

THE HIGH COURT OF SINDH, KARACHI

Suit No. 224 of 2013

[Abdul Qayum Khan v. Abdul Azeez & others]

- Plaintiff : Abdul Qayum Khan through Mr. Muhammad Arif Sheikh, Advocate.
- Defendants 1-7 & 10-13 : Nemo.
- Defendants 8, 14-19&21 : Abdul Sattar Khan, Shoaib Siddique, Qammar Siddique, Shahab Siddique, Shahid Siddique, Azrah, Uzmah and Zeenat Begum through Mr. Muhammad Azhar Farooqui Advocate.
- Defendant No.9 &28(iii) : Mrs. Surraiya Qaiser Begum (**since deceased**) through legal heirs 9(i) to 9(vi) & 9(a) to 9(d) and Nadia Sohail through Mr. Muhammad Nazim Khokhar, Advocate.
- Defendant No.20 : Abdul Razzaq Khan through Mr. Sohail Hameed, Advocate.
- Defendants 22, 28(i)&(ii) : Mrs. Sadiqa Begum and Sohail Ahmed (**since deceased**) through legal heirs, Sameer Ali Khan and Faryal Ali Khan through Mr. Faheem Shah, Advocate.
- Defendants 23 to 27 : Nemo.
- Auction Purchaser : Muhammad Asif through M/s. Badar Alam, Muhammad Kashif Badar and Farzana Yasmin, Advocates.
- Dates of hearing : 20-09-2022, 04-10-2022 & Re-hearing on 27-02-2024
- Date of decision : 01-03-2024

ORDER

Adnan Iqbal Chaudhry J. - In this suit for partition, house on plot No. N-8, PIB Colony, Karachi [**subject property**] was auctioned by the Nazir of this Court along with other properties of late Abdul Qadeer Khan [**the Deceased**] in furtherance of a decree of sale dated 20-05-2016. The sale of the subject property was confirmed by the

Court on 22-12-2017 and possession delivered to the **Auction Purchaser** namely Muhammad Asif on 18-01-2018. However, before the sale certificate could be issued, the Nazir referred the matter to the Court by a report dated 16-02-2018 seeking orders on defects noticed in the sale, whereas the Auction Purchaser moved CMA No. 15217/2019 for correcting those defects under sections 153 and 152 CPC and for issuing a sale certificate accordingly. By order dated 16-08-2022, the Court observed that the Nazir's report will be addressed while hearing listed applications. Therefore, the Nazir's report dated 16-02-2018 is taken up along with CMA No. 15217/2019.

2. The defects in the sale of the subject property noted in the Nazir's report are:

- (a) there is no record of allotment of the subject property to the deceased; and
- (b) the area of the subject property is actually 150 sq. yds., whereas the decree and auction proceedings describe that as 100 sq. yds.

The above is based on information received from the PIB Cooperative Housing Society where the subject property is situated.

3. Mr. Badar Alam, learned counsel for the Auction Purchaser submitted that he had purchased a house '*as-is-where-is*' and not open land, therefore the actual size of the plot was not relevant; that in any case, it was the responsibility of the Court/Nazir to mention the correct size of the plot, for which mistake the Auction Purchaser cannot be prejudiced; and therefore, the Court should exercise powers under sections 153 and 152 CPC to correct the decree and auction proceedings so as to describe the subject property as 150 sq. yds. instead of 100 sq. yds. and issue a sale certificate accordingly. For the maxim that '*an act of court shall prejudice no man*', learned counsel cited *Khushi Muhammad v. Fazal Bibi* (PLD 2016 SC 872). He relied upon *Mohammad Jameel v. Eridania (Suisse) SA* (2018 CLD 1478) to submit that inadequacy of sale price is not a valid ground to set-aside a court sale. *Hudaybia Textile Mills Ltd. v. Allied Bank of Pakistan* (PLD 1987 SC 512) was relied upon to highlight the importance of

ensuring stability in judicial sales. Further, *Noor Khatoon v. Habib Bank Ltd.* (2013 CLD 463) was relied upon to submit that mistake, error or irregularity committed by the Court cannot take away rights of the auction purchaser which vest in him on the sale.

4. On the other hand, Mr. Muhammad Arif Sheikh, learned counsel for the Plaintiff submitted that while the decree and the auction proceeding had erroneously described the subject property as 100 sq. yds. instead of 150 sq. yds., the bid of the Auction Purchaser too was on the basis of 100 sq. yds., and therefore he cannot seek to gain from that mistake to the detriment of the co-owners who are entitled to the market price of the entire 150 sq. yds.; that where both sides were under a mistake of fact as to the area of the subject property, the sale was void by virtue of section 20 of the Contract Act as laid down in *Muhammad Farooq v. Javed Khan* (PLD 2022 SC 73). He submitted that if the Auction Purchaser is not willing to pay the market price of the additional 50 sq. yds., then the sale is liable to be set-aside for a re-auction. Learned counsel for the Defendants 8, 4 to 22 adopted these submissions.

5. Heard learned counsel and perused the record.

6. The manner in which the subject property came to be sold is as follows. The suit was for partition of immovable properties left behind by the Deceased. The plaint described the subject property as 100 sq. yds. However, none of the parties placed on record any document with regards to the subject property. A preliminary decree was passed on 25-02-2015 under Order XX Rule 13 CPC appointing the Nazir as Administrator. After making enquiries from the PIB Cooperative Housing Society [**the Society**] the Nazir submitted a report dated 28-10-2015 (filed on 03-11-2015 - page 161) to lay before the Court the facts that the Society had no record of allotment of the subject property; and that its size was 150 sq. yds. The Society's letter dated 14-09-2015 to that effect was annexed to the Nazir's report (page 169) *albeit* it was acknowledged that the Deceased had been in possession of the subject property. It appears that contents of the

Nazir's report dated 28-10-2015 were overlooked, as the order dated 26-11-2015 passed thereon was simply: "taken on record". Thereafter, on 20-05-2016, the Court passed a final decree directing the Nazir to sell the subject property along with the other properties of the Deceased and distribute the proceeds amongst the co-owners. The final decree continued to describe the subject property as 100 sq. yds.

7. In proceeding with the sale of the subject property, the Nazir too overlooked his previous report dated 28-10-2015, and the fact that there was no document of that property before him. The mistake was again noticed by the Nazir when the Auction Purchaser applied for a sale certificate, and hence the Nazir's reference dated 16-02-2018. The Secretary of the Society was called to affirm the facts. His report dated 08-10-2018 reiterated that the Society had no record of any allotment of the subject property. Thereafter, by order dated 10-12-2019, the Court confronted the Auction Purchaser with the maintainability of CMA No. 15217/2019 and with the question why the sale should not be set-aside.

8. Mr. Badar Alam's first submission was that the subject property was sold '*as-is-where-is*', and therefore discovery of the additional area should not be to the prejudice of the Auction Purchaser. But then, the Nazir's reports dated 28-10-2015 and 15-11-2017 reflect that market value of the subject property was assessed and its reserve price was fixed on the assumption of a 100 sq. yds. property, not 150 sq. yds. Thus, while bidding for the subject property, the Auction Purchaser was consciously bargaining for 100 sq. yds., and the argument now being advanced is no justification for unjust enrichment. But all of that is secondary. The primary fact remains that there was no document before the Court whatsoever to show that the subject property vested in the Deceased. Mr. Badar Alam acknowledged that the Auction Purchaser too was not aware of that fact.

9. Learned counsel for the Auction Purchaser submitted that nevertheless, since no application was made under Order XXI Rules 89 or 90 CPC for setting aside the sale, it became absolute in terms of

Order XXI Rule 92 CPC. However, the matter is not as plain. The sale in this case was not to enforce a money decree, but a sale under section 2 of the Partition Act, 1893. As observed by the Supreme Court in *Shahid Ali v. Aziz Fatima* (PLD 2010 SC 38), a decree for sale of property in a partition suit cannot be equated with a money decree, because in a partition suit both the decree-holder and judgment-debtor being co-owners of the property can move for setting aside the sale also on the ground that the price fetched is inadequate. For the same reason, Justice Ajmal Mian speaking for a Division Bench of this Court in *Ahmed Ali v. Noor Muhammad* (1987 CLC 1575) held that Rule 89(1) of Order XXI CPC does not apply to a sale under the Partition Act. It appears that where the sale is under the Partition Act, then apart from Order XXI Rule 90 CPC (to the extent applicable), inadequacy of sale price may also become a ground in an appropriate case for setting-aside the sale as observed in *Shahid Ali supra*. Therefore, the case-law cited by learned counsel for the Auction Purchaser relating to sales made in execution of a money decree is distinguishable.

10. Section 7 of the Partition Act itself stipulates that for sales under said Act the procedure in the CPC for sales in execution of decrees is applicable “as far as practicable”, and that too where the High Court has not prescribed rules in that behalf. Here, the High Court of Sindh has prescribed certain rules. Per Rule 552 of the Sindh Chief Court Rules (O.S.): “The provisions of rules 337 to 351 shall, as far as the same are applicable, apply to a sale under section 7 of the Partition Act, 1893” (with a proviso for rule 343). Rules 337 and 338 clearly stipulate that sale of immovable property shall not be carried out without an abstract of title and without making such documents available to bidders for inspection. While those rules do not go on to explicitly provide grounds for setting aside a sale, it would be absurd to suggest that a sale of immovable property without title cannot be urged as a ground to set-aside the sale.

11. This brings us back to the central issue before the Court here. The Court is not looking at a contest between parties to the suit and

the Auction Purchaser, but to the mistake of the Court in overlooking the Nazir's report dated 28-10-2015 which had categorically stated that the Deceased held no title document of the subject property. Had that report not been overlooked, the Court would not have included the subject property for sale in the decree passed on 20-05-2016, but would have put the co-owners to proof of title. Learned counsel for the Auction Purchaser tried to impress upon the Court that the sale had become absolute, but that begs the question that when the Deceased had no title, what was it that was sold to the Auction Purchaser? Admittedly, the Auction Purchaser too had not satisfied himself of the title to the subject property. Section 152 or 153 CPC of course cannot be invoked by him to read-in title when there is none. For the same reason, reliance on the case of *Hudaybia Textile Mills* for protecting judicial sales is equally misplaced here.

12. This is a case where parties to the suit and the Auction Purchaser both stand to gain a property by a mistake of the Court. Therefore, even if there is no third-party before the Court as yet to lay claim to the subject property, it is nonetheless the process of the Court that becomes the casualty. The Court cannot allow the error to perpetuate. It has to act *ex debito justitiae* i.e. by reason of an obligation of justice.

13. Section 151 CPC is the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. It can also be used by the Court to rectify its own mistake. As held by the Supreme Court in *Abid Jan v. Ministry of Defense* (2023 SCMR 1451): "Every Court has the power to rectify *ex debito justitiae* its judgment and order to prevent abuse of process and severe patent oversights and mistakes. This power is an inherent power of the Court to fix the procedural errors if arising from the Court's own omission or oversight which resulted in a violation of the principles of natural justice or due process."

In *Dr. Asma Noreen Syed v. Government of the Punjab* (2022 SCMR 1546), and again in *Abdul Qudoos v. Commandant Frontier*

Constabulary, Khyber Pakhtunkhwa (2023 SCMR 334) the Supreme Court has observed that:

“A patent and obvious error or oversight on the part of Court in any order or decision may be reviewed sanguine to the renowned legal maxim "actus curiae neminem gravabit" which is a well-settled enunciation and articulation of law expressing that no man should suffer because of the fault of the court or delay in the procedure. The maxim 'actus curiae neminem gravabit' means an act of the Court shall prejudice no one. It is interrelated and intertwined with the state of affairs where the court is under an obligation to reverse the wrong done to a party by the act of Court which is an elementary doctrine and tenet to the system of administration of justice beyond doubt that no person should suffer because of the delay in procedure or the fault of the court. This is a *de rigueur* sense of duty in the administration of justice that the Court and Tribunal should become conscious and cognizant that as a consequence of their mistake, nobody should become victim of injustice and in the event of any injustice or harm suffered by mistake of the court, it should be remedied by making necessary correction forthwith. If the Court is satisfied that it has committed a mistake, then such person should be restored to the position which he would have acquired if the mistake did not happen. This expression is established on the astuteness and clear-sightedness that a wrong order should not be perpetuated by preserving it full of life or stand in the way under the guiding principle of justice and good conscience. So in all fairness, it is an inescapable and inevitable duty that if any such patent error on the face of it committed as in this case, the same must be undone without shifting blame to the parties and without further ado being solemn duty of the Court to rectify the mistake. In the judicial conscience and sense of right and wrong, the foremost duty in the dispensation of justice is to apply the correct law.”

14. Guided by the *dicta* above, I invoke the inherent power of the court to rectify the Court's mistake and recall the decree dated 20-05-2016 to the extent of the subject property. As a consequence, the sale of the subject property is set-aside and CMA No. 15217/2019 is dismissed. The Nazir shall take back possession of the subject property from the Auction Purchaser and refund the amount paid by him. Nazir's reference dated 16-02-2018 is answered accordingly.

JUDGE

Karachi
Dated: 01-03-2024