

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI

**R.A No.70 of 2016**

Date \_\_\_\_\_ Order with signature of Judge \_\_\_\_\_

**Present: Mr. Justice Nazar Akbar**

Applicant No.1 : Syed Abdul Ahad.  
through Mr. Farooq Rasheed, advocate

Respondent No.1 : Abdul Shakoor. (Nemo)

Respondent No.2 : Abdul Majeed  
through Mr. Fayaz Ahmed Dar, advocate

Respondent No.3 : Syed Abdullah  
through Mr. Nasrullah Korai, advocate

Date of hearing : 17.05.2018

Date of Decision : 11.06.2018

## JUDGMENT

**NAZAR AKBAR, J:-** This Revision Application is directed against the order dated **23.07.2016** passed by Vth Addl. District Judge, East Karachi, whereby an application under **Order XXI Rules 89 and 26 CPC** filed by the applicant to set aside sale of shop No.5 shade No.4, Block-A, New Fruit and Vegetable Market, Super Highway, Karachi (hereinafter “shop No.5”) in Execution Application **No.05 of 2006** was dismissed.

2. Briefly stated the facts leading to this Revision are that Respondent No.1 filed suit No.44/2002 for recovery of Rs.15,00,000/- under Summary Chapter based on promissory note, which was decreed by learned IVth Additional District Judge, East Karachi by judgment and decreed dated **24.4.2006**. Respondent No.1/D.H then filed an execution application and also prayed for attachment of shop No.5 belonging to Respondent No.2/J.D. The said application was allowed by order dated **07.2.2009** and the Nazir of the executing

Court was appointed to attach the shop No.5 and put it to an open auction. The auction was duly completed and bid of Rs.30,70,000/- by Respondent No.3, being highest, was accepted. Respondent No.3 made full payment of his offer in the Nazir Office on or about **10.7.2013**. Then the auction purchaser after about two years battle in execution proceedings with the Market Committee, New Fruit and Vegetable Market, got the allotment order and possession order of shop No.5 on **17.4.2015**. By letter dated **01.6.2015** Administrator, Market Committee confirmed to the executing Court that physical possession of shop No.5 was handed over to the auction purchaser on **28.5.2015**. The applicant on **29.5.2015** filed an application under Order XXI Rule 89 and 26 CPC before the executing Court alleging that shop No.5 was never allotted to Respondent No.2/J.D and the said shop was allotted to one Laiq Ahmed, partner of the applicant. Learned trial Court after hearing the parties, dismissed the application filed by the applicant/ claimant by impugned order dated **23.7.2016**. The applicant has preferred instant Revision against the said order.

3. I have heard learned counsel for the parties and perused the record.

4. Learned counsel for the applicant has mostly reiterated the contentions advanced by him in the grounds of the memo of Revision application and seems to be more comfortable with the orders obtained in suit No.972/2015 filed by him during pendency of his application before executing court. He had hardly challenged the findings of learned District and Sessions Judge which are basis of the dismissal of his application under **Order XXI Rule 89 and 26 CPC**. In reply learned counsel for Respondent has contended that suit

No.972/2015 subsequently filed in this Court with malafide intentions to frustrate the execution proceedings No.05/2006 in respect of the shop No.5 already sold in auction and possession was given to Respondent No.1 by Market Committee in compliance of order of the executing court. He has further contended that applicant has **not** produced any document before the executing Court to show that the applicant was lawful owner and/or has live interest in shop No.5 on the date of filing of an application under **Order XXI Rule 89 and 26 CPC**.

5. I have called R&Ps of Execution No.05/2006 from the executing court and also file of suit No.972/2015 since in the Rejoinder Affidavit record of Nazir report and order dated **17.11.2015** from the said suit were filed. I have noted the following facts from the entire record:-

- (i) Respondent No.1 has filed summary suit on **2.8.2001** and as it was originally **suit No.108/2001** and renumbered in 2002 as suit **No.44/2002**.
- (ii) The address of defendant/J.D shown in the plaint was same **shop No.5, Shade No.4, New Fruit Market, Super Highway, Karachi**, the subject matter of execution proceedings.
- (iii) In Execution proceedings the Administrator Market Committee by letter dated **4.12.2014** claimed the following payment for transfer/ mutation of subject shop in favour of auction purchaser.

**PAYMENT FOR OPEN SPACE**

Cost of Plot 1200 Sq. Ft.	Rs.1,52,000/-
Ground Rent in Advance	Rs.012,000/-
Utility Charges	Rs.023,200/-

<b>Total=</b>	<b>Rs.1,87,200/-</b>
<b>Paid=</b>	<b>Rs.1,16,500/-</b>
<b>Remaining Amount=</b>	<b>Rs.070,700/-</b>

**PAYMENT FOR COVERED AUCTION PLATFORM**

Cost of CAP 480 Sq. Ft.	Rs.2,42,000/-
Ground Rent in Advance	Rs.004,800/-
Utility Charges	Rs.023,200/-
<b>Total</b>	<b>Rs.2,70,000/-</b>
<b>Paid=</b>	<b>Rs.034,560/-</b>
<b>Remaining Amount</b>	<b>Rs.235,440/-</b>

- (iv) The auction purchaser in addition to auction price also paid the aforesaid dues claimed by the Market Committee through challan issued by the Market Committee.
- (v) The Administrator, Market Committee on payment of aforesaid dues and after perusal of record by order dated **19.2.2014** was pleased to transfer **Original File No.2345** for allotment of Plot No.5 Block-A-4/R, Shade No.5, Block CAP-4 (shop No.5) from the name of **Abdul Majeed** son of Abdul Karim (J.D) in the name of **Syed Abdullah** son of Ulfat Ali (auction purchaser).
- (vi) The Administrator Market Committee by letter dated **17.4.2015** directed the Incharge Anti-encroachment Cell, New Fruit and Vegetable Market to handover subject shop to the auction purchaser.
- (vii) On **28.5.2015** pursuant to the orders of Administrator, Market Committee, and in compliance of order of Additional District Judge, East Karachi the possession of shop No.5 was handed over to **Syed Abdullah** son of Ulfat Ali, the auction purchaser, under Mushairnama of handing over of possession by (1) **Abdul**

**Bari Soomro**, and (2) **Zulfiqar Ali Jat** Incharge Anti-encroachment Cell, New Fruit and Vegetable Mandi, Karachi.

- (viii) The applicant on **29.5.2015** filed an application under **Order XXI Rule 89** and **Rule 26 CPC** on the basis of five documents filed as annexures **A** to **F**. The perusal of these documents shows that annexure **A**, **B** and **C** are dated 20.3.1994, 18.2.2001 and 21.1.1996 and **D** and **E** bears dates of **May 2015** including an affidavit of defendant/J.D himself dated **29.5.2015**, which was sworn by him a day next to the date of handing over possession of shop No.5 to the auction purchaser.
- (ix) The applicant in his application to the Executing Court on 29.5.2015 did mentioned that the shop has been demolished as alleged in suit filed on **8.6.2015** nor he filed any other miscellaneous application in the Executing Court for inspection of shop No.5 pending his application.
- (x) The possession of auction purchaser was established and the auction purchaser after permission from the Market Committee on his application dated **2.6.2015** demolished shop No.5 with a view to renovate it.

6. The learned Executing Court thoroughly examined the facts of the case pleaded before him and requirement of law and reproduced provisions of **Order XXI Rule 89** in the impugned order. The applicant himself has stated before the Executing Court that he was not owner of shop No.5 rather it was owned by one Laeeq Ahmed who has died on **14.12.1997**. He claimed to be former partner of deceased owner and admittedly his name was not mentioned in the title document and record of Market Committee at any point of time before

or after **1997**. Nor shop No.5 was in the name of any partnership concern, therefore, it was rightly held by the learned executing Court that the case of the applicant was not falling within the parameters of **Order XXI Rule 89 CPC** which clearly envisage “*any person either owning such property or holding an interest therein by virtue of title acquired before such sale may apply to have the sale set aside*”. Learned executing Court has specifically referred to the record of Market Committee and contentions of parties and examined the same with reference to **Rule 89 of Order XXI CPC** in the following terms:-

*According to learned counsel for Market Committee the applicant/claimant has produced license for running of transportation business, while Market Committee can issue license only for business of fruit and vegetable. Whereas neither DH, nor JD, nor Market Committee has challenged the attachment and auction of shop No.5, Shed No.A-4, New Sabzi Mandi, Super Highway, Karachi. As per record the **learned counsel for Market Committee has admitted as per his additional statement dated 02.04.2016 that the reply of show cause notice dated 06.5.2008 submitted by Abdul Rashid Sheikh of Market Committee before this court and letter bearing No.MCK/Legal/91/2014 Karachi dated 19.12.2014 are available on record of Market Committee and according to reply of show cause notice dated 06.05.2008 the defendant/JD was holding file No.2345 shop No.5 of Shed No.A-4/R, which was allotted to him, but no allotment was issued to him as yet and according to letter No.MCK/Legal/91/ 2014 Karachi dated 19.12.2014 the original file No.2345 for allocated Subject No.5, Plot No.A-4/5, Shed No.5, Block-CAP-4 was transferred from the name of Abdul Majeed son of Abdul Karim (defendant/JD) in the name of Syed Abdullah son of Ulfat Ali (auction purchaser).***

7. The applicant was conscious of the strength of his case, therefore, pending his application before the Executing Court, he through suit No.972/2015 has attempted to preempt final order on his application under **Order XXI Rules 89 and 26 CPC**. The final impugned order has been passed on **23.7.2016** whereby as

anticipated his application which was pending since **29.5.2015** was dismissed.

8. The contention of learned counsel for the applicant that learned executing Court failed to take into consideration the record of civil suit No.972/2015 is misconceived. Whatever documents were filed with the plaint to obtain *ex parte* interim order in civil suit No.972/2015 should have been filed with his similar application before the executing Court and interim orders should have been sought pending his application under **Order XXI Rule 89 CPC**. While dealing with an application under **Order XXI Rule 89 CPC**, the executing Court cannot take into consideration any documents or orders in any other civil suit subsequently filed by the applicant. The Executing Court has to focus on the requirement of **Order XXI Rule 89 CPC**, that whether the claimant/applicant has title/interest in the subject property “**prior**” to the date of auction. The record shows that before the Executing Court the applicant **Abdul Ahad** in his application himself has stated in paragraph-K that shop No.5 was not owned by him but he claimed that he is entitled “*to get transferred the said property in his name*”. Para-K from his application is reproduced below:-

K) *That the applicant has all rights, privilege to get transferred the said property in his name and all acts, deeds done by Market Committee providing false record and manipulating tempering is amount of offence.*

In subsequently filed suit No.972/2015 the applicant is plaintiff No.1 but in the plaint he has not even prayed for “*transfer of the property (shop No.5) in his name*” as claimed by him in para-K of his application reproduced above. And plaintiff No. 2 are the legal heirs of late Laeeq Ahmed who for the last 20, since the death of their

predecessor-in-interest in 1997, have never claimed ownership of shop No.5 nor plaintiff No.2(i) to 2(iii) as legal heirs of deceased have ever approached the Market Committee in the last 20 years and yet at the behest of applicant/plaintiff No.2 through attorney they have prayed for declaration of ownership of shop No.5 in their own right in prayer clause "A" reproduced below:-

- A) *Declare that the plaintiff No.2 is lawful allottee and owner of commercial shop bearing No.5, measuring approx. 1200 sq. feet along with courtyard portion of approx. 500 sq. feet located at Block A-4, New Fruit and Vegetable Market, Super Highway, Karachi, as per possession order No.2345 dated 22.01.1996.*

9. Plaintiff No.2(i) to (iii) were neither before the Executing Court nor after 20 years they can raise any grievance in respect of shop No.5 in a civil suit since through plaintiff No.1 they know that shop No.5 is subject matter of proceedings in Executing Court. If at all they have any interest in shop No.5, like plaintiff No.1, they should have first approached the Executing Court. The applicant before the Executing Court has not stated that he and plaintiff No.2 (legal heirs of deceased Laiq Ahmed) are jointly doing business in shop No.5. In fact in prayer clause (C) in suit No.972/2015 by seeking relief that proceedings before Executing Court be declared illegal, the applicant confirmed that the applicant/plaintiff is already contesting his claim on shop No.5 before a higher forum than a forum of civil suit and, thefreoe, the plaintiffs were not supposed to raise the same controversy through anotehr civil suit in respect of same property. The prayer clause (C) is reproduced herein below:-

- C) ***Declare that the act of demolishing, removing valued articles, damaging the suit shop office and thereby causing serious loss to the business reputation without obtaining writ of possession and without accompanying bailiff from the Hon'ble Court of IV ADJ***



***East in Execution No.05/2006 is illegal thus the defendants are liable to pay damages caused to the plaintiffs to the sum of Rs.50 Million.***

The applicant should have prayed for the above relief before the executing Court instead of another civil court in a separate civil suit. Any other civil court including High Court in its original civil jurisdiction can neither declare any proceeding before an **Executing Court** illegal nor regulate the property involved in the said execution proceedings. If such practice is allowed, there will be a chaos in judiciary. The judgment and decree of one civil Court cannot be nullified by another civil Court. The law of execution of a decree and even provision of appeal against the decree would automatically stand repealed. The Court seized of suit No.792/2015 was conscious of this legal position and sanctity attached to the proceeding of Execution No.5/2006 in the Court of Vth Additional District Judge, East Karachi when on **17.11.2015** following order was passed in the said civil suit:-

*The learned counsel for the parties state that the matter is also in agitation before the Court of learned IVth Additional District Judge, East Karachi in proceedings of Execution No.05 of 2006 and the parties are also contesting the same, as an order was attained therein which is said to be one or the basic element starting the controversy.*

*Let the parties proceed with the said proceedings and report after a month as to the progress of the same.*

***It is clarified that in case any of the party failed to proceed with the said matter, it will be having direct bearing to the interim orders obtained from this Court.***

The applicant with his rejoinder affidavit has filed copy of the above order which is available at page-283 of Court file and he has also filed Nazir Report dated 25.6.2016 available at page-259. I reproduce Nazir report as under:-

**Submitted:**

1. The Hon'ble Court has been pleased to pass order dated 18.6.2015, the relevant portion of which is as under:-

*“...In order to ascertain the possession of the plaintiffs, Nazir of this Court is appointed as Commissioner to inspect the subject shop and to submit his report with regard to its possession and present status...”*

2. Complying with the above order, the undersigned deputed staff officials namely Mr. Mumtaz Ali & Mr. Muhammad Umair, who accompanied with Syed Muhammad Bashir representative of Plaintiff reached at site i.e Shop No.R-5, Plot No.A-4, Near Bilal Masjid New Fruit Market, Super Highway, Karachi at about 12:30 P.M.

3. At site, it was found that the subject shop is in possession of Syed Abdul Ahad, Plaintiff, who was present at the time of inspection. The shop having an open area of around 1600 Sq. Feet and some construction work was going on. Upon enquiry the Plaintiff informed that he is running business of transport **as an owner** and with the name and style “Piyara Pakistan, Goods Transport Company” from the last 15 years. He further informed that he has given some portion of shop on rent to Mr. Noor Shah S/o Syed Muhammad Shamshad and Mr. Muhammad Anwer, who are giving rent at Rs.7,000/- & Rs.4,500/- respectively.

4. Some photographs were also taken at site which are annexed herewith from Annexure “A/1” to “A/6”.

5. Report is submitted for kind perusal and further Orders.

10. It is regretted that on the face of it the Nazir report appears to be dubious and contrary to law. The Nazir has neither issued any notice to any of the defendants before inspection including Market Committee nor he appears to have been physically present at the inspection. The report do not disclose that how and who identified shop No.5 to the inspection team. The photographs annexed with the report, too, have been provided to the Nazir by the applicant/plaintiff No.1 as none of the staff of the inspection team is present in any of

these photographs. It is pertinent to mention here that except the applicant/plaintiff No.1 nobody was present on the spot at the time of inspection. None of the plaintiff No.2(i) to (iii) was present. Even Noor Shah and Mohammad Anwar were also not present about whom applicant/plaintiff No.1 has informed the Nazir that they are his tenants in portion of shop No.5. Interestingly neither in the plaint nor before the executing Court it was stated by the applicant/plaintiff No.1 that there are two tenants of applicant in shop No.5. These tenants have not complaint about any loss on demolition of shop No.5 by Respondent No.3, the auction purchaser. If we read pleading of applicant both in the application before the executing Court and the plaint we can find numerous contradictory claims.

11. In view of the above facts and legal position since shop No.5 was already subject matter of Execution Application No.5 of 2006 the Court of Vth Additional District Judge, East Karachi and the applicant/plaintiff No.1 himself has first approached the executing Court, therefore, on having lost his claim before the Executing Court he has to honour the order of executing court. The proceedings in civil suit No.972/2015 filed subsequently should not, cannot have any bearing on the orders of Executing Court in Execution Application No.05/2006. Therefore, on the order of dismissal of the application under **Order XXI Rule 89** and **26 CPC** by order dated **23.7.2016** in Execution Application No.05/2006 by the IV-Additional Sessions Judge, East Karachi, the applicant has no right to retain possession nor any order of Civil Court in suit No.972/2015 will have effect of setting-aside any of the orders of Executing Court for auction and possession of shop No.5 to auction purchaser. The auction of shop No.5 was lawful and the auction purchaser/respondent No.3 was not only put in possession by the Market Committee, the custodian of

entire New Fruit and Vegetable Market, even otherwise he (auction purchaser) is entitled to possession of shop No.5 being lawful owner under the authority of Court order/decreed.

12. The logical conclusion of above discussion on facts and law is that this Revision Application is dismissed and Nazir of this Court should immediately take possession of shop No.5 shade No.4, Block-A, New Fruit and Vegetable Market, Super Highway, Karachi and hand over its possession to the auction purchaser/Respondent No.3. In case of any resistance, the Nazir should obtain police aid for execution of this order. Copy of this order may be sent to the Incharge Police Chowki New Fruit and Vegetable Market, SHO, Gulshan-e-Maymar and SSP East Karachi. This order should be complied with by Nazir of this court within 48 hours and compliance report should be placed in chamber for perusal.

J U D G E

Karachi,  
Dated:11.06.2018

Ayaz Gul/PA