

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI

Suit No. 290 of 2018

M/s. Lucky Tex (Pvt.) Limited

Versus

M/s. Cresox (Pvt.) Limited

Before: Mohammad Abdur Rahman,J

Dated: Order with signature of Judge(s)

For Hearing on Maintainability

Dates of Hearing : 8 September 2023 19 September 2023,
2 October 2023, 29 February, 2024 and
11 February 2025

Plaintiff in Suit No. 290
of 2018 : Through Mr. Ali Mehdi, Advocate

Defendant in Suit No. 290
of 2018 : Nemo

Judl. Misc. No. 32 of 2022

M/s. Lucky Tex (Pvt.) Limited

Versus

Habib Bank Limited & 4 others

Before: Mohammad Abdur Rahman,J

Dated: Order with signature of Judge(s)

For hearing on the Main Application

Dates of Hearing : 8 September 2023 19 September 2023,
2 October 2023, 29 February, 2024 and
11 February 2025

Plaintiff in Suit No. 290
of 2018 : Through Mr. Ali Mehdi, Advocate

Defendant in Suit No. 290
of 2018 : Nemo
Applicant in

J.M. No. 32 of 2022 : Mr. Hanif Faisal Alam, Barrister-at-law
 Respondent No. 1
 In J.M. No. 32 of 2022 : Mr. Waqar Ahmed, Advocate
 Respondent No 2 and 4
 In J.M. No. 32 of 2022 : Mrs. Heer Memon, Barrister-at-law

Judl. Misc. No.33 of 2022

M/s. Lucky Tex (Pvt.) Limited

Versus

Faisal Bank Limited & 4 others

Before: Mohammad Abdur Rahman,J

Dated: Order with signature of Judge(s)

For hearing on the Main Application

Dates of Hearing : 8 September 2023 19 September 2023,
 2 October 2023, 29 February, 2024 and
 11 February 2025

Plaintiff in Suit No. 290
 of 2018 : Through Mr. Ali Mehdi, Advocate

Defendant in Suit No. 290
 of 2018 : Nemo

Applicant in
 J.M. No. 33 of 2022 : Mr. Hanif Faisal Alam, Barrister-at-law

Respondent No. 1
 In J.M. No. 33 of 2022 : Mr. Waqar Ahmed, Advocate

Respondent No 2 and 4
 In J.M. No. 33 of 2022 : Mrs. Heer Memon, Barrister-at-law

ORDER

MOHAMMAD ABDUR RAHMAN, J. Through this common order I will
 be deciding:

- (i) Judicial Miscellaneous Application No. 32 of 2022, that has
 been maintained under Sub-Section (2) of Section 12 of the

Code of Civil Procedure, 1908, against a compromise decree dated 14 February 2022 passed by this Court in Suit No. B-21 of 2017;

- (ii) Judicial Miscellaneous Application No. 33 of 2022 that has been maintained under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 against a compromise decree dated 14 February 2022 passed by this Court in Suit No. B-34 of 2017; and
- (iii) the maintainability of Suit No. 290 of 2018.

A. Facts

2. Cresox (Private) Limited (hereinafter referred to "Cresox") availed various financial facilities from Habib Bank Limited (hereinafter referred to as "HBL"), Faisal Bank Limited (hereinafter referred to as "FBL") and Pak Oman Investment Bank Limited (hereinafter referred to as Pak Oman") and on which financial facilities it has defaulted. As security for such financial facilities an immovable property bearing Plot No. A/40 SITE, Survey No.21, Sheet No.35P/1-35/13 admeasuring 5.039 acres (hereinafter referred to as the "Mortgaged Property") had been mortgaged by Cresox with HBL, FBL and Pak Oman.

3. It has been informed that the following litigation has been filed as against Cresox:

- (i) Suit No. B-02 of 2014 was presented on 3 January 2014 by Pak Oman before this Court in its Banking Jurisdiction under the provisions of the Financial Institution (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as the Ordinance, 2001) for recovery of Rs. 162,344,199/- and which was decreed on 26 July 2017 for the sum of Rs. 162,344,199/- with cost of funds from 1 December 2013 till the date of realisation of the entire decretal amount. A Judgment dated 18 September 2017 and Decree dated 18 September 2017 was passed by this Court in favour of Pak Oman in Suit No. B-02 of 2014.;

- (ii) Suit No. B-21 of 2017 was presented on 28 July 2017 by HBL before this Court in its Banking Jurisdiction under the Ordinance, 2001 inter alia for recovery of Rs. 332,133,097.16 and summons of service was published in the Daily Jung and the Daily Dawn on 14 August 2017. The Suit was decreed on 14 February 2022, on a comprise application, for the sum of Rs. 332,133,097.16 with cost of funds from the respective dates of default till the date of realization of the entire decretal amount;
- (iii) Suit No. B-34 of 2017 was presented on 20 November 2017 by FBL before this Court in its Banking Jurisdiction under the Ordinance, 2001 inter alia for recovery of Rs. 295,976,789 and summons of service was published in the Daily Jung and the Daily Dawn on 25 November 2017. The Suit was decreed on 14 February 2022, on a comprise application, for the sum of Rs. 295,976,789 with cost of funds from the respective dates of default till the date of realization of the entire decretal amount;
- (iv) Suit No. 816 of 2017 was instituted before Banking Court No. IV at Karachi as against Cresox and others in July 2017 for the recovery of US\$ 554,402.82/- and GBP 38,654.51/- and in which, on a compromise application, a decree was passed for US\$ 554,402.82/- and GBP 38,654.51/- with cost of funds from the respective dates of default till the date of realization of the entire Decretal amount.

4. It seems that during the pendency of the litigation with HBL and FBL and one week after the passing of the Judgement and Decree each dated 18 September 2017 in Suit No. B-02 of 2014, Lucky Tex Pakistan (Private) Limited (hereinafter referred to as "Lucky Tex") entered into an Agreement dated 25 September 2017 with Cresox and which obligations were settled in the following terms:

" ... *This AGREEMENT between M/S Cresox Private Limited ("CSL"), through its representative Mr. Tariq Shafi & Lucky Tex Pakistan Private Limited ("LTEX"). through its representative Mr. Ahmed Tabba, being mutually agreed upon for the sale of CSL's Land, Buildings, & Machineries to LTEX as defined by the Terms & Conditions here hereunder,*

1. Plot No. A-40 Manghopir Road SITE. having land totaling approximately 5.039 Acres and the buildings located on the same plot

totaling a covered area of approx. 144,400 square feet, in addition to the Power Generators, Waste Heat Recovery System, Chillers, Boilers, Effluent Treatment Plant and their installations, fixtures, fittings, cables and all their related parts and Infrastructure shall be sold by CSL to LTEX for a total consideration of PKR 900,000,000/- (PKR Ninety Crores)

2- The Sale Price of PKR 900,000,000/- is inclusive of any and all payments to be first paid to the Consortium of Banks/ Financial Institutions ("CoB") for the release of CSL's Pledged Assets from any encumbrances and charges, allowing for complete clearance/ release and No Objection Certificates to transfer the Land, Buildings, and Machineries to LTEX by CSL. Following the release of all charges & encumbrances on CS's Assets by the CoB, the balance amount of the Sale Price, if any, shall be transferred to CSL, Furthermore, any amount greater and/or less than PKR 900,000,000/- for the CoB settlement shall be to the account of CSL/Tariq Shafi and/or his nominees.

3. Annexure "A", which forms an integral part of this Agreement, being a list of Machineries and their related parts to be sold by Mr. Tariq Shafi and/or his nominees to a local and/or foreign buyer of his choice/ discretion and at a price/rate decided by Mr. Tariq Shafi and/or his nominees. The sale of the items included in Annexure "A" shall be routed thru LTEX and the net proceeds (net of L/C charges) of the same shall be at the disposal of Mr. Tariq and/or his nominees. The proceeds from the sale of the items included in Annexure "A" upto PKR 300,000,000/- shall be Mr. Tariq Shafi's and/or his nominees' share solely, and any proceeds exceeding PKR 300,000,000/- shall be LTEX's share. The sale proceeds of items in Annexure "A" are independent of the Sale Price of PKR 900,000,000/- detailed in Points 1 & 2 above.

4. In order to achieve mutually beneficial terms for all parties concerned, Mr. Tariq Shafi and/or his nominees and Mr. Ahmed Tabba and/or his nominees will conduct negotiations with the CoB jointly. The final terms agreed with the CoB will be the purview of the CoB, CS, and LTEX and shall be shown as the official agreement between the concerned parties.

5. Appropriate notices and other regulatory and compliance related issues regarding the Terms of this Agreement shall be fully covered to safeguard the interest of all concerned parties.

6. The timeline for the sale/removal of items in Annexure "A" shall be mutually agreed by Mr. Tariq Shafi and Mr. Ahmed Tabba and/or their nominees after the successful conclusion of Points 1 & 2 of this Agreement.

7. Bridge Financing upto a maximum of PKR 10,000,000/- Is to be provided by LTEX to CSL/Mr. Tariq and/or his nominees for miscellaneous expenditures, bills etc. Under the terms of this Bridge Financing, LTEX will directly pay upto PKR 10,000,000/- upon the written request of CSL/Mr. Tariq Shafi and/or their nominees. Furthermore, a provision for an additional PKR 10,000,000/- in Bridge Financing shall be provided by LTEX to CSL/Mr. Tariq and/or his nominees on a "if & when needed" basis. Adjustment of this Bridge Financing shall be done from the Sale Proceeds of the items in Annexure "A"."

5. On account of Cresox not performing on its obligations, Lucky Tex on 10 February 2018 maintained Suit No. 290 of 2018 seeking Specific Performance on the Agreement dated 25 September 2017 and an Injunction and in which suit ex-parte ad-interim orders were passed on 12 February 2018 in the following terms:

" ... 2. This is a suit for specific performance of the agreement dated 25.09.2017 executed between the plaintiff and defendant for plot No. A-40, Manghopir Road along with the building, fixtures and fittings in the

total sale consideration of PKR. 900,000,000/- which is inclusive of all payments to be first paid to the consortium of banks/financial institutions for the release of pledged assets from any encumbrances and charges allowing for complete clearance/release and no objection certificate to transfer the land, buildings and machineries to the plaintiff. In paragraph No.7 it is further stated that bridge financing up to maximum of PKR 10,000,000/-was to be provided by the plaintiff to the defendant for miscellaneous expenditures. Learned counsel submits that up to Rs. 76,00,000/- has been paid and in this regard a summary of payment is available at page No. 79. Learned counsel submits that since the bank loans are also involved in this case without payment of which further steps for the transfer of property could not be initiated, therefore, he offers to furnish solvent bank guarantee equivalent to the amount of the deal to show their seriousness. He argued that the plaintiff came to know that the defendant is planning to sell out this property to some other person, therefore, he requests that till next date, defendant may be restrained not to create any third party interest.

Issue notice to the defendant. However, subject to furnishing bank guarantee in the sum of Rs.900,000,000/- (PKR Ninety Crore only) to the satisfaction of Nazir of this court within seven days, the defendant shall not create any third party interest in the property. Adjourned to 23.02.2018."

The ex-parte interim order passed on 12 February 2018 was confirmed on 22 October 2018 in the following terms:

" ... 14. In view of above facts and circumstances, of this case, it appears that the Plaintiff has made out a prima facie case; whereas, the Plaintiff has shown its willingness to perform the Agreement in question and for such purposes has already furnished a Bank Guarantee with the Nazir of this Court as directed while passing the interim order. Moreover, the balance of convenience also lies in favour of the Plaintiff and if the injunctive relief is not granted, the Plaintiff shall suffer irreparable harm and loss, which cannot be quantified as in that case third party interest(s) would be created by the Defendant. Accordingly, the injunction application bearing CMA No.2072/2018 is allowed and Ad-interim order passed on 12.02.2018 is hereby confirmed on the same terms and conditions."

HCA No. 402 of 2018 was maintained by Cresox as against the order dated 22 October 2018 and which was dismissed on 15 January 2020. Apparently, an appeal was preferred as against the order passed in HCA No. 402 of 2018 before the Supreme Court of Pakistan and which was dismissed by the Supreme Court of Pakistan for non- prosecution.¹

6. It seems that after the passing of the interim order in Suit No. 290 of 2018, Execution No. 21 of 2020 was presented before this Court by Pak Oman seeking execution of the Judgement and Decree each dated 18 September 2017 that had been passed in Suit No. B-02 of 2014 and which remains pending. Thereafter Cresox entered into a compromise agreement with HBL and on which agreement a compromise decree dated 14 February 2022 was passed by this Court in Suit No. B-21 of 2017 and another compromise agreement was entered into by Cresox with FBL and on which

¹ This statement was made orally by the counsel for the Applicant in J.M. No. 32 of 2022 and J.M No. 33 of 2022. No document has been produced on record confirming this fact.

compromise agreement a compromise decree also dated 14 February 2022 was passed by this Court in Suit No. B-34 of 2017. Execution Application No. 14 of 2022 and Execution Application No. 15 of 2022 maintained by HBL and FBL respectively, each seeking execution of the compromise decrees dated 14 February 2022 passed in Suit No. B-21 of 2017 and Suit No. B-34 of 2017, also remain pending before this Court.

7. On account of the Compromise Decrees each dated 14 February 2022 passed by this Court in Suit No. B-21 of 2017 and Suit No. B-34 of 2017, Lucky Tex maintains J.M. No. 32 of 2022 and J.M. No. 33 of 2022 each under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 seeking to set aside each of the Compromise Decrees, primarily on the ground that they were entered into by Cresox in violation of the order dated 22 October 2018 passed in Suit No. 290 of 2018.

8. That while considering these issues I had on 19 September 2023, framed the following issue in Suit No. 290 of 2018:

“ ... *Whether the Sale Agreement dated 15.09.2017 was maintainable considering S. 23 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, and other relevant laws, given that the Subject Property possessed a charge prior to the Sale Agreement?*

B. Contentions on behalf of the Applicants in J.M. No. 32 of 2022 and J.M No. 33 of 2022

9. Mr. Hanif Faisal Alam entered appearance on behalf of the Applicants in J.M. No. 32 of 2022 and J.M. No. 33 of 2022 and contended that despite the Order dated 22 October 2018 passed in Suit No. 290 of 2018 and the Order dated 15 January 2020 passed in HCA No. 402 of 2018 confirming that order, both of which were in the knowledge of Cresox, FBL and HBL they continued to enter into a Compromise Agreement and on which basis the Compromise Decrees dated 14 February 2022 were passed in Suit No. B-21 of 2017 and Suit No. B-34 of 2017.

10. Mr. Hanif Faisal Alam has referred the court to Paragraph 6 of the Counter Affidavit that had been filed by HBL to J.M. No. 32 of 2022 and to Paragraph 6 of the Counter Affidavit that had been filed by FBL to J.M. No. 33 of 2022 in which they both confirmed receipt of letters dated 27 February 2020 that were issued to each of them informing them about the orders passed in Suit No. 290 of 2018 and HCA No. 402 of 2018 and contended that despite having knowledge about the injunctive orders, Cresox, FBL and HBL continued to violate the order by executing the compromise

agreement and presenting each application before this Court and on which applications a compromise decree has been passed.

11. Maintaining that the orders passed in Suit No. 290 of 2018 and HCA No. 402 of 2018 were deliberately suppressed from this court when passing the Compromise Decree dated 14 February 2022 in Suit No. B-21 of 2017 and the Compromise Decree dated 14 February 2022 passed in Suit No. B-34 of 201, Mr. Hanif Faisal Alam relied on a decision of the Supreme Court reported as **Mst. Nasira Khatoon and another vs. Mst. Aisha Bai and 12 others**² to advance the proposition that the concealment of material facts would constitute fraud and render an application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 as being maintainable.

12. He contended that there had no suppression of any fact on the part of Lucky Tex in as much as both the learned Single Judge in Suit No. 290 of 2018 and the Division Bench in HCA No. 402 of 2018 were each aware of the pendency of the proceedings instituted by HBL, FBL and Pak Oman and had passed orders notwithstanding the pendency of those proceedings. In this regard reference was made to the decision of the Supreme Court of Pakistan reported as **University of Health Sciences and others vs. Mumtaz Ahmad and another**³ in which it was held that a decision of Division Bench of a High Court would be binding on single judge of a High Court, and on which basis he stressed that this Court was bound to give effect to the decision passed by a Division Bench of this Court in HCA No. 402 of 2018 and allow both J.M. No 32 of 2022 and JM No. 33 of 2022 as the Compromise Decrees dated 14 February 2022 creating rights over the Mortgaged Property in favour of HBL and FBL had clearly been passed in violation of the order dated 15 January 2020 passed in HCA No. 402 of 2018. Reference in particular was made to the order dated 13 April 2022 passed in Execution Application No. 14 of 2022 and whereby the Court had permitted the sale of the Mortgaged Property and which had been passed pursuant to the Decree passed in Suit No. B- 21 of 2017. He therefore maintained that unless the Compromise Decrees dated 14 February 2022 passed in Suit No. B-21 of 2017 and Suit No. B-34 of 2017 were not set aside, the orders passed in Suit No. 290 of 2018 and HCA No. 402 of 2018 would each be rendered redundant.

13. Relying on a decision of the Supreme Court of Pakistan reported as **Subedar Sardar Khan through Legal Heirs and others vs. Muhammad**

² 2003 SCMR 1050

³ 2010 SCMR 767

Idress through General Attorney and another⁴ he said that while determining J.M. No 32 of 2022 and J.M. No. 33 of 2022 it was incumbent on this Court to restrict itself to the contents of the Application and not to consider the merits of the Suit. Reliance in this regard was also placed on a decision of a Learned Single Judge of the Islamabad High Court reported as **Rubina Amjad vs. Javaid Shafique Siddiqui and others**⁵ to forward the same contention.

14. He concluded on the merits of J.M. No. 32 of 2022 and J.M. No. 33 of 2022 by contending that even if the Court concluded that Suit No. 290 of 2018 was not maintainable, even in that scenario the Compromise Decrees dated 14 February 2022 passed in Suit No. B-21 of 2017 and Suit No. B-34 of 2017 each must still be set aside, as Suit No. 290 of 2018 and J.M. No. 32 of 2022 and J.M. No. 33 of 2022 must be considered independently of the proceedings in Suit No. 290 of 2018.

15. Regarding the application of Section 23 of the Ordinance 2001, Mr. Hanif Faisal Alam referred to the wordings of the Sub-Section (1) of Section 23 of the Ordinance 2001 and contended that “*after publication of summons, no customer shall without prior permission of Banking Court ‘transfer, alienate, encumber, remove or part with possession of any property furnished to the financial institution as mortgage...’, and any such transfer, alienation, encumbrance, or other disposition shall be void and of no legal effect.*” Maintaining that there was a clear difference as between an Agreement to transfer and a transfer he relied on a judgement passed by the Supreme Court of Pakistan reported as **Muhammad Iqbal and others vs. Nasrullah**⁶ wherein it had been held that Agreement to Sell did not create any title or claim over an immovable property and contended that therefore Sub-Section (1) of Section 23 of the Ordinance, 2001 did not prevent a mortgagor from entering into an Agreement of Sale in respect of Mortgaged Property and hence the Agreement of Sale that has been entered into as between Cresox and Lucky Tex for the purchase of the Mortgaged Property did not violate that provision. Placing further reliance on the decision reported as **Zamiruddin Ahmad vs. Havas Khan**,⁷ he maintained that in the event that there was any ambiguity with regards to the scope of the word ‘encumbrance’ as used in Sub-Section (1) of Section 23 of the Ordinance, 2001 then the Court should consider the meanings of other words connected with the word encumbrance in that section so as to

⁴ PLD 2008 Supreme Court 591

⁵ 2023 MLD 201

⁶ 2023 SCMR 273

⁷ PLD 1969 Supreme Court 57

apply the reference in the context in which it was being made and emphasised that the word 'encumbrance' should therefore be read as being restricted by the word of 'transfer' and hence not include an Agreement of Sale. He also placed reliance on Section 54 of the Transfer of Property Act, 1882 to maintain that a contract or an Agreement for Sale did not create any 'interest' or 'charge' in the Mortgaged Property and therefore on a literal interpretation did not come with the purview of Sub-Section (1) of Section 23 of the Ordinance, 2001 and could not be considered to be void. In this regard he relied on a decision of the Lahore High Court, Lahore reported as **Sheikh Jameel Ahmad vs. Raja Khalid Hussain**⁸ in which it was held that by entering into an Agreement of Sale the Plaintiff had not violated the provisions of Sub-Section (2) of Section 23 of the Ordinance, 2001. He also relied on a decision reported as **Habib Metropolitan Bank Limited vs. Messrs Dagra Textiles (Pvt.) Limited and 3 others**⁹ wherein it was held that the provisions of Sub-Section (1) of Section 23 of the Ordinance, 2011 would only be operative where the immovable property being transferred was subject to a mortgage and not otherwise.

16. Concluding on this issue Mr. Hanif Faisal Alam submitted that both the Learned Single Judge and well as the Learned Division Bench of this Court were each fully aware of the fact that the Mortgaged Property had been mortgaged but still were of the view that Lucky Tex had a prima facie case while granting the injunction application in Suit No. 290 of 2018. He maintained that the Respondents cannot be permitted from completely ignoring the orders of this Court and have obtained a consent decree in in Suit No. B-21 of 2017 and Suit No. B-34 of 2017 in sheer violation of this Courts orders. He pleaded that this Court should set aside the Consent Decrees passed in in Suit No. B-21 of 2017 and Suit No. B-34 of 2017 and award compensatory costs to the Applicant.

C. Contentions on behalf Lucky Tex in Suit No. 290 of 2018

17. Mr. Ali Mehdi entered appearance on behalf of the Plaintiff in Suit No. 290 of 2018. Referring to the Agreement of Sale dated 25 September 2017, he maintained that a perusal of that agreement would clearly show that the Plaintiff had made full disclosure in the Agreement of Sale of the fact that the Mortgaged Property was in fact mortgaged with a "consortium of financial institutions" and insisted that performance on the Agreement of Sale was contingent to the liabilities of the financial institutions being settled,

⁸ 2010 CLD 571

⁹ 2017 CLD 1256

the Mortgaged Property being redeemed and whereafter the Mortgaged Property would be transferred into the name of the Lucky Tex.

18. Reiterating the contentions of Mr. Hanif Faisal Alam, Mr. Ali Mehdi maintained that a distinction was to be made as between an Agreement of Sale and a Conveyance in terms of the language used in Sub-Section (1) and (2) of Section 23 of the Ordinance, 2001 and the interpretation cast on Section 54 of the Transfer of Property Act, 1882 and whereby in the case of an Agreement of Sale no rights per se were in created in the immovable property. Reliance in this regard were placed on the same decisions as relied on by Mr. Hanif Faisal Alam and reported as **Sheikh Jameel Ahmad vs. Raja Khalid Hussain**¹⁰ and **Muhammad Iqbal and others vs. Nasrullah**.¹¹ Distinguishing the judgments and orders of this Court reported as **Habib Bank Limited vs. Daizy Knitwear (Pvt) Limited through Chief Executive and 3 others**,¹² **National Bank of Pakistan vs. Messrs Dharamdad and 2 others**,¹³ **Rafiq Ahmed Sanauri through Attorney and 3 others vs. Union Bank Limited through Bank Manager and 5 others**,¹⁴ **Citizens Investment Co. vs. Askari Leasing Ltd. and others**,¹⁵ **Muhammad Hussain and another vs. Judge Banking Court No. 1 Multan and 3 others**,¹⁶ **Askari Bank Ltd. vs A.H. International (Pvt.) Ltd and others**,¹⁷ **Muhammad Mansha vs. Industrial Development Bank of Pakistan**¹⁸ Mr. Mehdi contended that in each of those matters conveyances and gift deeds i.e., instruments that actually conveyed title were set aside as being void under the provisions of either Sub-Section (1) or Sub-Section (2) of Section 23 of the Ordinance, 2001 but none of which involved an Agreement of Sale. Regarding a decision of a learned single judge of this Court reported as **Azra Saeed vs. Raees Khan through General Attorney and 5 others**¹⁹ Mr. Mehdi contended that while the Court did set aside an Agreement of Sale under Sub-Section (2) of Section 23 of Ordinance, 2001, in that suit the Plaintiff had sought declaratory rights to an immovable property premised on an Agreement to Sell and which the Plaintiff contended overrode the rights of financial institution to foreclose on the same immovable property. The learned Single Judge of this court, while rejecting the Plaint held that no declaratory rights to an immovable property could be premised on an Agreement of Sale and additionally also held that

¹⁰ 2010 CLD 571

¹¹ 2023 SCMR 273

¹² 2006 CLD 206

¹³ 2006 CLD 771

¹⁴ 2007 CLD 1002

¹⁵ 2009 CLD 1392

¹⁶ 2013 CLD 1684

¹⁷ 2016 CLD 1028

¹⁸ 2020 SCMR 1069

¹⁹ 2009 CLD 779

the Suit would be barred under Sub-Section (2) of Section 23 of the Ordinance, 2001. Mr. Ali Mehdi distinguished this order on the basis that the Plaintiff in Suit No. 290 of 2018 was not seeking declaratory rights to the immovable property and was instead seeking specific performance and hence that order would not be applicable to the facts of these proceedings.

19. He concluded by contending that Suit No. 290 of 2018 was therefore clearly maintainable and was not barred under either Sub-Section (1) or Sub-Section (2) of Section 23 of the Ordinance, 2001.

D. Contentions on behalf of Cresox

20. Mrs. Heer Memon entered appearance on behalf of Cresox. She contended that Suit No. 290 of 2018 was clearly not maintainable and was barred under the provisions of Sub-Section (1) and Sub-Section (2) of Section 23 of the Ordinance, 2001.

21. Referring to the distinction as made between an Agreement of Sale and a registered conveyance, whereby the former does not transfer any right or interest in any property, she contended that the language used by the legislature to state "*any such transfer, alienation, encumbrance, or other disposition by the customer in violation of this sub-section shall be void and of no legal effect*" clearly showed that a customer would be "estopped" from entering into any exchange or agreement which will create any level of encumbrance on the Subject Property. She further contended that the use of the word "encumbrance" has been defined in Black's Law Dictionary to mean "*any right to, or interest in, land which may subsist in third persons*" and would be broad enough to cover a "vast range of transfers."

22. Regarding the intention behind Section 23 of the Ordinance, 2001 Mrs. Memon contended that it could not have been the intention of the legislature to include an instrument within the ambit of Section 23 of the Ordinance, 2001 that would fall under the language of the expression 'transfer' but to exclude "Agreements to Sell" which were also instruments which 'alienate' immovable properties. She maintained that the intention of the Legislature was clear and which was to restrict the transfer or alienation or encumbrance of any property which has been made the subject of collateral to a financial institution as security and which would include the Mortgaged Property. On the abovementioned basis, she contended that the Agreement of Sale squarely fell within the ambit of Section 23 of the Ordinance, 2001 and was void.

23. Regarding the breach of the order dated 22 October 2018 passed in Suit No. 290 of 2018, she maintained that Cresox had at all times argued that the Respondent No. 4 did not have the requisite authority to sign the Agreement of Sale and which was even pleaded before the Court at the time of the hearing of the injunction application in that Suit and maintained that it was never the intention of Cresox to violate the orders of this Court. She however did submit that as the order dated 22 October 2018 had the impact of preventing the liabilities of Cresox from determining therefore it found itself compelled to enter into the compromise agreements with HBL and FBL to allow it to manage its financial exposure and which was being impacted on account of the pendency of the orders passed in Suit No. 290 of 2018.

24. Placing reliance on the decision reported as **Muhammad Ashraf vs. Muslim Commercial Bank Limited**²⁰ in which the Lahore High Court, Lahore dismissed an application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 which had been maintained to set aside a decree passed by a Banking Court on the ground that the immovable property that had been mortgaged had been sold out through an unregistered Agreement of Sale, Mrs. Memon maintained that in similar vein J.M. No. 32 of 2022 and J.M No. 33 of 2022 were liable to be dismissed. She also relied on the decisions reported as **Azra Saeed vs. Raees Khan**,²¹ **Habib Bank Limited vs. Daizy Knitwear (Pvt) Limited through Chief Executive and 3 others**,²² **National Bank of Pakistan vs. Messrs Dharamdad and 2 others**,²³ **Askari Bank Ltd. vs. A.H. International (Pvt.) Ltd and others**,²⁴ **Citizens Investment Co. vs. Askari Leasing Ltd. and others**²⁵ **Saudi Pak Commercial Bank Ltd. vs. A.H. International (Pvt.) Ltd. and others**,²⁶ **Soneri Bank Ltd. vs. Messrs Punjab Engineering Services (Pvt) Ltd and 3 others**,²⁷ **Raja Riaz Ahmad Khan vs. United Bank Limited and 7 others**,²⁸ **Saudi Pak Commercial Bank Ltd. vs. A.H. International (Pvt.) Ltd. and others**,²⁹ **Soneri Bank Ltd. vs Messrs Punjab Engineering Services (Pvt) Ltd and 3 others**,³⁰ and contended that each of these decisions stated that property mortgaged with

²⁰ 2018 CLD 911

²¹ 2009 CLD 779

²² 2006 CLD 206

²³ 2006 CLD 771

²⁴ 2016 CLD 1028

²⁵ 2009 CLD 1392

²⁶ 2007 CLD 175

²⁷ 2016 CLD 440

²⁸ 2003 CLD 552

²⁹ 2007 CLD 175

³⁰ 2016 CLD 440

a bank could not be subjected to an Agreement of Sale and which would be held as void under the provisions of Section 23 of the Ordinance, 2001.

25. Concluding by relying on the decision reported as **Muhammad Ejaz vs. Allah Bakhsh**³¹ Mrs. Heer Memon stated that under the provisions of the Transfer of Property Act, 1882 where a property that was mortgaged was sold, the property was sold subject to the mortgagees right to redemption, however on account of the provisions of Section 23 of the Ordinance, 2001 such a position has been modified in respect of a property with a financial institutions and whereby such transactions would be treated as void and prayed that the Court should dismiss J.M No. 32 of 2022 and J.M. No 33 of 2022 and reject the Plaint in Suit No. 290 of 2018 as being barred under the provisions of Section 23 of the Ordinance, 2001.

E. Contentions on behalf of HBL and FBL in J.M. NO. 32 of 2022 and J.M No. 33 of 2022

26. Mr. Waqar Ahmed entered appearance on behalf of HBL and FBL in J.M No. 32 of 2022 and J.M No. 33 of 2022. Outlining all the litigation that had been instituted as against Cresox he detailed that Suit No. B- 02 of 2014 had been decreed on 26 July 2017 and Execution No. 21 of 2020 had been instituted which was also pending before this Court, while Suit No. 816 of 2017 had been decreed and in respect of which Execution No. 38 of 2022 was pending before the Banking Court No. IV at Karachi. He contended that while in each of these suits, summons had been issued well before the execution of the Agreement of Sale and the Decree had also been passed prior to the execution of the Agreement of Sale. In addition, in respect of Suit No. B- 21 of 2017 and Suit No. B-34 of 2017 he maintained that summons in each of those suits had been issued well before the execution of the Agreement of Sale. While contending that the Mortgaged Property had been mortgaged by Cresox with Pak Oman, HBL and FBL, he maintained that prayer clause B in Suit No. B-2 of 2014 restrained the transfer of Hypothecated Assets, which expression is defined to include the Mortgaged Property and which reads as hereinunder:

“ ... (b) for permanent injunction restraining the Defendant its employees, agents or any other person acting for and on behalf, directly and/or indirectly from selling, alienating, disposing of or creating third party rights in any manner whatsoever in respect of the Hypothecated Assets charged in favour of the Plaintiff.”

He maintained that Suit No. B-2 of 2014 was decreed on 26 July 2017 and inter alia the following order was passed in the Judgement:

³¹ 2017 CLC Note 28

“ ... 65. For all the above, while rejecting the Defendant’s Leave to Defend Application [CMA No. 1701 of 2014]. Inter alia for want of raising substantial questions of fact and law, the Plaintiff’s suit is hereby decreed against the Defendant in the sum of Rs, 162,344,199/- as on 30.11. 2013 along with cost of funds thereon w.e.f 01.12.2013 till realization of the decretal amount. Beside a restraining order in terms of prayer clause (b) a final Decree for Sale of the hypothecated assets/goods per clauses (c) and (d) is also passed,”

Similarly, the Decree dated 26 July 2017 passed in Suit No. B-2 of 2014 declared that

“ ... The Plaintiff’s suit is hereby, decreed against the Defendant in the sum of Rs. 162,344,199/- as on 30.11.2013 along with cost of funds thereon w.e.f. 01.12.2013 till realization of the decretal amount. Beside, a restraining order in terms of prayer clause (b) a final Final Decree for sale of the hypothecated assests/goods per clauses (c) & (d) is also passed.”

In this context he pleaded that the provisions of Sub-Section (1) and Sub-Section (2) of Section 23 of the Ordinance, 2001 were attracted and the Agreement of Sale that was executed as between Lucky Tex and Cresox was void.

27. Placing reliance on the decision reported as **Azra Saeed vs. Raees Khan**,³² **National Bank of Pakistan vs. Messrs Dharamdad and 2 others**³³ and **Bank Al-Falah Ltd. vs Bilal Spinning Mills Ltd**³⁴ he contended that each of these decisions supported the proposition that a transfer made in violation of the provisions of Sub-Section (1) and Sub-Section (2) of Section 23 of the Ordinance, 2001.

28. Addressing the issue as to whether an Agreement of Sale fell within the language of either Sub-Section (1) or Sub-Section (2) of Section 23 of the Ordinance, 2001, Mr. Waqar Ahmed placed reliance on the expression “encumbrance” as used in Sub-Section (2) of Section 23 of the Ordinance, 2001 and referred to the definition given to that expression in Blacks Law Dictionary to mean:

“ ... A claim or liability that is attached to property or some other right and that may lessen its value, such as lien mortgage; any property right that is not an ownership interest.”

³² 2009 CLD 779

³³ 2006 CLD 771

³⁴ 2005 MLD

Stressing that the definition of an encumbrance would include a claim over even a property right that did not have an ownership interest, Mr. Waqar Ahmed contended that such a definition was wide enough to include an Agreement of Sale and which hence would bring the obligations under that instrument within the purview of the provisions of Section 23 of the Ordinance, 2001 and which would consequentially be rendered as void on this basis as well as being executed in violation of the Judgment and Decree passed in Suit No. B-2 of 2014. Stressing that the interim order dated 12 February 2018 and the final order dated 22 October 2018 that were passed by this Court in Suit No. 290 of 2018 had each been passed deceptively, as Lucky Tex, despite being aware of the Mortgaged Property being subject to a mortgage in favour of Pak Oman, HBL and FBL failed to implead each of them as defendants in the Suit No. 290 of 2018 and are now admittedly pleading that the rights of Lucky Tex in Suit No. 290 of 2018 would be subject to the consent of Pak Oman, HBL and FBL being obtained. He further contended that as the interim order dated 12 February 2018 and the final order dated 22 October 2018 that were passed by this Court in Suit No. 290 of 2018 only restrained the creation of third-party rights and which in respect of HBL and FBL were already in existence at the time the orders were passed in Suit No. 290 of 2018, each of the Compromise Decrees dated 14 February 2022 passed in Suit No. B-21 of 2022 and Suit No. B-34 of 2022 were simply confirming rights that were already in existence. He therefore contended that both J.M. No. 22 of 2022 and J.M. No. 23 of 2022 were not maintainable as no fraud or misrepresentation had been made by either HBL, FBL or Cresox when the Consent Decrees were passed in Suit No. B-21 of 2022 and Suit No. B-34 of 2022. In this regard Mr. Waqar Ahmed relied on a decision of a Division Bench of this Court reported as **Messrs Dadabhoy Cement Industries Limited and others vs. Messrs National Development Finance Corporation**³⁵ and in which it was stated that if the rights that were being claimed under the decree sought to be set aside by an applicant under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 were within the knowledge of the Applicant then an application under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 would not be maintainable and concluded by seeking dismissal of J.M No. 32 of 2022 and J.M. No. 33 of 2022 and rejection of Suit No. 290 of 2018.

³⁵ 2002 CLC 166

F. Opinion of the Court

29. I have heard Mr. Hanif Faisal Alam, Mrs. Heer Memon, Mr. Ali Mehdi and Mr. Waqar Ahmed and have perused the record

30. The questions raised in J.M No. 32 of 2022 and J.M. No. 33 of 2022 and Suit No. 290 of 2018 relate to the manner in which rights granted in favour of a mortgagee, including but not limited to the right of foreclosure, can be impacted by an Agreement of Sale entered into as between a customer of a financial institution and a third party in respect of property or asset that has been mortgaged or hypothecated with a financial institution within the purview of the Ordinance, 2001.

(i) Section 23 of the Ordinance, 2001, the Right of Redemption and the Jurisdiction of this Court under Section 9 of the Code of Civil Procedure, 1908

31. The starting point in considering this question would be to recognise that an Agreement of Sale does not create any right or interest in an immovable property and **ordinarily** allows the purchaser to sue on the Agreement of Sale for Specific Performance on that contract.³⁶ In respect of an immovable property that is subject to a mortgage, when the mortgagor conveys such a property through a registered instrument to a third party the purchaser would obtain right, title and interest in the immovable property which the seller held in that immovable property and which, on account of the subsistence of the mortgage, would be limited to the right to redeem the immovable property and which would contemporaneously be subject to the mortgagee's right to foreclose. This proposition has been clearly articulated by the Supreme Court of Pakistan in the decision reported as **Muhammad Sadiq and others vs. Muhammad Mansha and others**³⁷ wherein when considering the period for limitation in respect of a Suit for Specific Performance on an Agreement of Sale of an immovable property subject to a mortgage, the Lahore High Court, Bahawalpur had held that limitation would start from the date when the immovable property was redeemed, the Supreme Court of Pakistan opined that:

“ ... *In our view, with respect, the reasoning and the conclusion of the learned High Court proceeded on a fundamental misconception of the law. As is well known, when a property is mortgaged by one person to another the interest that is left in the hands of the mortgager is called the equity of redemption. Now, the equity of redemption is itself immovable property*

³⁶ See **Rao Abdul Rehman (Deceased) vs. Muhammad Afzal (Deceased)** 2023 SCMR 815; **Javaid Iqbal vs. Abdul Aziz** PLD 2006 Supreme Court 66; **Mst. Rasheda Begum vs. Muhammad Yousaf** 2002 SCMR 1089; **Muhammad Bakhsh vs. Zia Ullah** 1983 SCMR 988

³⁷ PLD 2018 Supreme Court 692

which can be dealt with as such by the mortgager, whether by way of sale, subsequent mortgage, gift or transfer but subject always to the rights and interests of the mortgagee. In other words the existence of a mortgage on immoveable property does not in or itself constitute a bar to subsequent dealing by the mortgager as regards the equity of redemption. This position was regarded as settled law as long ago as 1895, as is attested by the decision of the Calcutta High Court in Kanti Ram and others v. Kutubuddin Mohamed and others (1895) 22 Cal 33: As regards the equity of redemption, the Court held as follows (pp 41-2; emphasis supplied):

“ *It was strongly contended before us that the words "specific immoveable property," as mentioned in Section 58, denote the property itself as distinguished from any equity of redemption which the mortgagor might at the time possess in the said property. The words "immoveable property" have been defined in the General Clauses Act, I of 1868. Section 2, Clause (5) says: "Immoveable property shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth." [See now, section 3(25) of the General Clauses Act, 1897] Regard being had to this definition, it seems to us that the words "immoveable property" include the rights of the mortgagor in the property mortgaged at the time of the second mortgage, or, in other words, his equity of redemption in that property, and when the Legislature in Section 58, in defining what a mortgage is, speaks of the transfer of an interest in specific immoveable property, we are unable to say that, when property, subject to a prior mortgage, is mortgaged a second time, or, in other words, when the mortgagor's equity of redemption in that property is mortgaged to another person, it is not a mortgage of specific immoveable property within the meaning of that section."*

As to the nature of the equity of redemption, the High Court observed that it was

"the specific immoveable property of the mortgagor, burdened as it is with the prior incumbrance, i.e., the property of the mortgagor minus the interest which he had already transferred to the ... mortgagee" (pg. 37; emphasis in original)."

Finally, it was also observed as follows (pg. 42):

"It is, we think, now settled law that a mortgagor may either absolutely sell or mortgage his remaining interest in the property which he has already mortgaged, notwithstanding there may be a covenant in the earlier mortgage prohibiting such a sale or subsequent mortgage. The purchaser, or the second mortgagee, in that event stands in the place of the mortgagor and takes the property subject to the prior lien."

6. In our view, law that was regarded as settled 125 years ago can hardly be disturbed today. As will be seen from the foregoing passages, the equity of redemption is simply the interest in the property that remains with the mortgager minus the interest created thereon in favour of the mortgagee, and it is in this interest that can be dealt with by the mortgager in accordance with law. It follows from this that if the mortgager enters into an agreement to sell subsequent to the creation of the mortgage, he can do so. He is then selling his property burdened as it is with the mortgage in favour of the mortgagee, i.e., he is disposing off the equity of redemption. As this is permissible under law, it follows that if the mortgager having entered into such an agreement to sell does not abide by the same, then the buyer of the property is entitled to bring a suit for specific performance. Of course, the rights and interests of the mortgagee will not be defeated, since the buyer will step into the shoes of the mortgager as seller. If the factum of the mortgage is known to the buyer then he can simply join the mortgagee as a defendant in the suit so that if he succeeds in obtaining a decree for specific performance the rights of the various parties can be appropriately dealt with. However, even if the factum of mortgage is unknown to the buyer and does not

come to light during the course of the suit, any decree obtained by the buyer would still, and nonetheless, remain subject to the rights and interests of the mortgagee."

32. The question that therefore has to be considered is as to whether such a position has been modified in respect of such an obligation *inter se* a "financial institution" and a "customer" which comes within the purview of the provisions of the Ordinance, 2001. In this regard reference has been made by all the counsel to Section 23 of the Ordinance, 2001 and which reads as hereinunder:

" ... **23. Restriction on transfer of assets & properties.-**

(1) After publication of summons under sub-section (5) of section 9, no customer shall, without the prior written permission of the Banking Court transfer, alienate, encumber, remove or part with possession of any of his asset or property furnished to the financial institution as security by way of mortgage, pledge, hypothecation, charge, lien or otherwise pending final decision of the suit filed by the financial institution under this Ordinance, and any such transfer, alienation, encumbrance or other disposition by the customer in violation of this sub-section shall be void and of no legal effect:

Provided that the customer may sell any such asset or property which has been retained by or entrusted to him for purposes of dealing with the same in the ordinary course of business subject to the terms of the letter of hypothecation or trust receipt or other instrument or document executed by him, or for purposes of effecting their sale and depositing the sale proceeds with the financial institution:

Provided further that the customer before making the sale shall file in the Banking Court a statement supported by affidavit, containing full particulars of such asset or property, and within three days after the sale shall submit a full account thereof to the Banking Court and the financial institution.

(2) After pronouncement of judgment and decree by the Banking Court, including an interim decree under section 11, no judgment-debtor shall without the prior written permission of the Banking Court transfer, alienate, encumber or part with possession of any assets or properties and any such transfer, alienation, encumbrance or other disposition by a judgment-debtor in violation of this sub-section shall be void and of no legal effect.

(3) The provisions of sub-section (1) shall also apply to a person who has furnished any security on behalf of a customer to the financial institution on the basis of which finance was granted, provided such person is a defendant in the suit filed under section 9 or is added as a defendant thereafter.

The first thing to note is that a provision analogous to Section 23 of the Ordinance, 2001 did not exist in the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997. The section was therefore made with some intent and which to my mind would be that after proceedings are instituted by a financial institution for recovery, an embargo has been placed to restrain the alienation of property and assets that were presented to financial institutions as security so as to prevent the frustration of a decree that may be passed in favour of the financial institution. It would

therefore seem that the intention was to alter the general legal position that exists under Section 52 and Section 53 of the Transfer of Property Act, 1882 against “fraudulent” transfer during the pendency of a *lis* in respect of obligations regulated by the Ordinance, 2001. When considering the provisions of this Section it is apparent that it deals with two distinct situations.

- (i) Sub-Section (1) read with Sub-Section (3) of Section 23 of the Ordinance, 2001 considers the obligations as between a customer, a person who has furnished any security to a financial institution on behalf of the customer and a financial institution, after the publication of summons under Sub-Section (5) of Section 9 of the Ordinance, 2001 and, in effect, operates as a statutory restraint on the transfer alienation, encumbrance removal or the parting of possession of any “asset” or “property” that had been provided by a customer to a financial institution as security **without first obtaining the permission of the Banking Court**. The section further clarifies that in the event that such “*transfer, alienation, encumbrance or other disposition*” is made without obtaining the permission of the Banking Court the “*transfer, alienation, encumbrance or other disposition*” would be “*void and of no legal effect.*” The proviso to Sub-Section (1) of Section 23 of the Ordinance, 2001 excepts a situation where, after the publication of the summons, the customer has retained assets which it uses in the ordinary course of its business and which it can, subject to the terms of the hypothecation or trust against which they are held, be sold to settle the liability of the customer with the financial institution without obtaining permission from the Banking Court. This exception, on account of the second proviso is further subject to the customer, after the publication has been made and prior to alienating such assets or property, depositing with the Banking Court a statement coupled with an affidavit detailing the assets or property that it holds and after the sale of the assets or property obliges the customer to provide full accounts of the assets sold to both the Banking Court as well as the Financial Institution.
- (ii) The second situation occurs after the pronouncement of a judgment and decree by a Banking Court and whereby Sub-Section (2) of Section 23 of the Ordinance, 2001 imposes a similar restraint on a customer from transferring, alienating, encumbering or parting with the possession of any asset or property and further clarifies that in the event that such a transfer, alienation, encumbrance or other disposition is made in violation of that section it shall be treated as “void

and of not legal effect”. The language of this section in terms of the restraint imposed is at variance with the restraint that has been placed on the assets and properties in Sub-Section (1) of Section 23 of the Ordinance, 2001 and which is limited to the assets or property “furnished to the financial institution as security by way of mortgage, pledge, hypothecation, charge, lien or otherwise” and would therefore cover all assets and properties of the Customer, whether furnished as security or not.³⁸

33. I have considered the case law that has developed around Section 23 of the Ordinance, 2001 as referred by each of the counsels. The section has been held not to operate retrospectively and hence transfers that occurred prior to the promulgation of the Ordinance 2001 are not to be treated as void.³⁹ While the general restraint as contained in Sub-Section (1) and (2) of Section 23 of the Ordinance, 2001 has been recognised by numerous courts to set aside registered transfers that violate the provisions of each of those sections,⁴⁰ it has also been clarified that properties that were not furnished as security are not impacted by Sub-Section (2) of Section 23 of the Ordinance, 2001 prior to the decree being passed and hence are valid transfers.⁴¹ It has also been held that an Agreement of Sale that has been instituted for the sale of a mortgaged property would be void under Section 23 of the Contract Act, 1872 as the object of the Agreement of Sale would be to defeat the provision of law i.e., Section 23 of the Ordinance, 2001.⁴² Finally, certain judgements recognise the right of redemption in the context of transfers subject to Section 23 of the Ordinance, 2001.⁴³

34. Having considered these provisions, I am clear that the language of both Sub-Section (1), Sub-Section (2) and Sub-Section (3) of Section 23 of the Ordinance, 2001, restricting a customer from transferring any asset or property that had been furnished by a customer or a person on behalf of a

³⁸ See Zohair Zakaria vs. National Bank of Pakistan 2009 CLD 915;

³⁹ See Muhammad Mansha vs. Industrial Development Bank of Pakistan 2020 SCMR 1069; Al Haj Chaudhry Muhammad Bashir vs. Citibank NA 2002 CLD 962; Sheikh Muhammad Khalid vs. Malik Food Industries through Sole Proprietor 2009 CLD 1038

⁴⁰ See Bank Al Falah Ltd. vs Bilal Spinning Mills Ltd. 2005 MLD 1358; National Bank of Pakistan Messrs Dharamdad and 2 others 2006 CLD 771; Rafiq Ahmed Sanauri through Attorney and 3 others vs. Union Bank Limited through Branch Manager and 5 others 2007 CLD 1002; Citizens Investment Co. vs. Askari Leasing Ltd. 2009 CLD 1392; Soneri Bank Ltd. vs Messrs Punjab Engineering Services (Pvt.) Ltd. and 3 others 2016 CLD 440; Askari Bank Ltd. vs A.H. International (Pvt.) Ltd and others 2016 CLD 1028; Muhammad Ejaz and another vs. Allah Bakhsh and 7 others 2017 CLCN 28;

⁴¹ See Habib Metropolitan Bank Limited vs. Dagra Textiles (Pvt.) Limited 2017 CLD 1256

⁴² See Habib Bank Limited vs. Daizy Knitwear (Pvt.) Limited through Chief Executive and 3 others 2006 CLD 206

⁴³ See Sheikh Jameel Ahmad vs. Raja Khalid Hussain 2010 CLD 571; Nasir Abbas Bhatti vs. Abid Hussain 2024 CLC 268, Gujranwala Steel industries through Partner vs. Industrial Development Bank of Pakistan and 7 others 2024 CLD 343

customer cannot prevent the customer from entering into an agreement to transfer the right of redemption over such assets or property as clearly that “property” has not been “furnished” by the customer to a financial institution as “security,” which is a right that always exists with the mortgagor and which he is, as per the decision of the Supreme Court of Pakistan in **Muhammad Sadiq and others vs. Muhammad Mansha and others**,⁴⁴ clearly able to alienate. On a reading of clause 2 of the Agreement of Sale that has been entered into as between Lucky Tex and Cresox, I am in no doubt whatsoever that it was an agreement to transfer the right of redemption. While a query would have arisen as to the manner in which the right of redemption was being transferred, in as much as Lucky Tex only took on the liability to pay a determined amount and left the balance of the amount payable by Cresox, thereby arousing my curiosity as to whether Cresox would continue to retain a proportionate share in the Mortgaged Property after its redemption, however, after considering the same I am of the opinion that I do not have the requisite jurisdiction to consider this question.

35. There is no doubt that Suit No. 290 of 2018 has been maintained before this Court under Section 9 of the Code of Civil Procedure, 1908 seeking specific performance on an Agreement of Sale and whereby Lucky Tex seeks specific performance on its right to redeem the Mortgaged Property and which after the redemption would be transferred into its name. While, I have already held that an agreement in respect of the transfer of the right of redemption is not impacted by the provisions of Section 23 of the Ordinance, 2001 as that right always vested in Cresox, was never given as security to any financial institution and which it was free to transfer; the eventual transfer of the Mortgaged Property into the name of the Lucky Tex can only be achieved through a registered instrument and which transfer would clearly be barred under the provisions of Sub-Section (1) of Section 23 of the Ordinance, 2001 as publication of Suit No. B-21 of 2017 and Suit No B-34 of 2017 would have already been made prior to such registration and which would also be barred under Sub-Section (2) of Section 23 of the Ordinance, 2001 as a decree in Suit No. 816 of 2017 and Suit No. B-02 of 2014 had also been passed prior to such registration, **and which transfer therefore could only be made after the written permission of the Banking Court was obtained.** I am therefore of the opinion that the jurisdiction to determine the performance of the Agreement to Sell as entered into between Lucky Tex and Cresox, in terms of Sub-Section (1) and Sub-Section (2) of Section 23 of the Ordinance, 2001 at all times vests

⁴⁴ PLD 2018 Supreme Court 692

with the Banking Court and hence this Court does not have the requisite jurisdiction to entertain Suit No 290 of 2018. In this regard I have reviewed both the order dated 22 October 2018 passed in Suit No. 290 of 2018 and the order dated 15 January 2020 passed in HCA No. 402 of 2018 neither of which have considered the issue of jurisdiction and which issue can therefore be determined by me at any stage of the proceedings in that suit. I am therefore of the opinion that the Plaint in Suit No. 290 of 2018 is therefore barred under the provisions of Sub-Section (1) and Sub-Section (2) of Section 23 of the Ordinance, 2001 and is liable to be rejected under the provisions of clause (d) of Rule 7 of Order XI of the Code of Civil Procedure, 1908.

(ii) Misrepresentation and fraud in Obtaining the Compromise Decree dated 14 February 2022 in Suit No. B-21 of 2017 and Suit No B-34 of 2017

36. Regarding J.M. No. 32 of 2022 and J.M No. 33 of 2022, each challenging a Compromise Decree dated 14 February 2022 passed in Suit No. B-21 of 2017 and Suit No B-34 of 2017, and as to whether it had been passed suppressing the order dated 22 October 2018 passed in Suit No. 290 of 2018 preventing the creation of third party interests, as correctly contended by Mr. Waqar Ahmed, the right to foreclose on the Mortgaged Property vested in HBL and FBL at the time when the title documents were deposited by Cresox with HBL and FBL to secure the financial facilities and which continue to date and the passing of the Compromise Decree dated 14 February 2022 in Suit No. B-21 of 2017 and Suit No B-34 of 2017 to my mind therefore did not create any third party interest in the Mortgaged Property. That being the case while the execution of the Decree may create a third-party interest in the Mortgaged Property, that has to date not happened and certainly did not happen on the passing of the order dated 14 February 2022 on the compromise application maintained in Suit No. B-21 of 2017 and in Suit No B-34 of 2017. I am therefore of the opinion that there was no misrepresentation or fraud that had been practiced by either HBL or FBL in entering into the Compromise Agreements or on the passing of the Compromise Decrees dated 14 February 2022 in Suit No. B-21 of 2017 and Suit No B-34 of 2017. J.M. No. 32 of 2022 and J.M No. 33 of 2022 are therefore each liable to be dismissed.

37. For the foregoing reasons:

- (i) the jurisdiction to consider the performance on the Agreement of Sale in respect of the Mortgaged Property being vested in the Banking Court under Sub-Section (1) and Sub-Section (2)

of Section 23 of the Ordinance, 2001, the Plaint in Suit No. 290 of 2018 is rejected under the provisions of clause (d) of Rule 7 of Order XI of the Code of Civil Procedure, 1908 and all orders passed therein abate. The Nazir of this Court is directed to release any security deposited by Lucky Tex pursuant to orders passed by this Court in Suit No. 290 of 2018 as per rules;

- (ii) J.M No. 32 of 2022 and J.M No. 33 of 2022 each being not maintainable are dismissed;
- (iii) There will be no order to costs in each of the proceedings.

J U D G E

Karachi dated 22 February 2025