

IN THE HIGH COURT OF SINDH AT KARACHI

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

First Appeal 111 of 2018 : Muhammad Asif vs.
MCB Bank Limited
& Others

For the Appellant : Mr. Badar Alam, Advocate

For the Respondent
No.1 : Mr. Abid Naseem
Advocate

For the Respondent
Nos. 2, 3 & 4 : Syed Muhammad Kazim
Advocate

Date of Hearing : 27.03.2019

Date of Announcement : 05.04.2019

JUDGMENT

Agha Faisal, J: Through this appeal the appellant / auction purchaser has assailed the order dated 23.11.2018 (“**Impugned Order**”) rendered by the learned Banking Court V at Karachi, in Execution 27 of 2017 (“**Execution**”). By virtue of the Impugned Order the learned Banking Court dismissed an application filed by the judgment debtor under Order XXI Rule 69 CPC (“**O.21 r.69 Application**”), however, instead of confirming the auction proceedings, already conducted, set aside the said proceedings and directed that the process of auction be initiated afresh. The appellant / auction purchaser, aggrieved by the setting aside of the auction proceedings, preferred the present appeal.

2. Mr. Badar Alam, Advocate appeared on behalf of the appellant and submitted that Suit 78 of 2016 (“**Suit**”) was decreed by the learned Banking Court and in execution proceedings thereafter a public notice for sale of the mortgaged property was published in daily newspapers on 01.09.2018. Learned counsel adverted to the auction report dated 04.10.2018 to show that the appellant’s bid was recognized and deposit of 25% of the bid amount was ordered by the learned Banking Court.

Learned counsel next referred to the report dated 17.10.2018 wherein the balance 75% was also required to be deposited and submitted that same was done by the appellant pursuant to the orders of the learned Banking Court. Learned counsel then drew the Court's attention to the no objection certificate dated 07.11.2018 issued by the decree holder bank, wherein it was recorded that decree holder bank has no objection to the acceptance of the bid put forth by the appellant. Per learned counsel, it was the admitted fact that the judgment debtors never preferred any appeal against the judgment and decree, never filed any reservation to the notice for sale of mortgaged properties and no objection was ever filed with respect to the acceptance of the bid submitted by the appellant. On the contrary he submitted that judgment debtors moved the O.21 r.69 Application wherein they sought postponement / cancellation of the auction on the premise that a settlement was in the process of being reached with the decree holder bank. It was demonstrated that the application filed by the judgment debtors was dismissed vide Impugned Order. However, instead of proceeding with the confirmation of sale, the learned Banking Court vitiated the entire auction proceedings altogether. Per learned counsel it was this vitiation that was otherwise than in accordance with law and prayed that the said constituent of the Impugned Order may be set aside.

3. Mr. Abid Nasim, Advocate appeared on behalf of the decree holder bank, respondent No.1 herein, and supported the case set forth by the appellant. Per learned counsel, the judgment debtors, being respondent Nos.2, 3 and 4 herein, appeared before the learned Banking Court after notice was duly served thereupon, however, they opted not to participate further in the proceedings. It was further argued that no appeal was ever preferred against the judgment and decree in the Suit and nor was the process of execution ever challenged by the said respondents. Learned counsel drew attention to the fact that Impugned Order had also dismissed the O.21 r.69 Application, however, the said respondents opted not to challenge the Impugned Order either. Per learned counsel notice upon the judgment debtors under Order XI Rule 66 CPC had been duly effected and the same was recorded in the learned Banking Court's diary sheet dated 21.11.2017, copy whereof

was available on record and not controverted by the other respondents. In so far as the issue of the compromise / settlement was concerned, it was submitted that the same was a figment of the judgment debtors' imagination as no such settlement was ever acquiesced by the decree holder bank. Learned counsel drew attention to the counter affidavit filed by the decree holder bank, to the judgment debtors' O.21 r.69 Application, and demonstrated that it was specifically stated therein that no settlement was being entertained by the decree holder bank and it was further reiterated that the bank had no objection to the auction and to the confirmation of the appellant's bid by the learned Banking Court. It was thus argued that the present appeal merits the exercise of jurisdiction by this Court, hence, may be allowed in terms prayed.

4. Mr. Syed Muhammad Kazim, Advocate appeared for the respondent Nos.2, 3 and 4 and controverted the arguments advanced on behalf of the appellant. It was claimed that legal requirements for a sale proclamation were not completed. It was further argued that the valuation of the mortgaged property was otherwise than in accordance with the market price. Upon being specifically queried as to whether the judgment debtors deposited the requisite amount along with their R. 69 Application, the answer received was in the negative. Upon being further questioned by the Court, the learned counsel categorically admitted that no appeal was ever filed with respect to the judgment and decree rendered in the Suit and furthermore that the Impugned Order had also never been challenged by the said respondents. Learned counsel, however, sought dismissal of the present appeal. In addition thereto the learned counsel provided the citations in respect of the judgments in *Captain-PQ Chemical Industries (Pvt.) Ltd vs. Messrs A.W. Brothers & Others* reported as 2004 SCMR 1956, *Afzal Maqsood Butt vs. Banking Court No.2, Lahore & Others* reported as PLD 2005 SC 470, *Messrs NIB Bank Limited vs. Messrs Apollo Textile Mills Limited & Others* reported as PLD 2013 Sindh 430, *Messrs Saudi Arabia Airlines vs. Messrs International Marketing Corporation & Others* reported as 2015 CLC 916, *Muhammad Afzal Khan & Another vs. National Bank of Pakistan* reported as 2015 CLD 464, *Muhammad Hassan vs. Messrs Muslim Commercial Bank Ltd. & Others* reported as 2003 CLD 1693, *Messrs Ripple Jewellers (Pvt.) Ltd. vs. First Woman Bank & Others*

reported as 2003 CLD 1318, *Marudanayagam Pillani vs. Manickavasakam Chettiar* reported as AIR (32) 1945 Privy Council 67, *Md. Umar vs. Moti Chand & Others* reported as AIR 1952 Patna 244, *Haji Zahid Saeed vs. Messrs Asif Brothers & Others* reported as 2015 CLD 40, *Kandaswami Mudali vs. K.R. Narasimha Aiyar & Others* reported as AIR 1952 Madras 582, *Nand Lal vs. Mt. Siddiquan & Others* reported as AIR 1957 Allahabad 558, *Babu Singh vs. S. Gurbakhsh Singh* reported as AIR 1928 Lahore 249, *M/s. Asif Brothers & Others vs. Muslim Commercial Bank Limited & Others* reported as NLR 2005 Civil 517, *Mrs. Shahida Saleem & Another vs. Habib Credit and Exchange Bank Limited & Others* reported as 2001 CLC 126, *Abdul Jabbar Shahid & Others vs. National Bank of Pakistan & Others* reported as PLD 2019 Lahore 76, *Rana Muhammad Naseeb Khan vs. Zarai Tarukiyati Bank of Pakistan & Others* reported as 2007 CLD 466 and *Liaqat Ali vs. Bashiran Bibi & Others* reported as 2005 CLC 11 in support of his contentions.

5. We have considered the arguments advanced by the respective learned counsels for the parties and have also appreciated the record arrayed before us. The primary point for determination is whether there was any legal sanction for the learned Banking Court to set aside the auction proceedings.

6. The learned Banking Court observed, in the Impugned Order, that the O.21 r.69 Application was discrepant as the requisite deposit was never made by the judgment debtors. A bare perusal of Order XXI Rule 69(3) demonstrates that a sale may be stopped if the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale or proof is given to his satisfaction that the amount of said debt and costs have been paid into the Court which has ordered the sale. Therefore, it follows that either the amount was to be tendered to the officer conducting sale or proof of the same having been deposited before the learned Banking Court had to be provided. It is an admitted fact that the prescriptions of Order XXI Rule 69(3) were not complied with by the judgment debtors upon the day on which the O.21 r.69 Application was preferred, or at any time thereafter. While it is our considered view that the learned Banking Court had rightly dismissed

the judgment debtor's O.21 r.69 Application, the issue to be addressed remains that instead of proceedings towards the confirmation of sale the learned Banking Court observed in the Impugned Order that the judicial sale was conducted in a casual and cursory manner, which raised questions to the sanctity of the Court, therefore, such conduct went to the root of the case and brings the whole proceedings under a thick cloud of doubt and such illegality was alone sufficient to initiate the whole proceedings, hence the Nazir report / auction report dated 17.10.2018 was declined and the auction proceedings were ordered to be conducted afresh.

7. The ostensible basis upon which the learned Banking Court rendered the aforesaid conclusion was that on the date that the judgment debtors' filed the O.21 r.69 Application, being date of public auction, the Presiding Officer of the learned Banking Court was on leave and same was the case with the learned Link Judge. It was observed in the Impugned Order that in the absence the respective Judges the judgment debtors' application was not considered and since the judgment debtors were entitled to have their application adjudicated prior to the sale in question, therefore, non-consideration of the said application prior to the conclusion of the sale proceedings was a material illegality, which in turn vitiated the entire sale proceedings. While there is no cavil to the proposition that the application of the nature referred to may be adjudicated prior to the conclusion of the sale proceedings, it is imperative that the purportedly belated decision thereupon be considered in the facts and circumstances of the present case in order to determine whether such purported delay would be fatal to the entire sale proceedings.

8. It is noted from the diary sheet dated 04.10.2018 in the Suit, also reflected in the Impugned Order, that on the said date the advocate filed *vakalatnama* on behalf of the judgment debtors and the O.21 r.69 Application on their behalf. The said order also records that the Nazir of the Court submitted the auction report. It is prima facie apparent from the diary sheet that no proceedings were taken on that day either in respect of the judgment debtors' application or with respect to the auction report and the matter was simply adjourned to the next date.

The record shows that despite the subsequent availability of a learned Judge, the O.21 r.69 Application was not heard on several successive dates until 19.11.2018, when the matter was heard and reserved for orders. It is also apparent from the record that notwithstanding the fact that the judgment debtors' application had not been decided, the learned Judge directed on 17.10.2018, that the remaining 75% of the appellants bid be deposited in the Court account. It is thus apparent that notwithstanding the absence of the relevant Presiding Officer on 04.10.2018, the learned Presiding Officer was present on the subsequent dates including on the date when the deposit of balance 75% was ordered, notwithstanding no progress having been occasioned in so far as hearing of the judgment debtors application was concerned, which delay could not under any circumstances be attributed to the auction purchaser. It is also apparent from the record that no proceedings in so far as the sale was concerned took place in the meanwhile, other than the Court sanctioned deposit of the remaining constituent of the bid amount. Therefore, it cannot be said that the sale was concluded without adjudicating the O.21 r.69 Application.

9. Order XXI Rule 92 of the CPC expressly states that where no application is made under Rules 89, 90 or 91 CPC or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale become absolute. In the present facts and circumstances, it is an admitted position that no application under Rules 89, 90 or 91 CPC was ever preferred by the judgment debtors. We have also noted from the aforementioned Rule that the verbiage employed is "shall", thus signifying that the Court is bound to confirm a sale unless precluded from doing so by operation of Rule 92 referred to supra. The learned Banking Court appears not to have considered the import of Order XXI Rule 92 CPC while vitiating the auction proceedings and ordering for a de novo process in such regard.

10. It is observed by the learned Banking Court in the Impugned Order itself recorded that the condition precedent for entertaining an application under Order XXI Rule 69 is the deposit of the relevant amount, which admittedly did not take place on 04.10.2018, when the application was preferred, or at any time thereafter. The learned

Banking Court has not only recognized this material lacuna but has predicated the dismissal of the judgment debtors' application, inter alia, upon this ground. It is thus noted that, no justification has been reflected in the Impugned Order for vitiating the auction proceedings on the basis of the untimely appreciation of an application, which was admittedly and demonstrably discrepant at the very time when the same was instituted. Zaffar Hussain Mirza, J (as he then was) had observed in *Hudaybia Textile Mills Ltd. vs. Allied Bank of Pakistan Ltd. and Others* reported as *PLD 1987 Supreme Court 512* that a Court cannot refuse confirmation of sale on unsubstantiated grounds and further maintained that judicial discretion cannot be exercised in an arbitrary manner as such conduct would inevitable destroy the public confidence in the stability of judicial sales.

11. While we are cognizant of the well settled law that no vested right is created in favour of an auction purchaser until the fall of the hammer, which may in the present circumstances be a reference to the point at which a confirmation of sale is issued in favour of the auction purchaser, however, we cannot be oblivious to the scenario that the entire process of sale/auction proceedings could not be brought to naught upon the feeble and unjustifiable rationale employed by the learned Banking Court. No impropriety has been demonstrated from the record in so far as the auction proceedings are concerned and the assertion regarding non service of notice, made by the learned counsel for the respondent Nos. 2, 3 and 4, was also controverted by the record itself. Learned counsel for the respondent Nos. 2, 3 and 4 was also unable to substantiate any allegation with regard to sale proclamation and valuation from the record. In any event it has been maintained by the honorable Supreme Court in *Mumtaz-ud-Din Feroz vs. Sheikh Iftikhar Adil & Others* reported as *2009 CLD 594* that infraction with regard to the procedural aspects of a sale proclamation, its publication and the conduct of sale in execution could be deemed to be irregularities, however, the same cannot be regarded as illegalities thereby rendering the sale as a nullity. In so far as the issue of valuation is concerned earlier Division Benches of this Court had maintained in *Muhammad Rafiq vs. Federation of Pakistan & Others* reported as *2013 CLD 1667* and *Muhammad Mohammad Jameel vs. Eridania (Suisse) SA & Others*

reported as 2018 CLD 1478 respectively that an alleged inadequacy of sale price is not a valid ground to set aside auction proceedings. It is an admitted fact that upon the day that the O.21 r.69 Application was preferred the requisite deposit (or proof thereof) mandated pursuant to Order XXI Rule 69(3) CPC was not undertaken. Notwithstanding the judgment debtors' application having been demonstrably not maintainable from the very onset, the delay in adjudication thereupon could not be attributed to the auction purchaser. If the learned Banking Court procrastinated adjudication of the said application on several successive dates, despite the presence of the presiding officer/s as is apparent from the diary sheet, the consequence thereof could not be to the detriment of the auction purchaser. The age old maxim *actus curiae neminem gravabit* has always been given due credence by our Courts, including in *Rashad Ehsan & Others vs. Bashir Ahmad & Another* reported as *PLD 1989 Supreme Court 146* wherein Nasim Hassan Shah, CJ (as he then was) observed that if an error was occasioned by the officer authorized to conduct the sale the auction participant / purchaser could not be penalized, as doing so would be neither fair nor equitable.

12. Learned counsel for the respondent Nos. 2, 3 and 4 had categorically admitted that no appeal was ever preferred against the judgment and decree in the Suit; no constituent of the execution proceedings was ever objected to or challenged; no application had ever been preferred under Order XXI Rules, 89, 90 and / or 91 CPC; the requisite deposit was never made to maintain the O.21 r.69 Application. The case law filed by the learned counsel post hearing, even though not adverted to during the hearing itself, postulated that vested rights are only created upon the fall of the hammer; notice to judgment debtor is required to be issued so that objections may be filed; auctioneer is required to follow the provisions of the law; it is the duty of Court to prevent fraud; the Court has inherent powers to scrutinize the process of sale; and that a sale could be set aside even post confirmation. While we have no cavil to the ratio of the said judgments it is hereby observed that no benefit accrues to the said respondents as their reliance thereupon is patently misplaced.

13. In view of the foregoing, it is observed that while the learned Banking Court had rightly dismissed the judgment debtors' O.21 r.69 Application, however, there was no occasion to vitiate the auction proceedings. Therefore, we hereby set aside the constituent of the Impugned Order wherein the auction proceedings were nullified.

14. This appeal is allowed in terms herein.

JUDGE

JUDGE

Khuhro/PA