

IN THE HIGH COURT OF SINDH, AT KARACHI

Present:

Irfan Saadat Khan and
Yousuf Ali Sayeed, JJ

1st Appeal No. 83 of 2019

Appellant : M/s Hussaini Textile Industries
& others, through Khaleeq
Ahmed, Advocate.

Respondent No.1 : M/s. United Bank, through Adil
Khan Abbasi, Advocate.

Respondent No.2 : Muhammad Amir Yousuf,
through Badar Alam, Advocate.

Date of hearing : 04.11.2020

JUDGMENT

YOUSUF ALI SAYEED, J - The captioned Appeal under S.22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the “**Ordinance**”) impugns an Order made by the learned Judge of the Banking Court No. V at Karachi (the “**Executing Court**”) on 02.12.2019 in Execution No. 71 of 1999 ensuing from Suit Number 39 of 1996 decreed in favour of the Respondent No.1 as against the Appellant and others, whereby the Appellant’s Application under Order 21, Rule 90 CPC (the “**Underlying Application**”) against the auction sale of a built up immovable property bearing No. 26, Qasba Township, admeasuring 111.11 square yards, Karachi (the “**Subject Property**”) was dismissed.

2. It merits consideration that the Underlying Application was preferred by the Judgment Debtor No.3, namely Tahir Hussain Siddiqui, which is of significance as he had himself previously applied before the Executing Court for postponing the auction of the Subject Property, and being unsuccessful, had then preferred 1st Appeal No. 06 of 2019 (the “**Prior Appeal**”) before this Court, which was disposed of by a learned Division Bench on 09.10.2019 in light of Order 21 Rule 89 CPC, with the relevant part of the Order reading as follows:

“2. Today, Moulvi Iqbal Haider, Advocate for the Appellant stated, upon instructions, the Bank’s total liability is Rs.8,00,000/-, and he requests for 03 days’ time for making of the entire payment of Rs.8,00,000/- by the appellant to the Nazir of this court in lump sum. Mr. Adil Khan Abbasi, Advocate for the Respondent No.1 (United Bank Ltd.) has no objection and so far as the Auction Purchaser Muhammad Amir Yousuf is concerned, he submits that he has already deposited Rs.27,50,000/- in the Banking Court and due to settlement between the Bank and the appellant this amount may be returned to him after payment with some profit/markup. At this juncture, learned counsel for Bank also pointed out Order 21 Rule 89 CPC in which the modalities have been provided that in such circumstances for payment to a purchaser, a sum equal to five percent of the purchase-money. It is a fact that the property has been auctioned but so far the sale has not been confirmed by the Banking Court.

3. In view of the undertaking by the learned counsel for the appellant and the proposal accepted by learned counsel for Bank in presence of Mr. Imran Khan, AVP, United Bank Ltd. this appeal is disposed of, by consent, in the following terms:-

- “(1) The appellant shall deposit Rs.800,000/- with the Nazir of this court on or before 15.10.2019.
- (2) In addition to above liability of Bank, the appellant shall also pay Rs.1,37,500/- equivalent to 5% of the amount deposited by the Auction Purchaser, in terms of Order 21 Rule 89 CPC.
- (3) After depositing the aforesaid amount by the appellant the Nazir may release the amount to the respondent No.1 after proper identification and verification. The amount of Rs.137,500/- shall be paid to the Auction Purchaser (Respondent No.4) after proper identification and verification.
- (4) After discharge of the liability the respondent No.1 shall redeem the original title documents of the property in question to the Nazir of Banking Court, for releasing the same in accordance with law.
- (5) After compliance of this order and issuance of certificate by the Nazir for full and final payment, the Banking Court shall also release the amount of Auction Purchaser, which he deposited against the bid amount, on proper identification and verification.
- (6) It is agreed by the learned counsel for the appellant that in case the entire aforesaid amount is not deposited with the Nazir of this court on or before 15.10.2019, the settlement shall be void and the Banking Court shall confirm the sale and execute the decree in accordance with law.
- (7) Interim orders operating herein shall subsist until 15.10.2019, whereupon they shall automatically stand vacated.”

3. Thereafter, two Applications were also filed in the Prior Appeal, seeking (i) extension of time for deposit of the specified amount on the pretext that due to heavy rush in the bank, the Appellant was unable to deposit the same before the Court, and (ii) the suspension of an order passed by the Executing Court whereby the sale of the Subject Property in favour of the auction purchaser (i.e. the present Respondent No.2) was confirmed and the Nazir was directed to issue a sale certificate and hand vacant and peaceful possession thereof over to him accordingly. Both those Applications were found to be misconceived and were dismissed vide Order dated 22.11.2019.

4. It is that backdrop that the Underlying Application was nonetheless filed, seeking that the Executing Court set aside the sale of the Subject Property on the ground that the Decree Holder (i.e. the present Respondent No.1) had obtained confirmation by hiding the application for extension of time and that the Subject Property was put to auction without issuance of notice under Order 21, Rule 66 CPC. After considering the earlier course of litigation, including the proceedings that had ensued in the Prior Appeal, the Executing Court dismissed the Underlying Application as being without merit.

5. Learned counsel for the Appellants argued that the Executing Court had erred in dismissing the Underlying Application on the touchstone of the Orders made on 09.10.2019 and 24.10.2019 in the Prior Appeal without properly addressing the allegations of impropriety as regards the auction. He also sought to contend that it remained open to the Appellant to invoke Order 21, Rule 90 CPC, notwithstanding the Appellant having elected to exhaust the remedy otherwise available under Order 21, Rule 89 CPC.

6. Having considered the arguments advanced, it merits consideration that whereas Order 21 Rule 90 CPC allows for the setting aside of an auction sale on grounds of fraud or material irregularity, Order 21 Rule 89 CPC otherwise provides an opportunity to the judgment-debtor a means of avoiding a sale after it has been validly carried out, affording a final chance to the judgment-debtor post auction to have the sale set aside on payment of the decretal amount and an additional sum as compensation for the auction purchaser. As such, we are of the view that the remedies are mutually exclusive and after charting a course in terms of Order 21, Rule 89 CPC through the Prior Appeal, it did not lie in the mouth of the Appellant to allege that there was any fraud or irregularity marring the exercise. Moreover, it is to be borne in mind that upon confirmation of the sale, a vested right accrued in favour of the Respondent No.2, which could not be disturbed, and a finding to that effect had already been recorded by the learned Division Bench in its Order of 24.10.2019, with it being eruditely articulated in paragraph 8 thereof that:

“8. There is a preponderance of authority that stipulates that upon confirmation of sale and issuance of sale certificate the rights of an auction purchaser crystalize and as such rights may not be interfered with. The honorable Supreme Court has recently maintained in the case of *Muhammad Khalil vs. Faisal M.B. Corporation & Others* reported as 2019 SCMR 321 that upon confirmation of sale and issuance of a sale certificate vested rights accrue in favor of the auction purchaser. This Bench has rendered a judgment in a similar matter, *Nazli Hilal Rizvi vs. Bank Alfalah Limited* reported as 2019 CLD 808, wherein it was maintained that once an auction purchaser acquires an interest in property then the same may not be disturbed unjustifiably. The august Supreme Court has maintained *Nazli Hilal* in its recent judgment dated 07.08.2019 in *Nazli Hilal Rizvi vs. Bank Alfalah Limited & Others CP 381-K of 2019.*”

7. Under the circumstances, the conduct of the Appellants is to be deprecated and we are of the opinion that the Executing Court ruled correctly in dismissing the Underlying Application.

8. It is for the foregoing reasons that the Appeal was dismissed vide a short Order dictated in open Court upon culmination of the hearing on 04.11.2020, while imposing costs on the Appellants in the sum of Rs.10,000/- to be deposited towards the High Court Clinic fund within 7 days from that date.

JUDGE

JUDGE

Karachi
Dated _____

