

2011 CLD 269

[Karachi]

Before Mushir Alam and Aqeel Ahmed Abbasi, JJ

IMRAN ALI SOOMRO---Appellant

Versus

SAUDI PAK LEASING COMPANY LIMITED---Respondent

First Appeal No.14 of 2009, decided on 30th September, 2010.

(a) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

---Ss. 9, 10 & 22---Application for leave to defend suit---Security for finance to the principal borrower---Plea of fraud---Appellant (guarantor) had offered security at the time of signing of loan documents---Bank filed suit for recovery of loan amount of Rs.32,326,937 and after dismissal of application for leave to defend the suit, Banking Court decreed the suit against all defendants jointly and severally to the extent of Rs.1,799,723 with future cost of fund---Plea raised by appellant (guarantor) was that he had been made victim as he was induced to create mortgage by fraud and misrepresentation and the said mortgage was created only for the purpose of regulatory requirements without risking his property---Validity---Loan documents showed that the mortgage was created to offer mortgaged property as a security for repayment of liability under the finance and other supplemental agreements---Appellant did not dispute creation of equitable and registered mortgage which unequivocally acknowledged that mortgage had been created in consideration of finance produced or promised by the principal borrower---Appellant could not be allowed to plead any condition extraneous to written terms and agreement between the parties---Appellant might have a remedy against the principal borrower for damages and even otherwise, appellant being surety for the liability of the principal borrower, could proceed against the principal borrower or security lying with the Bank---High Court dismissed the appeal having no merits.

Zakas (Pvt.) Limited v. The Bank Alfalah Limited 2004 CLD 1660; Union Bank of India v. Manku Narayana AIR 1987 SC 1078; Haji Fazal Elahi & Sons v. Bank of Punjab 2004 CLD 162 and Marianne Khan versus National Bank of Pakistan 2006 CLD 232 ref.

(b) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

---Ss. 9, 10 & 22---Contract Act (IX of 1872), S.145---Bank loan---Promise to indemnify surety---Mortgagor by executing a mortgage, committed to the mortgagee/creditor that on failure of the borrower/debtor to clear the liability same be set off against the mortgaged property---All engagement to guarantee for repayment of debt implied a promise on the part of principal borrower to indemnify mortgagor/ guarantor whose mortgaged/charged property was liquidated to satisfy a debt for which the mortgage/charge was created.

(c) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

---Ss. 9, 10 & 22---Contract Act (IX of 1872), S.141---Bank loan---Surety's right to benefit of creditor's securities---Scope---Surety was entitled to the benefit of all security of the debtor held by the creditor.

(d) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

---Ss. 9, 10 & 22---Contract Act (IX of 1872), S.128---Bank loan---Surety's liability---Liability of surety was co-extensive with that of principal borrower, all the sureties stood side by-side and were on equal footing, it gave an option to the creditor to proceed against the securities and on charged property in sequel creditor in its option considered most expedient or less cumbersome to proceed against, unless of course parties to the contract of surety/guarantee/ mortgage stipulated otherwise---Agreement of surety, guarantor mortgagor of a debt could be subject to contingency or limitation to proceed after exhausting remedy against the principal sequence as might be contemplated in such agreement.

(e) Financial Institutions (Recovery of Finances) Ordinance (XL VI of 2001)---

---Ss. 9, 10 & 22---Contract Act (IX of 1872), 8.127---Bank loan---Consideration of guarantee---Plea of the judgment-debtor (guarantor) was that he was neither Director nor beneficiary of the finance availed by principal debtor; therefore he was not liable---Validity---One need not be director, partner and officer or in any manner beneficiary of finance extended to the borrower/debtor---Commitment or promise of creditor to extend finance to the borrower was sufficient consideration for standing guarantor, mortgagor or surety---No law provided that guarantor, and surety or mortgagor should invariably be directed or personal beneficiary for the credit line extended by the creditor to the borrower.

Imad-ul-Hasan for Appellant.

Mrs. Samia Faiz Durrani for Respondent No.1.

Date of hearing: 16th August, 2010.

JUDGMENT

MUSHIR ALAM, J.--- This first appeal arises out of judgment and decree passed by the learned Banking Court No.11, Karachi dated 28-2-2009 whereby Suit No.216 of 2008 filed by The Saudi Pak Leasing Company Limited for the recovery of Rs.32,326,937 was decreed against all the defendants jointly and severally to the extent of Rs.1,799,723 with future cost of fund at the rate as prescribed by the State Bank of Pakistan from the date of filing of the suit till decree, satisfied in addition to mortgage decree.

2. Appellant (defendant No.6 in Suit No.216 of 2008) is the mortgagor of the property offered as security for the finance extended to the principal borrower defendant No.2. Mr. Emad -ul-Hasan, learned counsel for the appellant/mortgager, contended that the appellant has been made victim, inasmuch as he was induced to create a mortgage fraud

and misrepresentation. It was urged the respondent No.3, who is chief executive of respondent No.2 represented appellant that the creation of mortgage is only for the purposes of regulatory requirements without risking his property. It was further urged that the appellant was induced to create mortgage without due Financial Analysis by the respondent No.1 as against the past practice of good Corporate-Governance. It was next contended that sufficient leased assets are in the ownership of the respondent No.1, therefore, in the first instance the security offered by the principle borrower is to be liquidated/adjusted before initiating any proceeding for recovery of the amount by sale of the mortgage property. It was urged questions raised herein are substantial questions of facts and law were also raised in the leave to defend application, which application was dismissed without providing, adequate opportunity to lead evidence.

3. In support of his contention learned counsel for the appellant has relied upon plethora of judgments almost over 40, mostly dealing with principle on which leave to defend is to be considered. In some of the cases from Indian jurisdiction, it is held that where the charged/pledged goods are lost by the bank, discharges the surety to the extent of lost security.

4. Learned counsel for the respondents contends that the appeal is hit by section 22(3) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 as the appellant has failed to deposit the decretal amount. It is urged that the appellant had created equitable registered mortgage to secure the liability, cannot avoid the liability on the pretext of any fraud as alleged against the principal borrower/respondents 2 and 3. It is stated that the appellant had entered into a mortgage of the subject property with open eyes and the recital of the registered mortgage deed acknowledges that such mortgage was entered to secure finance facility agreement between the respondent No.1 Leasing Company and the respondents Nos.2 and 3. Learned counsel has drawn our attention to Clause 7 of the Mortgage Deed, page 191 (195), which inter alia provides that the mortgagor has also created equitable mortgage for the payment of purchase price under the lease facility agreement dated 19-7-2005. It was further provided "that redemption shall not be claimed until total purchase price has been paid to the Company by the mortgage deed". It was argued that the redumption of the equitable mortgage as well as registered mortgage is admitted, no substantial question of law was been raised in the leave to defend application, same was rightly dismissed and the learned Banking Court had no option but to decree the suit.

5. It was further argued by the learned counsel for the respondent No. 1 if at all a fraud has been committed on the appellant by the principal borrower the respondents Nos.2 and 3 he may have a remedy for damages against them, respondent No.1 has no concern. In support of his contention reliance is placed on case of Zakas (Pvt.) Limited v. The Bank Alfatah Limited 2004 CLD 1660, Union Bank of India v. Manku Narayana AIR 1987 SC 1078, Haji Fazal Elahi & Sons v. Bank of Punjab 2004 CLD 162 and Marianne Khan v. National Bank of Pakistan 2006 CLD 232 and few unreported cases.

Having heard the arguments perusing the record.

6. Appellant does not dispute creation of equitable and registered mortgage. Contention of learned counsel that he was lured by the representation made respondent No.3 on behalf of the principal borrower that there is sufficient security and creating mortgage would not

risk property of the appellant, is preposterous. Both the equitable mortgage as well as registered mortgage unequivocally acknowledges that the mortgage has been created in consideration of finance provided or promised by the respondent. No.1. Saudi Pak Leasing, to Messrs Cosmos Communication (Pvt.) Ltd. through its director Abdul Aziz (defendants Nos.1 and 2) respondents Nos.2 and 3 respectively. Appellant cannot be allowed to plead any Condition extraneous to written terms and agreement between the parties.

7. As regards the contention of the learned counsel there was misrepresentation on the part of the principal borrower respondents Nos. 2 and 3, it may be observed that appellant may have a remedy against the principal borrower for 1 damages and even otherwise, appellant was surety for the liability of the principal borrower could proceed against the principal borrower and or security lying with the respondent No.1.

8. Appellant by executing a mortgage, he commits to the mortgagee/creditor that on failure of the borrower/debtor to clear the liability same be set-off against the mortgage property. All engagement to guarantee or repayment of debt implies a promise on the part of principal borrower to indemnify mortgagor/guarantor whose mortgage/charged property is liquidated to 'satisfy' a debt for which the mortgage/charge was created (see section 145 of the Contract Act). Appellant has an independent right to proceed against the principal borrower.

9. Learned counsel for the appellant strenuously argued that in the instant case before mortgage was created principal borrower had already created charge in respect of leased goods. It was urged that the appellant as a mortgagor/surety for repayment of the liability, if any, of the principal borrower is entitled to the benefit of every, security, which the creditor held against the principal debtor. It was urged that the creditor should have proceeded against the principal borrower before proceeding against the mortgaged property. There is no cavil to the proposition that surety entitled to the benefit of all security of the debtor held by the creditor, such proposition is resounds principles embodied in section 141 of the Contract Act. It is prerogative of the contracting parties to negotiate a contract on terms and conditions as may be agreeable. In normal course of the event, since the liability of surety is co-extensive with that of principal borrower, all the sureties stand side by side and are on equal footing, it gives an option to the creditor to proceed against the securities and or charged property in the sequel creditor in its option considers most expedient or less cumbersome to proceed against, unless of course parties to the contract of surety/guarantee/mortgage stipulate otherwise. Agreement of surety, guarantor mortgagor of a debt could be subjected to contingency or limitation to proceed after exhausting remedy against the principal sequence as may be contemplated in such agreement (see section 128 of the Contract Act). We have examined the Memorandum of Deposit of Title Deed (equitable mortgage) at page 183 of the file as well as mortgage deed dated 19-7-2005 to decipher any limitation and or contingency whereby the creditor had agreed to proceed against the principal borrower or any other security before proceeding against the mortgage/charged property. Learned Counsel for the appellant was unable to point out any limitation or contingency to proceed against the mortgage either in the Memorandum of Deposit of Title Deed (equitable mortgage) or in the mortgage deed. On the contrary, Memorandum of Deposit of Title Deed shows that the liability assumed is in the sum of Rupees 30 million. Both the charge documents shows that the mortgage was created to offer mortgage property as a security for repayment of liability

under the finance agreement dated 19-7-2005 and all supplemental agreements made by the creditor with the respondent No.2 Cosmos Communication (Pvt.) Ltd. Surety, guarantor, and mortgagor have no right to insist upon the creditor to proceed against any other security or charged property held by the creditor unless it is shown that there is a contract to the contrary, which the appellant failed to demonstrate.

10. As regards contention of learned counsel for the appellant that the respondent No.1 failed to carry out due credit and financial analysis as required under law and practice. It may be observed that it was for the appellant to consider all aspects of financial credibility of the debtor before standing mortgagor/guarantor for the finances committed or advanced to the principal borrower for which appellant has to blame himself and none other. It was feebly argued that the appellant is neither Director nor beneficiary of the finance availed by the Respondents Nos.2 and 3, therefore not liable. It may be observed that 'one need not be director, partner and officer or in any manner beneficiary of finance extended to the borrower/debtor. Commitment or promise of the creditor to extend finance to the borrower is sufficient consideration for standing guarantor, mortgagor or surety, no law provides that guarantor, and surety or mortgagor should invariably be direct or personal beneficiary for the credit line extended by the creditor to the borrower (see section 127) of the Contract Act).

Finding no merits, appeal is dismissed.

M.U.Y./I-33/K Appeal dismissed.

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