

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Shafi Siddiqui
& Jawad Akbar Sarwana JJ

First Appeal No.92 of 2021

Abdul Khalid s/o Abdul Ghani

v.

HBL Limited and Eleven Others

Appellant:	Abdul Khalid s/o Abdul Ghani, through Mr Nihal Khan Lashari, Advocate
Respondent No.1:	Habib Bank Limited, through its authorized Attorney through Masood Anwar Ausaf, Advocate
Respondent No.2:	Banking Court No.III at Karachi. Nemo.
Respondent No.3:	Aizaz Alam Sidique s/o Maqbool Ahmed Sidique (Auction Purchaser) through Mr Abdul Shakoor and Mr Muhammad Mobeen Khan.
Respondent No.4:	Abdul Malik s/o Abdul Ghani. Nemo.
Respondent No.9:	Abdul Wajid s/o Abdul Ghani. Nemo.
Respondent Nos.5, 8, 10, 11 &12:	Abdul Majid Farooque (Respondent No.5); Seema Fida (Respondent No.8); Huma Ghani (Respondent No.10); Abdul Wahab (Respondent No.11) and Ammar Ghani (Respondent No.12) - all legal heirs of Abdul Ghani and Mst. Raeesa Begum through Mr Syed Farhan A Jaffery, Advocate.
Date of hearing:	05.12.2023
Date of decision:	28.12.2023

J U D G M E N T

Jawad A. Sarwana, J.: The Appellant/Defendant No.1 (“Abdul Khalid”) s/o Abdul Ghani, whose mother, Mst. Raisa Begum, who passed away on 28.11.2017, has filed this appeal against the Order dated 02.08.2021 passed by the Banking Court No.III at Karachi in Banking Execution No.75/2012 arising from the Judgment dated 26.04.2012 and Decree dated 06.06.2012 in Banking Suit No.512/2009. The impugned Order challenges the Banking Court’s auction and sale of mortgaged property bearing Residential House No.A-56, Block-3, Shah Faisal Colony, Karachi owned by Late Mst. Raisa Begum w/o Abdul Ghani, admeasuring 423 sq. yds. (“Mortgaged Suit Property”)

2. The brief facts as available from the appeal file are that in the year 2006, M/s. Ghani & Sons (impleaded as Defendant No.1 in Banking Suit No.512/2009) through its proprietor, Abdul Wajid s/o Abdul Ghani (Respondent No.9/Defendant No.2/Judgment Debtor No.2) obtained Running Finance Facilities from Habib Bank Limited (“HBL”)(Plaintiff/Respondent No.1). Abdul Wajid stood as a Guarantor of the aforesaid finance, and his mother, Mst. Raisa Begum, who was the owner of the Mortgaged Suit Property, mortgaged her property to the Bank as security against such finance. According to the Title of the Plaint, Ms Raisa Begum was impleaded as Defendant No.3 in Banking Suit No.512/2009 and Judgment-Debtor No.3 in Execution No.75/2012. The residential address of Abdul Wajid and Mst. Raisa Begum was that of the Mortgaged Suit Property.

3. Abdul Wajid, Proprietor of M/s. Ghani & Sons and Mst. Raisa Begum defaulted against their payment obligations to HBL which filed a suit against them under FIO, 2001, and obtained a decree in the sum of Rs.1,380,345.76 along with the cost of funds from 01.07.2012 till realization of the entire decretal amount. After granting time to the

Judgment-Debtors to settle the debt, HBL initiated auction proceedings against them in 2017. According to the impugned Order, during the first round of the auction proceedings, Mst. Raisa Begum appeared before the Executing Banking Court No.III at Karachi on 20.11.2017 and filed an application under Section 151 CPC to stop the auction proceedings on the ground that she was ready to pay the loan to HBL in instalments. During the course of arguments, Raisa Begum also handed over to HBL a cheque of Rs.300,000 to be adjusted against the decretal amount of Rs.1,000,033 and proposed to settle the remaining decretal amount of Rs.700,033 (sic.) within three months. She agreed to pay the cost of funds of Rs.621,748.74 and the cost of the suit, i.e. Rs.33,392, within the next three months, too. The Executing Court recorded the above-mentioned offer and acceptance between HBL and Mst. Raisa Begum and allowed the said application vide Order dated 23.11.2017, and the auction proceedings were postponed till further orders.

4. Mst. Raisa Begum passed away on 28.11.2017, and on 06.12.2018, HBL filed an application impleading eight (8) of her legal heirs in the execution proceedings.¹ The application was allowed on 29.01.2019, and HBL was directed to file amended title impleading the legal heirs of Ms Raisa Begum. Auction proceedings recommenced thereafter, except that the bids offered were less than the forced value and not accepted by the Nazir. Finally, in the fourth attempt, on 06.04.2021, one Aziz Alam Siddiqui s/o Maqbool Alam Siddiqui ("Auction-Purchaser) offered a bid for Rs.18,000,000 and on the same date deposited more than 25% of the bid amount (Rs.6,000,000). Thereafter, within 15 days from the auction date, i.e.

¹ According to perusal of the Appeal file the Decree-Holder Bank impleaded the following eight (8) legal heirs of Mst. Raisa Begum in the amended title, namely (a) Abdul Malik (Respondent No.4); (b) Abdul Wajid (Respondent No.9); (c) Abdul Majid (Respondent No.5); (d) Abdul Khalid (Appellant); (e) Abdul Sajid (Respondent No.6); (f) Abdul Wahab (Respondent No.11); (g) Ammar Ghani (Respondent No.12) and (h) Huma Ghani (Respondent No.10). The following two legal heirs were apparently not impleaded by the Decree-Holder Bank in the Amended Title Page, namely, (i) Abdul Rahim; and (j) Seema Fida.

on 20.04.2021, he deposited the balance payment of the bid amount (Rs.12,000,000) with the Nazir.

5. On 08.05.2021, some of the legal heirs of Ms Raisa Begum, filed an Application under Order 21 Rule 90 CPC read with Section 151 CPC for setting aside the auction proceedings dated 06.04.2021 and auction notice under Order 21 Rule 64 on the grounds of fraud, misrepresentation and concealment of facts from the Court which they subsequently withdrew. The learned Judge of the Banking Court No.III vide the impugned Order dated 02.08.2021 directed the Nazir to issue a Sale Certificate under Order 21 Rule 94 CPC. Some of these legal heirs of Mst. Raisa Begum also filed certain other applications challenging the auction and/or the Judgment and Decree, which were also dismissed by separate Orders dated 12.08.2021.

6. The learned Counsel for Abdul Khalid (Appellant), who is also one of the legal heirs of Mst Raisa Begum, submitted that no notice of the auction proceedings was served on him and the entire proceedings had taken place in his absence; hence, he could not and did not have the opportunity to file objections to the auction (paragraphs 7 and 8 of the appeal). He further argued that none of the legal heirs of Mst. Raisa Begum was mentioned in the notices and the proclamation published in the newspapers. The learned Counsel for HBL/Decree-Holder (Respondent No.1) submitted that the impugned Order narrates the entire auction process, including the issuance of the auction notice under Order 21 Rule 64 dated 02.03.2021 delivered at the address of the Mortgaged Suit Property and the publication of the Sale Proclamation in three Newspapers published on 05.03.2021. He contended that the Abdul Khalid has admitted that he resides at the Mortgaged Suit Property and cannot plead ignorance about the notice or the auction or the Sale Proclamation which was published in three daily newspapers. Further, Abdul Khalid, was impleaded as one of the legal heirs of Mst.

Raisa Begum in the Amended Title. Finally, the learned Counsel for the Auction Purchaser (Respondent No.2) argued that he had fulfilled all the requirements of the Nazir in relation to the auction proceedings which have yet to be concluded after almost two and a half years. He contended that valuable vested rights had accrued to him.

7. We have heard the learned Counsels, reviewed the record as available in the Appeal and read the Impugned Order.

8. It is an admitted position that prima facie all the legal heirs of Mst. Raisa Begum had notice of the auction proceedings to the extent that the notice under Order 21 Rule 64 CPC a copy of which is available on record, it was sent to the address of the Mortgaged Suit Property and published in three newspapers. Yet there is a glaring lacuna in the Court Notice and the Sale Proclamation, i.e. the title of the suit is still in the name of Defendant No.3, Late Mst. Raisa Begum. The legal heirs of the deceased, Mst. Raisa Begum is mentioned neither in the Court Notices nor the Sale Proclamation. No notices have been sent to any of Mst Raisa Begum's legal heirs. Thus, the Notice under Order 21 Rule 64, the Sale Proclamation and all other communications between the Nazir of the Banking Court No.III and the Judgment Debtors are defective. The procedure prescribed for auction under Order 21 Rule 66(2) CPC mandates that the sale proclamation is to be drawn up after notice to the Judgment-Debtors, which includes as a corollary all the legal heirs of the Judgment-Debtor No.3, Mst Raisa Begum. Court Notices must be sent, in fact, to all of the legal heirs addressed individually at their last known address. The Court cannot accept its statutory responsibility as a matter of routine. In the present case, assuming that the address of the Judgment-Debtors provided by HBL is the same address for all the legal heirs of the Judgment-Debtor No.3, a single notice at one address will suffice. Individual stand-alone Notices had to be sent to each of the legal heirs of the Judgment-Debtor No.3 even if the address was the same. In the present case, additionally and crucially,

the Court Notices and Sale Proclamation were issued in 2021 to a dead person, Mst Raia Begum, who had passed away in 2017. In spite of HBL amending the title of the execution proceedings, this mandatory requirement of notices to all the legal heirs of Judgment-Debtor No.3, including judgment debtors and legal heirs of the deceased judgment debtor in auction proceedings, went unnoticed and slipped under the radar.

9. Normally, no one should suffer on account of a procedural lacuna on the part of the Court, but then neither should any party benefit or suffer on this account, as the case may be, in this case, HBL and the Auction-Purchaser. However, on closer scrutiny, HBL, as a decree-holder, should have also remained more vigilant and pointed out this critical missing information and mandatory requirement in the Banking Court notices and sale proclamation to the concerned Officer of the Court.

10. In view of the above, the impugned Order dated 02.08.2021 is set aside. The Banking Court No.1, as a first step, is directed to implead all the legal heirs of Raisa Begum as per her family tree set out in the FRC issued by NADRA, as well as positively ascertaining all her remaining legal heirs are still alive. However, the auction proceedings will not be delayed or postponed if, after giving sufficient notice to all the legal heirs to confirm their status, any of the legal heirs are not coordinating or cooperating or furnishing such information to the Banking Court. Thus, after completion of the above exercise within a reasonable time, the Banking Court will issue a fresh proclamation as per the Rules for the auction of the Mortgaged Suit Property. The Banking Court to ensure the issuance of Notices to all the legal heirs of Raisa Begum, including their mention in the Sale Proclamation. To provide equity to the Auction-Purchaser, he is at liberty to either match the proposed bid or to enhance the present bid or to re-payment of his deposited amount with profit to be paid to him, as required under the law.

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

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