

IN THE HIGH COURT OF SINDH, KARACHI

Ist Civil Appeal No.45 of 2020
Muhammad Sohail Vs. M/s. Zari Taraqati Bank Limited [ZTBL]

Date	Order with signature of Judge
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PRESENT:

Mr. Justice Irfan Saadat Khan

Mr. Justice Arshad Hussain Khan

Appellant	Through Mr. Arshad Khan, Advocate
Respondent-1	Through Mr. Ghulam Mujtaba Phull, Advocate
Respondent -2	Through Khalique Ahmed, DAG
Intervenor No.1 Auction purchaser	Through Mr. Sohail Abbas Advocate.
Intervenor No.2 Nominee	Noman Iqbal, present in person
Date of Hearing:	08.02.2023
Date of Decision	08.02.2023

JUDGMENT

ARSHAD HUSSAIN KHAN, J: The appellant through instant first appeal has assailed the order dated 18.08.2020, passed by the learned Vth Banking Court Karachi in suit bearing No.716/2017 [Execution No.21/2018] whereby sale of the appellant's mortgaged property was confirmed in favour of auction purchaser.

2. Briefly the facts giving rise to the present appeal are that respondent / plaintiff filed suit No.716/2017 under Section 9 of the Financial Institution [Recovery of Finances] Ordinance, 2001 (FIO 2001), before the Banking Court No.V at Karachi for recovery of outstanding amount of Rs.616,270.00 against the present appellant/defendant. The suit was proceeded ex-parte as the appellants despite service failed to appear and defend the suit. Eventually, the suit was decreed on 21.12.2017 to the extent of principle amount of Rs.4,72,411.00 and subsequently, in compliance of Section 19 of the Ordinance, the suit was converted into execution proceedings after expiry of appeal period and in that execution for realization of the

decretal amount the appellant's mortgaged property was put on for auction sale, which was subsequently confirmed through the impugned order.

3. Pursuant to the notice of this appeal, Advocate for Respondent No.1 filed his Vakalatnama. The record shows that in pursuance of the application filed by the appellant, the notices were also issued to the auction purchaser as well as his nominee. Upon which the counsel for the auction purchaser put his appearance whereas the nominee has appeared in person before this Court.

4. Learned counsel for the appellant, during the course of arguments, has contended that the order impugned in the present proceedings is not sustainable as the same is bad on facts and law both; inasmuch as learned Banking Judge while passing the impugned order has failed to apply her judicious mind and also failed to consider the relevant law on the point. He has further contended that the Banking Judge while passing the impugned order also failed to take into account the fact that the appellant did not receive any summon or notice from the learned trial/ executing court in respect of the auction proceedings. It is argued that learned Banking/ executing court while passing the impugned order has failed to consider the fact that the auction proceedings have been carried out in violation of the provisions under Order XXI Rule 66 CPC. It is further argued that learned court while putting the appellant's mortgaged property for auction in haste, in effect has deprived him from his valuable property of more than 40,00,000/- for an alleged decretal amount of Rs.4,72,411.00. It is urged that the appellant was ready to deposit the entire decretal amount for satisfaction of the decree, however, the opportunity has not been provided to him to do so. Lastly, he has argued that the impugned order suffers from material illegality, irregularity and infirmity, hence liable to be set aside as it has resulted in miscarriage of justice. He has prayed that instant appeal may be allowed and the impugned order may be set aside.

5. Conversely, learned counsel for respondent No.1 during the course of arguments has contended that the order impugned in the present proceedings is well within the four corners of law and equity, hence does not warrant any interference by this court in the present

appeal. It is contended the appellant despite notices served through all modes including publication did not appear and participate in the suit proceedings whereupon the judgment and decree were passed in favour of respondent No.1. He has further contended that no appeal against the judgment has been preferred by the present appellant which has attended finality. He has further contended that the appellant during the execution proceedings though has attempted to challenge the judgment and decree by filing applications under Section 12(2) CPC and under Order XXI Rule 89 CPC, however, both the said applications were also dismissed. Against the said dismissal order of the applications, the appellant did not file any appeal. However, when the sale of the mortgaged property has been confirmed in favour of the auction purchaser in the execution proceedings, the appellant has filed the present appeal against the said order. He has further submitted that the execution has been satisfied as the auction purchaser has already received the physical possession of the property pursuant to the directions of the banking court and has also raised constructions thereat. Lastly, he has submitted that this appeal has no merit and is liable to be dismissed.

6. Learned, DAG, counsel for the auction purchaser as well as the nominee of the auction purchaser while supporting the impugned order have adopted the arguments of learned counsel appearing for respondent No.1 and they have also sought dismissal of the present appeal.

7. Heard the arguments and perused the material available on the record.

From perusal of the record, it appears that suit bearing No. 716 of 2017 filed by present respondent No.1 / plaintiff was decreed on 21.12.2017 against the appellant to the extent of principal amount with cost of suit and cost of funds from the date of default till realization of the cost of funds of the financial institution. In the judgment, it was mentioned that in compliance of section 19 of the FIO 2001, the suit automatically shall stand converted into execution proceedings after expiry of appeal period. During pendency of the execution proceeding the appellant on 21.05.2019 filed two applications; **(i)** application under Section 12(2) read with Section 151 CPC and **(ii)** application under Order XXI Rule 89 CPC, seeking setting aside of the judgment and

decree, on the ground that the same was obtained through fraud and misrepresentation as the appellant was never served with notice either in the suit or in the execution proceedings. Furthermore, the notices of the suit and execution proceedings were issued on the address viz. House No. 158, Baba Wilayat Shah Colony Sector 11, Orangi Town Karachi, which is a wrong address whereas the appellant is residing at different address viz. House No. M-553, Street No. 4, Sector 11 ½, Orangi Town, Karachi. The said applications were dismissed by learned Banking Judge on 03.03.2020. Admittedly, no appeal either against the said judgment/decree or against the dismissal orders of the aforesaid applications have been preferred by the appellant. Nonetheless, when the learned Banking Judge for satisfaction of the judgment and decree confirmed the auction sale of the mortgaged property in favour of the auction purchaser on 18.08.2020, the appellant filed present appeal against the said order while taking more or less the same grounds, which he had taken earlier in the above said two applications.

8. Insofar as the contention of learned counsel for the appellant that notices of the suit and execution proceedings were issued on the wrong address is concerned, from the record it transpires that in the memo of present appeal the address of the appellant appears to be the same on which notices were issued, that is, *House No. 158, Baba Wilayat Shah Colony Sector 11, Orangi Town Karachi*. The affidavit sworn in support of the appeal reflects the same residential address. So much so, the address of the appellant in his CNIC also reflects the same address. Thus, it cannot be said that the notices were issued on the wrong address.

9. Insofar as the service upon the appellant in suit is concerned, from the record it appears that the process were issued against the present appellant/defendant through bailiff, registered post AD, courier service and by way of publication in two daily newspapers namely; DAWN and JANG. Such fact clearly reflects that the service upon appellant was duly effected. However, when the appellant despite the above service failed to appear before the court, the case was proceeded ex-parte against him.

10. Insofar as the contention of the appellant's counsel that the learned banking / executing court while conducting execution

proceedings did not adhere to the provisions of Order XXI Rule 66 CPC, is concerned, from the record it appears that prior to effecting the auction sale of the mortgaged property, a proclamation of sale by public auction (under Order XXI Rule 66 CPC) was issued to the appellant/Judgment Debtor, however, he did not turn up to raise any objection in respect of the auction proceedings and as such, he is precluded by the rule of constructive *res judicata* from raising any objection at this belated stage.

11. From perusal of the record, it also appears that the property mortgaged by the appellant while availing the finance facility with respondent No.1 was put on auction wherein Mr. Muhammad Farooque offered the highest bid of Rs.7,20,000/- and deposited 25% of the bid amount. Subsequently, said bidder deposited 75% of the remaining bid amount with the Nazir of the learned banking court. On 18.08.2020, learned executing court in absence of any objection on behalf of any of the parties, confirmed the sale of mortgaged property in favour of Muhammad Farooque and Nazir of the court was directed to issue sale certificate in favour of the auction purchaser or in the name of his nominee as well as hand over the physical possession of the auctioned property to him. Moreover, perusal of the impugned order does not show any infirmity and/or illegality and it is also not disputed that pursuant to the impugned order, the physical possession of the property has been handed over to the nominee who has also raised construction thereat.

12. In view of the above facts and circumstances, we do not find any merit in the present appeal as such the impugned order does not call for any interference by this Court and the appeal is liable to be dismissed in limine.

Foregoing are the reasons for our short order dated 08.02.2023 whereby Instant First Appeal along with the listed application was dismissed.

JUDGE

JUDGE