

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

FAB No.60 of 2006.

H.B.F.C.....Versus.....Muhammad Asif & others.

J U D G M E N T .

Date of hearing:- 22.07.2015.

Appellant(s) by Mr. Malik Haroon Iqbal, advocate

Respondent(s) by Mr. Abdul Munim Khan, advocate.

WAQAR AHMAD SETH, J:- *The instant*

appeal under section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, has been directed against the judgment / order dated 18.07.2006, passed by the learned Judge Banking Court-II, Peshawar, whereby he accepted the objection petition filed by respondents No.1 to 7 and order of attachment of the disputed house was withdrawn.

2- *Brief facts of the case are that, one Lali Khan (respondent No.8 herein) had availed a loan facility of Rs. 60,000/- from the appellant / corporation for the construction of house in the year 1983 and mortgaged / assigned his house bearing Khasra No.993/436 measuring 4 ½ Marla, situated in Mauza Tokra No.3 Beri Bagh, Peshawar and to this effect a deed was executed and entered in-favour of the appellant / corporation,*

which was registered before the Sub-Registrar, Peshawar on 3rd January 1983. That respondent No.8 failed to repay the aforesaid finance and committed the fault in payment of loan thus the appellant / corporation filed a suit against him before the Judge Banking Court-II, Peshawar, which was exparte decreed for the recovery of 1,26,091/- including cost of Rs. 6413/- vide judgment and decree dated 23.04.2001. Thereafter, the appellant / decree holder filed execution petition in which warrant of attachment of the property in dispute was issued on 21.06.2002. During the pendency of the execution petition Muhammad Asif & others respondents No.1 to 7 filed objection petition on 04.06.2003, claiming therein that the suit house has been purchased by their predecessor in interest namely Muhammad Yousaf, through registered deed No.1009 dated 28.04.1993 and it was mutated in his favour on 25.06.1998 and after his death, the same was transferred in their names on 30.09.2000.

3- The appellant contested the said objection petition by filing a detailed reply. After recording pro & contra evidence of the parties, the learned Judge Banking Court-II, Peshawar, vide his judgment dated 18.07.2006, accepted the objection petition filed by the respondents No.1 to 7 and withdrawn the order of attachment dated

21.06.2002 regarding the property in dispute. Hence the instant appeal.

4- Arguments heard and record perused.

5- The arguments of the learned counsel for respondents No.1 to 7 that the suit house has been purchased by their predecessor in interest namely Muhammad Yousaf through registered deed No.1009 dated 28.04.1993 and after his death in the year 1999, the same was transferred in their names on 30.09.2000, has no force. It is apparent from the record that the house in question had been mortgaged by Lali Khan the original owner of the house in dispute in favour of appellant / corporation vide mortgage deed dated 3rd January 1983, when he obtained finance facility of Rs. 60,000/-. He failed to repay the amount of finance facility according to the stipulated terms, therefore, in order to recovery the said amount the appellant filed suit for its recovery which was decreed in their favour vide judgment and decree dated 23.04.2001. On filing execution by the appellant/Corporation, Executing Court directed for auction of the house in question. Respondents No.1 to 7 who claimed bona fide purchasers of the house in question by their predecessor-in-interest namely Muhammad Yousaf

filed Objection Petition on 04/06/2003 contending that the suit house was purchased by their father through registered deed dated 28.04.1993 and after his death it was transferred in their names on 30.09.2000. No doubt the entries with regard to mortgage of the house in question in favour of appellant/Corporation were not made in the Revenue Record, but the Corporation could not be blamed because firstly mortgage of the house in question was through a registered deed which itself was a notice to public in general, secondly, under Article 7.18 of Chapter 7 of Land Record Manuals, all kinds of mortgages were required to be entered in Mutation Register and under Article 7.32 of said Manual, Registrar and Sub-Registrar were under obligation to send to Tehsildar particulars of all registered deeds. Since house in question was mortgaged by way of registered assignment and partnership deed, it was the duty of Sub-Registrar to have sent copy of said deed in accordance with procedure prescribed under Article 7.32 of Land Records Manual. Purchaser did not file any application in writing before Sub-Registrar in order to find out as to whether house in question which he wanted to purchase was free from encumbrance or

not. Thus the purchaser, in circumstances could not claim to be bona fide purchaser of the house in question.

6- It is also a matter of common knowledge that in order to find out as to whether the property has any encumbrance over it, an application under the prescribed manner is submitted to the Registrar of the area, where the property is situated, who after going through the contents of the relevant Register issues a non-encumbrance certificate if there is no encumbrance over the property. In case the property is under any encumbrance, this fact is mentioned by the Registrar while giving intimation to the applicant. In the case in hand the predecessor-in-interest of respondents No.1 to 7 admittedly did not file any application in writing before the Sub-Registrar in order to find out as to whether the property he wanted to purchase is free from encumbrance or not. Therefore, the arguments of the learned counsel that he had satisfied after inspecting the revenue record about non existence of any encumbrance stands repelled by his own conduct.

7- The rights of the appellant in respect of the mortgage house are also protected under section 24

(3) of House Building Finance Corporation Act, 1952, which reads as under:-

“No land or house in respect of which investment shall be transferred, sold or charge without the prior consent of the corporation, in writing and payments of the corporation dues, including shares in the capital appreciation; and any such transfer, sale or charge made with out such consent shall be void, and in case of sale, the corporation shall have the option to buy out the partners shares in the property at the price settled between the parties and intending buyer.”

8- *The purchase of the house in dispute by the predecessor of respondents No.1 to 7 admittedly was without the consent of the appellant and the same was made without the payment of appellants / corporation dues therefore, the same was void till payment of the appellant’s dues. It is also pertinent to mention here that at the time of execution of the mortgage deed between Lali Khan original owner and the appellant, the suit house was in exclusive ownership and possession of Lali Khan judgment-debtor, therefore, the appellant has not filed any suit*

against respondents No.1 to 7 and the order of attachment and auction proceedings initiated against the mortgaged property and the said mortgage deed was registered well before the alleged sale of the property in dispute in favour of predecessor-in-interest of respondents No.1 to 7..

9- *In view of what has been discussed above, it can safely be held that the learned Court below has not acted in accordance with law, while accepting the objection petition filed by respondents No.1 to 7, therefore, the impugned order dated 18/07/2006 is liable to be set aside. Resultantly, the instant appeal is allowed, judgment/order dated 18/07/2006 passed by the learned Judge, Banking court-II, Peshawar is set aside and the objection petition filed by respondents No.1 to 7 stands dismissed. The trial Court is directed to proceed in the case strictly in according with law.*

10- *Before parting with this judgment, we must observe that strict action also be taken against the revenue official/officers who had entered the deed dated 28/04/1993 and mutation No.14858 attested on 25/06/1998 regarding the transfer of the suit house in*

favour of predecessor-in-interest of respondents No.1 to 7 and subsequently in their names on 30/09/2000 despite the fact that the same has already been mortgaged in favour of the House Building Finance Corporation (appellant herein) by Lali Khan original owner, respondent No.8 herein vide deed No.1766 Bahi I Volume 1370 dated 3rd January, 1983. Copy of this judgment be sent to the Deputy Commissioner concerned for necessary action against the defaulter and to submit his report to this effect within two months positively to the Additional Registrar (Judicial) of this Court.

ANNOUNCED.
Dated: 22/07/2015.

JUDGE

JUDGE

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