

2012 CLD 1957

[Sindh]

*Before Faisal Arab and Nadeem Akhtar, JJ*

Mst. PATHANI through Attorney—Appellant

Versus

HABIB BANK LIMITED and another—Respondents First Appeal No. 14 of 2012, decided on 9th May, 2012.

***(a) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)—***

*—S. 15(6) proviso—Sale of mortgaged property—Tenant, eviction of— Protection—Pre-conditions— Protection provided under proviso to 8.15(6) of Financial Institution (Recovery of Finances) Ordinance, 2001, is available only to such person who is in occupation of mortgaged property or any part thereof under a bona fide" lease and such protection is available till expiry of period of lease--Pre-requisite for seeking protection by a person under proviso to 8.15(6) of Financial Institutions (Recovery of Finances) Ordinance, 2001, is to show that there is a bona fide lease in his/her favour and burden to show the same lies exclusively upon such person, (p. 1963] A*

***(b) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)—***

*—Ss. 15 & 22—Sale of mortgaged property—Eviction of tenant—Banking Court, powers of—Appellant resisted execution of decree on the plea that she was bona fide tenant in mortgaged property and could only be evicted by Rent Controller—Validity—Specific powers had been given to Banking Court for eviction of tenants from mortgaged properties, as Financial Institutions (Recovery of Finances) Ordinance, 2001, was a special law, provided I application filed by appellant—Appeal was dismissed in circumstances, [pp. 1963, 1965] B & C*

Asif All Pirzada for Appellant.

Sadrudin Hudda for Respondent No. 1.

Sohail Hameed for Respondent No.2.

Date of hearing: 20th April, 2012.

### **JUDGMENT**

NADEEM AKHTAR, J.— This appeal was dismissed by a short order announced by us on 20-4-2012, for the reasons to be recorded later. Following are the reasons for dismissing this appeal:

1. This appeal has been filed by the appellant against the order dated 30-1-2012 passed by Banking Court No. I at Karachi in Execution Application No. 36 of 2001 arising out of Suit No, 1401 of. 2000, whereby the application filed by the appellant under section 15(6) of the Financial Institutions (Recovery of Finances) Ordinance of 2001 ("**THE ORDINANCE**") read with Order XXXIX, Rules 1 and 2, C.P.C., was dismissed. The case has a chequered history which is given below in brief.

2. Respondent No. I (Habib Bank Limited) filed Suit No. 763 of 1995 before the Banking Tribunal, Hyderabad Sindh against one Tariq Aziz and three others for recovery of Rs. 11,573,577:00. After repeal of the Banking Tribunals Ordinance, 1984, the said suit was transferred to the Banking Court No. II, Hyderabad, and was renumbered as Suit No.467 of 1997. Thereafter, the suit was again renumbered as Suit No. 1401 of 2000.

3. It was the case of respondent No. 1 before the Banking Court that the defendants in suit had availed finance facilities from respondent No. 1, and In consideration thereof and as security for repayment thereof, defendant No.2 in suit Ghulam Mustafa, hereinafter referred to as "**THE MORTGAGOR**", had mortgaged in favour of respondent No. 1 his immovable property bearing No.192-K, Block-2, P.E:C.H.S. Karachi, measuring 600 sq. yds., hereinafter referred to as "**THE MORTGAGED PROPERTY**". In view of default committed by the defendants, respondent No. I filed the above-mentioned suit against them praying for a decree as stated above.

4. Respondent No. I's above-mentioned, suit was decreed with costs vide Judgment

delivered on 30-5-2001 and decree prepared on 15-6-2001 by the Banking Court No. II, Hyderabad, against all the defendants therein Jointly and severally In the sum of Rs.9,644,648.00 with agreed markup thereon from the date of filing of suit till satisfaction of the decree. After obtaining the said decree, respondent No. 1 filed Execution Application for execution of the said decree, which was transferred to the Banking Court No. I at Karachi as the mortgaged property is situated at Karachi. The said Execution Application was registered as No. 36 of 2001.

5. In the execution proceedings, the mortgaged property was put to auction and respondent No.2 was declared to be the highest bidder. Legal heirs of the deceased Judgment debtor No.2/mortgagor filed an application under Order XXI, Rule 89, C.P.C. on 11-6-2010 before the Executing Court for setting aside of auction of the mortgaged property in favour of respondent No.2/auction purchaser. The aforesaid application was dismissed by the Executing Court vide order dated 19-4-2011, whereby the objections in respect of sale of the mortgaged property were rejected and sale thereof by way of auction was confirmed In favour of the auction purchaser/respondent No.2. The said order dated 19-4-2011 was challenged before this Court through First Appeal No. 31 of 2011, which appeal was dismissed and the order of dismissal of the appeal was not challenged before the Hon'ble Supreme Court. As such they said order passed by the Executing Court on 19-4-2011 confirming sale of the mortgaged property In favour of the auction purchaser/respondent No.2 attained finality against the legal heirs of the deceased judgment debtor No.2 mortgagor.

6. In the meantime, a joint application under section 12(2), C.P.C. was filed on 26-3-2011 in the suit by legal heirs of deceased Judgment debtor No.2/mortgagor as well as by judgment debtor No. 3 Khalid Aziz, who is the real son of the appellant and is residing in the mortgaged property. The said application was dismissed by the Banking Court vide order dated 27-9-2011, against which all the above mentioned persons filed First Appeal No. 109 of 2011 before this Court. The said appeal was dismissed by order dated 29-11-2011, which order was not challenged before the Hon'ble Supreme Court. As such the order of dismissal of application under section 12(2), C.P.C. attained finality against

the legal heirs of the deceased Judgment debtor No.2/mortgagor and judgment debtor No. 3, Khalid Aziz, the real son of the appellant residing in the mortgaged property.

7. The said judgment debtor No.3 Khalid Aziz then filed an application before the executing Court in April 2011 under Order XXI, Rule 26, C.P.C. for stay of the execution proceedings. There is nothing on record to show as to what happened to this application. However, the same is not relevant for the purposes of this appeal as the application has impugned in this appeal the order passed on her application under section 15(6) of the Ordinance claiming to be the tenant of the mortgaged property.

8. Auction of the mortgaged property was held on 2-6-2010 and sale thereof was confirmed on 19-4-2011 by the Executing Court in favour of respondent No. 2/auction purchaser. Upon such confirmation, a Sale Certificate was duly issued on 21-4-2011 in favour of respondent No.2/auction purchaser in pursuance of the orders passed by the Executing Court, the Nazir made several attempts with and without police aid to take over possession of the mortgaged property for handing it over to respondent No.2/auction purchaser. All such attempts made by the Nazir were strongly resisted by judgment debtors mainly by judgment debtor Nos. 1 and 3, who are the real sons of the appellant herein and are residing in the mortgaged property. As the Nazir was prevented from complying with the orders of the Executing Court, he reported the matter to the Executing Court by submitting reports;

9. The Nazir submitted his last report dated 26-12-2011, wherein he stated that he went to the mortgaged property on 24-12-2011 with police party of Ferozabad Police Station headed by Additional SHO and one lady police constable. As per this report, Judgment debtor No.3 Khalid Aziz (real son of the appellant residing in the mortgaged property) initially resisted, but later on he surrendered and allowed the lady police constable to enter into the mortgaged property. The said report further reflects that the lady police constable had some arguments with the ladies present inside the mortgaged property. It was finally mentioned in Nazir's aforesaid report that one Farooq Aziz came at the site in extreme anger challenging the entire team that nobody can vacate the mortgaged property, and he also "expelled" the lady police constable forcibly from the mortgaged property. It was specifically pointed out by

the Nazir in his said report that the other judgment debtors were also present when the above scene was being created. Since a law and order situation had been deliberately created, the Nazir referred the matter back to the Executing Court for further orders.

10. After passage of a considerable period of nine (9) months from the Issuance of Sale Certificate on 21-4-2011 in favour of respondent No.2/auction purchaser and after submission of Nazir's last report dated 24-12-2011, the appellant filed an application on 23-1-2012 before the Executing Court under section 15(6) of the Ordinance claiming herself to be the tenant of the mortgaged property. It was prayed In this application by the appellant that both the respondents herein should be -restrained from taking over possession of the mortgaged property from her In her aforesaid application, the appellant herself admitted that auction of the mortgaged property was held way back on 2-6-2010. The alleged tenancy rights were claimed by the appellant through a Tenancy Agreement dated 1-12-1980 purportedly executed in her favour by the deceased judgment debtor No.2/mortgagor for a period of one-year. Appellant's aforesaid application has been dismissed by title Executing Court through the impugned order dated 30-1-2012.

11. We heard Mr. Asif Ali Pirzada, counsel for the appellant, who argued that since the appellant was inducted as a tenant by the deceased judgment debtor. No, 2/mortgagor through Tenancy Agreement dated 1-12-1980 prior to creation of mortgage In favour of respondent No. I. her rights as a tenant are protected under section 15(6) of the Ordinance. He contended that the appellant cannot be evicted from the mortgaged property without due process of law even If the mortgaged property has been sold by the Executing Court exercising powers under the Ordinance. According to him only a Rent Controller has jurisdiction to initiate such action against the appellant. In support of his above contentions, the counsel relied upon only two documents, the Tenancy Agreement dated 1-12-1980, and a bunch of rent receipts from December 1980 to December, 2012 containing purported thumb Impressions of Noor Khatoon, widow of the deceased Judgment debtor No.2/mortgagor. He relied upon Nazir's report dated 26-12-2011 which stated that the lady police constable had some arguments with the ladles present inside the mortgaged property which, according to him, was sufficient to prove that the appellant was the tenant and was present inside the

mortgaged property. The counsel finally submitted that the Impugned order is illegal and the same should be, set aside.

12. Mr. Sohail Hameed, learned counsel for respondent No.2/auction purchaser, strongly opposed this appeal and supported the impugned order. His main contention was that the legal heirs of the deceased judgment debtor No. 2/mortgagor filed a number of applications before the Banking Court for setting aside of the decree and stay of execution proceedings and they also filed appeals before this court, but the alleged tenancy in favour of the appellant was never disclosed by them. On the other hand, in all the aforesaid proceedings the legal heirs of the deceased judgment debtor No.2/mortgagor claimed to have resided at the mortgaged property. According to the learned counsel, this shows that even the legal heirs of the deceased Judgment debtor No.2/mortgagor never recognized the appellant as their tenant. He then challenged the tenancy agreement and receipts filed by the appellant as fake, fabricated and forged documents. He also contended that none of the said documents can be relied upon to show that the appellant is in occupation of the mortgaged property as a tenant. The learned counsel further argued that respondent No.2 is a bona fide purchaser of the mortgaged property which has been purchased by him for valuable consideration through auction, and that in spite' of deposit of entire sale consideration, he has not been able to get possession of the mortgaged property due to the hurdles created by Judgment debtors and the appellant In collusion with one another. He prayed for dismissal of this appeal so that possession of the mortgaged property could be handed over to respondent No. 2 without further delay.

13. While adopting the arguments advanced by Mr. Sohail Hameed, Mr. Sadruddin Hudda learned counsel for respondent No. 1 submitted that because of the mala fide and collusive acts of judgment debtors and the appellant, respondent No. 1/decree holder has not been able to receive sale consideration of the mortgaged property which would have satisfied the decree substantially. He further submitted that respondent No. 1 is continuously suffering financial loss as the entire amount of sale consideration is lying blocked unnecessarily. The learned counsel prayed for dismissal of that appeal on the ground that the appellant is not entitled to any relief or protection under the proviso of section 15(6) of the Ordinance as the alleged leasers not bona fide.

14. Section 19 of the Ordinance relates to execution of decree and sale of mortgaged,

pledged or hypothecated property with or without -intervention of Banking Court. By virtue of subsection (5) of the said section 19, provisions of many subsections of section 15 of the Ordinance, including subsection (6), have been, made applicable to sales of mortgaged, pledged or hypothecated properties by a financial institution in exercise of its powers conferred by section 19(3), whereby a financial institution may sell any of such properties with or without intervention of Banking Court.

15. Section 15(6) of the Ordinance provides that where the mortgagor his agent, servant, or any person put in possession by the mortgagor, does not voluntarily give possession of the mortgaged property sought to be sold or purchased, the Banking Court on application of the financial institution or purchaser, shall put the financial Institution or purchaser, as the case may be, in possession of the mortgaged property in any manner deemed fit by it. Under the Proviso of the said section 15(6), Banking Court has the discretion not to order eviction of a person if such person is in occupation of the mortgaged property or any part thereof under a bona fide lease, except on expiry of the period of lease. Thus the protection provided under the Proviso of the said section 15(6) of the Ordinance is available only to such person who is in occupation of the mortgaged property or any part thereof under a bona fide lease and such protection will be available only till the expiry of the period of the lease. The prerequisite for seeking protection by a person under the Proviso of the said section 15(6) of the Ordinance is to show that there is a bona fide lease in his/her favour, and the burden to show this lies exclusively upon such person.

16. The contention of appellant's counsel that the appellant cannot be evicted from the mortgaged property without due process of law even if the mortgaged property has been sold by the Executing Court exercising powers under the Ordinance, and that only a Rent Controller has jurisdiction to initiate such action against, the appellant has no force. The Ordinance, being a special law, has given specific powers in this behalf to the Banking Court for eviction of tenants of mortgaged properties provided the lease is bona fide.

17. After hearing the learned counsel at length and after carefully examining the record, we have noticed the following important aspects of this case:—

- A. The appellant has not disputed mortgage of the mortgaged property in favour of respondent No. 1 as well as sale thereof through auction in favour of respondent No.2.
- B. All the rent receipts filed by the appellant are without revenue stamps, some of them are blank without any thumb impression or signature, and all are typed in an identical stereo type manner.
- C. Mr. Sohail Hameed's contention appears to be correct that the legal heirs of the deceased Judgment debtor No.2/mbrtgag6r never disclosed the alleged tenancy In favour of the appellant in any of the applications before the Banking Court and/or in the appeals filed before this court.
- D. The other contention of Mr. Sohail Hameed also appears to be correct that in all the aforesaid proceedings' the legal heirs of the deceased Judgment debtor No.2/mortgagor claimed to have resided at the mortgaged property, which shows that even they never recognized the appellant as their tenant.
- E. Respondent No. 1 filed suit in the year 1995 wherein two sons of the appellant, namely, Tariq Aziz and Khalid Aziz were cited as defendants Nos. 1 and 3, respectively. In the title of the plaint, both the said defendants were shown to be residing at the mortgaged property. The suit was contested by the defendants, but they never pleaded that their mother (the appellant) was the tenant In respect of the mortgaged property.
- F. Similarly, the appellant/mother of the above mentioned defendants never came forward before any court in order to safeguard her alleged tenancy rights. The appellant approached the executing court for the first time on 23-1-2012 through her application under section 15(6) of the Ordinance claiming/alleging to be the tenant. All this was done by the appellant after passing of the decree, filing of execution proceedings, Issuance of sale proclamation, auction of the mortgaged property, deposit of entire sale consideration by auction purchaser/respondent No.2, and Issuance of the sale certificate in his favour.



- G. Nazir's report dated 26-12-2011 does not specifically state that the appellant was present inside the mortgaged property or she was in possession as a tenant thereof when the lady police constable went inside the mortgaged property. The said report simply states that the lady police constable had some arguments with the ladies present inside. If the appellant was in possession as a tenant and was actually present inside, she would have definitely informed the lady constable or the Nazir about her status and identity. The ladies present inside could be maids, guests, relatives or other family members of the occupant.
- H The most important thing which we have noticed is that the appellant on the one hand has filed a bunch of rent receipts for the period from December 1980 to December 2012 to show that she has been paying rent to Mst. Noor Khatoon (widow of deceased judgment debtor No.2/mortgagor). On the other hand, in ground 'H' of this appeal the appellant has claimed that the tenants have been legally depositing rent with the rent controller. If the latter stand of the appellant is accepted, then the rent receipts filed by her cannot be treated as genuine. This serious contradiction in appellant's stand has proved to be fatal to her alleged claim of tenancy rights.

18. In view of our above observations, we have no hesitation in holding that the appellant was/is not a tenant in respect of the mortgaged property and her alleged claim of tenancy was/is not bona fide. We further hold that the appellant was/is not entitled to seek protection under the proviso of section 15(3) of the Ordinance and her application was rightly dismissed. Keeping in view the history of this case and the mala fide and collusive acts of judgment debtors and the appellant, we are convinced that there is no infirmity in the impugned order which should be implemented in letter and spirit without further delay. The appeal stands dismissed along with listed C.M.A. No. 143 of 2012.

MH/P-10/K

Appeal dismissed.

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