

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

**MR. JUSTICE EJAZ AFZAL KHAN.
MR. JUSTICE DOST MUHAMMAD KHAN.
MR. JUSTICE IJAZ UL AHSAN.**

Civil Petition No.2064 of 2016

Against judgment dated 28.04.2016 of Lahore High Court, Bahawalpur Bench, Bahawalpur, passed in EFA No.4 of 2016.

Siraj Ahmed through LRs

Petitioner(s)

VERSUS

Faysal Bank Limited & others

Respondent(s)

For the Petitioner(s) : Mr. M. Akram Sheikh, Sr.ASC
Syed Rifaqat H. Shah, AOR

For Respondent#1 : Ch. Faiz Ahmed Sanghera, ASC

For Respondent#2 : Ch. Ali Muhammad, ASC.

Date of Hearing : 08.12.2017.

JUDGMENT

IJAZ UL AHSAN, J-. The petitioner seeks leave to appeal against a judgment of Lahore High Court, Bahawalpur Bench, Bahawalpur, dated 28.04.2016. Through the impugned judgment, an appeal (***EFA No.4 of 2016***) filed by the petitioner was dismissed.

2. Briefly stated the facts necessary for decision of this *lis* are that Respondent No.1-Faysal Bank Limited filed a suit for recovery of Rs.1,40,19,636.36/- against Siraj Ahmed, predecessor in interest of the petitioner and others. The suit was ultimately decreed on 13.06.2013 for a sum of Rs.1,03,84,569.07/-. The respondent-Bank initiated execution proceedings. The predecessor in interest of the petitioner filed objections which were dismissed on 24.10.2013. The said order was challenged by way of Writ Petition No.6278 of

2013. Vide order dated 25.10.2013, the High Court stayed auction proceedings.

3. It appears that notwithstanding the stay order, the auction proceedings were completed. Although the petitioner moved a contempt application before the High Court, but subsequently did not press the same and the constitutional petition as well as the contempt application were dismissed on 20.01.2015. It also appears that during proceedings in the execution petition, the predecessor in interest of the petitioner filed an application under Order XXI Rule 90 of CPC on 23.01.2015. However, subsequently on 03.11.2015 a request was made to treat the same as an application under Order XXI Rule 89 of CPC. Although the conversion was allowed, the application was dismissed on 05.04.2016. The sale was confirmed and sale certificate was issued in favour of Ata ur Rehman, Respondent No.2.

4. The record reveals that during pendency of the application under Order XXI Rule 89, CPC the petitioner also tendered an amount of Rs.1,03,84,569.07/- in addition to a further sum of Rs.10,84,569.09/- equivalent to 5% of the decretal amount. The objections as well as the application under Order XXI Rule 89, CPC were dismissed. The said dismissal was challenged by way of an appeal before the High Court, which was dismissed on 28.04.2016. Hence, this petition.

5. The learned counsel for the petitioner has laid great emphasis on the fact that the requirements of Order XXI Rules 66, 67 & 68 of CPC were not fulfilled by the executing Court. He points out that no reserve price was fixed, no date or time of auction was mentioned, the notices were neither affixed at the place of auction nor

on the notice board of the Court house; and that the property was sold at a throwaway price. He adds that the auction was collusive, did not actually take place and was meant to defraud the predecessor in interest of the petitioner. He finally maintains that auction was conducted in violation of the stay order issued by the High Court and has resulted in a grave miscarriage of justice.

6. The learned counsel for the respondent-Bank has defended the impugned judgment.

7. The learned counsel appearing on behalf of Respondent No.2/auction purchaser Ata ur Rehman has vehemently argued that predecessor in interest of the petitioner had not contested the proceedings seriously in view of the fact that he neither prosecuted his application under Order XXI Rule 90, CPC nor deposited the decretal amount together with 5% of the auction price within the time provided by law. He maintains that the allegation of collusive sale at a throwaway price is baseless in view of the fact that Respondent No.2 had paid more than the value fixed by the predecessor in interest of the petitioner himself in the constitutional petition filed by him before the High Court.

8. We have heard the learned counsel for the parties and gone through the record with their assistance. The suit filed by the respondent-Bank was admittedly decreed on 13.06.2013 for a sum of Rs.1,03,84.569.07/-. It appears that the said judgment and decree was not successfully assailed before any higher forum by the predecessor in interest of the petitioner. However, when execution proceedings commenced he did file objections on the ground that reserve price had not been fixed, certain properties owned by the

predecessor in interest of the petitioner were not included in the proclamation given by the Court auctioneer. The objection petition was dismissed. The predecessor in interest of the petitioner challenged such dismissal by way of a writ petition. He succeeded in obtaining a restraining order from the High Court in the said petition vide order dated 25.10.2013.

9. However, it appears that for some reason which is not clear from the record the auction proceeded and was finalized. Respondent No.2 was declared as the highest bidder having offered a sum of Rs.1,03,84,567.07/-. The predecessor in interest of the petitioners initially challenged the sale through an application under Order XXI Rule 90, CPC however, later he appears to have changed his mind and requested the executing Court to treat the application as one filed under Order XXI Rule 89, CPC. It also appears that in the meantime on 30.11.2015 he had tendered pay orders in the sum of Rs.1,03,84,569.07/- being the price of the property plus a sum equivalent to 5% of the recoverable amount, with the executing Court. The executing Court, however, without assigning valid or cogent reasons dismissed the application and confirmed the sale which order was upheld by the High Court.

10. The record shows that the process of auction left much to be desired. The mandatory provisions of Order XXI Rules 66 to 68, CPC were not strictly adhered to in so far as reserve price does not appear to have been fixed. Further, there is nothing on record to indicate that auction was widely publicized through advertisement in the newspapers and affixation of the proclamation/notices on and in the vicinity of the property to be auctioned and on the notice board of

the Court house. It has also vehemently been argued that despite the fact that it was a valuable agricultural property measuring 280 kanals 5 marlas and could have attracted many buyers, had it been properly advertised, the notice of auction was only published in an unknown newspaper under the name and style of REHBAR. Even the said notice which was sans material particulars was published on 24.10.2013 while the auction took place on 25.10.2013. As expected, only three persons participated in the auction proceedings.

11. In Lanvin Traders, Karachi v. Presiding Officer, Banking Court No.2 (2013 SCMR 1419) while dealing with similar issue, this Court held as follows:-

“Agreed that the expression “reserve price” does not find mention in the relevant rule but the words used in the rule pointedly hint thereto. A sale, in its absence, is apt to give walkover to manoeuvrers to fix any price of their choice. A sale thus effected is no sale in the eye of law especially when the number of bidders is meager, which, indeed is close to nill. A superstructure of sale built on such a shaky infrastructure cannot sustain itself. Neither the buttress of limitation nor the ministerial nature of the rule can prevent it from a fall.....

*.....
Crux of what has been discussed above is that clever manoeuvring forcing way for disposal of a property in execution of a decree for a paltry sum has to be guarded against and jealously so with all the care and circumspection so that it may go for a sum it deserves. The judgments rendered in case of “Messrs Majid and Sons and another v. National Bank of Pakistan through Manager and another”, “Messrs Magi Chemicals Industries v. Habib Bank”, Appu alias Subramania Patter v. O. Achuta Menon and others”, “Mir Wali Khan and another v. Manager, Agricultural Development Bank of Pakistan, Muzaffargarh and another” (supra) may well be referred to in this behalf. The learned counsel when faced with this situation also sought to invoke the application of section 99 of the Code by submitted that no decree of order could be reversed or modified for an error or irregularity not affecting the merits or jurisdiction but we are afraid the argument addressed on the strength of the aforesaid provision could not be of any help to him when it is rather incontestably clear on the record that such errors and irregularities have affected the merits of the case.*

12. Although, in the case of Zakaria Ghani v. Muhammad Ikhlaq Memon (PLD 2016 Supreme Court 229) it was observed that the reserve price would not be a material factor, however, the Court went on to observe as under:-

“Thus, the reserve price in the normal course has no special significance. However, the position would be different in cases of manifest fraud. If, for example, an auctioneer is acting in collusion with someone and proceeds to dispose of the property at a nominal price without making the requisite publicity then most certainly the Court would intervene to prevent such a fraud taking place. It is for this very reason that if a judgment debtor is apprehensive of foul play he should make a specific request in advance, or as soon as practicable thereafter, to have a reserve price fixed.”

13. In the instant case, the petitioner had raised a specific plea regarding non fixation of reserve price in his objection petition before the executing Court as well as before us. Further, “a series of ploys [which] appear to have been employed to harm one to benefit the other” (see *Lanvin ibid*). As such, non mention of reserve price is by no means the only defect in the auction proceedings, which have been found by us to be replete with defects, shortcomings and procedural flaws.

14. It has further been pointed out and is evident from the notice of auction that the same did not take place at the location of the property which was sought to be sold. On the contrary, the auction was held in the premises of Faysal Bank Limited, the decree holder which by itself makes it highly suspect.

15. The learned counsel for the petitioner has also placed on record an evaluation report prepared by AJ Associates, who are professional Engineers and Architects approved by Pakistan Bankers Association. They have evaluated the property and valued it much in excess of the amount paid by the auction purchaser. Likewise, the learned counsel for the petitioner has also referred to DC rate fixed for properties in the vicinity of the property in question and has argued that even on the basis of DC rate the property was worth more than the amount paid by the auction purchaser Ata ur Rehman.

16. The learned counsel for the Respondents have not been able to specifically deny either the evaluation report or DC rates or the fact that the property was sold for an amount much less than its real value. They have laid much stress on technicalities and asserted that the application under Order XXI Rule 89, CPC was barred by time. However, we have come to the conclusion that the auction was not properly conducted. The property was sold at a throwaway price in an auction which does not *prima facie* appear to be fair, transparent and above board. We are convinced that serious legal and procedural errors were committed at all stages of the execution proceedings which has caused serious miscarriage of justice. We cannot close our eyes to the same. We are not inclined to agree with the assertions of learned counsel for the Respondents, who has relied on mere technicalities to support his case. In this context, we may refer to Imtiaz Ahmed v. Ghulam Ali (PLD 1963 SC 382) wherein it was held as follows:-

“The proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. Any system, which by giving effect to the form and not to the substance defeats substantives rights is defective to that extent”

17. For reasons recorded above, while setting aside the impugned judgment of the High Court dated 28.04.016, we convert this petition into an appeal and allow the same. The matter is remanded to the executing Court i.e. Judge, Banking Court, Bahawalpur with the direction to conduct a fresh auction in accordance with law. The auction purchaser/Respondent No.2 shall have the right to participate in the fresh auction (if he so desires). He

shall also be given the right of first refusal if he matches the highest bid. In the event he does not wish to participate in the fresh auction or exercise of his right of first refusal, the respondent-Bank shall refund to him the entire amount paid by him together with mark up at the rate fixed by the State Bank of Pakistan from the date of the auction till the amount is refunded to him. Likewise, the respondent-Bank shall also have the right to claim cost of funds in accordance with the judgment and decree passed by the Banking Court.

JUDGE

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ISLAMABAD, THE

8th of December, 2017.

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NOT APPROVED FOR REPORTING