

IN THE HIGH COURT OF SINDH AT KARACHI

Ist APPEAL No. 29 of 2010

**Present:**  
**Mr. Justice Aqeel Ahmed Abbasi.**  
**Mr. Justice Muhammad Junaid Ghaffar.**

**Mansoor Khalil----- Appellant**

**Versus**

**Muhammad Moizuddin & Aonther ----- Respondent**

**Date of hearing: 17.02.2015**

**Date of order: 29.05.2015**

**Appellant: Through Mirza Sarfaraz Ahmed Advocate.**

**Respondent No 1: Through Mr. Ilyas Khan Tanoli Advocate.**

**Respondent No 2: Through Mr. Khalil Ahmed Siddiqui Advocate.**

**J U D G M E N T**

**Muhammad Junaid Ghaffar, J.** Through instant appeal, the appellant has impugned order dated 08.02.2010 passed by the learned Banking Court No. 1 at Karachi, whereby the learned Banking Court has allowed the application filed under Section 15(6) of the Financial Institutions (Recovery of Finances) Ordinance 2001, hereinafter referred to as the "(Ordinance 2001)", and has issued writ of possession in respect of the mortgaged property, auctioned by the Respondent No. 2, in terms of Section 15 of the Ordinance, 2001.

2. Briefly the facts as stated in the aforesaid appeal are that respondent No. 1 had filed an application before the Banking Court No.1 at Karachi, under

Section 15(6) read with Section 19(6) of the Ordinance, 2001, against the deceased mother of the appellant, and had submitted that respondent No.1 was an auction purchaser in respect of the property bearing No. R-772, Block No. 17, KDA Scheme No. 16, F.B. Area, Karachi. It has been further stated that respondent No. 1 after enhancing the bid amount from Rs. 18,00,000/- to 21,30,000/- had been declared as the successful bidder, whereafter the said property was transferred in the name of respondent No.1 through registered sale deed dated 29.7.2005. It is further stated that thereafter respondent No. 1 had filed an application on or about 30.08.2005 under Section 15(6) read with Section 19 of the Ordinance, 2001, wherein objections filed by the appellant have not been considered and the application has been allowed by the learned Banking Court vide impugned order dated 08.02.2010.

3. Mr. Mirza Sarfaraz Ahmed learned Counsel for the appellant contended that the impugned order has been passed against a dead person as the mother of the appellant had expired on 17.02.2003, whereas such information was brought to the notice of the learned Banking Court No. 1, by filing the relevant death certificate and certification of NADRA, however, the learned Banking Court without making proper investigation in the matter, has allowed the application filed by the Respondent No. 1, against a dead person. It has been further contended by the learned Counsel that the deceased mother of the appellant had never created any mortgage upon the said property during her lifetime, as she had expired on 17.02.2003, whereas the mortgage was created on 21.06.2003, which is an impossibility, hence according to the learned Counsel the learned Banking Court has fallen in error while passing the impugned order. Learned Counsel, without prejudice to the above submissions, has also referred to the judgment of the Hon'ble Supreme Court in the case of *National Bank of*

*Pakistan and 117 others Vs. Saif Textile Mills Ltd. and another (PLD 2014 SC 283)* whereby, the provisions of Section 15 of the Ordinance, 2001, have been declared to be ultra vires, and a judgment dated 15.12.2014 passed by a Division Bench of this Court in 1<sup>st</sup> Appeal No. 114 of 2011 in the case of *Muhammad Ismail Vs. Dubai Islamic Bank Limited* and has contended that the entire process of auction carried out by respondent No. 2 in terms of Section 15 of the Ordinance, 2001, is a nullity in law and is liable to be declared as void, as the possession of the property in question has not yet been handed over to the auction purchaser, hence the matter is not a past and closed transaction as held by this Court in the aforesaid judgment dated 15.12.2014 passed in 1<sup>st</sup> Appeal No 114 of 2011.

4. Conversely Mr. Ilyas Khan Tanoli, learned Counsel appearing on behalf of respondent No. 1 has contended that the property in question was purchased in auction carried out by Respondent No. 2, after offering the highest bid and after transfer of property through a validly executed Sale Deed on 29.07.2005, a valuable right has accrued in favor of respondent No.2, which cannot be taken away at belated stage of the proceedings. It has been further contended that after having got the property transferred in his name, the respondent No. 2 had approached the Banking Court No.1, by filing an application under Section 15(6) of the Ordinance, 2001, which has been allowed vide impugned order, whereas, the death certificate produced by the appellant has been found to be bogus and further the appellant had also failed to produce the original of the said certificate despite several chances opportunities by the learned Banking Court in this regard. It has been prayed by the learned Counsel for respondent No.2 that instant appeal be dismissed with further directions to the appellant to hand over the vacant and peaceful possession of the property in question.

5. Mr. Khalil Ahmed Siddiqi, learned Counsel for respondent No.2 has supported the impugned order and has contended that since the auction was carried out much prior to the judgment of the Hon'ble Supreme Court in the case of National Bank (Supra), hence, the auction proceedings carried out by respondent No.2 in terms of Section 15 of the Ordinance, 2001, were valid and cannot be disturbed or interfered with at this stage of the proceedings.

6. We have heard the learned Counsel for the parties, perused the record and the case law as referred to hereinabove. Since a short controversy is involved in the instant case, by consent of all the learned Counsel, instant appeal is being heard and disposed of at Katcha peshi stage.

7. At the very outset, and without touching merits of the case, we may observe that insofar as facts of the instant case are concerned, the same are not in dispute that the mortgaged property in question had been auctioned by respondent No.2 in terms of Section 15 of the Ordinance, 2001, privately, and without any interference by the Banking Court. The respondent No.1 had thereafter filed an application under Section 15(6) of the Ordinance, 2001, to seek possession of the property through indulgence of the Banking Court No.1, at Karachi, on which application, the impugned order has been passed. The only controversy before us in the instant appeal is to examine the application and the effect of the judgment of the Hon'ble Supreme Court in the case of *National Bank supra* to the present case, whereby, the provisions of Section 15 of the Ordinance, 2001 have been declared to be ultra vires, and the effect of the judgment of this Court dated 15.12.2014 in 1<sup>st</sup> Appeal No114 of 2011 (Muhammad Ismail Vs. Dubai Islamic Bank Limited), whereby, it has been held that cases in which the auction proceedings have been finalized in terms of

the then Section 15 of the Ordinance, 2001, but possession of the auctioned property has not been handed over, will not fall in the category of past and closed transactions. The Hon'ble Supreme Court in the case of *National Bank supra* has explicitly and in detail has dealt with the entire provision of Section 15 of the Ordinance, 2001, and the conduct of the Banks viz a viz its customers and the effect of insertion of Article 10A in the Constitution of Pakistan 1973 through 18<sup>th</sup> Amendment, and has reached to a conclusion that the entire provision of Section 15 of the Ordinance, 2001, is ultra vires to the Constitution. The relevant findings of the Hon'ble Supreme Court are in Para 32 & 33 of the judgment which reads as under:

"32. In order to ascertain the real import and effect of section 15 of the Ordinance of 2001, it is necessary to contextualize the said provisions. A functional banking sector is an integral and essential component of any modern economy. In the normal course of business, loans and finance are advanced by the banks and utilized by their customers. However, some of such customers will be unable or unwilling to meet their obligations. Defaults by customers whether willful or commercial are a fact of life. The banks too may occasionally act unfairly by raising inflated and exaggerated claims and engineer defaults as they may cover the assets of their customers. Banks also default necessitating huge bailouts with tax payer's money. A utopian world where all customers fulfill their obligations and all bankers are saints does not exist. A large number of private banks and financial institutions now populate the financial sector and therefore more often than not the provisions of law under scrutiny would be pressed into service with regard to a dispute between private parties in respect of commercial transactions. No doubt the Banking Sector is vital to any country and may need some protection and preservation yet bestowing of an unfair advantage at the cost of customers may not be necessary or permissible.

33. The matters pertaining to the financial claims secured by mortgagors as in the instant case, generally involves a two stage process, firstly the determination of the liability through due process and after a fair trial inclusive of a right of hearing and opportunity of show cause. Such determination under the general law is evidenced by a decree of a Court of competent jurisdiction. And secondly, the recovery of the determined amount by way of the satisfaction or execution of such decree including through

the sale of mortgaged property. Even if a liability has been determined by a decree of the Court, the mortgagor/debtor is not deluded of all his civil rights including with regards to the modes and methods of such recovery through the sale of the mortgaged property. The right of such debtor to ensure that the mortgaged property is sold in a free, fair and transparent manner so as to fetch the best possible price is now a well recognized principle of law, which finds its manifestation both in various statutory provisions, more particularly, Code of Civil Procedure (including order XXI of C.P.C) as well as the law, as laid down by this Court, including the case reported as *Mir Wali Khan v. Agricultural Development Bank of Pakistan, Muzaffargah* and another [PLD 2003 SC 500], wherein it has been held as follows:-

“Crux of what has been discussed above is that clever maneuvering forcing way for disposal of a property in execution of a decree for a paltry sum has to be guarded against and jealously so with all the care and circumspection so that it may go for a sum it deserves.”

8. Similarly, in the case of *Muhammad Ismail Vs. Dubai Islamic Bank Limited*, the issue before this Court, (Bench comprising both of us) was, that whether in case wherein, the property has been auctioned in terms of Section 15 of the Ordinance, 2001, but either the Sale Deed has not been executed or if the Sale Deed has been executed, the possession of the property has not been handed over. After considering the above judgment of the Hon’ble Supreme Court, whereby the entire provision of Section 15 of the Ordinance, 2001, has been held to be ultra vires, and the judgment of the learned Lahore High Court in the case of *Muhammad Umer Rathore Vs. Federation of Pakistan (2009 CLD 257)* we had come to the following conclusion;

8. Though the Hon’ble Supreme Court has not dealt with or given any definite finding on the issue of past and closed transactions or as to what would be the effect of declaring the provision of section 15 of the Ordinance, 2001, as ultra vires, on cases which had not been finalized and were pending, or in which the entire process of auction, its sale, transfer and possession of the property had not been finalized as it was not the dispute before the Hon’ble Supreme Court. However, the learned full bench of the Lahore High Court in the case of *Muhammad Umer Rathore* supra has dealt with the issue of past and closed transactions, as by that time, the Banks had acted upon the provisions of Section 15 of the Ordinance, 2001,

in various cases by auctioning the properties of the customers. The learned full bench of the Lahore High Court came to the conclusion that only such cases could be said to be of past and closed transactions, and would not be effected by the judgment, which had attained finality, whereby possession of the mortgaged properties had already been delivered, sale proceeds stood adjusted towards outstanding amounts and sale deeds have been registered. It would be advantageous to refer to the relevant finding of the learned full bench of the Lahore High Court in this regard which reads as under:-

"The cases, which have attained finality i.e. where the possession of the mortgage properties have already been delivered, sale proceeds stood adjusted towards outstanding amounts and sale deeds have been registered, under the impugned provision, are past and closed transactions and this Judgment will not affect such sales. The other sales under the impugned provision, which have not attained finality are declared illegal and are set aside. The auction price received by the Financial Institutions in respect of the sales, which have not attained finality, shall be refunded to the auction purchasers within a period of one month from the date when he approaches the Financial Institution. In view of the above, all such petitions, which fall within the parameters discussed above, are accepted. However, in view of intricacies involved, parties will bear their own costs".

9. From perusal of hereinabove findings as recorded by the learned full bench of the Lahore High Court, and keeping in view the facts of instant appeal, we are of the view that without prejudice to any other objection as raised by the learned Counsel for the appellant, the case of the appellant is not of a past and closed transaction, as in the instant matter, neither the possession has been delivered to the Bank, nor any sale deed has been executed, whereas, only proceedings of auction have taken place in terms of Section 15 of the Ordinance, 2001, wherein, in fact the Bank itself has purportedly purchased the mortgaged property after carrying out auction on its own. Therefore, in our view, the case of the appellant is fully covered by the decision of the learned full bench of the Lahore High Court in the aforesaid terms. As observed earlier, this judgment of the learned full bench of the Lahore High Court, was also assailed by the Banks / Financial Institutions, before Hon'ble Supreme Court and the Hon'ble Supreme Court while hearing the appeals against the aforesaid judgments, along with other cases in the case of **National Bank supra** has already approved the decision of the learned full bench of the Lahore High Court, therefore, the findings with regard to applicability and impact of declaring Section 15 of the Ordinance, 2001, as ultra vires on pending cases and cases covered under past and closed transaction, has been duly approved by the Hon'ble Supreme Court as well.

10. In view of herein above, whereby the provision of Section 15 of the Ordinance, 2001, has been declared to be ultra vires by the Hon'ble Supreme Court, there is no substance in the contention of learned Counsel for the respondent bank, whereby

an objection has been raised on behalf of the respondent that since the auction proceedings had been completed, the judgment of the Hon'ble Supreme Court would not be applicable in the instant matter, as the auction was carried out before pronouncement of judgment of the Hon'ble Supreme Court. We have already observed that instant matter is not a past and closed transaction, therefore, the observations of the learned full bench of the Lahore High Court in the case of **Muhammad Umer Rathore supra** which has been duly approved by the Hon'ble Supreme Court as referred to hereinabove, are fully attracted in the instant matter. In view of such settled position, in our opinion, the auction proceedings carried out by the Respondent Bank in the instant matter, without issuance and proper service of mandatory Notice(s) in terms of section 15 of the Ordinance, 2001, cannot be sustained and the same is liable to be set-aside.

9. Therefore, insofar as the issue of past and closed transaction is concerned, we have already held in the case of **Muhammad Ismail (supra)**, that the three parameters laid down by the learned High Court in the case of **Muhammad Umer Rathore Supra** must have been completed, including the possession of the property auctioned by the Financial Institution in terms of Section 15 of the Ordinance, 2001, otherwise, the sale / auction is not complete and is liable to be declared as a nullity in the eyes of law, as Section 15 of the Ordinance, 2001, is no more a law on the statute book.

10. In view of hereinabove facts and circumstances of the instant case, we are of the view that since the auction proceedings had not been finalised, including handing over of possession of the property auctioned privately by respondent No.2 in terms of Section 15 of the Ordinance, 2001, which no more exists on the statute book, the impugned order cannot be sustained and is liable to be set aside. Accordingly, the auction proceedings in respect of the mortgaged property undertaken by respondent No.2 is hereby set aside. However, the respondent No.2, if so advised, may proceed for recovery of any amount due



against the mortgager / borrower, in accordance with law, whereas, the Sale deed executed in favour of respondent No. 1 also stands cancelled.

11. Instant Appeal is allowed in the above terms, however, with no order as to costs.

Dated: 29.05.2015

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