

IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Mahmood Ahmed Khan

H.C.A. No. 381 of 2017

Muhammad Jamil
Versus
Mst. Waheeda Aslam & others

Date of Hearing: 19.07.2019

Appellant: Through Mr. Muhammad Arif Shaikh Advocate

Respondents No.1 to 3: Through Ms. Saadia Khatoon Advocate

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Impugned in this High Court Appeal is an order dated 22.09.2017 passed by learned Single Judge in Execution No.38 of 2014 whereby an application of one of the co-owners, being widow of deceased, under order XXI rule 89 CPC was allowed with the directions to deposit Rs.7 Million plus 5% in addition to the said amount.

2. Brief facts of the case are that a suit for administration of properties was decreed by way of compromise. The immovable properties mentioned therein were ordered to be relinquished respectively, in favour of respective parties as mentioned in the decree. In addition to the above adjustment and relinquishment, as agreed between the parties Ghulam Nabi, Ali Sufyan and Hasnain Aslam, defendants No.1 to 3 in suit respectively, were also directed to pay a sum of Rs.16.5 Million to the plaintiffs i.e. Waheeda Aslam, Baby Rohab Aslam and Baby Heeba Aslam, as they were at the relevant time. The suit was decreed by way of compromise in August, 2011 and since then it appears that the parties to the suit for administration were contesting for their respective rights.

3. At one point of time a property disclosed as Aslam Dairy Farm, Deh Kharkharo, Superhighway, Karachi, was ordered to be auctioned in pursuance of an amount recoverable under the decree. The application was resisted by two of the co-owners Ali Sufyan and Hasnain Aslam on the ground of having preferential rights. The said application however was dismissed by learned Single Judge in Execution No.38 of 2014, which order was maintained by learned Division Bench of this Court in High Court Appeal No.213 of 2017, for the reasons mentioned therein. The application of two co-owners, referred above, was dismissed on 27.02.2017 which order was maintained by the Division Bench in High Court Appeal, referred above. In the said order of learned Single Judge however the Nazir's report of 29.11.2016, which is perhaps signed on 28.11.2016 was taken on record and offer of Rs.7 Million was accepted.

4. For the purpose of the present controversy the cause triggered when Nazir's report dated 21.03.2017 was placed on record to the effect that auction purchaser had deposited entire sale consideration amounting to Rs.7 Million in respect of property mentioned at Sr. No.6 of the compromise application/compromise decree, which is Aslam Dairy Farm admeasuring 4-0 Acres. It is at this point of time when applicant (respondent No.1) has moved an application under order 21 rule 89 CPC who is also decree holder and widow of the deceased. She intended to exercise her right of first refusal as being one of the co-owners of the subject property. The orders of the learned Single Judge of 27.02.2017 and that of the Division Bench dated 12.04.2017 would not apply since the respondent No.1 is a separate legal entity and has a right to exercise her own rights independently which rights cannot be overlapped by an order passed on application of other legal heirs. On the said application learned Single Judge in Execution No.38 of 2014 was pleased to pass an order enabling/ directing the respondent No.1 (applicant/co-

owner/widow) to deposit the bid amount and in addition thereto 5% of the bid amount, as required under the law.

5. It is in the above background that instant appeal is preferred by alleged auction purchaser claiming therein that the rights of some and/or all of the parties to the suit for administration have been extinguished and that his (appellant's) rights were protected in terms of earlier order of learned Single Judge dated: 27.02.2017 as well as order of the Division Bench dated 12.04.2017 in High Court Appeal No.213 of 2017.

6. We have heard learned counsel for appellant and that of respondents No.1 to 3 and perused the material available on record while no one attended the matter on behalf of remaining respondents for the last many dates.

7. The appellant cannot succeed on the strength of earlier orders passed in respect of application under order XXI rule 89 CPC as well as of the learned Division Bench against the rights and interest of the other co-owners/legal heirs of deceased. Those applications may have been dismissed by learned Single Judge and Division Bench however both the aforesaid orders did not determine the rights of present applicant (respondent No.1) in CMA No.118 of 2017, who is one of the decree holders and widow of the deceased. No doubt in suit for administration all parties are deemed to be decree holders and judgment debtors, as the case may require, however, for the purposes of present controversy the respondent No.1 is being described as decree holder being widow of the deceased.

8. Order XXI rule 89 CPC requires that where immovable property has been sold in execution of a decree, any person either owning such property or holding any interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing

the amount, as required under the law. The cause to the widow (respondent No.1) triggered only when the order of 27.02.2017 was passed and the present application i.e. CMA No.118 of 2017 was filed 02.03.2017 i.e. within a period of five days approximately. The fate of other co-owners deciding their rights, which they exercised under order 21 rule 89 CPC, will not come into play while determining the rights of the present applicant (respondent No.1). The earlier applications (filed by other set of legal heirs/deed holders) may have been dismissed for which no comments are required, however, it is to be seen for the purposes of present controversy whether the order passed by learned Single Judge and impugned in this appeal is in accordance with law or otherwise.

9. In terms of decree passed in a suit for administration, parties i.e. legal heirs of deceased Aslam Perwez have relinquished their respective shares in the property left by the deceased. For convenience the list of properties left by the deceased is reproduced in paragraph 1 of the decree. The properties are shown at Sr. No.1 to 7 in the aforesaid paragraph. Defendants No.1 to 3 in the suit, i.e. Ghulam Nabi, Ali Sufyan and Hasnain Aslam who are also arrayed as respondents No.4 to 7 in this appeal have relinquished their claim in respect of properties mentioned at Sr. No.1 and 2 in favour of plaintiffs in suit, i.e. Waheeda Aslam Perwez and two minor babies at the relevant time, i.e. Rohab Aslam and Heeba Aslam, both daughters of Aslam Perwez.

10. The decree also provides that plaintiffs in suit i.e. respondents No.1 to 3 on whose behalf application under order XXI Rule 89 CPC was moved had relinquished their shares in respect of properties mentioned at Sr. No.3 to 7 in paragraph 1 of the decree. The aforesaid defendants/judgment debtors who are shown as respondents No.4 to 7 further required to pay a sum of Rs.1,65,00,000/- to plaintiffs i.e. Waheeda

Aslam and two minor babies. This amount of Rs.1,65,00,000/- is calculated as per respective share of relinquishment which is not under dispute.

11. As against the recovery of aforesaid amount the subject property at sr. No.6 of the decree in paragraph 1 was ordered to be auctioned. The earlier application of other legal heirs was dismissed, which order was maintained by the appellate Court whereas present application under order 21 rule 89 CPC filed by widow Mst. Waheeda Aslam was allowed by learned Single Judge. It is now to be seen whether respondent No.1 who is widow and had relinquished her share and of respondents No.2 and 3 in the subject property, can maintain an application under order 21 rule 89 CPC.

12. Rule 89 of Order XXI CPC provides that where immovable property has been sold in execution of a decree, any person either owning such property or holding any interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court (a) a sum equal to 5% of purchase money (b) for payment to the decree holder an amount specified in the proclamation of sale.

13. Order XXI rule 89 CPC was made applicable by learned Single Judge whereas decree provides that she has already relinquished her share in the subject property at Sr. No.6 in terms of paragraph 2 of the decree and the only interest of the decree holder Waheeda and others shown as plaintiffs in suit left is recovery of Rs.20 lacs as her share in the aforesaid property. This does not mean that she still has an interest in the property. Her interest is only limited to the extent of money that she claims for which the subject property is being auctioned. This arrangement is not by way of a private agreement but it is now a decree of this Court and the parties have agreed that in case of any default in

the payment, the plaintiffs i.e. respondents No.1 shall be entitled to the execution/ satisfaction of the decree through this Court.

14. It is further agreed in the decree that the respondents No.4 to 7 shall not dispose of the property mentioned at Sr. No.5 till entire payment of Rs.1,65,00,000/-. Parties further agreed that in case of delay in payment the defendants No.2 and 3 shall pay interest at the rate of 20% in addition to the settlement amount. Thus, we do not see any reason to hold that the respondent No1 has any interest left in the subject property as she had already relinquished her share, which could enable her to exercise her right under order XXI rule 89 CPC. She could have participated in the auction as an independent participant but she failed.

15. It is plaintiff (respondent No.1) who has come for execution of decree of money. Now money decree was matured only on account of her relinquishment of share in the immovable property being auctioned. Had she not relinquished her share in the property, her money decree would not have been passed. The property which she relinquished was auctioned for her money decree.

16. We are well aware that the consent decree is an agreement carrying the sanctity of a Court of law and in this regard accordingly the respondent No.1 in our understanding could only have approached the Court for her due share even otherwise, but for such an exercise it was required on her part to at least offer and deposit the partial amount which was acquired by her in part consideration of the consent decree which has not been found in present proceedings, rather she had filed the execution for recovery of the amount only and no alternative prayer is available on her part coupled with the required deposit in order for her to claim in the share in the auctioned property in which case she may have been entitled to her share (in accordance with Shariah) at

which the property could have been sold. As such we found that the respondent No.1 on the acquisition of the partial monetary benefit cannot claim subsequent benefit/share in the property i.e. both halves.

17. Insofar as issue of minors are concerned that she (respondent No.1) relinquished on their behalf, this question was not raised by any of the parties before us, therefore, we do not feel it necessary to decide such controversy, if it is so in these proceedings.

18. The appeal as such is allowed and the impugned order dated 22.09.2017 is set aside.

Dated:

Judge

Judge