

IN THE HIGH COURT OF SINDH

Ist Appeal No.25/06

Before : Mr.Justice Anwar Zaheer Jamaili, C.J.

Mr.Justice Faisal Arab

Date of hearing 20.1.2009

Mr. Muhammad Ali Waris Lari, Advocate for appellant.

Mr.Samiuddin, Advocate for respondent No.2.

Mr. Khaleeq Ahmed, Advocate for Respondent No.3.

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FAISAL ARAB. J:- Respondent No.2 Bank filed a recovery suit against the Appellant as the appellant has committed default in the repayments of finance. The suit was decreed and the mortgaged property was ordered to be sold. Respondent No.2 filed Execution Application, which was allowed on 3.10.2000. While the mortgaged property was in the process of being sold, Respondent No.2 Bank offered the appellant to get the

property redeemed vide its letter dated 17.3.2004. The appellant protracted the matter. In the meantime bids for sale of mortgaged property were invited. On 7.1.2006 the Appellant made a commitment before the Executing Court that it shall satisfy the entire decree by 18.1.2006. However, the appellant failed to make payment with the result that the sale in favour of the higher bidder was confirmed on 21.1.2006. An application moved by the appellant for recall of the order of sale was dismissed by the Executing Court on 6.3.2006.

2. Being aggrieved with the said order, the appellant has preferred the present appeal stating that as the Appellant was ready and willing to make payment to the Respondent No.2 Bank, therefore, the Court ought not to have sold the property.

3. We have carefully examined the impugned judgment and have noticed that even after the bids were invited ample opportunity was given to the appellant to get the mortgaged property redeemed but the appellant failed to make payment. There was no other course left with the Executing Court but to confirm the bid of the highest bidder. Thereafter it was too late in the day for the appellant to seek yet another opportunity to get the sale set aside. When the Respondent No.2 Bank offered the appellant for settlement in the year 2004, the appellant paid only Rs. 76,500/- which resulted in withdrawal of the offer and Respondent No.2 Bank proceeded to seek sale of the mortgaged property. Several opportunities were given to the Appellant before confirmation of the sale but the Appellant failed to avail them and did not make payment in terms of settlement arrived in 2004. The Executing Court also gave one last opportunity for making payment to the Appellant by 18.1.2006, which too was not availed, hence the sale was confirmed in favour of the auction purchaser on 21.01.2006.

4. A Court sale should only be set aside when equitable grounds for nullifying it exist in favour of the person who owns or holds any interest in the property sold. These equitable grounds are provided by law under the provisions of Rules 89 and 90 of Order XXI, C.P.C. and we shall briefly discuss such rules. Rule 89 entitles the person, who owns or has acquired any proprietary interest in the property, which is being sold by Court in execution proceedings, to seek recall of the order of sale within 30 days of such sale upon deposit of 5% of the purchase money for payment to the auction-purchaser. Such a course, if adopted within the stipulated time, is sufficient enough to avoid Court sale as this gives the successful bidder 5% of the purchase money as compensation for denying him the right to buy the property. Rule 90 on the other hand also entitles a person whose interests in the property sold by Court in execution have been affected on account of any material irregularity or fraud in the conduct of the sale proceedings or the price that was procured was inadequate and did not commensurate with the value of the property. This rule covers situation where the owner of the property under sale was either not aware of the sale of his property or his property ought not to have been put to sale in the first place. Therefore, in order to seek recall of the sale conducted in execution proceedings, it is necessary that one of the grounds provided in the above referred two rules of Order XXI, C.P.C. are available to a person who owns or holds any interest in the property. In case no ground as mentioned in the said rules is available to an aggrieved person it would result in creation of proprietary interest in the property sold in favour of the auction-purchaser and he as of right would be entitled to get an order of confirmation of sale from the Court.

In the present case, the petitioner failed to make payment though ample opportunities given at various stages of the proceedings. We, therefore, find no legal infirmity in the impugned judgment.

We had dismissed this appeal by a short order passed on 20.1.2009 and these are the reasons for the same.

JUDGE

CHIEF JUSTICE

sharif