

Order Sheet

IN THE HIGH COURT OF SINDH, KARACHI

H.C.A. No. 213 of 2017

PRESENT:**MR. JUSTICE MUNIB AKHTAR****MR. JUSTICE ARSHAD HUSSAIN KHAN****Ali Sufyan & another vs. Waheeda Aslam & others**

Appellants: Ali Sufyan & others
Through Mr. Afaq Yousuf, Advocate.

Respondents: Waheeda Aslam & others

Date of Hearing: 12.04.2017

Date of Order 12.04.2017

ARSHAD HUSSAIN KHAN, J. This High Court Appeal arises out of an order dated 27.02.2017 passed by the learned Single Judge of this Court in Execution Application No.38 of 2014, whereby the application under Order XXI Rule 89 of CPC filed by the present appellants seeking setting aside the sale of the immovable property, that is, Aslam Dairy Farm, Deh Kharkharo, Super Highway Karachi, was dismissed.

2. Brief facts leading to the filing of present appeal as averred therein are that the present appellants and respondents No.1 to 5 are legal heirs of (late) Aslam Pervaiz [**deceased**] who died at Karachi on 03.01.2011. Upon the death of said Aslam Pervaiz, respondent No.1 being widow of the deceased filed Suit No.490/2011 in this Court for administration and distribution of the properties left behind by the deceased amongst the legal heirs as per their shares. The above said suit was disposed of by way of a compromise reached between the parties. It is also averred that appellants and respondent No.1 filed separate execution applications, that is, Execution Application No.37 of 2014 filed by the appellants and Execution Application No.38 of 2014 filed by respondent No.1 for the execution of the compromise decree passed in Suit No.490 of 2011. Further averred that the appellants had made

payment of Rs.48,00,000/- to respondent No.1, however since respondent No.1 had to hand over property documents upon receiving first installment, that is, Rs.30,00,000/-, in which she had failed consequently, the appellants filed the execution application 37 of 2014. The said Execution Application No.37 of 2014 was disposed of with the direction to the appellants to furnish surety in the sum of Rs.1,17,00,000/-, However, the appellants were unable to furnish such security. It is also averred that respondent No.1 obtained an order of the auction of the immovable property known as Aslam Dairy Farm, Deh Kharkharo, Super Highway Karachi and the auction was conducted by the Nazir of this Court in Execution Application No. 38 of 2014. The highest bid was of Rs.70,00,000/- offered by one Mohammad Jameel Memon. The appellants immediately after the close of auction proceedings, filed an application under Order XXI Rule 89, CPC offering to match the highest bid. The respondent No.1 filed objections on the said application and after hearing the parties learned Single Judge dismissed the said application through the order impugned in the present proceedings.

3. The learned counsel for the appellants during the course of his arguments has contended that the order impugned in the proceedings is not sustainable in law. Further contended that the learned Single Judge while passing the impugned order has misread the contents of the application under Order XXI Rule 89, CPC and also failed to consider the fact that appellants have already paid Rs.48,00,000/- to the respondent No.1, which is more than the share the respondent No.1 and her minor daughters are entitled to. Further contended that the learned Single Judge has wrongly observed that the decree in Suit No.490/2011 was a money decree. Per learned counsel the question of money decree does not arise as the appellants never took any loan from the respondent No.1 nor any obligation accrued against appellants in respect of the estates left behind by the deceased. Further contended that the Leaned Single Judge while passing the impugned order failed to appreciate that the bid of co-sharers shall take precedence over any other bid offered by any third person. It is also contended that the learned judge while passing the impugned order has failed to consider the fact that respondent No.5 has died and his legal heirs have not been

brought on record and any order touching the interest of the said legal heirs is against the basic principles of natural justice. Furthermore, the appellants having the right to get the sale set aside and pay the other legal heirs of their due share had rightly filed application under Order XXI Rule 89 of CPC however, Learned Single Judge has dismissed the said application.

4. We have heard the learned counsel for the appellant and perused the documents annexed with the memo of appeal.

From the perusal of the record, it appears that deceased Aslam Pervaiz had contracted two marriages; from the first wife the appellant No.1, 2 and respondent no. 4 were born and after the death of his first wife the deceased contracted second marriage with respondent no.1 and out of said wedlock respondent No.2 and 3 were born. Upon the death of Aslam Pervaiz, respondents No.1 to 3 filed Suit bearing No. 490 of 2011 before this Court, inter alia, against the appellants for declaration, administration, rendition of accounts, recovery, possession, mesne profit, specific performance and permanent injunction, in respect of the properties left behind by the deceased Aslam Pervaiz. The said suit was eventually compromised and in terms of the said compromise a decree was passed on 20.08.2011. Pursuant to the terms of said compromise, it was, inter alia, agreed amongst the parties that present appellants (defendants No.2 and 3 in the said suit) shall pay Rs.1,65,00,000/- to respondent No.1 in respect of the shares of respondents No.1 to 3 (plaintiffs in the said suit) as per the schedule mentioned in the para-3 of the compromise decree and in case of any default in payment of a single installment on the due date the plaintiff shall be entitled to the execution of the decree through this court. The appellants out of above said total agreed amount of Rs.1,65,00,000/- had only paid Rs.48,00,000/-. Consequently, respondents No.1 to 3 filed execution application No. 38 of 2014. In the said execution application one out of several properties (Aslam Dairy Farm) of the deceased was ordered to be sold through auction proceedings by Nazir of this Court. Soon after, conclusion of the proceedings the appellants (Judgment Debtors No. 2 and 3 in the Ex.No.38/2014) filed an application under Order XXI Rule 89 of CPC in the Execution application No.38 of 2014 whereby

seeking to set aside the sale of property (Aslam Dairy Farm) and direction of the Court to allow the present appellants to satisfy the purchaser and the decree holder as provided in the rule as the appellant (judgment debtors) being sons of deceased have interest in the said property. The respondent No.1 filed objection/counter affidavit to the said application wherein, inter alia, it was stated that the application was filed with dishonest intention to further prolong the matter in order to defeat the ends of justice.

5. Before going into further discussion, it would be appropriate to discuss Order XXI Rule 89 CPC, which states as under:

“**89.** – *Application to set aside a sale on deposit* --(1) Where immovable property has been sold in execution of a decree, any person either owning such property or holding an 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) for payment to the purchaser, a sum equal to five per cent of the purchase money; and

b) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applied under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale”.

From the perusal of the said provision it appears that Sub-rule (1) provides for two types of deposits by the persons affected by the sale. One is the five per cent of the purchase money for payment to the purchaser and the other is the amount specified in the proclamation of sale for payment to the decree-holder. It is clear from the provisions of Rule 89 that it is attracted only to those cases where the sale has been effected in execution proceedings. It is also evident that both these deposits which have been referred to in this rule, must be made by an applicant who is seeking to set aside the auction sale. Thus, it is manifestly clear that the deposit of the amounts in terms of the Rule 89

CPC are conditions precedent to the entertainment of the application. The Executing Court has no jurisdiction to entertain an application as contemplated under Order XXI, Rule 89, C.P.C., without deposit of the required amounts along with the application, within the date of sale by auction. In this regard reliance can be placed on the case of Mst. ANWAR SULTANA through L.Rs. V. BANK AL-FALAH LTD. and others (2014 S C M R 1222) wherein it is held as under :

“10. Under the circumstances, the appellants have failed to deposit the amounts besides the fact that the Executing Court has no jurisdiction to entertain an application as contemplated under Order XXI, Rule 89, C.P.C., without deposit of the required amounts along with the application, within the date of sale by auction. As we have already noticed herein above that the deposit of the amounts in terms of the Rule are conditions precedent to the entertainment of the application, therefore, the Executing Court was not justified to entertain the application in the first place nor the Court was competent to extend time for deposit of the amounts being violative of the Article 166 of the Limitation Act. In the given circumstances, for the aforesaid reasons, we do not find any infirmity in the impugned judgment which could warrant interference by this Court.”

6. Reverting back to the case in hand, the Learned Single Judge after hearing the learned counsel for the parties passed a comprehensive order, impugned in the present proceedings, whereby the application under Order XXI Rule 89 filed by the present appellants was dismissed. Relevant portion of the said for the sake of ready reference is reproduced as under:

“I have heard both the learned Counsel and perused the record. Insofar as the compromise decree in question is concerned, it appears that the dispute between the decree holders and the judgment debtors was in respect of various properties left by deceased Aslam Pervaiz as parties appear to be his legal heirs. The property in question being sold is one out of several properties of the deceased. The contention of the learned Counsel for Judgment Debtor Nos.2 & 3 to the effect that it is only 1/8th share of the decree holders, which is required to be deposited in the Court for grant of an application under Order XXI Rule 89 CPC, appears to be wholly misconceived inasmuch as this provision enables as well as facilitates the judgment debtors to seek indulgence from the Court for setting aside of a sale. However, it is only possible when the judgment debtors not only deposit the entire decretal amount but also an amount of 5% as against the claim of auction purchaser, if any. Though the property may be owned by the judgment debtors as well as the decree holders according to their respective shares; however, insofar as the decree in question is concerned, the same appears to be a money decree for an amount of Rs.1,65,00,000/- against judgment debtors No.2 & 3. It further appears that admittedly the judgment debtors No.2 & 3 have not honoured such compromise decree since long and perhaps are also liable to pay interest to the decree holders. The offer for the property in question is much less than the decretal amount i.e. 70,00,000/-,

whereas, the Judgment Debtors during hearing of this application were also given a final opportunity to deposit the amount of entire offer of auction purchaser, however, it was insisted that they can only deposit 1/8th share of decree holder in the property. Therefore, the contention of the learned Counsel for the Judgment Debtors No.2 & 3 is not tenable and cannot be accepted. This neither complies the mandatory requirement of Order XXI Rule 89 CPC, nor it is the spirit and mandate of law.”

7. From the perusal of the said order it appears that the appellants have failed to comply with condition precedent, that is, deposit of entire sale proclamation and 5% of the auction price being compensation to the auction purchaser, in terms of the Rule 89 CPC, hence the application under Order XXI Rule 89 CPC filed by the present appellants before the executing court was not competent.

8. We have asked the learned counsel for the appellants to point out any illegality in the impugned order as there is nothing on record to demonstrate that the appellants ever questioned the legality of the sale proceedings before the executing Court and/or raised any objection on the sale procedure adopted by the Executing Court but despite query of the Court, learned counsel could not point out any illegality in the impugned order and/or any material irregularity in conducting the sale in the auction proceedings. Conversely, a perusal of the impugned order, relevant paras reproduced hereinabove, indicates that the Learned Single Judge while disposing of the application of the present appellants has taken into consideration all the relevant facts and provision of law. Hence, we see no reason to interfere with the impugned order.

9. In the circumstances, since neither any illegality in the impugned order nor any irregularity in conducting the sale in the auction proceedings has been pointed out by the learned counsel for the Appellant, therefore, instant appeal was dismissed in limine along with listed application and these are the reasons, vide our short order dated 12.04.2017.

JUDGE

JUDGE

*Jamil***