

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Muhammad Ali Mazhar** and **Agha Faisal, JJ.**

First Appeal 109 of 2018 : Muhammad Jawed vs.
First Women Bank Limited
& Others

For the Appellant : Mr. Khawaja Shamsul Islam
Advocate
Mr. Rahman Aziz Malik
Advocate

For the Respondent No.1 : Mr. Syed Muhammad Kazim
Advocate

For the Respondents : Mr. Ali Asghar Buriro
Nos. 2, 4 & 5 Advocate

Dates of hearings : 13.03.2019, 5.09.2019
& 29.10.2019

Date of announcement : 05.12.2019.

JUDGMENT

Agha Faisal, J: The appellant, being an auction participant, has impugned two orders rendered by the learned Banking Court I at Karachi in Suit 406 of 2017 (“Suit”) / Execution 26 of 2018 (“Execution”) dated 20.11.2018 (“Impugned Order 1” and “Impugned Order 2” respectively and collectively referred to as the “Impugned Orders”). Vide the aforesaid orders the learned Court was pleased to record that the decretal amount has been deposited therewith, hence, the bid of the auction participant is rejected and the bid amount be returned thereto. In addition thereto the learned Court determined the application of the judgment debtor for release of the original title documents of the mortgaged property. It is considered prudent to reproduce the operative constituents of the Impugned Orders herein below:

Impugned Order 1

"8. Perusal of the record reveals that the suit of the plaintiff was decreed exparte against the defendants No.1, 3 and 4(a) to (d) jointly and severally in the sum of Rs.51,760,377/- alongwith cost of funds as prescribed by the State bank of Pakistan from the date of default till realization of the entire decretal amount. It is also apparent from the record that the judgment debtor No.3, who is also the mortgagor was never served personally during the proceedings. It is also an admitted fact that the sale of the mortgaged property being all that piece and parcel of leased Industrial/Commercial/ residential land building thereon admeasuring 1.00 acres from Survey No.481 and 1.00 are from survey No.482 total 2.0 acres out of 7.20 acres, admeasuring 0.20 Ghuntas from Survey No.483 out of 7.20 acres, total 02 acres and 0.20 Ghuntas, situated at Deh Dih Tapo Ibrahim Hyderi Korangi, Karachi was fixed on 26.07.2018 however, the judgment debtor No.3 through his attorney Syed Haroon Ali so of Manzoor Ali appeared on 24.07.2018 and filed an application under Order 21 Rule 26 CPC, R.W. Rule 66, 69 and 151 CPC alongwith Bankers Cheque No.184623 dated 24.07.2018 for Rs.5.00 million with prayer to stay/suspend the ale proceedings. The case diaries further reveals that on 24.07.2018 the date when above application was filed and on 26.07.2018 the date when the sale of the property in question was fixed, the undersigned Presiding Officer was on ex-Pakistan leave and reportedly learned Link Judge was also on leave, therefore, no any order on the said application could be passed, therefore, the Nazir of this court conducted the auction of the property in question already fixed on 26.07.2018. It is also reported by the Nazir of this Court in his auction report that during the auction proceedings advocate for judgment debtors raised oral objections upon the auction on the plea that the application of the judgment debtor is lying pending. In terms of decree passed by this Court, the judgment debtors are required to deposit the decretal amount of Rs.51,760,377/- + Cost of Funds Rs.14,547,606.50 + Cost of Suit Rs.32,977/-, in all amounting to Rs.66,340,960.50, as disclosed in statement under Order 21 Rule 66 CPC filed by the decree holder Bank and proclamation of sale. It is reported by the Nazir of this Court vide his report dated 20.11.2018 that the judgment debtor No.3 has deposited total amount of Rs.66,340,961/- which is lying in court account. Moreover, the application dated 06.08.2018 for withdrawal of bid amount filed by the bidder is also available on record. It is settled law that in execution proceedings the parties should be treated alike and rights of the decree holder should not be preferred over the interest of judgment debtors. It is the duty of the executing Court to execute the decree but at the same time it is also duty of the executing Court to protect the rights of the judgment debtors, which should not be jeopardized at the altar of the execution of a decree. The record also reveals that the bid has not yet been accepted by this Court. Under the law, mere floating of bid in an auction is only an offer and without the confirmation of sale it does not create any vested right in the property in favour of the successful bidder, therefore, the confirmation of sale cannot be claimed as a right. In view of the fact that judgment debtor No.3 has deposited the decretal amount of Rs.51,760,377/- + cost of funds as of 30.01.2018 for Rs.14,547,606.50 + cost of Suit Rs.32,977/- in all amounting to Rs.66,340,961/-, the bid is hereby rejected with directions to the Nazir of this Court to return the bid amount of Rs..96,000,000/- to the bidder on proper receipt and verification. The case laws relied upon by the learned counsel for the decree holder and bidder are distinguishable from the facts and circumstances of this case for the reason that the judgment debtor approached this Court prior to sale but no any appropriate order could be solicited on the application for adjournment or stoppage of sale for the reasons discussed hereinabove."

Impugned Order 2

"The report from the Nazir of this Court has been called on the application under disposal and it is reported by the Nazir of this Court that the judgment debtor No.3 and 4(a) has deposited an amount of Rs.66,340,961/- which is lying deposited in Court account. Since the judgment debtors have deposited Rs.66,340,961/- which is equivalent to an amount as disclosed in statement under Order 21 rule 66 CPC and proclamation of sale, which includes decretal amount of Rs.51,760,377/- + cost of suit Rs.32,977/- plus cost of funds from the date of default to 31.01.2018 Rs.14,547,606.50, in all amounting to Rs.66,340,960.50, therefore, the decree holder is directed to deposit original title documents of the property in question with the Nazir of this Court with further directions to submit the breakup of amount due and payable by the judgment debtors in terms of decree duly supported with SBP Circulars of cost of funds, so as the actual amount due and payable by the judgment debtors to the decree holder Bank under the decree could finally be determined by this Court."

2. Briefly stated, the pertinent fact herein are that Suit was filed by respondent No.1, and the same was decided in its favour vide the Judgment dated 09.01.2018 (“Judgment”). The decree in pursuance thereof was delivered on 12.01.2018 (“Decree”). Immovable property had been mortgaged with the respondent No.1 bank and by virtue of the Decree the said respondent was entitled, inter alia, for its sale in order to realize the decretal amount. In pursuance of the execution proceedings, a public auction notice was issued on 31.05.2018 and publication thereof was also effected in the national daily newspapers. The present appellant was an auction participant and claimed to have submitted the highest bid for the acquisition of the immovable property being auctioned, however, by virtue of the Impugned Orders the appellant claimed to be deprived of his vested right to acquire the property under auction, hence, this appeal.

3. Mr. Rahman Aziz Malik, Advocate argued the case on behalf of the appellant on 13.03.2019. The order sheet of the said date records that the learned counsel after arguing the matter requested for some time to produce case law to substantiate his basic argument that prior to confirmation of sale a vested right could be created in favour of auction participants.

Khawaja Shamsul Islam, Advocate appeared before this Court on 05.09.2019 and sought to address the case afresh. Learned counsel submitted that the appellant had preferred the highest bid for the property subject to auction proceedings, hence, the same is to be construed as creating vested rights in favour of the appellant. It was further stated that the learned Banking Court had erroneously extended the time for the judgment debtors to satisfy the decree and in the process had unlawfully displaced the vested right of the appellant. Learned counsel placed reliance upon case law in an attempt to bulwark his submissions and also cited authority stipulating that the relief sought by the appellant could conceivably also be granted in exercise of the supervisory jurisdiction of this Court under Article 203 of the Constitution.

4. Mr. Ali Asghar Buriro, Advocate appeared on behalf of the respondent nos. 2, 4 and 5 and supported the Impugned Orders in their entirety. Learned counsel submitted that the Judgment and Decree had attained finality as no appeal has been filed there against. It was further submitted that the record clearly demonstrates the decretal amount has already been paid, hence, there was no question of any further proceedings to realize the underlined security in the Suit. Learned counsel drew attention to the admitted fact that there has been no order of the learned Banking Court with respect to confirmation of sale, thus argued that the present appellant is devoid of any right actionable in the present proceedings. Per learned counsel the appellant had failed to point out any illegality with respect to the Impugned Orders and his entire case was confined to the premise that he had a vested right in respect of the property under auction, hence, the said right could not be infringed. Learned counsel placed reliance on authority to drive home his argument that prior to confirmation of sale no vested right accrues in favour of any auction participant. It was thus argued that the present appeal is devoid of merit, hence, ought to be dismissed forthwith.

5. Syed Muhammad Kazim, Advocate appeared on behalf of the respondent No.1 and submitted that the Impugned Orders were without justification as the learned Banking Court had no jurisdiction whatsoever to extend the time. Learned counsel argued that the decretal amount had to be submitted by the judgment debtors before the learned Banking Court within one month and admittedly the same was not the case. It was the contention of the learned counsel that if such a delay was condoned then it would open the floodgates and cloud auction proceedings conducted under the auspices of the courts. In conclusion, the learned counsel sought the sale of the mortgaged property in order to realize the decretal amount as against appropriating the amounts already deposited before the learned court in satisfaction of the Decree.

6. We have heard the respective learned counsel and have also considered the law, precedent and record to which our surveillance was solicited. The primary question for us to determine, as recorded

vide the Order dated 13.03.2019 referred to supra, is whether prior to confirmation of sale a vested right could be created in favour of auction participants. In pursuance of Order XLI rule 31 the points for determination framed for deliberation are as follows:

- a. *Whether a right with respect to property, under auction, accrued in favour of the appellant despite no confirmation of sale having taken place.*
- b. *Whether in the present facts and circumstances the Court could compel the continuation of execution proceedings once the judgment debtor had deposited the amount decreed.*

7. We do hereby address the primary issue by placing it into the context of the present facts and circumstances. It is an admitted fact that no confirmation of sale had been made with respect to the bid/s received. On the contrary it is imperative to record at this juncture that the present appellant had preferred an application, dated 06.08.2018 (being three months prior to the rendering of the Impugned Orders), for withdrawal of the earnest money¹ and that the said application remained pending before the learned Banking Court until the amounts deposited by the appellant were ordered to be returned, vide the Impugned Orders.

It is settled law that rights of an auction participant are created upon confirmation of sale by the court and a pioneering pronouncement in such regard is the *Privy Council* decision in *Nanhela*². Earlier judgments of this Division Bench have also consistently applied this law³.

8. The honorable Supreme Court has held in the case of *Afzal*⁴ that a bid in an auction is only an offer and it confers no benefit unless it culminates in the issuance of a confirmation of sale. It was further observed that confirmation of sale cannot merely be claimed as of right. The honorable Supreme Court has maintained that mere

¹ Paragraphs 3 & 8 of the Impugned Order 1.

² *Nanhela & Another vs. Umrao Singh* reported as AIR 1931 Privy Council 33.

³ *Nazli Hilal Rizvi vs. Bank Alfalah Limited & Others* reported as 2019 CLD 808 (upheld by the honorable Supreme Court in *Nazli Hilal Rizvi vs. Bank Alfalah Limited & Others* reported as 2019 SCMR 1679);

⁴ *Afzal Maqsood Butt v. Banking Court No.2, Lahore & Others* reported as PLD 2005 Supreme Court 470.

submission of a bid does not vest the bidder with any proprietary rights in a property. A passage from *Muhammad Attique*⁵ is reproduced herein below to illustrate the aforesaid:

“31. The matter can be looked into from another angle. It is well settled that a bid made at an auction is in the nature of an offer which does not mature into a contract till its acceptance. The auctioneer acts as an agent of the seller to accept the bid, a concluded contract comes into being the moment the bid is accepted either by a word of mouth or in any other customary method like fall of hammer at public auction. If, however, the auctioneer is not vested with the power to accept the bid and said power is with another authority (i.e. the Court in a matter), the contract/sale comes into being when the bid is accepted by that authority...

32. In the case of *Murugappa Naicker v. Thayammal* (AIR 1923 Madras 82), a house was put for sale by the Government and the auction was held by the Tehsildar and the highest bid was forwarded to the Collector for confirmation on 15-7-1915. The Government declined to confirm the sale whereas bidder claimed that sale was completed. It was held that there was no complete contract and that the transaction before the Tehsildar amounted to merely an offer as contract was not concluded on 15-7-1915, when the auction took place.

33. In the case of *Union of India and others v. M/s. Bhimsen Walaiti Ram* (AIR 1971 SC 2295), where one of the conditions of auction was that the final bid would be made subject to the confirmation of the Chief Commissioner, it was held that the contract of sale was not completed till the bid was so confirmed and till such confirmation, the person whose bid had been provisionally accepted was entitled to withdraw his bid and when the bid was so withdrawn before the confirmation of the Chief Commissioner the bidder would not be liable for damages on account of any breach of contract or for shortfall on the resale.

34. Word `sale' has been defined in Black's Law Dictionary (Seventh Edition), as under:-

(1) The transfer of property or title for a price.

(2) The agreement by which such a transfer takes place. The four elements are (1) parties competent to contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised.

35. Term `sale' has also been defined in section 45 of the Transfer of Property Act, 1882 as "the transfer of ownership of immovable property for a price paid or promised". In an auction proceedings title in the property not transferred in favour of the highest bidder, at the time when auction was held and offer was forwarded to the Court for acceptance, the Court sale for immovable property under Order XXI, Rule 84 is subject to proceedings under Orders XXI, Rules 89, 90 and 91, as result of which sale may either be set aside or confirmed. Once the sale is confirmed, section 65 C.P.C. provides that ownership right in the immovable property will be deemed to have vested in the succeeding bidder retrospectively from the date when action was held. For the foregoing reasons, the listed appeal has no merit and is accordingly dismissed. However, no order as to costs."

9. This Division Bench has delved into this deliberation in the case of *Muhammad Farooq*⁶ and maintained that mere submission of a bid, even if it was the highest bid, in itself confers no inalienable

⁵ *Muhammad Attique v. Jami Limited & Others* reported as PLD 2010 Supreme Court 993.

⁶ Judgment dated 23.04.2019 in *Muhammad Farooq vs. Silk Bank Limited & Others* (First Appeal 50 of 2018).

rights upon an auction participant. Reliance was placed upon the recent pronouncement of the honorable Supreme Court in case of *Muhammad Khalil*⁷, wherein it was observed that no rights could be construed to have accrued in favour of an auction participant by virtue being the highest bidder and or even having deposited the entire sale price in court. The honorable Supreme Court maintained that it needs no reiteration that an auction is always subject to confirmation by the court and till such time such confirmation is granted no vested right can be claimed in the property subject to auction in favour of an auction participant. *Ijaz ul Ahsan J.* concluded in the aforesaid judgment that until the executing court does not confirm the auction no vested rights accrue in favour of an auction purchaser.

10. Therefore, it is held that in view of no confirmation of sale ever having been issued, and consequently no sale certificate ever having been issued, no rights were created in favour of the appellant with respect to the property subject matter of auction proceedings.

11. The second issue before us is whether the Court could compel the continuation of execution proceedings once the judgment debtor had satisfied the decree.

The very concept of execution proceedings is to give effect to a decree and the proceedings subsist until the said decree is satisfied. An array of methods is employed to execute a decree including without limitation the auction of property securing the debt. The realization of such security is warranted only in the event that the judgment debtor is unable or unwilling to satisfy the decree by other means. In the event that a decree is satisfied, by or on behalf of the judgment debtor, there would be no justification to perpetuate the execution proceedings and / or realize any property, which was available as security for the discharged debt.

12. The Impugned Orders record that the decretal amount has been deposited by the judgment debtor/s with the Court, hence,

⁷ *Muhammad Khalil vs. Faisal M.B. Corporation & Others* reported as 2019 SCMR 321.

there is no justification to continue with the execution proceedings to realize the underlying security. However, the arguments of the learned counsel for the respondent no. 1, supporting the appellant, need to be considered.

13. Learned counsel for the respondent no. 1 predicated his objection on the issue delay occasioned in deposit of the decretal amount. It is however observed that this objection appears to have materialized post rendering of the Impugned Orders, recording the receipt of the decretal amount, and admittedly not during the period of the purported delay. It is also manifest from the record that the present appellant had preferred an application for the withdrawal of the earnest money⁸ and in such circumstances the efforts of the learned Banking Court to recover the decretal amount stood to the benefit of the respondent no. 1. The learned counsel was specifically queried as to the whether the respondent no. 1 bank had assailed in the purported period of delay before any forum or even filed any appeal with respect to the Impugned Orders. The queries were answered unequivocally in the negative.

14. The entire argument of the learned counsel for the respondent no. 1 bank is that the Decree may be realized from the sale of the property, subject matter of the now vitiated auction proceedings, and not from the amount already deposited by the judgment debtors before the learned Banking Court. Respectfully, we are unable to accord any legal sanction to such an argument as it is *prima facie* contrary to the basic principle that realization of underlying security is warranted only in the event that the judgment debtor has been unable to satisfy the decree.

15. The authority relied upon by the appellant / respondent no. 1 did not augment their submissions and was entirely distinguishable in the present facts and circumstances in view the preponderance of well settled law, with regard to rights of auction participants, enumerated supra. However, prior to parting with this judgment we

⁸ Paragraphs 3 & 8 of the Impugned Order 1.

would like to address the import of *Yawer Kadir*⁹, as it was relied upon by the learned counsel for the appellant.

Yawer Kadir is a judgment of this Court wherein the Division Bench observed that in the appropriate facts and circumstances the High Court was empowered to correct the misuse of judicial power in exercise of its supervisory jurisdiction pursuant to Article 203 of the Constitution. The case pertained to a situation where the highest bid, in auction proceedings, was supplanted by the bid of another in a manner found to be otherwise than in accordance with the law. It was demonstrated before the learned Division Bench, in the said case, that the actions culminating in the displacement of the highest bidder, by another, were predicated upon peddling of political influence.

The ratio of *Yawer Kadir* is that the High Court retains supervisory jurisdiction when it is of the opinion that the exercise of judicial power was not bona fide. While we have no cavil with the aforesaid ratio, however, the same is entirely distinguishable in the present facts and circumstances as no case for mala fide, of the learned Banking Court, has been made before us.

16. This Division bench has earlier exercised its appellate jurisdiction and set aside the vitiation of auction proceedings in *Muhammad Asif*¹⁰. This judgment has not been relied upon by the appellant, however, we feel that it is appropriate to discuss its import here as well. In the said case annulment of auction proceedings by a banking court was set aside, however, in the said case the decree had not been satisfied by the judgment debtors and a re-auction had been ordered upon a *prima facie* discrepant application by the judgment debtors. Therefore, even *Muhammad Asif* is distinguishable in the present facts and circumstances.

17. It may also be opportune at this juncture to refer to the illuminating observations of the honorable Supreme Court in

⁹ *Yawer Kadir vs. Banking Court V at Karachi & Others* reported as 2013 CLD 488.

¹⁰ *Muhammad Asif vs. MCB Bank Limited & Others* reported as 2019 CLD 733.

*Mumtaz*¹¹ wherein it was held that infractions with regard to the procedural aspects of a sale in execution proceedings could be deemed to be irregularities, however, the same cannot be regarded as illegalities, thereby rendering the sale as a nullity.

18. In the present facts and circumstances it remains an admitted position, as recorded by the Impugned Order 1¹², that the appellant had itself sought the return of its earnest money and had preferred in application in such regard. It is also an admitted fact that the said application remained pending until the Impugned Orders, whereby the amount deposited by the appellant was ordered to be returned thereto. No confirmation of sale was ever undertaken and no sale certificate was ever issued¹³, in respect of the property under auction, hence, the status of the appellant remained that of an auction participant. Upon deposit of the decretal amount the learned Banking Court annulled the proceedings for realization of the underlying security and no exception in respect thereof has been demonstrated by the appellant. It is patently borne from the present facts and circumstances there was no justification to compel the continuation of execution proceedings once the judgment debtor was no longer in default. It is in this context that we do hereby express our concurrence with the finding of the learned Banking Court that mere floating of a bid in an auction is only an offer and without confirmation it does not create any vested right in favour of an auction participant.

19. In view of the reasoning and rationale herein contained, the present appeal, along with pending application/s, is hereby dismissed with no order as to costs.

J U D G E

J U D G E

Farooq PS/*

¹¹ *Mumtaz-ud-Din Feroz vs. Sheikh Iftikhar Adil & Others* reported as 2009 CLD 594.

¹² Paragraphs 3 & 8 of the Impugned Order 1.

¹³ *Habib and Company & Others vs. Muslim Commercial Bank Limited & Others* reported as 2019 SCMR 1453.