

IN THE HIGH COURT OF SINDH KARACHI

Present:

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Adnan Iqbal Chaudhry.

High Court Appeal No. 448 of 2017

Appellant : Ahsanuddin through Mr. Kazi Abdul Hameed Siddiqui, Advocate.

Respondent - 1 : Shahid Hussain Malik, in person.

Respondents 2-21 : Nemo.

High Court Appeal No. 06 of 2018

Appellant : Faiz Muhammad through Mr. Muhammad Rafi Advocate.

Respondent - 1 : National Bank of Pakistan through Mr. Muzammil Saleem Advocate

Respondents 2-21 : Nemo.

Respondent - 22 : Shahid Hussain Malik, in person.

Dates of hearing : 09-10-2018 and 12-10-2018

Date of decision : 24-12-2018

JUDGMENT

Adnan Iqbal Chaudhry J. - The captioned appeals are from the order dated 20-12-2017 passed by a learned Single Judge of this Court as the Banking Court in Execution No.39/2003 whereby CMA No.112/2017 and CMA No.113/2017 moved by the auction purchaser were allowed to the extent of possession of the auctioned properties. Since the order impugned in these appeal was common, and since the events leading to these appeal were overlapping, with the consent of learned counsel we heard these appeals together for disposal at the *katcha peshi* stage.

We have noticed that these appeals have been titled as being under the Law Reforms Ordinance, 1972 when these should have been titled as being under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 [FIO 2001] inasmuch as the order impugned is one that is appealable under sub-section (6) of the FIO 2001. But since it is settled law¹ that the citing of a wrong provision of law by the litigant is of no consequence when the Court otherwise has jurisdiction to entertain the matter, we deal with the appeals as being under Section 22 of the FIO 2001.

2. Execution No.39/2003 was brought by the erstwhile Corporate and Industrial Restructuring Corporation (CIRC) under Section 19 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 for the execution of decree dated 03-10-2002 passed by the High Court of Sindh as the Banking Court. Amongst the mortgaged properties sought to sold, the ones relevant to these proceedings are Property No.R-1855, Block-14, Federal B. Area, Karachi, that had been mortgaged by the father of Ahsanuddin (Appellant in HCA No.448/2017 and JD No.5 in the Execution), and Property No. R-44, Block-18, Federal B. Area, Karachi, that had been mortgaged by Faiz Muhammad (Appellant in HCA No.06/2018 and JD No.3 in the Execution). The underlying decree had not been appealed and had therefore attained finality.

3. By order dated 12-08-2003 passed in the Execution, the CIRC was permitted to conduct the auction itself but subject to confirmation by the Executing Court. This was so in view of sub-section (5) of Section 10 of the Non-Performing Assets and Rehabilitation of Industrial Undertakings (Legal Proceedings) Ordinance, 2000, which provided that “the sale of the collateral or any part thereof by the Corporation pursuant to sub-section (3) shall be either by public auction or inviting sealed tenders subject to the orders of confirmation by the High Court”.

¹ *Olas Khan v. Chairman NAB* (PLD 2018 SC 40).

4. In the Execution, Ahsanuddin moved CMA No.1217/2004 with the prayer that the judgment debtors be allowed time to match the highest bid that may be received for Property No.R-1855 and Property No.R-44 as these were family properties. Such prayer was allowed vide order dated 26-05-2004. The auction was held on 07-06-2004, and at such auction Shahid Hussain Malik (Respondent No.1 in HCA No.448/2017 and Respondent No.22 in HCA No.06/2018) emerged as the highest bidder with a bid of Rs. 20,30,000/- for Property No.R-1855 and a bid of Rs.11,80,000/- for Property No.R-44. Neither Ahsanuddin nor Faiz Muhammad deposited any money at the auction to match the highest bid and therefore the decree-holder filed auction reports in the Execution seeking orders for confirmation of sale in favor of Shahid Hussain Malik. Ahsanuddin and Faiz Muhammad then moved applications under Section 151 CPC, Fiaz Muhammad praying for permission to match the bid for Property No.R-44 in 36 installments, while Ahsanuddin praying for permission to deposit the earnest money (only) for matching the highest bid of both properties. However, these applications were dismissed by the Executing Court by order dated 18-05-2005 and the sale of Property No.R-1855 and Property No.R-44 was confirmed in favor of Shahid Hussain Malik, who deposited the entire sale price on 27-05-2005.

5. The aforesaid sale-confirmation order dated 18-05-2005 passed in the Execution in favor of Shahid Hussain Malik was appealed by Ahsanuddin and Faiz Muhammad (the Appellants) vide HCA No.145/2005, and on 02-06-2005 the sale-confirmation order was suspended, but subject to the deposit of the decretal amount within seven days. The decretal amount was not deposited by the Appellants, however, by a subsequent order dated 16-06-2005 passed in HCA No.145/2005 the sale-confirmation order was again suspended till the next date of hearing. Thereafter, the Appellants moved an application in HCA No.145/2005 for reviewing the condition of deposit imposed in the suspension order on the ground

that since they had challenged only the sale-confirmation order of two of the mortgaged properties and not the decree, they could not have been required to deposit the entire decretal amount. By order dated 15-07-2005, the suspension order passed in HCA No.145/2005 was reviewed to remove the condition of deposit of the decretal amount and the parties were directed to main *status quo*. That order was then modified on 21-12-2005 by directing the Appellants to deposit an amount equivalent to the auction price plus 5% before 24-12-2005, failing which the appeal would be dismissed. By order dated 17-01-2006 passed in HCA No. 145/2005 the Appellants were again allowed time to make the said deposit before the next date failing which the appeal would stand dismissed automatically, however with the caveat that the deposit if made, would not prejudice the rights of the auction purchaser. By order dated 31-01-2006 it was held that since the Appellants had failed to make the required deposit, HCA No.145/2005 stood dismissed.

6. Against the dismissal of HCA No.145/2005, the appellant No.2 therein, Faiz Muhammad, moved an application for review on the ground that it had not been brought to the notice of the Court that he (Faiz Muhammad) had already complied with the order dated 21-12-2005 and made the required deposit within the given time to the extent of Property No.R-44 of which he was owner/mortgagor. In this view of the matter, it was ordered on 30-11-2006 (in HCA No.145/2005) that till the next date of hearing, Faiz Muhammad should not be dispossessed from Property No.R-44. The review application of Faiz Muhammad eventually found favor with the learned Division Bench and vide order dated 13-12-2006, HCA No.145/2005 was restored to the extent of Faiz Muhammad. It was clarified that as regards Ahsanuddin, HCA No.145/2005 stood dismissed. Consequently, HCA No.145/2005 remained pending only with regards to auction of Property No.R-44, with the order that was passed on 13-12-2006 and extended on 11-01-2007, 25-01-

2007 and 17-01-2018, that Faiz Muhammad should not be dispossessed from Property No.R-44.

7. In the meanwhile, against the dismissal of HCA No.145/2005 to his extent, Ahsanuddin preferred CPLA No.85-K/2006 before the Supreme Court of Pakistan, wherein leave to appeal was granted on 20-12-2006; parties were directed to maintain *status quo*; and CPLA No.85-K/2006 was converted to Civil Appeal No.2389/2006. Thus, again a restraint was placed on the delivery of possession of Property No.R-1855 to the auction purchaser, Shahid Hussain Malik.

8. Ahsanuddin's Civil Appeal No.2389/2006 was eventually dismissed by the Supreme Court of Pakistan vide judgment dated 31-01-2017, and while dismissing the appeal the Supreme Court also made the following observation with regards to a submission made on behalf of the Faiz Muhammad who was a respondent in the said appeal:

"7. In light of the above, this appeal has no merits and is accordingly dismissed. We are not convinced by Mr. Abdur Rashid Awan, learned counsel for respondent who was a guarantor in the matter and did not challenge the judgment and decree dated 3.10.2002 or the order(s) of the learned Executing Court confirming the sale of the properties, that his property should be released from the auction after enabling him to pay the amount which the auction purchaser has paid along with 5% at this stage of the proceedings."

9. Against the dismissal of Civil Appeal No.2389/2006, Ahsanuddin filed Civil Review Petition No.62/2017 before the Supreme Court. Faiz Muhammad also filed CMA No.4242/2017 before the Supreme Court under Section 12(2) CPC on the ground that he had never engaged any counsel to represent him as a respondent in Civil Appeal No.2389/2006 and therefore a fraud had been played upon the Court to manipulated a finding against him when his HCA No.145/2006 was pending before the High Court. Both the said review petition and the application under Section 12(2) CPC were dismissed by the Supreme Court on 22.09.2017 as follows:

“CMA No.4242 OF 2017:

No ground for interference in the impugned judgment under Section 12(2) of the Code of Civil Procedure, 1908 has been made out. The application is, therefore dismissed.

C.R.P. NO.62 OF 2017:

No ground for review has been made out. The review petition is, therefore, dismissed.”

10. On 25-02-2017, the auction purchaser, Shahid Hussain Malik, filed CMA No.112/2017 and CMA No.113/2017 (under Order XXI Rules 94 and 95 CPC) in the Execution for the conveyance and possession of Property No.R-1855 and Property No.R-44 respectively in his favor on the ground that after judgment of the Supreme Court in Civil Appeal No.2389/2006, there remained no impediment to completing the sale. On the other hand, Ahsanuddin filed CMA No.114/2017 under Order XXI Rule 89 CPC submitting that he was ready to deposit the amount paid by the auction purchaser plus 5% to set aside the sale of Plot No.R-1855. By order dated 20.12.2017 passed in the Execution, the learned Single Judge granted CMA No.112/2017 and CMA No.113/2017 moved by the auction purchaser; dismissed CMA No.114/2017 moved by Ahsanuddin while imposing a cost of Rs.10,000/-; and ordered the Nazir of the Court to take possession of both Property No.R-1855 and Property No.R-44 and deliver the same to the auction purchaser, Shahid Hussain Malik. In passing such order the learned Single Judge deferred the prayer for the issue of sale certificates for the reason that it had yet to be determined whether the sale would entail a sale certificate by the Court or a conveyance deed by the decree-holder. This order dated 20-12-2017 passed by the learned Single Judge in the Execution is assailed by Ahsanudin vide HCA No.448/2017 and Faiz Muhammad vide HCA No.06/2018.

HCA No.448/2017:

11. Ahsanuddin, the Appellant in HCA No.448/2017 has impugned the order dated 20-12-2017 passed in the Execution only

to the extent of the order passed on CMA No.112/2017 i.e. for delivery of possession of Property No.R-1855 to the auction purchaser. The appeal is further confined only to one of the findings in the impugned order. Per Ground A of the memo of appeal of HCA No.448/2017, "... the appellant is only aggrieved by Paragraph 3 of page No.3 and paragraph 2 of page No.6 of the Impugned Order." The said paragraphs of the impugned order recorded and rejected the contention advanced on behalf of Ahsanuddin that CMA No.112/2017 by the auction purchaser for possession was time-barred. Per Mr. Kazi Abdul Hameed Siddiqui, learned counsel for the Appellant/Ahsanuddin, the learned Single Judge failed to appreciate that CMA No.112/2017 being an application under Order XXI Rule 95 CPC for possession of immovable property sold in execution of a decree, could have been moved within 3 years from the day the sale became absolute as mandated by Article 180 of the Limitation Act, 1908; that the sale became absolute on the sale-confirmation order dated 18-05-2005; whereas CMA No.112/2017 was moved after 12 years, and therefore was time-barred. He further submitted that after the expiry of limitation provided by Article 180 of the Limitation Act, 1908, the remedy of the auction purchaser was a suit for possession which too was time-barred by the time CMA No.112/2017 had been moved. In support of his submissions learned counsel for the Appellant/Ahsanuddin relied on the case of *Tatheer Hussain v. Agricultural Development Bank of Pakistan* (2008 CLD 73) and on the cases from the Indian jurisdiction reported as *Pattam Khader Khan v. Pattam Sardar Khan* [(1996) 5 SCC 48]; *A. Kamal Batcha v. Gokulam Ammal* (2015(3)CTC614); and *Mallika v. Ayyappu Karunakaran* (AIR 1981 Kerala 236).

12. The auction purchaser, Shahid Hussain Malik, the Respondent No.1 in HCA No.448/2017, while supporting the impugned order submitted that the sale-confirmation order dated 18-05-2005 was first suspended on 02-06-2005 by the Division Bench in HCA No.145/2005 and thereafter by subsequent orders passed therein up

until HCA No.145/2005 was dismissed on 31-01-2006; that the sale-confirmation order was then suspended on 20-12-2006 by the Supreme Court of Pakistan in Civil Appeal No.2389/2006 up until 31-01-2017 when the said appeal was dismissed; therefore the sale had only become absolute on 31-01-2017 and his application (CMA No.112/2017) for possession of Property No.R-1855 was within limitation as the period during which the sale-confirmation order remained suspended has to be excluded under Section 15 of the Limitation Act, 1908. He submitted that the R&P of the Execution had been summoned by the Supreme Court of Pakistan for Civil Appeal No. 2389/2006 which was received back by the Executing Court on 24-02-2017, and he filed the subject CMA No.112/2017 the very next day. He submitted that after the judgment of the Supreme Court of Pakistan in Civil Appeal No.2389/2006 the matter has been laid to rest and cannot be agitated further by the Appellant/Ahsanuddin.

13. We have heard the counsel/parties and perused the record. Admittedly, Ahsanuddin's objections to the sale of the mortgaged properties were dismissed by the Executing Court by the sale-confirmation order dated 18-05-2018; his appeal against such order (HCA No.145/2005) was dismissed (to his extent) by the High Court on 31-01-2006; and then his Civil Appeal No.2389/2006 was also dismissed by the Supreme Court of Pakistan vide judgment dated 31-01-2017. Therefore, the only question raised for our determination in HCA No.448/2017 is whether the application for possession of the auctioned Property No.R-1855 moved by the auction purchaser in the Execution was time-barred or not? This question was answered in the negative by the learned Single Judge for two reasons. Firstly, the learned Single Judge held that since the sale-confirmation order dated 18-05-2005 remained suspended from time to time in appeals up until 31-01-2017 when Ahsanuddin's Civil Appeal No.2389/2006 was dismissed by the Supreme Court, the application having been moved right thereafter was within limitation. Secondly, the learned

Single Judge held that in any case, by an earlier order dated 02-06-2005 passed in the Execution, an order had already been passed for delivering possession of Property No.R-1855 to the auction purchaser and therefore CMA No.112/2017 had only been moved by way of abundant caution. Since the latter reason cited by the learned Single Judge would be a complete answer to the contention of the Appellant/Ahsanuddin, we proceed to examine that aspect of the matter first.

14. The record shows that after the sale-confirmation order dated 18-05-2005 i.e., after the sale of Property No.R-1855 had become absolute, the decree-holder had on 01-06-2005 moved CMA No.1009/2005 under Section 151 CPC in the Execution praying for appointing the Official Assignee to take possession of both Property No.R-1855 and Property No.R-44 and for delivering them to the auction purchaser, Shahid Hussain Malik. That application was allowed vide order dated 02-06-2005 as follows:

“It appears that auction held by CIRC was confirmed by this Court’s order dated 18/5/2005. It appears that the entire bid amount had been paid in respect of two mortgaged properties bearing House No.R-44, Block 18, F.B. Area, Karachi and House No.R-1855, Block 18, F.B. Area, Karachi. Through listed application (CMA No.1009/2005) under Section 151 CPC seeks appointment of Official Assignee to take over possession of the aforementioned mortgaged properties and hand over the same to the Auction Purchaser. Let the possession be taken over of the said properties by the Official Assignee, if necessary, he may take assistance of police aid and local administration. Tentatively, Official Assignee’s fee is fixed at Rs.10,000/- of each property to be paid by the Auction Purchaser to be adjusted towards cost, if any”.

It is apparent that the aforesaid CMA No.1009/2005 by the decree-holder for possession of both the auctioned properties was treated as an application under Section 19(5) read with the erstwhile Section 15(6) of the FIO 2001, and the order dated 02-06-2005 was passed under the said provisions, which provisions at the time read as follows:

“19(5). The provisions of sub-sections (5), (6), (7), (8), (9), (10), (11) and (12) of section 15 shall, mutatis mutandis, apply to sales of mortgaged, pledged or hypothecated property by a financial institution in exercise of its powers conferred by sub-section (3).”

“15(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 *bon 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.”

We have also noticed that after HCA No.145/2005 had been first dismissed, and before restraining orders were again passed in Civil Appeal No.2389/2006 and in HCA No.145/2005, another order was passed in the Execution on 17-10-2006 for delivering possession of the auctioned properties to the auction purchaser as follows:

“From the record, it appears that the auction purchaser acquired the property, entire sale consideration has been paid, sale has been confirmed in his favour as far back as on 18/5/2005, more than one year has passed and the judgment debtors are avoiding to proceed with the case and hand over the vacant possession of the subject property to the auction purchaser on one pretext or the other. It was earlier directed that in case, no restraining orders are obtained from the Hon’ble Supreme Court, the matter shall proceed and all such lapse on the part of J/Ds are recounted in the order dated 20/9/2006. Under the circumstances, let possession of the subject property be handed over to the auction purchaser. Auction purchaser undertakes that he shall not change the complexion of the subject property and in case, findings are reversed, the auction purchaser shall restore the possession to the judgment debtors.”

15. Therefore, even if it can be argued that Article 180 of the Limitation Act, 1908 was applicable to an application for possession moved under Section 19(5) read with the erstwhile Section 15(6) of the FIO 2001, such application having been moved on 01-06-2005 after 31 days of the sale-confirmation order dated 18-05-2005 was well within the limitation of 3 years prescribed by Article 180 of the Limitation Act, 1908 and none of the cases cited by the learned counsel have any relevance. Further, it is obvious that the matter of possession of the auctioned Property No.R-1855 having remained stayed from time to time for around 12 years, first in HCA No.145/2005 and then in Civil Appeal No.2389/2006, CMA No.112/2017 was moved by the auction purchaser only to revive the matter. Given these circumstances, where the order for delivering possession of Property No.R-1855 had already been passed as far back as 02-06-2005, the impugned order dated 20-12-2017 passed by the learned Single Judge in the Execution was essentially passed towards the implementation of the earlier order dated 02-06-2005. To put it differently, nothing turned on CMA No.112/2017, in that, even if such application had been dismissed, the orders passed on 02-06-2005 and then again on 17-10-2006 for delivering possession of Property No.R-1855 to the auction purchaser, Shahid Hussain Malik, remained intact and could nevertheless be implemented. Therefore, there is no merit in HCA No.448/2017 and the same is dismissed along with the pending application.

HCA No. 06/2018

16. Faiz Muhammad, the Appellant in HCA No.06/2018 has impugned the order dated 20-12-2017 passed in the Execution to the extent of the order passed on CMA No.113/2017 i.e. for delivery of possession of Property No.R-44 to the auction purchaser. In passing the impugned order, the learned Single Judge held that even though Faiz Muhammad's HCA No.145/2005 against the sale-confirmation order dated 18-5-2005 was still pending before the Division Bench,

that appeal had become infructuous after the Supreme Court had heard Faiz Muhammad's counsel as a respondent in Civil Appeal No.2389/2006 and rejected his contention, and again when the Supreme Court dismissed Faiz Muhammad's application under Section 12(2) CPC.

17. Mr. Muhammad Rafi, learned counsel for the Appellant/Faiz Muhammad submitted that to the extent of Faiz Muhammad, HCA No.145/2005 against the sale-confirmation order dated 18-05-2005 had been restored and was pending; that in HCA No.145/2005 Faiz Muhammad had deposited the auction price of Property No.R-44 plus 5% within the period stipulated by the Court; that an interim order restraining dispossession of Faiz Muhammad from Property No.R-44 was still operating in HCA No.145/2005; that Civil Appeal No.2389/2006 before the Supreme Court of Pakistan had been filed by Ahsanuddin, not Faiz Muhammad and therefore nothing in the judgment of the said appeal could be construed to prejudice the case of Faiz Muhammad in HCA No.145/2005 especially when neither the said judgment nor the dismissal order of the application under Section 12(2) CPC made any comment in respect of HCA No.145/2005. Learned counsel therefore submitted that the finding of the learned Single Judge that HCA No.145/2005 had become infructuous was not only erroneous but also without jurisdiction.

18. The auction purchaser, Mr. Shahid Hussain Malik, the Respondent No.22 in HCA No.06/2018, relied on the submissions made by him in HCA No.448/2017 as submissions in this appeal as well. He submitted that the judgment of the Supreme Court in Civil Appeal No.2389/2006 also dealt with the auction of Property No.R-44 and rejected the contention of Faiz Muhammad's counsel who was a respondent in the said appeal, and therefore the learned Single Judge rightly concluded that HCA No.145/2005 had become infructuous. Learned counsel for the Respondent No.1 (NBP) too supported the impugned order.

19. We have heard the counsel/parties and perused the record. We have noticed that in HCA No.145/2005, which is pending to the extent of Faiz Muhammad and to the extent of the auction of Property No.R-44, an interim order was passed on 13-12-2006 restraining Faiz Muhammad's dispossession from the auctioned Property No.R-44. Such order was reiterated on 11-01-2007 and then extended on 25-01-2007. Thereafter the R&P of HCA No.145/2005 was summoned by the Honourable Supreme Court for the purposes of Civil Appeal No.2389/2006 which was received back by this Court in 2017 after the dismissal of the latter appeal. Thereafter, on 17-01-2018 the restraining order preventing the dispossession of Faiz Muhammad from Property No.R-44 was again extended in HCA No.145/2005. Thus, the matter of delivery of possession of Property No.R-44 to the auction purchaser is still *sub-judice* before and stayed by a Division Bench in HCA No.145/2005. It appears that the said restraining order was not brought to the notice of the learned Single Judge when he passed the impugned order dated 20-12-2017 in the Execution and therefore he concluded that nothing in HCA No.145/2005 prevented the delivery of possession of Property No.R-44 to the auction purchaser. In these circumstances we are inclined to agree with the learned counsel for the Appellant/Faiz Muhammad to the extent that during the operation of an order passed by a Division Bench in HCA No.145/2005 restraining dispossession of Faiz Muhammad from Property No.R-44, the learned Single Judge erred in passing an order to the contrary. The questions whether HCA No.145/2005 had been rendered infructuous by the judgment of the Supreme Court in Civil Appeal No.2389/2006, and/or by the dismissal of Faiz Muhammad's application under Section 12(2) CPC, and if not, whether HCA No.145/2005 would save Property No.R-44 from sale, were all questions for the Division Bench to address in HCA No.145/2005 and not by the learned Single Judge in the Execution. We may mention here that though the said HCA No.145/2005 was fixed for hearing before us along with the captioned appeals, the parties had

confined their submissions only to the captioned appeals and therefore HCA No.145/2005 was not heard by us for adjudication while reserving judgment on the captioned appeals.

20. For the foregoing reasons, we are inclined to entertain HCA No.06/2018 only on the ground that the impugned order, insofar as it was passed on CMA No.113/2017, runs contrary to a restraining order operating in HCA No.145/2005. We therefore dispose of HCA No.06/2018 by holding that the impugned order dated 20-12-2017 passed in Execution No.36/2003 on CMA No.113/2017 as regards the delivery of possession of Property No.R-44, shall be subject to orders in HCA No.145/2005.

JUDGE

JUDGE

Karachi

Dated: 24-12-2018