

IN THE HIGH COURT OF SINDH AT KARACHI

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

First Appeal 10 of 2017 : Muhammad Arif Gohar vs.
United Bank Limited

For the Appellant : Mr. Muhammad Javed Tanoli
Advocate

For the Respondent : Mr. Aijaz Hussain Shirazi
Advocate

Date of Hearing : 13.09.2019

Date of Announcement : 13.09.2019

JUDGMENT

Agha Faisal, J: The present appeal has challenged the dismissal by the learned Banking Court I at Karachi, in Suit 709 of 2012 (“Suit”) and Execution Application 44 of 2014 (“Execution”), of two applications, being under section 12(2) CPC and Order 21 Rule 90 CPC, vide orders dated 13.03.2017, (“12(2) Order”) and (“Order 21 Rule 90 Order”) respectively.

2. Briefly stated, the Suit was filed by the respondent bank against the appellant in the year 2012 and the same was determined vide judgment dated 20.08.2013 followed by a decree dated 27.09.2013 (“Judgment & Decree”). It is borne from the record that no appeal was preferred against the Judgment & Decree, however, an application under section 12(2) CPC was preferred in August, 2016. In addition to the aforementioned application, another application was filed under Order 21 Rule 90 CPC seeking to set aside the sale/auction proceedings in the Execution. The learned Banking Court was pleased to dismiss the applications under consideration vide the 12(2) Order and the Order 21 Rule 90 Order respectively, the relevant constituents whereof are reproduced herein below:

12(2) Order

“5. The perusal of record reveals that plaintiff filed suit for recovery of Rs.3,614,914.00 on 15.11.2012. In the said suit the process through all the modes as required under Section 9(5) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 was issued, including publication in two newspapers viz. daily Dawn and Jang both dated 06.12.2012. The summons were issued on the addresses as provided by the defendant himself in charge documents. The Bailiff report and Courier and postal receipts are also available on record, thus the contention of the defendant that the plaintiff got judgment and by misrepresentation and fraud is baseless. No any documentary evidence has been brought on record by the defendant in support of his contentions as regard to adjustment of entire loan. Likewise the defendant has also failed to establish that he shifted to Abbottabad since filing of suit on 15.11.2012, the Medical Reports relied upon by the defendant in support of his such contentions pertain to March, 2016 & June, 2016 which in any manner does not support the contentions of the defendant that he was residing in Abbottabad since the date of filing of the suit. Under Section 9(5) of the FIO, 2001 service duly effected in any one mode of the service shall be deemed to be a valid service for the purpose of this Ordinance. Moreover, the defendant has also failed to bring on record any intimation to Plaintiff for change of his address. The upshot of the above discussion is that the defendant has failed to satisfy to this Court that he was prevented by sufficient cause from making an application under Section 10 of the FIO, 2001 or that the summons were not duly served. In view of above discussion the application under Section 12(2) CPC read with Section 12 of the FIO, 2001 filed by the defendant having no merits is hereby dismissed.”

Order 21 Rule 90 Order

“5. The perusal of the record reveals that plaintiff filed suit for recovery of Rs.3,614,914.00 on 15.11.2012. In the said suit the process through all the modes as required under Section 9(5) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 was issued, including publication in two newspapers viz. daily Dawn and Jang both dated 06.12.2012, but the defendant failed to appear, as such the matter proceeded exparte against the defendant on 25.02.2013. finally the suit of the plaintiff was decreed in the sum of Rs.2,500,000/- against the defendant with cost of funds from the date of default till realization vide Judgment & Decree dated 20.08.2013 and 27.09.2013 respectively. The prayer of the plaintiff for attachment and sale of the mortgaged property viz. Plot No.B-36, admeasuring 130 sq. yds., situated at Gulistan-e-Landhi, Deh Landhi, Karachi was also allowed in terms of the said Judgment & Decree. Due to failure of J.D. to pay the decretal amount, the D.H. filed instant execution

application under Section 19 of the FIO, 2001 on 11.03.2014. In the execution proceedings the property in question was attached and after issuance of notices as required under Section 21 rule 66 CPC, the property viz. Plot No.B-36, admeasuring 130 square yards. Gulshan-e-Landhi, Deh Landhi, Karachi was ordered to be put to open auction vide order dated 16.02.2016. In compliance of the said order the proclamation of sale was issued on 10.05.2016 for auction of the said property to be held on 17.06.2016. during the pendency of bid learned counsel for the JD filed an application under Order 21 rule 90 CPC read with Section 19(7) of the FIO, 2001, read with section 151 CPC dated 29.07.2016 and another application under Order 12(2) CPC read with Section 12 of the FIO, 2001. The application 12(2) CPC read with Section 12 of the FIO, 2001 has been dismissed on this date through a separate order. The said property was put to auction on 17.06.2016 wherein one bidder Mr. Hidayatullah Kamboyo holding CNIC No.42401-4239086-1 participated in the bid in presence of Mr. Shafqat Mehmood, Recovery Officer of the D.H. and offered bid in sum of Rs.3,010,000/- and he deposited the entire bid amount with the Nazir of this Court in terms of sale proclamation. The D.H. bank has already given its no objection for confirmation of the bid in favour of the bidder. The bid so offered by the bidder is more than the forced sale value of the property in question. Mere assertion of the J.D. that the property in question has been auctioned at low price is no ground for setting aside of sale. The J.D. has also failed to point out any material irregularity or fraud in conducting of auction. The J.D. has also failed to deposit the amount as required under Order 21 Rule 90 CPC, therefore, the application under Order 21 Rule 90 CPC read with Section 19(7) of the FIO, 2001 read with Section 151CPC having no merits is hereby dismissed. The bid in the sum of Rs.3,010,000.00 offered by Mr. Hidayatullah Kamboyo holding CNIC No.42401-4239086-1 is more than forced sale of the property in question and decree holder has already given its no objection for confirmation of sale. Under the circumstances the sale is hereby confirmed. The Nazir of this Court is directed to release the sale proceeds to the D.H. on proper verification and identification. The Nazir is further directed to issue sale certificate in favour of Mr. Hidayatullah Kamboyo holding CNIC No.42401-4239086-1 or his nominee and release documents of said property to the said auction purchaser and put him in possession of the said property.”

3. Mr. Muhammad Javed Tanoli, Advocate argued on behalf of the appellant and submitted that the sale price obtained was below the value expected by the appellant in respect of the auctioned property. It was pleaded, in paragraph 3 of the memorandum of appeal, that the appellant was not in the habit of reading newspapers hence he could not read the notice of the Suit when it was published. Learned counsel submitted that the Banking Court

had wrongly disregarded the medical reports brought on record by the appellant to justify his absence before the Court. It was further submitted that the learned Banking Court had failed to appreciate the facts in their proper perspective, hence, erroneously dismissed the applications under consideration.

4. Mr. Aijaz Hussain Shirazi, Advocate appeared on behalf of the respondent bank and submitted that the Judgment & Decree had attained finality; the learned Banking Court had rightfully rendered the 12(2) Order as the necessary ingredients of misrepresentation or fraud were clearly absent from the proceedings then under consideration; the appellant had failed to deposit the requisite amount as prescribed under Order 21 Rule 90 CPC and therefore the relevant application was not maintainable in any event; the auction in respect of the mortgage property was concluded and in such regard drew the Court's attention to the sale certificate and possession letter available on the Court file. In conclusion it was argued that the present appeal was meritless, hence, ought to be dismissed forthwith.

5. We have heard the respective learned counsel at length and have also considered the record to which our surveillance was solicited. It is prima facie apparent that the present appeal does not assail the Judgment & Decree and on the contrary assails the orders passed by the learned Banking Court much thereafter. Pursuant to Order XLI Rule 31 CPC, the primary point framed for determination herein is whether any infirmity has been identified with respect to the orders under consideration to merit interference in appeal.

6. Section 12(2) CPC contains the provision to set aside a judgment on the ground of fraud and/or misrepresentation. We have perused the application itself, filed by the appellant before the Banking Court, and observe that no case for fraud or misrepresentation is made out therefrom as the basis premise of the appellant was that he had no knowledge of the court proceedings. The said assertion was demonstrably negated by the record before the learned Banking Court in respect whereof it was observed that

the bailiff report, courier receipts and postal receipts were available on record, thus, the challenge by the appellant was baseless. The learned Banking Court further observed that pursuant to section 9(5) of the Financial Institutions (Recovery of Finance) Ordinance, 2001 ("Ordinance") service duly effected in any one of the modes of service was to be deemed valid service for the purposes of the Ordinance, therefore, there was no question of service not having been effected upon the appellant. The 12(2) Order also records that the appellant failed to bring on record any intimation to the respondent demonstrating that his purported change of address had been brought on the record.

We have read the contents of the application filed by the appellant before the learned Banking Court and have also considered the medical certification sought to be relied upon. At the outset, it may be pertinent to record that the copies of the purported medical reports are dated 2016, hence, the learned Banking Court appears to have rightly concluded that they have no bearing on the issue of service upon the appellant, which was effected post filing of the Suit on 15.11.2012. The learned Banking Court appears to have given due consideration to the facts and circumstances pleaded by the appellant in the 12(2) CPC application and the 12(2) Order appears to have been rendered upon due consideration of the law. The learned counsel for the appellant has failed to demonstrate any infirmity in respect thereof.

7. We now proceed to consider the other order under challenge herein. It is precursor to an application under Order 21 Rule 90 CPC that the applicant deposits specified amount before the Court. It is also specified in Order 21 Rule 23-A CPC that an objection by a judgment debtor to the execution of a decree is not to be considered by the Court unless the decretal amount or security in respect thereof is deposited with the Court. It is an admitted fact that no amount was ever deposited by the appellant at the time of preferring the application under Oder 21 Rule 90 CPC, or at any time thereafter, and in such regard it would follow that the appellant's very application was discrepant from the very outset. The learned

Banking Court has duly considered this aspect in the Order 21 Rule 90 Order.

The learned Banking Court has also addressed the issue of the sale price and recorded that the bid offered was more than the forced sale value of the property in question and mere assertion by the Judgment Debtor that the price is low is no ground for setting aside the sale. Earlier Division Benches of this Court have maintained in *Muhammad Rafiq vs. Federation of Pakistan & Others* reported as 2013 CLD 1667 and *Mohammad Jameel vs. Eridania (Suisse) SA & Others* reported as 2018 CLD 1478 (“Eridania”) respectively that an alleged inadequacy of sale price is not a valid ground to set aside auction proceedings. *Eridania* was recently maintained by the honorable Supreme Court in its judgment dated 05.07.2019 in *Mohammad Jameel vs. Eridania (Suisse) SA & Others CP 949-K of 2018*.

8. Notwithstanding the fact that no infirmity has been demonstrated from the orders assailed before us, it is also an admitted fact that the auction proceedings have concluded and the property stands transferred / delivered to the auction purchaser. It thus stands to reason that the rights of a third party auction purchaser have intervened and the same are required to be safeguarded. This Bench has rendered a judgment in a similar matter, *Nazli Hilal Rizvi vs. Bank Alfalah Limited* reported as 2019 CLD 808 (“*Nazli Hilal*”) 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 pronouncement dated 07.08.2019 in *Nazli Hilal Rizvi vs. Bank Alfalah Limited & Others CP 381-K of 2019*.

9. In view of the reasoning and rational contained herein it is our considered view that the learned counsel for the appellant has failed to identify any infirmity with respect to the orders under consideration, hence, the same are hereby maintained. The present

appeal, alongwith pending application(s), is hereby dismissed with no order as to costs.

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