

JUDGMENT SHEET
IN THE LAHORE HIGH COURT
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

EFA No. 18 of 2022

Mst. Saima Naeem

Versus

M/s Habib Bank Ltd. and another

JUDGMENT

Date of hearing	26.01.2023
Appellant by	Mr. Qaiser Nawaz Khan Niazi, Advocate.
Respondent(s) by	Barrister Khalique Zaman, Advocate for respondent No.1-Bank. Mr. Shoaib Shahid, Advocate for the respondent No.2.

SULTAN TANVIR AHMAD, J:- The present appeal, filed under section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (*'FIO, 2001'*), is directed against the order dated 16.11.2022 passed by learned Judge Banking Court, Rawalpindi (the *'Banking Court'*), whereby objection petition dated 01.06.2022 filed by the appellant has been dismissed.

2. Facts, necessary for the disposal of the present appeal, are that respondent-bank filed suit for recovery under section 9 of *FIO, 2001* on 11.12.2020,

which was decreed to the extent of Rs.2,087,590/- along-with costs of suit and cost of funds vide judgment dated 10.09.2021. The said decree stood converted into execution in terms of section 19(1) of *FIO, 2001* and proceeding for its satisfaction through auction of mortgage property measuring 10-Marlas, Plot No.429, Block-D, Press Club Housing Society, Media Town Rawalpindi, as further detailed in the suit (the '*mortgaged property*'), were initiated by the learned *Banking Court*. On 01.06.2022, the appellant filed objection petition in terms of section 19(7) of *FIO, 2001* with the averments that one-third of the *mortgaged property* belongs to the appellant as per undertaking dated 18.03.2017 (the '*undertaking*') given by ex-husband of the appellant (the '*mortgagor*'), who has concealed the same from the learned *Banking Court*, thus, the proceedings of auction are nullity in eyes of law. This objection petition was contested by the respondent-bank by filing reply dated 27.06.2022. The learned *Banking Court* dismissed the objection petition vide order dated 16.11.2022. Aggrieved from the same, present appeal has been filed.

3. Mr. Qaiser Nawaz Khan Niazi, learned counsel for the appellant has submitted that on the basis of the *undertaking* the appellant is owner of one-third of the *mortgaged property* and civil litigation regarding the title, to the said extent, is pending before the learned civil Court, hence, the auction of the *mortgaged property* cannot proceed further; that the learned *Banking Court* has failed to consider the case of the appellant in true perspective; that the learned *Banking Court* failed to appreciate that the *mortgagor* has defaulted in

payment of maintenance allowance to appellant and / or minors for which execution proceedings are pending. It is added by the learned counsel for the appellant that the impugned order and subsequent auction of the *mortgaged property* are contrary to the law as well as principles of natural justice.

4. Conversely, Barrister Khalique Zaman, learned counsel for the respondent-bank has submitted that present appeal is merely an attempt to delay the recovery proceedings; that the respondent-bank has prior right of mortgage that was created on 17.07.2016 and the subsequent undertaking allegedly conferring ownership rights to the extent of one-third share in the *mortgaged property* to the appellant cannot take priority over the mortgage rights of the respondent-bank. Mr. Shoaib Shahid, learned counsel for the respondent No.2 has supported the arguments of the learned counsel for the respondent-bank, while opposing the appeal.

5. We have heard the arguments of learned counsel for the parties and perused the record.

6. As per section 58 of the Transfer of Property Act, 1882 mortgage is transfer of an interest in specific immovable property for the purposes of securing the payment of money advanced or to be advanced by way of loan or financing, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability. Once the mortgage is validly created against a specific immoveable property, the interest of mortgagor in the property, to the specific extent, stands transferred to the mortgagee. Upon creation of mortgage, the charge travels with the property and not

with the person. Thus, if a mortgagor manages to part with the property or confers further interest to third party then the buyer or the third party will step into the shoes of mortgagor and he cannot claim any better title or rights in the property or any interest free from the charge of mortgage. Reference in this regard can be made to the cases titled “Muhammad Sadiq and Others Versus Muhammad Mansha and Others”(PLD 2018 Supreme Court 692), “Chief Land Commissioner and another Versus Maula Dad and Others”(1978 SCMR 264), “Dost Muhammad Versus House Building Finance Corporation”(2007 CLD 1369) and “Kanti Ram and Others Versus Kutubuddin Mahomed and Others”(1895) 22 Cal 33). It will be beneficial to reproduce the paragraph 6 of “Muhammad Sadiq and Others” case (*supra*), whereby, the Honourable Supreme Court has observed as follows:-

“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 interest 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 the 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.”

(Underlining is added)

7. In case titled “Muslim Commercial Bank Limited Versus Syed Ataullah Shah and 2 Others”(2003 CLD 888) a learned Division Bench of this Court has also held that the transferee of the previously encumbered property steps into shoes of the debtor and subsequently he cannot complain that the such property cannot be sold in execution of the decree. The relevant extract of the said judgment is as under:-

“5. *There cannot be any cavil to the proposition that the mortgage travels with the property and not the person and the transferee of the previously encumbered property steps into the shoes of the debtor. Reference in this regard can be made to a case reported as Chief Land Commissioner v. Maula Dad and others 1978 SCMR 264. In the instant case, property in dispute was, admittedly, mortgaged with the appellant bank, as noted above, and the same was transferred in favour of the respondent during the subsistence of the mortgage, thus, as per the principle laid down in the aforementioned case of Chief Land Commissioner the respondent has stepped into the shoes of the judgment-debtor and, therefore, cannot complain or agitate that the mortgaged property cannot be sold by the appellant bank, being the mortgagee, in execution of the decree.*”

(Emphasis supplied)

8. Reverting to the relevant facts of the case, it is admitted before us that the mortgage by way of deposit of title deed(s) was effected in favour of the respondent-bank on 17.10.2016, whereas, the appellant has asserted her rights on the basis of the *undertaking*, which was purportedly executed by the *mortgagor* about nine (9) months after the creation of mortgage, therefore, appellant cannot claim any right in the property free of encumbrance created through the mortgage. The rights of appellant, if any, in the *mortgaged property* on the

strength of the *undertaking*, is minus the interest that has been created by way of the mortgage in favour of the *mortgagee* / respondent-bank, for which the appellant, as per objection-petition, has already instituted a separate suit, thus, the learned *Banking Court* has rightly proceeded with the auction of the *mortgaged property* for the satisfaction of the decree passed in terms of *FIO, 2001*.

9. In the wake of above discussion, we are of the considered view that the order under appeal is in accordance with law and no interference with the same is required through the present appeal. Consequently the appeal is ***dismissed***. No order as to costs.

(MIRZA VIQAS RAUF)
JUDGE

(SULTAN TANVIR AHMAD)
JUDGE

J.A. Hashmi/*

Approved for Reporting

JUDGE

JUDGE