Order Sheet
I N THE HIGH COURT OF SINDH, KARACHI.

Suit No. B-25 of 2006

Present:
Mr. Justice Khilji Arif Hussain

Date of hearing	:	08.08.2006, 16.08.2006 & 22.08.2006
Plaintiffs	:	Muhammad Khilji & others through Mr. Abdul Latif A. Shakoor, Advocate.
Defendant	:	KASB Bank Ltd. through Mr. Nadeem Ahmed, Advocated

For hearing of CMA No. 4138/06:

ORDER

KHILJI ARIF HUSSAIN, J.- The plaintiffs filed application under Order XXXIX Rules 1 & 2 read with Section 151, CPC and prayed to restrain the defendant from selling mortgaged properties, viz. Shops on plot bearing Survey Nos. 116, Sheet No. 45/116 & 45/122. Old Town, Bombay Bazaar, Karachi and bungalow No. B-34, Block 8, Gulshan-e-Iqbal, Karachi.

Brief facts for the purpose of deciding the listed application are that plaintiff No. 1 carrying on the business as sole proprietor of Al-Madina Trading and plaintiffs No.2 & 3, who are his father and mother, mortgaged their above referred properties as a security for the finance facility of Rs. 17,000,000/- to plaintiff No. 1 to facilitate export and repayment was to be made on realization of export proceeds. As per memo of plaint agreed markup on the facility was @ 8 to 10% per annum to be charged quarterly. One of the grievances of the plaintiffs was that instead of charging markup at 8 to 10% per annum defendant had charged markup at 13.68 to 16% per annum, in disregard of State Bank of Pakistan directions. The plaintiffs on 01.03.2006, 22.03.2006 & 25.03.2006 requested defendant-Bank to allow plaintiffs to establish letter of credit and assured that all dues of defendant-Bank including markup will be adjusted thereafter. However, defendant-bank never replied to the plaintiffs' letter nor acceded to their request. It is further alleged that the plaintiffs informed the defendant-Bank particulars of export receipts in the sum of US$ 5, 14,457/- equivalent to Pakistani Rs. 30, 417, 435, 66 for a period ending 30.06.2005, which is carried out through defendant-Bank. It is also alleged that the plaintiff deposited markup installment of Rs. 300,000/- on 09.03.2006 and further a sum of Rs. 45,000/- on the same is not reflected in the statement of account for the period 01.03.2005 to 15.03.2005 issued by the defendant-Bank. The defendant-Bank through its advocate served notices dated 28.03.2006 and 20.04.2006 for the sale of mortgaged properties under Section 15(2) of Financial Institutions (Recovery of Finances) Ordinance, 2001. On receipt of the second notice dated 20.04.2006, the plaintiff on 04.05.2006, through his advocate replied and informed the defendant-Bank that the defendant-Bank is fully secured as mortgaged properties are presently valued at Rs. 30,000,000/- and Rs. 20,000,000/- respectively and requested the Bank not to take hasty steps as threatened with a view to maintain cordial relations between the parties. The plaintiff filed the suit seeking declaration that the legal notices dated 28.03.2006, 20.04.2006 and 05.05.2006 issued by the defendant-Bank to the plaintiffs for sale of their mortgaged properties are illegal, void, ultra vires and of no legal effect.

Heard Mr. Abdul Latif A. Shakoor learned counsel for the plaintiffs and Mr. Nadeem Ahmed learned counsel for the defendant-Bank.

Coming to the contention of the learned counsel for the plaintiffs that before deciding any application, court has to decide the leave granting application and learned counsel relied upon the case of Muhammad Azwar Siddiqui vs. Chief Executive Union Leasing Ltd (2006 CLC 946). Wherein it was held that plaint cannot be rejected without first granting leave.

In my humble view, an interlocutory application on behalf of the defendant is normally not entertained without first deciding whether defendant is entitled to grant of leave or not, but if plaintiff had filed an application and delay in deciding the application may cause prejudice to the defendant while hearing such application on its merits defendant's contention can be looked into. I would also like to mention here that even an application like an application under Section 10, CPC or an application under Section 34 of the Arbitration Act, filed by the defendant without deciding application for leave can be heard and decided on its merits. It would be worth to mention here that although defendant-Bank had filed application for leave to defend and copy whereof has been sent to the advocate for the plaintiff by courier service, the plaintiffs, advocate refused to argue the application and claimed notice through bailiff.

Mr. Abdul Latif A. Shakoor learned counsel for the plaintiffs, argued that the plaintiff No. 1 is a sole proprietor of the firm M/s Al-Madina Trading, whereas plaintiffs No. 2 & 3 are mortgagors of their properties with the defendant-Bank, learned advocate for the plaintiff stated that on 06.05.2004 and 13.05.2004 a facility in the sum of Rs. 17,000,000/- was granted to plaintiff No. 1, who used and utilized the same. The facility was granted at the markup of 8% per annum and repayment was to be made from realization of export proceeds, but instead of charging markup @ 8% per annum, the defendant-Bank has illegally and unlawfully charged markup at 13.86 to 16% per annum. It was contended by the learned counsel for the plaintiff that through the plaintiff has requested the defendant-Bank for the establishment of the letter of credit and renewal/regularization of the finance facility, but the defendant Bank without any justification refused to establish the letter of credit and renew the finance facility granted. It was contended that all export proceeds are lying with the defendant-Bank and a sum of Rs. 300,000/- and Rs. 45,000/- were deposited on 09.03.2005, but same is not reflected in the statement of account. The learned counsel argued that the defendant-Bank's facility is fully secured and notices in question have been issued malafidely and without any lawful authority. He further argued that in the counter affidavit supplied to him the amount paid by the defendant-Bank is much more than the amount shown in the counter affidavit filed before the Court, which clearly establishes discrepancies in the amount. In support of his contention, the learned counsel for the plaintiff relied upon the case of Sh. Abdul Sattar Laqsi vs. Federation of Pakistan & another (2004 CLD 252).

On the other hand, Mr. Nadeem Ahmed, learned counsel for the defendant-Bank, argued that the plaintiff had filed to adjust the outstanding liability within the time frame and committed default and accordingly the defendant-Bank served notice under section 15 of Financial Institutions (Recovery of Finances) Ordinance 2001 for sale of the mortgaged properties. The learned counsel further argued that in terms of Section 15 of the Ordinance, Court cannot grant injunction to restrain the defendant-Bank form selling the mortgaged properties for recovery of outstanding dues. In support of his contention the learned counsel for the defendant-Bank relied upon the case of Sheikh Abdul Sattar Vs. Federation of Pakistan (SBLR 2006 Balochistan 89) and Muhammad Hussain vs. SME Bank Limited & another (2003 CLD 323).

I have taken into consideration respective arguments advanced by the learned counsel for the parties and perusal the record.

From the perusal for the record it appears that admittedly finance facility in the sum of Rs. 17,000,000/- has been used and utilized by the plaintiffs and a substantial part of it has not been paid so far. From the plaintiffs own letter dated 01.03.2006. It appears that the plaintiffs admitted not only about the outstanding dues of the defendant-Bank, but

also that they have committed default in depositing markup on its due and requested for renewal and regularization of facility granted to the plaintiffs. From the perusal of the plaint as well as documents filed along with it, one can see that the plaintiffs have filed to adjust the outstanding dues and substantial part of it is outstanding. The plaintiffs only questioned about the charging of markup at a rate higher than the rates agreed between the parties, but failed to point out that how much excess amount has been charged by the defendant-Bank.

The question, which requires to be considered while deciding the listed application is "Whether in the circumstances of the case an application under Order XXXIX rules 1 & 2, CPC is maintainable" Section 15 of Ordinance, 2001 reads as under:

"15. **Sale of Mortgaged Property.** (1) In this section, unless there is anything repugnant in the subject of context-----

(a) "mortgage" means the transfer of an interest in specific immovable property for the purpose of securing the payment of the mortgage money or the performance of an obligation which may give rise to a pecuniary liability;

(b) "mortgage money" means any finance or other amounts relating to a finance, penalties, damages, charges or pecuniary liabilities, payment of which is secured for the time being by the document by which the mortgage is effected or evidenced, including any mortgage deed or memorandum of deposit of title deeds: and

(c) "mortgaged property" means immovable property mortgaged to a financial institution.

(2) In case of default in payment by a customer, the financial institution may send a notice on the mortgagor demanding payment of the mortgage money outstanding within fourteen days from service of the notice, and failing payment of the amount within due date, it shall send a second notice of demand for payment of the amount within fourteen days. In case the customer on the due dated given in the second notice sent, continues to default in payment, financial institution shall serve a final notice on the mortgagor demanding the payment of the mortgage money outstanding within thirty days from service of the final notice on the customer.

(3) When a financial institution serves a notice of demand, all the powers of the mortgagor in regard to recovery of rents and profits from the final mortgaged property shall stand transferred to the financial institution until such notice is withdrawn and if it shall be the duty of the mortgagor to pay rents and profits from the mortgaged property to the financial institution.

Provided that whether the mortgaged property is in the possession of any tenant or occupier other than the mortgagor, it shall be the duty of such tenant or occupier, on receipt of notice in this behalf from the financial institution to pay the rent or less money or other consideration agreed with the mortgagor to the financial institution.

(4) Where a mortgagor fails to pay the amount as demanded within the period prescribed under sub-section (2) and after the due dated given in the final notice has expired the financial institution may, without the intervention of any Court, sell the mortgaged property or any part thereof by public auction and appropriate the proceeds thereof towards total or partial satisfaction of the outstanding mortgage money.

Provided that before exercise of its powers under this subsection, the financial institution shall cause to be published a notice in one reputable English daily newspaper with wide circulation and one Urdu daily newspaper in the Province in which the mortgaged property is situated specifying particulars of the mortgaged property, including name and address of the

mortgagor, details of the mortgaged property, amount of outstanding mortgage money, and indicating the intention of the financial institution to sell mortgaged property. The financial institution shall also send such notices to all persons who to the knowledge of the financial institution, have an interest in the mortgaged property as mortgagees.

(5) The financial institution shall be entitled, in its discretion, to participate in the public auction, and to purchase the mortgaged property at the highest bid obtained in the public auction.

(6) Where the mortgagor or his agent or servant or any person put in possession by the mortgagor or on account of the mortgagor does not voluntarily give possession of the mortgaged property sought to be sold or sought to be purchased or purchased by the financial institution, a 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:

Provided that the Banking Court may not order eviction of a person who is in occupation of the mortgaged property or any part thereof under a bona fide lease, except on expiry of the period of the lease, or on payment of such compensation as may be agreed between the parties or as may be determined to be reasonable by the Banking Court.

Explanation. (1) Where the lease is created after the date of the mortgage and it appears to the Banking Court that the lease was created so as to adversely affect the value of the mortgaged property or to prejudice the rights and remedies of the financial institution, it shall be presumed that the lease is not bona fide, unless proved otherwise.

(7) For the purpose of execution and registration of the sale-deed in respect of the mortgaged property, financial institution shall be deemed to be the duly authorized attorney of the mortgagor and a sale deed executed and presented for registration by duly authorized attorneys of the financial institution shall be accepted for such purpose by the Sub-Registrar under the Registration At. 1908 (XVI of 1908).

(8) Upon execution and registration of the sale-deed of the mortgaged property in favor of the purchaser all rights in such mortgaged property shall vest in the purchaser free from all encumbrances and the mortgagor shall be divested of any right, title and interest in the mortgaged property.

(9) Net sale proceeds of the mortgaged property after deducting all expenses of sale or expenses incurred in any attempted sale, shall be disturbed ratably amongst all mortgagees in accordance with their respective rights and priorities in the mortgaged property. Any surplus left, after paying in full all the dues of mortgagees, shall be paid to the mortgagor.

(10) A financial institution which has sold mortgaged property in exercise of powers conferred herein shall file proper accounts of the sale proceeds in Banking Court within thirty days of the sale.

(11) All disputes relating to the sale of the mortgaged property under this section including disputes amongst mortgagees in respect of distribution of the sale proceeds shall be decided by the Banking Court.

(12) Neither the Banking Court nor the High Court shall grant an injunction restraining the sale or proposed sale of mortgaged property unless-

(a) It is satisfied that no mortgage in respect of the immovable property has been created, or

(b) all moneys secured by mortgage of the mortgaged property have been paid; or

(c) the mortgagor or objector deposits in the Banking Court in cash the outstanding mortgage money.

(13) The rights and remedies provided under this section are in addition to, and not in lien of, any other rights or remedies a financial institution may have under this Ordinance."

(14) The provisions contained in this section shall have effect notwithstanding any thing contained in this Ordinance."

Sub-section (12) of Section 15 provides that neither the Banking Court nor the High Court shall an injunction restraining the sale or proposed sale of the mortgaged property unless:

(a) it is satisfied that no mortgage in respect of the immovable property has been created, or
(b) all moneys secured by mortgage of the mortgaged property have been paid: or
(c) the mortgagor or objector deposits in the Banking Court in cash the outstanding mortgage money.

Legislature in its wisdom had framed a special law for expeditious recovery of dues of financial institutions. From reading the above Section one can see that the legislature used negative language in it. The negative, prohibitory and exclusive words or terms are indicative of legislative intent that the statute is to be mandatory. While interpreting a law, Courts have to find out the intention of the law makers, from the words used in the statute, and as such while interpreting Section 15(12) of the Ordinance, it has to be interpreted in a way which advance the intention of law makers and not in a way which defeat the very object of special law, resuming that sub-section (12) of Section 15 of the Ordinance 2001, in my humble opinion, is a mandatory provision restraining the court from granting injunction, to restrain the proposed sale of the mortgaged property, except when condition of clause (a), (b) & (c) of sub-section (12) of section 15 of the Ordinance are attracted.

In order to restrain the defendant-Bank to sell the mortgaged properties without intervention of the Court, mortgagor or customer ought to have satisfied that the property has not been mortgaged or all money secured by mortgage of the mortgaged property has been paid or mortgagor or objector deposited in Banking Court in cash outstanding mortgage money.

The plaintiff have not disputed about the mortgage of the properties as a security for the money used and utilized by them, nor it was the case of the plaintiffs that all money used and utilized by them, nor it was the case of the plaintiffs that all money secured by the mortgage has been paid. The learned counsel for the plaintiff was specifically asked how much amount, according to the plaintiff is outstanding and whether plaintiff is ready to deposit the same in Court, Mr. Abdul Latif A. Shakoor, learned counsel for the plaintiffs, in reply made & statement at bar that about Rs. 15 to 20 million is outstanding to the defendant-Bank and he can deposit the amount by disposing of one of the properties.

The question, what actual amount is outstanding against the plaintiffs can be decided after recording the evidence or after detailed scrutiny of the statement of account, as the case may be, put neither or less it is established that a substantial

amount is outstanding against the plaintiffs which plaintiffs failed to pay till date and to secure the same plaintiffs mortgaged the properties.

Section 15 of the Ordinance requires that in case of default in payment by a customer the financial institution may send a notice to mortgagor demanding payment of mortgaged money outstanding within 14 days from the service of the notice and on failing to pay the amount within due date, second notice of demand for payment of the amount within 14 days has to be served. If the mortgagor fails to pay the amount after service of second notice, then financial institution has to serve a final notice on the mortgagor demanding payment of the mortgaged money outstanding within 30 days from the service of the final notice on the customer. Upon service of the final notice the financial institution acquires right to recover the rent and profit from the mortgaged property till the time notice is withdrawn and to sell the mortgaged property without the intervention of Court by public auction.

Admittedly, in the instant case the defendant-Bank has served three notices, first notice was served upon plaintiffs No. 2 & 3 mortgagors on 28.03.2006 calling upon the mortgagors that a sum of Rs. 19,621,067/- is outstanding against the customer as at 16.03.2006. The defendant-Bank called upon plaintiffs No. 2 & 3, mortgagors, to pay the due amount together with further markup within 14 days from the date, failing which mortgaged properties will be sold for recovery of Bank dues. The second legal notice under Section 15(2) of the Ordinance was sent to plaintiffs No. 2 & 3 on 20.04.2006 while drawing their attention to first notice calling upon them to adjust the outstanding dues within 14 days time. The defendant-Bank then served final notice on 05.05.2006 and called upon plaintiffs No. 2 & 3 to deposit the amount within 30 days, falling which mortgaged property will be sold for recovery of bank dues. The above three notices, served upon plaintiffs No. 2 & 3, satisfied the requirements of Section 15(2) of the Ordinance.

From the perusal of the secured it appears that the plaintiffs No. 2 & 3 have mortgaged their respective properties with the defendant-Bank. The defendant-Bank placed on record notices served upon plaintiffs No. 2 & 3, as required under Section 15(4) of Ordinance, 2001 calling upon them to pay the outstanding dues, failing which properties mortgaged by them to pay the outstanding dues, failing which properties mortgaged by them will be sold for recovery of the Bank’s dues and money secured by mortgage of property has not been paid nor mortgagors are ready and willing to deposit the admitted outstanding dues in Court. The plaintiffs are not entitled for the grant of relief asked for.

The matter does not end here and I cannot close my eyes from the fact that plaintiffs have specifically alleged that value of one of the properties, mortgaged by plaintiffs No. 2 or 3, is more than the outstanding dues of the defendant-Bank. In my view the defendant, being a banking institution, is supposed to act fairly and should act in a manner that by their act their client should not suffer loss unnecessarily. The interest of justice will be served if defendant-Bank is directed to sell on the properties of plaintiffs No. 2 & 3 in the first instance and it from the proceeds of sale outstanding dues could not be satisfied, then put the second mortgaged property for sale.

With the above observation listed application is dismissed.