

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI  
**EXECUTION No. 39 / 2003**

DATE	ORDER WITH SIGNATURE OF JUDGE
1)	For hearing of CMA No. 112/2017.
2)	For hearing of CMA No. 113/2017.
3)	For hearing of CMA No. 114/2017.
4)	For hearing of CMA No. 268/2017.
5)	For hearing of CMA No. 380/2017.
6)	For orders on Nazir report dated 5.12.2017.

**20.12.2017.**

Mr. Muhammad Nawaz Advocate for Decree Holder.  
Mr. Muhammad Rafiq Advocate for Judgment Debtor No. 3.  
Mr. Qazi Abdul Hameed Siddiqui along with  
Mr. Mr. Muhammad Nawaz Tahiri Advocate for J.D. No. 5.  
Mr. Shahid Hussain Malik Auction Purchaser of  
property No. 1 & 2.

4) Through this application the Auction Purchaser has requested to correct his name in orders dated 2.3.2017 and 13.3.2017 wherein, his name has been mentioned as **“Muhammad Shahid”** instead of **“Shahid Hussain Malik”**. On perusal of the orders as above, it appears that his contention is correct. Accordingly, this application is allowed and the name of **“Muhammad Shahid”** should be read as **“Shahid Hussain Malik”** in the aforesaid orders.

1, 2 & 3) CMAs listed at Serial No.1 and 2 have been filed by the Auction Purchaser and it has been prayed through both these applications that the properties so stated therein, that is House No. 1855 measuring 120 square yards Block 14 Federal “B” Area, Karachi (hereinafter referred as **Property No. 1**) and House No. R-44 admeasuring 120 square yards in Block 18 Federal “B” Area, Karachi (hereinafter referred as **Property No. 2**) be handed over with peaceful vacant possession and

additionally Sale Certificate be issued and the title documents be handed over as the matter stands settled.

It is the case of the Auction Purchaser who appears in person that the properties in question were purchased on 7.5.2004 and sale was confirmed on 18.5.2005, whereafter, the Judgment Debtors preferred High Court Appeal and restraining orders were passed. He further submits that the Appeal was dismissed vide order dated 31.1.2006 which was further challenged by filing Civil Petition for Leave to Appeal and after grant of Leave, and suspension of impugned judgment, the Appeal has been finally dismissed by the Hon'ble Supreme Court on 31.1.2017 and even the review as well as Section 12(2) application(s) filed by the Judgment Debtors also stand dismissed. The Auction Purchaser contends that in view of such position both these applications be allowed as prayed as the Auction Purchaser since 2004 is pursuing his remedy and has neither been handed over the possession nor the title documents. In support he has placed reliance upon *Nazar and others V. Member (Judicial-II) BOR (2010 SCMR 1429)*, *Abdul Majid and another V. Qazi Abbas Hussain Shah (PLJ 195 SC 257)*, *Mir Sahib Jan V. Janan (2011 SCMR 27)*, *Shahid Pervaiz V. Ejaz Ahmed and others (2017 SCMR 206)*, *Mustafa Kamal and others V. Daud Khan and others (2004 SCJ 409)*, *Mst. Anwar Sultana V. Bank Al-Falah Ltd and others (2014 SCMR 1222)*, *Muhammad Farooq M. Memon V. Government of Sindh (1986 CLC 1403)*, *Anwar Ali and 9 others V. Chief Engineer, Irrigation, Sukkur Zone, Sukkur and 2 others (1986 CLC 745)*, *Jehan Khan V. Province of Sindh and others (PLD 2003 Karachi 691)*, *Muhammad Attique V. Jami Limited and others (PLD 2010 SC 993)*, *Muhammad Ikhtlaq Memon V. Zakaria Ghani and others (PLD 2005 SC 819)*, *Khazada Ainuddin Khan and others V. Feroze Khan and others*

*(1992 SCMR 2175) and Muhammad Abdullah V. Yatim Khana Khalqia, Sargodha and others (2004 SCMR 471).*

On the other hand, learned Counsel for the Judgment Debtor No.3 submits that insofar as dismissal of High Court Appeal bearing No. 145/2005 is concerned, though it was dismissed, but thereafter, the Judgment Debtor No. 3 who claims and is in possession of Property No. 2, filed an application for review of the order, as pursuant to an order passed by the Division Bench in the said Appeal the Judgment Debtor had already deposited the auction price plus five percent as provided in Order 21 Rule 89 CPC and to the extent of Judgment Debtor No.3, the Appeal for Property No.2 was restored vide order dated 13.12.2006 which is still pending. He submits that Judgment Debtor No.3 has remained in possession during this period and therefore, to this extent the application is liable to be dismissed.

Counsel for Judgment Debtor No.5 has raised a legal objection regarding maintainability in filing of these applications and submits that in terms of Section 65 CPC read with Article 180 of the Limitation Act, the Auction Purchaser was required to move such application within three years from the date of absolute sale i.e. 18.5.2005; hence, both these applications are hopelessly time barred. He has further contended that Article 134 of the Limitation Act 1973 in India is para-materia to Article 180 ibid and there are Judgments of the Hon'ble Supreme Court of India whereby, it has been held that such applications are to be filed within the limitation. Learned Counsel in support has relied upon *A. Kamal Batcha V. Gokulam Ammal and others (2015 (3) CTC 614) and Pattam Khader Khan V. Pattam Sardar Khan and another (1996) 5 SCC 48*). Insofar as application at serial No.3 bearing CMA No.114/2017 filed by Judgment Debtor No.5 is concerned, learned

Counsel submits that the Judgment Debtor No.5 is ready and willing to deposit the price of auction plus five percent which could be paid to the Auction Purchaser and property be handed over to Judgment Debtor No.5.

I have heard all the learned Counsel and perused the record. The facts briefly as appear to be are that in this Execution Application there are various properties of Judgment Debtors which have come for sale from time to time pursuant to Judgment and Decree dated 3.10.2002. At the relevant time all defaulting loans of the then Nationalized Banks were handled through Corporate and Industrial Restructuring Corporation ("**CIRC**") and this matter pertains to that period. It appears that at the request of the Decree Holder an order was passed on 12.9.2003, whereby, in terms of Section 19(3) of the Financial Institutions (Recovery of Finances) Ordinance, 2001, ("**FIO 2001**") Decree Holder Bank was permitted to make private sale of the hypothecated and or mortgaged properties. Pursuant to such order various properties were put to auction and for the present purposes, the dispute is in respect of properties as mentioned in the earlier part of this order i.e. property No.1 and 2. It is to be noted that both these properties were sold by CIRC and or the Bank(s) and not by the Nazir of this Court. However, according to the procedure then in vogue and to safeguard the interest of any affected party, including the Judgment Debtors, the sales through auction were placed before the Court as auction reports from time to time and through order dated 18.5.2005 the sale of the aforesaid two properties (along with others) was confirmed. It appears that thereafter, the order dated 18.5.2005 was impugned by Judgment Debtors No.3 and 5 through HCA No.145/2005. On 2.6.2005 in the

HCA while issuing notice to the Respondents the Court passed the following order:-

“Till next date of hearing, the operation of the impugned order shall remain suspended provided Appellant/ J.D deposits the decretal amount within seven days from today. In case the Appellant fails to deposit the said amount within the prescribed period, the interim relief granted to him shall vanish.”

It appears that thereafter, time and again adjournment was sought on behalf of the Appellants and finally on 31.1.2006 the Appeal was dismissed due to non-deposit of the amount as directed in the aforesaid order. It further appears that thereafter, an application bearing CMA No. 158/2006 was filed by Judgment Debtor No. 3 (Appellant No. 2) seeking review of the order dated 31.1.2006 on the ground that the Appeal was wrongly dismissed to his extent as the amount had already been deposited as directed and the Court could not be assisted properly on such date. The order was reviewed and the operating part of such order dated 13.12.2006 reads as under:-

“7. Considering the above noted aspect of the case, we are of the view that the mistake pointed out by the Appellant No. 2, in the form of listed application, is apparent on the face of the record. It has occurred primarily due to lack of proper assistance by the learned Counsel for the appellant No. 1 and who did not disclose these relevant fact. In such circumstances, the appellant No. 2 cannot be made to suffer for this reason. Accordingly, the order dated 31.1.2006 is reviewed to the extent that the present appeal is restored only to the extent of the claim of the appellant No. 2 in respect of property No. R-44, Block 18, F.B. Area, Karachi. Office is directed to fix this appeal for hearing before the Court on 11.1.2007, on which date no further adjournment will be allowed to the appellant No. 2. Till then the appellant No. 2 shall not be dispossessed from property No. No. R-44, Block 18, F.B. Area, Karachi. It is clarified that appeal on behalf of appellant No. 1 stands dismissed in terms of appellant No. 1 stands dismissed in terms of the earlier order passed in this appeal. Therefore, in respect of the remaining two auctioned properties the executing Court is free to proceed in accordance with law.”

It further appears that the Appellant No.1 (Judgment Debtor No.5) being aggrieved with order dated 31.1.2006 filed Civil Petition for Leave to Appeal, wherein, leave was granted and finally Civil Appeal No. 2389/2006 was dismissed through order dated 31.1.2017. It further appears that thereafter, the Judgment Debtor No. 3 filed an application under Section 12(2) CPC before the Hon'ble Supreme Court against this Judgment, whereas, Judgment Debtor No.5 filed a review application and both these application bearing CMA No. 4240/2017 and CRP No. 62/2017 respectively stand dismissed through order dated 22.9.2017.

Firstly I would like to attend the objection raised on behalf of the Judgment Debtor No.5 in respect of limitation. Though in terms of Article 180 of the Limitation Act such an application for possession has to be filed within three years from the date of confirmation of sale; however, admittedly in this matter the sale was confirmed through order dated 18.5.2005 and Appeal was preferred and interim order was passed on the very first date. Thereafter, the Appeal was dismissed finally on 31.1.2006 and again the same was impugned before the Hon'ble Supreme Court and admittedly the impugned Judgment of the High Court was suspended, leave was granted, and appeal was fixed for regular hearing. The Appeal has been finally decided by the Hon'ble Supreme Court on 31.1.2017. Thereafter both these applications at serial No. 1 and 2 have been filed and there appears to be no delay on the part of the auction purchaser in this regard. Even otherwise, and notwithstanding the above, the auction purchaser had immediately filed such application before this Court for possession of and issuance of Sale Certificate and through order dated 2.6.2005 the said application was allowed by directing the Official Assignee to take over the possession in the following terms:-

- “1. Granted.
2. It appears that auction held by CIRC was confirmed by this Court’s order dated 18.5.2005. It appears that the entire bid amount has been paid in respect of two mortgaged properties bearing House No. R-44, Block 18, F.B. Area, Karachi. Through listed application (CMA No. 1009/2005) under Section 151 CPC seeks appointment of Official Assignee to take over possession of the aforementioned mortgaged properties and hand over the same to the Auction Purchaser. Let the possession be taken over of the said properties by the Official Assignee, if necessary, he may take assistance of police aid and local administration. Tentatively, Official Assignee’s fee is fixed at Rs. 10,000/- of each property to be paid by the Auction Purchaser to be adjusted towards cost, if any.”

In view of the above order, I am of the view that in fact no further application was required to be filed as orders have already been passed directing the Official Assignee to take over the possession and in fact both these applications have been filed as an abandoned precaution and therefore, the objection regarding limitation is hereby overruled.

Insofar as the case of Judgment Debtor No.3 is concerned, on facts the contention of the learned Counsel seems to be correct to the extent that through order dated 13.1.2006 the Appeal was dismissed for failure on the part of the Appellants to deposit the decretal amount; however, to the extent of Judgment Debtor No.3, the order of dismissal of the Appeal was recalled through order dated 31.12.2006. In fact apparently the Appeal is still pending. However, this does not help the case of Judgment Debtor No.3 any further. Insofar as this Executing Court is concerned, the Judgment Debtor No.3 itself approached the Hon’ble Supreme Court by filing an application under Section 12(2) CPC against the Judgment dated 31.1.2017. In the said application very clearly the facts which have now been pleaded and agitated before this Court were stated in paragraph C, D and E. However, the Hon’ble

Supreme Court through order dated 22.9.2017 has been pleased to dismiss the said application by observing that, *“No ground for interference in the impugned judgment under Section 12(2) of the Code of Civil Procedure has been made out. The application is therefore, dismissed.”* Now admittedly, the Judgment Debtor No. 3 has already approached the Hon’ble Supreme Court seeking the same relief as is being sought by opposing the two applications of the Auction Purchaser and such plea has not been entertained by the Hon’ble Supreme Court. Therefore, in the given facts, I am of the view that perhaps, this Court cannot go into any further details as to the facts prevailing in this matter. Notwithstanding this observation, in the Appeal before the Division Bench the relief was only to the extent that upon deposit of the auction price plus five percent, (initially it was decretal amount) the impugned order remained suspended. However, when the appeal of Judgment Debtor No.5 was taken up before the Hon’ble Supreme Court, it was decided on merits after considering the entire issue so raised by the Appellant / Judgment Debtor No.5 (and now being pleaded by Judgment Debtor No.3). After that there is nothing left in the High Court Appeal which remains to be decided. The Hon’ble Supreme Court has dealt with all objections and has repelled them in the following manner;

3. Heard. As far as Property No.4 is concerned, learned counsel for the appellant has abandoned his claim therefore the auction of the said property is not in question anymore. **As regards the other two properties, i.e. Properties No.1 and 2, it is clear from the order dated 18.5.2005 that the appellant was allowed to attend the office of the decree holder bank where the auction purchaser and other interested parties were required to participate in a limited auction pursuant to the order dated 26.5.2004. According to auction reports No.2, 3 and 4, although the appellant was present during auctions, he failed to deposit the earnest money for the auction of Properties No.1, 2 and 4 despite sending written letters to the Corporate and Industrial Restructuring Corporation offering to match the highest bid. Then on 21.10.2004, the appellant filed an application under Section 151 CPC praying that he may be allowed to deposit earnest money. We find that the fact that the appellant, after failing to deposit the earnest money by**



the initial due date, i.e. 8.6.2004, subsequently merely requesting to be allowed to deposit the earnest money rather than the whole amount of the highest bids, shows his utter disinterest and lack of *bona fide*. This conduct of the appellant in that he was never prompt in making payments was highlighted by the learned Executing Court in its order dated 18.5.2005 despite having been given numerous opportunities to do so. Additionally, if the appellant wanted to set aside the auction of the properties, he should have paid to the auction purchaser an amount of 5% of the purchase money and to the decree holder the amount specified in the proclamation of sale under Order XXI Rule 89 of the CPC to set aside the sale, that too within a period of 30 days from the date of such sale as provided for by Article 166 of the First Schedule to the Limitation Act, 1908 (*the Limitation Act*) however this was not so done, therefore he had no right to raise any objection to the auction of the properties. It is thus in these circumstances keeping in view the conduct of the appellant that his option to buy the properties was denied and the sale of the properties was confirmed in favour of the auction purchaser.

6. Finally, the argument that the appellant had deposited a sum of Rs.5,000,000/- with this Court in 2008 which should be adjusted towards Properties No.1 and 2, suffice it to say that a perusal of the order sheet indicates that there was no direction by this Court regarding deposit of such amount, rather it was deposited by the appellant voluntarily. Furthermore, this amount as envisaged by the order of this Court dated 4.1.2008 was deposited in favour of respondent No.2 relating to Property No.4 against which the appellant has abandoned his claim. Such amount was not deposited with respondent No.19 who was the auction purchaser of Properties No. 1 and 2, against which the appellant is still making a claim. Therefore, no benefit can be given to the appellant on this account. Adverting to the argument by the learned counsel for the appellant that the appellant had made a payment of Rs.1,500,000/- with the Appellant Court, suffice it to say that such payment was made pursuant to the order dated 16.6.2005 passed by the learned High Court as a condition for the grant of interim relief, i.e. suspension of the order dated 18.5.2005 confirming the sale of the properties, and was not a substitute for the payment that the appellant should have made as per the provisions of Order XXI Rule 89 to have the sale of the properties set aside.

7. In the light of the above, this appeal has no merits and is accordingly dismissed. We are not convinced by Mr. Abdul Rashid Awan, learned counsel for respondent who was a guarantor in the matter and did not challenge the judgment and decree dated 3.10.2002 or the order(s) of the learned Executing Court confirming the sale of the properties, that his property should be released from the auction after enabling him to pay the amount which the auction purchaser has paid along with 5% at this stage of the proceedings. However, as the appellant has voluntarily deposited an amount of Rs.5,000,000/- with the Registrar of this Court and his appeal is now dismissed, therefore, the office is directed to return that amount to the appellant after taking due receipt from him.

The above observations of the Hon'ble Supreme Court very clearly reflect that all issues and objection of the Judgment Debtors now stand answered, including that of Judgment Debtor No.3 who claims that his appeal is pending in this Court. In my view after going through the above order, perhaps there is nothing left in the case of Judgment Debtor, except to seek refund of his amount deposited in Appeal. If further appears that the appellant before the Hon'ble Supreme Court was in fact agitating the case in respect of both the Properties, i.e. Property No.1 and 2-*See request in Para 6 above*; (before the Supreme Court they were also Property No.1 and 2), and therefore, even if the Appeal is pending before a Division Bench of this Court, it appears to have become infructuous in view of the aforesaid observation of the Hon'ble Supreme Court. The only ground that has been urged is that since amount was deposited in High Court Appeal, therefore, no further order could be passed in this matter. However, it is to be appreciated that mere deposit of an amount does not ipso facto amounts to allowing the appeal, when the Hon'ble Supreme Court has already discussed such issue in the main appeal. Admittedly the judgment and decree in this matter was never challenged, whereas, the provisions of Order 21 Rule 89 CPC have been violated and no amount was deposited within time to as to setting aside the sale. In such circumstances, the objection of Judgment Debtor No. 3 to this effect also stands dismissed.

Now coming to the application of Judgment Debtor No.5 bearing CMA No. 114/2017 filed under Order 21 Rule 89 CPC seeking permission to deposit the auction amount with five percent profit for setting aside of the sale is concerned, it may be observed that such application has to be filed within 30 days from the date of confirmation of sale. The Judgment Debtor No.5 instead of complying with the said

provision agitated the matter and raised objections before this Court which were dismissed vide order dated 18.5.2005 against which Judgment Debtors No.3 & 5 filed an Appeal before a Division Bench of this Court and even in that Appeal had failed to comply with the interim orders by making such deposit. The Appeal was dismissed against which the Hon'ble Supreme Court was approached which also stands dismissed. This application on the face of it appears to be misconceived, belated and only an act to delay the auction proceedings further which have already been withheld for over a decade. There appears to be no justifiable ground for filing such an Application once again, whereas, even in the very order passed by the Hon'ble Supreme Court, another Judgment Debtor / Guarantor had made a request to the Hon'ble Supreme Court seeking release of the auction property by making payment of the Auction Purchasers price with five percent profit, but such request was declined and even could not have been entertained in view of the settled proposition of law as such an application has to be filed within 30 days as provided under Order 21 Rule 89 CPC and such provision has held to be mandatory and not procedural. In the circumstances, this application does not merit any consideration and is liable to be dismissed with costs.

In view of the above facts and circumstances of this case, the applications bearing CMA No. 112 and 113 of 2017 filed by the Auction Purchaser are allowed partially to the extent of handing over possession to the Auction Purchaser and accordingly, Nazir is directed to take over possession of both these properties in question and hand it over to the Auction Purchaser with police aid and or other necessary support as may be required. Insofar as the issuance of sale certificate and title documents is concerned, the Auction Purchaser as well as Decree

Holder are directed to go through the fresh Nazir report dated 5.12.2017 listed at serial No. 6, furnished pursuant to order dated 23.11.2017 passed for issuance of Sale Certificate in respect of another property, whereafter, appropriate orders would be passed as according to the Nazir these properties were not auctioned by the office of the Nazir but by the Decree Holder Bank through private sale as per order dated 12.9.2003. Insofar as CMA No. 114/2017 is concerned, the same is dismissed by imposing cost of Rs. 10,000/- on Judgment Debtor No.5 which is to be deposited in the account of Sindh High Court Clinic.

5 & 6)           Adjourned to come up in the third week of January 2018.

**J U D G E**

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