

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUSHIR ALAM

MR. JUSTICE DOST MUHAMMAD KHAN

Civil Appeal No.1129 of 2013

Against order dated 04.4.2012 passed
by Lahore High Court, Lahore in W.P.
No.3974 of 2005

Major ® Pervez Iqbal

Appellant(s)

Versus

Muhammad Akram Almas, etc.

Respondent(s)

For the Appellant(s):

Mian Ashaq Hussain, ASC
Ch. Akhtar Ali, AOR

For Respondent No.1:

Mian Asrar ul Haq, Sr. ASC

For Respondent No.3:

Tehseen Sadiq, Addl. Commissioner (FBR)

For Respondent No.5:

Nemo

Date of Hearing:

10.01.2017

JUDGMENT

Mushir Alam, J- Appellant has impugned order dated 04.4.2012 whereby the learned Judge in Chambers of the Lahore High Court, Lahore dismissed the CMA No.2565 of 2009, under section 12(2) of the CPC, challenging the judgment of the very Court dated 25.4.2007, whereby Writ Petition No.3974 of 2005, filed by one Muhammad Akram Almas, Respondent No.1 herein, seeking *writ of mandamus*, against the Income Tax Authorities to issue sale certificate and possession of the property of tax defaulter, purchased by him in open auction and, further direction to the Military Estate Officer (MEO) and others to affect mutation of said property in his favour, which was allowed.

2. Leave in the matter was granted vide order dated 5.9.2013, which reads as follow: -

"Submits that respondent No.1 filed a constitution petition seeking a direction that the Income Tax Department should issue a sale certificate in his favour pursuant to the auction of petitioner's property measuring 7 Kanals at a paltry amount of Rs.20,54,047/-

notwithstanding the fact that the sale in auction had abated in view of Rule 150 read with Rule 111 of the Income Tax Rules, 1982; that respondent himself gave incorrect address of the petitioner in the writ petition filed by him, on account of which petitioner was neither served nor heard by the learned High Court while passing the judgment dated 25.4.2007.

2. Having heard petitioner's learned counsel at some length, leave is granted inter alia to consider the issue raised."

3. In order to appreciate the controversy raised in the instant appeal, it would be necessary to recapitulate facts forming matrix of controversy.

4. Appellant, adjudged tax defaulter, after service of a show cause notices as required under the law, he was arrested on 22.8.2000; he was released on commitment to clear the dues in installments. However, on his failure to adhere to such payment schedule, he was again arrested and produced before the Tax Recovery Officer (TRO) on 23.12.2000. The appellant in order to earn his release, per rules disclosed the property subject matter of instant proceedings, gave consent in his own writing for the attachment and auction of the property, for the recovery of tax dues, as a result thereof, subject property was attached and put to auction after fulfilling all the requirements of Rules 141 & 142 of IT Rule, 1982. Auction succeeded second time and the respondent No.1 was declared successful on 31.5.2001, entire amount of Rs.64,25,000/- was deposited within time. Auction purchaser also paid additional amount of Rs.1,92,750/- as gain tax on the sale of this property, which otherwise was payable by the appellant.

5. From the record it seems that Military Estate Officer (MEO), requested for the deferment of the sale on the ground, *inter alia*; that the property has not been mutated in the name of the appellant. The matter shuttled between the TRO, MEO and Station Commander Head Quarter, Sialkot Cantt without any resolution. From the record it appears that the appellant succeeded in obtaining a decree dated 21.12.1994 in a Civil Suit No.761/1993, for specific performance in respect of subject property held on old grant by the previous owners. In execution proceedings, conveyance deed dated 2.3.2000 was executed in his favour, however, for obvious reasons he

did not followed up his application for the mutation of subject property in his favour from the *MEO*, apparently, for this reason his name was not recorded in the *General Land Register (GLR)* maintained by the *MEO*, which provided a cause to the *MEO*, to make request to defer the auction.

6. Respondent No.1, when failed to obtain the sale certificate from *TRO*, needed for effecting mutation of the property in his name, as a last resort filed Writ Petition No.3974 of 2005, which as noted above was allowed on 25.4.2007 and the Income Tax Authorities were directed to issue sale certificate, which was issued in favour of the Respondent No.1, on 2.5.2007. *MEO* was also directed to consider the application for mutation of the auction purchaser in accordance with law. *MEO* unsuccessfully challenged the order of the High Court, before this Court through Civil Appeal No.529-L of 2009, which was dismissed vide order dated 20.7.2011; however, right of the appellant to pursue his Application under section 12(2) CPC; (filed on 01.6.2009) then pending before the learned Lahore High Court was preserved. The application, was ultimately heard and dismissed, vide impugned order, essentially on the ground that the appellant had neither challenged nor, availed the remedy against the auction in terms of Rule 127 of Income Tax Rules, 2002 (*contemporary Rule 106 of IT Rules 1982*).

7. Mian Ashiq Hussain, learned ASC appearing for the appellant, vehemently contended that on the application made by the *MEO/Station Commander*, the *TRO* had deferred the sale vide order dated 30.6.2001 available at page No.86 of the main paper book, which according to learned ASC amounted to setting aside of the auction sale in terms of Rules 111, 141 and 150 of IT Rules, 1982 requiring fresh proclamation, which was not issued. Therefore, auction if any, is of no consequences. To a specific query of the Court, learned counsel candidly conceded that the appellant did not challenge the auction sale held on 31.5.2001. He however, maintained that under the law auction sale could be challenged by any person and in instant case it was challenged by the *MEO*, in accordance with IT Rules, 1982. It was next urged that, impugned judgment of the High Court is a result of fraud and misrepresentation, correct address of the appellant was not disclosed by the Respondent No.1, appellant has not been heard, impugned judgment is liable to be set aside.

8. Mian Asrar ul Haq, learned Senior ASC appearing for the respondent No.1 vehemently opposed the appeal. According to him auction was held with the consent of appellant. Auction, succeed in second attempt on 31.5.2001. Respondent No.1/Auction purchaser had deposited the entire sale consideration within time. It was urged that since the auction purchaser was denied the sale certificate on the intervention of *MEO*, on wholly unjustified grounds, who otherwise had no interest in the property, therefore he was compelled to file writ petition, which was allowed. It was argued that appellant consented to the attachment and auction of subject property. According to him, Sale Certificate was issued on 2.5.2007 on the directions of High Court; appellant had a right to challenge the auction/sale within 30 days from the date thereof under the IT Rules 1982, which he failed. He cannot be allowed to challenge the auction, through 'collateral proceedings' under section 12 (2) CPC filed on 1.6.2009 after more than 8 years.

9. Mr. Tehseen Sadiq, Additional Commissioner (FBR) representing Tax Authorities, also supported the impugned order. According to him, attachment and auction of the appellant's property was carried out strictly in accordance with Income Tax Act, 1979 and IT Rules, 1982. The appellant was given several opportunities to clear his dues, which he failed. Appellant volunteered the attachment and auction, which was held twice, to his knowledge, which he never challenged before the TRO and or the hierarchy provided under the IT Rules 1982.

10. We have heard the arguments and perused the record. Admittedly appellant was adjudged a tax defaulter, Certificate to such an effect in terms of sub section (1) of section 93 of the Income Tax Ordinance, 1979 read with Rule 100 of the IT Rules 1982 was issued by the Income Tax Officer to the TRO, to effect the recovery, by attachment, arrest and sale of the property of the defaulter/Appellant. There is also no dispute as to the service of the show cause notice under section 93 (1) of Income Tax Act, 1979 read with Rule 162(1) of the Income Tax Rules, 1982. It is not denied by the appellant that he was arrested and he agreed to pay dues in installments, which commitment he could not adhered. It is a matter of record that he was again arrested and produced before the *TRO* on 23.12.2000 and, in order to earn his release, the appellant disclosed his whole of the

property and placed the same at the disposal of *TRO* for the recovery of tax dues in terms of Rule 167 (1) of *IT Rules 1982*, which reads as follows: -

"167. Release--(1) The Tax Recovery Officer may order the release of a defaulter who has been arrested in execution of a Certificate upon being satisfied that he has disclosed the whole of his property and has placed it at the disposal of the Tax Recovery Officer and that he has not committed any act in bad faith."

The appellant in terms of above rule also authorised the *TRO* to auction the said property and recover the amount due, endorsement in his writing reads as under: -

"میرے ذاتی نام پر پہلے تک کوئی غیر منقولہ جائیداد نہ تھی۔ عدالت کے ذریعے سے ایک سات کنال کپلاٹ بنگلہ نمبر ۷۳ سیالکوٹ کینٹ میں میرے نام پر مورخہ ۲۰۰۰-۰۳-۰۲ کو رجسٹری ہو گیا تھا جس کی رجسٹری کی کاپی پیش کر رہا ہوں۔ اس پر اپرٹی کو محکمہ قانونی طور پر **Attach** کر کے اپنی ریکوری کے لئے اس کو **Auction** کرے تو مجھے کوئی اعتراض نہ ہو گا۔ اس کی **Attachment** کی ایک کاپی پر میں نے خود آج دستخط کر دیئے ہیں۔"

11. Consequently, his property was attached second time, in terms of rule 137 of the *IT Rules 1982*. It is a matter of record that, an attempt to obtain stay from Civil Court failed and so also Lahore High Court in Civil Revision No.1261 of 2001 declined any indulgence to stay the auction vide order dated 7.06.2001. Subject property was auctioned on 31.5.2001; Respondent No.1 was declared the successful bidder. Appellant was fully aware of the auction, chose not to avail the remedy under Rule 111, 149 and or Rule 150 of *IT Rules 1982* and did not challenged the auction till before 1.6.2009, that too in a collateral proceedings under section 12 (2) CPC.

12. In terms of scheme of *IT Rules 1982*, where no application is made for setting aside the sale of the attached property under Rule 149 or 150 of the Rules *ibid*; or where any such application is made and is dismissed, the *TRO*, in terms of Rule 152 *ibid* is obliged, on payment of entire bid amount, to confirms the sale, which than becomes absolute and consequently *TRO* is further obligated in terms of Rule 154 of the *IT Rules 1982* to issue the Sale Certificate.

13. The Respondent No.1 being declared successful bidder having paid the entire bid amount in the sum of Rs.64,25,000/- on 14.6.2001 and further sum of Rs.1,92,750 as gain tax due and payable by the appellant. Respondent was denied sale certificate and became victim of brawl between the *TRO* and *MEO*, filed W.P No.3974 of 2005 dated 11.3.2005, before the Lahore High Court seeking writ of mandamus against the *TOR* and *MEO*, to perform their legal duties, which Writ Petition was allowed on 25.4.2007, consequently *TRO* issued Sale Certificate to the Respondent No.1 on 2.5.2007.

14. It may be observed that sub-section (4) of section 93 of the Ordinance, 1979 bestows on the *TRO* similar power as are vested in a Civil Court for the recovery of amount under a decree. Provisions contained in Chapter IX (Rules 99 to 190) of the IT Rules, 1982 are complete Code akin to provisions of Order 21 rule 82 to rule 104 CPC, whereby the tax defaulter and or any person having any right or interest in the property attached and or sold pursuant to attachment order for the recovery of arrears of tax, may seek stoppage of sale, (Rule 111 *ibid*) challenge such auction/sale, before the *TRO*, (as provided for under Rule 149 and 150 respectively of Rules *ibid*). Against any order of sale hierarchy of appeal under Rule 173, which is subjected to Revision under Rule 174 and Review under Rule 175 *ibid*; is provided, thus elaborate procedure for attachment and sale of immovable property of the defaulter and host of remedies pre and post auction/sale are provided under the Income Tax Rules, 1982. It is settled position in law that where special law provides elaborate mechanism and procedure to challenge certain action under the scheme of special law, recourse to general law and or challenge to such action, that too through collateral proceedings are not approved. Neither the Appellant nor any other respondents herein filed any application against the auction of the subject property within the contemplation of IT Rule 1982. In instant case rule 111 *ibid*, which may justify stoppage of sale, on satisfactory proof of payment of tax dues, before the hammer is struck down in favour of the highest bidder, was not availed by the appellant, thus it cannot be pressed into service.

15. Arguments of learned ASC for the appellant, that the objections filed by the *MEO* could always be treated as an application

under Rule 149 or Rule 150 *ibid*; are flawed for the simple reasons that sale under referred rules could only be annulled on meeting twin conditions set down therein; with a rider that such challenge is made within 30 days from the date of sale. First condition is the deposit of the amount mentioned in the proclamation of sale with 8% interest and second is to pay a sum equal to 10% of the purchase money to the purchaser, admittedly such conditions as noted herein were neither met by the *MEO* nor by the appellant, therefore, the objections of *MEO*, which even otherwise, were on altogether different premise, could not be treated as challenge to auction sale under the referred rules. The appellant cannot question sale on the ground of irregularity in service in terms of Rule 150 *ibid*; when he himself had authorised the attachment and sale of his property as noted above. It may be observed that any error or irregularity in or in publishing or conduct of sale of immoveable property in terms of Rule 134 does not vitiate sale. Even otherwise, all such grounds, if at all available could have been raised before the forum and hierarchy provided under the *IT Rules 1982* and not in collateral proceedings under section 12(2) CPC.

16. As noted above, elaborate provisions contained in Chapter IX of the *IT Rules, 1982* are self contained code, providing elaborate procedure for the recovery of tax arrears, attachment, arrest and sale of property of defaulter and challenge to sale by the defaulter and or any other person having interest in the attached and sold property. Admittedly, the appellant who was adjudged tax defaulter in contested legal proceedings up to the High Court. Appellant failed to challenge the sale before a competent forum in the manner provided as discussed above, cannot be allowed to challenge the sale, in a collateral proceedings arising out of a writ of mandamus against the Income Tax Authorities and *MEO* for the issuance of Sale Certificate and effecting mutation in his name.

17. In this view of the matter, finding no merits in this appeal, it is accordingly dismissed.

JUDGE

JUDGE