

**IN THE HIGH COURT OF SINDH,  
AT KARACHI**

**Present:**

Irfan Saadat Khan and  
Yousuf Ali Sayeed, JJ

**High Court Appeal No.342 of 2019**

Appellant : Muhammad Khurram Butt,  
through Abdul Wajid Wyne,  
Advocate.

Respondent No.1 : Nemo.

Respondent No.2 : Allauddin son of Lal Badshah,  
through Haseeb-ur-Rahman,  
Advocate.

Date of hearing : 15.12.2020

**JUDGMENT**

**YOUSUF ALI SAYEED, J** - The Appellant has sought to question the propriety of the Order made by a learned Single Judge of this Court on 31.10.2019 in SMA No. 137 of 2011 (the “**Impugned Order**”), dismissing an Application under Order 21, Rule 89 CPC, bearing CMA No. 137/2011 (the “**Underlying Application**”), seeking that the auction sale of House No. CN-28, Block-B, admeasuring 1000 sq. Yards situated at Ali Town, Gulzar-e-Hijri Gulshan-e-Iqbal, Karachi (the “**Subject Property**”) in favour of the Respondent No.2 be set aside.

2. A perusal of the Impugned Order reflects that after examining the course of proceedings leading up to the auction and filing of the Subject Application, the learned Single Judge went on to hold with reference to the judgment rendered by a learned Division Bench of this

Court in the case reported as Ahmed Ali Noor Muhammad and 8 others 1987 CLC 1575 that Order 21, Rule 89 CPC was inapplicable to auctions conducted in matters of administration, and was accordingly pleased to dismiss the Underlying Application as not maintainable. The operative part of the Impugned Order reads as follows:

“The auction proceedings have already been concluded by this Court accepting the offer of the auction purchaser in terms of order dated 07.08.2019. Now this application has been filed by the petitioner on the ground that being co-owner of the subject property he has direct interest and rights, as such he is ready to pay the 5% more purchase money to the auction purchaser as per the rules provided in Rule 89 of Order XXI C.P.C.

I am of the view that Rule 89 of Order XXI C.P.C. is applicable only in sale pursuant to money decree and it is not applicable in this auction sale held in Administration case, in view of the observation made by a Division Bench of this Court in a case of Ahmed Ali Noor Muhammad and 8 others reported in 1987 CLC 1575 wherein question was referred to Division Bench by a learned Single Judge of this Court in view of dictum laid down by Justice Aftab Hussain in the case of Muhammad Din v. Illahi Noor and 4 others reported in PLD 1975 Lah. 1393, as to:

“Whether the provisions of Order XXI, Rule 89, C.P.C. should be universally applied to all auction sales without distinction and irrespective of the fact whether the sales are in pursuance of money decree or other decrees and whether auction sales held in Partition Suits or Administration Suits etc. are beyond the scope of rule 89 of Order XXI, as held by Aftab Hussain, J.”

The Hon'ble Division Bench held as under:-

“It may be observed that though in the above sub-rule (1) of Rule 89, the words used are “where immovable property has been sold in execution of a decree”, and the words “a money decree” have not been employed therein and, therefore, if we read the above words in isolation from the other portion of the said sub-rule, it can be urged that a partition decree is also covered by the said provision. But if we

read the sub-rule as a whole, it becomes evident that a partition decree does not fit in the above sub-rule for more than one reason. Firstly, in a partition decree all the parties having interest in the property to be partitioned, are in fact decree-holders to the extent of their respective share. It is a decree akin to decree for accounts in which all the parties are plaintiffs and defendants. Secondly, apart from the fact there is no decretal amount, the sale proceeds of the property involved is to be distributed among the co-sharers and, therefore, none can be said to be the judgment debtor. Thirdly, in case of a tie between two co-sharers, as to the right to claim the property under above Rule 83 to the exclusion of other, there seems to be no provision in the above rule to resolve the above dispute, similarly, there is no provision in the said rule to cater for a case in which some of the co-sharers may oppose application under the above rule filed by some of the co-sharers like the instant case in which co-sharers having 50% share have opposed the aforesaid application of their remaining co-sharers having 50% share.

We are, therefore, inclined to hold that the view found favour with Aftab Hussain, J. in the case of Muhammad Din v. Illahi Noor and 4 others is more in consonance with the provision”.

Accordingly, the application is dismissed being not maintainable in law. Let the Nazir submit his further report.”

3. Learned counsel for the Appellants presented a two-pronged argument to contend that while dismissing the Underlying Application on the point of maintainability, the learned Single Judge had failed to appreciate that the preceding orders made for sale of the Subject Property were void, as the Court had become *functus officio* after the grant of the SMA on 14.3.2012, and that the sale had also transpired without notice to the Appellant, in violation of the principles of natural justice.

4. Building on that submission, it was argued that no further substantive order for disposal/sale of the Subject Property could have been made after the grant of the SMA, hence such order(s) and all further steps taken in pursuance thereof were void, and the sale had even otherwise been undertaken without notice to the Appellant, hence was liable to be set aside.
  
5. Considering the matter, it merits consideration at the outset that this line of argument is unsupported by any pleading to that effect in the Underlying Application, which is by its very nature inconsistent with such a plea, for whereas Order 21 Rule 90 CPC allows for the setting aside of an auction sale on grounds of fraud or material irregularity, Order 21 Rule 89 CPC otherwise provides an opportunity to the judgment-debtor a means of avoiding a sale after it has been validly carried out, affording a final chance to the judgment-debtor post auction to have the sale set aside on payment of the decretal amount and an additional sum as compensation for the auction purchaser. Indeed, the Underlying Application itself proceeds only on that premise and reads as follows:

**APPLICATION UNDER ORDER XXI RULE 89 R/W  
SECTION 151 OF CPC**

For the facts and reasons as disclosed in the accompanying affidavit, it is most reverently implored on behalf of above named Petitioner that this Honourable Court may be pleased to set aside the Order of auction of subject property i.e. House No. CN-28, Bock-B, admeasuring 1000 sq. Yards situated at Ali Town, Gulzar-e-Hijri Gulshan-e-Iqbal, Karachi, whereby the auction of sale has already been initiated by this Honourable Court and the above named auction purchaser had purchased the subject property and in response thereof he deposited the amount of Rs.2,40,00,000/= and it is further prayed that the petitioner may please be allowed to purchase the subject property, mainly for the reason that the petitioner being co-owner of

subject property having direct interest and rights, as such, the petitioner is ready to pay the 5% more purchase money to the auction purchaser as per the rules provided in Rule 89 of Order XXI CPC before the Nazir of this Honourable Court, therefore, Nazir of this Honourable Court may please be directed to adjust/settle this share of Petitioner as well as share of deceased brother to the total sale amount. It is, therefore, beseech for ample consideration of this application, in the larger interest of justice, equity and fair play.

Prayed accordingly.

[Emphasis supplied]

6. The supporting Affidavit filed in the matter also simply reiterated the same ground, as such, it is evident that the very tenor of the Underlying Application was wholly inconsistent with the stance now adopted, it being conspicuous that such a case was not set up before the learned Single Judge.
  
7. In fact, as it transpires, after the grant of the SMA on 14.03.2012, the Appellant had filed CMA No. 940/2013, eliciting the appointment of Nazir of this Court for purpose of selling out the Subject Property, which was allowed vide an Order dated 11.11.2013, which read as follows:

**CMA No. 940/2013**

**APPLICATION FOR APPOINTMENT OF NAZIR.**

“For the reasons mentioned in the accompanying affidavit and the facts disclosed in main Petition, it is prayed on behalf of the Petitioners that this Hon’ble Court may graciously be pleased to appoint Nazir of this Hon’ble Court for auction of the property, documents of which is lying/ deposited before this Hon’ble Court as surety so that the shares of all the legal heirs may be distributed amongst them in accordance with law & sharia.

Prayed accordingly.”

**Order dated 11.11.2013**

“Mr. Saadat Ali Khan, Advocate for the Petitioner.

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**CMA No. 940/2013:** Learned Counsel appearing for the Petitioner and learned Counsel appearing for applicant Mst. Tabassum Butt, one of the legal heir and applicant in CMA No.955/2013 and CMA No.956/2013, made a joint request for appointment of Nazir to auction the property according to law and rules. Learned Counsel further submits that the documents of the property are already lying/deposited with the Nazir as surety and after auction, the shares of all the legal heirs be distributed amongst them in accordance with ‘*Fiqa Hanifia*’. The instant application is accordingly disposed of with the direction to Nazir of this Court to proceed ahead in accordance with law and rules as well.”

8. Thereafter, as the sale of the Subject Property did not materialize at the time, the Petitioner filed CMA No.192/2014 seeking partition instead, but that process too apparently failed to bear fruit due to non-cooperation on the part of one of the heirs, namely Mst. Tabassum Butt, who then in turn again sought that the same be disposed of through auction vide CMA No.469/2016, which was allowed on 04.05.2016 in the presence of counsel appearing at the time for the Appellant in his capacity as the Petitioner, and reads as follows:

**“4<sup>th</sup> May, 2016.**

Mr. Imtiaz Ali effendi, advocate for Petitioner.

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Perusal of order dated 11.11.2013, reflects that original documents are lying with the Nazir of this Court. Through CMA No.469/2016, one of the legal heirs seeks disposal of subject matter property as per market value. Accordingly same is allowed. Nazir would be competent to dispose of subject matter property with the consent of all legal heirs. Cost of this exercise would be paid by all the parties as per their share from sale proceeds. Nazir is entitled to receive Rs.20,000/- fee.”

9. Subsequently, the Appellant was himself also present during an attempt at auction, as reflected in the Nazir's Report dated 17.12.2016, Paragraph 4 of which reads as follows:

“4. On the date of auction Mr. Khurram Butt, Petitioner alongwith his counsel Mrs. Sadia Khatoon, Advocate as well as Mst. Tabassum Butt, Objector/one of the legal heir appeared only, but no one turned up to submit bid to purchase the subject property. Parties were also given opportunity to offer their bids, but they were also not interested to purchase the same.”

10. The aforementioned Report was taken on record on 24.01.2017, with it being ordered that the exercise be carried out afresh. However, the Appellant continually absented himself thereafter without any further representation coming to the fore on his behalf, despite his being well aware that the process remained ongoing.

11. Even if the arguments advanced at this stage are considered, it is manifest that the Appellant had himself been instrumental in orienting the SMA towards auction of the Subject Property after grant thereof, and was well aware that the process stood reinitiated and that further steps would be taken for its completion. Yet he did not make any offer to acquire the Subject Property, but came forward with the Underlying Application only subsequent to confirmation of the sale and issuance of the Sale Certificate. Following its dismissal, the Appellant then saw fit to prefer this Appeal, seeking to set up his own deliberate and unexplained hiatus from the proceedings as a pretext to vitiate the sale, albeit it being apparent that he was aware of the process and remained mute until a vested right stood accrued in favour of the Respondent No. 2.

12. Under the circumstances, the conduct of the Appellant is clearly *mala fide* and it is not open to him to either question the sale as being void or to plead lack of notice. As such we are of the opinion that the learned Single Judge ruled correctly in dismissing the Underlying Application. That being so, the Appeal fails and stands dismissed accordingly, along with all pending miscellaneous applications.

**JUDGE**

**JUDGE**

Karachi  
Dated \_\_\_\_\_