

# IN THE HIGH COURT OF SINDH AT KARACHI

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

First Appeal 50 of 2018 : Muhammad Farooq vs.  
Silk Bank Limited  
& Others

For the Appellant : Mr. Shahzaib Akhtar Khan  
Advocate

For the Respondent : Ms. Alizeh Mahak  
No.1 Advocate

For the Respondent : Mr. Khaleeq Ahmed  
Nos. 3 & 4 Advocate

Date of Hearing : 03.04.2019

Date of Announcement : 23.04.2019

## JUDGMENT

**Agha Faisal, J:** Present appeal has been filed by an auction participant against the order dated 21.04.2018 (“**Impugned Order**”), passed in Execution 15 of 2016 (“**Execution**”), contents whereof are reproduced herein below:

“Learned advocate for the decree holder has filed statement accompanied with the bank letter No.SBL/SAMG(S)/SAK/2018/040 dated 9<sup>th</sup> April, 2018 stating as under:-

“It is most respectfully and most humbly submitted on behalf of the Decree holder, that since the parties have settled their dispute out of Court, therefore the instant Execution Application is being withdrawn, and the same may be dismissed as being ‘not pressed’ by this Honourable Court”.

2. The brief facts of the case are that the auction / sale was conducted on 16-05-2017 against the property under mortgage bearing plot No.285-A, 286-A, 287-A and 339-A (Each plot 140 Square Yards) Hawkesbay truck stand Karachi, and three persons participated in the auction proceedings among them one Muhammad Farooq Son of Muhammad Zameer offered the highest bid of Rs.157,00,000.00. He has paid 25% of bid amount of Rs.4,000,000.00 through pay order Nos.1431838, 00000298, 00000300 & 00000299 thereafter, as per report of Nazir, the auction purchaser deposited the total amount of Rs.157,00,000.00 within the prescribed time. In the meantime the legal heirs of J.D

No.3 moved the objections u/s 19(7) of the FIO, application u/o XXI rule-90 CPC & application dated 19.12.2017 along with 5% of the sale proceeds / bid money and the decree holder filed application u/o XXXIV rule-5 r/w Section 151 CPC, all these applications were heard and were dismissed as infructuous vide order dated 27.2.2018 while the application dated 19.12.2017 filed along with 5% of the bid money was kept pending. The decree holder has also filed application u/s 151 CPC with the prayer to adjourn the present execution sine-die which was also dismissed on 27.2.2018. The present statement seeking withdrawal of the execution has been filed on 10.04.2018. The notice has been waived by the auction purchaser.

3. I have heard the learned advocate for Decree holder advocate for the legal heirs of judgment debtor No.3 and advocate for the auction purchaser. The learned advocate for decree holder relied upon 2007 CLD 698, learned advocate for judgment debtor relied upon 2007 CLC 698 & 1409, 2005 CLD 967, 2017 CLD 1158, 2007 CLD 698, 2014 MLD 192, 2009 CLD 1056 and learned advocate for auction purchaser relied upon 2016 CLD 480, 2007 CLD 1511, I have also perused the case file along with case law.

4. The learned advocate for the auction purchaser opposed the withdrawal of the Execution on the ground that settlement reached between the bank and the borrower outside the court is not binding upon executing court and further that the property has been auctioned and he prayed to confirm the auction. Admittedly it is settlement between financial institution and the borrower/ J.D outside the court but judgment debtor cannot be restrained from the entering into settlement with the financial institution just to save his property from being disposed of to third party by way of auction which has not yet been confirmed, moreover it is settled law that the Execution proceedings can be withdrawn by the decree holder at any stage.

5. In view of above reasons given in the preceding paragraph No.4, the Execution application No.15/2016 stands dismissed as withdrawn and this order application dated 19.12.2017 filed along with 5% of the bid money stands disposed of, consequent thereto the highest bidder offered by one Muhammad Farooq S/o Muhammad Zameer is rejected. Nazir directed to return the bid money together with 5% of bid money (deposited by the judgment debtor) to the auction purchaser. The case law relied upon the learned advocate for auction purchaser, referred in the paragraph No.3, is quite distinguishable on the facts & circumstances of this case.”

2. Mr. Shahzaib Akhtar Khan, Advocate represented the appellant and submitted that the Impugned Order was *prima facie* in negation of Order 21 Rule 92 CPC, hence, ought to be set aside forthwith. Per learned counsel, Suit 263 of 2010 (“**Suit**”) was filed before the learned Banking Court IV at Karachi and the same was decreed against the

judgment debtors. It was submitted that pursuant thereto the mortgaged property was sought to be sold vide auction and the appellant participated in the said process and was the highest bidder in such regard. Per learned counsel no application was ever filed by the judgment debtors under Rules 89 or 90 of Order 21 CPC and notwithstanding the foregoing the learned Banking Court kept the matter pending for one year. Learned counsel submitted that the decree holder bank and judgment debtors entered into an out of court agreement to settle the judgment and decree and on the basis of such settlement the execution proceedings were permitted to be withdrawn. It was argued that an out of court settlement was no grounds for setting aside the execution proceedings, as vested rights of an auction participant / purchaser had already intervened and such rights could not be disregarded by the Court. It was further argued that only avenue to set aside an auction is pursuant to Rules 89 and 90 of Order 21 CPC and no such avenue was availed by the judgment debtors.

3. Mr. Khaleeq Ahmed, Advocate appeared on behalf of the respondent Nos.3 & 4 and submitted that the said judgment debtors had in fact preferred an application under Order 21 Rule 90 in the Execution, however, the same was dismissed vide order dated 27.02.2018 (“**O.21 r.90 Order**”). Learned counsel submitted that the judgment debtors were specifically permitted vide the aforesaid order to conclude the settlement with the decree holder bank and the same is apparent from the bare perusal of the said order. It was argued that the auction in respect of the mortgaged property was never concluded as no confirmation of sale was ever issued by the learned Banking Court. It was further argued that there is preponderance of case law which recognized the rights of the auction purchaser once such rights had been crystalized by virtue of appropriate orders of the Court and the same is admittedly not the case herein. In conclusion, it was argued that present appeal is without merit and it is an admitted fact that judgment and decree has already been satisfied and thus the Execution already stands withdrawn.

4. Ms. Alizeh Mahak, Advocate appeared on behalf of the decree holder bank, respondent No.1 herein, and submitted that the present appeal was misconceived and even otherwise devoid of merits. Learned

counsel argued that it is apparent from the paragraph 4 of the memorandum of appeal that the appellant was aware of the application filed by the judgment debtors under Order 21 Rule 90 CPC before the learned Banking Court. It was further argued that decree holder bank was well within its rights to seek an out of court settlement with the judgment debtors and the same that was rightfully recognized vide Impugned Order. Learned counsel categorically submitted that the decretal amount was twice the value of the mortgaged property, hence, it was just and proper for the decree holder bank to avail the settlement of its entire liability in one go by accepting the decretal amount directly from the judgment debtors themselves. Learned counsel submitted that no right has crystalized in favour of the appellant, hence, he was ineligible to claim any entitlement to the mortgaged property, especially in view of the fact that the judgment and decree stood satisfied and the Execution proceedings stand withdrawn.

5. Mr. Shahzaib Akhtar Khan, Advocate accepted in rebuttal that an application under Order 21 Rule 90 CPC was in fact filed, however, submitted that said application was discrepant from its very inception, since the amount required to be deposited therewith was never deposited in fact. Learned counsel referred to the O.21 r.90 Order and submitted that last paragraph thereof was otherwise than in accordance with law as the learned Banking Court had no authority to provision for settlement taking place between the decree holder and the judgment debtors.

6. We have considered the arguments of the respective learned counsels and observe at the very onset that the settlement between the judgment debtors and decree holder bank was recognized in O.21 r.90 Order. It may be appropriate to reproduce the relevant constituent of the aforesaid order herein below:

“In view of above discussions and reasons given in the preceding paragraph No.5 to 7 the objections u/s 19 (7) of the Financial Institutions Ordinance, 2001, together with application u/o XXI rule-90 CPC filed by the legal heirs of J.D No.3 and application u/o XXXIV rule-5 r/w Section 151 CPC filed by the decree holder having become infructuous stand dismissed. It in case the legal heirs of J.D No.3 failed to clear the liability by 15<sup>th</sup> March, 2018 as per settlement then the appropriate order will be passed on the

auction on next date of hearing i.e. 20.03.2018. The case law relied upon by learned advocate for auction purchaser referred in the preceding paragraph No.4 is quite distinguishable on the facts and circumstances of the case.”

7. While the appellant’s claims to have been aggrieved primarily on the basis of the settlement vitiating the auction proceedings, it is an admitted fact that the appellant has never impugned the O.21 r.90 Order. It is observed that the Impugned Order followed the O.21 r.90 Order and gave effect to the settlement that was already provisioned for in the preceding order. It is relevant to observe at this juncture that the failure of the appellant to assail the O.21 r.90 Order casts a prejudicial shadow upon the present appeal.

8. With regard to the issue of vested rights, it is trite law that rights of an auction purchaser only crystalize upon the fall of the hammer. Learned counsel for the respondent Nos.3 & 4 had drawn our attention to the recent pronouncement of the honorable Supreme Court in case of *Muhammad Khalil vs. Faisal M.B. Corporation & Others* reported as 2019 SCMR 321, wherein it was categorically observed that valuable rights cannot be deemed to have accrued in favour of a person by virtue being the highest bidder and or even having deposited the entire sale price in court. The honorable Supreme Court maintained that it needs no reiteration that an auction is always subject to confirmation by the court and till such time such confirmation is granted no vested right can be claimed in the property subject to auction in favour of an auction participant / purchaser. Ijaz ul Ahsan, J concluded in the aforesaid judgment that when the executing court does not confirm the auction no vested rights accrue in favour of an auction purchaser. This authority is applicable squarely to the present facts and circumstances and it is thus maintained that the present appeal is not sustainable, hence, is hereby dismissed, along with pending application, with no order as to costs.

J U D G E

J U D G E