

**IN THE SUPREME COURT OF PAKISTAN**

(Appellate Jurisdiction)

**Present:** Mr. Justice Anwar Zaheer Jamali, HCJ  
Mr. Justice Mian Saqib Nisar  
Mr. Justice Amir Hani Muslim  
Mr. Justice Iqbal Hameedur Rahman  
Mr. Justice Khilji Arif Hussain

**Civil Appeal No.280-L/2009**

*(Against the judgment dated 16.4.2009 of the  
Lahore High Court, Lahore passed in EFA  
No.489/1999)*

Shahida Bibi etc.

Appellant(s)

**Versus**

Habib Bank Limited etc.

Respondent(s)

For the Appellant(s):

Mian Muhammad Nawaz, ASC  
Raja Muhammad Sabir, ASC

For Respondent No.1:

Mr. Muhammad Shuja Baba, ASC

For Respondents No.2 - 3:

Mr. Shahid Ikram Siddiqui, ASC

Date of Hearing:

15.03.2016 & 17.03.2016

...

**JUDGMENT**

**MIAN SAQIB NISAR, J.-** *Vide* order dated 10.6.2014 a

bench of this Court requested the Hon'ble Chief Justice of Pakistan for the constitution of a larger bench in order to reconcile two apparently conflicting judgments of this Court reported as **Muhammad Attique Vs. Jami Limited and others** (PLD 2010 SC 993) and **Mst. Asma Zafarul Hassan Vs. M/s United Bank Ltd. and another** (PLJ 1981 SC 242) (1981 SCMR 108).

2. In order to decide this appeal, a comprehensive narration of the facts is required:- respondent No.1/bank (*decree holder*) filed a suit on 30.5.1994 for recovery of finances granted to respondent No.2/customer, for whom Rana Muhammad Aslam, the predecessor-in-

interest of respondents No.3(i) to (vi) (*judgment debtor*), stood surety having mortgaged his property bearing No.S-57-R-32-E, 5-Temple Road, Lahore measuring approximately 12 *marlas* 86 square feet (*lower portion of a double storied residential house; hereinafter referred to as the 'property'*). A decree for the recovery of Rs.600,871.10/- was passed (*alongwith Rs.15,167/- as costs*) under Section 6 of the Banking Tribunals Ordinance, 1984 (*1984 Ordinance*) in favour of the decree holder and against the judgment debtor on 20.3.1995 which (*decree*) has attained finality. Subsequently, the decree holder filed an execution petition under Section 11 of the 1984 Ordinance and a court auctioneer was appointed on 24.10.1995 to conduct the sale of the mortgaged property. In this order it is unequivocally mentioned that though Section 11(3) of the 1984 Ordinance enables a decree holder to sell mortgaged property itself without intervention of the Banking Tribunal, but in the instant case the decree holder sought execution of the mortgaged property through the Tribunal. The first auction was held, in which the predecessor-in-interest of the appellants, Liaqat Ali Mujahid (*auction purchaser*), was the highest bidder, with a bid of Rs.226,000/- (*which was deposited by him with the Executing Court*). The judgment debtor filed an objection petition challenging the auction to the auction purchaser on the ground that the value of the property had been assessed by the surveyor of the decree holder as Rs.950,000/- at the time of provision of finance to respondent No.2. The objection petition was accepted by the Tribunal *vide* order dated 27.11.1996. A fresh proclamation of sale was issued, a reserve price of Rs.600,000/- was fixed and the second auction was held on 12.1.1997 which failed. Subsequently, the auction purchaser offered to raise his bid from Rs.226,000/- to Rs.400,000/-. Meanwhile, the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Ordinance, 1997 (*1997 Ordinance*) was promulgated on 4.2.1997

and the Banking Tribunals constituted under the 1984 Ordinance were abolished *vide* notification dated 11.2.1997 after which the execution petition stood transferred to the Banking Court constituted under the 1997 Ordinance as is manifest from the order dated 27.2.1997 of the newly constituted Banking Court (*note:- the Ordinance of 1997 was replaced by the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 (1997 Act) which came into force on 31.5.1997*). On 8.5.1997 the Banking Court rejected the auction purchaser's offer to raise his bid for the reason that his revised offer was still below the assessed value of the property and the reserve price, which (*offer*) was neither acceptable to the judgment debtor nor the decree holder. Through the same order, upon the request of the decree holder, the Banking Court allowed the former to sell the mortgaged property by public auction or private treaty, subject to confirmation by the court. The relevant part of the order reads as under:-

*“In reply to the application, the decree holder has sought permission to sell the mortgaged property itself and the law permits the same. **The decree holder is, therefore, permitted to sell the mortgaged property either by way of public auction or through private treaty** but the proceedings would be subject to confirmation by this court.*

*For report of sale and filing of the sale proceedings by the decree holder now to come up on 10.6.97.”*

*(Emphasis supplied)*

There are numerous dates on which the Court awaited the report of the court auctioneer for the sale of the property through auction and one of the orders even suggests that the Banking Court approved the draft

proclamation of sale in terms of Order 21 Rule 66 of the Code of Civil Procedure, 1908 (CPC) subsequent to which the third auction took place on 7.9.1998. During the proceedings the counsel for the decree holder had been appearing but no one appeared on behalf of the judgment debtor of the case. The order dated 23.9.1998 reveals that the auction purchaser, whose previous offer of Rs.400,000/- was not accepted by the Banking Court, when present in the Court improved his offer to the tune of Rs.6,16,038/- which (*offer*) was accepted by the decree holder. However the Court ordered:-

*“Now it is to be seen whether auction is to be confirmed for the above referred amount or the property is to be re-auctioned.”*

The Court adjourned the matter to 2.10.1998 and upon an application filed by the court auctioneer claiming fee, issued notice to the decree holder. No notice was issued to the judgment debtor. Such sale was confirmed by the Banking Court *vide* order dated 2.10.1998 and the file was consigned to the record room. The relevant part of the above order reads as follows:-

*“Whereas the auction purchaser has purchased the property mentioned in ‘Fard Taliq’ for a sum of Rs.6,16,038/- **as a result of private negotiation with the decree holder**, therefore, the same is confirmed in favour of the auction purchaser Mr. Liaqat Ali Mujahid. He be issued sale certificate on his application subject to payment of remaining price deducting 1/4<sup>th</sup> amount already deposited till 15.11.98.”*

*(Emphasis supplied)*

On 7.12.1998 seemingly on an application by the auction purchaser, the file was resurrected and the following order was passed:-

*“Pursuant to my order dated 18.11.98 on the application referred to above, the file has been put up before me today.*

*The auction purchaser Mr. Liaqat Ali Mujahid has sought the Sale Certificate being the highest bidder of property No.S-57-R-32 E situated at 5-Temple Road, Lahore. The report of the Nazir shows that the purchase price of Rs.622,038/- has been deposited by the auction purchaser in out of which Rs.616,038/- has been given to the decree holder bank and now remaining Rs.6000/- are lying in this court which are to be disbursed to the judgment debtor being the excess amount from the decretal amount. Sale Certificate be issued to Mr. Liaqat Ali Mujahid the auction purchaser in accordance with law.*

*File be consigned to the record room as before.”*

The sale certificate was issued on 8.12.1998. Thereafter the auction purchaser moved an application seeking possession of the purchased property and for that purpose, a Commission was appointed by the Banking Court vide order dated 19.4.1999 and eventually the possession was delivered to the auction purchaser. The judgment debtor filed an application under Order 21 Rule 90 of the CPC on 15.4.1999 challenging the sale of the property in favour of the auction purchaser and he was directed to deposit of 20% of the sale price i.e. Rs.123,200/- with the Banking Court before 16.7.1999 which was so done on 8.7.1999. Vide order dated 20.9.1999 the application under Order 21 Rule 90 of the CPC filed by the judgment debtor was

dismissed on the grounds that (i) he had been participating in the proceedings throughout, (ii) the judgment debtor previously filed objections which were disallowed by the Banking Court, (iii) some earlier attempts were made to sell the property but none came forward except the auction purchaser, (iv) the decree holder and the auction purchaser mutually negotiated the sale of the property and as a result the decree holder agreed to the disposal of the property at Rs.616,038/- as is evident from the order dated 23.9.1998. The Banking Court finally adjudged that the property has been rightly sold through private negotiation. The plea taken up by the respondent that he was unaware of the execution proceedings was discarded as he was held to be participating in the proceedings; besides the property was sold on 29.3.1998, whereas the objection petition was moved on 15.4.1999 which was barred by time and no application for condonation of delay was filed. Thus the application under Order 21 Rule 90 of the CPC was dismissed both on merits as also on the ground of limitation. Aggrieved of the above, the judgment debtor assailed this order in appeal and the learned Appellate Court whilst accepting the same (*appeal*) came to the conclusion that once having resorted to selling the property through public auction as per the provisions of Order 21 of the CPC, the same could not be sold through private negotiation and thus the Banking Court had committed an illegality. Thereafter, the auction purchaser filed an appeal before this Court which has culminated into the instant opinion.

3. Learned counsel for the appellants by relying upon the judgments reported as **Muhammad Attique** (*supra*) and **Asma Zafarul Hassan** (*supra*) argued that there is no bar upon the Executing Court against selling the property through private treaty/negotiation. He submitted that initially the auction procedure for the purposes of sale of

the property as envisaged by Order 21, CPC was adopted, but due to numerous failed attempts, the Banking Court was authorized to permit sale to take place through private treaty between the decree holder and the auction purchaser and to subsequently confirm such sale. He submitted that the view set out by the learned High Court that the sale could not be made otherwise than in accordance with Order 21, CPC is violative of the judgments cited above, and since the decree was passed prior to enactment of the 1997 Act therefore its execution would be governed by the 1984 Act, Section 11(3) whereof allowed for sale by private treaty; and if it is the 1997 Act which is to govern the execution process, even then sale by private treaty is permissible under the law as the same is amply covered by the phrase "in such other manner as the Banking Court may deem fit" as set out in Section 18(1) of the said Act. Learned counsel submitted that there was conscious application of mind by the learned Tribunal, as no bidders came forth as a result of which the numerous attempts at auction failed, it was well within the jurisdiction of the Tribunal and in the interests of justice to allow for sale by private treaty. He further argued that the judgment debtor had participated in the execution proceedings throughout and was well aware that the property could not be sold through auction. When the auction purchaser moved an application to the Court seeking permission for sale of the property through private negotiation, the judgment debtor was not required to be issued any notice, rather it was a matter between the decree holder and the auction purchaser on the one hand and the learned Executing Court on the other. He also contended that the objection petition was filed beyond the period of thirty days and was thus rightly discarded by the learned Court as being barred by time.

4. Conversely, learned counsel for the respondents has led us to various orders of the Banking Tribunal/Court and argued that no notice had been issued to the judgment debtor whose property was to be sold through private treaty, rather a notice was issued to the decree holder when the auction purchaser applied for sale of the property through private treaty. In this manner the judgment debtor had been condemned unheard and therefore the entire process of the private sale in favour of the auction purchaser stands vitiated. He also submitted that once the process and procedure of auction under the CPC was resorted to for the disposal of a mortgaged property thereafter the Court did not have the jurisdiction to deviate therefrom and take a different course. Reliance in this regard has been placed on the cases reported as **Muhammad Rafiq Vs. United Bank Limited and another** (2005 CLD 1162), **National Bank of Pakistan and 117 others Vs. SAF Textile Mills Ltd. and another** (PLD 2014 SC 283) and **Muhammad Attique** (*supra*).

5. Heard. The propositions which have emerged for the purposes of the present appeal are:-

- (i) What was the law applicable on 8.5.1997, 23.9.1998 and 2.10.1998, when the Banking Court allowed the property to be sold by the bank through private treaty, the offer of the appellant was accepted by the bank and the confirmation of the private sale in favour of the appellant respectively, and what is the effect of such law on the facts and circumstances of the present case;
- (ii) Whether the order dated 8.5.1997 passed by the Banking Tribunal was superseded by the Banking Court *vide* its order dated 10.6.1997 and if so, to what effect;
- (iii) Whether under the 1984 Ordinance or the 1997 Ordinance/Act both being special laws, the Banking



Tribunal/Court in execution proceedings, could adopt any procedure it deemed fit for the sale of the mortgaged property other than the one (*the procedure*) prescribed by the two laws mentioned above;

- (iv) Having once adopted a mode of execution as set out in the CPC, can a court deviate therefrom;
- (v) With respect to the merits of the case, does the sale achieve validity on the touchstone of either of the special laws;
- (vi) To reconcile the two apparently conflicting judgments of this Court identified in paragraph No.1 of this opinion, i.e. Muhammad Attique (*supra*) and Asma Zafarul Hassan (*supra*).

In order to resolve the propositions at hand, it is instructive to reproduce the relevant provisions from the 1984 Ordinance, 1997 Ordinance and 1997 Act:-

#### **1984 Ordinance**

***“11. Execution of decree.— The Banking Tribunal shall, on the written application of the decree-holder, forthwith order execution of the decree or order and where the decree or order pertains to money recover the amount covered, by the decree or order, as the case may be, as arrears of land revenue or in such other manner as may be applied for by the decree-holder, in accordance with the provisions of the Code of Civil Procedure, 1908 (Act V of 1908), or any other law for the time being in force:***

*(Emphasis supplied)*

*Provided* .....

(2) .....

(3) *Notwithstanding anything contained in this Ordinance, where a banking company holds any property belonging to the judgment-debtor as security, it may sell the same without intervention of Court either by public auction or private treaty to any person, and appropriate the proceeds thereof according to law towards total or partial satisfaction of the decree:*

*Provided that proper account of the proceeds shall be filed with the Banking Tribunal not later than thirty days from the date of such satisfaction:*

*Provided further that, where the Banking company wishes to sell the property by private treaty, it shall, before concluding the sale, give to the judgment-debtor, by a notice, the option to purchase or redeem it, as the case may be, at the same price within such time as the banking company may specify in such notice.*

(4) .....

(5) .....

**1997 Ordinance**

**7. Powers of Banking Courts.– (1) .....**

(6) *All proceedings, including proceedings following the filing of an arbitration award and proceedings for the execution of a decree within the jurisdiction of a Banking Court, pending in any Special Court constituted under the Banking Companies (Recovery of Loans) Ordinance, 1979 (XIX 1979), any Banking Tribunal constituted under the Banking Tribunals Ordinance, 1984 (LVIII of 1984) or any other Court including a High Court shall stand transferred to the Banking*

*Court having jurisdiction. On transfer of proceedings under this subsection, a Banking Court shall require the attendance of the parties through notice issued in accordance with the procedure for service of summons or notice laid down in subsection (2) of section 9.*

*(7) In respect of proceedings transferred to a Banking Court under subsection (6) **the Banking Court shall proceed from the stage at which the proceedings have been transferred** and shall not be bound to recall and rehear any witness who has given evidence before the transfer, and may act on the evidence already recorded or produced before the Court or Tribunal from which the proceedings have been transferred.*

*(Emphasis supplied)*

**12. Execution of Decree.**--(1) *The Banking Court shall, on the written or oral application of the decree-holder, forthwith order execution of the decree or order and, where the decree or order pertains to money, may direct, that the amount covered by the decree or order, as the case may be, shall be recovered as arrears of land revenue in accordance with the provisions of the Code of Civil Procedure, 1908, or any other law for the time being in force or in such other manner as the Banking Court may deem fit.*

*(2) Subject to subsection (3), where a banking company is a mortgagee of any property belonging to the judgment-debtor, it may, sell such property without the intervention of the Banking Court either by public auction or by private treaty to any person or purchase such property on its own account and appropriate the*

*proceeds thereof towards total or partial satisfaction of the decree.*

*(3) Where the judgment debtor or any person acting on his behalf does not voluntarily give possession of the mortgaged property sold or sought to be sold or purchased or sought to be purchased or purchased by the banking company under subsection (2), the Banking Court on the application of the Banking Company or the purchaser shall put the banking Company or, as the case may be, the purchaser in possession of the mortgaged property in accordance with the provisions of Order XXI of the Code of Civil Procedure.*

*(4) .....*

*(5) Where the banking company wishes to sell the property by private treaty or to purchase it on its own account it shall, before concluding the sale give to the judgment debtor an option by a notice in writing for purchasing or redeeming such property at the price at which the banking company proposes to sell or purchase within such period as the banking company may specify in such notice which shall not, in any case, be less than seven days.*

*(6) .....*

*(7) .....*

*(8) .....*

**23. Repeal.**– *The Banking Companies (Recovery of Loans) Ordinance 1979 (XIX of 1979), and Banking Tribunals Ordinance, 1984 (LVIII of 1984) are hereby repealed.*

**1997 Act**

**“7. Powers of Banking Courts.– (1).....**

(6) All proceedings, including proceedings following the filing of any arbitration award and proceedings for the execution of a decree within the jurisdiction of a Banking Court, pending in any Special Court constituted under the Banking Companies (Recovery of Loans) Ordinance, 1979 (XIX 1979), or under the Banking Companies (Recovery of Loans, Advance, Credits and Finances) Ordinance, 1997 (XXV of 1997), or any Banking Tribunal under the Banking Tribunals Ordinance, 1984 (LVIII of 1984), or any other Court including a High Court shall stand transferred to, or be deemed to be transferred to the Banking Court having jurisdiction. On transfer of proceedings under this sub-section, a Banking Court shall require the attendance of the parties through notices issued in accordance with the procedure for service of summons or notice laid down in subsection (3) of section 9.

(7) In respect of proceedings transferred to a Banking Court under sub-section (6) **the Banking Court shall proceed from the stage which the proceedings had reached immediately prior to the transfer** and shall not be bound to recall and re-hear any witness and may act on the evidence already recorded or produced before the Court or Tribunal from which the proceedings were transferred. (Emphasis supplied)

**18. Execution of Decree.– (1)** The Banking Court shall, on the written application of the decree-holder, forthwith order execution of the decree or order at any time seven days after the

*passing of the decree or order and, where the decree or order pertains to money, may direct that the amount covered by the decree or order, as the case may be, shall be recovered in accordance with the provisions of the Code of Civil Procedure, 1908, or any other law for the time being in force or **in such other manner as the Banking Court may deem fit:***

*(Emphasis supplied)*

*Provided that the Banking Court may, at the time of passing a final decree pass an order of the nature contemplated by subsection (1) of section 16 to the extent of the decretal amount.*

*(2) Subject to subsection (3), in cases of pledged or mortgaged property a banking company may sell the same with or without the intervention of the Banking Court either by public auction or by inviting sealed tenders and appropriate the proceeds thereof towards total or partial satisfaction of the decree.*

*(3) .....*

*(4) .....*

*(5) Where the banking company wishes to sell a property by inviting sealed tenders, it shall, invite offers through advertisements in one English and one Urdu newspaper which are circulated widely in the city in which the sale is to take place giving not less than thirty days time for submitting offers. The sealed tenders shall be opened in the presence of the tenderers or their representatives or such of them as attend:*

*Provided that before concluding the sale the judgment-debtor shall be given an opportunity to purchase the property at a*

*matching price to be paid in cash within a period of thirty days.*

(6) .....

**28. Repeal.**– (1) *The Banking Companies (Recovery of Loans) Ordinance, 1979 (XIX of 1979), the Banking Tribunals Ordinance, 1984 (LVIII of 1984), and the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Ordinance, 1997 (XXV of 1997), are hereby repealed.*

(2) ..... ”

6. With respect to the first proposition we may reiterate the following: a decree for the recovery of a certain amount was passed in this case under Section 6 of the 1984 Ordinance and an execution petition was filed under Section 11 of the said Ordinance. During the pendency of the execution proceedings, the 1997 Ordinance was promulgated on 4.2.1997 and the Banking Tribunals constituted under the 1984 Ordinance were abolished *vide* notification dated 11.2.1997 after which the execution petition stood transferred to the Banking Court constituted under the 1997 Ordinance. The 1997 Ordinance was replaced by the 1997 Act which (*Act*) came into force on 31.5.1997. The 1997 Ordinance was promulgated on 4.2.1997 and by virtue of Article 89(2)(a)(ii) of the Constitution of the Islamic Republic of Pakistan, 1973 (*the Constitution*), it was to stand repealed at the expiration of 120 days of its promulgation, i.e. on 3.6.1997. However before the expiry of 120 days, the 1997 Ordinance was laid before Parliament under Article 89(3)(b) of the Constitution and culminated into the 1997 Act which was promulgated on 31.5.1997, i.e. the day it received the President's

assent. The 1997 Act repealed the 1997 and 1984 Ordinances (*the latter of which already stood repealed under the 1997 Ordinance*).

7. Accordingly, the 1984 Ordinance stood irrevocably repealed on 4.2.1997 by virtue of the 1997 Ordinance, ergo for all legal intents and purposes, the 1984 Ordinance ceased to have effect on the said date. The fact that there was **no saving clause** in the 1997 Ordinance (*and none in the 1997 Act either*) to the effect that all proceedings, rights or liabilities under the 1984 Ordinance would continue to be governed by the latter ordinance lends credence to this interpretation. Instead there was only a transfer provision in the form of Section 7(6) of the 1997 Ordinance (*and the 1997 Act*), providing that all proceedings, including proceedings for the execution of a decree within the jurisdiction of a Banking Court, pending in any Banking Tribunal constituted under the 1984 Ordinance (*and the 1997 Ordinance*) shall stand transferred to the Banking Court having jurisdiction under the 1997 Ordinance (*and the 1997 Act*).

8. In any event, it is indeed settled law, in line with Section 6 of the General Clauses Act, 1897, that any act done or any action taken or purported to have been done or taken under or in pursuance of the repealed Act, shall in so far as it is not inconsistent with the provisions of new Act, be deemed to have been done or taken under the corresponding provisions of the new Act. A litigant is provided protection with respect to any right, privilege, obligation or liability acquired or accrued under any enactment repealed. Substantive laws are only very exceptionally amended with retrospective effect for the eminently sensible reason that one does not change the goal posts mid-game. Unless a Legislature enacts a new law (*the 1997 Act*) to be specifically retrospective, and that too with great particularity of language, the Courts are not to assume retrospectivity. There is nothing



in the repealing section, i.e. Section 28 of the 1997 Act, to indicate that the Legislature meant for such Act to be applied with retrospective effect. Therefore the question of retrospective application of the provisions of the 1997 Ordinance (*and the 1997 Act*) does not arise, as the execution proceedings in the case at hand, though instituted under the 1984 Ordinance, stood transferred to the Banking Court established under the 1997 Ordinance and then the 1997 Act, and in the absence of any saving clause as mentioned above, the relevant provisions of the 1997 Ordinance (*and then the 1997 Act*) were to apply on the date of transfer of such proceedings and thereafter. The Banking Court is not required to proceed de novo, rather from the stage which the proceedings had reached immediately prior to the transfer as envisaged by Section 7(7) of the 1997 Act (*reproduced hereinabove*).

9. Section 12 of the 1997 Ordinance dealt with execution of decrees and provided that where a banking company is a mortgagee of any property belonging to the judgment-debtor, the banking company may sell such property without the intervention of the Banking Court either by public auction or by private treaty to any person or purchase such property on its own account. Further, where the banking company wished to sell the property by private treaty or to purchase it on its own account it was to, before concluding the sale, give to the judgment debtor an option by a notice in writing for purchasing or redeeming such property at the price at which the banking company proposed to sell or purchase within such period as the banking company may specify in such notice which was not, in any case, to be less than seven days. Therefore the 1997 Ordinance clearly permitted for sale by way of private treaty, subject to the written notice of option to purchase being provided to the judgment debtor. However these provisions only came into effect from the date of promulgation of the 1997 Ordinance till its

repeal, i.e. from 4.2.1997 to 31.5.1997, after which the relevant provisions of the 1997 Act came into force. The provisions governing execution of decree under the 1997 Act were contained in Section 18, which provided that in cases of mortgaged property a banking company could sell the same with or without the intervention of the Banking Court by inviting sealed tenders in which case the banking company was to invite offers through advertisements in one English and one Urdu newspaper having a wide circulation in the city in which the sale was to take place giving not less than thirty days' time for submission of offers, provided that before conclusion of the sale the judgment-debtor was to be given an opportunity to purchase the property at a matching price to be paid in cash within a period of thirty days. There was a clear departure in the wording of Section 18 of the 1997 Act from that of Section 12 of the 1997 Ordinance, the former allowing a banking company to sell the mortgaged property by sealed tenders, and the latter by private treaty, thereby implying that sale by private treaty was no longer permissible under the 1997 Act. This was the situation prevailing from 31.5.1997 onwards, and this is indubitably the reason that the Banking Court on 10.6.1997 passed an order to the effect that *"...For report of sale by auction or inviting tenders of the mortgaged property by the decree holder..."*, and not *"sale by auction or private treaty"*. This distinction needs to be appreciated and it is the reason why the subsequent order of the Banking Court allowing the sale by private negotiation/treaty (*and the issuance of the sale certificate*) is violative of the law that existed at the relevant point of time.

Notwithstanding the above stated legal position, the sale was even otherwise illegal on the touchstone of the 1984 Ordinance. Section 11(3) of the 1984 Ordinance required the bank (*decree holder*) in case of sale through private negotiation to give to the judgment debtor, by a notice,

the option to purchase or redeem the property, as the case may be, at the same price within such time as the banking company may supply in such notice, but this option, **a right conferred upon the judgment-debtor**, was never afforded to him. Therefore, the sale was not made as per the law and cannot be sustained even by virtue of the repealed 1984 Ordinance. It is settled that where law requires an act to be done in a particular manner it has to be done in that manner alone and such dictate of law cannot be termed a mere technicality.

10. In the case of **Asma Zafarul Hassan** (*supra*) leave was refused to challenge the order of the Sindh High Court whereby the court dismissed an application for setting aside a sale of property in execution proceedings. The relevant facts are that after two attempts to sell the property through public auction failed, the court allowed the sale through private offer arranged through the Nazir's personal efforts. It must be kept in mind that these events occurred during 1977 i.e. before the promulgation of special banking laws and hence the relevant provisions of the CPC would have been applicable. Through the leave refusing order this Court, inter alia, held that the High Court gave its "**tacit consent**" to the "private offer" mode of sale and by ineluctable inference that it was not necessary to pass a specific order to this effect and further that unless a procedure was specifically barred it may be adopted by the court for serving the ends of justice. This finding is not in consonance with that of **Muhammad Attique**'s case (*supra*) wherein this Court upheld the order of the Lahore High Court remanding the challenge/objections to the auction of a property in execution proceedings to the Banking Court for decision afresh. The sale of the property in question had been effected through a purportedly flawed public auction. For our purposes the relevant finding of this Court was that the provisions of the Financial Institution (Recovery of Finances)

Ordinance 2001 (*FIO 2001*) allow the Executing Court to choose the mode of execution in accordance with the CPC or any other law in force but *"once it has chosen the mode as provided in the Civil Procedure Code, then it cannot be permitted to divert that mode at subsequent stage without **conscious application of mind**" (emphasis supplied).* The conundrum before us is this; is the Executing Court simply required to give its "tacit consent" to a new/different mode of sale or must it do so through "conscious application of mind"?

11. In execution proceedings the court of law must always proceed to employ the principles of balancing and proportionality in order to accomplish a state of affairs where the rights of both the decree-holder and those of the judgment debtor are secured. In the same manner the court must be conscious of protecting a third party such as the auction purchaser. *Proportionality<sup>1</sup> analysis involves different steps, each involving a test. First, in the "legitimacy" stage, the Court confirms that the action has been taken by a person authorized to do so. The second phase – "suitability" – is devoted to judicial verification that, with respect to the act in question, the means adopted are rationally related to stated objectives. The third step, called "necessity," is to ensure that the measure does not curtail the right of a party any more than is necessary for achievement of stated goals. The last stage, "balancing in the strict sense," requires that the court weighs the benefits of the act against the costs incurred by infringement of the right, in order to determine which right shall prevail, in light of the respective importance of the values in tension, given the facts.* The principles of proportionality outlined above are increasingly defining jurisprudence across the globe. For our purposes the court is to achieve the purpose of the execution

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<sup>1</sup> Essay, March 2008, Proportionality Balancing and Global Constitutionalism by Alec Stone Sweet, Yale Law School and Jud Mathews, Yale Law School.

viz. the recovery of money owed to the decree holder through sale of the judgment debtor's property; to this end the court holds the rights of every litigant equally dear. The ideal manner of sale of the judgment debtor's property is indeed through public auction and the open manner in which this may be effected has been aptly defined in **Lanvin Traders, Karachi Vs. Presiding Officer, Banking Court No.2 (2013 SCMR 1419)** per our learned brother, Justice Anwar Zaheer Jamali. But sale(s) of property in execution proceedings are essentially distress sales and the circumstances are far from ideal. Therefore the legislature in its wisdom has allowed alternative means of sale. The court may depart from a preferred mode of sale if the circumstances warrant such departure. But when it does depart therefrom it must be through a conscious application of mind because it must itself be convinced that a less "ideal" mode of sale is necessitated by the circumstances prevailing and these must be set out in order to reassure all the parties that the sale proceedings are open and transparent and the court is conscious of its solemn duty. Tacit consent would not meet the standard of openness required of the executing court. It is its reasons for so doing (*adopting an alternative method*) which shall inspire confidence.

12. In the case reported at **National Bank of Pakistan Vs. Paradise Trading Company (2015 CLD 366)** this Court has held that,

*“Now it is admitted fact that in execution proceeding the Banking Tribunal has adopted the procedure of selling of the mortgage property by public auction. Once such procedure for selling the mortgage property through public auction is adopted by the Banking Tribunal then no other mode or procedure is permissible for selling of mortgage property except by public auction”.*

With the greatest of respect we are constrained to state that the aforesaid judgment is *per incuriam* and not good law for the reason that the court was not assisted properly and appears not to have considered **Muhammad Attique**'s case (*supra*) which lays down the correct law i.e. the executing court may indeed adopt a different method of sale if required, the only proviso being that such change in course must be after due application of mind by assigning justifiable reasons. To hold otherwise is to shackle the court in an undesirable manner and hold it hostage to its own earlier orders.

13. Our attention has been drawn to a recent judgment of this Court cited at **Zakaria Ghani Vs. M. Ikhlaq Memon (PLD 2016 SC 229)** in support of the proposition that the executing court may adopt a different method of sale without a specific order to this effect. The said judgment is authored by myself and I have given anxious consideration to the aforesaid proposition and whether the said judgment indeed supports such a rendering of law. The question before this Court in the said case was not whether or not an executing court was to adopt a different method of sale after due application of mind (*or otherwise*) but the more fundamental question of whether or not the court could change the course or mode adopted at all? It was this latter question that the court answered in the affirmative through the said judgment by holding that,

*“.....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 a factual plane.”*

*(Emphasis supplied)*

Hence this judgment does not stand in the way of our present finding which is that an executing court may change the mode of sale after due application of mind and giving reasons as mentioned above; the manner in which it was to adopt a new course was a moot point in the said judgment.

14. The answers to the questions devised in the earlier part of this opinion can thus be summarized as follows:

- (i) The law applicable on 8.5.1997, 23.9.1998 and 2.10.1998, (*when the Banking Court allowed the property to be sold by the bank through private treaty, the offer of the appellant was accepted by the bank and the confirmation of the private sale in favour of the appellant respectively*) was the 1997 Ordinance on the first of said dates and thereafter the 1997 Act;
- (ii) The order dated 8.5.1997 passed by the Banking Tribunal was not superseded by the Banking Court *vide* its order dated 10.6.1997 for the reason that the latter order was illegal for the reasons outlined in the earlier part of this opinion;
- (iii) Under the 1984 Ordinance or the 1997 Ordinance/Act both being special laws, the Banking Tribunal/Court in execution proceedings could adopt any procedure it deemed fit for the sale of the mortgaged property other than the one (*the procedure*) prescribed by the said two laws;

- (iv) Having once adopted a mode of execution as set out in the CPC, an executing court can deviate therefrom with due application of mind and upon assigning justifiable reasons;
- (v) The sale was even otherwise illegal on the touchstone of either of the special laws;
- (vi) The correct law has been laid down in the case of **Muhammad Attique** (*supra*) and the judgment delivered in **Asma Zafarul Hassan** (*supra*) is not the correct law.

In light of the above, subject to the reasons assigned in this opinion while upholding the impugned judgment, this appeal is dismissed with the consequence that the private sale made in favour of the auction purchaser (*predecessor-in-interest of the appellants*) as confirmed by the Banking Court stands set aside. However, keeping in view the peculiar facts and circumstances of the case, particularly that the auction purchaser has paid an amount of Rs.6,16,038/- as sale consideration which amount has been received (*wholly or partly*) by the decree holder in satisfaction of its decree and has no further claim in this behalf; and as the real contest is between the appellants and the judgment debtor, thus in order to safeguard the interest of both the parties and keeping in view the rule of justice, equity and fairplay we direct that the property in question should be put to open auction and out of the sale proceeds the appellants should be returned the amount paid by them to the decree holder (*or any further amount if deposited in the court after satisfying the decree*) along with 10 percent yearly profit (*note:- not on compound basis*) as compensation on such amount; besides the appellants should be refunded the amount of utility bills paid by them (*subject to*



*proof*) along with the profit at the rate mentioned above and the balance amount should be given to the judgment debtor/respondent No.3. Both the parties may participate in the auction.

Chief Justice

Judge

Judge

Judge

Judge

Announced in open Court  
on **29.9.2016** at **Islamabad**  
Approved For Reporting  
Ghulam Raza/\*

Judge