

IN THE HIGH COURT OF SINDH AT KARACHI
C.P.No.D-4927 of 2023

Date	Order with signature of Judge
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PRESENT:
MR. JUSTICE AQEEL AHMED ABBASI,
CHIEF JUSTICE;
MR. JUSTICE ABDUL MOBEEN LAKHO

***Muhammad Mumtaz Khan.....V/s.....Muhammad Ahmed Khan
& others***

21-02-2024

Mr.Muhammad Aqil, Advocate for the Petitioner.
Respondent No.1 Muhammad Ahmed Khan and Respondent
No.2(i) Mst.Shahnaz Rafee Respondent No.2(vii) Mst.Uzma Rafee
are present in person.

Ms.Uzma Khan, Advocate for Respondent No.3

ORDER

Through instant petition, the petitioner has impugned the order dated 04.10.2023, passed by Senior Civil Judge-XII, Karachi Central, in Civil Suit No.103 of 2020, whereby, according to learned counsel for the petitioner, while allowing the petitioner, who is one of the co-sharer of the subject property allowed another chance to purchase the subject property at the highest bid of Rs.3,76,00,000/-. The learned Senior Civil Judge, however, through impugned order further directed the petitioner to submit a pay order of 25% along with 5% of the highest bid as a solatium for the Auction Purchaser within three days from the date of order before the Nazir, which order, according to learned counsel for the petitioner, is not tenable in law for the reasons that unless a bid is confirmed and subsequently, by the order of the Court at the instance of any of the parties, after the sale has become absolute, the provisions of Order XXI Rule 88 and 89 CPC cannot be invoked.

2. Learned counsel for the petitioner submits that since in the instant matter the bid was not confirmed nor the sale has become conclusive or final, whereas, the petitioner being one of the co-sharer in the subject property has a preferential right to

match the highest bid under the law, whereas, the Respondent No.3 (Bidder in the case) under the facts and circumstances, is not entitled to 5% solatium if his bid amount is returned by the Court, while not accepting the same as final or conclusive in nature.

3. Notices were issued to the respondents, who filed their replies/objections, whereas, learned counsel representing the Respondent No.3 could not controvert the factual and legal position as argued by the learned counsel for the petitioner in view of clear provisions of Order XXI Rule 88 and 89 CPC, which are reproduced as under:-

“Order XXI Rule 88 and 89 CPC”

“88. Bid of co-sharer to have preference: Where the property sold is a share of undivided immovable property and two or more persons, of whom one is a co-sharer respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.

89. Application to set aside sale on deposit: (1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court---

- (a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and
- (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.”

4. In view of the hereinabove factual and legal position, it has emerged that the preferential right of petitioner, who is co-sharer in the subject property, and the non-applicability of the condition to deposit 5% of the highest bid as solatium for the auction purchaser in the instant case, wherein sale has not become final has been established, therefore, the order of the learned Senior Civil Judge-XII Karachi Central to the extent of requiring the petitioner to deposit 5% solatium is unwarranted under the law, which is hereby set-aside and the petition is allowed in the aforesaid terms. However, the petitioner is directed to deposit the remaining balance amount of share of the Respondents/legal heirs before the Nazir, District and Session Court, Karachi Central within three (03) days from the date of receipt of this order.

5. Learned counsel for the petitioner under instructions submitted that the petitioner has already prepared a pay order dated 21.02.2024 in the sum of Rs.22,23,334/- in favour of Nazir, District and Sessions Court Karachi Central, copy of which has been placed on record, and the same will be deposited before the Nazir, whereas, the petitioner has already deposited Rs.94 lakhs before the Nazir, District and Session Court Karachi Central.

6. In view of the above statement, learned counsel for the respondents do not raise any objection for disposal of instant petition in the above terms, which is accordingly disposed off along with listed application.

Chief Justice

Judge