

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

**SMA NO.83/1995**

**PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR**

Petitioner : Mst. Parveen Shoukat,  
through Mr. Rana Azeem, advocate.

Mr. Zeeshan Abdullah advocate for legal heirs  
Faizan Bohijani and Humana Fatima Bohijani.

Mr. Khalid Mehmood Siddiqui advocate for  
auction purchaser.

Mr. Zaheer Minhas advocate present on hearing.

Date of hearing : 08.09.2016.

Date of announcement : 07.10.2016.

**ORDER**

Through SMA No.596/2005 under section 12(2) read with section 151 CPC, applicant has challenged order dated 31.08.2001 being relevant prayer of such application is that:-

*"..... to recall/set aside the order dated 12<sup>th</sup> March 2004 passed by this honourable Court in the above matter as the said order has been obtained by the purchaser by misrepresentation of facts, inducement, pressure and collusion depriving the applicant and the minor from getting the actual market price of the property in question and it may kindly be ordered that the said property may be sold out by way of auction in fair and transparent manner in accordance with law and as per orders passed by this honourable Court in the above matter."*

2. Learned counsel for applicant *inter alia* contends that applicant was minor, during pendency of instant petition, he became adult and moved application that sale agreement between the petitioner (mother) and auction

purchaser is void, without any substance; on his behalf his mother was not competent to enter into any sale agreement. He has also referred section 364 of Muhammadan law, further contends that sale was allowed by this Court but due to instant application further proceedings were stayed by order dated 14.12.2009 issues were framed and evidence was recorded. He relied upon PLD 1976 SC 258, PLD 1975 SC 311, PLD 2009 SC 751, PLD 1981 Azad J&K 33, PLD 2015 Sindh 46, 2016 MLD 337 and 2011 SCMR 921.

3. Learned counsel for petitioner has contended that sale agreement cannot be acted upon as same was obtained by fraud and misrepresentation. He has relied upon CLC 2016 Lahore 73, PLD 2015 Karachi 646, PLD 2013 Karachi 513, YLR 2006 Lahore 820, CLC 2001 138 and CLC 1995 Quetta 1246.

4. Counsel for auction purchaser vehemently contended that petitioner was very much in knowledge and being guardian of minor she was competent to enter into sale agreement; that sale agreement was prepared in pursuance of order of this Court, such permission was granted hence plea of petitioner is not acceptable under these circumstances. This is not a case of simple sale agreement but such sale agreement was completed under supervision of this Court.

5. Heard and perused the record.

6. The *peculiar* circumstances of the instant matter compels me to *first* examine the scope and object of *letter of Administration* under Succession Act. There can be no *denial* that the scope of the Succession Act, 1925 is summary in nature and does not *permit* determination of complicated questions of *facts*.

7. The purpose of grant of Letter of Administration or that of Succession Certificate is not meant to determine or declare the title and share

of claimants (*legal heirs*). The *former* is rather meant to enable one to recover/collect the debts so as to protect the party, paying such debts to one, *holding* the Certificate who *however* continues with obligation to distribute the same amongst legally entitled persons. The *later* is meant to determine question about the *assets left by the deceased* and administration thereof. Either of two *however* does not confer any title. The reference in support of such *legally* established principle of law, if any, can well be made to the case of *Aisha v. Mah Gul* (2015 CLC 1719) wherein it was held as:

“A person may apply under section 372 of the Act, 1925 for issuance of a certificate for the purpose but the application must be in described form with required details. On receipt the court has to adopt the procedure, summary in nature, provided to deal with the application filed for the purpose. While section 381 of the Act, 1925 described the effect of the certificate issued by a court on such application. The logic behind section 381 of the Act, 1925 is to enable a person to recover the debts on estate of a deceased, but the certificate issued for the purpose neither declared the rights of the persons interested, nor determined their shares in the recoverable debts. Rather issuance of the certificate is with sole purpose to protect the party paying the debts to holder of the certificate. However, a duty imposed on the holder of the certificate to disburse the amount realized under the certificate among the persons entitled in accordance with their respective rights. It is clear in view of the above discussion that a certificate issued under the Act, 1925 does not confer any title upon a person, but only enables him to recover the debts.”

In another case of *Sindh Industrial Trading Estates Ltd. v. Muhammad Ilyas* (2005 SCMR 309), it was *categorically* held as:

‘In the matter pertaining to letters of administration the Court only determined the question about the assets left by the deceased and inherited by the legal heirs and in appropriate cases undertook to investigate adverse claim between the legal heirs in the said proceedings, but **the same does not tantamount to confirming title on the legal heirs.**’  
(*Emphasis supplied*)

8. The scope and object of the *Letter of Administration* should no more be confusing. The Court can *competently* exercise the following jurisdictions:-

- i) *determine the question about the assets, left by deceased;*
- ii) *inheritance thereof by **legally entitled** persons (legal heirs);*
- iii) *may determine the adverse claim(s) between the **legally entitled** persons;*

9. In short, through such exercise of *jurisdiction* the 'entitlement' is determined and not the 'title'. I would add that the term 'entitle' is something different from 'title' and both cannot be termed as 'synonym' to each other. At this juncture, it would be appropriate to refer the meanings of both the above *two* with reference to Black's Law Dictionary (Ninth Edition) which are:

**"ENTITLE"** - *To grant a legal right to or qualify for.*

**"TITLE"** - *The union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property.*

Now, I can conclude that a *Letter of Administration* may determine 'entitlement' of *legal persons (legal heirs)* but shall not vest 'title' in them for which such *legally entitled persons* shall have to follow the course, provided by law, for getting title *normally* in Record of the Rights. An *exception* to this *however* may be made but in appropriate *rather* exceptional cases by resorting course of *auction* of subject matter so as to distribute the shares among **legally entitled** persons but only where property is partitionable and auction is only available course which exception shall *first* require existence of:

- i) *determination of the legally entitled persons;*
- ii) *determination of assets;*
- iii) *determination of adverse claim, if any;*
- iv) *legal consent of all parties;*
- v) *consent by guardian in case one of legal persons is minor;*

10. Needless to mention that in such *exception* the procedure, provided by Order XXI rule 65 to 69 of the Code of Civil Procedure to extent of mode, manner and conduct of auction shall be followed which is meant to bring *maximum* price of the property, to be auctioned by eliminating all chances of any *prejudice* to *rights* of any of the legally *entitled* persons. Such object was highlighted by Honourable Apex Court in the case of Muhammad Attique v. Jami Limited (2015 SCMR 148). The operative and relevant portions thereof are reproduced hereunder:-

“.. It is, however, discretionary with the Court to execute the decree in accordance with the provisions of the Code, it cannot depart therefrom. Proclamation cannot be an exception to that. The relevant provisions need to be read once again for the sake of clarify which read as under:-

*'67. Mode of making proclamation. ... ..'*

*'54. Attachment of immovable property... ..'*

6. A careful reading of the above quoted provisions would reveal that the purpose behind their enactment, as far as it can be gathered from the words used therein, **was to give wide publicity to the sale of the property so that maximum number of people may turn up to participate in it and give bids that match the price the property deserves.** The words used in the aforesaid provisions may not sound mandatory and according to the judgment rendered in the case of Ghulam Abbas v. Zohra Bibi and another (PLD 1972 SC 337) are directory in their nature. But if we interpret these provisions by ignoring the purpose behind them then a sale held in the chambers of secrecy would be as good as the one held in accordance with the provisions of the Code. **Failure to comply with such provisions, therefore, cannot be light ignored.** We , in view of the surroundings we live in, where people do not know what is happening to their next door neighbors or outside their houses, would rather desire the involvement of even electronic media for the publicity of such sale or auction so as to ensure compliance with the letter and spirit of the law. Therefore, the argument that the provisions contained in Rule 54 as well as 67 of Order XXI are directory in nature and failure to comply therewith cannot undo an auction could be held to be correct so long as it does not cause prejudice to any of the stakeholders. **But where it is otherwise, failure to comply with the provisions cannot be brushed aside without due application of mind. The Court has to undo a sale if failure to comply with the provisions causes injustice. Needless to reiterate that these**

provisions have been enacted to advance and not to impede the cause of justice.  
(Emphases supplied).

11. Reverting to merits of the case, the perusal of the record shows that this court did determine the rights and entitlement of the parties in instant proceedings but at *its* own never ordered for *auction* of the subject matter but it was passed on a *joint* application of the parties. The position shall stand clear from a direct reference to such application and order passed thereon which are:

**ORDER DATED 31.8.2001**

“Learned counsel confirm the contents of CMA No.2223/2000 and state that the parties have also signed this application. They jointly submit that order may be made in terms of para 5 of the application. Accordingly, the application CMA No.2223/2000 is allowed. Nazir is appointed as Commissioner for the purpose mentioned in para 5 of the application. His fee is tentatively fixed at Rs.10,000/- which may be shared equally by the parties. Report within 30 days.”

The para-5 of the said *joint application* (CMA 2223/2000) reads as:

“That in view of the aforesaid facts and circumstances it is therefore prayed that this Honourable court may be pleased to allow this application and appoint a Commissioner to sell the immovable properties and to secure funds of moveable properties for distribution of the same among all legal heirs according to law in the interest of justice and equity.”

Since, in the instant matter the *legal persons* and *assets* of deceased were not *disputed* therefore, on such *joint application* of parties the course of *auction* may have been consented / approved by the Court through *Nazir*. Such *joint application*, however, was without proper consent of *guardian* as one of legal persons was minor which *otherwise* was obligation of parties to have brought into notice of Court. Be as it may, since *auction*, if would have been completed as per *procedure* it would have protected the *ultimate* entitlement /

right of the minor therefore, such failure / defect *ipso facto* alone shall not prejudice the legality of an *auction* if same is *otherwise* backed by law, as was/is held in the case of *Muhammad Attique supra*.

12. The record further spells out that the attempts to complete *auction* failed and such reports were submitted within notice and knowledge of all concerned. On failure of attempts to complete *auction* by *authorized* official appointment, the parties *themselves* came forward with a written request (CMA NO.478/2004) that:

‘That in the circumstances, it is prayed that this Honourable court may graciously be pleased to grant the following relief to the parties herein :-

- a) To accept the bid of Rs.5.5 Millions of Cdr. (Retd.) Amjad Javed Ubaid s/o Muhammad Ubaid, having NIC # 42301-1490037-3 for the property mentioned at serial No.2 i.e House #64-B/1 Khayaban-e-Shahbaz, Phase VII, DHA Karachi
- b) To direct Nazir to issue notice to the tenant living therein to vacate the premises within one month as he has already committed with Nazir to do the needful in case notified one month in advance
- c) To direct the Nazir to receive and accept the balance sale consideration from Cdr. (Retd). Amjad Javed Ubaid s/o Muhammad Ubaid, having # 42301-1490037-3 and thereafter execute sale deed in his name of the proeprty mentioned at serial No.2 i.e House # 64-B/1, Khayaban-e-Shahbaz, Phase VII, DHA Karachi
- d) To direct Nazir that after execution of sale deed of property mentioned at serial no.2 i.e House # 64-B/1 Khayaban-e-Shahbaz, Phase VII, DHA Karachi and vacation thereof to put Cdr. (Retd) Amjad Javed Ubaid s/o Muhammad Ubaid, having NiC # 42301-1490037-3 in possession of the property
- e) To direct Nazir to distribute the sale proceeds of Rs.5,50,000 amongst the legal heirs as per their shares mentioned hereinbelow :

Mst. Parveen Shoukat	widow	Rs.6,87,500
Kamran Bhojani	son	Rs.19,25,000
Faizan Bhojani	son	Rs.19,25,000
Humna Fatima	daughter	Rs.9,62,500

It is pertinent to mention that since Faizan Bhojani and Humna Fatima are yet minors therefore their shares shall be retained by Nazir , and this Honourable Court may pleased to order the Nazir to invest the aforesaid shares belonging to minors in some lucrative scheme

13. From above application , it should no more be disputed that such bid was not a 'bid' came through *auction* for an attached property under *decree* but it was on an *independent* move of parties *themselves* which stands evident from the '*sale agreement*' later brought into light which, being material, is referred hereunder:-

'This Agreement is made and entered into on 25th February 2004 at Karachi between Mst. Parveen Shaukat widow of Shoukat Ali Bhojani, Muslim, adult, resident of House NO.470-A, Street No.10, F-10/2, Islamabad, being the party of the 1st Part and Cdr. (Retd) Amjad Javed Ubaid s/o Muhammad Ubaid, having NIC # 42391-1490037-3 being the Party of the 2<sup>nd</sup> party.

WHEREAS the Party of the 1st Part is the owner of the property in House # 64-B/1, Khayaban-e-Shahbaz, Phase VII, DHA Karachi with all its fittings and fixtures ;

AND WHEREAS the Party of the 2<sup>nd</sup> Part is desirous of purchasing the property from the Party of 2<sup>nd</sup> Part.

AND WHEREAS the parties herein have agreed to sell and purchase the property in Rs.6700,000/ (6.7 Millions).

NOW THEREFORE it is hereby agreed by and between the parties that an amount of Rs.5.5 Millions as official consideration shall be deposited by the Party of the 2<sup>nd</sup> Part in the High Court of Sindh in SMA No.83/1995 and when ordered by the Honourable Court and an amount of Rs.12,00,000/- as unofficial sale consideration shall be paid through Pay Order No.2121338 drawn on Union Bank Limited DHA Branch Karachi, by the Party of the 2<sup>nd</sup> part to the Party of the 1st Part through Pay Order at the time of execution of this agreement.

IT IS FURTHER AGREED by and **between the parties** that in case this transactgion doesnot **conclude** as it has been desired by the parties, the Party of the 1st Part shall be bound and hereby promise to refund the amount of Rs.12,00,000/- to the Party of the 2<sup>nd</sup> Part and Party of the 1st Part shall have no claim whatsoever



IN WITNESSES WHEREOF the parties hereto have set their hands to this deed in presence of witnesses on the day and place as mentioned hereinbefore.

14. Such application (CMA NO.478/2004) was however accepted by this Court vide *impuged* order in following terms :-

'This is joint application made by the **petitioner and the objector** who are also present before the court. It is submitted that earlier this court had directed the **Nazir to sell the property at serial no.2 in para-2 of this application by way of auction but he failed to do and submitted his report to that extent**. The learned counsel for the parties present before me have prayed that with the joint consent of the parties this application may be disposed of in terms of the scheme contained in para 11 of the application.

The listed applicaiton is hence allowed by consent as prayed.

15. From above, it facts and record following facts are *prima facie* evident rather *undeniable* i.e:

- i) *the auction proceedings ordered failed;*
- ii) *parties i.e **petitioner & objector** only made application to accept a 'bid' ;*
- iii) *the petitioner and purchaser independently entered into an agreement of sale subject to conclusion thereof;*
- iv) *the minor and other legal heir (s) were / are not parties to such agreement;*

16. Thus, *even* acceptance of such *joint application* shall not equate to a '*confirmation*' of auction *legally* conducted by authorized official. An agreement between *two*, even if allowed by the Court, shall not make *independent* persons (not parties to agreement) *liable* to any obligation nor the Court (in such proceedings) *legally* can presume consent / assent of such persons in an agreement *independently* arrived between the parties because in the event of *dispute*, as in the instant case, the parties shall have to prove their *independent* plea(s) which this Court in a *summary proceedings* cannot

determine. Therefore, even assent to such *joint application* shall not prejudice the entitlements and rights of *independent* legal persons nor shall bring a *non-signatory* under any legal obligation because it is well established principle of law that neither a consent or assent of one shall dress an *illegal* act as 'legal' nor shall be a cause to deviate from mandatory requirement of law and procedure for doing a *particular* act. Reference in this regard may be made to the case reported as PLD 2015 SC 380 wherein it is held as:

“If an act was done in violation of law, the same shall have no legal value and sanctity, especially when the conditions/ circumstances which rendered such an act invalid had been expressly and positively specified in law.”

In another case, reported as 2003 MLD 1626 it is held as:

“..... where names of applicants though were mentioned in the said compromise, but they were not signatories to the same. Applicants, in circumstances, were not bound by terms of compromise...”

17. I would also add here that an application Under Section 12(2) CPC *legally* can only be filed challenging legality of a Judgment / Decree or Order which is capable of being enforced but cannot be sustained against a *right to file a separate suit* because legally the status of *an agreement* is *nothing more than a right to file a suit for enforcement thereof* which is always to determined / decided by a competent court of law. The object of Section 12(2) of the Code is meant to provide a remedy to challenge legality of a Decree or Order and is not a substitute for an independent suit for enforcement of an *independent* right even if arose from an order passed in a suit / proceedings.

18. It is further added that seller or purchaser cannot challenge the legality of their *assent* merely with reference to *agreed & legal* consideration of the agreement because if this is allowed to hold the field it shall result in declaring all *agreements* open to be challenged with reference to such ground

*alone*. Thus, the application under Section 12(2) CPC, filed by petitioner, was never sustainable while regarding the application u/s 12(2) CPC, *independently* filed by minor(non-signatory of agreement), it would suffice to reiterate that consent of petitioner, in absence of proper appointment of her guardian of minor, never bought to minor under any legal obligation hence in the instant matter there never *occasioned* a need to lead evidence with regard to enforcement thereof or *otherwise* nor evidence shall bring any change to established legal principle. The examination of agreement and enforcement thereof or otherwise falls within absolute and exclusive domain of *Civil Court* and not of the Court, *exercising* jurisdiction under Succession Act.

19. In view of above, I am of the view that impugned order is not in accordance with law and same is set aside. Since, these facts are not disputed:

- i) *the assets, left by deceased;*
- ii) *the legality of **legally entitled** persons (legal heirs);*
- iii) *no adverse claims between legally entitled persons;*

Which is the *only* scope of jurisdiction to be exercised for *Letter of Administration* , according the SMA stands allowed, subject matter property shall be transferred in the name of legal heirs.

20. With regard to in-question sale agreement it would not be proper to express any opinion; auction purchaser would be at liberty to approach civil Court if advised so as well auction purchaser would be competent to withdraw the amount deposited with the Nazir.