JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

C.R.No.144 of 2016
Hashim Babur
Versus.
Learned Civil Judge 1st Class & others

Date of Hearing:	22.04.2016
Petitioner by:	Shah Khawar and Mr. Hasan Rashid, Advocates
Respondents by:	Mr. Omair Saleem, Advocate for respondent No.2, Mr. Ghulam Shabbir Akbar, Advocate for respondent No.3/CDA, Mr. Adnan Tahir, learned Prosecutor NAB for respondent No.4, Mr. Qaiser Masood, Additional Director Law FIA for respondent No.5.

MIANGUL HASSAN AURANGZEB, J:- Through the instant Civil Revision Petition, the petitioner, Hashim Babur, impugns the Order dated 10.03.2016, passed by the Court of learned Civil Judge 1st Class (West) Islamabad, whereby the petitioner's application under Section 12(2) read with Section 151 and Order I, Rule 10 of the Code of Civil Procedure, 1908 ("C.P.C."), was dismissed.

2. The facts essential for the disposal of this petition are that the petitioner and his former wife respondent No.2 (Ms. Ayesha Alam) were joint owners of House No.17, College Road, F-7/3, Islamabad ("the suit property"). On 07.11.2000, the petitioner was convicted by the learned Accountability Court in Reference No. 09/1999, and was sentenced to three years imprisonment. A fine of Rs.2 Million was also imposed on him and his share in the suit property was confiscated. As the petitioner's share in the suit property was to the extent of 50% only, the ownership of the remaining 50% share owned by respondent No.2 continued to vest in her. The Hon'ble Lahore High Court dismissed the petitioner's appeal against his conviction. The Hon'ble Supreme Court of Pakistan turned down the petitioner's Criminal Petition against the

appellate judgment of the Hon'ble Lahore High Court. His Criminal Review Petition also met the same fate.

3. The judgment by the learned Accountability Court was passed as far back as 07.11.2000, whereas the Hon'ble Supreme Court of Pakistan on 20.09.2010 dismissed the petitioner's Criminal Review Petition. As respondent No.2 continued to remain the owner of 50% share in the suit property, she, on 12.03.2014, applied to respondent No.3 (Capital Development Authority) for the sub-division of the suit property in two halves. This application was turned down by respondent No.3, and she was advised vide letter dated 08.04.2014 to first obtain a "No Objection Certificate" from the Federal Investigation Agency. Thereafter, respondent No.2, on 17.04.2014, applied to respondent No.4 (National Accountability Bureau) for its consent for the sub-division of the suit property. Respondent No.4, on 01.07.2014, informed respondent No.2 that respondent No.4 had marked a caution on the suit property in the light of the decision made by the learned Accountability Court in Reference No.09/1999; that the 50% share in the said property, owned by the petitioner had been forfeited by respondent No.4 in favour of the Federal Government; that the suit property could not be partitioned/divided by meets and bounds; and that the only way out was to auction the suit property through the court and to distribute the sale proceeds between the sharers. Furthermore, respondent No.2 was advised that the learned civil court was the appropriate forum before which she could address her grievances.

4. Consequently, on 09.09.2014, respondent No.2 instituted a suit for declaration and partition/auction of the suit property before the court of learned Civil Judge, Islamabad. The petitioner was not impleaded as a party in this suit. The learned Civil Court on 09.12.2014 passed a preliminary decree to the extent of respondent No.2's prayer regarding the partition of the suit property or in the alternative, its auction. Learned civil court also observed that both respondent No.2 and respondent No.4 were not willing to retain their respective shares in the suit property. In order to ascertain the suit property's mode of partition, market value and measurement, the learned civil court appointed a local

commission and directed him to inspect the suit property and submit report on the following points:-

a) Whether the suit house is partition-able;

b) Mode of partition; and

c) Present market value of the premises

5. The local commission submitted its report on 22.12.2014 wherein the market value of the suit property was stated to be approximately 20,50,00,000/-. It was also reported that the building on the suit property could not be sub-divided and that it was difficult to partition the same.

6. On 16.01.2015, respondent No.2 filed an application under Order VI, Rule 17 C.P.C. praying for the valuation clause in her suit to be amended so as to read as follows:-

> *"That the valuation of the suit for the purpose of court-fee and pecuniary jurisdiction so far it relates to declaration, the same is fixed at Rs.1,000 for the purpose of court-fee and jurisdiction so far as relief of partition is concerned, the same is fixed at Rs.91,434,000/-."*

7. Respondent No.2's said application was allowed by the learned civil court on 10.03.2015, whereafter she filed an amended suit.

8. Vide order dated 25.06.2015, the learned civil court agreed with the report of the local commission and put the suit property to auction with the observation that the proceeds of the auction would be distributed in equal shares between respondent No.2 and respondent No.4. Furthermore, the learned civil court appointed a Court Auctioneer and directed him to conduct the auction proceedings in accordance with the schedule contained in the said order. As the Court Auctioneer had proceeded abroad, the learned civil court, vide order dated 04.07.2015, gave a new schedule, whereunder the auction was to take place on 17.08.2015.

9. It appears that on 01.09.2015, the petitioner filed an application under Section 12(2) read with Section 151 and Order 1 Rule 10 C.P.C. before the learned civil court. The prayer-clause of the said application is reproduced herein below:-

> *"In the light of the above, it is prayed that the preliminary decree dated 09.12.2014 and all the orders passed subsequently*

be set aside and consequently the applicant be impleaded as party to the suit and case be decided on merits."

10. The grounds taken by the petitioner in the said application were that the petitioner had filed Criminal Revision Petition No.644/2011 before the Hon'ble Lahore High Court praying for a set off in lieu of the fine imposed on him against the confiscation of his 50% share in the suit property; that the suit instituted by respondent No.2 against *inter-alia* respondent No.4 was collusive and in consequence of a secret arrangement between the said parties; and that the petitioner should be afforded an opportunity of hearing. Vide order dated 10.03.2016, the learned civil court dismissed the said application. It is the said order dated 10.03.2016, which has been impugned by the petitioner in the instant petition.

11. Learned counsel for the petitioner drew the attention of the Court to the advertisement published in the "Daily Express Tribune" of 03.04.2016 inviting bidders to the auction proceedings scheduled to be held on 09.04.2016. In this advertisement, the reserved price of the suit property is stated to be 20,50,00,000/-. Learned counsel for the petitioner submitted that the said reserved price of the suit property is way beyond the pecuniary jurisdiction of the learned civil court (i.e. 10,00,00,000/-); that the execution proceedings before the learned civil court are *coram non judice* and without jurisdiction; and that initially when respondent No.2 filed the suit, no amount was mentioned in the valuation clause; that subsequently, through an amendment, an amount of Rs.9,14,34,000/- was inserted in the valuation clause; and that given the reserved price of the suit property mentioned in the advertisement, respondent No.2 had wrongly valued the suit.

12. Learned counsel for the petitioner further submitted that although the petitioner's Crl. Revision Petition No.644/2011 had been dismissed by the Hon'ble Lahore High Court, vide judgment dated 15.12.2015, a petition against the said judgment had been filed by the petitioner before the Hon'ble Supreme Court of Pakistan; that the said petition was taken-up for hearing by the Hon'ble Supreme Court of Pakistan on 18.04.2016 and notices

were issued to the respondents therein; that propriety demands that until the said petition is decided by the Hon'ble Supreme Court of Pakistan, auction of the suit property should not take place; and that the proceeds from the auction of the suit property cannot be appropriated by respondent No.4 and should either be deposited in the Federal Treasury or the Federal Consolidated Fund.

13. On the other hand, learned counsel for respondent No.2 submitted that respondent No.2 had been deprived of her 50% share in the suit property since the past many years; that the marriage between the petitioner and respondent No.2 had come to an end on 20.08.2014; that on account of the judgment dated 07.11.2000, passed by the learned Accountability Court in Reference No.09/1999 against the petitioner, he was left with no share in the suit property; that the 50% share previously owned by the petitioner in the suit property now vested in the Federal Government; that as the suit property could not be sub-divided or partitioned, the only way forward was to put it to auction and to distribute the proceeds between respondent No.2 and the Federal Government; that as the petitioner had no share in the suit property this is why he was not impleaded as a party in the suit for declaration and partition etc., instituted by respondent No.2. He further submitted that the respondent No.2 had correctly valued the suit according to her share in the suit property; that only respondent No.2's share in the suit property is to be taken into account in determining valuation; and that at the time of the filing the application for the amendment of the suit, the suit had been correctly valued. In making his submission, the learned counsel for respondent No.2 placed reliance on the cases of Ajiruddin Mondal and another Vs. Rahman Fakir and others (PLD 1961 SC 349), Zafeer Gul Vs. Dr. Riaz Ali and others (2015 SCMR 1691), Mst. Sabira Bibi and others Vs. Hikmat Khan and others (2012 CLC 292) and Amir Fayaz Ali Khan Vs. Member, Board Revenue Judicial-1 PLD 2008 Lahore 10).

14. Learned counsel for respondent No.2 further submitted that on 07.04.2016, the instant civil revision petition was taken-up for hearing by this Court. On the petitioner's application for staying the

auction proceedings, this Court allowed the auction proceedings to take place as scheduled, but observed that the result of the auction proceedings shall not be confirmed and shall be subject to the final outcome of the instant petition; that a law and order situation was created on 09.04.2016, at the site where the auction was to take place; that due to the said situation, no bidder came-up with a bid above the reserve price. Learned counsel for the petitioner brought on record the auction report submitted by the Court Auctioneer before the learned civil court.

15. Learned counsel for respondent No.4 adopted the arguments of the learned counsel for respondent No.2. He further submitted that the role of respondent No.4 is to ensure that the auction proceedings take place strictly in accordance with the law and that the 50% share in the proceeds from the auction belongs to the Federal Government.

16. I have heard the arguments of the learned counsel for the contesting parties and have perused the record with their able assistance.

17. There is no need to recapitulate the facts, which have been mentioned above in sufficient detail. The first question that needs to be answered is whether the auction proceedings should be stayed until the decision on the petitioner's Criminal Petition before the Hon'ble Supreme Court of Pakistan against the judgment dated 15.12.2015, passed by the Hon'ble Lahore High Court in the petitioner's Criminal Revision No.644/2011.

18. There is no denying the fact that the petitioner was convicted on 07.11.2000 by the learned Judge, Accountability Court No.1, Lahore, in Reference No.09/1999. The sentence awarded to the petitioner was as follows:-

i) Three years rigorous imprisonment.
ii) Rs.02 Million fine or in default to undergo eighteen months rigorous imprisonment.
iii) Forfeiture of the applicant's share in the suit property.

19. The petitioner was released from jail on 16.10.2001 after being given the benefit of Section 382-B of the Code of Criminal Procedure. He also paid a fine of Rs.5,55,556/- (which had been reduced from Rs.02 Million by the Hon'ble High Court in appeal).

The petitioner's conviction was upheld up to the Hon'ble Supreme Court of Pakistan, which dismissed the petitioner's Criminal Petition No.216-L/2005 on 15.04.2010. The petitioner's Review Petition No.55/2010 was also dismissed by the Hon'ble Supreme Court of Pakistan on 20.09.2010. Thus, the conviction and sentence awarded to the petitioner by the learned Accountability Court attained finality for all intents and purposes. Consequently, the petitioner's entire share in the suit property stood forfeited in favour of the Federal Government.

20. The petitioner, on 17.02.2011, filed an application before the learned Judge, Accountability Court No.1, Lahore, for a set off of the fine imposed on him against the forfeited property in accordance with Section 11 of the National Accountability Ordinance, 1999. The prayer-clause of the said application is reproduced herein below:-

> ***"In view of Section 11 of the National Accountability Ordinance Bureau, 1999 (No. VXIII of 1999): the Ordinance which was applicable to the case of applicant at the time of a sentence being passed and in view of the fact that he has already served all his sentence of imprisonment, further imprisonment in lieu of fine and has also paid Rs.5,55,556/- (Rupees 55,556/- more than the reduced fine by the Hon'ble Bench of the Lahore High Court Lahore) he led to has completed his sentence and is therefore, entitled to seek this learned Court to direct the NAB authorities to ensure that the property which was subject to forfeiture is made free from any and all attachment / freezing / Caution orders of NAB and the clear property is returned to the applicant with immediate effect as the forfeiture order having been set off in terms of law.***
> ***Any further relief deemed fit by this learned Court is also prayed for."***

21. Vide order dated 18.05.2011, the learned Accountability Court dismissed the petitioner's said application. Thereafter, the petitioner filed a Criminal Revision Petition No.644/2011 before the Hon'ble Lahore High Court, Lahore. As mentioned above, the said Criminal Revision Petition was also dismissed by the Hon'ble High Court, vide judgment dated 15.12.2015. The operative part of the said judgment is reproduced herein below:-

> ***"3. A Reference No.09/1999, was filed against the petitioner, in the court of learned Judge, Accountability Court No.1, Lahore, with the allegations that he had acquired assets beyond his means. In the reference, the petitioner was tried and ultimately through the judgment dated 17.11.2000, he was convicted and sentenced for three years RI and fine of Rs.2-million, in default***

whereof to undergo RI for eighteen months. House No.17 situated at College Road F-7/3, Islamabad to the extent of half share of the petitioner was also confiscated in favour of Federal Government.

4. The above mentioned judgment was challenged by the petitioner before this Court in shape of Criminal Appeal No.1629 of 2000 and decided on 03.02.2015, whereby the sentence of imprisonment and forfeiture of the above mentioned house was maintained but the amount of fine was reduced to Rs.5,00,000/-. The petitioner in shape of Criminal Petition No.216-L of 2015 approached the august Supreme Court of Pakistan but dismissed on 5.4.2010. The petitioner again approached the august Supreme Court of Pakistan by filing Criminal Review Petition No.55 of 2010 but turned down on 20.09.2010.

*5. The learned trial Court under Section 10 of the National Accountability Ordinance, 1999 was fully competent to forfeit the property of the petitioner, hence, besides the above mentioned sentence of imprisonment and fine, also ordered for forfeiture of the above mentioned house. The said judgment of the learned trial Court, regarding sentence of imprisonment and forfeiture of the house in question, remained intact up to the august Supreme Court of Pakistan. Therefore, above mentioned application of the petitioner before the learned trial Court was nothing but to reopen the case, which was not permissible and acceptable under the law. In this way, the impugned order has rightly been passed and the revision petition in hand being not maintainable, is **dismissed**."*

22. Against the said judgment dated 15.12.2015, the petitioner is said to have preferred a Criminal Petition before the Hon'ble Supreme Court of Pakistan. I am afraid that the mere pendency of such a Criminal Petition against concurrent judgments of the learned Accountability Court and the Hon'ble High Court cannot *ipso facto* be a valid ground for staying the auction proceedings. Even otherwise, the said Criminal Petition before the Hon'ble Supreme Court of Pakistan does not arise from an order passed by a Court in civil proceedings for the auction of the suit property. It is well settled that unless a superior court expressly stays execution proceedings, the mere filing of an appeal against an order or a decree would not operate as a stay of such proceedings. Reference in this regard may be made to the law laid down by the superior courts in the cases of Shah Wali Vs. Ghulam Din alias Gaman and another reported as PLD 1966 SC 983 and Naeem Ullah Khalid and another Vs. Dr. Hafiz Mushtaq Ahmad and 3 others reported as 2007 YLR 1418.

23. As mentioned above, the petitioner's share in the suit property now vests in the Federal Government on account of the judgments of the learned Accountability Court, the Hon'ble High

Court and the Hon'ble Supreme Court of Pakistan. As these judgments have attained finality, the petitioner stands bereft of any share in the suit property. Hence, the learned Civil Court was correct in holding that the petitioner was not a necessary party in the suit for declaration and partition etc., instituted by respondent No.1.

24. The second question needs to be determined in these proceedings is whether the proceedings taken by the learned civil court in pursuance of respondent No.2's civil suit are *coram non judice* or without jurisdiction. Now, respondent No.2's application for amendment of her suit was allowed by the learned Civil Court and an amount of Rs.9,14,34,000/- was inserted in the valuation clause. The learned counsel for the petitioner does not deny in that there are no pleadings in the petitioner's application under Section 12 (2) C.P.C. to the effect that the suit has been wrongly valued. The petitioner did not take the objection as to the incorrect valuation before the learned subordinate court. Even otherwise, in a suit for partition, law permits a plaintiff, who is a co-sharer of the property in dispute, a tentatively value the suit. The suit was instituted on 10.09.2014, whereas respondent No.2's application for amendment of the suit was allowed vide order dated 10.03.2015. The advertisement showing the reserve price of Rs.20,50,00,000/- for the suit property was published on 03.04.2016. Admittedly, respondent No.2 only owns 50% share in the suit property. Therefore, respondent No.2 could not be non-suited on account of a subsequent determination of a reserve price of market price of the suit property. Additionally, vide order dated 17.03.2015, the learned Civil Court has judicially determined the valuation of the suit in the following terms:-

> *"I have heard the arguments and perused the record, relevant law under Section 3 of Suits Valuation Act, 1887, case law relied upon case law 2012 CLC 292 Lahore and 1989 MLD 3797 wherein it has been laid down that:-*
>
> > *"For ascertaining forum of appeal, value of original suit as determined under S.3 of Suits Valuation Act, 1887 would be taken into consideration for purposes of jurisdiction and not market value or sale price, of subject matter of suit."*
>
> *It further reveals that the plaintiff has filed suit for declaration as a consequential relief partition/auction and rendition of accounts and valued the suit Rs.91,434,000/- for the*

purpose of court fee and jurisdiction and prayed for his 50% share from the suit property. Whereas, defendant has conceded such fact and given no objection on adjudication of the suit pending before this Court having civil original jurisdiction. Therefore, let the matter be fixed for filing of objection on the report of local commission if any on 24.03.2015."

25. The said order dated 17.03.2015 has been left unchallenged. This order, having attained finality, cannot be collaterally challenged by the petitioner through the instant petition. Therefore, the objection of the petitioner to the jurisdiction of the learned Civil Court is also spurned.

26. In view of the above, I do not find any infirmity in the impugned order dated 10.03.2016 passed by the learned Civil Court/executing Court. Hence, this petition being devoid of merit is dismissed with no order as to costs.

27. Before parting with this judgment, I must observe with dismay that the auction proceedings, which were due to be held on 09.04.2016 were disrupted by some nefarious elements. Paragraphs 4 to 6 of the report dated 13.04.2016 submitted by the Court Auctioneer before the learned civil court, reads as follows:-

"4. At the site the undersigned, at 2:00 Pm was about to start the Auction proceedings, suddenly right outside the gate of the Site, someone started shouting that the auction has been stayed and is being carried out illegally. The NAB officials who were present at the site went outside to inquire and obtain copy of stay order, if any. After the NAB official went outside, lot of abusive language was used and some threats were hurled with respect to continuation of auction proceedings. Lot of heated words, threats and abusive language was heard by all present at the site. NAB official namely Mr. Farooq Azam Deputy Director NAB came inside the house and informed that the person making all the commotion is Mr. Hashim Babar, who is here along with his accomplices. It was informed that they do not possess any stay order and have manhandled him. He further informed that he has sought the help of the local police and has informed them about the incident.

5. It is pertinent to mention here that all the people who had come to make a bid at the auction also went outside the site to inquire what was going on. At about 2.35 Pm, a person came and handed over the order of the Honourable Islamabad High Court. The undersigned signed the receipt of receiving the order. The police also arrived and undersigned was asked to being the auction.

6. The undersigned read out the order of the Honourable Islamabad High Court before all who were present and even explained the same. The auction proceedings were not stayed by the Honourable Islamabad High Court, so the undersigned explained the procedure of auction once again. The reserve price was quoted and the bidding process was initiated. The undersigned repeatedly requested the people gathered for

auction, to step forward and make a bid if they wish to do so, however, no bid was received. Only one person, namely Mr. Tariq Khan made a bid of Rs.15,000,0000/- however, the same being considerably short of reserved price fixed by the Court was not accepted. At 3:00 Pm the auction proceedings were concluded and no other bid was received."

28. I must clarify that there is no impediment on the learned Civil Court to make a schedule for the auction of the suit property. On the date fixed by the learned Civil Court of the auction of the suit property, the local administration may provide adequate security so as to ensure that auction proceedings are carried out smoothly and in accordance with the law. Any person disrupting the auction proceedings held under the orders of the learned Civil Court, shall in effect be perverting the cause of justice. Such elements must be dealt with strictly in accordance with the law.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

Qamar Khan*

Uploaded By: Zulqarnain Shah