

# IN THE HIGH COURT OF SINDH, KARACHI

**1<sup>st</sup> Appeal No. 39 of 2020**

**Before:**

Mr. Justice Aqeel Ahmed Abbasi  
Mr. Justice Abdul Mobeen Lakhoo

**Hearing / Priority**

1. For orders on office objection / reply at 'A'.
2. For hearing of Main Appeal.
3. For hearing of CMA No. 1479/2020.

**25.05.2022:**

Mr. Khursheed Jawed, advocate for the appellant.

Mr. Muhammad Bilal Rasheed, advocate for respondent No. 2.

Raja Mir Muhammad Khan, advocate for respondent No. 9.

**O R D E R**

1. Instant appeal has been filed against the impugned order dated 23.07.2020 passed by the learned Banking Court No. 1 at Karachi in Suit No. 353 of 2007 [Execution Application No. 33 of 2007], whereby, according to learned counsel for the appellant, the property of the appellant i.e. R-120, measuring 120 square yards, Jinnah Garden, Tappo Malir, Karachi has been wrongly put to auction by the learned Banking Court inspite of the fact that the appellant is neither borrower or the mortgager, nor the property of the appellant was ever subject matter in the proceeding before the learned Banking Court, whereas, according to learned counsel for the appellant, admittedly, the property bearing R-121, measuring 120 square yards, Jinnah Garden, Tappo Malir, Karachi was mortgaged by the judgment-debtor with the bank and pursuant to judgment and decree against the

judgment-debtor, such property was put to auction through public auction vide order dated 19.12.2016. It has been contended by the learned counsel for the appellant that from perusal of the public auction and the schedule of the property, it is clear that property R-121, measuring 120 square yards, Jinnah Garden, Tappo Malir, Karachi was put to auction, however, through misrepresentation the judgment-debtor and the decree-holder attempted to auction the property of the appellant, while stating that the plot number of the appellant is in fact R-121, measuring 120 square yards, Jinnah Garden, Tappo Malir, Karachi. According to learned counsel for the appellant, the appellant is in possession of all the documents i.e. registered conveyance deed dated 01.04.2002 and since then the appellant is residing there, however, this fact was not taken into consideration, whereas, without verifying the record from the KDA, on the basis of an affidavit filed by the judgment-debtor, the impugned order has been passed. Learned counsel for the appellant has argued that since the appellant is bonafide purchaser of the property through a registered conveyance deed, therefore, unless cancellation of such document is sought in accordance with law, the appellant cannot be deprived from the right or title as well as enjoying the possession of such property, particularly, any execution proceedings before the Banking Court. It has been further argued by the learned counsel for the appellant that the learned Banking Court has no jurisdiction to decide the right or title of the subject property, therefore, impugned order is liable to be set-aside.

3. Conversely, learned counsel for respondent No. 2 has submitted that the learned Banking Court, while exercising the authority as vested in Section 19 of the Financial Institution (Recovery of the Finances) Ordinance, 2001 read with Section 47 of the CPC, as the authority was justified to pass impugned order, whereas, relevant record was examined by the learned Banking Court, while reaching to a conclusion that the Plot No. R-120, measuring 120 square yards, Jinnah Garden, Tappo Malir, Karachi is in fact Plot No. R-120, measuring 120 square yards, Jinnah Garden, Tappo Malir, Karachi, whereas, the Plot R-120, is in fact Plot No. R-119/1. According to learned counsel for respondent No. 2, complete opportunity of being heard was provided to the appellant then the impugned order was passed after hearing all the parties and after detailed scrutiny of the record as well as physical inspection of the site, therefore, impugned order does not suffer from any factual error and legal infirmity.

4. Learned counsel for respondent No. 9/auction purchaser has adopted the arguments of the learned counsel for respondent No.2.

5. We have heard the learned counsel for the parties, perused the record with their assistance and have also examined the conveyance deed in respect of both the property i.e. R-120 and R-121. From perusal of such documents, it reflects that as per schedule of property in the conveyance deed in respect of Plot No. R-120, measuring 120 square yards, Jinnah Garden, Tappo Malir, Karachi mentioned as under:-

*On the north by: Plot No. R-119*  
*On the south by: Plot No. R-121*  
*On the east by: Plot No. R-99*  
*On the west by: 30' wife road.*

Whereas, from perusal of the conveyance deed of Plot No.

R-121 reflects as follows:

*On the north by: 30' wife road*  
*On the south by: Plot No. R-99*  
*On the east by: Plot No. R-120*  
*On the west by: Plot No. R-122.*

From perusal of the aforesaid documents, prima facie, it appears that there is existing Plot Nos. R-120 and R-121 are duly recognized, whereas, no document whatsoever has been placed on record, which may suggest that the Plot No. R-120 is in fact R-119/1 as argued by the learned counsel for respondent No. 2.

6. It may further observe that the learned Banking Court, while having undertaking such exercise for the purposes of identification of the mortgaged property appears to have entered into an exercise through which, the right and title in respect of immovable properties have been decided which prima facie is not the domain of the Banking Court and such exercise can be undertaken by the competent Court of civil jurisdiction in appropriate proceedings in accordance with law, whereas, in the absence of such exercise, the findings of the learned Banking Court under such circumstances are not in accordance with law, whereby, an independent right and title of the appellant, who was admittedly, neither the borrower nor the judgment-debtor, has been affected to the extent that the property of the appellant has been put to auction.

7. We may further observe that the decree-holder bank has not taken due care while accepting the mortgage

document and failed to conduct physical examination in respect of the subject property i.e. R-120, measuring 120 square yards, situated at Jinnah Garden, Deh Mehran, Tappo Malir, Karachi and such exercise at the relevant point of time such confusion could not have been occurred. The decree-holder instead of getting to hold the property of the judgment-debtor for the purposes of seeking satisfaction of the decree found it convenient to get hold of the property of the appellant.

8. In view of hereinabove facts and circumstances of the case, we are of the considered opinion that the respondent No.2 could not establish its case through documents that the property owned and occupied by the appellant i.e. Plot No. R-120, measuring 120 square yards, situated at Jinnah Garden, Deh Mehran, Tappo Malir, Karachi is in fact Plot No. R-121, measuring 120 square yards, situated at Jinnah Garden, Deh Mehran, Tappo Malir, Karachi. Accordingly, impugned order is hereby set-aside and instant appeal is allowed.

9. The decree-holder bank/respondent No.2, however, may be at liberty to seek execution of the decree against the judgment-debtor in accordance with law, whereas, respondent No. 9/auction purchaser may also be at liberty to approach the learned Banking Court for release/return of the amount, which he deposited, which shall be considered by the learned Banking Court in accordance with law.

***JUDGE***

***JUDGE***

A.S.