

IN THE HIGH COURT OF SINDH AT KARACHI

IST APPEAL NO. 14 of 2008

Present:
Mr. Justice Sajjad Ali Shah.
Mr. Justice Muhammad Junaid Ghaffar.

Muhammad Arshad Qasim Abbasi
and another ----- Appellants

Versus

Allied Bank of Pakistan & others ----- Respondents

Date of hearing: 19.08.2015

Date of judgment: 19.08.2015

Appellants: Through Khawaja Shamsul Islam Advocate.

Respondent No.3: Through Mr. Arshad Hussain Advocate.

JUDGMENT

Muhammad Junaid Ghaffar, J. Through instant appeal, the appellant has impugned order dated 29.2.2008 passed by the Banking Court No.1, at Karachi, whereby, the application filed by the Decree Holder Bank under Section 19(3) & (5) read with Section 15(10) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 has been allowed.

2. Briefly the facts as stated in the Memo of Appeal are that respondent No. 1 had filed a Suit against respondent No. 2 who was the principal borrower, whereas, the appellants were mortgagers, whereafter through judgment dated 26.8.1998 the Suit was decreed and in Execution bearing No. 118 of 1999 the property was put to auction

thrice, however, none of the bids were accepted being on the lower side Subsequently, the respondent No. 1 moved an application before the Banking Court with the prayer to allow the respondent No. 1 to accept the offer of Rs. 4 million given by respondent No. 3 and such application was allowed by the Banking Court, and, the bid of Rs. 4 million offered by Respondent No.3 was accepted. Thereafter one Mr. Amir Ali Ghulam Hussain approached the Banking Court by offering initially a bid of Rs. 4.2 Million which was then enhanced to Rs. 6 million but such offer was rejected by the Banking Court, against which an appeal was preferred before this Court which was also dismissed. Thereafter the appellants moved an application under Order 21 Rule 89 CPC by offering an amount of Rs 5.5 Million, however, withdrew the same vide order dated 27.6.2007. Subsequently, vide impugned order the learned Banking Court has accepted the sale of mortgaged property to the auction purchaser and has directed the Nazir to issue sale certificate in its favour.

3. Learned Counsel for the appellants has contended that the learned Banking Court had no jurisdiction to allow the respondent No.1 to enter into negotiations with the auction purchaser privately, whereas, the provision of Order 21 Rule 66 CPC have been violated. Learned Counsel has further contended that even Respondent No.1 through its Rejoinder had agreed to accept the offer of the appellants amounting to Rs. 5.5 million and had supported the case of the appellants therefore, the learned Banking Court ought to have accepted the offer of the appellants as against the auction purchaser. It has been further contended by the learned Counsel that the impugned order has been passed in violation of the provisions of Section 19(3) of the Ordinance, 2001, whereas, the learned Banking Court was required to order for fresh publication, once the bids were not accepted and any private negotiation was not permissible under the law. In support of his contention the learned Counsel has relied upon the case of *Yawer Kadir Vs. Banking Court NO. V Pakistan Secretariat, Karachi and 3 others (2013 CLD 488)* and *Mst. Zainab Bibi Vs. Allied Bank of Pakistan Limited and others*

(2003 YLR 3274), *Ripple Jewellers (Pvt) Limited Vs. First Woman Bank and 6 others* (2003 CLD 1318) and *Syed Marghoob Alam Vs. Muhammad Shoaib Ansari & 2 Others* (2003 CLD 778).

4. Conversely the Counsel for respondent No. 3 has contended that the property in question was evaluated twice, whereas, the original evaluation dated 27.12.1993 was not realistic and was done much prior to obtaining finance from the Bank. Learned Counsel has further contended that all legal and codal formalities were followed by the Banking Court including proclamation / auction notices, however, the property could not be auctioned as the bids received were too low. Counsel further contended that though the appellants had earlier moved an application under Order 21 Rule 89 CPC however, they withdrew the same; therefore, the appellants have no locus standi to contest the matter anymore. Learned Counsel further contended that a sale certificate dated 18.2.2008 has already been issued, whereafter, the property in question has also been mutated on 16.6.2008 in favour of Respondent No.3. Therefore, the appeal merits no consideration and is liable to be dismissed. In support of his contention the learned counsel has relied upon the case of *Sanobar Talkies Vs. Government of Punjab through Secretary, Excise & Taxation Department, Lahore and others* (1972 SCMR 337) and *Messrs Chawla International Vs. Habib Bank Limited and others* (2003 CLD 956).

5. We have heard both the learned Counsel and perused the R & P. It appears that on the basis of judgment dated 26.8.1998 and decree dated 29.10.1998 Execution proceedings were initiated by the Banking Court wherein the property in question was put to auction. The first proclamation of sale was published on 22.10.2001 and value of the property was fixed at Rs. 13775000/- on the basis of valuation report dated 27.12.1993. Since the bid received was too low, the property was put to auction once again by publication in daily JANG dated 10.5.2002 and in daily DAWN on 14.5.2002. However, once again the highest bid received was Rs. 800,000/- and the

auction was cancelled. It further appears that thereafter the property was Re-evaluated through Joseph Lobo Surveyors and vide report dated 4.7.2003 the total forced sale value was determined as Rs. 24, 00,000/- (Rs: 750,000/- for survey No. 270 and Rs: 16, 50,000/- for Survey No. 271) and the property was again put to auction on 21.5.2004 by publication in JANG on the basis of fresh valuation. In this auction the highest bid received was on behalf of the respondent No. 3 amounting to Rs. 23,00,000/- and the auction purchaser had paid 25% of the bid amount and the matter was placed before the Court for acceptance by the Nazir. However, vide order dated 2.8.2004, the learned Banking Court rejected the bid as being low. Thereafter, an application was moved on behalf of the bank / respondent No.1, whereby, the Court was requested to accept the bid of respondent No. 3 for Rs. 4 million in respect of the subject property and the learned Banking Court allowed the same vide order dated 10.1.2005. The respondent No. 1 thereafter filed an application under Section 19(3) and (5) read with Section 15(10) of the 2001 Ordinance as it had received the entire payment from the auction purchaser. It further appears that thereafter one Amir Ali Ghulam Hussain approached the Banking Court with an offer of Rs. 4.2 million which was subsequently enhanced to Rs. 6 million however, such request was not accepted by the Banking Court, whereafter, the said Amir Ali Ghulam Hussain filed Ist Appeal No. 11 of 2005 before this Court which was dismissed vide order dated 24.6.2006. On 8.11.2006 the appellants approached the learned banking Court by filing an application under Order 21 Rule 89 for setting aside of the order of sale of the mortgaged property and offered an amount of Rs. 5.5 million. Such request was vehemently opposed by the respondent No. 1 through its Counter affidavit, whereas, the said application was withdrawn by the appellants on 27.6.2007 and the same was dismissed as withdrawn. Perusal of the record further reflects that on 28.8.2007 a new Advocate was engaged by respondent No. 1 who then filed a rejoinder (*which in our view could not have been filed by the Bank/Respondent No.1 as it had already filed its Counter Affidavit*) to the application under Order 21 Rule 89 filed by the present appellants on

14.9.2007 and supported the application as well as the contention of the appellants for making payment of Rs. 5.5 million as against the auction price of Rs. 4 million paid by respondent No. 3. However, we are surprised to note that such rejoinder was filed in respect of an application on 14.9.2007, whereas, the application itself had been withdrawn by the appellants on 27.6.2007. We are also surprised to note that as to how, respondent No.1 Bank had authorized any officer to file such rejoinder in support of the appellant's contention, when their own application for allowing the auction purchaser to enhance the bid and make payment of Rs. 4 million had been accepted by the Court, notwithstanding that the application of the appellant under Order 21 Rule 89 CPC had already been dismissed as withdrawn. Such conduct on the part of the Bank officials has led to unnecessary litigation before this Court, whereas, it has also been a cause for delaying the proceedings of Execution before the Banking Court. We deprecate such conduct of the Bank officials as well.

6. After having perused the record and the discussion hereinabove as well as the conduct of the appellants, we are of the view that since the appellants had themselves withdrawn their application under Order 21 Rule 89 CPC on 27.6.2007, and therefore, any reliance placed on the rejoinder filed allegedly on behalf of the respondent No. 1 Bank, which though has supported the case of the appellants to some extent, appears to be entirely misconceived and cannot be entertained by this Court as the same was filed much after the withdrawal of said application.

7. Insofar as the objection with regard to Order 21 Rule 66 CPC is concerned, we may observe that perusal of R & P reflects that the property in question was put to auction thrice after proclamation and publication in the newspapers and all along the appellants were in knowledge of such auction proceedings and had never objected to such auction. The terms of sale were properly settled by the Banking Court in terms of Order 21 Rule 54 & 66 CPC, and substantial compliance was made, whereas, the appellants have neither challenged the judgment and decree, nor at any moment of time they had come forward to match the highest bid nor had shown any intention to

deposit the decretal amount. The only remedy sought by them was by filing an application under Order 21 Rule 89 CPC which was also withdrawn. It is only when the auction had been confirmed by the Banking Court and sale certificate had been issued, pursuant to which the property has been mutated in favor of Respondent No.3, they have come to this Court and have made an attempt to seek relief on the basis of their application under Order 21 Rule 89 which otherwise had been withdrawn by them.

8. In view of herein above facts and circumstances of the instant case, we are of the view that no case has been made out on behalf of the appellants so as to upset the impugned order, which otherwise, has also attained finality after issuance of sale certificate and mutation of the property, whereas it has also created a vested right in favour of respondent No.3. Accordingly, we did not find any substance in the instant appeal which was dismissed by us vide short order dated 19.8.2015 and above are the reasons in support thereof.

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