

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

I.A. No. 46 of 2015

*Before: Muhammad Shafi Siddiqui, J
Adnan Iqbal Chaudhry, J*

Muhammad Ali Rashid
Versus

M/s. United Bank Ltd. & others

Date	Order with signature of Judge
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1. For orders on office objections
 2. For hearing of CMA No.1721/16
 3. For hearing of main case
 4. For hearing of CMA No.1880/15
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Date of Hearing: 22.10.2019

Appellant: Through Mr. Ovais Ali Shah Advocate

Respondent No.1: Through Mr. Ijaz Ahmed Zahid Advocate

Respondents No.2 to 6: Through Ms. Sofia Saeed Shah Advocate

ORDER

Muhammad Shafi Siddiqui, J.- Appellant has challenged the impugned order dated 02.7.2015 whereby the Banking Court No.II at Karachi in Suit NO.204/2011 in Execution No.163/2013 was pleased to issue fresh sale proclamation of a mortgaged property, despite its earlier sale.

2. Brief facts of the case are that a suit under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 was instituted before the Banking Court. The suit was decreed on 14.5.2013 and consequently an execution application along with statement showing terms of sale was filed. Notices of the execution application in terms of sale were issued to the Judgment Debtors i.e. respondents No.2 to 6. The Judgment Debtors remained absent and service was held good and sale proclamation on the terms was ordered to be issued in respect of the mortgaged property on 28.11.2013. In pursuance of the auction

proceedings Nazir submitted his report on 21.1.2014 where the bid of Rs.38 Million was enhanced to Rs.38.5 Million and appellant was declared as highest bidder. He consequently deposited Rs.10 Million towards 25% of the bid amount through a pay order dated 16.1.2014 prepared earlier. A statement was then filed by the auction purchaser on 06.2.2014 along with which he deposited Rs.22.5 Million vide pay order No.03244540 dated 03.2.2014 drawn on Standard Chartered Bank Ltd. DHA, Branch, Karachi Whereas he failed to arrange the balance amount and requested for some time. Nazir submitted its report on 10.2.2014 on which date the matter was put up before the learned Presiding Officer who passed an order for re-auction with penalty of Rs.500,000/- along with publication charges. The application for extension of time was filed on 11.2.2014 however the same was dismissed on account of the order passed on 10.2.2014. The application for recalling the order dated 11.2.2014 was filed whereon an order was passed that the appellant may approach proper forum as order has already been passed and it cannot be recalled.

3. The appellant approached this Court by filing 1st Appeal No.09/2014 and on 28.2.2014 this Court was pleased to pass an order, after issuing notices to all the respondents including the Judgment Debtors, that the balance amount of Rs.6 Million be deposited within three days and the order of the Banking Court dated 10.2.2014 referred above was set aside. Consequently on 03.3.2014 a statement was filed along with two pay orders of Rs.5 Million and Rs.1 Million respectively. Nazir of Banking Court submitted its report on 04.3.2014 that the remaining bid amount was deposited. An application for antedating the matter was filed by the auction purchaser/appellant whereon the Banking Court was pleased to pass an order that the case had been fixed in terms of Order 21 Rule 92 CPC. The appellant aggrieved of it yet again filed an interlocutory application in the aforesaid 1st Appeal No.09/2014 for setting aside the order. On 10.3.2014 the application was disposed of

by directing the appellant to approach the Banking Court to file urgent application and that the order further provides that the Banking Court shall entertain the said application and pass appropriate orders for confirmation of sale and issuance of sale certificate in accordance with law in a shortest possible time.

4. It is at this stage when an application under section 12(2) CPC was filed. The application was originally allowed by order dated 08.5.2014 wherein issues were framed however an appeal preferred by the appellant bearing Appeal No.40/2014 and the order passed on application under section 12(2) CPC was set aside. The Bench further observed that in case the Banking Court considered that the auction process was not in accordance with law or for any other lawful reason not satisfied with the process, it would be at liberty to put up the property for re-auction after issuing fresh sale proclamation for sale in accordance with law. It was on this count that an impugned order dated 02.7.2015 was passed whereby fresh sale proclamation was issued.

5. We have heard the learned Counsel and perused the material available on record.

6. The controversy that relates to an application under section 12(2) CPC was taken to its logical end by virtue of order dated 05.5.2015 in 1st Appeal No.40/2014. It appears that a suit No.641/2003 was filed by applicant of application under section 12(2) CPC for recovery of certain amounts and with regard to this property an interim order was passed by the Court trying recovery suit. The application of the applicant under section 12(2) CPC had no right otherwise in respect of the property in question which was otherwise mortgaged with the bank. The property was auctioned by the executing Court which process was an outcome of the decree passed by it. Thus the applicant of the application under section 12(2) CPC had no right and was accordingly declared.

7. Insofar as the impugned order is concerned, it appears that the Banking Court perhaps was influenced by the ultimate observations of the Division Bench of this Court in the aforesaid order in Appeal No.40/2014 where this Court observed that the Banking Court may issue fresh sale proclamation if it is not satisfied with the auction proceedings or for any lawful reason. The impugned order is in the following form.

“Advocate for Decree Holder is present. Issue fresh sale proclamation of mortgaged property. Put off to 28.07.2015 for sale cost.”

8. We have not been able to reconcile this impugned order with the spirit of order of Division Bench in Ist Appeal No.40/2014. No reasoning at all is available and perhaps there cannot be any for fresh sale proclamation. What influenced the Court to issue fresh sale proclamation is a mystery.

9. The history of this case is clear. For the Judgment Debtors the cause triggered when Nazir submitted its report on 21.1.2014 whereby the appellant was declared as highest bidder. The sale of the property was approved on 21.1.2014. The appellant deposited Rs.10 Million towards 25% of the bid amount and consequently deposited balance amount in terms of the orders of this Court. If the Judgment Debtors had any right having interest in the property, it was under Rule 89 of Order 21 CPC. It was at that time when hammer fell approving highest bid of the appellant when Judgment Debtors could have intervened under Rule 89 CPC. The Judgment Debtors never raised any objection when the notices of execution along with application and statement under Order 21 Rule 66 CPC was issued. The Judgment Debtors thus, failed at the relevant time, to raise objections regarding valuation of the property. No fraud is pleaded by Judgment Debtors/respondents. The execution application was filed on 15.8.2003 on the basis of valuation of the bank. The valuation of the property as disclosed in the execution application was only 17 months prior to the publication. Along with execution application the consultant's report dated 03.3.2012 was filed and

apparently property was surveyed on 29.2.2012 and the execution application was filed in the month of October, 2013 when notices were issued. These valuations are made for a period of three years under the law and apparently the property was sold by approving highest bid within two years of the valuation by the consultant and that too with active participation and knowledge of respondents. The Judgment Debtors/respondents not only in an attempt to avail rights in terms of Order 21 Rule 89 CPC but also mislead the Court by asking for the present valuation or a valuation of later date.

10. Judgment Debtors/respondent's Counsel has heavily relied upon an order whereby Nazir of this Court was directed to assess the value vide order dated 26.10.2015 i.e. almost after one year and eight months of the sale of property. This valuation would take the respondent nowhere. It is the valuation of the property on day of auction that counts which the consultant provided, to which respondent never raised any objection throughout. The proceedings remained pending before the executing Court. Even the objections to the execution were not filed. The bid amount was despotised in terms of the orders of the Banking Court as well as this Court when time was extended. As far as extension of time for depositing the balance amount is concerned, that has attained finality as it was not challenged by the respondent whereby time was extended.

11. In the case of Muhammad Attique vs. Jami Ltd. & other reported in 2015 SCMR 148 the arguments that the "sale" means "fall of hammer" and not its confirmation by the Court was held to be correct. In the cases of Diwan Ghulam Rasul vs. Ghulam Qutab-ud-Din reported in AIR (29) 1942 Lahore 142 and Mst. Asma Zafarul Hassan vs. M/s United Bank Limited & another reported in 1981 SCMR 108, the Hon'ble Supreme Court laid down the parameters of Rule 89 of Order 21 CPC that there are two primary conditions to deposit i.e (i) there must be a deposit of

5% payment by auction purchaser along with, (ii) the amount specified. Article 166 of the Limitation Act requires such application under Order 21 Rule 89 CPC as well as deposit thereunder to be made within 30 days from the date of sale. Such deposit is a condition precedent to entertain the application and the Court cannot extend the time for depositing the amount under section 148 CPC too. The date of sale in the ibid rules relates to situation on which the sale was knocked out to the highest bidder and not the date of confirmation. The date of confirmation of sale under Rule 92 CPC relates to the issuance of sale certificate.

12. The appellant cannot be made to suffer on these facts and circumstances when he had deposited the bid amount at the relevant time. The bid amount was in fact more than forced sale value evaluated by the consultant and declared in the sale proclamation to which no objections were raised. Thus there are enough material and reasons available to interfere with order passed by the Banking Court, which has no reason or logic.

13. These are the reasons for the short order dated 22.10.2019 whereby this appeal was allowed.

Judge

Judge