

IN THE HIGH COURT OF SINDH AT KARACHI

First Appeal No.50 of 2012

Mst. Noor Khatoon & others

Versus

M/s Habib Bank Ltd. & another

BEFORE:

Mr. Justice Mushir Alam, CJ

Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing: 04.12.2012

Appellants: Through Mr. Muhammad Yaseen Azad Advocate

Respondent No.1 Nemo

Respondents No.2 Through Ms. Sana Akram Minhas Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This appeal is arising out of order dated 21.01.2012 passed in Execution Application No.36 of 2001 in terms whereof the application under order XXI Rule 89 read with section 151 CPC was disposed of.

Brief facts of the case are that the respondent No.1 filed suit bearing No.763 of 1995 (New No.1401 of 2000) for recovery of Rs.96,44,648/- against one Tariq Aziz, Mrs. Farhana Tariq, Khalid Aziz and predecessor of appellants No.1, 2 and 3. The Banking Court No.II at Hyderabad passed the judgment and decree dated 30.05.2001, and 15.06.2001 respectively. Subsequently the execution proceedings were initiated by respondent No.1 against the judgment debtors before the Banking Court No.II at Hyderabad. On 02.06.2010 the mortgaged property viz. House No.19-K, Block-2, PECHS, Karachi, (hereinafter referred to as the subject property) was put to auction and the respondent No.2 was declared as the highest bidder with highest bid of Rs.1,36,00,000/-. On 11.06.2010 the application under order XXI rule 89 CPC was filed by appellants No.1, 2 and 3 being legal heirs of Ghulam Mustafa before the learned Banking Court along with deposit of Rs.20,00,000/- with the request in the supporting affidavit that the rest of the amount shall be paid to the decree holder within 6 months from the date of the order to be passed on the application seeking setting aside the sale of the mortgaged property. On 15.06.2010 the appellant sought time for payment of balance amount within 15 days, which was allegedly granted by the Banking Court No.I at Karachi suspending the confirmation of sale. On

10.08.2010 the Banking Court extended further time for depositing the balance amount. The auction purchaser pursuant to such extension that was made on 10.08.2010 whereby one month time was extended for the payment of balance amount by the judgment debtors preferred First Appeal No.113 of 2010. On 26.03.2011 an application under section 12(2) CPC was filed by the appellant before the learned Banking Court No.I at Karachi for setting aside the judgment and decree passed in favour of respondent No.1 on the ground of concealment of facts. On 28.03.2011 learned Division Bench in First Appeal No.113 of 2010 directed the Banking Court to dispose of the matter regarding the confirmation of auction proceedings within a period of 30 days. On 19.04.2011 the Banking Court proceeded with the case and passed the following order:-

“That directions have been received by this Court from the Hon’ble High Court by order dated 28.3.2011 that as the Banking Court though having suspended the auction proceedings on 5.6.2010 till the next date but to date had not allowed the confirmation of auction proceedings “We are therefore of the opinion that inaction of the Banking Court is hampering the interest of justice and we will therefore dispose of this appeal by directing the Banking Court to dispose of the matter regarding the confirmation of auction proceedings within a period thirty days of this order and file the copy of that order with the MIT of this Court.

The copy of the Order was received by this Court on 8.4.2011.

That by an order 15.6.2010 on a application moved U/O 21 Rule 89 CPC the LRs of the J.D. No.2 were permitted to deposit the amount of Rs.26 lacs in the name of D.H. and the remaining balance within 15 days but said LRs failed to do, appeal having being filed the above directions were received by this Court from the Hon’ble High Court. It would be pertinent to point out that in the auction proceedings the highest bid of Rs.1,36,00,000/- was made by one Raja Tariq

Minhas who has deposited the entire bid amount and the D.H. has also given no objection for acceptance of the said bid.

That the two application moved U/O 21 Rule 89 by the LRs of defendant No.2 and other U/O 21 Rule 26 by the J.D. No.3 in both the applications it was ordered that the advocate would be heard.

Without going into merits of these applications, in my opinion as clear directions has been received by this Court to dispose of the matter regarding the confirmation of the auction proceedings within a period of 30 days as quoted above, I therefore dispose to (of) these applications, as to delay the matter any further would be violation of the order of the Hon'ble High Court. The auction stands confirmed in the name of Raja Tariq Minhas. The Nazir is directed to complete all the formalities within one week and report. The copy of this order thereafter with the copy of the sale certificate be forwarded to the MIT Hon'ble High Court.

On 21.04.2011 sale certificate was issued to the auction purchaser i.e. respondent No.2. On 22.04.2011 the appellant filed First Appeal No.31 of 2011 before this Court being dissatisfied with the order dated 19.04.2011 in terms whereof the auction proceedings of the mortgaged property in favour of respondent NO.2 were confirmed. On 26.04.2011 in First Appeal No.31 of 2011 the learned Division Bench of this Court passed an order directing the executing Court that they shall not proceed further in the matter till decision of application under section 12(2) CPC which was to be decided in accordance with law. On 27.09.2011 the application under section 12(2) CPC filed by the appellant was dismissed which was assailed in First Appeal No.109 of 2011 on 22.11.2011. Both the aforesaid First Appeals i.e. Appeal No.31 and 109 of 2011 came for hearing and both the appeals were dismissed by order dated 29.11.2011.

The case of the appellant in nutshell is that the auction proceedings were confirmed in favour of respondent No.2 prior to the disposal of application under order XXI rule 89 CPC and secondly that the suit was filed against dead person and that these facts were concealed.

In support of the above, learned counsel for the appellant submitted that by an order dated 21.1.2012 learned Banking Court practically dismissed the application under order XXI rule 89 CPC whereas auction that took place on 02.06.2010 was confirmed on 19.04.2011 without disposing off application under order XXI rule 89 CPC. The application under order XXI Rule 89 CPC which was filed on 11.06.2010 remain pending despite filing of several appeals before this Court. The other ground that was taken by the learned counsel for the appellant was that the suit was filed by respondent No.1 against one Tariq Aziz who expired in an accident, as such the mortgage as well as sanction shown after the sad demise of Tariq Aziz, is managed one. He submitted that even the signature on the agreement do not resemble from the signatures of deceased.

As against this learned counsel for respondent No.2 has argued that in fact the application under order XXI rule 89 CPC was disposed of vide order dated 19.04.2011 when First Appeal No.113 of 2010 was disposed of and the Banking Court was directed to dispose of the matter regarding the confirmation of the auction proceedings within a period of 30 days from the date of disposal of the appeal. Per

learned counsel the order dated 19.4.2011 has attained finality and as such the auction proceedings were confirmed after the disposal of all applications including one under order XXI rule 89 CPC and the impugned order dated 21.1.2012 in fact confirms the same in terms of its Para 10. Per learned counsel for respondent No.2 the observation made by the learned Banking Court in terms of Para 12 of the impugned order dated 21.1.2012 that “the application under order XXI rule 89 CPC are dismissed” would not be considered as an actual disposal of the application since they were already disposed of on 19.04.2011

We have heard the learned counsel and perused the record. First we would take up the second contention raised by the learned counsel for the appellants regarding concealment of facts which were agitated by the appellants by filing an application under section 12(2) CPC. We have specifically perused the appeal No.109 of 2011 which was preferred against the order dated 27.9.2011 disposing off the application under section 12(2) CPC. The said appeal was disposed of by order dated 29.11.2011 in terms whereof the order passed by the learned trial Court while disposing of the application under section 12(2) CPC was neither disturbed or set aside and which has attained finality, hence , it is not open to the learned counsel for the appellants to re-agitate the same ground of fraud, misrepresentation, concealment of facts in this appeal as it is implied resjudicata as far as finding arrived at in respect of the application under section 12(2) CPC is concerned.

While disposing of First Appeals No.31 and 109 of 2011, the learned Division Bench of this Court held as under:-

“2. The case of the appellants No.1 to 3 is that they are L.Rs of Ghulam Mustafa who expired in 1981 and the suit filed in the year 2000 was against a dead person and thus not maintainable. The case of the appellant No.4 on the other hand is that at the time of filing of the suit he was out of the country and therefore decree against him is nullity.

3. Counsel for the appellants argued that when the predecessors-in-interest of the appellant No.1 to 3 expired in the year 1981 the question of creating mortgage on the property in question in the year 1990 does not arise and it was a case of forgery committed by other borrowers therefore, the decree ought to have been set aside on the application filed by them under section 12(2) CPC.”

Thus, as far as this appeal is concerned it is not open to the appellants to raise such grounds of fraud and misrepresentation as it is past and closed transaction in terms of order referred above.

The other ground that may be relevant for the purpose of this appeal is the alleged disposal of application under order XXI rule 89 CPC in terms of the impugned order, prior to which the auction proceedings have been confirmed. For the purpose of deciding this application it is important to reproduce the relevant provision of Order XXI Rule 89 and Rule 92 CPC:-

“89. Application to set aside sale on deposit.—(1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing the Court.—

(a) *For payment to the purchaser, a sum equal to five per cent of the purchase-money, and*

(b) *For payment to the decree holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree holder.*

(2) *Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute any application under this rule.*

(3) *Nothing in this rule shall relieve the judgment debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.*

92. *Sale when to become absolute or be set aside.—(1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.*

(2) *Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale;*

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) *No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.*

We have perused the record and it appears that in fact there are two applications which have been filed under order XXI rule 89 CPC. The first application was filed on 11.6.2010 which is supported by an affidavit of one Badruddin son of Ghulam Mustafa, one of the appellants, and the other application that is available on record is an application under order XXI rule 89 CPC which is

supported by an affidavit of one Khalid Aziz on 27.12.2011. We have also gone through the orders passed in First Appeal No.113 of 2010 on 28.03.2011, operative part of which is reproduced as under:-

“We are therefore of the opinion that inaction of the Banking Court is hampering the interest of justice and we will therefore dispose of this appeal by directing the Banking Court to dispose of the matter regarding the confirmation of auction proceedings within a period of thirty days of this order and file the copy of that order within the MIT of this Court.”

Pursuant to and subsequent to this order, the Banking Court while dealing with the pending applications in Execution Application No. 36/2011 decided the controversy vide order dated 19.4.2011, reproduced above. Thus, in terms of this order all pending applications including but not limited to the application under order XXI rule 89 CPC were disposed of and the auction stood confirmed.

It is important to note that after passing of order dated 19.4.2011 whereby the auction proceedings were confirmed, the appellants preferred two First Appeals bearing No.31 of 2011 and 109 of 2011 on 22.4.2011 and 26.4.2011 respectively and both these appeals were disposed of by order dated 29.11.2011. Thus the order dated 19.04.2011 that is impugned in one of the aforesaid appeal i.e. Appeal No.31 of 2011 as far as confirmation of the auction is concerned attained finality and all grounds which were available to the appellants to challenge the said order dated 19.04.2011 were exhausted and this ground was not taken in the aforesaid appeal that the auction

proceedings were confirmed without disposing off the application under order XXI rule 89 CPC, therefore, in terms of Order II rule 2 CPC if the appellant omitted to sue or relinquished any portion of his rights, entitlements and claims he is precluded from re-agitating such claim or grounds in subsequent proceedings or appeal. Thus the appellant No.2 who is of the view that his application under order XXI rule 89 CPC was not disposed of on 19.04.2011 and the auction proceedings were confirmed should have agitated such grounds in First Appeal No.31 of 2011.

We have perused the contents of grounds of appeal No.31 of 2011. The said appeal No.31 of 2011 was disposed of along with First Appeal No.109 of 2011 by order dated 29.11.2011. As far as the issue of the confirmation of the auction is concerned, the learned Division Bench has held as under:-

“Counsel for the auction purchaser on the other hand contended that in so far as the appellant No.4 is concerned he on 25.07.2000 moved an application under Order 1 Rule 10 CPC for his joining as a party in the suit, which was dismissed in the year 2001 for non prosecution. The matter ended there and therefore, he has no right to file application under Order 12(2) CPC. In so far as the appellants No.1 to 3 are concerned counsel for the Auction purchaser contended that they filed objections under Order 21 Rule 66(1) CPC, which were dismissed on 12.10.2009 and thereafter they did not challenge the order of dismissal, which attained finality, therefore, no right accrued to them to file application under order 12(2) CPC. He further contended that even otherwise application filed under order 12(2) CPC was dismissed as barred by time as it was filed beyond three years from the date of the knowledge of the passing of the impugned decree as the knowledge of the decree is said to be of 14th March, 2008, whereas application under order 12(2) CPC was filed on 26.03.2011. Counsel for the Auction Purchaser also contended that after dismissal of the objections under Order 21 Rule 66(1) CPC, the appellants also moved an application to match the bid of the auction purchaser. Therefore, he now cannot turn around and challenge the confirmation of sale in favour of auction purchaser. In view of this no case for making

application under order 12(2) CPC was made out for the appellants. The Banking Court rightly dismissed the 12(2) CPC application filed by the appellants.”

Thus, if the appellants consider that the auction proceedings should not have been confirmed without disposing of application under order XXI rule 89 CPC they ought to have either agitated such grounds before the learned Division Bench in the aforesaid appeal or should have assailed the order dated 29.11.2011 *ibid* before the Hon’ble Supreme Court.

However, perusal of the order dated 19.04.2011 reveals that the Banking Court disposed of all applications while confirming the auction proceedings in favour of respondent No.2 and therefore the impugned order dated 21.01.2012 whereby the appellants claim that the application under order XXI rule 89 CPC filed by appellant No.2 was disposed of in fact is misconceived. Such inadvertence, mistake, error or irregularity on the part of the Court cannot take away the rights of the auction purchaser which accrued in his favour when he deposited the bid amount as provided under the law. In addition both the applications under order XXI rule 89 CPC were also filed without substantial compliance of Order 21 Rule 89(1)(a) and (b). Thus, it is considered as if no such applications have been preferred.

In the case of *Hudaybia Textile Mills Ltd. v. Allied Bank of Pakistan* reported in PLD 1987 SC 512 it has been held by the Hon’ble Supreme Court as under:-

“Although the aforesaid decision turns on the provisions of the CPC the general principle laid down therein that once a sale has been effected a third party interest intervenes which cannot be disregarded would be applicable in the present case. It cannot, therefore, be argued that the auction purchaser had no interest whatsoever before confirmation of the sale and the Court could disregard the same by merely looking at the arrangement made between the decree holder and the judgment debtor about the satisfaction of the decree. In Mian Muhammad Abdul Khaliq v. M. Abdul Jabbar Khan and others PLD 1953 Lahore 147, similar view was taken and it was held that confirmation of sale cannot be withheld merely on the ground that the decree was wiped out or reversed before confirmation of the sale.

...Therefore, on facts as well as on principle the learned Single Judge went wrong in refusing confirmation on the ground that after the sale the decree had been satisfied. Even otherwise once the Court had made up its mind to execute the decree by attachment and sale by public auction, as long as the order so directing was in the field, the discretion vesting in it under section 8(3) of the Ordinance stood exhausted and a particular course of proceedings was brought into motion which had to culminate in a result contemplated by legal principles, and this course could not be diverted on the assumption that the executing Court had discretion to choose any mode of execution. In the premises the question of confirmation was to be regulated either by the CPC or equitable principles under the provisions thereof or on general principles as pointed out above. From any angle the refusal of confirmation by the learned Single Judge is unsustainable and the auction purchaser was entitled, in the circumstances of the case to the confirmation of the auction sale. It was urged that the discretion was properly exercised because the purchaser himself was present when the negotiations between the decree holder and the judgment debtor were taking place in Court and had applied at one stage for withdrawal of deposit. This argument is without substance because purchaser has not been shown to be a consenting party to the arrangement between the decree holder and the judgment debtor. He had no doubt at one stage applied for withdrawal of the amount deposited by him on the ground that there was some clog on the title of the judgment debtor in the property subjected to Court sale but before any orders were passed on this application it was withdrawn stating that the same was made under wrong advice and the Court dismissed the application. It is well recognized that a proceeding withdrawn with the permission of the Court is wiped off from the record as non-existent.”

In the case of United Bank Limited v. Messrs A.Z. Hashmi (Pvt.) Limited reported in 2000 CLC 1438 wherein it has been held as under:-

“In the instant case admittedly there are not allegations of any malpractice, irregularities or fraud in the process of auction conducted by the trial Court even the judgment debtors have not come forward to question the legality of such auction proceedings. After payment of full bid money, and confirmation of sale, the auction purchasers have acquired valuable rights in the property which cannot be disturbed at this stage

In the above circumstances we are of the view that the trial Court has rightly followed the guidelines given by the Honourable Supreme Court of Pakistan in the case of Hudaibia Textile Mills Ltd. (supra) as the same is fully applicable and attracted to the facts and circumstances of this case, whereas the case-law referred by the learned counsel for the appellant is on different facts and is not applicable to the present case.

In view of the above no case for interference in the impugned order is made out and this appeal, which has no substance, is accordingly dismissed”

In the case of Tribhovandas v. Ratilal reported in AIR 1968 SC 372 it has been held that:

“Rule 89 requires that two primary conditions relating to deposit must be fulfilled: the applicant must deposit in the Court for payment to the auction purchaser 5 per cent of the purchase-money; he must also deposit the amount specified in the proclamation of sale less any amount received by the decree holder since the date of proclamation of sale for payment to the decree holder. In the present case, the trustees of the trust had deposited Rs.250 for payment to the auction purchaser. They also deposited Rs.63 for payment to the decree holder, but it is common ground that the claim of the mortgagee was not satisfied by that deposit. The first condition was, therefore, fulfilled, but the second condition of O. 21, R.89 was not fulfilled.”

In the case of Unicom Enterprises v. Banking Court No.5 reported in 2004 CLD 1452 a division bench of this Court has been held as under:

“We have gone through the record and find that auction of mortgaged property took place on 30.01.2003 against which petitioner raised no objection. On 19.6.2003 the sale was confirmed. The auction-purchaser/ respondent No.3, has deposited sale price of the auctioned property in Court and in the terms of Order 21, rule 92, CPC sale of mortgaged property has become absolute and it cannot be recalled. Reference in this regard is made to the case of Hundaybia Textile Mills Ltd. v. Allied Bank of Pakistan PLD 1987 SC 512. The letter dated 5.8.2003 of the State Bank of Pakistan being subsequent to the confirmation of sale is of no consequence and cannot effect confirmation of sale by the Court. It is further noted that section 22 of Finance Institutions (Recovery of Finances) Ordinance, 2001 provides for challenging of judgment decree, sentence and final order passed by Banking Court within 30 days of such judgment, decree, sentence and final order to this Court. In view of availability of remedy of appeal, present Constitutional petition filed by the petitioner is also not maintainable.”

Thus as far as the first application filed on 11.6.2010 is concerned, it is neither filed in compliance of Rule 89(1)(a)(b) nor it is deemed to be pending when the impugned order dated 21.1.2012 was passed

It is pertinent to point out that in terms of order XXI rule 89 CPC the requisite amount is to be deposited along with application or within 30 days from the date of sale i.e. 02.06.2010 as prescribed under order XXI rule 89 CPC whereas their own schedule in Para 6 of Memo of appeal shows that a substantial amount was deposited after almost 1½ years which alone is sufficient to disentitle the appellants to agitate their rights in terms of Order XXI Rule 89 CPC.

13.	27.12.2011	16,00,000	POISFK 0030278
14.	27.12.2011	23,55,500	PB 0020020

15.	27.12.2011	6,80,000	PB0020021
		14,284,648	

In the case of Lutufr Rahman Vs. Mst. Tahera Khatun & others (PLD 1961 Dacca 303) a similar question was placed before the learned single Judge and it was held as under:-

“----The applicant must fulfill the specific terms of Order XXI, rule 89 of the Code before he can make an application thereunder. It would not do for the applicant to deposit only a part of the amount specified in the proclamation of sale; he must deposit the entire amount. If he fails to do so, he cannot maintain the application. In support of this view, the following cases may be noted; *Kripa Nath Pal v. Ram Laksmi Dasya* (1); *Maharaja-dhiraj Sir Rameshwar Singh Bahadur v. Mangal Prasad Sahu* (2); *Mannu Naik v. Mathura Prasad and others* (3). It is interesting to note that a Division Bench of the Allahabad High Court in the aforesaid case of *Mannu Naik v. Mathura Prasad and others* has distinguished the decision of the same Court in the case of *Panna Lal v. Bhole Nath* (4). In the present case, admittedly Mst. Tahera Khatun, the applicant under Order XXI rule 89 of the Code merely deposited the amount in respect of only three items of properties for which she wanted the sale to be set aside. She did not deposit the entire amount specified in the sale proclamation. In these circumstances, I hold that she cannot maintain the aforesaid application which must be dismissed.----”

We agree with the findings arrived by the learned Single Judge in the case *ibid* and the appellants in this case as well have not complied with the terms of Rule 89 of Order 21 CPC and thus on this score alone the same cannot be maintained.

The other application under order XXI rule 89 CPC of Appellant No.4 was filed on 27.12.2011 i.e. after almost 1½ year of the sale in terms of the auction conducted on 02.06.2010. Thus in addition to the merit, the application is also barred in terms of Article 166 of the Limitation Act which ought to have been filed within 30 days of the date of sale i.e. 02.06.2010. Article 166 of the Limitation is reproduced as under:-

Description of application	Period of limitation	Time from which period begins to run
166. Under the same Code to set aside a sale in execution of a decree including any such application by a judgment debtor.	Thirty days	The date of the sale.

In view of the above reason and findings, the appeal merits no consideration and is accordingly dismissed.

Judge

Chief Justice