

Enforcement of a Mortgage

by Ammar Haykal - a.haykal@tamimi.com - Sharjah

Zane Anani - z.anani@tamimi.com -

March 2013

The judgment below highlights how a mortgage can be enforced by the Execution Court in the event a debtor defaults on paying the mortgage installments. The mortgage deed, in this case, was silent on the issue of obtaining attachments over mortgaged property.

The judgment below highlights how a mortgage can be enforced by the Execution Court in the event a debtor defaults on paying the mortgage installments. The mortgage deed, in this case, was silent on the issue of obtaining attachments over mortgaged property.

Summary

A Home Finance provider (the creditor- mortgagee) sought an order against a debtor (mortgagor) for an attachment to be levied on property and for the sale of land by public auction in order to collect a debt amounting to AED 1,637,807.22 from the proceeds of the sale. The Home Finance provider had given the debtor a mortgage in the amount of AED 1.6 million to construct a villa on the plot pursuant to a mortgage contract attested by the Land Department.

The debtor defaulted on paying the mortgage installments and as a result, the Home Finance provider filed an application with the Execution judge of the Dubai courts to enforce the mortgage deed.

The Court of Cassation held that the Home Finance provider was entitled to recover its debt from the sale proceeds pursuant to Article 292, 293 of the Civil Procedure Law and Articles 25, 26 of Dubai Law 14 of 2008 concerning mortgages.

It was established that the Home Finance provider could proceed directly to the Execution judge to execute the mortgage deed without going to the courts. The judgment also highlights that pursuant to Article 173 (3) of the Law of Civil Procedures, it is not permissible to contest judgments by the appeal courts at cassation if they concern execution procedures.

Execution procedures are steps taken by the execution judge in execution of judgments and other executory instruments by way of compulsory enforcement. 173(3) also encompasses disputes relating to the procedures falling within the jurisdiction of the execution judge.

Court of First Instance

On 12.10.11, the judge dismissed the Home Finance Provider's application on the basis that the mortgage deed did not expressly state that the creditor-mortgagee had the right to obtain an executive attachment over the mortgaged property and therefore not entitled to request that it be sold by public auction before the end of the mortgage term (06.08.28)

Court of Appeal

The Home Finance Provider appealed the Court of First Instance judgment [Property Execution] and on 11.10.12, the Court of Appeal accepted the appeal in form and, on the merits, reversed the first instance decision and ordered that an executive attachment be imposed on the mortgaged property (in anticipation of selling it by public auction) and the Land & Property Department be

notified accordingly in accordance with its procedures and finally, the Home Finance provider was authorised to collect an amount equivalent to the principal amount of debt from the sale proceeds.

Court of Cassation

The debtor/mortgagor appealed before the Court of Cassation on 05.03.12 seeking a reversal of the appealed decision. The Home Finance provider argued that no appeal against the Court of Appeal's decision was possible because it was final, pursuant to Article 173(3) of the Civil Procedure Law.

The Home Finance provider's argument was accepted by the Court of Cassation on the basis of Article 173 (3) of the Civil Procedure Law and the last section of Article 17 of Law No. 3 of 1992 on the formation of the Dubai Courts, it reiterated that appeals at cassation are not available for disputes concerning enforcement where a request is made to bar, stay, continue, or invalidate enforcement, as the case may be, whether brought by a party to the enforcement action or otherwise, as long as the dispute concerns enforcement, whatever the amount or nature of the relief sought, be it provisional or substantive (except those actions specifically excluded by law such as an action for recovery of possession) where the final outcome is to allow or disallow enforcement as valid or invalid. This is known as an enforcement action.

According to the grounds for relief, the action is a substantive enforcement action by the Home Finance Provider seeking an executive attachment over the property mortgaged in its favour, owned by the debtor-mortgagor, and registered in his name at the Land & Property Department, Dubai and an order that the latter be notified to arrange for the property to be sold by auction in accordance with its applicable procedures, and that the creditor would be entitled to recover its debt from the sale proceeds pursuant to Articles 292, 293 of the Civil Procedure Law and Articles 25, 26 of Dubai Law No. 14 of 2008 concerning mortgages.

The Home Finance Provider's requests were granted. The cassation appeal revolved around the issue of the writ of execution and the property in question and as this matter was adjudicated by the Court of Appeal, its decision cannot be appealed to the Court of Cassation. The appeal was dismissed with costs and AED 2,000 as advocate's fees with the deposit forfeited.