

2010 C L D 784

[Lahore]

Before Mian Shahid Iqbal and Nasir Saeed Sheikh, JJ

MUHAMMAD SHARIF and another---Appellants

Versus

Hafiz MUHAMMAD ISMAIL and 10 others---Respondents

EFA No.158 of 2008, heard on 20th April, 2010.

(a) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

---S.15(11)--Civil Procedure Code (V of 1908), O. XXI, Rr. 89 & 90-Auction of mortgaged property--objection petition---Objector claimed to be owner of property on basis of ex parte decree of specific performance of sale agreement--Non-filing of appeal against rejection of objection petition by Banking Court-Auction/sale of property by Bank without intervention of court and execution of sale-deed in favour of purchaser---Second application by objector under O.XXI, Rr.89 & 90, C.P.C., for setting aside such sale/auction---Validity---Earlier order of rejection of objection petition had attained finality---Second application could not create a fresh cause of action for objector to seek a new order on an issue decided through such earlier order--Original owner of property had created mortgage in favour of Bank---Objector could not be allowed to file such second application--Proceedings for setting aside such ex parte decree were pending before court which passed the same---In absence of registered sale-deed executed in favour of objector in pursuance of such decree, he could not claim any title in property merely on its basis---Such second application for being incompetent was dismissed in circumstances.

Mumtaz ud Din Adil and others v. Sheikh Iftikhar Adil and others PLD 2009 SC 207 and Hakim Enayat Ullah v. Khalil Ullah Khan and another AIR 1938 Allahabad 432 ref.

(b) Transfer of Property Act (IV of 1882)---

---S.54-Specific Relief Act (1 of 1877), S.12-Sale agreement-Ex parte decree passed in suit for specific performance of such agreement-Non-execution of registered sale-deed in favor of decree-holder in pursuance of such decree-Effect-Decree-holder could not claim title in suit property merely on basis of such decree.

(c) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

---S.15(11)--Civil Procedure Code (V of 1908), O.XXI, R.89---Sale/auction of mortgaged property and execution of its sale-deed in favour of purchaser by Bank without intervention of Banking Court---Application under O.XXI, R.89, C.P.C., for setting aside such sale/auction after deposit of 5% of auction price in court by applicant---Maintainability---Without establishing

some illegality in effecting of sale/auction in favour of purchaser, applicant could not claim its setting aside merely on basis of such deposit---Such application was not competent before court, as such sale/auction had not taken place in execution of decree passed by court---Such application could be entertained only by Executing Court, when sale of immovable property had taken place in execution of a decree---Such application was dismissed in circumstances.

M. Qamar-uz-Zaman for Appellants.

Sh. Nadeem Ashraf for Respondents Nos. 1 to 9.

Inam Ullah Hashmi for Respondents Nos. 11.

Date of hearing: 20th April, 2010.

JUDGMENT

NASIR SAEED SHEIKH, J.---The appellants have assailed the order dated 29-4-2008, passed by the learned Judge Banking Court, Sargodha, whereby an objection application moved under Order XXI, rule 89 of C.P.C. by the appellant has been dismissed.

2. Brief facts of the case are that property subject-matter of the instant appeal comprising a shop situated in a portion of 200 sq.ft. situated in Mandi Sillanwali, Tehsil Sillanwali, District Sargodha, situated in Khasra No.6887/ 110-111 was owned by the respondents Nos.3 to 6 who transferred this shop in favour of Mst. Parveen Akhtar through a sale-deed dated 23-4-2003. The said Mst. Parveen Akhtar mortgaged this property to Bank of Punjab, Sillanwali Branch as security for the loan of Rs.50,000 obtained by Hafiz Muhammad Ismail the respondent No.1 through ordinary mortgaged dated 23-11-2004. Another loan of Rs.2,95,000 was also secured against the same property vide ordinary mortgage dated 29-11-2004. The subject property was proposed to be auctioned by the Bank of Punjab in exercise of powers under section 15 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. The present appellants also instituted a separate suit before the Judge Banking Court, Sargodha in which suit the appellants contended that they have purchased the subject property through an agreement to sell dated 23-8-1997 reduced into writing between Mst. Salma Bibi, Muhammad Farooq, Muhammad Khalid, Muhammad Naeem, Muhammad Nadeem and Mst. Khalida Parveen all sons and daughter of Bashir Ahmed on one side and Muhammad Sharif and Muhammad Saeed on the other side for sum of Rs.5,65,000. The sale agreement was not being performed by the vendors, therefore, the suit for specific performance was instituted on 26-2-2000 before the Civil Court of Sargodha in which an ex parte decree dated 14-2-2006 was passed in favour of the appellants. The appellants on the basis of this decree challenged through a suit the mortgaging of the said shop by the previous owners against loans in question and the Banking Court was requested to stay, the auction proceedings, which were being processed at the instance of the Bank of Punjab. The learned Judge Banking Court rejected the plaint of the said suit on 8-11-2006 by holding that the property going to be auctioned was bearing Shop No.108, whereas, the alleged decree obtained is in respect of Shops bearing Nos.110, 111 and also that there were' variations in the areas of the shop to be auctioned and of the shop claimed by the appellants. The appellants preferred R.F.A No.545 of 2006 against the order dated 8-11-2006, which R.F.A was disposed of by the High

Court vide order dated 13-12-2006 and the order rejecting the plaint was not set aside, however, the appellants were advised to have recourse to filing an objection application under sections 15 and 19 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. It is important to submit that the Bank of Punjab initiated the proceedings of the auction of the mortgaged property without the intervention of the Court and the auction was conducted on 26-1-2007 in favour of the respondent No.11 namely Kamran Ali Abbasi. The appellants then moved an objection application dated 6-2-2007 before the Judge Banking Court, Sargodha under Order XXI, rules 89 and 90 of C.P.C. with the contention that a decree for specific performance dated 14-2-2006 has been passed in favour of the appellants from the Court of Civil Judge, Sargodha in respect of Shops Nos. 110, 111 and that the auction and sale dated 26-1-2007 effected in respect of the suit property in favour of the respondent No.11 be set aside.

3. This objection application was resisted by the respondents and was ultimately dismissed by the learned Judge Banking Court vide order dated 29-4-2008, which order is assailed through the instant EFA by the appellants.

4. It is contended by the learned counsel for the appellants that although the appellants moved an objection application under Order XXI rules, 89 and 90 of C.P.C., but they withdrew their request with respect to the invoking of the provisions of Order XXI rule, 90 of C.P.C. before the learned Judge Banking Court and that the appellants deposited 5% of the auction price with the Judge Banking Court and contended that they having been granted decree for specific performance of the agreement by the Civil Court of Sargodha and also claiming to be in possession of the suit shop were entitled to pray for the setting aside of the auction/sale of the subject property made in favour of the respondent No.1. The precise contention of the learned counsel for the appellants is that all what the appellants were required to do for maintaining their application under Order XXI, rule 89 of C.P.C. seeking setting aside of the auction of the subject property was to make a deposit of 5% and move an application before the Judge Banking Court and having done so they were entitled to the relief prayed for and the learned Judge Banking Court illegally refused to accede to the request made in the objection application and unlawfully dismissed the same through the impugned order. The learned counsel argued that the appellants are in possession of the suit property and they are sufficiently clothed with the locus standi to raise objection to the auctioning of the shop in question in favour of the respondents No.11.

5. The learned counsel for the respondent No.11 auction-purchaser has resisted the contentions of the learned counsel for the appellants and has argued that no decree was ever passed in favour of the appellants for specific performance of the agreement in respect of the shop subject-matter of the auction proceedings as it has neither been produced or proved on the record. The learned counsel further argued that the provisions of Order XXI, rule 89 of C.P.C. are not applicable to the facts of the instant case as such an application can only be moved for the setting aside of a sale if there is a decree passed by a Court of law and execution of such a decree is pending before the executing court. The learned counsel argued that the shop in question was auctioned by the Bank without intervention of the court and there was no decree passed in the execution of which the shop in question was sold, therefore, the application moved by the appellants under Order XXI, rule 89 of C.P.C. was not maintainable. It is further argued that the appellants earlier moved an objection application under sections 15 and 19 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 before the Judge Banking Court, which application was dismissed

vide order dated 22-1-2007 in which order it was observed that the shop subject-matter of the auction proceedings was a mortgaged property and was sold through an auction by the Bank for the recovery of its outstanding amount in exercise of powers under section 15 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. The order dated 22-1-2007 was not further challenged by the appellants through any appeal etc. The passing of the earlier order dated 22-1-2007 and it having attained finality was mainly the reason which prevailed with the learned Judge Banking Court in dismissing the application under Order XXI, rule 89 of C.P.C. moved by the appellants through the impugned order dated 29-4-2008. The learned Judge Banking Court also observed that merely because an ex parte decree for specific performance of an agreement was passed in favour of the appellants, it was not sufficient to confer any title upon the appellants for seeking the setting aside of the auction of the subject shop effected and completed in favour of the respondent No.11 particularly when an application for setting aside of the ex parte decree was also still pending. The learned counsel relies upon the judgments reported as Mumtaz ud Din Adil and others v. Sheikh Iftikhar Adil and others PLD 2009 SC 207 and Hakim Enayat Ullah v. Khalil Ullah Khan and another AIR 1938 Allahabad 432 in support of his contentions and prayed for the dismissal of the instant appeal.

6. The learned counsel for the Bank adopted the arguments of the learned counsel for the respondent No.11 auction purchaser.

7. We have considered the arguments of the learned counsel for the parties and have perused the record.

8. The appellants admittedly moved an objection application under section 15 subsection (11) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 before the learned Judge Banking Court raising objection to the auction proceedings by asserting rights on the basis of the existence of an agreement to sell in their favour and claiming to be holder of an ex parte decree for specific performance of the said agreement in their favour. This objection application was rejected by the Judge Banking Court through an order dated 22-1-2007, which fact has been taken notice of by the learned Judge Banking Court in the impugned order in paragraph No.3, wherein a portion of the order dated 22-1-2007 has also been reproduced. Admittedly, the appellants did not prefer any appeal against the order dated 22-1-2007 and the said order has attained finality. The auction proceedings of the subject property in question were finalized and a registered sale-deed dated 7-5-2008 as a result thereof has been executed in favour of the respondent No.11. The moving of a subsequent application by invoking Order XXI, rules 89 and 90 of C.P.C. for setting aside of the sale effected through the auction proceedings cannot create a fresh cause of action for the appellants to seek a new order on the issue, which issue had already been decided earlier vide order dated 22-1-2007. Admittedly, no decree has been passed in this case for the execution of which the learned Judge Banking Court was proceeding in the matter creating an occasion for the appellants to move an application under Order XXI, rules 89 and 90 of C.P.C. An objection application for setting aside of the sale on the ground of making a deposit of 5% of the auction price as envisaged by Order XXI, rule 89 of C.P.C. is only entertainable by the executing court when the sale of immovable property has taken place in execution of a decree. The application moved by the appellants by invoking provisions of Order XXI, rule, 89 of C.P.C. was incompetent on the face of it. It is also important to point out that the appellants originally moved an objection application under Order XXI, rules 89 and 90 of C.P.C. and their

learned counsel got recorded a statement dated 14-1-2008 of withdrawing the application to the extent of Order XXI, rule 90 of C.P.C. on this context, the statement got recorded by the learned counsel is important, which is reproduced as follows: --

On the basis of above statement, the learned Judge Banking Court passed the following order dated 14-1-2007:--

9. The learned counsel for the appellants has admittedly not placed on the record copy of the order dated 22-1-2007 on the file of this case nor the objection application moved by the appellants, which was disposed of vide order dated 22-1-2007 has been produced in order to create any distinction in favour of the appellants for filing the fresh application under Order XXI, rule 89 of C.P.C. The earlier objection application moved under section 15 subsection (11) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 having been rejected through the order dated 22-1-2007 by the learned Judge Banking Court therefore the appellants could not be allowed the moving of a second application by invoking the provisions of Order XXI, rules 89 and 90 of C.P.C., moreso because the auction proceedings were finalized on 26--1-2007 1 and a registered sale deed dated 7-5-2008 was executed in favour of the respondent No.11 auction-purchaser. The mortgage in respect of the subject shop was admittedly executed in favour of the Bank by the original owners and the auction was conducted and the sale-deed was effected by the Bank without the intervention of the Court. The appellants based their claims on the basis of an ex parte decree obtained by them on 14-2-2006 from a Civil Court, but admittedly no registered sale deed has been executed in their favour in pursuance to the alleged ex parte decree dated 14-2-2006, therefore, the appellants are not clothed with any title in the subject property on the basis of a mere ex parte decree for specific performance of an agreement to sell, which ex parte decree has also been sought to be set aside and the proceedings are admittedly still pending before the Court, which passed the ex parte decree. The impugned order passed by the learned Judge Banking Court rejecting the objection application moved by the appellants is based upon valid reasons, which are detailed in paragraphs Nos. 8 and 9 in the following words:--

"8. The remedy of the petitioners against order dated 22-1-2007 was appeal under section 22 of the said' Ordinance but they did not avail this opportunity. Allowing this application would amount to review and revise the order passed by my learned predecessor on 22-1-2007 which is barred by section 27 *ibid*.

9. Apart from above, the applicants have failed to show that they were owning property by virtue of a title before the sale. The agreement in favour of the applicants had not conferred title on them nor the ex parte decree against which the application for setting aside the same is still pending conferred any title on the applicants to qualify for filing objection petition under Order XXI, rule 89, C.P.C. It may be pointed out that two of the defendants in suit for specific performance had died during pendency of the suit whose legal representatives were not brought on record and decree to the extent of said two dead persons was of no legal effect. However, this matter is pending in the Civil Court, in the application for setting aside the ex parte decree and no other observation can be given on the merit of the said decree."

10. The appellants cannot claim setting aside of the auction/sale completed in favour of the respondent No.11 merely on the ground that they have deposited 5% of the auction price before the Judge Banking Court unless some illegality is established or pointed out in effecting of the auction or of the sale in favour of the auction purchaser. The learned counsel for the appellants could not point out any illegality in this context and the application moved under Order XXI, rule 89 of C.P.C. was not at all competent before the learned Judge Banking Court, in view of the fact that the auction/sale sought to be set aside of the shop in question had not taken place in execution of any decree passed by the Banking Court. The impugned order passed by the learned Judge Banking Court is, therefore, unexceptionable and does not call for any interference by this Court. The instant EFA resultantly is dismissed, without any orders as to costs.

S.A.K./M/323/L

Appeal dismissed.