

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Justice Ms. Sana Akram Minhas

First Appeals No. 41 and 42 of 2019

M/s Allied Bank Ltd.
Versus
M/s SAS Construction (Pvt.) Ltd. & others

A N D

First Appeal No.220 of 2017

Muhammad Noman Saigal
Versus
The Banking Court No.5 Karachi & others

Date of Hearing: 25th and 26 April, 2024

Appellant in First Appeals No.41 and 42 of 2019 and respondent No.1 in First Appeal No.220 of 2017: Through Ms. Faiz M. Durrani and Bashir Ahmed Khan along with Mr. Zeeshan Bashir Khan Advocates.

Appellant in First Appeal No.220 of 2017 and respondent No.2 in First Appeals No.41 and 42 of 2019: Through Mr. Mukhtar Ahmed Kobhar Advocate.

Respondent No.4 in First Appeals No.41 and 42 of 2019: Through Mr. Haris Rasheed Advocate.

Respondent No.5 in First Appeals No.41 and 42 of 2019: Through Mr. Abdul Shakoor Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Impugned in Appeals No.41 and 42 of 2019 are two separate orders passed on the same day i.e. 03.04.2019 by Banking Court No.V at Karachi, in Execution No.61 of 2013 (Suit No.197 of 2012) whereby confirmed auction of the two properties i.e. (i) Office No.63, 64 and 65 which is amalgamation of three offices together

measuring 3500 sq. feet situated on 6th Floor, and (ii) Office No.SA-8 (8-A), measuring 650 sq. feet on First Floor, both in Shahnaz Arcade, Plot No.158/3, Shaheed-e-Millat Road, Karachi was stayed/set aside and the amount deposited by the auction purchaser/respondent No.4 was ordered to be returned. Order impugned in First Appeal No.41 of 2019 pertains to the first property whereas First Appeal No.42 of 2019 pertains to the second property.

2. Brief facts are that Banking Suit bearing No.197 of 2012 was filed by M/s Allied Bank Limited/appellant against respondents No.1 to 3 i.e. SAS Construction (Pvt.) Limited, Muhammad Noman Saigal and Mrs. Shahnaz Saigal, as being borrower and mortgagers. The judgment was passed on 08.03.2013 and decree was drawn on 15.03.2013. For the execution of the aforesaid decree, Execution Application No.61 of 2013 was filed and the mortgaged properties were attached for the recovery of the decretal amount, as adjudged. A sale proclamation was issued, the terms whereof were drawn after notice to the concerned parties as available under Order XXI Rule 64/66 CPC 1908. The auction notices were published in Daily Jang and Dawn. Respondent No.4 was declared to be the successful bidder/participant of the auction and accordingly his bid was confirmed and he deposited the offered amount. There is no such dispute as such in this regard. The dispute raised later after confirmation of bid is of actual/carpet/covered area of first property and existence of the other property.

3. Later in time when implied possession was handed over, as properties were on rent, the auction purchaser/respondent No.4 objected as to the covered area of the subject property i.e. Office Nos.63, 64 and 65 admeasuring 3500 sq. feet, 6th Floor Shahnaz Arcade on Plot No.158, Block-3, Shaheed-e-Millat Road, Bahadurabad, Karachi, which was auctioned as it was not found the same as disclosed in the auction notices. Whereas for the other

property i.e. Office No.SA-8 (8-A), measuring 650 sq. feet on First Floor, objector/respondent No.5 additionally, claimed to be its owner via registered sublease dated 05.09.1992 and sought such relief accordingly; hence respondent No.4 sought withdrawal from the bid/amount deposited. He (respondent No.4) initially asked for the adjustment of the amount as per the offered rate applied on net/carpet area of the property, in respect of the first property, whereas after some time he moved application for withdrawal of the bid as offered. Respective applications of both these respondents i.e. objector and auction purchaser were allowed via impugned orders, referred above, hence these appeals.

4. We have heard learned counsel for the parties and perused material availed on record.

5. The matter was heard on 25.04.2024 as well as on 26.04.2024. The two immovable properties by common public notices were put to auction and the salient features of such auction of the mortgaged properties were reduced into writing, as required in terms of Order XXI Rule 64/66 CPC. The first property i.e. Office No.63, 64 and 65 is amalgamation of three offices together measuring 3500 sq. feet situated on 6th Floor whereas the other property is office No.SA-8 (8-A), measuring 650 sq. feet on First Floor, both in Shahnaz Arcade, Plot No.158/3, Shaheed-e-Millat Road, Karachi. The forced sale value of the first property is disclosed as 16 Million whereas forced sale value of the second property is disclosed as 3.2 Million.

6. The auction took place on 18.04.2017 and on 06.11.2017 the Banking Court in the aforesaid execution was pleased to accept the bid of auction purchased i.e. Abdul Aziz Memon (respondent No.4) for the respective amounts disclosed in the two orders of the same date i.e. 16.1 Million of the first property and 3.3 Million for the second property. The Court also ordered that since 30 days period has expired from the

date of offer/acceptance (as not disputed), therefore, sale was confirmed vide aforesaid order dated 06.11.2017. Nazir was then directed to issue sale certificate accordingly.

7. In the first instance these objections, as raised, at a belated stage after almost 16 months to get out of the bid process wherein respondent No.4 not only participated but was declared as successful bidder in pursuance whereof he deposited entire amount and his offer was confirmed as being successful. Prior to his participation public notices were also issued in two leading newspapers disclosing terms as available at page 581 of First Appeal 41 of 2019 titled as 'Schedule of the mortgaged moveable property' (it is in fact immovable property which perhaps has incorrectly typed as 'movable property'); terms are reproduced as under:-

"1. Property will be auctioned condition on "as is where is basis". (emphasis applied)

2. All the taxes, utility charges, government, semi-government, charges Revenue and 10% withholding charges Tax will be paid by the Auction Purchaser in respect of the aforesaid property.

3. The person declared to be the highest bidder/purchaser shall deposit immediately 25% pay order in the name of Judge Banking Court No.V, along with photocopy of C.N.I.C. of the amount of this purchase price with the undersigned. No cheque of 25% will be accepted.

4. The balance of the purchase money shall be paid by the purchaser before the Court closes on 15th day from the date of Auction.

5. The sale shall be subject to confirmation by the Court.

6. The Court reserves the right to cancel the auction or note to accept any bid even if it is the highest and to cancel the auction at any time.

Detail terms and conditions and other information may be obtained from Court by dated 27th day of February 2017.

8. Nothing prevented the auction purchaser from inspection of the properties prior to his participation in the auction. More importantly the properties were auctioned on 'as is where is basis'.

9. Record also reveals that on 20.06.2016 a report was filed by Joseph Lobo (Pvt.) Ltd. disclosing respective gross areas of the subject properties as 3500 and 650 sq. feet respectively of property No.1 and property No.2. This was never shown to be a carpet area.

10. In terms of order dated 06.11.2019 of this Court passed in these appeals Nazir of this Court was directed to carry out survey which was carried out again through Joseph Lobo (Pvt.) Ltd. The report was filed by the Nazir on 26.10.2020 annexing therewith report of Joseph Lobo dated 24.02.2020 who with its report also filed a layout plan which shows carpet area as 3169 sq. feet of the first property. Respondent No.5 however in respect of second property on the First Floor has produced sublease of the year 1992 dated 05.09.1992. The objections with respect to this property is a different one and be concluded separately on such point of difference.

11. In First Appeal No.220 of 2017 although it was ordered to be heard first as being appeal of the borrower Noman Saigal, learned counsel appearing for him however conceded and submitted that in case the connected appeals No.41 and 42 of 2019 be heard and decided, he would then make a response to proceed or otherwise as he might not required to be heard. We, therefore, in view of such statement of the counsel appearing for the appellant in First Appeal No.220 of 2017 heard these two appeals No.41 and 42 of 2019.

12. In view of above facts and circumstances we are of the view that the properties were auctioned on 'as is where is basis'; there was nothing to prevent the auction purchaser/respondent No.4 from inspecting the premises.

13. The subleases of the two premises do not demonstrate the carpet area of the properties; it demonstrate gross area and the notified amenities such as area of corridors, the area which is in common use of all occupants such as stairs, lift etc. and other covered area such as underground and overhead water tanks etc.; the common facilities provided to the visitors and the occupants of the building. The builder would not occupy and construct such amenities for his own benefit; those are for the use and benefit of the occupants and the area of those amenities would sink in the subleases, as per the ratio ascertained over the plot, with the carpet area and consequently a gross area has to be disclosed in the subleases, as is done in these cases. It is this gross area which creates a right over the plot otherwise the lessee would suffer in many ways if that is not included in the sublease. It is not therefore impressive argument that the area disclosed in the public notices for auction ought to have been provided physically as carpet area.

14. In view of above the reasoning provided to upset the confirmed auction in respect of properties is not tenable under the law as one should not be allowed to take advantage of a re-thought process in a confirmed auction. We do not find above objections as discrepancies in the process of auction. The other property however has an additional ground and that is of a prior sublease registered in 1992.

15. The crucial applications of the objector remain for consideration is in respect of office No.SA-8 (8-A) filed by one Shua ul Ambia Riaz. He claimed intervention of the Court on the strength of registered indenture of lease executed between him and the judgment debtor/ respondent No.2 who is a builder. This indenture of lease was executed on 05.09.1992 and has the description of not only the plot on which it was constructed but also office was stated to be bounded by SA-7 on one side and SA-9 on the other side whereas shop//flat/office No.SM-1 was

under/below the said office and Flat/shop/office No.SA-30 is stated to have been constructed over it on upper/above floor. The other indenture of lease (mortgage) available in respect of an office which is claimed to be Office No.SA-8 and described as 8-A is not disclosed to have been bounded by any premises; those were left blank. This indenture of lease was executed in the year 2006; it remains a crucial point for determination whether the two properties/offices shown in the two subleases are the same or different.

16. It is these applications including the one in respect of Office No.63, 64 and 65 filed separately which were allowed by the Banking Court on account of discrepancies such as lessor area of the properties which were handed over as against the area disclosed in the respective leases/subleases and the dispute of the title as to other property i.e. SA-8 (8-A) as through a separate title the ownership is being claimed by the objector, disclosed it to be a separate property other than the one in relation to which equitable mortgage was claimed.

17. Although we have provided a general description as to how the subleases/leases issued/executed which show the gross area of the premises, however, the question in relation to the property on the first floor is a different one. The objector who claimed title through an independent lease executed much before the lease which is available with the Bank on which equitable mortgage has been created. The objector's lease is shown to have been executed apparently in the year 1992 whereas the lease of which equitable mortgage is being claimed is of 2006, though both the premises are situated on the first floor on same "footprint" with slightly different nomenclature i.e. SA-8 and 8-A. The important thing however is that later equitable lien over property was not objected by prior purchaser. It could be lack of knowledge or collusion between him and vendor who is the borrower.

18. There could have been a possibility that the borrower/judgment debtors might have executed a lease earlier in favour of the objector and for the purposes of availing loan they have executed yet another lease in 2006 in favour of one of the family members Muhammad Noman Sehgal, the judgment debtor/respondent 2 and has provided the same as a security to obtain loan. It could have been a collusion between the objector and the judgment debtors however these intricate questions could not be resolved on the strength of affidavit or getting the property inspected unless the parties are allowed to lead/record their respective evidence in respect of their claim which could be summary in nature. The purpose of summary proceedings does not exclude expeditious trial and such summary process could not be restricted to a decision on the basis of affidavit alone filed in respect of the applications.

19. The interference made by the objector and/or the judgment debtors thus is different in respect of both the properties; there is no issue as far as first property i.e. Office No.63, 64 and 65, which is amalgamation of three offices together measuring 3500 sq. feet situated on 6th Floor in Shahnaz Arcade, Plot No.158/3, Shaheed-e-Millat Road, Karachi, is concerned wherein we do not find any discrepancy and we do not agree with the reasoning assigned by the Banking Court in allowing the application and relieving the auction purchaser to get back his offered amount hence High Court Appeal No.41 of 2019 is allowed and the Court may undertake further consequential steps. However, the appeal bearing No.42 of 2019 in respect of Office No.SA-8 (8-A), situated on the first floor of the aforesaid building, is disposed of as the objector and appellant both have an arguable case that requires probe through summary process, as detailed above, which may include recording of evidence by the parties, if they deem fit and proper, resultantly the order(s) are set aside and applications of the objector

and auction purchaser be deemed to be pending and the parties may lead their respective evidence in respect of the premises SA-8 (8-A) on the First Floor and only after that banking Court may decide these applications on the strength of material and evidence made available.

20. Since the borrower i.e. appellant of First Appeal No.220 of 2017 has not argued his appeal on the count that the two connected appeals, referred above, be heard and decided first, therefore, we adjourn aforesaid First Appeal No.220 of 2017, to be fixed independently wherein the appellant would show as to how the “process of auction”, as undertaken, (not the questions raised here) was not lawful. Any observations made hereinabove with regard to First Appeals No.41 and 42 of 2019 would be only be to the extent of those appeals and would not deprive the appellant of the connected appeal No.220 of 2017 from pleading his case independently without being influenced by any of the observations made hereinabove.

21. Office to send the R & P to the trial Court.

Dated: 16.05.2024

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