IN THE HIGH COURT OF SINDH AT KARACHI

HCA NO.90 of 2007

JUDGMENT / OPINION

Date of hearing: 04.10.2007 :

Appellant: M/s. Bismillah Textile Ltd. through Mr.Muhammad Saleem Mangrio, Advocate :

Res. No.1: Habib Bank Limited through Mr. Shakeel Pervaz, Advocate :

Res. Nos.2-56: Muhammad Ilyas and others are called absent :

N O T E:

This matter was heard by a Division Bench comprising of my learned brother Muhammad Athar Saeed, J. (as his lordship then was) and my self and by a short order dated 04.10.2007 the same was allowed in open Court and the short order was signed. Thereafter, I have recorded the reasons but before signing the same my learned brother Muhammad Athar Saeed, J. (as his lordship then was) ceased to be a Judge of this Court.

Rule 3 of Chapter 4-H of Volume V of the High Court Rules & Order deals with such situation and provides as under:-

> "Opinion recorded before delivery of judgment: Where an appeal has been heard by a Bench of the Court, the written opinions of the Judges who heard the appeal, but have ceased to be attached to the Court before delivery of judgment, shall, unless delivered by another Judge of the Bench which heard the appeal, be deemed to be minutes merely and not judgments."

Earlier the same situation was dealt by two separate learned Division Benches of this Court. In the reported case of GHULAM HUSSAIN VS. THE STATE (PLD 1981 Karachi 711) it was held as under:-

> ". . . Although both the Judges of a Division Bench may have concurred in the decision and the short order, it is conceivable that the reasons for the conclusion reached may be different. In that case, if one of the Judges of the Division has ceased to be available, as in the instant case, the reasons given by the Judge who still continues to adorn the High Court, would not really be the reasons of the Bench in support of the conclusions reached or the short orders passed by it, but would be, in effect, the individual opinion of that learned Judge. However,

such a written opinion would be of assistance to the Supreme Court, in case an appeal against the decision of a Division Bench is preferred to it."

In the reported case of OFFICE REFERENCE DATED 28.4.1981 (PLD 1982 Karachi 250) a learned Division Bench of this Court has held as under:-

". . . The cases in which short orders have been recorded and signed by the concerned Judges, these cases stand disposed of as these orders are fully operative in law. In the last-mentioned cases the Judges who have ceased to hold office cannot record reasons, but in cases in which one of the Members of the Bench was a Judge who is still available, he may be requested to record his reasons in support of the decision which will, however, serve as minutes of his individual opinion for use as deemed fir by the Supreme Court in case appeals are filed against such orders."

The matter was also placed before the Hon'ble Chief Justice by Reference dated 04.02.2008 who had allowed the undersigned to deliver the judgment.

Following the above pronouncements and permission of the Hon'ble Chief Justice I am recording the following reasons/opinion in support of short order already announced and signed by both the members of the bench.

NADEEM AZHAR SIDDIQI, J : The appellant has filed this appeal challenging the order dated 15.11.2005 passed by the learned Single Judge of this Court in Ex. Appln.

No.11 of 2004 whereby dismissed the appellant's application under Section 151 CPC (CMA No.773 of 2005) by which the appellant has prayed that Official Assignee may be directed to issue/grant sale certificate for transfer of property free from duties/taxes.

The facts necessary for disposal of this appeal are that the appellant through public auction held by Official Assignee under the order of the Court purchased property namely Lake View Motel situated at Islamabad on "as is where is basis" against a consideration of Rs.32.5 crore and the sale was made absolute vide order dated 5.1.2005. After the purchase of property as a result of enquiries the Official Assignee received property tax bill for the year 2004-2005 amounting to Rs.42,31,482/- and water and allied charges amounting to Rs.6,57,948/-. The bills were forwarded to Respondent No.1 who refused to pay the bills on the pretext that the property was not auctioned free of liabilities and the appellant was liable to pay the dues outstanding against the property prior to sale of property in their favour. The appellant filed application under Section 151 CPC (CMA No.773 of 2005) for issuance of sale certificate free from dues/taxes. The Respondent No.1 filed counter-affidavit to the said application and the Official Assignee has also filed his objections. The learned Single Judge dismissed the application, hence this appeal.

The Respondent No.1 file counter-affidavit to the appeal. The pleas raised by the Respondent No.1 are that the initial offer dated 10.12.2004 made by the appellant for purchase of the property does not contain pre-condition "free from all liabilities" and that the property was offered for sale "as is where is" basis. The Respondent No.1 has also challenged the authority of the person who has signed and verified the appeal.

Mr. Muhammad Saleem Mangrio, learned counsel for the appellant, has contended that while advertising the sale of property neither liabilities were mentioned/disclosed nor in the advertisement it was mentioned that the dues and taxes shall be borne by the purchaser. He submits that the property was sold on "as is where is" basis which only reflect the condition of the property sold. He further submits that the order of the learned Single Judge is in ignorance of Section 16(4) of The Sindh Urban Immovable Property Tax Act, 1958, and Section 55(1)(g) of the Transfer of Property Act, 1882.

The learned counsel for the appellant has relied upon the following reported cases:-

1) MIR AMJAD ALI VS, THE OFFICIAL ASSIGNEE, HIGH COURT OF SINDH, KARACHI AND OTHERS (2001 CLC 671)

2) UNITED BANK LIMITED VS. M/Z. AL-NOOR ENTERPRISES AND ANOTHER (SBLR 2006 Sindh 479)

3) M/S INDUSTRIAL DEVELOPMENT BANK OF PAKISTAN VS. M/S. MAIDA LIMITED AND OTHERS (1994 SCMR 2248)

4) NATIONAL BANK OF PAKISTAN VS. ZARAK TEXTILE MILLS LTD (SBLR 2007 Sindh 1358).

On the other hand Mr. Shakeel Pervaz, learned counsel for Respondent No.1, has supported the order and attack the maintainability of the appeal on the grounds that it has been filed by an unauthorised person and under a wrong provision of law. The learned counsel further submits that the appeal is time barred. On merit he submits

that the offer made by the appellant was not conditional and that at the time of acceptance of offer no such objection was raised and the sale was made absolute vide order dated 15.1.2005 and thereafter the appellant cannot raise the question of payment of taxes. The learned counsel has attempted to distinguish the case of M/S. INDUSTRIAL DEVELOPMENT BANK OF PAKISTAN VS. M/S. MAIDA LIMITED AND OTHERS (1994 SCMR 2248) by submitting that in that case offer was made free from all liabilities. He relied upon the following case:-

1. SHAHID HUSSAIN MALIK VS. HABIB BANK LIMITED (2006 CLD 766)

I will first deal with the legal objections raised by the learned counsel for Respondent No.1 regarding the maintainability of appeal. The first objection is that the appeal was filed by an unauthorised person. From the perusal of record of appeal it appears that a Board Resolution dated June 18, 2005, has been placed on record by which Mr. Abdul Hafeez Shaikh was authorised to deal with the legal matters regarding property known as Lake View Motel. Alongwith the Vakalatnama of the learned counsel for the appellant a special power of attorney was filed which was executed by the Chief Executive of the appellant in favour of Mr. Tahir Ahmed in respect of property known as Lake View Motel. In view of the production of two documents this objection has no force. The other objection was that the appeal was filed under the wrong provision of law. Mere mentioning the wrong provision of law is not sufficient to reject the appeal. If the Court has jurisdiction to hear the appeal this defect can be ignored and the appeal on merits can be considered. As far as the objection to the limitation is concerned the time provided for filing of High Court Appeal is twenty days. The impugned order was passed on 15.11.2005, copy was applied on 18.11.2005, which was made ready and delivered to the appellant on 24.11.2005 and the appeal was filed on 12.12.2005 within the time

prescribed by law. The legal objections raised by the learned counsel for the appellant have no force and are rejected.

The property was sold through pubic auction on "as is where is" basis and it is an admitted position that in the advertisement for sale of property neither the dues on the property was mentioned/disclosed nor in the advertisement it was mentioned that the property was sold with liabilities to be borne by the purchaser. The learned counsel for Respondent No.1 has stressed that since the property was sold on as is where is basis the purchaser is liable to pay the dues and disclosing the dues in the advertisement was not necessary. To show that unless it is mentioned in the advertisement that property is sold with liabilities the purchaser is not bound to pay the same, three advertisements issued by Respondent No.1 in respect of sale of property in question were referred by the learned counsel for the appellant. In the first advertisement dated 22.11.2003 there was no mention regarding liabilities. In the other two advertisements dated 5.5.2004 and 6.5.2004 it was specifically mentioned that the property is to be sold on as is where is basis and all liabilities, dues, taxes of whatever nature will be borne by the purchaser. This condition is missing from the advertisement for sale of property published by Official Assignee in daily DAWN dated 19.10.2004. It is now well settled that "as is where is" basis only referable to physical attributes of the property sold and did not relate to liabilities, dues and taxes. A learned D.B. of this Court in the case of MIR AMJAD ALI VS. THE OFFICIAL ASSIGNEE, HIGH COURT OF SINDH, KARACHI AND OTHERS (2001 CLC 671) has held as under:-

> "Having heard the learned counsel, we are of the view that the expression "as is where is" is only referable to the physical attributes of the vehicles in terms of auction notice, dated 7.2.1999 and not the intent motor vehicle tax liability against these vehicles. Learned Official Assignee who appeared before us on the next date confirmed that the appellants were never apprised of the tax liabilities against the vehicles auctioned."

In the other reported case of UNITED BANK LIMITED VS. M/S AL-NOOR ENTERPRISES AND ANOTHER (SBLR 2006 Sindh 479) another learned D.B. of this Court has held as under:-

> "It is now settled position in law that, when the mortgaged property is offered and sold under orders of the court, the auction purchaser acquires clean and unencumbered right and title to the property. Unless such charge, lien or encumbrance is notified in the sale proclamation as required under Rule 61 and 66 to Order 21 C.P.C. even then, the auction purchaser can challenge the validity of such charge, lien or encumbrance."

The same learned D.B. has also interpreted the terms "as is where is basis" and concluded that "as is where is" could be divided in two parts, "as is" and "where is". "As is" has been defined by the learned D.B. as under:-

> " "As it is." As it stands, means that, the property offered for sale in its present state, condition or form. It refers only to condition of the property sold no warranty, or assurance of any nature as to state or quality of the property is neither attached nor is to be presumed. It implies that the property is taken with whatever attributes good or bad known or inherent it may possess and that seller or lessor is released of any obligation or liability to reimburse purchaser or lessee for any defect that may be discovered later on."

"Where is" has been defined by the learned D.B. as under:-

> "Other part of the phrase "Where is" implies and meant 'at the place, location where the property happens to be or situated at the time of the examination, assessment, evaluation and making offer'. It also implies the place where the transaction is to be effected, concluded materialized or the place where from the delivery of the property is to be taken by the intended purchaser."

The learned D.B. has also held that "liability of utility bills is always on the consumer. In the instant case the consumer was the judgment-debtor company and not its property, merely providing utility services at the subject property will not create any charge over the property unless by law it is so declared, as in the case of Urban Immovable Property Tax Act and the Rules 1958".

In the case of SHAHID HUSSAIN MALIK VS. HABIB BANK LIMITED AND ANOTHER (2006 CLD 766) a learned D.B. of this Court has observed as under:-

> "It would be seen that the proclamation of sale specifically provided the condition of as is where is basis which ordinarily means that all the taxes, dues charges etc., would have to be paid by the auction purchaser."

From the above judgments it is established that the majority view of this Court is that "as is where is" only reflect the present status, condition, position, place and location of the property and the phrase cannot be interpreted to include liability, charge or

encumbrances attached to the property unless it is specifically provided in the agreement or in the proclamation of sale/advertisement for sale of property. It is also requirement of Order 21 Rule 66 CPC that any encumbrance to which the property is liable should be specified fairly and accurately. Encumbrance as defined in the Sixth Edition of Blakc's Law Dictionary includes the accrued and unpaid taxes.

The other aspect of the case is that the property tax is the first charge upon the property as provided under Subsection (4) of Section 16 of The Sindh Urban Immovable Property Tax Act, 1958, which reads as under:-

> "(4) Notwithstanding anything contained in any law or contract, any tax, surcharge or penalty due under this Act in respect of any land or building shall be a first charge upon such land or building and upon the movable property, if any, found thereon belonging to the defaulter."

The Hon'ble Supreme Court in the reported case of M/S. INDUSTRIAL DEVELOPMENT BANK OF PAKISTAN VS. M/S. MADIA LIMITED AND OTHERS (1994 SCMR 2248) while interpreting the above provision of law has held as under:

> "Subsection (4) in clear terms provides that any tax surcharge due under this Act shall have a first charge upon the building in supersession of anything contained in any law or contract. Therefore any right conferred by any law or contract which is in conflict with the priority conferred by this provision cannot be enforced against a claim for recovery of tax, surcharge or penalty due under this Act. When the attention of Mr. A.I. Chundrigar was invited to this provision he fairly conceded the legal position. Tax under the Urban Immovable Property Tax Act will have priority over the appellant's claim on the sale proceeds."

From the above it is clear that the property tax under the Urban Immovable Property Tax Act will have priority over the claim of Respondent's No.1 and before releasing the amount to the Respondent No.1 the tax has to be paid from the sale proceed of the property.

Even otherwise, the Respondent No.1 as seller of the property in absence of contract to the contrary is liable to pay all public charges in respect of the property sold as provided under Clause (g) of Subsection (1) of Section 55 of the Transfer of Property Act, 1882, which reads as under:-

> " (g) to pay all public charges and rent accrued due in respect of the property upto the date of the sale the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing."

A learned Single Judge of this Court in the case of NATIONAL BANK OF PAKISTAN VS. ZARAK TEXTILE MILLS LTD. (SBLR 2007 Sindh 1358) while interpreting the above provision of law has held as under:-

> "Section 55(1)(g) of Transfer of Property Act (IV) 1882, provides that the seller shall be bound to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing."

There is no contract between the appellant and Respondent No.1 that appellant was liable to pay the dues and taxes over the property. No such condition is available in the advertisement published by the learned Official Assignee. The seller to the contrary is bound under the law to pay the public charges and rent accrued in respect of the property upto the date of the sale of the interest except where the property is sold subject to encumbrances. The Respondent No.1 cannot shift the burden of payment of taxes and other dues upon the appellant in presence of specific provision of law. The Respondent No.1 has failed to rebut the legal position. The sale was made absolute by order dated 5.1.2005 which was the date on which the property was actually sold to the appellant. The appellant is not liable to pay any dues over the property upto 5.1.2005 and thereafter liable to pay all dues, taxes and other charges over the property. The Official Assignee is directed to issue/grant sale certificate to the appellant free from all liabilities. The property tax and water charges and any other charges over the property may be paid from the sale proceed. The Respondent No.1 is at liberty to claim the property taxes and the water charges and any other dues from the judgment-debtors.

For the above reasons/opinion the appeal was allowed by short order dated 4.10.2007.

JUDGE

Karachi:

Dated:06.02.2008.

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