

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Shafi Siddiqui
& Jawad Akbar Sarwana JJ

Special High Court Appeal No.137 of 2023

National Tiles and Ceramics Ltd. and Another

v.

Sindh Bank Ltd. and Nine (9) Others

- Appellant No.1: National Tiles and Ceramics Ltd., through its CEO / Managing Director, through Mr Abdul Wahab Baloch, Advocate
- Appellant No.2: Mr Agha Tajammul Hussain s/o Agha Yousuf Hussain through Mr Abdul Wahab Baloch, Advocate
- Respondent No.1: Sindh Bank Limited, through its President through Mr Mehmood Ali, Advocate
- Respondent Nos.2 to 5, 7 & 9: Mr Agha Tahir Hussain s/o Agha Yousuf Hussain (Resp. No.2); Mr Agha Afsar Hussain s/o Agha Yousuf Hussain (Resp. No.3); Mr Agha Athar Hussain s/o Agha Tajammul Hussain (Resp. No.4); Mr Agha Baber Hussain s/o Agha Yousuf Hussain (Resp. No.5); Ms Niaz Fatima w/o Agha Tajammul Hussain (Resp. No.7) and Ms Erum Fatima w/o Khawaja Akhtar Abbas (Resp. No.9) – all through Mr Moulvi Iqbal Haider
- Respondent No.6: Late Mrs Shafiq Fatima w/o Agha Yousuf Hussain (deceased on 28.10.2016). Nemo
- Respondent No.8: Ms Minhaj Fatima w/o Khawaja Azhar Abbas. Nemo.
- Respondent No.10: Park View Enclave (Pvt.) Ltd. through its authorized Manager, Legal and Corporate Affairs,

through Mr Abdul Hameed
Chohan, Advocate

Date of hearing: 08.12.2023

Date of decision: 08.12.2023

Date of Judgment with reasoning: 14.12.2023

J U D G M E N T

Jawad A. Sarwana, J.: On 22.06.2015 and 28.09.2015, the spouse and some family members of Agha Yousuf Hussain, namely, Appellant No.2 and Respondent Nos.2, 3, 5, 6, 8 and 9 mortgaged in favour of Respondent No.1(“Sindh Bank Limited”)(hereinafter referred as the “Respondent No.1-Bank”) their immovable property viz. all that piece and parcel of the residential bungalow on Plot No.F-44, Block 7, Scheme No.5, Clifton, Karachi constructed on 1,875 Sq. Yds. plot comprising of a basement, ground floor and second floor (hereinafter referred to as “Banking Suit Property”) to secure finance facilities in favour of Appellant No.1 (“National Tiles and Ceramics Ltd.”)(hereinafter referred to as “NTCL”).¹ When NTCL defaulted on its payment obligations with the Respondent No.1-Bank, the latter filed Banking Suit No.B-30/2017 in the High Court of Sindh at Karachi against NTCL, and Appellant No.2, and Respondent Nos.2 to 9 (hereinafter referred to as “the AYH family”).² The learned Single Judge exercising jurisdiction as a Banking Court under the Financial Institutions (Recovery of Finances), Ordinance (“the FIO”), 2001, passed Judgment dated 12.04.2018 and Decree dated 25.04.2018 against NTCL and the AYH family in the sum of Rs.141,934,474 along with markup at the applicable rate of the cost of funds determined by the State Bank of Pakistan from the date of default till its realisation. The Banking Court also passed order that in case of further default in payment to the Respondent No.1-Bank, the Banking Suit Property,

¹ Based on page 4 of judgment dated 12.04.2018 passed in High Court of Sindh at Karachi Banking Suit No.B-30/2017 & Amended Title dt. 25.05.2023 in HCA No.137/2005

² Following the death of Respondent No.6/Mrs.Shafiq Fatima, the wife of Agha Yousuf Hussain, on 28.10.2016, her children became her legal heirs.

which was mortgaged with the Respondent No.1-Bank, will be attached/sold. On 06.06.2018, the Respondent No.1-Bank (Decree Holder) initiated execution of the decree under Section 19 of the FIO, 2001, read with Order 21 CPC and Section 151 CPC. The matter proceeded against the parties impleaded herein under the banking jurisdiction of the High Court of Sindh at Karachi docketed as Execution Application No.85/2018.

2. The Respondent No.1-Bank, NTCL and the members of the AYH family appear to have made several attempts to settle the matter amicably between 2018 and 2020. Eventually, by Order dated 16.10.2020, what appears to be continuing inaction on the part of NTCL and the AYH family, the Court ordered the sale of the Banking Suit Property by auction through the Official Assignee (hereinafter referred to as "the OA"). But then, once again, with the parties' consent, the execution proceedings were adjourned sine die on 18.03.2021 to attempt some compromise. When no progress was made, proceedings were revived on 24.09.2021 and culminated in the Executing Court's Order dated 10.03.2022, leading to the publication of the Sale Proclamation in the Daily Dawn and Daily Jung Newspapers on 18.03.2022 in respect of sale of the Banking Suit Property on "AS IS WHERE IS" basis with a reserve price of Rs.252,197,680.³ In response to these proceedings under Order 21 Rule 66 CPC, two bidders, namely Respondent No.10 ("Park View Enclave (Pvt.) Ltd.")(hereinafter referred to as the "Auction-Purchaser") and one, Mr Irfan Wahid, took part in the auction proceedings and eventually further improved their offers as on 21.04.2022. On the same date, i.e. 21.04.2022, pursuant to Order 21

³ As per the Court's Order dated 20.04.2022 in Execution No.85/2018, the valuation of the Banking Suit Property was obtained by OA on 07.01.2022, whereafter the same was shared with both Respondent No.1-Bank, NTCL, Appellant No.2 and Respondent Nos.2 to 9 along with a draft of sale proclamation. No objection was received from them regarding the reserve price as obtained by the OA. NTCL et al. submitted a valuation report not prepared by a professional but by a design consultant contending that the Reserve Price was on the low side, but the learned Single Judge held that the challenge to the reserve price was perhaps to stall the proceedings. Appellant No.2 and Respondent Nos.2 to 9 were given the liberty to bring a higher offer/bidder than the reserve price set by the OA.

Rule 84 CPC, the Auction-Purchaser deposited 25% of the enhanced/improved offer amount of Rs.320,000.000 with the OA. Accordingly, on 22.04.2022, the OA filed in Court, OA Reference No.03/2022, to accept the Auction-Purchaser's enhanced/improved bid as the highest bid.

3. From 25.04.2022 to 07.03.2023, the matter was listed in Court seven (7) times, but for one reason or another, it did not proceed. The OA Reference No.03/2022 hearing was accordingly deferred during this period until it was taken up and decided by the impugned Order dated 07.03.2023. Although the learned Single Judge confirmed the Auction-Purchaser's Bid Offer of Rs.320,000.000, in the last line of the Order, he suggested that NTCL and the AYH family were free to move an application under Order 21 Rule 89 CPC.

4. On 20.03.2023, the Auction-Purchaser, pursuant to Order 21 Rule 85 CPC, paid into Court to the OA the full amount of the enhanced/improved purchase-price, i.e. 75% of Rs.320,000,000, payable within the 15th day from the sale of the property, i.e. the Court's Order dated 07.03.2023, confirming the highest bid. Aggrieved by the impugned Order, on 30.03.2023, NTCL and Appellant No.2 filed this appeal and obtained ad-interim Order dated 18.04.2023. with the consent of Respondent No.1-Bank to the effect that they will deposit a pay-order of Rs.50,000,000 with the Nazir and surety for the remaining amount within 15 days, and if the needful is done within the stipulated period, the parties with consent would maintain status quo in the matter. On 18.04.2023, the Appellate Court also impleaded the Auction-Purchaser as Respondent No.10 in this Appeal.

5. According to the Nazir's Report dated 15.05.2023, following the Appellate Court's ad-interim Order of 18.04.2023, NTCL deposited Rs.50 million with the Nazir on 29.04.2023 and thereafter submitted a Conveyance Deed executed in favour of Late Agha Yousuf Hussain of an agricultural land measuring 29 Acres and 25

Ghuntas situated in Deh Heethal Pat, Thano Bula Khan Taluka Kotri, District Dadu, and supporting related documents, etc. The Respondent No.1-Bank filed objections against the surety, contending that the agricultural land was not still mutated in the name of the legal heirs of Late Agha Yousuf Hussain, and the valuation was not in accordance with the rules of the Court, etc.

6. The learned Counsel for the Appellants has argued that the Banking Suit Property is a residential house in which six families live together, and the sale of the house will disturb them. He further contended that Respondent No.1-Bank also retains mortgage over several other AYH family properties, including one Al-Sehat Centre, Rafiqul Shaheed Road, Karachi, etc. and requested that this Appellate Court pass an order to substitute these properties with the current Banking Suit Property. Finally, he submitted that the Court did not accept the sale offer as the learned Single Judge gave NTCL and the AYH family the right to file an Application under Order 21 Rule 89 CPC, and no Sale Certificate has been issued so far under Order 21 Rule 94 CPC. The impugned Order dated 07.03.2023 and the sale of the Banking Suit Property may be set aside under Order 21 Rule 92 CPC, and the payment made by Auction-Purchaser to the OA may be returned to Auction-Purchaser under Order 21 Rule 93 CPC. On the other hand, the learned Counsel for Respondent Nos.2 to 5, and 7 and 9 submitted that according to the Appellate Court's Order dated 18.04.2023, the Judgment and Decree had been satisfied, and the said Respondents were willing to pay off the outstanding decretal amount, including the cost of funds. Therefore, the AYH family may be allowed to continue to enjoy the Banking Suit Property in satisfaction of the Decretal amount plus the cost of funds only. The Counsel for Respondent No.1-Bank has declined the offer made by NTCL and the members of the AYH family. The Counsel for Auction-Purchaser has also opposed the contentions of NTCL and the AYH family, and both Respondent No.1-Bank and the Auction-Purchaser (Respondent No.10) seek dismissal of the appeal and issuance of the Sale Certificate under Order 21 Rule 94 CPC.

7. We have heard the learned Counsel for NTCL and Appellant No.2, learned Counsel for Respondent No.1-Bank, the learned Counsel for Respondent Nos.2 to 5, 7 and 9 and the learned Counsel for Auction-Purchaser (Respondent No.10), reviewed the record as available in the Appeal file, perused the impugned Order and checked the law.

8. We would take up first the contentions of Counsel for NTCL and Appellant that as the Respondent No.1-Bank retains a mortgage over several other properties of AYH family, including one Al-Sehat Centre, Rafiqul Shaheed Road, Karachi, etc., the same may be substituted with the current Banking Suit Property. It is now well established by several judgments of the Supreme Court of Pakistan that once a sale has been affected through the Court for a third-party, its interest cannot be disregarded.⁴ The Court cannot assume that the auction purchaser has no interest whatsoever until confirmation of the sale and consider in isolation any arrangement which has been reached between the decree-holder and the judgment-debtor about the satisfaction of the decree during the Court's sale process.⁵ In the case at hand, the Decree-holder (Respondent No.1-Bank) and the Judgment-Debtors (NTCL and AYH family) have not reached any such agreement. Respondent No.1-Bank has rejected the NTCL and AYH's offer to substitute the Banking Suit Property mortgaged with them for anything else.

9. Next, NTCL and the AYH family contended that the Court sale is still being processed, is not completed and will crystallise after the Auction-Purchaser obtains a sale certificate. This is not the correct view of the law. In the present case, although the auction proceedings emerged from a banking suit, the majority view of the Supreme Court of Pakistan is that the principles applicable to a sale conducted under

⁴ Messrs. Habib and Company and Others v. Muslim Commercial Bank Limited and Others, 2019 SCMR 1453

⁵ Hudaybia Textile Mills Ltd. v. Allied Bank of Pakistan, PLD 1987 SC 512

the provisions of CPC, 1908, would also apply to the Banking Court exercising special jurisdiction under the FIO, 2001.⁶ In view of the same, the Supreme Court of Pakistan has consistently held that a sale is complete once the Auction-Purchaser has completed the procedural requirements mandated to effect a sale under the CPC. In *Mohammad Attique v. Jami Limited and Others*, PLD 2010 SC 993, the Supreme Court of Pakistan made the following observations regarding the word “sale” in the context of auction proceedings.

“35. Word `sale' has been defined in Black's Law Dictionary (Seventh Edition), as under:-

“(1) The transfer of property or title for a price.

(2) The agreement by which such a transfer takes place. The four elements are (1) parties competent to contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised.”

36. Term `sale' has also been defined in section 45 of the Transfer of Property Act, 1882 as "the transfer of ownership of immovable property for a price paid or promised". In an auction proceedings title in the property not transferred in favour of the highest bidder, at the time when auction was held and offer was forwarded to the Court for acceptance, the Court sale for immovable property under Order XXI, Rule 84 is subject to proceedings under Orders XXI, Rules 89, 90 and 91, as result of which sale may either be set aside or confirmed. Once the sale is confirmed, section 65 C.P.C. provides that ownership right in the immovable property will be deemed to have vested in the succeeding bidder retrospectively from the date when action was held.”

10. A sale of immovable property through Court is set out under Order 21 Rules 66 to 86 and is subject to any challenge/objections under Order 21 Rules 89 and 90, albeit the same are submitted to the

⁶ *Lanvin Traders, Karachi v. Presiding Officer, Banking Court No.2, Karachi and Others*, 2013 SCMR 1419.

Court within the prescribed time limit. In the present case, as of 20.03.2023, the Auction-Purchaser had submitted the full amount of the enhanced/improved purchase-price payable. Valuable rights had accrued to the Auction-Purchaser once the sale was completed, as per the Muhammad Attique case (ibid.). The Supreme Court of Pakistan has also held in the Muhammad Attique case (ibid.) that for the purposes of Article 166 of the Limitation Act, 1908, time starts to run from the date when the Court accepts the highest offer.⁷ Thus, the date of sale used in the Rule relates to the date on which the Banking Suit Property was knocked out to the highest bidder and not the confirmation date.⁸ Neither NTCL nor the AYH family filed any formal application objecting to such a sale under Order 21 Rules 89, 90 and 91 CPC. Instead, NTCL and Appellant No.2, on 30.03.2023, preferred an appeal against the impugned Order dated 07.03.2023, wherein the Court had declared the Auction-Purchaser as the highest bidder. On 30.03.2023, when the appeal came up for hearing, neither the Appellate Bench passed any Order to stay/suspend operations of the execution proceedings, nor the Appellants volunteered to deposit any amount in Court in terms of Order 21 Rule 89 CPC nor filed any objections. There was no fetter on the Appellants not to do so. There was no reason to delay the same. The period of limitation of 30 days to set aside a sale in execution of a decree commenced from the date of sale under Article 166 of the Limitation Act, 1908, i.e. from 07.03.2023 onwards. Any application by a judgment debtor to set aside the sale on deposit, if filed after 30 days from 07.03.2023, would be barred by time. Yet no objection/challenge was filed in the execution proceedings under Order 21 Rule 89 CPC. No Court's Order was required to deposit the amount, and no permission was required,⁹ yet the Appellants did not deposit any amount in the execution proceedings, not even a sum equal to five per cent of the

⁷ Mohammad Attique v. Jami Limited and Others, PLD 2010 SC 993

⁸ Mst. Anwar Sultana through L.Rs. v. Bank AL-Falah Ltd. and Others, 2014 SCMR 1222

⁹ *Ibid.*

enhanced/improved purchase-price, i.e. 5% of Rs.320,000,000, i.e. Rs.16,000,000 in addition to the amount already paid by the Auction-Purchaser. The Superior Courts of Pakistan have consistently held that objections to a sale are not competent unless an amount is deposited.¹⁰ The Appellants slept over their rights and cannot invoke equity to overcome the bar of limitation under Article 166 of the Limitation Act of 1908. Additionally, the limitation cannot be waived or mutually extended beyond 30 days from the impugned Order dated 07.03.2023.

11. The two Counsels submitted another argument on behalf of NTCL and the AYH family based on the Appellate Court's Order dated 18.04.2023. They argued that after filing this appeal on 30.03.2023, when this Court passed an ad-interim order dated 18.04.2023, directing NTCL and AYH to submit Rs.50,000,000 to the Nazir of this Court and a surety for the remaining amount within 15 days from 18.04.2023, the Court had in effect set aside the sale. They contended that after the compliance of the ad-interim Order of deposit dated 18.04.2023 passed by the Appellate Court, the only outstanding issue was the mode and timing of payments. The argument has no force. First, as mentioned above, the Judgment-Debtors have not applied to set aside the sale on deposit in terms of Order 21 Rule 89. They filed no objection/challenge in terms of Order 21 Rule 89, 90 and 91 CPC in this Appeal, which is a continuation of the proceedings from the original side of the Court. Therefore, it is not proper for the Judgment-Debtors to continue to contend that there is no sale of the Banking Suit Property. Secondly, the period of limitation of 30 days from the date of sale under Article 166 of the Limitation Act, 1908, to set aside a sale in execution of a decree had expired 30 days from the date of the impugned Order confirming the highest bid. The Appellants could have complied with the provisions of Order 21 Rule 89 CPC at the appellate stage, but they elected not to do so. The

¹⁰ Messrs. Abdur Razaq and Company, through Mian Abrar Ahmed v. Bank of Punjab and Others, 2005 CLC 1170

deposit by the Appellants was a condition precedent to the entertainment of their request to the Appellate Bench to set aside the sale on deposit by the Auction-Purchaser. Thirdly, the Order dated 18.04.2023 was an ad-interim Order and not final. The Court was at liberty to pass such an ad-interim Order and thereafter to amend and modify the same based on a final hearing of the matter. As an interim order, the Appellate Court's Order dated 18.04.2023 was not carved in stone and final. It did not establish any permanent rights to the advantage or disadvantage of the parties, which rights have been decided herein by us after hearing the parties in this final order/judgment of this Appeal.

12. Notwithstanding the foregoing, the fact of the matter is that during the appellate proceedings, on 18.04.2023, this Appellate Court entertained the Appellant's request, even though it was beyond the period of 30 days from the date of sale (i.e. the impugned Order of 07.03.2023) to make a deposit of Rs.50,000,000 and submit a surety for the balance amount. Although the ad-interim Order did not meet the four corners of Order 21 Rule 89, it set up an arguable case for the Appellants to set aside the sale, which we now propose to address.

13. The first aspect regarding the ad-interim Order passed by the Appellate Bench on 18.04.2023 is that it was passed in the absence of and without the consent of the Auction-Purchaser. While the Appellants and the Respondent No.1-Bank (Decree-Holder) were present, the Respondent Nos.2 to 9 were called absent, and the Auction-Purchaser had no notice as he was not arrayed as a Respondent in the Appeal. It was only following the Order of 18.04.2023 that the Auction-Purchaser was impleaded in the appellate proceedings. It appears that the learned Division Bench which passed the ad-interim Order was aware of the proverbial "elephant missing in the room" when it qualified the interim Order that the status quo in the matter would be maintained, "[i]f the needful is done within the stipulated period [by] the parties, with consent...." It

is to be borne in mind that after the passing of the impugned Order dated 07.03.2023 by the Executing Court, a vested right accrued in favour of the Auction-Purchaser, which could not be disturbed.

14. In Ghulam Abbas v. Zohra Bibi and Another, PLD 1972 SC 337¹¹, the Supreme Court of Pakistan held:

"...indeed, it would appear that the view of the Courts has consistently been that the non-compliance with the provisions of the Code of Civil Procedure, with regard to the proclamation of sale, its publication and the conduct of the sale in execution, are only material irregularities but not illegalities which render the sale in disregard of those provisions a nullity. A sale cannot be set aside unless direct evidence of substantial injury resulting from the irregularity has been given and the onus of proving this prejudice is on the party complaining thereof."

15. The principles highlighted in the Zohra Bibi case (ibid.) have been further elaborated and discussed in Zakarai Ghani and 4 Others v. Muhammad Ikhtlaq Memon and 8 Others, PLD 2016 SC 229. The Supreme Court has observed as follows:

"4. There is a great deal of difference between these two provisions of law. Under Order XXI, Rule 89 a judgment debtor is not obligated to show any legal infirmity in the order of sale. He has an unqualified right to have the sale set aside provided he complies with the conditions laid down therein, namely, that he should deposit the full decretal amount in court plus 5% to be paid to the auction purchaser. The time period for making such an application is 30 days. Admittedly he failed to do so and accordingly, it follows, by necessary implication of law that a vested right accrued in favour of the auction purchaser. The second provision, namely, Order XXI, Rule 90, C.P.C. proceeds on a different basis. In order to succeed it is mandatory for the judgment debtor to satisfy the court, on the merits, that the sale should be set aside on the ground of a material irregularity, or fraud, in publishing or conducting it. Yet another condition is

¹¹ Relied upon and cited by the Supreme Court in Mst. Asma Zafarul Hassan v. Messrs. United Bank Ltd. and Another, 1981 SCMR 108

prescribed by means of the proviso thereto which stipulates that no sale shall be set aside on the ground of irregularity or fraud unless, upon the facts proved before the Court, it is established that the judgment debtor has sustained substantial injury by reason of such irregularity or fraud. Yet another condition is prescribed by the second proviso which states that no application shall be entertained in terms of this provision of law unless and until the judgment debtor deposits an amount equal to 20% of the sum realized at the sale or furnish such security as the court may direct. These are stringent conditions which make the policy of the law crystal clear. A mere allegation is not sufficient. It has to be established that not merely an irregularity but a material irregularity has taken place, or, in the alternative, that fraud has been perpetrated in the process of carrying out the sale. Then is super added the requirement that even if these conditions are complied with the judgment debtor must satisfy the court that he has sustained a substantial injury by reason thereof. Finally, in order to discourage frivolous applications intended to delay the execution of the decree it is mandatory on the judgment debtor to deposit 20% of the sale amount or furnish such security as the court may direct. It is also material to note that once again a time frame of 30 days has been specified under Article 166 of the Limitation Act in this behalf. Failing compliance with the provisions of Order XXI, Rule 90 once again the inevitable consequence is that the judgment debtor is precluded from making any such allegation in order to challenge the validity of the sale at a subsequent stage. The above is further clarified by the provisions of Order XXI, Rule 92, C.P.C. which lays down explicitly the consequences of a failure to make an application under Order XXI, Rule 89 or Order XXI, Rule 90. The said provision states that where no such application has been made under the above mentioned rules, or where such application has been made and disallowed, it becomes mandatory on the court to make an order confirming the sale and thereupon the sale becomes absolute. These provisions leave no doubt for any ambiguity in the matter. The plaintiff has not merely a legal right flowing from the contract between the parties but a statutory right crystallized in the form of a decree passed by a court of competent jurisdiction. The law has laid down the only methods available in order to challenge such a crystallized right vesting in a plaintiff. If a judgment debtor chooses not to take

advantage of the opportunities afforded to him by the law the matter comes to an end (In a later part of this judgment we will consider the case law which discusses whether an application under section 151, C.P.C. seeking to circumvent the failure to apply under Order XXI, Rule 89 or Rule 90, C.P.C. is maintainable or not).”

16. Applying the principles laid down in the Zohra Bibi case (ibid.) and the Zakaria Ghani and 4 Others case (ibid.) to the facts at hand, the Appellants have failed to identify any illegalities in the proclamation of sale, its publication and the conduct of the sale in execution. The Appellants, including the members of the AYH family, have brought nothing on record to assail the auction proceedings. Further, no cogent reason has been advanced by NTCL and the AYH family, which includes Appellant No.2, to set aside the sale on the grounds of irregularity or fraud. The main ground submitted by them is that the mortgaged Banking Suit Property is a residential bungalow occupied by members of the AYH family. Hence, it should not be sold. They submitted no arguments to justify setting aside the sale to the detriment of the Auction-Purchaser pursuant to the impugned Order of 07.03.2023. The Auction-Purchaser has consistently obeyed the orders of the Executing Court, as well as successfully achieved all the milestones during the auction proceedings, including, inter alia, depositing with the OA within 15 days of the impugned Order, i.e. on 20.03.2023, the entire enhanced/increased purchase-price pursuant to Order 21 Rule 85 CPC. A Court should not be prejudiced against a party that has obeyed them. The Auction-Purchaser has acquired legal rights and interest in the purchased Banking Suit Property. In Muhammad Ikhtlaq Memon v. Zakaria Ghani and Others, PLD 2005 SC 819, the Supreme Court of Pakistan, while approvingly citing a reported Judgment of the Indian Supreme Court, observed as follows:

“In Janak Raj's case (AIR 1967 SC 608), it was held that once payment of the sale price by the auction-purchaser in compliance with the orders of the Court had been made, it was the duty of the Court to confirm the sale as required by Order XXI, rule 92, C.P.C. Even where the Court fails to pass an order of confirmation that could not lead to deprivation of right

of auction-purchaser or cause prejudice to him. In such a case, it could be deemed that the sale stood confirmed and would be deemed to have become absolute in title by virtue of section 65, C.P.C. which would relate back to the date of sale. In the case of Hudabia Textile Mills (supra), the legal rights and interests of auction-purchaser were recognized which would not be defected.”

17. In a Division Bench Judgment of this Court, Mrs. Yasmeen Yaqoob v. Messrs. Allied Bank of Pakistan Ltd. 2007 CLC 1511, Justice Sabihuddin Ahmed and Justice Faisal Arab, who were both later elevated to the Supreme Court of Pakistan,¹² observed as follows:

“. . .In the American Jurisprudence (2nd Edition) volume 47, Article 178 at page 440, the general principles governing the discretion to grant or refuse confirmation of a judicial sale are discussed. It has been observed:--

"Although in some jurisdictions a more restrictive rule is followed in cases where it is urged that confirmation should be refused on the sole ground that an advance or upset bid has been received, the confirmation of, or refusal to confirm, judicial sale, as a general rule, rests largely within the discretion of the trial Court, and such determinations ordinarily will not be reviewed except for manifest abuse of such discretion. The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in view of all the circumstances. The Court must act in the interest of fairness and prudence, and with a just regard to the rights of all concerned and the stability of judicial sales. Thus, if the sale was fairly conducted and the property sold for a reasonable and fair value under the circumstances, the Court is ordinarily required in the exercise of its judicial discretion to confirm the sale."

In Article 179 on page 441 further observations as regards the policy of law in respect of judicial sales have been made as under:--

¹² Weightage of Judgments by a Single Bench of the High Courts. Cases decided by High Court Judges who were subsequently elevated to the Supreme Court, which were neither approved nor disapproved by the Supreme Court, were entitled to the highest consideration and respect as and when such cases come up for consideration before the Supreme Court. Agricultural Workers Union v. The Registrar of Trade Unions, 1997 SCMR 66, 81

"Nevertheless, the policy of the law does not require Courts to scrutinize the proceedings of a judicial sale with a view to defeat them, but on the contrary, every reasonable intendment will be made in their favour, so as to secure, if it can be done consistently with legal rules, the object which they are intended to accomplish. As a consequence it order to maintain confidence in the stability of judicial sales Courts have adopted the wise policy that confirmation will not be refused except. for substantial reasons and that in the 'absence of fraud or misconduct the highest bidder will ordinarily be accepted as the purchaser of the property offered for sale " The above passages from the American Jurisprudence clearly point out the dominant principle of law in such cases, namely, the stability of judicial sales. In this context the argument that since the Court was vested with the wide discretion to choose any mode of execution of the decree, is can likewise refuse confirmation of the sale on any around it chooses is without substance. Judicial discretion vested by statutory provisions cannot be construed in such a manner as it will arm the Court with arbitrary powers and would inevitably destroy the public confidence in the stability of the judicial sales as pointed out by the American jurisprudence. Therefore in facts as well as on principle the learned Single Judge went wrong i n refusing confirmation on the ground that after the sale the decree had been satisfied. Even otherwise once the Court had made up its mind to execute the decree by attachment and sale lay public auction, as long as the order so directing was in the field, the discretion resting in it under section 8(3) of the Ordinance stood exhausted and a particular course of proceedings was brought into motion which had to culminate in a result contemplated by legal principles, and this course could not be diverted on the assumption that the executing Court had discretion to choose any mode of execution. In the premises the question of confirmation was to be regulated either by the C.P.C.or equitable principles under the provisions thereof or on general principles as pointed out above. From any angle the refusal of confirmation by the learned Single Judge is unsustainable and. the auction-purchaser was entitled, in the circumstances of the case to the confirmation of the auction sale. . . ."

In view of the above, the rights acquired by the Auction-Purchaser as discussed herein cannot be negated by an ad-interim Order of an earlier bench passed without notice and in the absence of the Auction-Purchaser.

18. Further, the Appellants' submission of surety, as per one of the conditions of the ad-interim Order to be positively complied by the Appellants has also been challenged/objected to by Respondent No.1-Bank, who filed objections with the Nazir concerning compliance with the Appellate Court's Order dated 18.04.2023 by the Appellants. The Nazir has also identified this aspect in his Report dated 15.05.2023 submitted to the Appellate Court. Essentially, the surety being offered is in the name of the father of the Judgment-Debtors and is yet to be mutated in the names of the Judgment-Debtors. Thus, the Appellate Court's Order dated 18.04.2023 is yet to be complied with fully. This is yet another illustration of the short-coming by the Judgment-Debtors (to be read as AYH family) to comply with the Court's Orders, including its procedural timelines.

19. On 01.12.2023, after hearing the matter, when no cogent reason to set aside the sale on deposit was advanced by the Judgment-Debtors, including NTCL and the Appellant No.2, this Court, to provide equity and on the insistence of the appellants being judgment-debtors and the Banking Suit Property mortgaged to the Respondent No.1-Bank (Decree holder) being a residential bungalow, granted one week's time to the appellants to bring a better bidder/buyer, who should come along with pay orders of 25% of the enhanced/increased bid amount, failing whereof, appropriate orders shall be passed. The Court added that the present Auction-Purchaser would be at liberty to match the proposed or enhance the present bid as required under the law. However, when this matter was taken up on 08.12.2023, neither NTCL nor the AYH family submitted any material offer to the Court in terms of the Appellate Court's Order. The Counsels for the Appellants and the Judgment-Debtors have candidly admitted that no one is available to match or better the bid. Instead, they requested additional time. When this Court declined such a request, Counsels submitted their arguments, including hearing the Auction-Purchaser, who had not been heard by the Appellate Court when the ad-interim Order was passed on 18.04.2023 until to date.

20. No other legal grounds have been urged to set aside the impugned Order. The impugned Order has been passed on proper appreciation of facts and law. The learned Single Judge has not fallen into any error while passing the impugned Order, which requires interference.

21. The above are the reasons for the Short Order passed on 08.12.2023 dismissing the Appeal including all listed applications. Following this reasoning, the Nazir is directed to release to the Appellants the funds of Rs.50,000,000 (Rs.5 crore) along with the profit accrued thereon deposited by the Appellants with the Nazir. The property documents submitted by the Appellants to the Nazir may also be returned to the Appellants.

22. The parties are left to bear their own costs.

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