

IN THE HIGH COURT OF SINDH AT KARACHI

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

First Appeal 14 of 2015 : Nazli Hilal Rizvi vs.
Bank Alfalah Limited
& Others

For the Appellant : Mr. Farhan Zia Abrar, Advocate

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

For Respondent No.5 : Mr. M.R. Sethi, Advocate

Date of Hearing : 13.03.2019

Date of Announcement : 13.03.2019

JUDGMENT

Agha Faisal, J: The present appeal was filed assailing the order dated 13.3.2015 (“**Impugned Order**”), rendered by the learned Banking Court II at Karachi in Execution 122 of 2013 (“**Execution**”), whereby an application under Order XXI Rule 90 CPC (“**Application**”) was dismissed.

2. Mr. Farhan Zia Abrar, advocated the case for the appellant and submitted that the appellant was a judgment debtor in the Execution and had filed the Application to challenge the sale proceedings in respect of the mortgaged property being auctioned. It was contended that the learned Banking Court did not appreciate the pleas raised by the present appellant and dismissed the Application without application of any judicial mind. It was further argued that proceedings against the appellant were conducted behind her back, as the appellant was a permanent resident of USA, hence, unaware of the proceedings

conducted in Pakistan. Per learned counsel, the requisite notice was never served upon the appellant and thus the appellant was condemned unheard, which is against the principles of natural justice. It was further stated that the value upon which the property was being auctioned was well below the market value in respect whereof valuation reports were available on the record, which fact was not considered by the learned Banking Court. It was thus prayed that the Impugned Order be set aside.

3. Mr. Haris Rasheed, Advocate appeared on behalf of the respondent No.1 and submitted that Suit 78 of 2011 ("**Suit**") was filed against the defendants, including the present appellant, and that the present appellant had filed a leave to defend application therein. Learned counsel demonstrated from the record that the leave to defend application of the present appellant was considered by the learned Banking Court and dismissed on account of the same being devoid of merit. Per learned counsel the judgment and decree was passed in the Suit and it is an admitted fact that no appeal in respect thereof was ever preferred by the appellant within the period prescribed in the Financial Institutions (Recovery of Finance) Ordinance, 2001 ("**Ordinance**") or at any time thereafter. Learned counsel submitted that the auction proceedings concluded in the Execution where after the sale of the auctioned property was confirmed in favour of the auction purchaser, who was also given possession of the said property. It was stated that subsequent thereto the defendant No.3 in the Suit took forcible possession of the property and illegally dispossessed the auction purchaser therefrom. Learned counsel submitted that the sale proceedings had been realized by the bank and the decree stood

satisfied. It was further added that the valuation certificates obtained by the judgment debtor, defendant No.3 in the Suit, were fallacious and the purported valuers were even otherwise not approved by the Pakistan Banking Council. It was lastly contended that the Application, purportedly filed by the present appellant, before the learned Banking Court was *prima facie* discrepant as the person who filed the same on behalf of the appellant had no authority to do so. It was thus prayed that the present appeal merited dismissal forthwith.

4. Mr. M.R. Sethi, Advocate appeared on behalf of the auction purchaser, the respondent No.5 herein, and submitted that the entire proceedings with respect to the auction were duly concluded before the learned Banking Court and the entire amount was deposited by the auction purchaser at the relevant time. Learned counsel controverted the valuation reports sought to be relied upon by the appellant and submitted that the same were inconsistent with the facts and were mere fallacious concoctions crafted to augment the arguments of the appellant. It was demonstrated from the record that while the said valuation reports had been prepared at the behest of the defendant No.3 in the Suit, the Application was not filed by the said person and the same was preferred by a judgment debtor, who claims to be to have been overseas while the entire proceedings were conducted. Learned counsel also reiterated the argument that the Application was in itself discrepant as the same was preferred by the stranger and not by a then authorized representative of the present appellant. In the conclusion it was argued that the present petition is a *prima facie* attempt to defeat the due process of the law, hence, is liable to be dismissed.

5. We have heard the arguments advanced by the respective learned counsel and have also appreciated the record arrayed before us. The primary issue for determination before this Court is whether there is any infirmity in the Impugned Order which merits interference in appeal.

6. Since the very validity of the Application was challenged before us, it is considered prudent to address the said issue at the very onset. We have perused the R&P of the Suit and it is apparent therefrom that the Application was instituted on 08.09.2014. The affidavit filed in support thereof expressly states that the present appellant had executed a power of attorney in favor of the deponent and on the basis thereof the Application was being preferred. The power of attorney, copy whereof is available in the R&P of the Suit and also in the record filed before us, is dated 30.09.2018 and the affixation of stamps thereupon, upon being brought to Pakistan, carries the date 19.12.2014. It is thus *prima facie* apparent that the said power of attorney did not exist at the time that the Application was presented before the Banking Court. Per learned counsel for the respondents, the said power was presented in the Banking Court for the first time when it was annexed to a rejoinder filed therein to the counter affidavit of the respondent, wherein the objection was taken with regard to the manifest absence of any authority empowering the deponent to institute the Application. This statement of was not controverted by the learned counsel for the appellant. It is thus our considered view that the Application was *prima facie* instituted without any authorization and the said fact ought to have been considered by the learned Banking Court at the very time when the Application was presented there before. Even though we have just

deprecated the very Application, upon which the Impugned Order is predicated, it is considered proper to address the arguments advanced with respect to the Impugned Order as well. In such regard it may be prudent to reproduce the operative constituent thereof, herein below:

“Considered the arguments made by the learned counsel of both the parties gone through the entire record of the case and material placed thereon as well as case laws produced on behalf of both the parties. The arguments made by the learned counsel of the judgment debtor No.2 that she was not in knowledge about the present case, and that she was not served any notice, has found no force. Record speaks that judgment debtor No.2 has contested the suit by filing her leave to defend application through her counsel. Even the judgment and decree passed in this case has not been challenged to the proper forum and attained finality. In this respect provision 19(1) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 is very much clear for no need of issuing the fresh notice to the judgment debtor, reproduce the same as under:

19(1) “Upon pronouncement of judgment and decree by a Banking Court, the suit shall automatically stand converted into execution proceedings without need to file a separate application and no fresh notice need be issued to the judgment debtor in this regard. Particular of the mortgaged, pledged, or hypothecated property and other assets of the judgment debtor shall be filed by the decree holder for consideration of the Banking court and the case will be heard by the Banking court for execution of its decree on the expiry of 30 days from the date of pronouncement of judgment and decree”

As evident from the record that in the instant case, judgment and decree passed on 13.02.2013 and 20.02.2013 respectively, while separate Execution Application was filed on 22.10.2013. Obviously she was very much in knowledge about the proceedings going on in this case. The notice under Order 21 Rule 54 was served upon the judgment debtors on 12.03.2014. As per Bailiff report one Arif had received the same on behalf of judgment debtors. Then Bailiff affixed the order on the outer door of the subject property. Thereafter notice under Order 21 rule 66 CPC was served upon the judgment debtors on 21.04.2014 and as per Bailiff report, it was received by the judgment debtor No.3 on behalf of all the judgment debtors but he neither appeared before the Court nor informed the court regarding unavailability of judgment debtor No.2 in Pakistan. Then proclamation of sale was drawn up and published in daily newspapers “Jang” and “Dawn” Karachi both dated 03.06.2014 and 05.06.2014 and auction was conducted on 11.08.2014. On such day all the judgment

debtors including judgment debtor No.2 were preferred to remain absent, while one bidder namely Mohammad Ibrahim was participated in auction proceedings and offered bid for and amount of Rs.11,000,000/- and deposited the pay order amounting to Rs.2,600,000/- being 25% of the total bid amount. Subsequently on 26.08.2014, he deposited the remaining 75% of the bid amount before the Nazir of this Court. The decree holder bank then furnished his no objection for acceptance of the said amount on 08.09.2014. In support of his arguments learned counsel of judgment debtor No.2 has failed to produce any documentary evidence, that she is permanent resident of America, so also the American Passport to show that she has an American nationality, so also the proof to show that on those days since filing of the present execution till auction proceedings she was not available in Pakistan. The photocopies of Pakistani Passport produced by the learned counsel of judgment debtor No.2 even failed to support her version. It is a basis principal of law that "debtor seeks the creditor". Court sale should only be set aside, when equitable grounds for nullifying the same existing in favour of the person, who owned or held any interest in the property sold. Moreover that mere inadequacy of sale price by itself is no ground for setting aside the sale. In this case, at the time of mortgage of the property, the learned counsel has failed to furnish any equitable ground for nullifying the proceeding in this Execution Application, Bank has got the property evaluation subsequently the evaluator fixed the market value Rs.12,169,920/- and forced sale value Rs.10,344,432/-, whereas the Court tried to fetch the proper price that is more than the forced value and sold the same for Rs.11,000,000/-. Thus it stands established on record that the judgment debtor No.2 has not approached before this Court with clean hands and intended to obstruct the auction proceedings rather the advance or assist the process of law and justice.

In view of the above discussion, I hereby dismiss the present application as not maintainable and confirm the sale accordingly."

7. The basic premise of the appellant's argument was that since she was a permanent resident overseas, she had no knowledge of the present proceedings and therefore was condemned unheard. It is an admitted fact that the appellant had filed a leave to defend application in the Suit and that is confirmation that due notice had been served thereupon. The leave to defend was dismissed and it was incumbent upon the appellant to continue to remain abreast of the proceedings. While it was submitted before us that the same legal counsel

represented all the defendants before the learned Banking Court and there was no argument that the *vakalatanama* in respect of the present appellant was ever withdrawn, it is pertinent to consider that in the power of attorney filed by the appellant it is clearly stated in the second recital thereof that the appellant was aware that her leave to defend application had been dismissed as the same was conveyed thereto by her legal counsel. The Impugned Order succinctly records that the appellant's assertion of having remained away from Pakistan at all material times was not supported by the record and nothing has been demonstrated before us to dispel the said conclusion. It is thus observed that the appellant's argument of being in the dark about the proceedings is without merit.

8. The next contention advanced on behalf of the appellant was that the valuation of the mortgaged property was understated and the same was manifest from the valuation reports relied upon by the judgment debtors in the Execution. Learned counsel for the respondents had argued that the valuation reports relied upon by the judgment debtors were fallacious and even otherwise not issued by valuers approved by the Pakistan Banking Council. Learned counsel for the appellant took no effort to controvert the assertion that the valuation relied upon was given by uncertified persons. However, notwithstanding the foregoing it is pertinent to observe that a Division Bench of this Court has earlier maintained in the case of *Muhammad Mohammad Jameel vs. Eridania (Suisse) SA & Others* reported as 2018 CLD 1478 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. An earlier Division Bench

of this Court was seized of a similar matter, in *Muhammad Rafiq vs. Federation of Pakistan & Others* reported as 2013 CLD 1667, and the challenge to auction proceedings upon unjustified allegations of inadequate sale price was deprecated in the following manner:

“12. The first ground urged on behalf of the petitioner is hardly a ground on which any order in favour of the petitioner could be passed. It is very well known to a person of ordinary prudence that a property sold through auction will not fetch the market value and will always be sold for a price below the market value. In the case reported as *East Yarn Trading Company and others v. United Bank Limited and others* (2007 CLD 1555), a Division Bench of this Court has held that "merely raising objections as to inadequacies of sale price is not sufficient." We are, therefore, of the opinion that mere inadequacy of sale price in court sale, is no valid ground for setting aside the sale. A buyer is always reluctant to purchase a property in Court sale as it involves litigation, it is time consuming and has the element of uncertainty. The Court sales do not fetch market price for the reason and sale through auction cannot be set aside on this score alone.”

9. It is evident from the record that the mortgaged property was auctioned and the sale was confirmed in favour of the auction purchaser. The learned counsel for the auction purchaser had submitted that the possession had also been handed over but the said assertion had been vehemently contested by the learned counsel for the appellant. It is however clear from the order sheet of these very proceedings that possession was also handed over to the auction purchaser and the same is manifest from the Order dated 09.04.2015 wherein an application preferred by the appellant was dismissed, content whereof is reproduced herein below:

“Through this application the appellant has prayed that Nazir of the Banking Court No.II, Karachi, be directed to remove the locks and to handover the possession of the auction property to the appellant. The record reflects that on 24.03.2015 property was already handed over to the Auction Purchaser. In the circumstances, in our opinion unless the appeal is heard such

relief cannot be granted to the appellant the application is therefore dismissed in limine.”

10. The rights of an auction purchaser stand crystallized upon the fall of the hammer and this principle has been enunciated time and time again by the superior Courts, with an early exposition in such regard being *Nahelal & Another vs. Umrao Singh* reported as *AIR 1931 Privy Council 33*. The honorable Supreme Court maintained, in *Hudaybia Textile Mills Limited & Others vs. Allied Bank of Pakistan Limited & Others*, reported as *PLD 1987 Supreme Court 512*, that once an auction purchaser acquires an interest in the property, such an interest may not be whittled away by resort of procedural incongruities. Subsequent pronouncements of the honorable Supreme Court pertinent hereto include *Muhammad Attique vs. Jami Limited & Others* as reported *PLD 2010 Supreme Court 993* and *Mumtaz ud Din Feroze vs. Sheikh Iftikhar Adil & Others* as reported *PLD 2009 Supreme Court 207* wherein protection was accorded to the sanctity of rights that are created upon the acceptance of an offer and the subsequent confirmation of sale and the rights of a duly determined bona fide auction purchaser were duly recognized and safeguarded.

11. It is an admitted fact that no appeal had ever been preferred against the Judgment and Decree delivered by the learned Banking Court in the Suit within the limitation prescribed vide the Ordinance or at any time thereafter. The learned Banking Court considered the Application, notwithstanding the fact that it was discrepant, and dismissed the same on merit. It is our considered view that the learned Banking Court has aptly considered the issues there before and delivered the Impugned Order upon due consideration of the evidence

and application of the law. The learned counsel for the appellant has been unable to demonstrate any infirmity in the Impugned Order. This Division Bench has earlier maintained in the case of *Muhammad Naseer Akhter vs. Bank Alfalah Limited & Others* reported as 2018 CLD 1439 attempts to frustrate a Judgment and Decree in execution proceedings, despite never having appealed the said Judgment and Decree, are not tenable in law.

12. In view of the reasoning and rationale herein contained, we had dismissed the present appeal vide our short order delivered in Court, dated 13.03.2019. These are the reasons for our short order.

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Dated 18.03.2019.

*Farooq PS/**