

Stereo.HCJDA 38.
Judgment Sheet
IN THE LAHORE HIGH COURT, LAHORE.

JUDICIAL DEPARTMENT

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Civil Revision No.72449 of 2023.

Adnan Anwar.

Versus

Ijaz Ahmad & others.

JUDGMENT.

Date of hearing: **18.04.2024.**

Petitioner by: Barrister Muhammad Adil Fayyaz.

Respondents No.1-3 by: Mr. Javed Iqbal Bhatti, Advocate.

Respondents No.4-8 by: Hafiz Muhammad Mohsin Waseem
Sipra, Advocate.

AHMAD NADEEM ARSHAD, J. Through this Civil Revision filed u/s 115 of *Code of Civil Procedure, 1908*, petitioner has called into question the vires, validity and legality of judgment dated 20.09.2023 whereby learned Appellate Court, while accepting the appeals of respondents, set-aside the judgment/order of learned Trial Court through which the auction was confirmed in favour of the petitioner and sale certificate was issued.

2. *Pithily*, the facts forming background of proceedings in hand are that respondents No.4 to 8 instituted a suit for possession through partition against respondents No.1 to 3 qua four immoveable properties. The learned Trial Court, after observing due codal formalities, decreed the suit vide judgment & decree dated 20.12.2021 and adjourned the proceedings for submission of mode of partition. Since the defendants were not in attendance, hence, the learned Trial Court observed that without their consent referee cannot be appointed and the property was put to internal auction by

fixing the reserve price vide order dated 07.02.2023. Due to absence of defendants, learned Trial Court declared internal auction to be failed and appointed Muhammad Aslam Khan, Advocate as Court Auctioneer with a direction to submit proposed schedule of open auction vide order dated 17.04.2023. Thereafter, the auction schedule was approved vide order dated 11.05.2023 and the case was adjourned for awaiting the report of Court auctioneer. In the meanwhile, order dated 17.04.2023 and 11.05.2023 were challenged by respondent No.1 through preferring an appeal. Said appeal was allowed vide order dated 12.06.2023 subject to depositing an amount of Rs.10 million before the Executing Court within a week and respondent No.1 was granted single opportunity to participate in the internal auction. Respondent No.1 failed to deposit the said amount within the stipulated time. As the learned Appellate Court had not suspended and set aside the order of open auction dated 11.05.2023, hence, the Court auctioneer conducted the auction proceedings and resultantly properties were auctioned on 15.06.2023 and 16.06.2023. In the said auction proceedings, petitioner participated and declared to be the highest bidder with regard to the commercial shop measuring 01 Marla bearing Khewat No.443, Khatuni No.448, Khasra No.287 situated at the Revenue Estate Chak No.51, Tehsil & District Mandi Bahauddin. On 26.06.2023, the Court Auctioneer submitted his report. On the said date, petitioner also submitted an application seeking permission to deposit remaining 80% amount in the Court. Learned Trial Court adjourned the proceedings for perusal of report and further appropriate order. Vide order dated 06.07.2023, auction in favour of the petitioner was confirmed subject to payment of entire remaining amount till 15.07.2023. Petitioner deposited the total sale consideration amount through Receipt dated 10.07.2023 and through Challan Form on 12.07.2023. Learned Trial Court vide order dated 17.07.2023 directed to issue sale certificate in favour of the petitioner. After rejection of the objections raised on the auction proceedings, respondent No.1 challenged the orders dated 26.06.2023 and 06.07.2023 through preferring an appeal. Learned

Appellate Court disposed of the appeal in terms that the learned counsel for the parties shall inform the executing Court about their compromise and also deliver arguments on their objections and after hearing the purchaser of the property, learned Executing Court shall decide the same in accordance with the provisions of Section 11(5) and 11(10) of the Punjab Partition of Immoveable Property Act, 2012. Consequently, the learned Trial Court vide order dated 27.07.2023 dismissed the objections. Being dissatisfied, respondents No.4 to 8 as well as respondents No.1 to 3 preferred their separate appeals by challenging the orders of learned Trial Court dated 06.07.2023, 17.07.2023 and 27.07.2023. Learned Appellate Court, while accepting the appeal of respondents No.4 to 8 set aside the auction proceedings dated 15.06.2023 and 16.06.2023, the orders of confirmation of sale and also cancelled the sale certificate issued in favour of the petitioner as well as other successful bidder namely Asif Sohail (*respondent No.9*) vide impugned order dated 20.09.2023. Respondent No.9 did not assail the said order, however, petitioner challenged said order through filing instant revision petition.

3. I have heard learned counsel for the parties at length and perused the record with their able assistance.

4. From the perusal of record, it has transpired that petitioner participated in an open auction held on 15.06.2023 and declared highest and successful bidder of a commercial shop measuring One Marla by giving higher bid amounting to Rs.38,500,000/- the reserve price of which was Rs.23,878,100/-. Accordingly, he deposited the 20% of his bid amount i.e. Rs.7,700,000/- (*Rupees 100,000/- in cash and Rs.7,600,000/- through cheque*). Learned Appellate Court set aside the auction on the ground that petitioner failed to deposit the remaining auction amount within the period of 07-days fixed by the law as well as on the grounds of other irregularities and illegalities committed during the auction proceedings.

5. Learned counsel appearing on behalf of the petitioner maintains that petitioner participated in the auction proceedings held on 15.06.2023 and he was declared to be the successful bidder who

deposited the 20% of the bid amount forthwith to the Court Auctioneer. Petitioner moved an application before the Court on 26.06.2023 whereby he sought permission to deposit remaining bid amount. Said application was allowed by the Trial Court on 06.07.2023 and he was directed to deposit the remaining bid amount before 15.07.2023. Learned counsel for the petitioner has drawn attention of this Court towards the receipt/Transfer Pay In Slip dated 10.07.2023 whereby an amount of Rs.38,400,000/- was deposited in the Government treasury account G-11215 and Challan Form No.32-A whereby said amount was deposited in the Court on 12.07.2023. He argued that petitioner complied with the direction of the Court within the stipulated time, hence, he could not be penalized for the act of the Court.

6. In response to this, learned counsel for the respondents argued that petitioner was bound to abide by the law, where it has been provided that the successful bidder shall deposit the remaining 80% amount within a period of 07-days. He referred to the “Auction Proclamation” (اشتہار نیلام عام) wherein at serial No.6 of the auction conditions it has been mentioned that the purchaser will deposit the remaining auction price of 80% in the Court within 15 days and in case of default the Court has jurisdiction to deduct the auction expenditures from the deposited 20% amount and put the property to re-auction in case the highest bid is lower than the earlier highest bid then that difference shall also be deducted. For ease, said clause is reproduced as under:-

”باقیہ زر نیلام کا حصہ (80%) 15 دن کے اندر کامیاب بولی و ہندہ فاضل عدالت میں جمع کرائیگا۔ عدم ادائیگی کی صورت میں عدالت کو اختیار ہو گا کہ وہ 20% جمع شدہ رقم سے اخراجات نیلام وضع کرے اور جائیداد دوبارہ نیلام کرے۔ دوبارہ نیلام میں پہلی بولی سے جتنی کم رقم نیلامی ہو گی اس کی بھی کٹوتی کرنے کے بعد رقم واپس کی جائے گی۔“

And argued that at the most the petitioner could take advantage of the “Auction Proclamation” wherein he was required to deposit the remaining amount within 15 days, to which he also failed.

7. Before proceeding further, it is better to consider the provision of open auction as described in Section 11 of the Punjab Partition of Immoveable Property Act, 2012, which reads as under:/

11. Open auction.—(1) If the co-owners refuse to participate in the internal auction or only one co-owner shows his willingness to participate in such auction or the internal auction under section 10 has failed, the Court shall fix the reserve price of the immovable property and direct open auction of the property.

(2) A co-owner of the immovable property may participate in the open auction of the property.

(3) The Court shall appoint a court auctioneer for conducting the open auction and fix fee of the court auctioneer to be paid by the co-owners in proportion to their respective shares in the immovable property.

(4) The court auctioneer shall submit in the Court an auction plan in the form of a public notice which shall include detailed specifications of the immovable property, the time, date and place of open auction, and the amount of bid security for participating in the open auction, and the Court may approve the auction plan with or without modification and direct its publication in such manner as it deems appropriate.

(5) The court auctioneer shall conduct open auction under the auction plan approved and published by the Court and direct the highest bidder to deposit—

(a) earnest money equal to twenty per cent of the bid price immediately on the close of bidding; and

(b) the remaining amount of the bid price in the court within seven days.

(6) The court auctioneer shall maintain the record of the auction proceedings and return the bid security to unsuccessful bidders but shall adjust the bid security of the highest bidder in the bid price.

(7) The court auctioneer may, in an appropriate case, accept deposit under clause (a) of subsection (5) in the form of cash, crossed cheque, demand draft or banker's cheque against a receipt.

(8) The court auctioneer shall, immediately after conclusion the auction, deposit in the Court the auction price collected by him along with the auction report.

(9) If the highest bidder deposits the auction price under subsection (5), the Court shall confirm the sale, put the highest bidder in possession of the property and distribute the auction price amongst the co-owners according to their respective shares.

(10) If the highest bidder fails to deposit the auction price under subsection (5), the amount deposited by him shall stand forfeited and the immovable property shall be put to open

auction again, as far as possible, in accordance with the procedure contained in this section.

8. From the perusal of section 11 (5) of the Act *ibid*, it emerges that the highest bidder is bound to immediately deposit the 20% of his bid amount and the remaining amount is to be deposited within 07-days. The sub-clause 10 of Section 11, provides the consequence of non-compliance of the former provision, wherein the legislature has provided that if the highest bidder fails to deposit auction price under sub-Section 05, the amount deposited by him shall stand forfeited and the immoveable property shall be put to re-auction.

9. The provision with regard to payment of 80% of the balance purchased money contained under sub-section (5) of Section 11 of the Act *ibid* is mandatory in nature and not merely directory and that non compliance thereof renders a sale void and the court is under obligation in such circumstances to order for resale of the property in terms of Section 11(10) of the Act *ibid*. Non payment of balance 80% of the purchase money cannot be described as an irregularity in connection with the “publication and conducting of the sale” so as to attract the provisions of Order XXI, Rule 19 CPC. The fact of non compliance of Section 11(5) of the Act *ibid* on auction sale is that the sale is rendered void and there is no sale within the contemplation of said section. In the event of a default the previous proceedings for sale would completely wiped out as if they do not exist in the eye of law. The Court had no power either under Section 148 or Section 151 CPC to extend the time fixed for payment of the balance money of sale price. The maxim that act of the court prejudice no man apply on to those cases where it is shown in the first place that the party, who acted bona fide on the order of Court was in no way responsible for passing of that order and secondly the party was in a position to meet his obligation under law but non compliance resulted due to orders of the Court. The Court was not possessed any power to enlarge the time fixed under this Section *ibid*. The Hon’ble Supreme Court while discussing consequences of non deposit of $\frac{3}{4}$ auction money by purchaser within 15-days as provided

under Order XXI, Rules 85 and 86 of CPC in a case titled Mst.Nadia Malik Versus Messrs Makki Chemical Industries Pvt Limited through Chief Executive and others (2011 SCMR 1675) observed as under:-

"12. The next question before this Court is whether the executing Court while following the provisions of Order XXI, Rules 84 and 85 CPC, was competent to extend time before 15 days for deposit of balance 75% of the amount of the auction money. The answer in this behalf would be in negative. The time for deposit of amount is provided under Order XXI, Rule 85 C.P.C. Under Rule 85 an auction purchaser shall deposit 25% of the auction amount immediately on being declared as highest bidder and the balance amount of 75% shall be deposited within 15 days of the auction. In the present case, the sale was confirmed on 29-04-2002 on which date the appellant had deposited 35% of the auction amount. In terms of Order XXI, Rule 85 C.P.C., the appellant was required to deposit the balance amount of Rs.6.00 million by 13-05-2002. Admittedly, this amount was not deposited by the said date and record reveals that an application for extension of time was made by the appellant on 13-5-2002 and on 14-05-2002 an amount of Rs.3.00 million was deposited and for the balance amount of 3 million further time of 10 days was sought. The appellant as has already been observed earlier has deposited Rs.19,93,750 on 29-04-2002, which was 25% of the auction price whereas Rs.3.00 million was deposited on 14.5.2002 after a lapse of 15 days, the stipulated time, and the remaining 3.00 million on 23.5.2002. The default in deposit of the balance amount was violative of the mandatory conditions provided under the proclamation which language was borrowed from the mandatory provisions of the Order XXI of the C.P.C. Failure to deposit the balance amount of 75% of auction money within 15 days by the appellant renders the sale/auction proceedings nullity . The language of Order XXI, Rules 84 and 85 C.P.C are mandatory in nature. If the balance amount of auction price is not paid within the stipulated period of 15 days, the court has the discretion to forfeit the deposit and order re-sale of the property. In addition to forfeiture, the defaulted purchaser forfeits all claims to the property. The conditions contained in the proclamation provide all such details. It has provided that a party who is declared as highest bidder, shall immediately deposit 25% of the sale price and remaining 75% of the sale price would be deposited within 15 days. Violation of these conditions would not empower the executing court to extend time for deposit of balance amount unilaterally."

10. The legislature has not necessitated the permission of the Court to deposit the remaining consideration amount. Petitioner was bound to deposit the remaining 80% amount within 07-days after the auction to which he failed. Hence, non-compliance of said mandatory provision entails the penal consequences.

11. There is no force in the arguments of learned counsel for the petitioner that the petitioner deposited the remaining 80% amount within the period stipulated by the Court. In this regard, suffice is to say that no Court can deviate from the mandatory provision of law.

The act of the Court derives force from the statute and when the statute has not provided any leniency in this regard then how the Court could give any relaxation. The Division Bench of this Court in its reported judgment titled as *Messrs Magi Chemicals Industries (Pvt.) Limited through Chief Executive and 3 others Versus Habib Bank Limited through Manager and 2 others (2003 CLD 571)* observed as under:-

"14. The arguments of learned counsel for respondent No.3, that because the Court had enlarged the time on 14.5.2002 and if the application had been refused in terms of Rule 85, the purchaser would have made arrangement to make the deposit and thus in the above situation, the purchaser on account of act of the Court, cannot be prejudiced.

We are afraid, this argument has no substance, because every person is required to know the law. Thus respondent No.3, should have known that full payment has to be made within 15 days and her application by itself was absolutely unfounded and misconceived, it was an abortive attempt to circumvent the provision of Rule 85. The rule that no one shall be prejudice on account of an act of the Court, would only be applicable in those cases, where the court has the authority to pass the order but the order is erroneous, however, where the court lack the authority and absolutely has no jurisdiction, notwithstanding such order having been passed by the court, a person cannot take premium of such void order on the principle mentioned above."

12. In view of the above, learned Appellate Court has rightly allowed the appeals of the respondents. Learned counsel appearing on behalf of the petitioner remained unable to point out any illegality, irregularity or jurisdictional defect in the impugned judgment. Impugned judgment has been passed in accordance with law after due appreciation of the law on the subject, which do not call for any interference by this Court while exercising revisional jurisdiction.

13. For what has been discussed above, the instant Civil Revision is without any merits, hence, the same is hereby **dismissed** with no order as to costs.

**(AHMAD NADEEM ARSHAD)
JUDGE**

Approved for reporting.

JUDGE

*M.Arsalan**