

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI.
Suit No. 541 of 2007

DATE: **ORDER WITH SIGNATURE(S) OF JUDGE(S).**

1. For order on Nazir's report dt. 13.04.17
2. For orders on CMA No.12325/15
3. For orders on CMA No.11818/16
4. For hearing of CMA No.3125/17
5. For hearing of CMA No.3126/17
6. For hearing of CMA No.3278/17
7. For hearing of CMA No.3279/17
8. For hearing of CMA No.5828/17

20th April, 2017

Mr. Munawar Ali, advocate for the plaintiffs

Mr. Muhammad Arif, advocate for defendants No.2 to 4

Jawed Hussain, Auction Purchaser, is present in person.

Mr. Jawed Hussain, Auction Purchaser, is present in person. With the able assistance of learned counsel for the parties, the record has been perused and an undisputed position is that on 06.02.2017, a bid of the above named Auction Purchaser being the highest amongst all was confirmed. The bid amount is Rs.1,32,00,000/- (Rupees One Crore Thirty Two Lacs only) for the purchase of factory, which is mentioned in paragraph-5 of the plaint and is built on two plots being plot No.CA-307 and CA-308, Gabol Town, North Karachi. To challenge this confirmation order, an appeal was also preferred being High Court Appeal No.132 of 2017, which was eventually dismissed on 20.03.2017 with certain observations against defendant No.1 and part of the amount deposited by latter with the Nazir in connection with the above bid was also ordered to be forfeited.

Today, two applications preferred by defendants No.2 to 4 and plaintiff No.1 being C.M.A.Nos.3125 and 3278 of 2017 were heard. The crux of both these applications is that the parties to the proceedings, who are legal heirs, are ready to purchase above factory at a higher value. Defendants No.2 and 3 are ready to purchase it for the sum of Rs.1,35,00,000/- (Rupees One Crore Thirty Five Lacs only), whereas plaintiff No.1, who resides in Canada has also offered to purchase the

factory in the sum of Rs.1,45,00,000/- (Rupees One Crore and Forty Five Lacs only).

Arguments of the learned counsel for the parties is that the entire sale proceeds of the above factory was received beyond the statutory period of two weeks, which is in violation of Order XXI, Rule 85 of Civil Procedure Code, 1908, and to justify this stance, learned counsel for the defendants No.2 to 4 has referred to the Nazir's report dated 13.04.2017, which is taken on record today subject to all just exceptions. As per learned counsel, some of the payments mentioned in the third page of the General Ledger (appended with the Report) shows that it was remitted in the Nazir's account after 20th February, 2017. Nazir's report has been perused, which shows that the balance sale consideration of Rs.1,02,00,000/- (Rupees One Crore Two Lacs only) was paid through thirteen (13) pay orders, which are dated from 13th February, 2017 to 15th February, 2017, which is within time as the cutoff date for making the payment was 20th February, 2017, as the bid was confirmed on 06.02.2017. This position has not been disputed with regard to dates of pay orders and their amounts.

Learned counsel has also relied upon a Judgment of this Court reported in **P L D 2013 Karachi 430** [*Messrs NIB Bank Limited v. Messrs Apollo Textile Mills Limited and 2 others*], in which, *inter alia*, the sale was set aside as the auction was conducted in violation of Order XXI, Rule 66 of CPC, which relates to, *inter alia*, notifying Decree Holder and Judgment Debtor about the proclamation of sale and order XXI, Rule 85 of CPC, whereunder, balance amount of a bid is required to be deposited within fifteen days, whereas, in the above reported case, the time was enlarged to thirty days. Basic difference in that reported case and the present case is, that payments through pay orders have been submitted to Nazir within time but the proceeds of some of the pay orders were transferred into Nazir's account after 20th February, 2017 through Banking channel. A party cannot be made liable for an act on which he has no control. This is a basic legal principle, which has been expounded by the Hon'ble Apex Court in its reported Judgment-**P L D 1985 Supreme Court 28** [*Government of the Punjab v. Dr. Ijaz Hasan Qureshi*] in the following words: -

“ In understanding and interpreting this provision of law two maxims must be kept in view. First, *lex non cogit ad Impossibilia*. (The law does not compel a man to do that which he cannot

possibly perform). Second, *Impotentia Excusat Legem* (where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over, there the law will in general excuse him).”

The time that was consumed in remitting an amount from the two accounts, one maintained by the Auction Purchaser and the other one by the Nazir, on which neither Nazir nor the Auction Purchaser has control but the said transaction and proceeds are governed by Regulations of the State Bank of Pakistan, I am not inclined to follow the above cited decision, but a well-known Judgment on Judicial Sale reported in **P L D 1987 Supreme Court 512** [*Hudaybia Textile Mills Ltd. and others v. Allied Bank of Pakistan Ltd. and others*], in which, *inter alia*, sanctity of a Judicial Sale has been highlighted and it has been clearly mentioned that once the sale is confirmed, the Auction Purchaser has interest in the proceedings.

In view of the above, both applications listed at Sr. No.4 and 6 are dismissed. Nazir is allowed to complete the sale but strictly in accordance with Rules.

Adjourned to a date in office.

Riaz / P.S*

Judge