

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Muhammad Ali Mazhar** and **Agha Faisal, JJ.**

First Appeal No. 195 of 2017

Muhammad Nasser Akhter
Versus
Bank Alfalah Limited & 5 others

For the Appellant : Mr. Merajuddin
Advocate.

For Respondent No. 1 : Mr. Haris Rasheed, Advocate

For Respondent No. 2 : Mr. Abdul Shakoor, Advocate

Dates of Hearing : 16.05.2018 & 29.05.2018

ORDER

Agha Faisal, J: The issue under determination is whether a Court sanctioned auction of an immovable property could be overturned after the sale of such property had been confirmed and hence the title and the possession stood conveyed.

2. The facts leading up to this appeal are encapsulated in chronological order herein below:

- i. The respondent No.1, being Bank Alfalah Limited (“**Bank**”) had filed a suit being Suit No. 32 of 2013 (“**Suit**”) before the Banking Court No. II, Karachi for recovery, inter alia, against the present appellant under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (“**Ordinance**”).

ii. The Suit was decreed by the learned Banking Court on 25.03.2014 (“**Decree**”) in favour of the Bank and the operative part thereof is reproduced herein below:

“It is hereby ordered that the suit of the Plaintiff is decreed against the defendants jointly and severally in the sum of Rs. 22,945,459/79 inclusive of markup till the date of filing of the suit i.e. 31.01.2013, and, thereafter cost of funds, till realization of the entire decretal amount. The prayers of the Plaintiff Bank for cost of suit, sale of mortgaged properties and sale of hypothecated assets/goods are also allowed.”

iii. The appellant, or any other judgment debtor, did not file any appeal against the judgment and Decree passed in the Suit. Subsequent to the Decree, execution proceedings commenced in such regard, in which appellant participated.

iv. The appellant filed an application under Order 21 Rule 2 CPC assailing the auction proceedings but such application was dismissed by the learned Banking Court vide order dated 02.05.2017.

v. After conclusion of the auction proceedings, the learned Banking Court was pleased to pass an order dated 30.08.2017 (“**Impugned Order**”), wherein appellant’s application to set aside the auction proceedings was dismissed and the sale of mortgaged property was confirmed in favour of the auction purchaser. It was further directed in the Impugned Order that the physical possession of the said property be handed over to the auction purchaser.

vi. The appellant claimed to be aggrieved by the Impugned Order and instituted the present appeal in respect thereof.

3. Mr. Merajuddin, the learned counsel for appellant, submitted that the Impugned Order was not sustainable in law and sought for the same to be set-aside. The submissions made by the learned counsel in such regard are summated herein below:

i. It was contended that the proclamation for sale that was issued was not in conformity with Order 21 Rule 66 read in conjunction with Order 21 Rule 69(2) of the CPC.

ii. It was further submitted that the valuation in respect of the property was undertaken a year prior to issuance of the proclamation and that the same valuation could not be made the basis of sale.

iii. It was contended that the property, which was auctioned, was on a road upon which several properties had been commercialized, therefore, notwithstanding the fact that the auction property was residential its valuation should have been done on the basis of a commercial property.

iv. Learned counsel submitted that the appellant had also filed objections to the auction proceedings, which were unjustifiably rejected by the learned Banking Court.

v. It was further submitted that appellant is ready to pay the decretal amount, therefore, the confirmation of sale of the property in favour of the auction purchaser may be set-aside.

vi. In order to augment his contention, the learned counsel relied upon the authorities of the following Judgments:

i. NIB Bank Limited v. Apollo Textile Mills Limited as reported 2013 CLD 1398. (“Apollo Textile”)

- ii. *Asif Ali Khan v. Standard Chartered Bank Limited as reported 2016 CLC 204. (“Asif Ali”)*
- iii. *M. Ahmed Sh. v. J.S.B. Bank Ltd., as reported 2012 CLD 477. (“M Ahmed”)*

4. Mr. Haris Rasheed, the learned counsel for respondent No.1 supported the Impugned Order and submitted that the same was in due consonance with the law. It was submitted that the contentions of the appellant were baseless in fact and meritless in law and hence the appeal was liable to be dismissed. The submissions of the learned counsel are summarized herein below:

- i. At the very outset, it was submitted that the appellant exercised his rights and opted not to prefer an appeal against the Decree. Since the limitation for filing an appeal had expired, the appellant was unlawfully attempting to frustrate the Decree by seeking to thwart the execution proceedings.
- ii. It was submitted that the auction proceedings were conducted in due conformity with the law and that nothing has been brought on record to controvert the same.
- iii. It was demonstrated from the record that the appellant/appellant’s counsel was present during the entire execution proceedings / auction proceedings and that any issue raised by the appellant was duly considered and decided by the learned Banking Court.
- iv. It was contended that valuation of the auction proceedings was determined to be Rs. 46 Million. The market value was adjudged to be Rs. 62 million. However, property was auctioned, in a process in which six bidders participated, at a much higher price of Rs. 65 million.

- v. It was demonstrated that valuation of the property was duly undertaken, the proclamation and the notice in respect of the auction proceedings were competently issued in pursuance of the order of the learned Banking Court referred to on the dates when the appellant was also present in Court.
- vi. It was contended that the sale proclamation was ordered to be issued in presence of the appellant and the order for auction was also ordered by the Court on 02.05.2017, when the appellant was duly represented before the Court.
- vii. It was argued that the mandatory deposit, required to have been made by a judgment debtor seeking the determination of an application under Order XXI Rule 90, was never made by the present appellant.
- viii. It was contended that the entire proceedings in respect of the auction had been completed and the property has already been handed over to the lawful auction purchaser.
- ix. It was contended that the present appeal is another unlawful attempt by the appellant to circumvent the due process of law and the same cannot be sanctioned by this Court.

5. Mr. Abdul Shakoor, the learned counsel for the Respondent No.2, being auction purchaser herein, supported the arguments presented by the learned counsel of the Respondent No. 1. The submissions made in addition thereto, by the learned counsel, are condensed herein below:

- i. It was demonstrated that the Respondent No.2 had purchased the property in an auction conducted under the

auspices of the learned Banking Court and after the success of his bid he had deposited the entire amount, sale consideration, in respect thereof.

ii. It was submitted that the sale in respect of the auctioned property was duly confirmed in his favour by virtue of the Impugned Order and thereafter possession of the said property was also delivered to him.

iii. Per learned counsel, possession of the property was directed to be handed over to him by the learned Banking Court on 15.11.2017 in the presence of the learned counsel for appellant. It may be pertinent to reproduce the contents of the order dated 15.11.2017, which was placed before the Court during course of the hearing today.

“Heard M/s Muhammad Mobin Khan, advocate for the decree holder Bank, Mr. Meraj-uddin advocate for judgment debtor No.2 and Mr. Abdul Shakoor, advocate for auction purchaser.

Mr. Meraj-ud-ddin, advocate for the judgment debtor No.2 filed a statement along with photocopies of list of the articles/inventory prepared by the judgment debtor No.2, allegedly lying in the mortgaged/auctioned property. The said statement is kept on record. During arguments learned advocate for the judgment debtor No.2 conceded to the extent that judgment debtor No.2 is ready to take over the possession of the articles lying in the mortgaged /auctioned property as per list of the Nazir prepared at the time of handing over the possession of the mortgaged property to the auction purchaser and, if any discrepancy is found then he will point out the same after taking over the articles from the mortgaged property by the judgment debtor No.2.

The Nazir of this Court is directed to accompanied with the representative of the decree holder Bank, the judgment debtor No.2 and auction purchaser and hand over the articles lying in the mortgaged property after de-sealing the premises, where articles are lying in presence of all the parties and hand over the articles to the judgment debtor as per inventory and obtain signatures from all the parties. This exercise may be completed within one week and report be submit before this Court accordingly.”

iv. It was contended that a bare perusal of the aforesaid order shows that the manner in which possession of the auction property was handed over to the present respondents was with the consent of the appellant.

v. Learned counsel cited the judgment of the honorable Supreme Court in the case of *Messrs Nice 'N' Easy Fashion (Pvt.) Ltd vs. Allied Bank of Pakistan & Another* reported as *2014 SCMR 1662* in support of his contention that failure to deposit the amounts required pursuant to Order XXI Rule 90 constitutes sufficient grounds for rejection of the said application.

vi. Learned counsel also relied upon a Division bench judgment of this Court in the case of *Muhammad Rafiq vs. Federation of Pakistan & Others* reported as *2013 CLD 1667* to bulwark his contention that an alleged inadequacy of sale price is not a valid ground to set aside auction proceedings and that once a sale has been confirmed, the same creates vested rights in favor of the auction purchaser.

vii. Learned counsel also cited the Division Bench judgment of the Lahore High Court in the case of *Mian Muhammad Unis Qamar vs. Citibank NA* reported as *2004 CLD 966* to demonstrate that the appellant's assertions pertaining to the publication of notices etc were untenable in law.

viii. Learned counsel submitted that the respondent No. 2, the auction purchaser, has no nexus with the dispute between Bank and the present appellant, therefore, no shadow could be permitted to be cast upon the duly confirmed conveyance of the property in his favour.

6. This Court has been ably assisted by the respective learned counsel and has also considered the record available on file.

7. It would appear that the primary issue to be considered is whether there exist any grounds for this Court to intervene in concluded auction proceedings, in respect whereof the sale confirmation had been issued and the possession of the property had also been duly transferred to the auction purchaser.

8. The challenge to auctions proceedings have been subjected to myriad challenges before the Superior Courts. An initial pronouncement in such regard was the case of *Nanhelal and another v. Umrao Singh as reported AIR 1931 Privy Council 33*. This was a Privy Council judgment and it maintained that once a sale has been effected a third party's interest intervenes.

9. In the case of *Hudaybia Textile Mills Ltd. and others v. Allied Bank of Pakistan Ltd. and others as reported PLD 1987 Supreme Court 512* it was held by the honorable Supreme Court that once an auction purchaser acquires an interest in a property, the same may not be whittled away by resort to procedural incongruities.

10. The case of *United Bank Limited v. Messrs A.Z. Hashmi (Pvt.) Limited and 8 others as reported 2000 CLC 1438* was decided by a Division Bench of this Court and it was held that when a sale was confirmed, an auction purchaser acquired valuable rights in the property which could not be disturbed.

11. The judgments of the honorable Supreme Court in the cases of *Muhammad Attique v. Jami Limited and others as reported PLD 2010 Supreme Court 993* and *Mumtaz ud Din Feroze v. Sheikh*

Iftikhar Adil and others as reported PLD 2009 Supreme Court 207 dealt with the sanctity of rights that are created upon the acceptance of an offer and the subsequent confirmation of sale. The pronouncements afford sanction and protection to a duly determined bona fide auction purchaser.

12. The authority cited by the learned counsel for the Respondent No. 2 augments his case, however, the judgments relied upon by the learned counsel for the appellant are distinguishable in the facts and circumstances of this matter.

13. *Apollo Textile* is an exhaustive treatise upon the law dealing with auction proceedings in satisfaction of a decree. However, the determinants identified therein, vitiating auction proceedings, are not applicable to the present matter. *Asif Ali* dealt with material irregularities pertaining to violation of Order XXI Rule 66 CPC. In the present case the Impugned Order itself records the uncontroverted observation that no challenge had been initiated *inter alia* under Order XXI Rule 66 CPC by the judgment debtors or any other person having an interest by virtue of title over the mortgaged property. *M Ahmed* dealt with the issue of a decree holder's offer to purchase the property. This citation does no merit to the appellant either as the auction purchaser has no nexus with the decree holder herein.

14. It is patently clear that a judgment was rendered *inter alia* against the appellant and the same crystallized in the Decree. The appellant never filed any appeal against the Decree within the prescribed period of limitation or at any time thereafter.

15. The appellant, however, remained inextricably involved in the execution and auction proceedings and made several applications therein, which were duly heard and decided on merit. It is only the Impugned Order, which *inter alia* dismissed the application of the appellant, filed under Order XXI Rule 90, which the appellant sought to assail. The dismissal of the said application was undertaken on merit despite the fact that the appellant had failed make the mandatory deposit required to prefer such an application.

16. The factual contentions raised by the appellant are not corroborated by the record and on the contrary it would appear that the right and title of the auction purchaser, Respondent No. 2 herein, in the property has the due sanction of the law. The law cited by the learned counsel is demonstrably distinguishable herein, whereas, the judgments referred to supra, whereby the auction proceedings and the title of the auction purchaser are sought to be sanctified, are properly attracted to the facts of this case.

17. The appellant has already forgone his right to appeal the Decree and present appeal, assailing the execution proceedings and results thereof, is not tenable in law.

18. In the present facts and circumstances no material was placed before us to interfere in the auction of a property, after the sale thereof had been confirmed and the title and possession thereof stood conveyed

19. In view of the reasoning contained herein, the instant First Appeal is hereby dismissed, with no order as to costs.

JUDGE

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