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Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE

(JUDICIAL DEPARTMENT)

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E.F.A No.8251/2023

Gujranwala Steel Industries.

Versus

Industrial Development Bank of Pakistan, etc.

JUDGMENT

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| Date of hearing | 14.11.2023 |
| For appellant | Mr. Asad Ahmad Ghani, Advocate. |
| For the Respondents | M/S Imran Malik, C.M Sarwar and Sikandar Javed, Advocate for respondents No.2 and 3. Mr. Fiaz Ahmad Ranjha, Advocate for respondent No.8. |

ASIM HAFEEZ, J. Instant Execution Appeal (‘Appeal’) is directed against orders dated 19.01.2023 and 23.01.2023. In terms of order of 23.01.2023, learned Judge Banking Court (‘Banking Court’), for the reasons recorded therein, declared allotment in favour of appellant void, upon invoking section 23 of the Financial Institutions (Recovery of Finances) Ordinance, 2001(‘FIO’). Banking Court further directed respondent No.1 [decree holder-cum-mortgagee] to redeem subject matter property to the respondents No.2 and 3 [judgment debtors-cum-mortgagor] and deliver possession thereof. And through order of 19.01.2023, various applications of the appellant were dismissed by the Banking Court, having the effect of denying alleged rights claimed by the appellant.

2. Facts, essential for adjudication of appeal, are that property bearing plot No.24/B, SIE-II, PSIC, Gujranwala, measuring 2-Kanals ("property"), was leased to the respondents No.2 by respondent No.8 - [Punjab Small Industries Corporation] - ("lessor") on terms contained in the lease deed dated 25.01.1988, conferring lease hold rights, which rights were then mortgaged by respondent No.2 ("lessee") with respondent No.1 on 08.02.1998, by way of mortgage by way of deposit of title deed - [term of lease was for 99 years with option of renewal] - for securing repayment of Mark-up based facility, extended by the respondent No.1.

On 08.04.1999, respondent No.1 sued respondents No.2 to 7 for the recovery of claim before the Banking Court. On 24.01.2002 lessor cancelled the lease hold rights. Recovery suit was decreed on 21.02.2002. On 13.06.2002, lessor filed objections and sought detachment of property, which objections were dismissed on 08.01.2004, and application of the respondent No.1 [decree holder-cum-Financial Institution] for grant of possession was allowed. Reportedly the possession was delivered to respondent No.1. Lessor, notwithstanding dismissal of objections, proceeded to auction the property, whereupon allotment letter was issued to the appellant on 15.03.2004. Appellant started asserting rights qua property, based on letter of allotment, and, at one point in time, sought permission to deposit the decretal amount, which request was declined by Banking Court. Appellant preferred EFA No.68179/2020, which appeal was disposed of on 13.09.2022, in following terms,

“After arguing the case at some length, learned counsel for parties agreed that the judgment debtor will deposit the entire decretal amount with the decree holder bank within a period of 30 days, after which the decree holder bank will redeem and return the mortgaged property / plot subject to determination by learned executing court, at the first instance, that to whom said mortgaged property is to be returned, considering the relevant record as well as provision of section 23 of Financial Institution (Recovery of Finances) Ordinance, 2001, and hearing all concerned. The said exercise shall be done by learned executing court preferably within a period of two months from the date of entire decretal amount be paid by the judgment debtor to the decree holder bank.”

[Emphasis supplied]

3. Respondents No.2 and 3, after order of 13.09.2022, satisfied the decree in full by making payment on 10.10.2022, whereafter Banking Court proceeded to pass the orders hereby assailed.

4. Learned counsel for the appellant contends that lease hold rights extended to lessee were cancelled, whereafter property stood allotted to the appellant, and such subsequent transaction was a valid transaction, which could at best be subjected to the mortgage charge, and appellant had shown willingness to satisfy decree. Adds that section 23 of the FIO is not attracted since the lessor, in this case, was neither the customer nor mortgagor, or for that matter the judgment debtor. Submits that executing court has no jurisdiction to entertain and adjudicate disputes touching cancellation of lease and consequent allotment of property to the appellant once decree was adjusted. Lastly submits that evidence needed to be recorded for the determination of controversial issues on the pattern of an inquiry envisaged under the provisions of Order XXI Rule (58) of Code of Civil Procedure 1908. Learned counsel refers to following decisions to support submissions, reported as “Mst. Farhat Fareed Sheikh Vs. NIB

Bank Limited and 5 others” (2019 CLD 632), “Siraj Din and 2 others Vs. Khushi Muhammad through legal heirs” (2002 YLR 1643), “Muslim Commercial Bank Limited Vs. Syed Ataullah Shah and 2 others” (2003 CLD 888), “A. Gnanam Vs. M/s Palaniappa & Co. and others” (AIR 2001 MADRAS 14), “Hafizur Rehman and 2 others Vs. Messrs Fresh Farms (Pvt) Ltd” (2010 CLD 999), “Manzoor Ellahi through legal heirs Vs. Ch. Muhammad Akbar and 2 others” (1999 MLD 901), “Mst. Irshad Yamin Vs. Citibank N.A. and others” (2005 CLD 1477), “Allied Bank Limited Vs. Messrs Fazal Vegetable Ghee Mills and others” (2019 CLD 441), “Anees-ur-Rehman Vs. Faysal Bank Limited through Manager” (2019 CLD 1031), “Messrs PEL Appliances Limited Vs. United Bank Limited” (2005 CLD 1352), “Rai Muhammad Riaz Vs. Ejaz Ahmad and others” (2013 YLR 1890), “Sardar Ali Vs. Abdul Ghafoor and others” (2022 CLC 1925), “SME Bank Ltd, (Former Regional Development Finance Corporation) through Branch Manager Vs. Messrs Continent Leather (Pvt) Ltd through Director and 3 others” (2005 CLD 1508), “Mirza Naseem Ahmad and 4 others Vs. Dr. Sadiqa Sharif and 12 others” (2003 CLD 88), “Government of Pakistan through Director General Ministry of Interior, Islamabad and others Vs. Farheen Rashid” (2011 SCMR 1) and “Fasih-ud-Din Khan and others Vs. Government of Punjab and others” (2010 SCMR 1778).

5. Conversely, learned counsel appearing for respondents No.2 and 3 submits that lessee, being the mortgagor, has exercised right redemption and satisfied the decree. Adds that respondents No.2 and 3 stepped in the shoes of the respondent No.1 / mortgagee, and same are entitled to have possession of property. Adds that allotment letter was issued after the passing of the decree, hence,

transaction is void in terms of section 23 of the FIO. Following decisions are referred to support submissions, "The Bank of Punjab Vs. Messrs Magic River Services and 4 others" (2016 CLD 171), "Haji Dad Muhammad Vs. Muslim Commercial Bank Limited" (2011 CLD 785), "Mazco Industries Ltd Vs. Habib Bank Ltd and others" (2011 CLD 186), "Messrs Data Laboratories (Pvt) Ltd through Chief Executive and 3 others Vs. Judge Banking Court No.III, Lahore and 4 others" (2008 CLD 1326).

Learned counsel for the respondent No.8 pleaded against the orders impugned and emphasized on issue of cancellation of lease. Respondent No.1 is a satisfied decree holder.

6. Heard.

7. Indubitably, through order of 08.01.2004 Banking Court crystalized the scope of rights of the parties and prescribed limitations qua exercise of those rights, while dismissing objections filed by the lessor against incidence of the attachment of property – conspicuously conduct of auction sale and issuance of allotment letter happened after the order of 08.01.2004. It is expedient to reproduce operative part of order of 08.01.2004,

There is no denial to the fact that Plot No.24/B situated at SIE-11, PSIC, Gujranwala is owned by the Punjab Small Industries Corporation, the objector/petitioner. It had been leased-out to the judgment debtor vide lease deed dated 25-01-1988. As per clause 3 of the said agreement, the lessor i.e. Punjab Small Industries Corporation had given the rights of lease to the judgment debtor which mortgaged it to the Industrial Development Bank of Pakistan in lieu of loan for industrial purposes. It was made clear in the said agreement that in case the judgment debtor obtained loan from any institution other than Industrial Development Bank of Pakistan, the decree holder, the lessee judgment debtor M/s Seven Aays Enterprises would be under a legal obligation to obtain prior written consent from the lessor. The judgment debtor had obtained finance facility from the decree holder by mortgaging the said plot which, factually, was owned by the

petitioner/objector whereas, it had granted the rights of lease only. The title of the mortgaged property, since vested with the objector and the judgment debtor being lessor only, was not competent to mortgage title of the same to the decree holder, the property cannot be put to auction, but there is no hurdle whatsoever in transfer of lease hold rights of the lessee to any person through auction by the court. The objection petition being baseless and misconceived is dismissed. However, it is made clear that decree holder bank shall dispose of only that right to satisfy the decree of this court which had been mortgaged against the loan. To be more clear, it is observed that the decree holder would not be competent to dispose of the plot but the lease hold rights of the judgment debtor only.

[Emphasis supplied]

8. Rights allegedly claimed by the appellant, based on letter of allotment dated 15.03.2004, were subject to the mandate of order of 08.01.2004 – at the time of allotment lease hold rights in the property were mortgaged and otherwise under attachment. Key takeaway of order dated 08.01.2004 was the prioritization of the mortgage charge and reiteration of inherently vested proprietary right of the lessor. Notably, before order of 08.01.2004, lessor had allegedly cancelled the lease, however no determination was carried out regarding legality or otherwise of the order of cancellation of lease. It was quite logical to defer the determination of cancellation of the lease in the wake of outstanding decree and enforceable mortgage charge. However, situation has changed after the satisfaction of the decree. Applicability of section 23 of the FIO need to be examined in the context of satisfaction of decree and redemption of lease hold rights. Learned counsel for respondents No.2 and 3 pleaded that same had stepped in the shoes of the mortgagee bank, upon redeeming the property. This assertion is misconceived. Dealing with or disposal of mortgaged property to the

third party by the mortgagee, either in exercise of right of foreclosure or upon auction sale by the executing court must not be confused with the voluntary redemption of mortgage charge by the mortgagor-cum-lessee. In the context of this case, we are dealing with later scenario. Despite redemption of lease hold rights the status of respondent No.2 remained as a lessee, and only difference was satisfaction of the decree. This aspect escaped attention of the Banking Court, which otherwise proceeded to decide legality of the allotment of appellant without appreciating that before such determination the legality of the order of cancellation of lease needs adjudication. Banking Court essentially failed to construe the context and effect of order of 08.01.2004. After satisfaction of the decree and redemption of lease hold rights Banking Court has no jurisdiction to decide validity of order of cancellation of lease and / or rights consequently claimed by the appellant.

9. We take up the issue of applicability of sub-section (2) of section 23 of the FIO, since respondents No.2 and 3 attacked allotment on the plea that allotment letter was issued after the passing of the decree by the Banking Court and transaction otherwise succeeded order of 08.01.2004. Composite reading of sub-sections to section 23 of the FIO manifests the objectivity intended for protecting the interest of the mortgagee or other categories of charge holder(s) described therein. Section 23 of the FIO defines, limits and restricts the exercise of rights by the customer or the judgment debtor, as situation warrants, with respect to the property

/ asset(s) under mortgage / charge / encumbrance. There is no cavil that sub-section (2) of section 23 of the FIO is relevant and attracted so long the decree is outstanding or the mortgage / charge / encumbrance is enforceable, depending upon the facts in each case. Under sub-section (2) of section 23 of the FIO, element of voidness is attributed to the transaction, through legal fiat, for the purpose of protecting, preserving and safeguarding the rights and entitlement of the respondent No.1 - decree holder. Once decree was adjusted in full, question of voidness of the alleged transaction would become irrelevant for the decree holder, and at that point in time jurisdiction of the Bank Court ends. Position is explained with an illustration. Assumingly, A is the decree holder, B the judgment debtor. Property belonging to B, is subject of mortgage charge. If B executes an agreement to sell with C the transaction is void and not enforceable against B, in wake of an outstanding decree, since transaction had prejudiced A [decree holder]. But if decree stood fully satisfied, whether transaction between B and C could still be held void to the disadvantage of C, who, once satisfaction of the decree is certified by the Banking Court, will be entitled to claim enforceability of the transaction claimed before the courts of plenary jurisdiction. Either C claims enforcement of alleged transaction with the judgment debtor or not but certainly Banking Court is not vested with the jurisdiction to adjudicate dispute between B and C, in absence of an outstanding decree – in such scenario why would the decree holder in first place object to the transaction and press for declaration of voidness.

Creation of a third party rights by way of auction sale by the Banking Court in execution of decree or the sale of mortgage property by resorting to section 15 of the FIO or Sale in exercise of right of foreclosure is another matter, which is not the position here [appellant is not claiming any right from the decree holder].

According to the facts of the case at hand, question of determination of voidness of allotment, upon satisfaction of the decree, falls outside the jurisdiction of Banking Court. And sub-section (2) of section 23 of the FIO has no application. Once decree stood satisfied the effect of attachment order would also disappear. Lessor, lessee and allottee each are at liberty to plead, raise or agitate their respective claims before the courts having general jurisdiction. It is apparent from the record that possession was taken from the lessee and delivered to the decree holder bank in terms of order of 08.01.2004, lessee is entitled to have possession upon redemption of lease hold rights. This arrangement is subject to the terms of the lease deed and determination of the legality of the order of cancellation of lease – certainly the rights claimed by the appellant is subject to the determination of the issue of legality of order of cancellation of lease. Judgments referred are not relevant and applicable qua the facts of the case.

10. Before summing up the decision, we deem it appropriate to amplify the context of the order of 13.09.2022. At the time of passing of said order in EFA No.68179/2020, the decree was outstanding and in that context observations qua the effect of section 23 of the FIO

were recorded but before stage of determination reaches the decree stood adjusted / satisfied and lease hold rights were redeemed. At that point Banking Court stands divested of the jurisdiction to invoke section 23 of the FIO, in the context of the facts of this case.

11. This appeal is allowed to the extent that declaration of voidness of the allotment in favour of appellant is set-aside. It is observed that lessor, lessee and allottee shall be at liberty to seek remedies available in law for enforcement of respective claims, without being prejudiced by observations in the orders impugned. We direct that process of redemption of property shall be completed and possession of the property be delivered to the lessee. We allow thirty days to the lessee to challenge the factum of order of cancellation of lease, failing which lessor shall be at liberty to invoke the remedies available against the lessee. The appellant may join the proceedings, if advised. Respondent No.8 would be at liberty to seek enforcement of order of cancellation of lease or exercise rights available under the terms of the lease deed, if so advised. No order as to the costs.

(Shahid Karim)
Judge

(Asim Hafeez)
Judge

M. Nadeem/*

Approved for reporting.

Judge

Judge