the title all of a sudden changed hands although powers to obtain any such transfers/leases vested with mortgagee on account of power of attorney. This has to be explained by subsequent transferee buyers. CDGK, as it then was, issued lease without surrender of original transfer order and in 2015 last sale deed was issued when there was already a lien. We are therefore, of the view that this investigation requires detailed probe and should not have been done without investigation/evidence however requires expeditious trial as a summary probe, by the Banking Court. This amounts to allowing the objector scot-free without evidence.

12. We therefore, deem it appropriate to set aside the impugned order and remand the case back to the Banking Court that the application be deemed to be pending and evidence, as deemed and required by the parties, be recorded, preferably in six months' time and then on the strength of the evidence an order under Order-19 Rule-7 of the FIO, 2001 read with Section-XXI Rule-58 CPC be passed.

13. The instant Appeal stands disposed of in the above terms along with pending application(s).

Dated: -15.05.2024

JUDGE

JUDGE

Ayaz Gul