

Stereo. HCJDA 38.
Judgment Sheet
IN THE LAHORE HIGH COURT
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

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EFA No.30/2022

M/s Rafi Cotton Industries (Pvt). Ltd. etc.

Versus

Bank Al-Habib, etc.

JUDGMENT

Date of hearing: **22.10.2024.**

Appellants by: M/s Muhammad Sulaman Bhatti,
Peer Muhammad Masood Chishti,
Qaisar Abbas and Naveed Qadir
Khan, Advocates.

Respondents by: M/s Syed Muhammad Ali Gillani and
Anwar Kamal, Advocates for
respondent No.1.

ANWAAR HUSSAIN, J. Instant Execution Appeal is directed against orders dated 05.10.2022 and 13.10.2022, in terms of former order objections against auction sale were dismissed, in wake of the failure of the appellants to fulfil the condition of deposit 20% of the amounts realized at the sale; and by virtue of latter one, auction sale was confirmed in favour of the decree holder bank – respondent No.1.

2. Auction sale was confirmed in the backdrop of following facts; Suit instituted by respondent No.1 - [**“decree holder Bank”**] -, was decreed vide judgment and decree dated 07.03.2017, where-after those proceedings stood converted into execution, as provided in law. Thereafter, decree holder Bank sought execution through the

intervention of the Court. Auction schedule was approved, in terms whereof auction was to be held on 18.07.2022. Reserve price of the assets, subjected to prospective auction comprised of land, building and machinery, was settled at Rs.513,000,000/-. On 18.07.2022, auction proceedings commenced. Single bidder was registered – [namely, Abid Hussain] – but same had refused to make any bid. Court Auctioneers (“**the Auctioneers**”) adjourned auction proceedings for 22.07.2022, claiming powers under Rule (69) of Order XXI of Code of Civil Procedure 1908 (“**Code, 1908**”).

On 22.07.2022, previously registered bidder was present but same had again refused to tender any bid. Auction was again adjourned for 12.08.2022. On 04.08.2022, respondent No.1 – [Decree holder Bank] - moved application with the Court for permission to participate in the auction, which permission was granted vide order of 10.08.2022. Auction was conducted on 12.08.2022. As per the report of the proceedings dated 12.08.2022, Mr. Abid Hussain was declared as successful purchaser, out of three bidders, including decree holder Bank. Successful purchaser did not deposit 25% of the purchase money on 12.08.2022, on the pretext of closing of Banks after 5:00 pm. Auctioneers extended time for deposit till 15.08.2022, by 10:30 A.M. Auctioneers intimated the bidders that in case successful purchaser failed to deposit 25% of the purchase money by the time granted, second highest bidder would be asked to deposit 25% of the purchase money. And further declared that in case of failure of second highest bidder, third highest bidder, the decree holder Bank, would be

offered the option to purchase against the bid submitted on 12.08.2022. It is pertinent to mention that successful purchaser offered bid of Rs.517.700 Million; second bidder made bid of Rs.517.500 Million and third bidder – the decree holder Bank – gave bid of Rs.513.600 Million [barely Rs.600,000/- over the reserve price].

On 15.08.2022, upon default by the successful purchaser and second highest bidder, the bid offered by decree holder Bank was accepted, whereupon decree holder claimed benefit of set-off against the payment of 25% of the purchase money. Objections were filed by the appellants and vide order of 21.09.2022 Court directed deposit of 20% of the amounts realized at the auction. Order was affirmed by learned Division Bench of this Court upon dismissing appeal bearing EFA No.21/2022, vide order of 26.09.2022. On 05.10.2022 objections were dismissed for non-compliance to meet condition of deposit of 20%. On 13.10.2022 auction sale was confirmed in favour of the decree holder bank. Hence, this Appeal.

3. Foundational premises of the argument of the appellants rest on the ground that the Auctioneers had violated the mandate of Rule (84) of Order XXI of the Code, 1908. It is submitted that upon default in the payment of 25% of the purchase money, by the successful bidder, auction proceedings stood aborted and thereafter, the Auctioneers were required to re-sell the property, instead of offering the choice to the second and, thereafter, to the third highest bidder. It is emphasized that the expression ‘forthwith be re-sold’ implies conducting of fresh proceedings / bidding. Learned counsel pleads causing of substantial

injury to the appellants upon non-adherence of the statutory requirements. Following case-laws are cited to support the submissions, reported as, Mst. Nadia Malik V. Messrs Makki Chemical Industries Pvt. Ltd. through Chief Executive and others (2011 SCMR 1675), Afzal Maqsood Butt V. Banking Court No.2, Lahore and 8 others (PLD 2005 Supreme Court 470), Muhammad Ashraf and others V. U.B.L and others (2019 SCMR 1004), Muhammad Ali Asghar Sabir Raja V. Mst. Sajida Bashir and others (2006 SCMR 801), Mst. Samrana Nawaz and others V. M.C.B. Bank Ltd and others (PLD 2021 Supreme Court 581) and Messrs Habib and Company and others V. Muslim Commercial Bank Limited and others (PLD 2020 Supreme Court 227).

4. Conversely, learned counsel for respondent No.1 – auction purchaser-cum-decree holder Bank – submit that decree holder Bank had participated in the bidding upon seeking written permission of the Court, which was granted on 10.08.2022. Adds that grant of permission in terms of Rule (72) of Order XXI of the Code, 1908 entitles the decree holder Bank to claim set-off against the payment of purchase money, in which case Court possessed requisite discretion to dispense with the requirements of sub-rule (1) of Rule (84) of Order XXI of the Code, 1908. Further submits that objections to the auction were not entertainable once the appellants failed to deposit 20% of the amounts realized at auction sale. Adds that order, directing deposit of 20%, was unsuccessfully challenged through appeal, bearing EFA No.21/2022, which was dismissed *in limine* vide order of 26.09.2022.

Learned counsel emphasized that essentiality of fulfilment of the condition of deposit of 20%, before hearing the objections, was affirmed in the case of Mst. Samrana Nawaz and others V. MCB Bank Ltd and others (PLD 2024 Supreme Court 873), and various paragraphs of the decision are read.

On the question of re-sale of the property, once successful bidder failed to deposit 25% of the purchase money, it is submitted that the auction proceedings did not terminate at any stage but were simply adjourned, in exercise of discretion under Rule (69) of Order XXI of the Code, 1908, and no illegality was committed while offering option to the succeeding bidders, which manifest continuity of the auction proceedings without any break, providing no occasion for re-sale. Add that since auction proceedings were not adjourned beyond the 30 days limit, therefore, there was no necessity of issuing fresh proclamation of sale and re-conducting the auction proceedings.

5. Heard. Record perused.

6. Primary questions that arose for determination are, firstly, the effect and consequence of failure to fulfill the condition to deposit of 20% of the amounts realized; and secondly, an equally significant question, what is the scope, effect and consequence of alleged non-compliance of requirements under Rule (84) of Order XXI of the Code, 1908. Likely determination of aforesaid questions requires findings that whether non-compliance of mandate of Rule (84) of Order XXI of the Code, 1908 is so gross an illegality, falling in the realm of nullity, that irrespective of non-deposit of 20%, auction sale

could be declared invalid / void, simplicitor for non-compliance of Rule (84), *ibid*.

7. Before we proceed to adjudicate legal questions, it is appropriate to highlight / reiterate critical facts, that provoked our thinking and persuaded us to examine, threadbare, the allegation of non-compliance of statutory requirements under Rule (84) of Order XXI of the Code, 1908. It calls for attention that auction proceedings were scheduled for 18.07.2022, as per approved terms of proclamation of sale, claimed to have had published in newspapers having wide circulation, for the information of the public. Auction proceedings commenced on 18.07.2022 but the Auctioneers had adjourned it for 22.07.2022, on the premise that only one bidder had registered, who was not willing to make bid. *Whether adjournment of proceedings justified on this ground?* In normal circumstances, absence of bid is a ground to terminate proceedings, and seek fresh approval of the terms of sale from the Court. There is nothing available on record, nor alleged, that from 18.07.2022 to 22.07.2022 what steps / efforts were taken to ensure increased participation of prospective bidders in the auction.

On 22.07.2022 same position continued, and auction was adjourned for 12.08.2022 – at that point of time the decree holder Bank had not demonstrated intent to bid in the auction. *Was another adjournment justified when no bid was available with the Auctioneers.* Later, the decree holder Bank submitted application on 04.08.2022, seeking permission to participate in the bidding, adjourned for

12.08.2022. Permission was granted on 10.08.2022. On 12.08.2022 auction proceedings, either commenced or re-commenced, were conducted. Evidently, three bidders had participated. Abid Hussain, previously registered bidder, made highest bid, who was declared successful purchaser, against quoted bid of Rs.517.700 Million. Successful purchaser failed to deposit 25% of purchase money on 12.08.2022, who again failed on 15.08.2022. *Were the Auctioneers justified, in terms of Rule (84) of Order XXI of the Code, 1908, to offer option to purchase to second highest bidder, and upon his failure to extend option to purchase to third highest bidder [decree holder Bank] – the only bidder standing.* The decree holder Bank showed willingness to purchase and was declared as successful purchaser on 15.08.2022.

Our first concern is whether adjourning the auction proceedings, repeatedly was a coincidence or facilitation to the decree holder Bank to re-visit its strategy and take advantage of the continuing auction proceedings – which commenced on 18.07.2022 and apparently concluded on 15.08.2022. Our second concern is that when, on 18.07.2022, only one, an unwilling bidder, was available, what persuaded the Auctioneers to adjourn auction proceedings, firstly, for four days and thereafter till 12.08.2022 – presence of single, unwilling bidder, affords no plausible basis to adjourn the auction, when nothing was otherwise done to ensure reasonable participation of bidder, to meet requirements of a public auction. Apparently, probable outcome of repeated adjournments was discovery of second highest bidder and

re-thinking of strategy by the decree holder Bank - third highest bidder. We acknowledge that Rule (69) of Order XXI of the Code, 1908 extends discretion to the Auctioneers to adjourn the auction but then plausible reasons / explanation must be provided, but none found in the auction report. The Auctioneers had discussed previous unscrupulous conduct of Abid Hussain, highest bidder, but still adjourned the auction proceedings twice. We have discussed the facts appearing from the record and do not intend attributing insinuations. Circumstances narrated provided enough ground to adjudicate and examine the effect of non-compliance of mandate of Rule (84) of Order XXI of the Code, 1908, which appears to be a bigger lapse / illegality, in the context of aforesaid unique facts.

8. Before discussing the effect and repercussions of non-compliance of Rule (84), *ibid*, it is expedient to reproduce text thereof, before and after the amendment by the Lahore High Court, which read as,

Before amendment:

“Deposit by purchaser and re-sale on default.-(1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent, on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold”.

(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase money under rule 72, the Court may dispense with the requirements of this rule”.

After amendment:[Effective from 01.11.2020]

(1) “On every sale of immovable property, the person declared to be the purchaser shall pay to the officer or other person conducting the sale the amount equal to the reserve price of the property through pay order or bank draft or banker’s cheque immediately after such

declaration and in case such payment is not so made, the property shall forthwith be resold in the manner provided under this Order”.

9. Argument that where the decree holder Bank was successful purchaser, requirements under sub-rule (1) of Rule (84) of Order XXI of the Code, 1908, could be dispensed with is grossly flawed. Notwithstanding, the circumstances where successful purchaser is a decree holder, the concession available under sub-rule (2) of Rule (84) of Order XXI of the Code, 1908 is confined to the extent of requirement of deposit of 25% of the purchase money and does not spill to prejudice statutory direction regarding forthwith re-sale, if payment of purchase money was not deposited by declared successful purchaser. In case where decree holder is the successful purchaser and decretal amount is more than the bid offered and accepted, no occasion would arise for re-sale – construing default in such cases tantamount to an absurdity. Question of default under Rule (84) of Order XXI of the Code, 1908 would arise if decree holder bids and declared successful, and the decretal amount claimed is less than the bid price, or even less than 25% of the purchase money, in such case non-payment of the amount by the decree holder would obligate the Auctioneer to re-sell the property. It appears that distinguishing features of the case and extent of illegalities escaped attention of the Court, while confirming sale. Once declared successful purchaser – [Abid Hussain] – failed to arrange 25% of the purchase money, the auction, for all intents and purposes, aborts. Law does not envisage the option of revisiting the bidder’s list for picking and offering option to purchase to the succeeding bidder(s), lower on the list. Offering of such option to the second highest bidder does not constitute re-sale

but tantamount to continue or resurrect an otherwise aborted sale / proceedings. Rule (84) of Order XXI of the Code, 1908 does not envisage or permits the practice of continuing further with an aborted sale, once default was committed by the successful purchaser, in terms thereof. By offering the option to purchase to the lower and then to the lowest bidder tantamount to hedge the success of the auction, which is not required under Rule (84) of Order XXI of the Code, 1908. *Whether the Auctioneers were required to ensure the success of the auction even by conspicuously ignoring the mandate of law.* This is an illegality. And mere invocation of sub-rule (2) of Rule (84) of Order XXI of the Code, 1908, in the facts and circumstances, does not dispense with the necessity of forthwith re-sale upon happening of an event of default – failure of declared successful purchaser to deposit 25% of the purchase money. Expression re-sale of the property has to be examined in the context of Rule (84), *ibid*, which does not imply sale of property to the next bidder in the bidder's list – if that was intended it would have been expressed through original Rule (84) or by virtue of Lahore High Court amendment. Hypothetically, if there are two bidders and if the highest bidder fails to deposit 25% of the purchase money, as required under Rule (84) of Order XXI of the Code, 1908, would it imply that the other bidder would claim right to purchase the property *ipso-facto*. No! Second bidder had no entitlement in such circumstances, who may participate in fresh sale proceedings and bid. Hence, offering of option to the second highest and thereafter to third highest bidder is contrary to the mandate of Rule (84) of Order XXI of the Code, 1908. An aborted auction sale

cannot be resumed / resurrected upon proceeding to exhaust the list of bidders, in descending order. This manifests clear non-compliance and violation of mandatory requirement of law - Rule (84) of Order XXI of the Code, 1908.

10. There is another aspect of the matter. *Whether sale to single bidder is lawful and meets essential requirements of a Public Auction?*

In view of the facts of the case, once declared successful bidder had defaulted and likewise, second highest bidder was declared defaulter in the context of Rule (84) of Order XXI of the Code, 1908, and both the bids were cancelled - without prejudice to the observations recorded that offering of option to purchase to the second highest bidder is inherently illegal – only one bidder remained available – decree holder Bank. *Were the Auctioneers justified to offer option to purchase to the last standing bidder – in such circumstances, when there is single bidder left, re-sale of property would otherwise be an impossibility.* There is no dearth of case-laws on the point that presence of single bidder or availability of single bid is contrary to the spirit of public auction. Guidance is solicited from the cases reported as Muhammad Shoaib Arshad and another V. Federation of Pakistan through Secretary, Ministry of Law, Justice Human Rights and Parliamentary Affairs and 4 others (2020 CLD 638) and Al-Hadi Rice Mills (Pvt.) Ltd. through Chief Executive and 4 others V. MCB Bank Limited and 6 others (2023 CLD 85).

In a recent decision by the Apex Court of the Country, in the case of Summit Bank Limited, Lahore V. Messrs M. M. Brothers,

Proprietorship Concern through Proprietor and others (2023 CLD 297), significance of competitive bidding was reiterated, which relevant observations are reproduced hereunder,

“11. It is well-known that an auction is a form of sale of property to the highest bidder, usually as a result of competition between bidders who compete among themselves by offering competitive prices and the highest bid is normally approved, but according to the established norms and standards, the presence of at least two potential bidders is indispensable to carry out an auction in which competitive bidding is a key factor for free and transparent public auction.....”

[Emphasis supplied]

11. On the question of invalidity of auction sale once default in terms of Rule (84) of Order XXI of the Code, 1908 had occasioned, we refer to the observations returned in the case of Afzal Maqsood Butt (supra), reproduced hereunder,

“5..... In case of failure of purchaser to deposit of the sale price in full in terms of the above rules, the sale becomes invalid and the Court is under obligation to re-sell the property forthwith.....”.

12. We hold that giving continuing effect to an invalid / aborted sale constitute an illegality, bringing case within the realm of patent nullity / voidness. No continuity of sale proceedings was envisaged or directed in terms of Rule (84) of Order XXI of the Code, 1908, which prescribed option of re-sale, which implied annulment of the process of auction sale, upon happening of default under Rule (84) of Order XXI of the Code, 1908. Sale in question violates mandate of law, which, in the context of the facts and circumstances, is bordering fraud, resulting in substantial injury to the appellants.

13. Now we address the last question that whether invalid / void sale could be declared as such despite non-compliance of deposit of 20% under Rule (90) of Order XXI of the Code, 1908. Question raised is answered in the case of 'MUHAMMAD ASHRAF and others (supra), relevant paragraph is reproduced hereunder,

Para 8 “... *Without dwelling further on this aspect of the matter, we are constrained to observe that there can be no escape from the fact that even in the absence of an Objection Petition, learned Executing Court is not required to automatically confirm an auction mechanically and without application of mind by not even, considering the law applicable. Such is the law laid down by this Court in the case reported as National Bank of Pakistan and 117 others v. SAF Textiles Mills Ltd. and another (PLD 2014 SC 283).*

14. In the case of Mst. Nadia Malik (supra), it was observed that non-compliance of condition of deposit under Rule (90) of Order XXI of the Code, 1908 could be condoned in exceptional circumstances, which *inter alia* include violation of mandatory provisions of Order XXI of the Code, 1908.

In the case at hand, Rule (84) of Order XXI of the Code, 1908 was violated by treating an aborted sale as continuing, which illegality resulted in extending premium to the decree holder Bank, by way of offering the option to purchase, being the third highest bidder, instead of going for re-sale, which means conduct of auction proceedings *de-novo*. Context of substantial injury and prejudice caused to the judgment debtor, in wake of violations qua mandatory provisions of Order XXI, in cases when purchaser is an independent third party and in case of purchase by the decree holder Bank, have had to be appreciated while issuing direction in terms of second *proviso* to Rule (90) of Order XXI of the Code, 1908, depending upon the facts and

circumstances of the case. Principles laid down in the case of Hudaybia Textile Mills Ltd. and others V. Allied Bank of Pakistan Ltd. and others (PLD 1987 Supreme Court 512) are not attracted, in the context of peculiar facts of this case. In view of the facts narrated, we are constrained to hold that failing to interfere, upon being convinced that mandate of Rule (84) of Order XXI of the Code, 1908 has been violated, would extend premium to the decree holder Bank at the expense of causing substantial injury and wrongful loss to the appellants. We declare that notwithstanding the failure to deposit 20% of the amounts realized, auction sale cannot be confirmed in wake of violations committed - ratio settled in the case of 'MUHAMMAD ASHRAF and others' (supra) is attracted.

The case of Mst. Samrana Nawaz and others (supra) is not applicable to the peculiarity of allegations against the sale, which decision in fact interprets the scope and effect of second *proviso* to Rule (90) of Order XXI of the Code, 1908, in the context of requirement of direction of the Court, for the purposes of imposing the condition, extent and nature thereof. Case of Mst. Samrana Nawaz and others (supra) does not lay down the principle that a sale, nullity in law, carried out in violations of mandatory requirements, still be protected if condition of deposit under Rule (90) of Order XXI of the Code, 1908 was not met. Ratio settled in the case of 'Al-Hadi Rice Mills (Pvt.) Ltd. through Chief Executive and 4 others', (supra) is reiterated in the context of sales, spilling into the realm of nullity.

15. There is another peculiar feature of the case. Examined in the context of gross illegalities committed, we are convinced that no apparent prejudice has been caused to the decree holder Bank, which had claimed privilege of seeking set-off and was not obligated to deposit purchase money.

16. In view of aforesaid, we allow instant appeal, declare the auction sale in favour of respondent No.1 a nullity, void and of no legal effect including all actions taken pursuant to the auction or confirmation thereof. Consequently, order of confirmation of sale dated 13.10.2022 is, hereby, set aside. No order as to the costs.

(Asim Hafeez)
Judge

(Anwaar Hussain)
Judge

Imran/*

APPROVED FOR REPORTING

Judge

Judge