

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI
 Suit No.1489 of 2007
 Adnan Aziz Ahmed vs. Rakil Ahmed Zaman & others

Date	Order with signature of Judge
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For orders on Nazir's Report dated 26.01.2022

Syed Ghulam Shabbir Shah, Advocate for the Plaintiff.
 Mr. M. Jaffer Raza, Advocate for Defendants 2-4
 Mr. Muhammad Nauman Jamali, Advocate for Defendant No.5
 Mr. Naeem Iqbal Malik, Advocate for Auction Purchaser/Buyer.

Date of Hg: 23.05.2023 & 30.05.2023.

ARSHAD HUSSAIN KHAN, J.- The listed Nazir's report mainly speaks as follows:-

- “2. It is respectfully submitted in compliance of foregoing orders that after deposition of entire sale consideration amount of Rs.30,00,00,000/- by Mr. Farhan Ali, Buyer in this office, in respect of subject property i.e. House No.55, Block-5, Clifton, Karachi, Sale Certificate has been issued in his favour on 24.01.2022 by the under signed.
3. It is further respectfully submitted that learned counsel for buyer has filed an application for de-sealing and handing over the possession to the buyer. In this regard, it is respectfully submitted that the undersigned took over the possession and sealed the property in question, in compliance of order dated 23.12.2016. Under such circumstances, matter is referred to the Hon'ble Court for further orders regarding de-sealing and handing over the possession to the buyer.”

[emphasis supplied]

2. Learned counsel for the Auction Purchaser/Buyer while referring to the order of previous date has contended that in this matter sale in respect of property viz. House No.55, Block-5, Clifton, Karachi (**Clifton property**) was confirmed and sale certificate was issued in favour of the Buyer after completion of all the codal formalities and payment of entire sale consideration and only the possession of the property is required to be handed over to the Buyer, which fact is also reflected from the listed Nazir's report. He has further contended that Nazir of this Court was appointed as an Administrator by the orders of the Court to conduct the private sale, which exercise was undertaken after notice to all the parties and all the parties participated in such process, however, no one could offer higher bid, therefore, after having received the highest bid, same was

confirmed by this Court and in pursuance thereof sale certificate was issued by the Nazir. He has contended that there is no illegality either in the process of sale of the subject property or issuance of sale certificate by the Nazir as it was made pursuant to a consent order dated 02.02.2021, passed by this Court and the plaintiff and/or any defendant failed to bring any buyer within 45 days as prescribed in the aforesaid order nor any one objected to the bid of the Buyer, therefore, on a Reference made by the Nazir dated 15.11.2021, the bid received in the sum of Rs.30,00,00,000/- was duly confirmed by this Court, vide order dated 15.11.2021 and against such order, HCA 325/2021 was filed, however, it was dismissed in limine on 12.01.2022. Learned counsel has argued that the consent order in the matter and the order of confirmation of sale dated 15.11.2021 have attained finality in view of the order dated 12.01.2022, passed in HCA No.325/2021 and the order dated 22.09.2022, passed in HCA 164/2022, both passed by Divisional Benches of this Court. Learned counsel has further submitted that the Buyer despite payment of entire sale consideration in the year 2021, he has not been able to use and utilize the property. He has further submitted that in view of the order of the Divisional Bench passed in HCA 164/2022, no further deliberation on the listed Nazir's Report is required to be made except that the possession of the subject property may be directed to be handed over to the Buyer. It is urged that sanctity is attached to the judicial sale. It is also urged that although the CPLA has been filed before the Supreme Court of Pakistan against the order dated 22.09.2022, passed by the Divisional Bench of this Court in HCA No.164 of 2022, however, till date neither said petition was listed for hearing nor any order has been passed, which could restrain this Court from passing any order in the matter. Learned counsel lastly contended that since the sale has been confirmed and the sale certificate has already been issued in favour of the Buyer, as such, the possession of the subject property, which is lying with the Nazir, may be directed to be handed over to the Buyer without any further delay. Learned counsel in support of his arguments has relied upon the cases of *Asghar Ali v. Mrs. Zohra Bai* and another [PLD 2003 Karachi 463], *Syed Tariq Mustafa v. Tauqir Jahan Mustafa and others* [PLD 2022 Sindh 423], *Dost*

Muhammad v. Babar Munir [1991 SCMR 415], *Raja Hafeez Ur Rehman v. Messrs Genera Rice Traders Associations and others* [2023 CLD 175], *Messrs Habib and Company and others v. Muslim Commercial Bank Limited and others* [PLD 2020 SC 227], *Zakria Ghani and 4 others v. Muhammad Ikhtlaq Memon and 8 others* [2016 CLD 480] and *Ahmed Ali v. Faysal Bank Limited and 3 others* [2015 CLD 498].

3. Learned counsel for defendant No.5 while supporting the stance of the Auction Purchaser/Buyer has submitted that against the consent order, the plaintiff though filed HCA No.40/2021, however, the same was dismissed on 10.03.2021 as not pressed. He has further submitted that since the plaintiff has exhausted his remedy as such the amount lying with the Nazir may be directed to be distributed amongst the legal heirs of both the deceased in order to meet the ends of justice.

4. Conversely, learned counsel for the plaintiff submits that against the order dated 22.09.2022 [reasoning dated 18.04.2023], passed by the Divisional Bench of this Court in HCA 164/2022, the plaintiff and other defendants have filed CPLA before the Supreme Court of Pakistan as such the matter is pending before the Supreme Court, therefore, in all fairness, this Court shall wait till the decision of the Supreme Court. Learned counsel mainly contended that the preliminary decree is silent regarding **Clifton property** as such the Buyer cannot seek execution of the order and cannot claim the possession of the subject property as a right. It is further contended that the Buyer is not the party in the instant proceedings as such he cannot seek execution of the order of this Court. Per learned counsel only a decree holder acquires right under the decree and can enforce his rights under the said decree and in the instant matter since the final decree has not been passed, as such, none of the parties has acquired any right which can be enforced. It is also contended that the Nazir cannot assume the role of executing court and prepare a report at its own or on the request of the party. It is further contended that this court is not the executing court as such cannot pass directions to the Nazir to handover the possession of the subject property. It is further contended that the sale certificate issued by the

Nazir was also not covered under the provisions of Order XXI containing 103 Rules, CPC, whereby the court makes an order confirming the sale and issues sale certificate. Further the provisions of Order XXI are not attracted in respect of the private sale, as such, the sale did not become absolute. Per learned counsel, it is in the interest of all the parties that the property may fetch the maximum price and in the instant case there are parties who are ready to purchase the subject property for a sum of Rs.400 Million by enhancing the amount of Rs.100 Million as compared to the amount of Rs.300 Million made by the Buyer. Learned counsel has referred to the concluding para of the order dated 20.01.2022, passed by the Divisional Bench of this Court in High Court Appeal No.325/2021 whereby respondent was allowed to approach the learned single judge with the offer of higher price of the **Clifton property** through a proposed buyer, which was to be considered by this Court in accordance with the law. Keeping in view the said order a proposed buyer with higher offer from the amount of Rs.300 Million was arranged and CMA 1441/2022 was filed, which was rightly allowed by this Court. However, the said order was subsequently set aside by the Divisional Bench of this Court in HCA 164/2022, vide order dated 22.09.2022, which has been challenged in the CPLA, and is pending adjudication in the Supreme Court of Pakistan. It is contended that since substantial question of law has been raised in the CPLA as such this Court should wait till the final decision of Supreme Court of Pakistan. Learned counsel in support of his contention has relied upon the cases of *Sohail Ahmed Rana vs. Munair Ahmed Rana and 3 others* [2019 CLC Note 7 Sindh], *Muhammad Talib vs. Muhammad Sarwar Naz and another* [2019 CLC 623], *Syed Tariq Mustafa vs. Tauquir Jahan Mustafa and others* [PLD 2022 Sindh 423] and *Hasham Abbas Sayyad vs. Usman Abbas Sayyad and others* [2007 (2) Supreme Court Cases 355].

5. Learned counsel for defendants No. 2 to 4 while adopting the arguments of learned counsel for the plaintiff has submitted that merely upon filing of CPLA, there is no bar on this Court in passing any order in the present case, however, since the matter is already pending before the Supreme Court as such no prejudice would be

caused to any of the parties if the parties wait till the decision of the Supreme Court as the amount deposited by the Buyer is invested in profit bearing scheme and in the event if the order is passed in the Supreme Court against the Buyer he will have the payment along with the profit accrue thereon and in the event if he succeeds, the amount lying with the Nazir and the profit accrue thereon will be disbursed amongst the parties viz. the plaintiff and the defendants.

6. I have heard learned counsel for the parties as well as the Buyer's counsel, perused the material available on the record and the case law cited at the Bar.

From the record, it appears that the present suit was filed in the year 2007 for declaration, administration, partition and injunction in respect of the properties left behind by the deceased parents of the plaintiff and defendants. During protracted proceedings, various orders including preliminary decree by appointing the Nazir as administrator were passed by this Court for the purposes of distribution of assets amongst the legal heirs, including the order for sale of immovable property of the subject property. On 02.02.2021 a consent order was passed; relevant excerpts of the order for the sake of ready reference are 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 Shreen 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 the 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 regard to the said property. The Nazir's report to that end is taken on 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 sale value of Rs. 291,400,000/- shall be treated as the reverse price of the property. The parties may bring a buyer with 45 days, failing which 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 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.”

[Emphasis supplied]

7. Thereafter, the Nazir through his report dated 31.03.2021 had informed the court that defendant No.1 has brought the buyer who has offered Rs. 300 (M). The said offer was subsequently confirmed by this Court through the order dated 15.11.2021; relevant portion whereof is reproduced as under :

“ 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.”

8. Record reflects that order dated 15.11.2021 was challenged in HCA 325 of 2021, which was dismissed on 12.01.2022. Thereafter, application for review of the said order was filed, which too was dismissed vide order dated 20.01.2022, relevant portions whereof are reproduced as under:

“...Prima-facie, there seems no ground for seeking review of the order passed by this Court on 12.01.2022, therefore, both the listed applications being misconceived are dismissed in limine.

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”.

9. Record also reflects that this Court on 21.1.2022 when the matter was fixed for orders on the Nazir’s report dated 18.12.2021 passed the following orders:

“Mr. Mamoon N. Chaudhry, Advocate, files Vakalatnama for the Plaintiff and places reliance on order dated **20.01.2022**, passed by the learned Division Bench of this Court in HCA No.325 of 2021 to submit that the Appellant has been permitted to place a higher offer for consideration of this Court. However, since at present there is no such offer before this Court, the Nazir’s report is taken on the record subject to all just exceptions. The Nazir may proceed as already ordered on 15.11.2021. In the meanwhile, if the Plaintiff moves an application before the Court in line with the order of the Division Bench, same will be considered accordingly”.

[emphasis supplied]

10. Pursuant to above order of this Court the Nazir submitted the listed Report dated **26.01.2022**. Relevant portions thereof have been reproduced supra. Record shows that on 28.01.2022 the plaintiff filed application under section 151 CPC [CMA 1441/2022] for cancellation of sale certificate and consideration of a higher bid for Rs.350 Million offered by another bidder. The said application was heard and allowed by this Court, vide order dated 06.05.2022, directing the parties to appear for a fresh contest of the sale of the **Clifton property** and all the parties may bring their respective buyers in the contest. The said order was challenged by the Buyer before the Divisional Bench in HCA 164 of 2022, which appeal after hearing the learned counsel for the parties was allowed, vide order dated 22.09.2022, whereby the order dated 06.05.2022, passed by learned Single Judge was set aside.

11. During the course of arguments it has been informed that CPLA has been filed against the order passed by the Divisional Bench of this Court in HCA No. 164 of 2022, , however, upon the specific query, learned counsel for the plaintiff has very candidly admitted that till date neither the said petition has been listed in the Court nor any order has been passed on it.

12. The Supreme Court of Pakistan in the case of *Dost Muhammad v. Babar Munir* [1991 SCMR 415], inter alia, has observed that mere pendency of a petition for leave to appeal is no ground for the High Court for not dealing with petition on merit. It is also well settled that mere filing of appeal and or CPLA cannot operate as stay order against decree or order. Reliance in this regard can be placed on the cases of *Raja Hafeez Ur Rehman v. Messrs Genera Rice Traders Associations and others* [2023 CLD 175], *Ahmed Waqas and others v. Ishtiaq Ali and others* [PLD 2022 Lahore 313] and *Messrs Agro Dairies (Pvt.) Limited and 2 others v. Messrs Agricultural Development Bank of Pakistan and 03 others* [2004 CLD 232].

13. Insofar as the contention of learned counsel for the plaintiff with regard to preliminary and final decree is concerned. This court

in the case of *Syed Tariq Mustafa v. Tauqir Jahan Mustafa and others* [PLD 2022 Sindh 423] while dealing with issue of preliminary and final decree in detail, inter alia, has held as under:

“10.Normally, preliminary decree is passed when adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit leaving room for further inquiry to be carried on. It does not completely dispose of the suit and it is passed in those cases in which the Court has to first adjudicate upon the rights of parties and it is succeeded by a final decree. It may be observed that the rights so determined from the preliminary decree are conclusive in nature and in that limited sense a preliminary decree is final; however, the Court then makes a further inquiry to settle all the issues and gives its final decision, which is a final decree. When the preliminary decree is passed, the Court would not become functus officio and would retain control over the action even after the decree; as such, the suit remains pending till such time a proper final decree is passed and right of parties are determined. In the case of *Shankar Balwant Lokhande (Dead) v. Chandrakant Shankar Lokhande* (AIR 1995 SC 1212), the Court has observed that "a preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final." It may also be observed that a preliminary decree and a final decree are both distinct and independent entities. If a question arises as to whether a decree is preliminary or final, it has to be decided by a reference to the decree itself. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final where such adjudication completely disposes of the suit. Reliance in this regard may be placed on the case of *Ali Muhammad Brohi v. Haji Muhammad Hashim* (PLD 1983 Karachi 527) and *Syed Abdul Majid v. Choudry Manzoor* (1987 CLC 617).

11....."

12. It has been held by the Hon'ble Supreme Court of Pakistan in the case of *Syed Mehdi Hussain Shah v. Mst. Shadoo Bibi and others* (PLD 1962 SC 291) that "in a suit for administration the relief to be granted is that the estate of the deceased is to be administered under the decree of Court. This means that the Court will assume the functions of an administrator; it will realize the assets, will discharge the debts and legacies, will take an account of the income of the property and will distribute the assets amongst those entitled to it. This is the relief to be granted appears also from form 41 in Appendix A, Schedule I to the Civil Procedure Code." It has also been observed in the case of *Nutan Chandra Mahajan v. Srimati Charu Bala and others* (PLD 1965 Dacca 557) in a suit for partition that "if upon a proper construction of the terms of the Solehnama (compromise) it appears that something more is yet to be done, then the Solehnama though embodied in a decree could not be looked upon as the basis

of a final decree." It has further been observed that "decree embodying the Solehnama as its part, is in the nature of a preliminary decree and it requires to be made final in due course."

13. In the instant case, it is an admitted position that earlier a preliminary decree was drawn in compliance of order dated 13.02.2015, whereby Official Assignee was appointed as an administrator of the properties left by the deceased. Thereafter, a compromise decree was drawn in terms of settlement reached between the parties, which was forwarded to the Official Assignee under the Court's order for "further compliance". Directions of the Court for "further compliance" denote that further proceedings i.e. transfer of suit property and distribution of sale proceeds amongst legal heirs of the deceased in accordance with sharia, are required to be taken effect before the suit can be completely disposed of. As such, the compromise decree in continuation of earlier preliminary decree, embodying the terms of compromise as its part in this suit for administration, is in the nature of a preliminary decree and it is required to be made final in due course. Therefore, I am of the view that no execution application in the instant case is required to be filed by the parties to execute the later decree, in respect thereof; the Court has already directed the Official Assignee for compliance of the said decree."

[Emphasis supplied]

14. In the present case also, the preliminary decree has already been passed and one of the subject properties viz. **Clifton property** was put on sale with the consent of the parties. Subsequently, the Buyer made an offer to purchase the property which offer was confirmed by this Court upon which entire sale consideration has been deposited and sale certificate has been issued pursuant to the orders of this court, as such, the Nazir of this court who is acting as an administrator of the properties of the present proceedings, through his listed report sought permission of this court for handing over the possession of **Clifton property** to Buyer. In the circumstances, and keeping in view the decision of this court in case of Syed Tariq Mustafa (Supra), the arguments articulated by learned counsel for the plaintiff appears to be misconceived hence untenable.

15. Moreover, in the instant case since the sale of **Clifton property** in favour of the Buyer has been confirmed and upon deposit of entire sale consideration sale certificate has been issued, as such, the sale of the property has become absolute and the sanctity of the judicial sale has been attached, which cannot be done away with unless it is established that there has been fraud which in the

present case is missing. Reliance in this regard has been placed on the cases of *Zakria Ghani and 4 others v. Muhammad Ikhtlaq Memon and 8 others* [2016 CLD 480], *Messrs Habib and Company and others v. Muslim Commercial Bank Limited and others* [PLD 2020 SC 227] and *Ahmed Ali v. Faysal Bank Limited and 3 others* [2015 CLD 498].

16. As a consequence of the above discussion, keeping in view the order of the Divisional Bench of this Court, passed in HCA No.164/2022, and since there is no procedural defect or any illegality in the prolonged proceedings of sale of the **Clifton property** conducted by the Nazir in compliance of the orders of this Court, there appears no impediment in allowing the Nazir to hand over the possession of the **Clifton property** to the Buyer. Accordingly, the Nazir is directed to proceed further in accordance with law and handover the physical and vacant possession of the **Clifton property** viz. House No.55, Block-5, Clifton, Karachi, to the Buyer. The Nazir's listed Report dated **26.01.2022** is taken on the record and the same stands disposed of.

JUDGE

Karachi;
Dated: 07.06.2023

Jamil*