

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.1375 of 2013

M/s Paramount Enterprises

Versus

Judge Banking Court, Islamabad and others

Date of Hearing: 15.10.2020

Petitioner by: Mr. Shah Khawar, Advocate

Respondents by: Mr. Muhammad Ilyas Sheikh, Advocate for
respondent No.3

Malik Muhammad Siddique Awan,
Advocate for respondents No. 2 and 4

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, M/s Paramount Enterprises, impugns the order dated 01.08.2012 passed by the learned Executing Court/Banking Court, whereby the sale of mortgaged property (i.e. petrol pump built over land measuring 03 *Kanals*, 19 *Marlas* bearing *Khasra* Nos.4460/2599, 4462/2600, *Khewat* Nos.276 and 399, *Khatooni* Nos.432 and 615, situated at *Mouza* Kotha Kalan, Tehsil and District Rawalpindi known as Haidri Petrol Pump) was confirmed and a sale certificate was issued by spurning the petitioner's objections dated 18.10.2010. Furthermore, the petitioner seeks a direction to respondent No.2 (M/s Samba Bank Limited, formerly M/s Crescent Commercial Bank Limited) and respondent No.4 (MCB Bank Limited) to deposit the auction money in the account of respondent No.1 (Judge Banking Court, Islamabad) so that the petitioner's objections dated 18.10.2010 are decided on merits.

2. The facts essential for the disposal of this petition are that on 02.09.2008, M/s Crescent Commercial Bank Limited filed a suit for recovery of Rs.42,322,926.06 along with costs of funds etc. against the petitioner and its sole proprietor, Mian Khurram Rasool, before the learned Banking Court, Rawalpindi / Islamabad. After the assets and liabilities of M/s Crescent Commercial Bank Limited were transferred to respondent No.2, an application for filing an amended plaint was filed to substitute

M/s Crescent Commercial Bank Limited with respondent No.2 as the plaintiff. The said application was allowed by the learned Banking Court, vide order dated 27.04.2009. The amended plaint was filed on 02.06.2009.

3. On 18.11.2008, an application for leave to appear and defend the suit under Section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (**"the 2001 Ordinance"**) had been filed on behalf of the petitioner. On 16.02.2009, a reply to the said application was filed. Vide judgment and decree dated 03.09.2009, the learned Banking Court dismissed the petitioner's application for leave to appear and defend the suit. Consequently, respondent No.2's suit was decreed for an amount of Rs.26,367,105.85 with costs of the suit and costs of funds. Under Section 19(1) of the 2001 Ordinance, the said decree was converted into an execution petition. Furthermore, it was ordered that the decretal amount shall be recovered through execution of the decree by attachment and sale of mortgaged properties and other assets belonging to the petitioner.

4. During the execution proceedings, the learned Banking Court, vide order dated 12.03.2010, appointed a Court Auctioneer. On 03.09.2010, the mortgaged property was auctioned for a sum of Rs.20,200,000/-, and on 07.09.2010 the Court Auctioneer submitted a report to the learned Banking Court regarding the completion of the auction proceedings. Thereafter, notices were issued to the petitioner for filing objections to the sale.

5. On 18.10.2010, the petitioner filed objections under Order XXI Rule 90 C.P.C. to auction proceedings and deposited a sum equivalent to 1/4th of the auctioned amount. The petitioner also filed an application under Section 19(7) of the 2001 Ordinance which was allowed vide order dated 17.02.2011 and respondent No.2 was directed by the learned Banking Court to file an undertaking in terms of the proviso to Section 19(7) of the 2001 Ordinance.

6. Vide order dated 17.02.2011, the learned Banking Court while accepting the petitioner's application to require respondent No.2 to give an undertaking in terms of the proviso to Section 19(7) of the 2001 Ordinance, directed respondent No.2 to file such an undertaking. The proviso to Section 19(7) of the 2001 Ordinance requires the Financial Institution to give a written undertaking that in the event objections are found to be valid, or are sustained, it shall in addition to compensating the aggrieved party by payment of such amount as may be adjudged by the Banking Court also pay a penalty up to 20% of the sale proceeds and such amount shall be recoverable from the Financial Institution in the same manner as in execution of decrees. Respondent No.2's appeal (F.A.O.No.17/2011) against the said order dated 17.02.2011 passed by the learned Banking Court was dismissed by the Division Bench of this Court vide judgment dated 22.02.2012. Civil petition No.790/2012 filed by respondent No.2 against the said judgment dated 22.02.2012 was dismissed by the Hon'ble Supreme Court vide order dated 06.07.2012.

7. On 20.09.2012, respondent No.2 filed an undertaking in accordance with the requirements of the proviso to Section 19(7) of the 2001 Ordinance before the learned Banking Court.

8. Vide order dated 01.08.2012, the learned Banking Court confirmed the sale and issued a sale certificate in favour of the auction purchaser. Subsequently, on 29.08.2012 the petitioner filed an application before the learned Banking Court seeking the recall of the said order dated 01.08.2012. Vide order dated 07.02.2013, the petitioner's said application was dismissed for non-prosecution. On the previous dates of hearing before the learned Banking Court, the petitioner had not appeared.

9. After the issuance of a sale certificate, a sale deed was also issued in favour of the auction purchaser on 14.03.2013. Possession of the mortgaged property has also been delivered to auction purchaser through the Bailiff of the Court.

10. Before the learned counsel for the petitioner could address his arguments, learned counsel for the auction

purchaser/respondent No.3 raised an objection to the maintainability of this petition on the ground that since the order dated 01.08.2012 for the confirmation of the sale of the mortgaged property was a final order, the said order was appealable in terms of Section 22(1) of the 2001 Ordinance; that in the presence of the remedy of an appeal provided by law against the said order dated 01.08.2012, the instant writ petition was not maintainable; that upon the confirmation of the sale nothing more was left for the learned Banking Court to do in the proceedings for the execution of the judgment and decree dated 03.09.2009; and that the 2001 Ordinance is a special law and Section 22(1) thereof provides a limitation period of thirty days for filing an appeal to this Court against a final order. Learned counsel for the auction purchaser/respondent No.3 prayed for the writ petition to be dismissed as not maintainable.

11. On the other hand, learned counsel for the petitioner, consistent with his high stature, fairness and expertise in the field of law, submitted that although the order dated 01.08.2012 for the confirmation of sale was a final order, and therefore appealable under Section 22(1) of the 2001 Ordinance, this Court had ample power to convert the instant writ petition into an appeal; that such a conversion would subserve the interests of justice. He further submitted that this Court ought to bear in mind that along with the objections to the auction, the petitioner had also deposited 1/4th of the decretal amount; that this shows that the objections filed by the petitioner were with a *bonafide* motive; that the auction had taken place on 03.09.2010 whereas the objections were filed on 18.10.2010; that the delay in filing the objections was beyond the petitioner's control; that in the year 2011, the sole proprietor of the petitioner was arrested and remained behind bars until 2020; that the order to confirm the sale was passed without deciding the petitioner's objections; that the learned Banking Court did not comply with its obligations to issue a notice under Order XXI, Rule 66 C.P.C. on the petitioner when the proclamation was issued; that it was not until 23.12.2009 that such notice was served on the

petitioner; and that in view of all these factors, this Court ought to convert the writ petition into an appeal and decide the same on merits.

12. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

13. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 9 above and need not be recapitulated.

14. Since the learned counsel for the petitioner very fairly submitted that the order dated 01.08.2012, whereby the sale of the auction property was confirmed in favour of the auction purchaser/respondent No.3 was a final order and therefore appealable under Section 22(1) of the 2001 Ordinance, the sole question that needs to be determined is whether this Court can convert the instant writ petition into an appeal under Section 22(1) of the 2001 Ordinance.

15. It ought to be borne in mind that the 2001 Ordinance is a special law, and Section 22(1) thereof provides a limitation period of thirty days for filing an appeal against a final order before this Court. The instant writ petition was filed on 26.03.2013 whereas the request to convert it into an appeal was made by the learned counsel for the petitioner on 15.10.2020. The order sheet reveals that this case was partly heard on several dates of hearing. This Court had time and again warned the contesting parties that no further adjournment would be granted. The objection to the maintainability of this petition had been taken by the learned counsel for the auction purchaser/respondent No.3 during the hearing on 09.10.2017, 29.01.2018 and 12.06.2018. Since the said objection was taken years before the learned counsel for the petitioner conceded that the order dated 01.08.2012 (whereby the sale was confirmed in favour of auction purchaser/respondent No.3) to be appealable, the filing of the writ petition cannot be held to be the petitioner's *bonafide* mistake.

16. It is well settled that if the Court is satisfied that circumstances of the case justified the conversion of a writ petition into an appeal, an order for conversion ought to be passed provided the requirements of the law are not transgressed. There is a catena of case law in support of proposition that an appeal can be converted into a revision and vice versa. Where, however, the conversion of a revision into an appeal would make the appeal time barred given the date on which the revision was originally filed, such a conversion ought not to be allowed unless the application for conversion is accompanied with an application for condonation of delay.

17. As mentioned above, the instant writ petition was filed beyond the limitation period of thirty days provided in Section 22(1) of the 2001 Ordinance for filing an appeal against the order dated 01.08.2012. At no material stage was an application for condonation of delay filed by the petitioner. In the case of Sheikh Faqir Muhammad Vs. Muhammad Din (1993 SCMR 1955) instead of filing a second appeal, a revision was filed after the expiry of a limitation period for filing a second appeal. It was held that for the conversion of a revision into a second appeal, an application for condonation of delay will have to be filed. In the case at hand, the request for conversion was made by the learned counsel for the petitioner without filing an application for condonation of delay.

18. In the case of Zafar Iqbal Hameed Khan Vs. Ashiq Hussain (2005 SCMR 1371), the Hon'ble Supreme Court spurned the request for the petition for leave to appeal to be converted into an appeal and for the condonation of delay in the following terms:-

“13. We have considered this request of the petitioner but do not feel persuaded to grant the same.

14. The precedent cases cited by the learned Advocate Supreme Court cannot be understood as laying down a law that whenever a litigant is negligent in the matter of reading a simple provision of the Constitution and whenever he files a petition which is not competent and whenever he insists on the maintainability of such a petition despite an objection and a warning from the office of this Court, then this Court must always treat such a petition as an appeal and that this Court must feel further obliged, in all such cases, to condone the delay which was caused only and only through the negligence of such a litigant.

15. The above-mentioned authorities are, in fact, only some of the situations where this Court had shown indulgence in some given cases. We have however, noticed lately that such a laxity shown by this Court was encouraging negligence and carelessness instead of breeding caution and diligence. Therefore, we consider it neither appropriate nor desirable to continue to show such a lenient tolerant treatment to one party at the cost of the other. As has been noticed above, the provisions of Article 185(2)(d) of the Constitution are couched in rather simple words which do not admit of any ambiguity and confusion. The least that can be said about a party filing a petition under Article 185(3) of the Constitution when it has a right to file an appeal under Article 185(2)(d), is that such a party is grossly negligent. Needless to add that the law favours only the diligent and not the negligent.”

19. Recently, in the cases of Anis Ibrahim Vs. The State (2020 MLD 1424) and Azad Government of the State of Jammu and Kashmir Vs. Muhammad Yousaf (2016 CLC 493), it has been held *inter alia* that an application for conversion of an appeal into a petition for leave to appeal or vice versa after the prescribed limitation period was not maintainable. Delay is also one of the grounds on which an application for the conversion of a writ petition into an appeal can be denied. Reference in this regard may be made to the case of Anti Narcotics Force Vs. Razia Kousar (2016 PCr.LJ 1504).

20. Even otherwise, the instant writ petition was filed almost **eight months** after the order dated 01.08.2012 was passed by the learned Banking Court. The petitioner could not come up with any plausible explanation for the delay in filing the instant petition. This is an added reason why the instant petition has to be dismissed. In the case of Pakistan International Airlines Corporation Vs. Tanveer-ur-Rehman (PLD 2010 S.C. 676), it has been held that an aggrieved person may invoke the jurisdiction of the High Court under Article 199 of the Constitution within a “reasonable time” and “reasonable time” had been interpreted to mean ninety days. The Division Bench of the Hon'ble Lahore High Court in the case of Tayyab Iqbal Vs. Member (Colonies) Board of Revenue, Punjab (2005 CLC 1447) held as follows:-

“There is no period of limitation prescribed for filing of a Constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 but it has to be filed within a reasonable time. What is the reasonable time, has been

interpreted by the superior judiciary of this country as time requisite for filing of appeals/revisions before this Court which is normally three months.”

21. In view of the above, the objection of the auction purchaser/respondent No.3 to the maintainability of this petition succeeds. Consequently, this petition is dismissed as not maintainable. There shall be no order as to costs.

(LUBNA SALEEM PERVEZ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

(JUDGE)

Qamar Khan*

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