

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Faisal Arab
Mr. Justice Sajjad Ali Shah

Civil Petition No. 686-K of 2019

(Against the judgment dated 5.12.2019 of the High Court of Sindh, Karachi passed in First Appeal No. 109 of 2019)

Muhammad Jawed

...Petitioner(s)

Versus

First Women Bank Ltd. and others

...Respondent(s)

For the Petitioner(s): Mr. Khawaja Shamsul Islam, ASC

For the Respondent-2 Syed Kazim, Legal Advisor, FWB

For the Respondent-4: Mr. Abrar Hassan, Sr. ASC

Date of Hearing: 08.09.2020

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JUDGMENT

Sajjad Ali Shah, J.- The Petitioner, through the instance petition, seeks leave of this Court to appeal against the judgment of the High Court of Sindh, Karachi whereby his appeal against the orders of the Banking Court rejecting his bid, was dismissed.

Facts and Procedural History

2. Briefly, a Running Finance Facility to the extent of Rs.50 million at the request of Respondent No.3-9 was allowed to their Company-respondent No.2. The respondents after having availed the facility failed to repay the same giving rise to initiation of recovery proceedings before the Banking Court. The suit ultimately was decreed *ex parte* on 09.01.2018 against the said respondents excluding Respondent No.3 (“Judgment Debtors”) jointly and severally in the sum of Rs.51,760,377/- along with the cost of funds as prescribed by the State Bank of Pakistan from the date of default till realization of the entire decretal amount.

3. Upon failure of the Judgment Debtors to pay the decretal amount, Execution Proceedings were initiated wherein a writ to attach the

mortgage property was ordered on 14.02.2018. After the attachment of the mortgaged property, notices as required under Order XXI Rule 66 of the Code of Civil Procedure 1908 ("CPC") were issued and the attached property was ordered to be put into open auction *vide* order dated 26.04.2018. The Nazir of the Court then issued proclamation of sale of the said property on 31.05.2018, which was published in different national dailies on 20.06.2018, declaring that public auction for the said property will be held on 26.07.2018. However, just two days before the auction, on 24.07.2018, an application under Order XXI Rule 26 read with Rules 66, Rule 69, and Section 151 of the CPC was filed on behalf of the respondents along with Banker's Cheque No.184623 dated 24.07.2018 in the sum of Rs.5,000,000/-, praying that the auction proceedings be suspended. The auction was nevertheless conducted on 26.07.2018 despite objection on account of pending application due to non-availability of the learned Presiding Officer. In the auction, two bidders, namely, the Petitioner and one Mr. Muhammad Shahid, offered bids of Rs.96,000,000/- and Rs.95,600,000/-, respectively. The Petitioner also deposited Rs.24,000,000/- being more than 25% of the bid amount on 09.08.2018. The record also reveals that prior to this, the Petitioner, on 06.08.2018, had filed an application for withdrawal of earnest money. However, he later deposited the balance bid amount within stipulated time despite the pendency of his application.

4. It appears that the highest bid of the Petitioner was placed before the Court for acceptance on 20.11.2018 when the Nazir filed a report stating that the Judgment Debtors had incrementally deposited a total sum of Rs.66,340,961/- in the Court, which consisted of the entire decretal amount (Rs.51,760,377/-), the cost of funds (Rs.14,547,606.50), and the cost of suit (Rs.32,977/-). In view of this development, the Court refused to accept the aforesaid bid, directed the Nazir to return the deposited bid amount of Rs.96,000,000/- to the Petitioner, and ordered the bank to

deposit original title documents of the property in question with the Nazir of the Court for onward delivery to the respective judgment debtor. Being aggrieved, the Petitioner challenged this order before the High Court of Sindh, Karachi by way of first appeal which was dismissed *vide* the impugned judgment. The Petitioner now seeks leave of this Court to appeal against the said judgment.

Submissions of the Parties

5. Mr. Khawaja Shams-ul-Islam, learned ASC for the petitioner contended that the facts that the Petitioner was the highest bidder in a fair and transparent auction and that he had deposited the earnest money and the balance amount within stipulated time, created a vested interest in the auctioned property and, therefore, in absence of any application under Order XXI Rule 89 or Rule 90 of CPC, the bid of the petitioner could not have been rejected. ASC further submitted that the Petitioner had a legitimate expectation that the Court will accept his bid and confirm the sale under Order XXI Rule 92 CPC, particularly because no application under Order XXI Rules 89 or Rule 90 CPC had been filed. He further submitted that the Banking Court erred in prolonging the acceptance of the bid which provided unreasonably extra time to the Judgment Debtors for depositing the decretal amount which even otherwise was of no consequence. Per counsel such subsequent deposit could not be considered after the auction proceedings were concluded. In support of his contentions, the learned counsel primarily relied upon the dictum laid down in the case of Hudaybia Textile Mills LTD v Allied Bank of Pakistan LTD (PLD 1987 SC 512) and Mst. Anwar Sultana v Bank Al-Falah LTD (2014 SCMR 1222).

6. On the other hand, Mr. Abrar Hassan, learned Sr. ASC for the Respondent No.4 argued that the basic purpose of the execution proceedings always is to ensure realization of the decretal amount which purpose has been fulfilled by depositing the decretal amount and the other

costs well before the acceptance of petitioner's bid. Therefore, the execution stood satisfied before creation of any rights in the mortgage property. He also submitted that even otherwise, the delay can be explained in light of the fact that the Presiding Officer was on leave during the relevant time and the same should therefore not be attributed to the conduct of Respondent No.4 in order to adversely affect his right to redeem the subject property. Furthermore, relying primarily on Muhammad Khalil v Messrs. Faisal M.B. Corporation (2019 SCMR 321), he submitted that no vested right can be created in favour of a bidder prior to confirmation of sale under Order XXI Rule 92 CPC. Based on this reasoning, he contended that since the Court neither accepted the Petitioner's bid nor confirmed the sale as aforesaid, it cannot be said that a vested right had accrued in favour of the Petitioner. Per counsel the present petition is therefore devoid of any merits and is liable to be dismissed.

Opinion of the Court

7. We have heard the learned counsels for the respective parties and have also perused the record and the case law cited at bar with their able assistance. The only question which needs to be decided in this case is as to whether after having been declared the highest bidder any vested right in the subject property was created in favour of the Petitioner extinguishing the right of redemption.

Enforcement Proceedings

8. The execution proceedings are conducted under Section 51 read with Order XXI of the CPC. A brief description of various stages of these proceedings, in our opinion, is warranted before a detailed discussion of the issue. In decrees involving payment of money backed by mortgage, the judgment-debtor may satisfy his/her obligations by payment in Court or to the decree-holder in terms of Order XXI Rule 1 CPC. However, if the judgment-debtor fails to satisfy the decree in such manner, the decree-holder may *inter alia* apply to the Court for attachment of, the immovable

property of the judgment-debtor under Order XXI Rule 54 CPC. After adjudicating upon any and all objections raised against such attachment under Order XXI Rule 58 CPC, the Court may order the attached property to be sold through public auction under Order XXI Rule 64 CPC. Once such an order is made, the Court causes a proclamation of intended sale, containing material details such as description of the property, its reserve price, the terms and conditions of the auction, and its time, date and venue, to be published in terms of Order XXI Rule 66 and Rule 67 CPC. This auction-sale can however be stopped or adjourned under Order XXI Rule 69 CPC if, *inter alia*, the requisite debt and costs are tendered to the officer conducting the sale or to the Court. Similarly, the sale can be postponed as well under Order XXI Rule 83 CPC. However, in case no such eventuality arises, the Court Auctioneer conducts the auction in accordance with the terms and conditions mentioned in the proclamation of sale. Upon completion of the auction proceedings, the Court Auctioneer declares the highest bidder to apprise him of his obligation to deposit the sale price in terms of the proclamation of sale and then sends a report to the Court describing various particulars of the proceedings including the detail of participants, the bids offered by them, the information about the highest bidder, and the notification of earnest money as deposited by the latter under Order XXI Rule 84 CPC. The Court then applies its judicial mind on the report in order to choose the most appropriate bid, preferably the highest, for the realization of the decree and attendant costs. Once a bid is accepted by the Court as adequate and thereafter the full purchase-money is deposited in terms of Order XXI Rule 85 CPC, a qualified sale of the auctioned property comes into being which can only be defeated through an application made under Order XXI Rule 89, 90, or 91 CPC. If, however, no such application is made within the time limit prescribed by law, the Court mandatorily confirms the qualified sale under Order XXI Rule 92 CPC, thereby making it absolute and transferring the title of the

auctioned property in the name of the successful bidder/purchaser, unless a delayed application is entertained in the circumstances. Once the sale is confirmed and made absolute, the Court grants a sale certificate to the successful bidder/purchaser under Order XXI Rule 93 CPC and gives the sale proceeds necessary for the satisfaction of the decree to the decree-holder under Order XXI Rule 64 CPC, thereby bringing the execution proceedings to an end. It is in the context of these different stages of execution proceedings that we now proceed to discuss the legal issues involved in this case.

Highest Bidder vis-à-vis Legitimate Expectation

9. Before discussing the central issue of legitimate expectation, we think it is pertinent to decide on the legal effects that follow when a bidder is declared the highest bidder at the end of a court auction involving sale of immovable properties. In this regard, this Court has repeatedly held that the nature of a bid made in such auctions, notwithstanding whether it is the highest or the lowest, is that of an offer which does not by itself give rise to any rights, as the same is always subject to acceptance by the Court after proper application of its judicial mind followed by the deposit of full purchase-money under Order XXI Rule 85 CPC. This position was fortified in Muhammad Attique v Jami Limited (PLD 2010 SC 993), wherein a three-member bench of this Court held that “a bid made at an auction is in the nature of an offer which does not mature into a contract till its acceptance.” In this regard, reference can also be made to Navalkha & Sons v Ramanya Das [(1969) 3 SCC 537], Union Bank of India v Official Liquidator [(2000) 5 SCC 274], and FCS Software Solutions LTD v LA Medical Devices LTD [(2008) 10 SCC 440].

9A. Indeed, this position is understandable from a jurisprudential point of view as well. As we know, except inherent human rights, rights and

liabilities generally arise out of legal relationships that exist in the society, be they between the state and the citizens or among the citizens themselves. Since a bid, being an offer, standing alone does not create any such relationship, and neither does the aforesaid deposit, it logically follows that no rights can be said to arise out of the same. According to the *Muhammad Attique* case, such relationship is created only when a bid is accepted by the Court in due exercise of its judicial discretion and the successful bidder/Purchaser deposits the full purchase-money before the Court closes on the fifteenth day from the sale of the property meaning thereby from the date of acceptance of the bid by the Court in terms of Order XXI Rule 85 CPC. The word employed in Order XXI Rule 85 CPC for providing the time line for the deposit of balance sale price is “*fifteen days from the sale*” and the sale factually takes place when the bid is accepted by the Court. In case the proposition that the declaration by the Court Auctioneer as highest bidder is to be treated as sale is accepted then it would amount to devolving the duty/function of the Court to see the appropriateness of the bid on the auctioneer which under no circumstances is permissible as functions of the Court cannot be delegated. Beside the Court always withhold the power to reject any or all the bids without assigning any reason which itself reflect that the declaration by the Auctioneer as the highest bidder is not a sale, therefore, to ask the highest bidder “*to deposit the balance sale price*” upon being declared as the highest bidder would be highly unfair and would amount to asking him to deposit the entire purchase price and then wait if his bid is accepted by the Court or not which is against the spirit of Order XXI Rule 84 and 85 CPC.

9B. It is to be kept in mind that the declaration of the highest bidder at the end of an auction is merely to let the participant bidders know who is to deposit the earnest money in terms of Order XXI Rule 84 CPC. As to the creation of legitimate expectation in favour of the highest bidder to the sale of subject property, such

expectation is of course created in favour of the highest bidder but against the other bidders, making him expect that his/her offer shall be accepted by the Court and the property in question against other competitors will be transferred in his/her name after all the legal requirements have been met. However, it should be borne in mind that such expectation does not give rise to any right much less vested right in the property, for such rights are created, as is discussed hereinafter, only when a bid is accepted by the Court after proper application of its judicial mind and, in consequence thereto, the full purchase-money is deposited as aforesaid.

Acceptance of the Bid vis-à-vis Vested Rights

10. The issue as to when vested rights are created in favour of a bidder in such proceedings has been previously addressed in three pronouncements of this Court. In Hudaybia Textile Mills LTD v Allied Bank of Pakistan LTD (PLD 1987 SC 512), this Court held that “once a sale has been effected, a third party interest intervenes which cannot be disregarded.” The question as to when sale is effected in execution proceedings involving auction of immovable property was considered in the *Muhammad Attique* case, wherein this Court held that in cases involving court auctions of immovable properties “the contract/sale comes into being when the bid is accepted by” the Court. This position was reiterated in Muhammad Khalil v Messrs. Faisal M.B. Corporation (2019 SCMR 321) – albeit in slightly different terms, wherein this Court held that “it needs no reiteration that an auction is always subject to confirmation by the Court.” This Court then held that since “the executing court never confirmed the auction. Therefore, no vested right had accrued in favour of the auction purchaser.”

10A. A holistic reading of these judgments, along with the provisions of Order XXI, reveals that in execution proceedings involving court auction of immovable property, so-called vested/third party rights accrue in favour of a bidder when the auction-sale becomes complete, i.e. when a bid is accepted by the Court and thereafter the full purchase-money is deposited in terms of Order XXI Rule 85 CPC. However, such vested rights again are defeatable and would not take away the right of the

mortgagor to redeem his/her property if s/he brings his/her case within the parameters of Order XXI Rule 89, Rule 90, or Rule 91 CPC. If, however, no application under these provisions is made within the time limit prescribed by law or the same is rejected, the Court mandatorily confirms the qualified sale and makes it absolute under Order XXI Rule 92 CPC, transferring the title of the property in the name of the successful bidder/purchaser, unless a delayed application to set aside the sale is entertained. The property is then deemed to have been vested in the purchaser, per Section 65 of the CPC, since the time when sale became complete. It is a known fact that the Court sale is a forced sale and, therefore, contain certain elements of risk with a chance of litigation and for this very reason properties auctioned by the Courts do not fetch the price which it would in sale between two private persons. This *inter alia*, is for the reason that the law provides maximum opportunities to the mortgagor to redeem the property and discourages any clog against the equity of redemption and as a last recourse when the mortgagor fails to avail all the opportunities provided under the law extinguishes the right of redemption. However this does not, by any stretch of imagination, would mean to provide undue favour by prolonging the execution or auction proceedings. The auction once conducted successfully then the Auctioneer's report must be taken up in Court for orders at the earliest if not on the next day accepting or rejecting the sale. To prolong the proceedings or to keep the Auctioneer report pending for months altogether as was in this case not only discourages the public in general to participate in Court sale but effects the sanctity of the proceedings and also cause loss to financial institutions and recovery of public money.

Examination of the Petitioner's case

10B. If we consider the facts of the instant case in light of the foregoing discussion, it becomes immediately clear that no such acceptance was ever tendered by the executing court. In fact, the Court refused to accept the Petitioner's bid *vide* order dated 20.10.2018. Without the requisite acceptance, his bid was merely an offer that did not result into a complete sale out of which vested

rights could have accrued in his favour. In this regard, the reliance placed by the learned counsel for the Petitioner on the *Hudaybia Textile Mills* case in favour of the position that vested rights accrued in the latter's favour at the time when he was declared the highest bidder, before the acceptance of his bid by the court, is misplaced. It is misplaced because the same is based on misreading of the said judgment and is therefore contrary to the settled legal position on this issue. It is pertinent to note that in *Hudaybia Textile Mills* case, the court had accepted the bid and the sale had been completed, giving rise to vested rights in the auctioned property. In contrast, the factual scenario in the instant case is distinguishable from the *Hudaybia Textile Mills* case, as the bid of the Petitioner in this case was never accepted by the executing court. As such, no vested rights accrued to the Petitioner on the basis of which he could apply for the confirmation of sale under Order XXI Rule 92 CPC as of right. Furthermore, the delay which took place between the declaration of the Auctioneer and the order of the Court rejecting the bid was on account of the fact that the Petitioner himself had made an application for refund of the deposited amount on the ground that the subject property was under some sort of litigation and that he therefore had no intention to buy such property. Though ASC for the Petitioner has pleaded that on deposit of the balance sale price this application had become infructuous, but admits that this application was never withdrawn. This argument does not appeal to us that on the one hand the Petitioner has clearly given in writing that he does not want to buy the property under litigation and on the other hand he has deposited the whole amount while keeping his application alive. In our opinion, the only answer to justify such contrary actions appears to be that the Petitioner wanted to save his initial deposit of Rs.24,000,000/- from the peril of forfeiture under Order XXI Rule 85 CPC. Besides, the Petitioner has made no efforts to ensure that a court order accepting or rejecting the bid is made in due time which perhaps could be on account of non-availability of the Presiding Officer as asserted by the ASC for the Respondent No.4. Under these circumstances, there was no clog on the equity/right of redemption as it was neither narrowed down to be exclusively challenged under the provisions of Order XXI Rules 89, 90 and 91 CPC nor extinguished.

11. The foregoing are the reasons for the Short Order of even date whereby this petition was dismissed by declining the leave to appeal, which reads as follows:-

“For the reasons to be recorded later, this petition is dismissed by declining the leave.”

Judge

Judge

Karachi, the
8th September, 2020
Approved for reporting
Asad Ullah Khan, LC.