IN THE SUPREME COURT OF PAKISTAN
(REVIEW JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE SH. AZMAT SAEED
MR. JUSTICE MAQBOOL BAQAR

CIVIL REVIEW PETITION NO.383/2005 IN CIVIL APPEAL NO.670/2002
(Against the judgment dated 27.6.2005 of this Court passed in Civil Appeal No.670/2002)

Zakaria Ghani and 4 others

…Petitioner(s)

VERSUS

Muhammad Ikhlaq Memon and 8 others

…Respondent(s)

For the Petitioner(s): Mr. Muhammad Akram Sheikh, Sr. ASC

For Respondent No.1: Mr. Khalid Anwar, Sr. ASC

Date of Hearing: 03.11.2015

…

JUDGMENT

MIAN SAQIB NISAR, J.- This Review Petition seeks to impugn the judgment of this Court dated 27.6.2005 in terms whereof Civil Appeal No.670 of 2002 filed by the Respondent No.1, Muhammad Ikhlaq Memon, against the judgment of a Division Bench of the High Court of Sindh was allowed. The essential facts of the case, as set out in the judgment under appeal, are that United Bank Limited obtained a decree from the Banking Tribunal constituted under the Banking Tribunals Ordinance, 1984. Thereafter, the Bank filed execution proceedings for recovery of the decretal amount of Rs.103,789,753.00. A learned single judge of the High Court of Sindh, acting as a judge of the Banking Court, passed an order 8.10.1988 directing the sale of three properties belonging to the Petitioners by the Nazir of the Court. It is material to note, for purposes of deciding the present Review Petition, that the

original court order clearly stated that the sale was to be effected by means of sealed bids *(i.e. not a public auction)* after issuing advertisements in different newspapers. These were widely circulated newspapers, namely, Jang, Dawn and Millat.

2. A sale proclamation was issued for the first time on 15.5.1999. Despite the fact that the papers enjoyed a wide circulation no offer was forthcoming and this is a matter which we will revert to in a later part of this judgment. The process was repeated on 24.7.2000 and once again no offers came forth. A third endeavour was made by sale proclamation issued on 24.10.2000 but yet again the Nazir did not receive any offer. The Nazir was directed to make a fourth attempt and accordingly a sale proclamation was issued on 26.1.2001. By now about 1½ years had elapsed since the issuance of the first proclamation. It was this sale proclamation which bore fruit and the Respondent No.1 came forward with offers for all three of the properties in the sum of Rs.1,19,78,600, Rs.55,53,900, and Rs.57,47,700 respectively. He attached pay orders of Rs.11,97,860, Rs.2,55,390 and Rs.5,74,770, alongwith his offer. The matter was put up before the learned single judge and the Respondent No.1 was requested to enhance the offer which he duly did. Thus the original total of the three offers which came to Rs.2,32,80,280 was enhanced to Rs.2,41,00,000. He was directed by the Court to deposit the price within one month. It is pertinent and relevant for purposes of present case to note that on 15.3.2001 *(i.e. within the stipulated period of 30 days)* he submitted an application bearing CMA No.619 of 2001 to the Banking Court seeking a direction from the Court that he should be given vacant possession of the properties. To establish his bona fides he attached therewith photocopies of

three pay orders for the balance amount of the sale consideration. Thus it is clear that he had made the financial arrangements for paying the money within 30 days. The Banking Court by an order dated 26.2.2001 directed the Respondent No.1 to take steps in terms of Order 21, Rule 85 CPC. It may be noted that this was for the first time an order was passed in terms of the CPC. The original order, which required sealed tenders instead of a public auction, was obviously not passed under the CPC but in terms of the powers conferred on the Banking Court under the Banking law to adopt any procedure deemed appropriate by it for purposes of execution of the decree. Though Order 21, Rule 85 CPC contemplates a time frame of 15 days commencing from the relevant date as mentioned in the said provision of law, in this particular case the order was passed obviously conferring additional time on the Respondent No.1 and, in fact, he deposited the balance amount three days later on 30.3.2001. The Banking Court had directed that the case should be heard on the next date namely 31.3.2001. The Banking Court by means of an order dated 9.4.2001 noted that the Respondent No.1 had deposited the balance amount of the sale and directed the Nazir to take steps for confirmation of the sale. Thus the bid was accepted by the court.

3. At this point of time it is necessary to examine the conduct of the Petitioner. Although the Petitioner had been served he did not raise any objection whatsoever, despite entering appearance, to the original order passed for the sale of the property through sealed tenders and not by way of public auction under the CPC. He also did not raise any objections whatsoever in relation to the framing of the four sale proclamations. Specifically, he did not raise any objection, either at that stage or at any later stage, in the ensuing

litigation all the way upto this court to the text of sale proclamation. He, however, preferred special HCA No.94 of 2001 against the said order dated 26.2.2001. It is important to note that he had a clear cut legal right to challenge the order passed in relation to the sale of properties by means of two alternative methods. One was to file an application under Order 21, Rule 89 and the other was to file an application under Order 21, Rule 90.

4. There is a great deal of difference between these two provisions of law. Under Order 21, Rule 89 a judgment debtor is not obligated to show any legal infirmity in the order of sale. He has an unqualified right to have the sale set aside provided he complies with the conditions laid down therein, namely, that he should deposit the full decretal amount in court plus 5% to be paid to the auction purchaser. The time period for making such an application is 30 days. Admittedly he failed to do so and accordingly, it follows, by necessary implication of law that a vested right accrued in favour of the auction purchaser. The second provision, namely, Order 21, Rule 90 CPC proceeds on a different basis. In order to succeed it is mandatory for the judgment debtor to satisfy the court, on the merits, that the sale should be set aside on the ground of a material irregularity, or fraud, in publishing or conducting it. Yet another condition is prescribed by means of the proviso thereto which stipulates that no sale shall be set aside on the ground of irregularity or fraud unless, upon the facts proved before the Court, it is established that the judgment debtor has sustained substantial injury by reason of such irregularity or fraud. Yet another condition is prescribed by the second proviso which states that no application shall be entertained in terms of this provision of law unless and until the judgment debtor deposits an amount equal to 20% of the sum realized at the

sale or furnish such security as the court may direct. These are stringent conditions which make the policy of the law crystal clear. A mere allegation is not sufficient. It has to be established that not merely an irregularity but a material irregularity has taken place, or, in the alternative, that fraud has been perpetrated in the process of carrying out the sale. Then is super added the requirement that even if these conditions are complied with the judgment debtor must satisfy the court that he has sustained a substantial injury by reason thereof. Finally, in order to discourage frivolous applications intended to delay the execution of the decree it is mandatory on the judgment debtor to deposit 20% of the sale amount or furnish such security as the court may direct. It is also material to note that once again a time frame of 30 days has been specified under article 166 of the Limitation Act in this behalf. Failing compliance with the provisions of Order 21, Rule 90 once again the inevitable consequence is that the judgment debtor is precluded from making any such allegation in order to challenge the validity of the sale at a subsequent stage. The above is further clarified by the provisions of Order 21, Rule 92 CPC which lays down explicitly the consequences of a failure to make an application under Order 21, Rule 89 or Order 21, Rule 90. *The said provision states that where no such application has been made under the above mentioned rules, or where such application has been made and disallowed, it becomes mandatory on the court to make an order confirming the sale and thereupon the sale becomes absolute.* These provisions leave no doubt for any ambiguity in the matter. The plaintiff has not merely a legal right flowing from the contract between the parties but a statutory right crystallized in the form of a decree passed by a court of competent jurisdiction. The law has laid down the only methods available in

order to challenge such a crystallized right vesting in a plaintiff. If a judgment debtor chooses not to take advantage of the opportunities afforded to him by the law the matter comes to an end *(In a later part of this judgment we will consider the case law which discusses whether an application under section 151 CPC seeking to circumvent the failure to apply under Order 21, Rule 89 or Rule 90 CPC is maintainable or not)*.

5. By means of the Review Petition a number of arguments were advanced on behalf of the Petitioner. It was stated that the approximate value of the three properties was Rs.13,95,00,000. It was claimed in the Review Petition that this value was supported by means of a sworn affidavit. The contention raised was that the properties were sold for a sum of only Rs.2,41,00,000 which was completely out of proportion and out of line with the actual value. Now it is indeed true that there is a very great difference between an estimated price of Rs.13,95,00,000 and the amount which was actually recovered. However, when we examine the statement under Order 21, Rule 66 CPC filed before the Banking Court we find that the total figure includes the price of two other properties other than the three which are in dispute. Admittedly these properties do not form the subject matter of the present proceedings. Accordingly, if we confine ourselves to the three properties which are in question we find that the total value as estimated in terms of the statement under Order 21, Rule 66 CPC amounts to Rs.29.5 million. This is not very far different from the actual figure at which the properties were sold which was Rs.24.1 million. Accordingly the first submission made by the learned counsel cannot be accepted.

6. Another major submission made on behalf of the Petitioner was that the first order passed by the Banking Court directed that the sale should be made pursuant to Order 21, Rule 66 CPC. It was contended that the CPC requires sales to be by public auction and accordingly it was not open to the learned court to subsequently invite tenders by means of sealed bid. It was submitted that this was a fundamental illegality which went to the root of the case. In support of this contention our attention was drawn to the first order dated 8.10.1998 and paragraph 3 of the said order was read out before us. A perusal of the above paragraph would show however that it does not support the contention advanced by the Petitioner. It is indeed true that the request made was for the sale of the properties and a further reference was made to the statement filed under Order 21, Rule 66 CPC by the counsel appearing in the case. However, the actual order passed by the court which follows in the very next statement makes no reference at all to Order 21, Rule 66. On the contrary, it categorically states that the sale is to be effected by the Nazir of the Court by inviting sealed bids through advertisement in the daily newspapers. There can be no doubt about the fact that the Banking Court was entitled in terms of the then banking law applicable, and indeed, in terms of the present banking laws as well, to follow any procedure deemed appropriate by it. Thus no objection can be taken to the order of sale. It was clearly not passed under the CPC. This finding is also sufficient to dispose of the accompanying submission which was to the effect that once an order has been passed stipulating that the sale is to be made under the CPC it is not open to the court to switch over to any alternative procedure. Although the correctness of this assertion is even otherwise doubtful in view of the case law including several judgments by this court, to

which reference is made in a subsequent part herein, the contention is ill founded on the factual plane.

7. A further criticism which has been advanced on behalf of the Petitioner against the judgment in appeal of this Court is relatable to the observation that it was a "negotiated sale". It is contended that this observation is not justified. However, we find from the record that the total amount of the sealed bids amounted to Rs.2,32,00,000. This was subsequently as a result of the proceedings which took place in open court, enhanced to Rs.2,41,00,000. Thus this criticism also falls to the ground. Exception has also been taken to the observation made in paragraph 12 of the judgment of this Court in which it was stated *"it was for the first time through order dated 27.3.2001 that the Banking Court by making a reference to Order 21, Rule 85 had decided to follow the procedure as laid down by CPC"*. However, as has been clarified in the above the factual position is the exact opposite since right at the inception the Banking Court had passed an order for the sale of the properties through sealed bids which by no stretch of the imagination can be called an order passed under the CPC. This argument therefore accordingly equally fails.

8. We now turn to the next argument advanced on behalf of the Petitioner which was that the payment was made belatedly. Now we have already taken note of the fact that the learned judge had right at the inception decided not to follow the time frame laid down in the CPC. Accordingly, he had fixed the time of one month within his own discretion. This he was entitled to do. Within that period of one month, as pointed out earlier, the Respondent applied by means of CMA No.619 of 2001 for an order that when the property would be transferred to him he should obtain vacant possession. With that application

he attached photocopies of pay orders issued by the bank for the balance amount of the sale consideration. It is therefore clear that he had made arrangements for making payment well within the period of 30 days. On this the banking court on 27.3.2001 directed the Appellant to take further steps in terms of Order 21, Rule 85 CPC which contemplates a period of 15 days from the inception. The Respondent deposited the amount within 3 days on 30th of March, 2001 and this amount was accepted by the banking court which, by means of the order dated 9.4.2001, directed the Nazir to take steps for confirmation of the sale. All these steps were well within the discretion of the Banking Court and no criticism can be attached in relation thereto. This argument therefore can also not succeed.

9. A major grievance which was made by the learned counsel of the Petitioner was that the Respondent No.1 withdrew the money deposited in Court by him within 60 days and hence it was unfair to allow him the benefit of the sale in his favour. We have noticed that no such ground has been raised either in the Review Petition or in the certificate filed by the learned counsel in support thereof. However, we have nevertheless examined it carefully. The facts are set out in the order passed by the Court on 31.5.2001. By a perusal of this order we find that the hearing of the case was being delayed at the request of the counsel for the Petitioner. It was by reason thereof that the learned counsel appearing for the Respondent contended, as is evident from the order, that the existing state of affairs was operating to his prejudice inasmuch as although he had deposited the entire sale consideration the matter was being held up indefinitely. He further stated that he did not believe in interest on Islamic grounds and hence the suggestion that the money deposited be kept in a

profit bearing account was not acceptable to him. His proposal therefore was that, without prejudice to his claim, he should be allowed to withdraw 90% of the amount deposited by him which, in case he succeeded, would be re-deposited by him. The order records the fact that the counsel for the Petitioner gave his consent to this proposal. The Court thereafter, after recording the consent, observed that in the circumstances the Respondent would be entitled to withdraw the amount of 90% without prejudice to his legal rights and in case he succeeded he would redeposit the same in court. In the event of his failure to deposit the said amount the 10% would be forfeited. This was a consent order and we do not see how, in the presence of this order, it is now open to the Petitioner to raise an objection thereto. The balance amount of 90% was of course re-deposited in Court once the appeal had been allowed in favour of the Respondent and no further objection in this regard has been raised. It should be added, however, that when the present Review Petition was filed a stay order was granted so in consequence, although the appeal was decided in favour of the Respondent as far back as 7.6.2005, for the ensuing period of 10 years the Respondent has been denied the possession of the property which he had acquired through payment of the full amount in court. The Petitioner has thus enjoyed the benefit of the property for an additional 10 years while the Respondent has been out of pocket. In these circumstances the grievance of the Petitioner that the Respondent only deposited the money for a period of 60 days and is claiming title on the basis thereof is not justified and cannot be accepted.

10. It was also contended that a higher offer had been made by a company known as Star Cotton Corporation Ltd and this offer was disregarded without

any justification. This question is discussed in paragraph 17 of the judgment of this court which refers to a so called higher bid of Rs.28 million by Star Cotton Corporation (Pvt.) Ltd. Karachi and it has been noted that there is nothing on the record to show that it was actually made to the Court at the relevant time. It also does not find any mention in the court's order dated 9.4.2001. This finding is supported by the documentary evidence on the record. An undated offer by Star Cotton Corporation is available on the record and that too is addressed to the Nazir of the Sindh High Court. There is nothing whatsoever on the record which indicates that it was brought to the notice of the court. Certainly there is no question of our conducting an independent enquiry into the matter in review proceedings. It was the duty of the Petitioner to have brought on record any evidence which indicated that the offer was placed before the court on or before the date on which the operative orders were passed. This plea therefore cannot be entertained. In this connection, it may also be noted that again this is a point which is not raised either in the review petition or the certificate in support thereof. It appears, on the face of it, to be an after thought.

11. Although the above is sufficient to dispose off the case, in view of the fact, that important questions of law have been raised in relation to the mode of execution of banking decree we have considered, the case law in relation to this subject in some depth and we now turn to an examination of the same.

12. A convenient point to start with is the landmark judgment of this court in the case of Hudaybia Textile Mills Limited vs. Allied Bank of Pakistan Ltd. (PLD 1987 SC 512) which has been relied upon by both sides. The facts of the case, in brief, are that the Bank obtained a decree against the judgment debtor

pursuant to which an order was passed for the auction of the attached property. It is important to note that no objection was taken by the judgment debtor to the proposed terms and conditions of the auction proclamation. After the auction had been carried out, but prior to the confirmation thereof, an application was filed by the judgment debtor under section 151 CPC for holding it in abeyance on the ground of negotiations being carried on between the judgment debtor and the Bank. It appears that thereafter a settlement was arrived at between them. The question however arose about the rights of the Auction Purchaser which, as pointed out above, had yet to be confirmed. The executing court passed an order to the effect that since the judgment debtor had paid up the agreed amount to the decree holder the auction was to be set aside and the property would be restored to him. Insofar as the Auction Purchaser was concerned it was ordered that he was entitled to 5% of the amount in terms of Order 21 Rule 89 CPC which should be paid to him. It should however be noted that no application had been filed under Order 21 Rule 89 CPC and indeed, by that time, it was already barred by limitation. Thus the judgment debtor's request was made under section 151 CPC and the important question was whether this request could be allowed under law.

13. To continue with the narration of events thereafter the Auction Purchaser filed an application under Order 21 Rule 89/92 stating that the auction should be confirmed in the above facts and circumstances. On that application the executing court passed an order stating that an objection petition had been filed in time under section 151 C.P.C, and since the negotiations were proceeding which ultimately succeeded the fact that there was a violation of the provisions of Order 21 Rule 89 inasmuch as neither the sum of 5% had been deposited

and nor had the decretal amount been paid, this was not essential. Accordingly the application of the Auction Purchaser was dismissed with the observation that he would be entitled to 5%. Against this an appeal was filed before a division bench of the Lahore High Court which accepted the contention of the Auction Purchaser. The relevant passage of the division bench order is reproduced below:

> "An objection to the sale of immovable property in execution of decree could be taken either under rule 89 or rule 90 of Order 21 C.P.C. It is conceded that Hudaybia Mills before filing application dated 18th September, 1985 (C.M. No. 103-B/1985) did not deposit in Court firstly, for payment to the purchaser, a sum equal to 5 per cent of the purchase money; and secondly, for payment to the decree-holder the amount of which the sale was ordered. Rule 89 of Order 21 C.P.C. makes it a condition precedent that the above said two deposits be made in the Court before applying for setting aside of the sale. The sale could not be permitted to be challenged through an application under section 151 C.P.C. It was held in *Nanhelal and another V. Umrao Singh* (AIR 1931 P.C. 33) that when once a sale had been effected, a third party's interest intervene and there is nothing to suggest that the provisions of Order 21, Rule 2 or 89 are to be disregarded. It was further held that after a sale is duly held, the Court cannot refuse to confirm sale on the ground that the decree-holder and judgment debtor say that the decree has been satisfied."

14. Insofar as of the objection of the judgment debtor which was filed under section 151 CPC is concerned the finding is reproduced below:-

> "As such, Hudaybia Mills, one of the judgment-debtors whose property was sold by the Court auctioneer having failed to make requisite deposit under rule 89 of Order 21, C.P.C., the Court was left with no choice except to confirm the sale. It was argued by the learned counsel that application dated 18th September, 1985, was filed under section 151 C.P.C. and as such, no deposit was required

> to be made by the judgment-debtor. In alternate, the learned counsel contended that the said application could be treated as an application under Order 21 rule 90 C.P.C. This argument is without any force and cannot be given any credit. The inherent powers under the Code of Civil Procedure can be exercised only where no specific provision of law is available. In the instant case, as held above the sale of attached property in execution of decree could be challenged either under rule 89 or under rule 90 of Order 21, C.P.C. The argument that the said application be treated as an application under Order 21 rule 90, C.P.C. cannot be accepted because the judgment debtor, in the said application did not allege any material irregularity or fraud in publishing or conduction of sale by the Court auctioneer. Secondly, the allegation of material irregularity and fraud by the Court auctioneer before us seems to be an afterthought, and thirdly, no finding on material irregularity or fraud could be recorded without recording evidence. As no such objection was taken before the executing Court, these questions were not adverted to and as such, cannot be permitted to be canvassed by the judgment-debtor, for the first time, before us."

15. The judgment debtor took the matter in appeal to this court. In relation to the finding by the executing court that it was not mandatory to deposit 5% under Order 21 Rule 89 the finding of this court is as under:-

> "Having regard to these principles we may now advert to the facts of present case. The sole ground that prevailed with the learned Single Judge to set aside the sale and refuse confirmation was the fact that the decree had been adjusted or satisfied to the satisfaction of the decree holder. There was no objection raised, nor is any such objection being pressed before us, that there was any fraud or irregularity in the conduct of the auction, or the price offered by the auction purchaser was inadequate. There is no doubt that the executing Court had a discretion to choose the mode of execution as it deemed fit but it cannot be denied that the Court by its order dated 3rd July, 1985, clearly and unequivocally directed that the attached property be put to sale through public auction. The perusal of the various orders passed by the executing Court also

> clearly show that the Court had adopted the procedure provided in Order XXI C.P.C. for the sale through public auction of the property attached. Even the terms and conditions of the auction were expressly determined in accordance with Order XXI rule 66, C.P.C. Further in his order dated 5th June, 1986 whereby the learned Single Judge finally refused to confirm the sale, it is conceded that the judgment debtor had to deposit the 5% of the purchase money and the decretal amount which are the requirements of the Order XXI rule 89, C.P.C. The difficulty was overcome by taking the view that such deposits were not the essence of the proceedings. *This view is not based on any recognized principle of law.*" (Emphasis supplied)

16. This Court further observed that the principles applicable in such cases were laid down by the Privy Council in the case of *Nanhelal and another Vs. Umrao Singh* (AIR 1931 Privy Council 33) in which it was held as under:

> "In the first place, Order XXI, rule 2, which provides for certification of an adjustment come to out of Court, clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder, and when no other interests have come into being. When once a sale has been effected, a third party's interest intervenes, and there is nothing in this rule to suggest that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in rule 89 viz by depositing in Court the amount for the recovery of which the property was sold, together with 5 per cent of the purchase money which goes to the purchaser as statutory compensation, and this remedy can only be pursued within 30 days of the sale; see Article 166, Sch., Lim. Act, 1908. That this is so is, in their Lordships opinion, clear under the wording of rule 92, which provides that in such a case (i.e. where the sale has been duly carried out), if no application is made under rule 99;
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> "The Court shall make an order confirming the sale and thereupon the sale shall become absolute."

17. This court thereafter considered what should be the general approach in such matters. In this connection reliance was placed on the following extract from American jurisprudence (2nd Edition) Volume 47, Article 178 at page 440 in which the general principles governing the discretion to grant or refuse confirmation of a judicial sale are discussed as below:-

> "But apart from the above another vital principle is involved. In American Jurisprudence (2nd Edition) Volume 47, Article 178 at page 440, the general principles governing the discretion to grant or refuse confirmation of a judicial sale are discussed. It has been observed:-
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> > "Although in some jurisdictions a more restrictive rule is followed in cases where it is urged that confirmation should be refused on the sole ground that an advance or upset bid has been received, the confirmation of, or refusal to confirm, judicial sales, as a general rule, rests largely within the discretion of the trial Court, and such determinations ordinarily will not be reviewed except for manifest abuse of such discretion. The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in view of all the circumstances. The Court must act in the interest of fairness and prudence, and with a just regard to the rights of all concerned, and the stability of judicial sales. Thus, if the sale was fairly conducted and the property sold for a reasonable and fair value under the circumstances, the Court is ordinarily required in the exercise of its judicial discretion to confirm the sale."

18. The Court then proceeded to lay down the following principles of law:-

> *"The above passage from the American Jurisprudence clearly points out the dominant principle of law in such cases, namely, the stability of judicial sales*. In this context the argument that since the Court was vested with the wide discretion to choose any mode of execution of the decree, it can likewise refuse confirmation of sale on any ground it chooses is without substance. Judicial discretion vested by statutory provisions cannot be construed in such a manner as it will arm the Court with arbitrary powers and would inevitably destroy the public confidence in the stability of

> the judicial sales as pointed out by the American Jurisprudence. Therefore, on facts as well as on principle the learned Single Judge went wrong in refusing confirmation on the ground that after the sale the decree had been satisfied. Even otherwise once the Court had made up its mind to execute the decree by attachment and sale by public auction, as long as the order so directing was in the field, the discretion vesting in it under section 8(3) of the Ordinance stood exhausted and a particular course of proceedings was brought into motion which had to culminate in a result contemplated by legal principles, and this course could not be diverted on the assumption that the executing Court had discretion to choose any mode of execution. In the premises the question of confirmation was to be regulated either by the C.P.C. or equitable principles under the provisions thereof and general principles as pointed out above. From any angle the refusal of confirmation by the learned Single Judge is unsustainable and the auction purchaser was entitled, in the circumstances of the case to the confirmation of the auction sale. It was urged that the discretion was properly exercised because the purchaser himself was present when the negotiations between the decree-holder and the judgment debtor were taking place in Court and had applied at one stage for withdrawal of deposit. This argument is without substance because purchaser has not been shown to be a consenting party to the arrangement between the decree-holder and the judgment debtor. He had no doubt at one stage applied for withdrawal of the amount deposited by him on the ground that there was some clog on the title of the judgment debtor in the property subjected to Court sale but before any orders were passed on this application it was withdrawn stating that the same was made under wrong advice and the Court dismissed the application. It is well recognized that a proceeding withdrawn with the permission of the Court is wiped off from the record as non-existent." (Emphasis supplied)

19. In the circumstances the appeal was dismissed. This is an extremely important judgment which was and is binding on all subsequent benches of equal or fewer numbers of judges and still rules the field. It is unfortunate that its existence has sometimes been in advertently lost sight of.

20. The next important case is that of *Asma Zafarul Hassan Vs. United Bank and another* (PLJ 1981 SC 242.) which is an even earlier case. In this case also an objection was raised to the execution by sale of the judgment debtor's property. The following paras of the judgment are material and are reproduced below.

> "7. In regard to the objection that there was violation of rule 65 Order XXI, C.P.C, the Court held though the mode of sale by public auction was prescribed yet in a fit case the Court could, in the exercise of its inherent jurisdiction, accept a private offer after due notice to the parties if it was reasonable in the absence of any "prohibitive legislation". The High Court also dealt with the other objections relating to the manner and mode of the publication of the proclamation and rejected them on the short ground that the petitioner had failed to prove that the prescribed method had resulted in a loss to the petitioner; and further, that as he had failed to object to the mode of the publication of the proclamation he was debarred from raising it now."
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> The plea of the inadequacy of the sale price was also rejected on the premise that as the petitioner or her counsel had failed to object at the time the offer was accepted, it was not open now to make a grievance of it.
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> 11. The learned counsel vehemently urged that the property could not be sold otherwise than by auction. For this proposition, he placed reliance on rule 65, Order XXI, C.P.C. and rule 351 of the Chief Court Rules (Original Side). These provisions do prescribe the mode of disposal by public auction but neither of them expressly or by necessary implication prohibit any other mode of disposal. Therefore, if the Court had deviated from this mode of disposal to serve the ends of justice, no exception can be taken to it. In Narising Das V. Mangal Dnbey [(1883) 5 All, 163] Mahmood, J. observed:-
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> > "Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code but, on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed."

Furthermore, insofar as the objections to the procedure adopted for the sale is concerned, in terms of which a private offer was accepted by the High Court, reliance was placed on the still earlier judgment of this court in *Ghulam Abbas Vs. Zohra Bibi* (PLD 1972 SC 337) in which it was held:

> "No doubt, this gives the judgment-debtor a valuable right, but there is no evidence at all to show that the judgment-debtor, in the present case, ever tendered any amount to the officer conducting the sale, or paid any amount into the Court which ordered the sale, or asked for the postponement of the sale for this purpose. This complaint of the violation of his right could have been lodged, if it was genuine, at the time of the auction but this was not done even when the appellant on the first postponement of the sale waived the issuance of a fresh proclamation. He must have been aware of its contents then. *Before a violation of a right can be alleged it must be shown that the right was asserted and denied.* To assert this right, at least, the amount which the judgment-debtor considered to be the correct amount should have been tendered to the officer conducting the sale. This was never done, nor is there any evidence on the record to show that the judgment-debtor was ever in a position to procure this amount. No violation of the right has, therefore, taken place, about which any legitimate complaint can be made at this stage. This is clearly an afterthought.
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> The appellant is also not in a position to show that he has in any way been prejudiced by this mistake or that the mistake alleged prevented any prospective bidder from participating in the bidding.
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> *Indeed, it would appear that the view of the Courts has consistently been that the non-compliance with the provisions of the Code of Civil Procedure, with regard to the proclamation of sale, its publication and the conduct of the sale in execution, are only material irregularities but not illegalities which render the sale in disregard of those provisions a nullity.* A sale cannot be set aside unless "direct evidence of substantial injury resulting from the irregularity has been given" as was observed in the case of Tassaduk Rasul Khan v. Ahmad Hussain (1) and the onus of

proving this prejudice is on the party complaining thereof." *(Emphasis supplied)*

The judgment debtor's objections were accordingly dismissed.

21. On the question as to whether it is open to an executing court to switch over from one mode of execution under the banking law to another under the CPC is possible or not, this court held in the case of *Mumtaz-ud-din Feroze vs. Sheikh Iftikhar Adil and others* (PLD 2009 SC 207) as under in para 15 and 16 of the judgment, the relevant part of which is reproduced below.

> "15. As to the contention that the Banking Court in execution of the decree once adhering to the procedure prescribed by Civil Procedure Code could not have switched over to any other mode, it may be pointed out here that since by virtue of section 18(2) of the Banking Companies (Recoveries of Loans, Advances, Credits and Finances). Act (XV of 1997) (hereinafter referred to as the Act XV of 1997), the Banking Court is at liberty to recover the amount covered by a decree, on the application of the decree holder, in accordance with the provisions of the Code of Civil Procedure, 1908 or any other law or in such other manner as it may deem fit, therefore consideration and approval of offer made by the petitioner, by the Court, in our view, was neither illegal nor unjustified particularly when all efforts made previously, including those made by the decree-holder and even by the judgment-debtors, had failed to procure a better offer than Rs. 85,000,000, hence approval of the offer made by the petitioner, which was more than eight crore over and above the highest offer received was just and proper."

It was further observed in paragraph 16 as follows:

> "16. *In the wake of above, it follows that non-compliance with the provisions of C.P.C. with regard to the proclamation of sale, its publication and the conduct of sale in execution, are only material (sic) irregularities and cannot be termed or regarded as illegalities thereby rendering the sale nullity. Objection after completion of sale shall not, therefore, ordinarily be allowed*

> *except on very limited grounds like fraud, etc. otherwise no auction sale will ever be completed.* In this view, we, in addition to the cases cited above, are fortified by the judgments in the cases reported as (i) Mian Muhammad Abdul Khaliq v. M. Abdul Jabbar Khan and others PLD 1953 Lah. 147 and (ii) Nanhelal and another v. Umrao Sindh AIR 1931 PC 33. Further, a distinction has to be drawn between the decree-holder who came into purchase under his own decree and a bona fide purchaser who came in and got the sale in execution of a decree to which he was not a party. *In case where third party is a bona fide auction purchaser, his interest in sale of auction has to be protected*." (Emphasis supplied)

22. A striking case from the Indian jurisdiction is the judgment of the Indian Supreme Court in the case of *Janak Raj Vs. Gurdial Singh* (AIR 1967 SC 608). The facts of this case highlight the legal principle involved. Before the auction sale had been confirmed the decree in terms of which the sale was ordered was set aside in appeal on the merits. Therefore, it was contended, that there was nothing left to execute. The question therefore arose that since the sale had not been confirmed at that point of time, whether the auction purchaser was still entitled to the property. The following finding was delivered on this point:

> "There is no provision in the Code of Civil Procedure of 1908 either under O. XXI or elsewhere which provides that the sale is not to be confirmed if it be found that the decree under which the sale was ordered has been reversed before the confirmation of sale. It does not seem ever to have been doubted that once the sale is confirmed the judgment-debtor is not entitled to get back the property even if he succeeds thereafter in having the decree against him reversed. The question is, whether the same result ought to follow when the reversal of the decree takes place before the confirmation of sale.
>
> (5) There does not seem to be any valid reason for making a distinction between the two cases. It is certainly hard on the

> defendant-judgment-debtor to have to lose his property on the basis of a sale held in execution of a decree which is not ultimately upheld. Once, however, it is held that he cannot complain after confirmation of sale, there seems to be no reason why he should be allowed to do so because the decree was reversed before such confirmation. The code of Civil Procedure of 1908 contains elaborate provisions which have to be followed in cases of sales of property in execution of a decree. It also lays down how and in what manner such sales may be set aside. Ordinarily, if no application for setting aside a sale is made under any of the provisions of Rs. 89 to 91 of O. XXI, or when any application under any of these rules is made and disallowed, the Court has no choice in the matter of confirming the sale and the sale must be made absolute. If it was the intention of the Legislature that the sale was not to be made absolute because the decree had ceased to exist, we should have expected a provision to that effect either in O. XXI or in Part II of the Code of Civil Procedure of 1908 which contains Ss. 36 to 74 (inclusive)."

23. We now turn to the final aspect of the case. It has earlier been noticed that no grievance was made at any stage of the proceedings about the fact that no reserve price was mentioned in the auction notices. This objection was also not raised either before the trial court, the first appellate court or before this court in appeal. Neither does it find any mention in the review petition or in the certificate appended thereto. The interesting question therefore arises as to whether it is at all open to us to examine this question. The settled law is of course that the scope of a review petition is very narrow and limited and it hardly seems appropriate to consider a legal objection which has not been taken at any stage of the proceedings on an initiative of this Court on its own. This is especially true since the point has not even been argued in court and we have not had the benefit of submissions by the counsel for the Respondent either. Nevertheless, since we are aware of certain judgments on the question

of reserve price we think it would be not inappropriate to make certain observations in relation thereto for purposes of clarification of the law. There are two recent judgments on this point delivered by this court.

24. The case of Lanvin Traders, Karachi Vs. Presiding Officer, Banking Court No. 2, Karachi (2013 SCMR 1419) stresses importance of fixing the reserve price. We may note straightaway that there are certain important distinguishing features in this case. In the present case the question of non-mention of the reserve price has not been raised at all at any stage of the proceedings including the arguments before us in the present review petition. However, this question was specifically raised and argued in the Lanvin Traders case. Secondly, note should also be taken that in the Lanvin Traders case the objection was not merely in relation to the non-mention of the reserve price but, as stated in paragraph 10, "getting down to the brass tacks of the case, it will be seen that it was not a single lapse which flashed by without causing harm to any. It was rather a series of ploys which appears to have been employed to harm one and benefit another." Thirdly, it should also be noted that in paragraph 11 it was specifically recognized that "agreed that the expression "reserve price" does not find mention in the relevant rule but the words used and the rule pointedly hint thereto." Furthermore, it was held "we therefore are constrained to hold that the whole proceedings from inception to the end have not been held in accordance with law and thus cannot be blessed with any sanctity". *(It should incidentally be noted in passing that this is a majority judgment with a dissenting judgment also and a review petition has been admitted for hearing against it which is pending before this court)*. Since this case is distinguishable it is not necessary to dwell further on it. Insofar as the subsequent case of

National Bank of Pakistan vs. Saf Textile Mills Ltd. (PLD 2014 SC 283) is concerned it simply places reliance thereon and primarily dealt with the question of the constitutionality of non-judicial sales of property.

25. We are now in a position to revert to the observation made by us earlier as to the circumstances in the present case in which for a period of one and half years repeated attempts were made to obtain offers by means of public auction for the sale of the properties in question without any success. The sale proclamations, as noted earlier, were published in widely circulated newspapers. The first three elicited no response whatsoever and the last one led to only one offer being made. The question arises as to what could be the possible reason for this unhappy state of affairs. Unfortunately the reason is all too clear. There is a general impression in the market, which is not without foundation, that to purchase a property in a court auction is to purchase not property but litigation. In the normal course purchasers are interested in concluding a transaction as soon as possible and thereafter to take over possession of the property and use it for whatever purposes they have in mind. The unfortunate facts in this case reveal that although the process started as far back as the year 2000 and 15 years have elapsed in the meanwhile a definitive resolution of the case has been delayed up till now. This delay provides vindication of the wide spread belief that prudent buyers should refrain from participating in court auctions of property. This leads to two deeply unfortunate consequences. On the one hand the decree holders suffer since the collateral which is being attempted to be sold is eventually sold at a price which may well be far below the market value in a private sale and thus the full decretal amount cannot be recovered. It is not merely they, but even the

judgment debtors, who suffer. Obviously it is in their interest to obtain the highest possible price for their property. If, however, the above market perception continues to prevail they also will be deprived of a fair value since very few people will be interested in purchasing their property. This therefore, is a case not merely of one party's legal rights suffering but of both parties suffering. If the valuable lessons contained in the judgment of this Court in the Hudaybia case had been observed and followed by banking courts such a state of affairs could perhaps have been averted. The sanctity of judicial sales needs to be reaffirmed authoritatively and definitively in the public interest as well as in the interest of decree holders and judgment debtors. This can only be done if judicial sales are only set aside if it is clearly established that there has been fraud. A mere irregularity, even if material, should not suffice unless it can be shown that material loss has been caused. It is also important to note that where the irregularity consists of errors by the court, or by court officials such as the Nazir, no party should be made to suffer by reason thereof. The maxim of law that no one should suffer because of an error by a court is well known and has been reiterated again and again. Thus if, for example, the judgment debtor was of the view that the insertion of reserve price would help him in getting a good offer for it he could and should have raised this objection before the executing court at the initial stage. He did not do this either in relation to the first sale proclamation, or the second one, or the third one, or the fourth one. A legal right which inheres in a party should be asserted and ex post facto objections should not be entertained thereafter, especially when the law provides a machinery for raising objections as set out in Order 21, Rule 89 and Rule 90. In fact if the judgment debtor had asked for setting a reserve price at

the initial stage there is no reason to doubt the fact that the court could easily have ordered that. The Bank had given its own valuation but the judgment debtor did not trouble to do so.

26. At this point we can conveniently examine the concept of reserve price. What exactly does it means. This is a well known concept and we can, by way of example, refer to the following definition contained in Business Dictionary.com.

> "Reserve price; lowest fixed price at which an item is offered at an auction sale and (1) at which it will be sold if no higher price is bid, or (2) below which the seller is not obligated to accept the winning bid."

The reserve price is often, although not invariably, fixed in sales of property by the owners thereof. Its relevance and importance depends on the circumstances in which the sale is being held. For example, in cases of Government owned property which is being privatized *a reserve price is often fixed but is deliberately not disclosed to the public at all.* The fixation of the reserve price is intended to be an internal guide to the Government in taking a decision as to whether or not to carry out a sale of the property at the highest price bid. The reason it is not disclosed to the bidders is that this may actually cause a loss to the Government. This would be because bidders would assume that if the Government, on the basis of its internal evaluation of the property, had come to a conclusion as to the actual value of the property, they would be reluctant to offer amounts substantially higher. This then is the reason why fixation of a disclosed reserve price could cause a loss to the owner of the property. We now turn to Court auctions. In the case of property which is being privatized it is

within the sole discretion of the owner, namely the Government, to decide whether it wishes to sell or not to sell and at what price. However in the case of Court auctions the judgment debtor has no such right. Indeed if it were left to him he would say that no sale should be carried out, or, he would indicate an exorbitantly high price, so as to ensure that no bid would be received and the property would remain in his possession indefinitely. In auction sales it is the Court which therefore has to decide. The court in taking the decision essentially strikes a balance in terms of which it is fair to both the decree holder and the judgment debtor. It however always bears in mind the fact that, after a decree has been passed, the decree holder has a crystallized legal right to get the property sold if the judgment debtor persists in not paying the decretal amount. A judgment debtor cannot plead that prices are abnormally low at present and if the sale is delayed for some months or years a higher price could be obtained. The court will simply ensure a fair and even playing field and then proceed to sell or dispose of property at the highest price someone is prepared to pay at the prevalent time and in those circumstances. A judgment debtor cannot object to the same because when he fails to discharge his obligation to pay the decretal amount he must suffer the consequences. Insofar as potential bidders are concerned it is obvious that the Nazir's valuation of the property is not likely to be decisive one way or the other. All bidders would unquestionably carry out their independent valuation of the property before making an investment. 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. The Nazir always issues a notice before issuing a sale proclamation so the judgment debtor has an opportunity to object. It is primarily in his interest to decide whether fixation of a reserve price is in his interest or not. He may for example feel that it is not advisable since lower bids may come as a result thereof. He has to take a decision, one way or the other.

27. It should be remembered that the reserve price is never set by means of a judicial determination since that would be clearly impracticable inasmuch as the court can only decide matters on the basis of evidence. The important point to bear in mind is that once the plaintiff's rights have crystallized in a court decree the burden has to be on the judgment debtor since his duty is clearly to comply with the terms of the decree. If he feels that he is being harmed by some ministerial order, which is not in accordance with law, it is his clear duty to assert the same before the court rather than waiting to raise it at the stage of appeal, or further appeal, or in review, or not at all *(as in the present case)* and expect the court to do it for him. If he wishes to avail a legal right he must assert it. He cannot be allowed to do nothing and then after the passage of many years in which third party interests have been created to rely on a technical objection to delay the course of justice. In this connection it would be pertinent to note that in the judgment under appeal this court has rightly relied on the following passage from an earlier judgment:

> "The maxim "actus curiae neminem gravabit" comes into play, with a view to obviate hardships and which may otherwise be the result of the errors of the Court itself. Thus where a non-compliance with the mandatory provisions of a law occurs by complying with the direction of the Court, which is not in conformity with the law, the party complying therewith is not to be penalized. Indeed, the law becomes flexible to absorb such abnormalities and treat the infractions as harmless. Where the directions issued while administering the law have been followed but it is found that the authority itself had acted in deviation of the law in some particulars, the party acting in accordance with such directions is not held to be blameworthy."

28. The facts of the present case provide an excellent illustration for the applicability of the above principles. The judgment debtor had four opportunities to raise an objection about the non-mentioning of the reserve price at the time of issuance of the sale proclamations. He then failed to raise this objection before the trial court, the division bench of the High Court, and before this court either in appeal or in the review. Now it is clear that there is no conceivable way by which the auction purchaser can be blamed for the act of the court in not mentioning the reserve price. He was not even a party to the court proceedings at the time the auction proclamations were prepared and issued. We are unable to see how it would further the ends of justice if we were to now non-suit the auction purchaser for the error of the court and the negligence of the judgment debtor.

29. In the above circumstances, we are unable to conclude that the judgment debtor is entitled to any relief in the present case and the review must therefore fail. However we have noted that in the past case the judgment-debtor has perhaps been rather severely treated by the Bank. Although this is not the fault

of the auction purchaser, taking into account the broader equities of the case from a humanitarian perspective, we feel that the ends of justice would be met if instead of the original price, in addition to the amount already deposited in court by the Auction Purchaser an additional amount of Rs.1,25,00,000/- *(one crore and twenty five lacs)* is also deposited by him. Such deposit should be made within 30 days with the office of the Nazir of Sindh High Court which amount can thereafter be withdrawn by the Judgment Debtor. This review petition is disposed off accordingly.

JUDGE

JUDGE

JUDGE

Announced in open Court
on _____ at _____
Approved For Reporting
Waqas Naseer/*

SH. AZMAT SAEED, J.- This Civil Review Petition is filed against the judgment dated 27.5.2005 announced on 27.6.2005 of this Court, whereby Civil Appeal No.670 of 2002 filed by Respondent No.1, Muhammad Ikhlaq Memon against the judgment dated 07.3.2002 passed by a learned Division Bench of the High Court of Sindh was set aside and the Orders dated 26.02.2001, 27.03.2001 and 09.04.2001 passed by the learned Single Judge were held to be valid.

2. The brief facts necessary for adjudication of the *lis* at hand are that Respondent No.3 had apparently obtained a Finance Facility from Respondent No.2 United Bank Limited (UBL), which was secured by mortgaging of various properties of the predecessor-in-interest of the present Petitioners. Respondent No.2 (UBL) filed a suit for recovery of the said amount, which was decreed by the Banking Tribunal vide Judgment and Decree dated 31.8.1994. Thereafter, Respondent No.2 (UBL) initiated execution proceedings for recovery of the decretal amount of Rs.103,789,753.00 against the judgment debtors. The properties in dispute, which are situated at Karachi were directed to be put to auction through Nazir of the Court by inviting the sealed tenders, vide Order dated 08.10.1998 passed by a learned Single Judge of the High Court of Sindh. The sale proclamation was published in

the local daily newspapers. After three unsuccessful attempts, a fourth proclamation was published and in response thereto, Respondent No.1 submitted a bid to the Nazir of the Court for a total amount of Rs.2,32,80,280/-. Subsequently, the matter was presented in Court, wherein Respondent No.1 enhanced his bid to Rs.2,41,00,000/-, which was accepted by the Court vide Order dated 26.02.2001 and Respondent No.1 was directed to deposit the balance amount within one month. Apparently, the balance consideration was deposited. The Petitioners challenged the said Order dated 26.02.2001 before the learned Division Bench of the High Court of Sindh through Special HCA No.94 of 2001, which was allowed vide Order dated 07.3.2002. Aggrieved, Respondent No.1 invoked the jurisdiction of this Court through Civil Appeal No.670 of 2002, which was allowed vide judgment under review dated 27.5.2005 announced on 27.6.2005, as a consequence whereof, the judgment dated 07.3.2002 passed by a learned Division Bench of the High Court of Sindh was set aside and the Order confirming the sale in favour of Respondent No.1 was held to be valid and was affirmed.

3. We have heard the learned counsel for the parties and with their assistance examined the available record.

4. It is contended by the learned counsel for the review Petitioners that the learned Executing Court initiated the proceedings for execution of the judgment and decree in terms of Order XXI of the Code of Civil Procedure, 1908 and, therefore was required by law to continue with such procedure till the culmination of the execution proceedings, however, the learned Executing Court made serious departures from the procedure as laid down in Order XXI of the CPC to the prejudice of the judgment-debtor. In the above context, the learned counsel urged that no public auction was held, only sealed bids were invited, the time for deposit of balance consideration allowed to Respondent No.1 was more than the 15 days contemplated under Order XXI, Rule 85 CPC. It was further contended that even otherwise, the terms and conditions, as originally approved by the Court, were allowed to be violated and a period of one month was given to deposit the balance consideration and the amount in question, as per the record, was not even deposited within such period. The learned counsel next contended that the judgment under review is based on an assumption that the time for deposit of the balance consideration had in fact been extended, which assumption is contrary to the record. It is further contended that the judgment in question is based on another assumption that the balance

consideration stood deposited with the Nazir of the Court, while in fact the said amount was withdrawn by Respondent No.1 after a few weeks of its deposit. It is added that a higher price had been offered by a third party, which was ignored by way of the judgment under review without ascertaining conclusively as to when such higher offer was made. The learned counsel also contended that even if the learned Executing Court could depart from the time honoured and settled procedure, as laid down in Order XXI CPC, it could not effect the court sale without fixation of a reserve price and the failure in this behalf vitiated the entire proceedings, which had been rightly set aside by the learned Division Bench of the High Court of Sindh, and this aspect of the matter has been completely ignored by way of the judgment under review. In support of his contentions, the learned counsel for the Petitioners has relied upon the judgment, reported as Muhammad Attique v. Jami Limited and others (2015 SCMR 148).

5. The learned counsel for Respondent No.1 has vehemently controverted the contentions raised on behalf of the Petitioners. At the very outset, it is contended that the scope of review is limited to an obvious error evident on the face of the record and the jurisdiction in this behalf does not extend to rehearing the entire matter or to adjudicate upon the contentions

not raised at the time of the hearing of the judgment sought to be reviewed.

The learned counsel further contended that Section 18 of the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997, whereunder the execution proceedings were conducted, authorizes the Banking Court either to adopt a process as contemplated by the Code of Civil Procedure or adopt any other mode or method for execution of the decree. In the instant case, from the very outset, the learned Executing Court had not adopted the procedure as laid down in the Code of Civil Procedure by inviting sealed tenders. Furthermore, even if, the procedure as laid down in the Code of Civil Procedure was initially adopted, a subsequent departure there-from by the Banking Court is permissible under the law. It is added that Respondent No.1 strictly adhered to the requirements as laid down by the learned Executing Court and upon acceptance of his offer and confirmation of sale in his favour, a vested right had accrued to Respondent No.1, which could not be prejudiced. With regard to withdrawal of the balance consideration, it was contended that upon an application filed by Respondent No.1, such withdrawal was permitted by the learned High Court and not only without prejudice to the rights of Respondent No.1 but also with the

consent of the learned counsel for the decree-holder (UBL) and the present review Petitioners, as is evident from the Order dated 31.5.2001, therefore, such withdrawal cannot be construed to be detrimental to the rights of Respondent No.1. It was further contended that neither any Objection Petition was ever filed by the Petitioners contesting the sale or offering to buy the property at a price higher than that offered by Respondent No.1 alongwith 5% thereof nor any attempt was made to satisfy the decree prior to the confirmation of the sale. In support of his contentions, the learned counsel for Respondent No.1 has relied upon the judgments, reported as Hudaybia Textile Mills Ltd and others v. Allied Bank of Pakistan Ltd and others (PLD 1987 SC 512), Mst. Asma Zafarul Hassan v. M/s United bank Ltd and another (PLJ 1981 SC 242) and Noor Muhammad and others v. Allah Ditta and others (PLD 2009 SC 198).

6. At the very outset, it may perhaps be appropriate to examine and ascertain the amplitude and the limitations for the exercise of the powers of the review vested in this Court. In the judgment reported as Lt. Col Nawabzada Muhammad Amir Khan etc. v. The Controller of Estate Duty, Government of Pakistan, Karachi etc. (PLD 1962 SC 335), learned A. R. Cornelius, CJ, as he then was observed as follows:-

> "….There must be a substantial or material effect to be produced upon the result of the case if, in the interests of "complete justice" the Supreme Court undertakes to exercise its extraordinary power of review of one of its own considered judgments. If there be found material irregularity, and yet there be no substantial injury consequent thereon, the exercise of the power of review to alter the judgment would not necessarily be required. The irregularity must be of such a nature as converts the process from being one in aid of justice to a process that brings about injustice…."

In the above said reported judgment, Kaikaus, J, as he then was has also observed as under:-

> "….It is not because a conclusion is wrong but because something obvious has been overlooked, some important aspect of the matter has not been considered, that a review petition will lie. It is a remedy to be used only in exceptional circumstances."

This Court in the judgment reported as Abdul Ghaffar-Abdul Rehman v. Asghar Ali (PLD 1998 SC 363), after examining the case law on the subject, observed as follows:-

> "17. From the above case-law, the following principles of law are deducible:
>
> > ….(iv) that simpliciter the factum that a material irregularity was committed would not be sufficient to review a judgment/order but if the material irregularity was of such a nature, as to convert the process from being one in aid of justice to a process of injustice, a review petition would lie;
> >
> > (v) that simpliciter the fact that the conclusion recorded in a judgment/order is wrong does not warrant review of the same but if the conclusion is wrong because something obvious has been overlooked by the Court or it has failed to consider some

> important aspect of the matter, a review petition would lie;
>
> (vi) that if the error in the judgment/order is so manifest and is floating on the surface, which is so material that had the same been noticed prior to the rendering of the judgment the conclusion would have been different, in such a case a review petition would lie;
>
> (vii) that the power of review cannot be invoked as a routine matter to rehear a case which has already been decided nor change of a counsel would warrant sustaining of a review petition, but the same can be pressed into service where a glaring omission or patent mistake has crept in earlier by judicial fallibility….."

The aforesaid view was reiterated by this Court in the judgment reported as Federation of Pakistan through Secretary, Establishment Division, Government of Pakistan, Islamabad v. Muhammad Tariq Pirzada and others (1999 SCMR 2189).

In the case reported as Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Shabbir and others (PLD 2003 SC 724), it was observed as under:-

> "Accordingly it is held that due to non-consideration of the documents referred to hereinabove, a case for the review of the judgment to the extent of petitioners' case has been made out. We are fortified in this behalf by the judgment in the case of Suba through Legal Heirs v. Fatima Bibi through Legal Heirs (1996 SCMR 158), wherein it has been held that "review petition would also be competent if something which is obvious in the judgment had been overlooked and that if it would have been

considered by the Court, the final result of the case would have been otherwise".....”

In the judgment reported as Syed Wajihul Hassan Zaidi v. Government of the Punjab and others (PLD 2004 SC 801), it was held as under:-

“17....We are of the considered view that even if the view taken by this Court in the decision of the appeal be erroneous, it does not warrant revisiting by this Bench in the exercise of review jurisdiction, which can only be exercised when an error or mistake is manifestly shown to float on the face of record, which is patent and if allowed to remain intact would perpetuate illegality and gross injustice. Basic object behind the conferment of power of judicial review on superior Courts essentially is to foster justice and eliminate chances of perpetuating illegality....

18...Likewise, factum that a material irregularity was committed by the Court would not be adequate enough to warrant a review of the judgment unless the material irregularity be of a nature so as to convert the process of acting in aid of justice to a process of gross injustice. In such eventuality, a review petition would be competent ... Furthermore, principle of law is well recognized that this Court would not exercise the power of review as a routine matter to rehear a case already decided but the same can be pressed into service where a glaring omission on the face of record or patent error has crept in the judgment by judicial fallibility.”

In the case reported as Muhammad Siddiqul Farooq v. The State (2010 SCMR 198), it was held as under:-

“12...The observations in the case of Suba through Legal Heirs v. Fatima Bibi through Legal Heirs 1996 SCMR 158 were repeated that review petition would be competent if "something which is obvious in the judgment had been overlooked and that if it would have been considered by the court the final result of the case would have been otherwise". The present case directly attracts the above settled principles of law on the exercise of review jurisdiction. While passing the judgment under review this Court appears to have overlooked the all important evidence of P.W.6, P.W.8 and P.W.9 and also the absence

of prosecution evidence on the culpability of the petitioner in terms of offences of section 9(a)(iii) and (vi) of the National Accountability Bureau Ordinance, 1999.

5. Since the scope of review power and jurisdiction has not been free of complexity, it has received attention of the Court time and again primarily for the reason that the indulgence by way of review is granted mainly owing to the natural desire to prevent irremediable injustice by a Court of last resort by some inadvertence or accident. Muhammad Amir Khan's case PLD 1962 SC 335 lays down the principles for the exercise of review power and jurisdiction wherein all the Honourable Judges seized of the matter contributed and rendered their separate opinions. Cornelius, C.J. observed at page 340 as follows:--- "There must be a substantial or material effect to be produced upon the result of the case if, in the interests of "complete justice" the Supreme Court undertakes to exercise its extraordinary power of review of one of its own considered judgments...The irregularity must be of such a nature as converts the process from being one in aid of justice to a process that brings about injustice ... B.Z. Kaikaus, J. expressed his opinion at page 354 as follows:--- "While I would prefer not to accept those limitations as if they placed any technical obstruction in the exercise of the review jurisdiction of this Court I would accept that they embody the principles on which this Court would act in the exercise of such jurisdiction. It is not because a conclusion is wrong but because something obvious has been overlooked, some important aspect of the matter has not been considered, that a review petition will lie. It is a remedy to be used only in exceptional / circumstances."

... However, if the Court has overlooked some material question of fact or of law which would have a bearing on the decision or there is otherwise some apparent mistake or error on the face of the record, then of course the power of review can be exercised. As far as error apparent on the face of the record is concerned, it should be so manifest, so clear as could not be permitted by any Court to remain on record. Such error may be an error of fact or of law but must be self-evident and floating on surface. The orders based on erroneous assumption of material facts, or without adverting to a provision of law, or a departure from undisputed construction of law and Constitution, may, however, amount to error apparent on face of record. It must have also a material bearing on the fate of the case. These propositions were enunciated by this Court in the judgment reported as PLD 1979 SC 741, 1975 SCMR 115 and PLD 1984 SC 67.....

9. It is said and rightly so that to err is human.

> Possibilities of mistakes and errors creeping in the decision making may not be very often but cannot out rightly be ruled out on occasions, especially the courts becoming over conscious of heavy backlog of cases and long lists of daily causes fixed before them. Skipping over or escaping the notice of the court some material and important aspects is also not unusual. Once, therefore, such a mistake/error comes to the notice of the court resulting in injustice it should not be hesitant or reluctant to make necessary correction to undo the injustice caused thereby. The entire theme of the above referred ideas expounded by the learned jurists is the avoidance of injustice. If in a case it is caused by any act or omission of the court inadvertently, accidentally or otherwise there should be no hesitation to rectify and make necessary correction by undoing the same."

7. A perusal of the aforesaid reveals that it is now well settled that the power of review stems from the possibility of judicial fallibility and is exercised in exceptional circumstances in the aid of justice to avoid gross injustice and in view of the necessity to avoid perpetuating such illegality, which cannot be allowed to remain on the record. A review is not synonymous with an appeal and does not include rehearing of the matter in issue nor will be warranted merely because the conclusion drawn is wrong or erroneous but is limited to eventualities where something obvious has been overlooked or where there is a glaring omission or patent mistake of fact or law, which is self-evident, manifest and floating on the surface, materially affecting the outcome of the adjudicatory process. Where such material mistake or error has resulted in injustice or an illegality, the Court should not hesitate

or be reluctant to make necessary corrections to undo the injury caused thereby.

8. A perusal of the record reveals that the matter came up for hearing before the learned Executing Court on 08.10.1998, when it was observed that the UBL had filed a statement in terms of Order XXI, Rule 66 CPC. The properties, initially to be put to auction, were identified and the Nazir of the Court was directed to sell the same by inviting sealed tenders after publication of advertisement in the daily newspapers. A sale notice was prepared by the Nazir of the Court and, after approval of the Court, published in the daily newspapers. In terms of the sale notice, sealed bids were invited and bidders were directed to submit Pay Orders/Demand Drafts of 10% of the price so offered. The other terms and conditions of the sale were also specified. The condition 3 read as follows:

> "3. The balance amount shall be deposited immediately on confirmation by the Hon'ble Court."

9. Three publications went in vain. In pursuance to the fourth advertisement issued on the same terms and conditions, a sealed bid was received from Respondent No.1, who was the only bidder. It is not disputed that the said offer was accompanied by a Pay Order/Demand Draft of 10% of the amount offered.

Thereafter, the matter came up for hearing on 26.2.2001 when the sealed bid of Respondent No.1 was considered. Respondent No.1 enhanced the amount originally offered, whereafter, the Court in unequivocal terms confirmed the sale in favour of Respondent No.1.

According to the terms and conditions of the sale, Respondent No.1 was required to deposit the balance consideration immediately upon confirmation by the Court. However, vide Order dated 26.2.2001 one month's time was given to Respondent No.1 to deposit the balance consideration.

10. It appears from the record that on 15th March, 2001, an application was filed by the Petitioners, which pertained to the vacant possession of the properties subject matter of the sale whereupon the following Order was passed on 27.3.2001:

> "Adjourned. In the meantime, the auction purchaser may take steps in terms of Rule 85 Order 21 CPC. Put up after 31.3.01."

11. In the subsequent Order, it was noticed that the balance consideration has been paid. It is an admitted fact on the record and as also mentioned in the judgment under review that such payment was made on 30.3.2001.

12. A careful examination of the available record referred to above, reveals that it is difficult to hold conclusively that the

learned Executing Court had initiated, commenced or pursued the execution proceedings by invoking the provisions of the Code of Civil Procedure, 1908. At the very outset, the sale was sought to be effected through the Nazir of the Court by inviting sealed tenders. The Certificate under Order XXI, Rule 66 CPC was filed by the decree-holder (UBL). It is not apparent from the available record whether such filing was pursuant to a specific Order passed by the learned Executing Court. Thus, the contention of the learned counsel for the Review Petitioners to the contrary, in this behalf cannot be accepted, therefore, the learned Executing Court in view of Section 18 of the Act of 1997 may have been at liberty to adopt any procedure to effect the sale of the properties in question.

13. It is evident from the available record that the terms and conditions for sale were advertised with the approval of the learned Executing Court and in accordance therewith, the balance consideration was required to be paid immediately upon confirmation of the sale by the learned Executing Court. The sale was confirmed vide Order dated 26.02.2001. However, by the same Order, Respondent No.1 was allowed one month's time to deposit the balance consideration. A perusal of the Order dated 26.02.2001 does not disclose any conscious adjudication by the Court, for granting this indulgence of extension of time beyond the period as

contemplated by the terms and conditions of the sale. Be that as it may, the time allowed to Respondent No.1 to deposit the balance consideration was "within one month from today". Admittedly, the said balance consideration was not deposited within one month but in fact was deposited on 30.3.2001. This aspect of the matter has been considered and dealt with in para 12 of the judgment under review, which is reproduced herein below:

> "12. The negotiated offer made by the appellant/auction-purchaser to purchase the properties in question was accepted by the Banking Court, by order dated 26.2.2001 with the direction to deposit the balance of consideration amount within a period of one month. The appellant moved C.M.A.No.619 of 2001 before the expiry of the period of one month for issuance of directions to the Nazir of the Court to obtain vacant possession of the properties. The photo-copies of pay orders for the balance amount were also attached therewith. The said application was taken up by the Banking Court on 27.3.2001 and the Court directed the appellant to take steps in terms of Order XXI Rule 85 CPC. Therefore, he deposited the entire balance amount of the sale with the Nazir of the Court on 30.3.2001. On 9.4.2001, the Banking Court had noted that the appellant had deposited the balance amount. Therefore, the Court directed the Nazir of the Court to take steps for confirmation of sale. The Banking Court, by order dated 26.2.2001, had itself given a period of one month to the appellant to deposit the balance of purchase money which was extended by order dated 27.3.2001. He made the requisite payment to the Court on 30.3.2001. Therefore, he could not be penalized merely on the ground that he had failed to make such deposit within a period of 15 days as stipulated in Order XXI Rule 84 CPC. It was for the first time through order dated 27.3.2001 that the Banking Court, by making a reference to Order XXI Rule 85, had decided to follow the procedure as laid down by the CPC."
>
> (emphasis is supplied)

14. The entire judgment under review in this behalf is based on the erroneous assumptions that the time had been

extended by the learned Executing Court vide Order dated 27.3.2001. The said Order has been reproduced hereinabove, which merely states that Respondent No.1 may take steps in terms of Order XXI, Rule 85 CPC, which reads as follows:

> *"85. Time for payment in full of purchase-money*—The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property:
>
> Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off which he may be entitled under rule 72."

(emphasis is supplied)

15. A bare perusal of the aforesaid provisions of the law reveals that the steps to be taken in terms thereof are to deposit the balance sale price within 15 days from the date of the sale of the property. In the instant case, sale was confirmed by the Court on or before 26th February, 2001. The only other steps to be taken or privilege advanced to the auction purchaser would be to take advantage of any set-off, if permitted, under Order XXI, Rule 72 CPC. In the above circumstances, it is very difficult to accept that in fact the period of one month to deposit the balance consideration set forth in the Order dated 26.2.2001 had been extended.

16. It is not the case of Respondent No.1 that a prayer for extension of time had been made. There is no clear and

unequivocal Order passed to the effect that such time was extended. The judgment under review is based on an incorrect and erroneous assumption that the time for deposit of the balance consideration had been extended. This error is floating on the face of the record. The entire edifice of the judgment under review is based upon such incorrect assumption of the facts and law. The obvious failure of Respondent No.1 to deposit the balance consideration within time fixed would materially impact the final adjudication of the matter at hand especially since a general principle of law as also reflected by Order XXI, Rule 85 CPC, the failure to deposit the balance consideration by an auction purchaser may result in setting aside the sale.

17. After deposit of the balance consideration, while the matter was pending in appeal, Respondent No.1 made an application before the learned Appellate Court/Division Bench of the High Court seeking withdrawal of 90% of the consideration as deposited. No doubt, such withdrawal was sought without prejudice and was allowed by the Court without prejudice to the rights of Respondent No.1 and *prima facie* with the consent of the decree-holder (UBL) and the learned counsel of the present Petitioners, however, it has been noticed with some interest that possibility of depositing the balance consideration in a profit

bearing scheme was spurned by Respondent No.1 on the plea that such profit in his view was interest which he was not prepared to accept. However, it is also mentioned in the Order that in case Respondent No.1 succeeded, he would deposit the money withdrawn within one week. A perusal of the judgment under review also reveals that this Court acted upon an erroneous assumption that the balance consideration stood deposited and was available with the Nazir of the Court. This is obvious from the fact that in the judgment under review neither any direction was given for deposit of the balance consideration nor any timeframe was fixed in this behalf. It does not appear that the said amount was re-deposited by Respondent No.1 immediately or within one week from passing of the judgment under review.

18. There is no cavil with the contentions of the learned counsel for Respondent No.1 that Section 18 of the Act of 1997, contemplates the Banking Court being permitted to adopt any procedure other than the one prescribed by the Code of Civil Procedure, for execution of the decree. It is a settled law that in sale of immovable properties under Order XXI CPC, the reserve price must be fixed and the absence thereof may vitiate the entire process.

19. In this behalf, reference can be made from various judgments of this Court. In the judgment reported as M/s Lanvin Traders, Karachi v. Presiding Officer, Banking Court No.2, Karachi (2013 SCMR 1419), it was observed as follows:

> "11. Yes, the prices have gone to a dizzying height ever since the sale was confirmed in favour of the respondent but this will not deter the Court from undoing the sale when the proceedings leading thereto were marred by serious lapses causing serious prejudice to the decree holders as well as the judgment debtors whose amount, which is much greater than that of the auction purchaser, also lay in a static repose till date. ... 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. ..."
>
> (Emphasis is supplied)

In the case reported as National Bank of Pakistan and 117 others v. Saf Textile Mills Ltd and another (PLD 2014 SC 283), while considering the vires of Section 15 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, pertaining to the sale without intervention of the Court, it was observed as follows:

> "40. As a supplement to the aforesaid, it may be noted that no doubt, some rudimentary procedure for conducting such sales is provided in subsection (4) of section 15 of the Ordinance of 2001 but yet again the time honoured and well entrenched principle of fixation of a "reserve price" is conspicuous by its absence. It is now well settled law that even where the sale is conducted by

> the Court a "reserve price" is essential and the absence thereof may be fatal…."

20. The question that floats to the surface is whether while adopting a procedure other than as provided by the Code of Civil Procedure, 1908, the Banking Court could permit the sale of immovable properties without fixing a reserve price. This aspect of the matter has also escaped notice of this Court and has not been adjudicated upon. However, the available record reveals that a Certificate of an approximate value of the property of the subject matter of the sale was provided by Respondent No.2 (UBL), to which no objection was raised by the either party. If such value is deemed to be equivalent to the reserve price then unfortunately the sale was confirmed at a price lower than the said price.

21. The aforesaid gains further significance as it appears from the record that at some point of time, a higher price was offered by a third party. By way of the judgment under review, it has been held that the said offer was made after the sale was confirmed and the amount deposited by Respondent No.1. A document in this behalf (the higher offer) is available on the record but is undated. It needs to be ascertained as to when such offer was in fact made and whether the same would be a sufficient ground

for putting the property to re-auction as was ordered by the learned Appellate Court / Division Bench of the High Court.

22. In view of the facts and circumstances, detailed hereinabove, it is clear and obvious that the judgment under review is based upon incorrect and erroneous assumptions of facts and law, which are manifest and self-evident on the face of the record. Critical legal questions, which floated to the surface from the record and from the pleadings of the parties have been sidestepped and thus evaded adjudication. In order to do the complete justice and to avoid perpetuating an illegality, it is imperative that the judgment dated 27.5.2005 announced on 27.6.2005 of this Court be recalled and Civil Appeal No.670 of 2002 be revived to be decided afresh in accordance with the law.

23. Consequently, this Civil Review Petition is allowed and the judgment dated 27.5.2005 announced on 27.6.2005 is recalled and Civil Appeal No.670 of 2002 shall be deemed to be pending and be decided afresh.

Judge

ORDER OF THE BENCH

By majority of 2 to 1 (Sh. Azmat Saeed, J. dissenting), this Civil Review Petition is disposed of.

Judge

Judge

Judge

Announced in open Court
on **5.1.2016** at **Islamabad**
Approved for Reporting

Judge