

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

Suit No.1489 of 2007

Adnan Aziz Ahmed
Versus
Rakil Ahmed Zaman & others

Date	Order with signature of Judge
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For hearing of CMA 1441/2022

Date of hearing: 03.02.2022, 08.03.2022 & 02.04.2022

Ms. Nahl Chamdia for plaintiff.

Mr. Mansoor Ali Ghanghro for defendant No.1

Mr. Abdul Qayyum Abbasi for defendants No.2 to 4.

Mr. M. Nauman Jamali for defendant No.5.

Mr. Abdul Razzak for defendant No.6.

Malik Naeem Iqbal along with Mr. Faizan H. Memon for buyer.

M/s. Abdul Sattar Pirzada and Mamoon N. Chaudhry for proposed bidder.

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Muhammad Shafi Siddiqui, J. - This is a suit for administration of the properties left by deceased father and mother. Father passed away on 23.10.1982 in Washington DC, United States of America whereas mother on 07.01.2005 in London, United Kingdom. Plaintiff and defendants No.1 to 6 are the legal heirs of Aziz Ahmed, deceased father, and Begum Shireen Aziz Ahmed, deceased mother (collectively called 'deceased'). Plaintiff is son of the deceased whereas defendants No.1 to 4 are legal heirs of late Meekal Aziz who was also son of the deceased whereas defendants No.5 and 6 are daughters of deceased.

2. Present application is for cancellation of earlier sale, which is outcome of a private sale, and consideration of a bid having a difference of at least Rs.50 Million, if not more, with the one attempted on the day it was confirmed.

3. I have heard learned counsel appearing for the plaintiff and defendants as well as that of the buyer/purchaser and perused material available on record.

4. Subject matter is a property bearing House No.55, Block-5, Clifton, Karachi, (hereinafter referred to as "55 Clifton"), cause in relation with kicked off when an order dated 02.02.2021 was passed by this Court. The second paragraph of this order deals with the 55 Clifton, which is reproduced as under:-

"2 & 5. Referring to the Nazir's report dated 17.08.2011 submitted pursuant to the preliminary decree dated 29.03.2010, all learned counsel state that since the parties are not at issue over House No.55, Block 5, Clifton, Karachi, the same can be put to sale to distribute, or if need be to adjust its proceeds amongst the legal heirs. The record (Annexure E to the plaint) shows that House No.55 was the property of the deceased mother, Begum Shereen Aziz Ahmed, and in the year 2006 such property was mutated to the names of the legal heirs. Since, the parties do not desire partition of said house, its sale is the only option left. Learned counsel for the parties take no issue to the forced sale value of Rs.291,400,000/- determined by the evaluator with regards to said property. The Nazir's report to that end is taken on the record. Therefore, with the consent of the parties the following order is passed. The parties shall deposit the original title documents of House No.55, Block 5, Clifton, Karachi, with the Nazir of this Court. The forced value of Rs.291,400,000/- shall be treated as the reserve price of the property. The parties may bring a buyer within 45 days, failing with the Nazir will draw up a sale proclamation with consent of counsel and give them an estimate of the expense of the sale and the Nazir's fee, of which 50% will be deposited by the plaintiff and 50% by the side of the defendants. Thereafter, the Nazir shall invite bids by public sale. The parties shall be free to participate in the bidding. CMA No.6900/2015 stands disposed above in said terms."

5. It was ordered that in pursuance of preliminary decree dated 29.03.2010, since parties were not at issue in respect of 55 Clifton, the same may be put to sale to distribute or if need be to adjust its proceeds amongst the legal heirs. The order further suggests that by consent of the parties title documents of 55 Clifton be deposited with the Nazir of this Court. A forced sale value of Rs.291,400,000/- was determined by the evaluator of 55 Clifton. Parties were set at liberty to bring buyer

within 45 days failing which the Nazir was permitted to draw a sale proclamation as required under order XXI Rule 66 CPC.

6. A crucial Reference of 31.03.2021 was then filed by the Nazir stating that defendants' counsel appeared along with a buyer Farhan through his advocate Mr. Naeem Iqbal and offered to purchase the subject property i.e. 55 Clifton in the sum of Rs.30 Crores and has also submitted CDR (Call Deposit Receipt) No.00072427 of 19.03.2021 (CDR is the amount of money kept by the customer on call i.e. the customer may come to the bank any time asking for withdrawal of money), and not pay order for 3 Crores as part of sale consideration whereas parties did not deposit the title documents in requirement of the order dated 02.02.2021 (as stated in reference). The same is reproduced as under:-

**“NAZIR REPORT IN COMPLIANCE OF
ORDER DATED 02.02.2021”**

1. *With profound respect, I have the honour to submit that complying with the above order, notices were issued to the parties with direction to appear before undersigned to deposit the title documents and to bring a buyer in respect of subject property i.e. House No.55, Block-5, Clifton, Karachi, within 45 days.*
2. *It is respectfully submitted that matter was fixed on 19.03.2021 before undersigned and on such date, Mr. Noman Jamali, Advocate for Defendant No.1 appeared and brought a buyer namely Farhan through Mr. Naeem Iqbal, Advocate appeared and gave offer to purchase the subject property in sum of Rs.30,00,00,000/- and he submitted CDR No.00072427 dated 19.03.2021 of Dubai Islamic Bank, of sum of Rs.30,00,00,000/- being offered sale consideration of subject property, for the purpose of purchasing of subject property while parties have not deposited title documents so far in terms of foregoing order. Under such circumstances, matter is referred to the Hon'ble Court for further orders for confirmation or otherwise.*
3. *The report is submitted for favour of kind perusal and orders.*

Dated: 31.03.2021

Sd/- 31/03/2021

N A Z I R”

7. This (above) Reference of 31.03.2021 came for consideration on 07.04.2021 when everyone denied to have the title documents. Co-owners were thus directed to take steps for procuring certified copy of

original title documents for submitting them to Nazir in terms of order dated 02.02.2021. On 25.08.2021 again Nazir as Administrator was directed to apply to obtain certified copy of original title documents and the cost was to be borne by plaintiff which eventually ordered to be treated as cost of suit. On 07.10.2021 Nazir was directed to submit final report as and when certified copy would be obtained.

8. On 15.11.2021 however a crucial order was passed relying on order dated 02.02.2021. The same is as under:-

“....

Thereafter Nazir has submitted report contending therein that all required documents are received from the concerned office i.e. Deputy Settlement Commissioner, Revenue Department, and are lying in safe custody. Accordingly, bid as received is hereby confirmed in terms of Nazir's Reference dated 31.03.2021. Hence Nazir shall proceed further and sale consideration shall be deposited within one month.”

9. The above order was passed on Nazir's report dated 09.11.2021 (signed by Nazir on 06.11.2021) and not on sale reference. This report is not for confirmation of offer of Rs.300 Million, which report is reproduced as under:-

**“NAZIR REPORT IN COMPLIANCE OF
ORDER DATED 25.08.2021”**

1. *With profound respect, I have the honour to submit that complying with the above order, notices were issued to the concerned department with direction to provide CTC in respect of House No.CF-1-5/55, Clifton Quarters, Karachi.*
2. *It is respectfully submitted that matter was fixed on various dates and lastly on 03.11.2021 before undersigned, Mr. Noman Jamali, Advocate for Auction Purchaser appeared while later on, the official of Deputy Settlement Commissioner, Revenue Department, appeared in this office and submitted Letter dated 3.11.2021 of Ex-Pcs/Deputy Secretary (RS & EP) along with CTC of the P.T.D. (Permanent Transfer Deed) dated 31.07.1962, in the of foregoing property, which is lying in safe custody of this office and copy whereof is annexed as “A”.*
3. *The report is submitted for favour of kind perusal and orders.*

4. Dated: 06.11.2021

Sd/- 6/11/2021

N A Z I R

10. Important point in it which raised the eyebrows is that firstly there was no Reference of 31.03.2021 fixed on that day i.e. 15.11.2021 for consideration of bid/offer and secondly, subject report of 9.11.2021 is only to the extent that documents have been obtained in compliance of order dated 25.08.2021. Thirdly in this private sale Nazir was directed to proceed further who had no role under the law as it concerns private sale. The only Reference that was fixed on 15.11.2021 was to the extent that the certified copies of the title documents have been received and lying in safe custody (Nazir's custody) and there seems to be no deliberation and/or debate over 7½ months old offer of a bidder, which was suddenly confirmed on presentation of only CDR on 45th day of order.

11. Aggrieved of order dated 15.11.2021, plaintiff filed an appeal bearing High Court Appeal No.325 of 2021 and on 20.12.2021 the order of 15.11.2021 was suspended. On 12.01.2022 the appeal was eventually dismissed. However, on considering review application on 20.01.2022, in last paragraph learned Division Bench of this Court observed as under:-

“However, it may be observed that appellant be at liberty to approach the learned Single Judge with offer of higher price of the subject property through a proposed buyer whose affidavit to this effect has also been filed along with listed applications, according to which, the proposed buyer has offered an amount of Rs.35 Crores in respect of the subject property, which may be considered by the learned Single Judge in accordance with law, however, subject to all just exceptions and the objections by the respondents, provided there is no legal impediment in this regard, who may pass appropriate order after hearing the parties strictly in accordance with law.”

12. Thus, appellant's/plaintiff's right to submit a better offer was protected, which was likely to be considered in the pending suit by this Court.

13. On 20.12.2021 learned Single Judge was informed of such proceedings in High Court Appeal No.325 of 2021 whereas on 21.01.2022

counsel for plaintiff appearing at the relevant time in this suit, informed that they have been permitted to place higher offer for consideration of this Court. Learned Single Judge was of the view that although at that point of time there was no such offer, the Nazir report of 18.12.2021 was taken on record subject to all just legal exceptions and Nazir was directed to proceed as already ordered on 15.11.2021 with the clarification that if plaintiff moves an application before the Court in line with the order of learned Division Bench the same will be considered accordingly.

14. In view of facts of the case, where private sale was in consideration, I am of the view that defendants misled the Court as Nazir had no role except that he placed the offer of the proposed bidder. As it was a private sale there was no occasion in obtaining an order of 21.01.2022 as in private sale it is the sale deed, which is likely to be executed by parties and not the sale certificate, as it was not an outcome of auction conducted by Court or Court sale. A week later of this confirmation i.e. on 28.01.2022 an application was moved with the enhanced offer/additional bid with respect to 55 Clifton with request to consider it and sale certificate be cancelled, which is a subject matter here. This application is being resisted on the count that it was a consent order of 02.02.2021 when title documents were not available and were materialized on 15.11.2021 on obtaining certified copy of subject property. Thus offer, if any, was materialized after almost 7½ months and that too on the day when no such Reference of confirming sale was fixed and no consent of plaintiff was obtained as far as offer of Rs.300 Million is concerned.

15. There are two defences of the defendants who brought the bidder, firstly that there was consent of the plaintiff regarding private sale and the second that sale certificates were issued.

16. I will deal with these issues accordingly. The substantive portion of the order dated 02.02.2021 is already reproduced above. The consent was primarily for depositing title documents of 55 Clifton with Nazir of this Court with understanding that forced sale value would be 291,400,000/-, whereas parties to bring buyer within 45 days, failing which Nazir to draw sale proclamation. For the subject sale at Rs.300 Million no specific consent was obtained. There was an understanding for a private sale but plaintiff never consented to sale to present bidder for 300 Million nor any such consent was obtained on the crucial day when it was approved. Record reveals that the offer was made on 45th day through CDR and not within 45 days and Nazir should have prepared sale proclamation for court's consideration. Secondly on 15.11.2021 i.e. the effective date, no such reference of confirming the bid/sale was fixed and sale could not have been confirmed. Nazir in this private sale could not be given direction to issue sale certificate nor he could self-assumed to issue sale certificate being private sale and to be finalized via sale deed to be executed by parties. "Proceed further" in the order means Nazir to ask parties to execute sale deed. Thus sale certificates carry no mandate or legal status. The mandate of issuance of sale certificate by Nazir was neither confirmed nor matured on 15.11.2021 when order "to proceed further" was passed. The claim of sale certificate was requested by Nazir on 18.12.2021 when court ordered on 21.01.2022 to proceed as already ordered on 15.11.2021. Even this order did not contain directions to issue sale certificate. On 21.01.2022 the court specially observed that if plaintiff moves any application in line with order of Division Bench, same shall be considered. Now in the absence of lawful sale certificates there was/ is no impediment in considering the application of plaintiff who placed better offer of 350 million i.e. 50 million more than what was offered earlier, in few days' time. In fact Mr. Sattar Pirzada was adamant to enhance his offer substantively which

might reach 400 million according to tentative assessment of Mr. Pirzada, which could benefit the legal heirs alone. I do not find any reason as to why “legal heirs” are objecting this offer of Mr. Pirzada. It make sense when bidder objected to the application under consideration, but when legal heirs specially the one who brought the previous buyer, whose offer was confirmed, objected such offer which could fetch 100 million more than what was offered by bidder, it raises the eyebrows.

17. On 20.01.2022 when the Division Bench of this Court disposed of Review Application with certain observations and specific directions to consider the higher offer, the record shows that surreptitiously and in most suspicious way sale certificate was issued on 24.01.2022 by the Nazir of this Court. These four days includes the day of 21.01.2022 when learned Single Judge passed order and Saturday and Sunday. This surreptitious action is apparent despite and notwithstanding the fact that the sale certificate itself is seriously disputed by the plaintiff as it could not have been issued under any circumstances. In the absence of any specific order of issuance of sale certificate, this undue haste raises doubt on the intention of the defendants. Perhaps the defendants were avoiding a situation where plaintiff side could seek an order and place a better offer in compliance of the orders of the Division Bench and hence were resisting the possibility of another potential purchaser/buyer with much higher offer.

18. The next day of the disposal of the review application by the Division Bench i.e. on 21.01.2022 case was put up and the potential buyer appeared but he has not provided the pay order of the offer that he made on that day nor grace was shown by defendants to provide him time to enable him to supplement offer through pay order. The order however records appearance of potential purchaser represented by M/s Abdul Sattar Pirzada and Mamoon Chaudhry. The potential purchaser

however deposited the pay order on 28.01.2022 for Rs.35 Million and consequently the plaintiff moved instant application for cancellation of sale certificate.

19. As far as strength and defence of sale certificate, as relied upon by the defendants, who are the other set of legal heirs are concerned, the subject property never vested with the Nazir of this Court, which could enable him to sell the same and issue sale certificate. Nazir was never given any authority to sell the property on behalf of legal heirs. It was a private sale and some of the legal heirs arranged a buyer and presented him before the Court. Thus, the act of issuing sale certificate by the Nazir was without jurisdiction and/or mandate. The Nazir report dated 26.01.2022 reflecting act of issuance of sale certificate was not taken on record by this Court against which report the objections were filed on 24.03.2022.

20. In a private sale in Court, the intricacies of Order XXI do not apply, however since defendants are relying on sale certificates as defence, I may discuss it accordingly.

21. Order XXI Rule 94 CPC provides a mechanism for issuance of sale certificate to the purchaser. It articulates that where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of person who at the time of sale is declared to be the purchaser. Order XXI Rule 92 sparks when there is no application made under Rule 89, 90 and 94 of Order XXI or where such application is made and disallowed and the Court shall make an order confirming the sale and thereupon sale shall become absolute. It is this absolute sale which may end up in issuance of a sale certificate to be issued under Rule 94 of Order XXI. This situation never reached. In fact there was no such situation for applying provisions of Order XXI which include all enabling Rules such as 84, 85, 90, 91, 92

and 94 etc. When there was no absolute sale confirmed by the Court, there was no occasion of issuing a sale certificate under Rule 94 of Order XXI CPC.

22. The facts of instant case distinguishes the sale as being one undertaken by the Court through officials of the Court and through private negotiations by the legal heirs. Thus, we have two kinds of sale in Court i.e. (i) sale by Court and (ii) sale under the orders of the Court. In sale by Court, the Court makes a title to the purchaser and issue sale certificate whereas in sale under the orders of the Court, the Court authorizes an official but does not authorize him to sale which is left with parties. In the later no sale certificate is issued. The instant case has a sale under the orders of the Court and not by the Court.

23. In the instant case neither has the Court ordered to convey title nor has it authorized Nazir to make the sale. The order of 15.11.2021 simply confirms the sale undertaken by legal heirs, thereby authorizing the legal heirs to proceed with the sale as it is a requirement of law and the Nazir could not have been instructed any further. Perhaps he could only arrange things/supervise the proceeding to enable the legal heirs to provide title and submit reports to Court to pass appropriate orders in case of denial. Nazir was only obligated to have the parties execute the sale deed in favour of buyer which again is prerogative of the parties and the legal heirs cannot be forced as it was a private negotiation and private sale and the Court never involved itself in the subject proceedings (as the Court had no knowledge of such negotiation), as neither sale proclamation was issued nor the bids were invited nor any negotiations through Nazir or any other Court official took place.

24. In the case of Subbulakshmi Ammal¹ Single Judge of Madras High Court held that in the administration suit sale by the Administrator can

¹ Subbulakshmi Ammal v. R. Balasubramanian (MANU/TN/1378/1996)

only be executed through a sale deed under section 54 of the Transfer of Property Act.

25. In the case of MCB², Single Judge of Lahore High Court held as under:-

“An overview of the statutory provisions reproduced above and the afore-quoted judgments make it clear and obvious that in case of a sale mortgaged property by a financial institution without intervention of the Court, the mode of transfer of title would be through the execution of a deed of conveyance by the financial institution and not by the Court through a sale certificate. Consequently, this petition is misconceived and is hereby dismissed.”

26. In the case of Chase Manhattan Bank³ the Court held that sale by Official Liquidator cannot be equated with the sale by a Civil Court in terms of Order XXI Rule 92 and so a conveyance deed has to be issued and not a sale certificate.

27. In view of above facts and circumstances, I am of the view that the Nazir of this Court acted in haste while issuing sale certificate and notwithstanding deposit of entire consideration, the offer of the potential buyer who has already deposited 10% of his offer being Rs.35 Million should now be considered and a fresh contest be set. Hence I allow the application and direct the parties to appear for a fresh contest of the sale of subject property. All parties may bring their respective buyers in the contest. The amount of Rs.300 Million, as deposited by the bidder be returned if so desired or remain with Nazir till the above contest is over.

Dated:

J U D G E

² MCB v. Chaudhry Apparels Ltd. (2007 CLD 214 [Lahore])

³ Chase Manhattan Bank, N.A. v. Firdous Spinning & Weaving Mills Ltd. (2002 CLD 145 [Karachi])