

Form No: HCJD/C.

JUDGEMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Execution First Appeal No.02 of 2014

M/s Capital Poultry Feed and Daal Mills etc.

Vs

Atlas Bank Limited etc.

Appellants' by: M/s. Tariq Saleem Sheikh.

Respondent's by: Raja Muqsit Nawaz Khan, Adv. Res.1

***Mr. Irsalan Rasheed Qureshi, Adv. for
respondents No.3 & 4.***

Date of Hearing: 05.03.2015.

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Aamer Farooq, J.- The present appeal is directed against order dated 12.09.2014 passed by Banking Court, Islamabad whereby the objection petition filed by the appellants was dismissed and sale certificate was granted to the auction purchaser namely, respondents No.3 and 4.

2. Respondent No.1 filed a suit (C.S. No.1131/2010) against the appellants and respondent No.2 in the Banking Court at Islamabad. The said suit was decreed in favour of respondent No.1 to the tune of Rs:37,730,655/- (Rupees thirty seven million seven hundred thirty thousand six hundred and fifty five only) and against the appellants and respondent No.2. The proceedings were converted into execution petition under provisions of Financial Institution (Recovery of Finance) Ordinance, 2001 with effect from 29.10.2010. Upon creation of

Banking Court at Islamabad the execution proceedings were transferred to Islamabad Court on 08.07.2013. In the execution proceedings respondent No.1 sought the sale of following two properties mortgaged with respondent/bank:

(a) house No.F-825/A2 Satellite Town, Rawalpindi &

(b) plot No.158 Industrial Area Section I-9, Islamabad.

On 24.03.2011, notices under Order XXI Rule 66 Code of Civil Procedure, 1908 (CPC) were issued to the judgement debtors. The appellants raised number of objections against the notices which, inter alia, included fixation of the reserved price. The objections, filed by the appellants, were dismissed which order was assailed through Writ Petition No.3392/2012 in this Court. After dismissal of objections by the learned Banking Court attempt was made to auction the properties which did not materialize. On 07.02.2014, the terms of auction with respect to one of the properties No.F-825/A-2, Satellite Town, Rawalpindi were settled. On 20.03.2014, the property which was to be auctioned was substituted by the factory premises of M/s Capital Poultry Feed situated at Plot No.158, Industrial Area, Sector I-9, Islamabad. In this regard the terms of sale were settled vide order dated 20.03.2014 and the auction schedule was announced on 04.04.2014. Reserved price fixed for the sale/auction of the property was Rs:51,061,125/- (Rupees fifty one million sixty one thousand one hundred and twenty five only). The property was auctioned and the Court Auctioneer filed report whereby respondents No.3 & 4 were declared to be successful bidders making highest bid of Rs:5,75,00,000/- (Rupees fifty seven million five hundred thousand only). The entire auction money was paid in the Banking Court at Islamabad. The appellants filed an application under Order

XXI Rule 90 CPC for setting aside the sale on various grounds. The same was controverted by the respondent/bank wherein various factual and legal objections were taken. The objections filed by the appellants were dismissed by the Banking Court, Islamabad vide order dated 12.09.2014 and the sale in favour of respondents No.3 & 4 was confirmed.

3. Learned counsel for the appellants, inter alia, submitted that on 07.02.2014 the case was adjourned for 14.03.2014 for settlement of schedule of sale with respect to the property situated at Rawalpindi and the respondent/bank fraudulently procured the orders for the sale of the property situated at Islamabad. It was contended that the reserve price of the property is not its actual worth and the property auctioned is worth much more than its auction price; no notice under Order XXI Rule 66 CPC was served on the appellants before the sale of property; the description of the property in the auction/sale proclamation was inaccurate and has caused serious prejudice to the appellants. Learned counsel emphasized that the entire process of sale has been accomplished in a clandestine manner which is prejudicial to the interest of the appellants.

4. Learned Counsel for respondent No.1 contended that the sale has been conducted in accordance with law and there is no irregularity or fraud in doing the same. In support of his contentions the learned counsel for respondent/bank placed reliance on “M/s Nowshera Bricks and Tiles (Pvt.) Limited & others vs. Regional Development Finance Corporation” (2002 CLC 904), Nadeem Akhtar Tabasum vs. MCB Ltd. & others (2014 SCMR 1371), “Ghulam Abbas vs. Zohara Bibi & another” (PLD 1972 SC 337) and M/s Nice ‘N’ Easy Fashion (Pvt.) Ltd. and others vs. Allied Bank of Pakistan & another (2014 CLD 1404).

5. The property bearing plot No.158 Industrial Area, Islamabad was ordered to be auctioned on 20.03.2014 and in this regard the terms and conditions of auction were settled fixing the reserve price as Rs:51,061,125/- (Rupees fifty one million sixty one thousand one hundred and twenty five only) and the matter was adjourned to 04.04.2014 for schedule of auction. The detailed auction report was filed by the Court Auctioneer specifying that the notices were issued to the parties about the sale/auction on 11.04.2014. The sale proclamation /notices were pasted at Court's premises on 15.04.2014 and at site on 17.04.2014. The notice for auction was also published in Daily Khabrin on 17.04.2014 and the auction was conducted on 22.05.2014 at site. As per the auction report the attendance sheet was also prepared and various bidders participated in the bid process and in this regard bid of respondents No.3 & 4 was the highest to the tune of Rs:5,75,00,000/-. The objection by the appellants that no notices under Order XXI Rule 66 of CPC were issued to them is not tenable inasmuch as sale had been done previously and the property was admitted to be auction in past but could not. The fact that it was ordered again to be auction did not require fresh issuance of the notice under Order XXI Rule 66 *ibid*. In case cited as **2014 SCMR 1371** the Hon'ble Supreme Court of Pakistan observed that where the judgement debtor was aware of auction proceedings he could not challenge the auction on grounds that notice was sent to him on incorrect address, as notice was also published in the newspapers. In **PLD 1972 SC 337** *supra* the Hon'ble Supreme Court observed as follows:

“Held: There is nothing in this to show that the provisions of Order XXI, rule 54 of the Civil Procedure Code are mandatory and substantial compliance is not enough. 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", and the onus of proving this prejudice Is on the party complaining thereof.

If there was any doubt as to the correctness of the above view, this doubt is laid at rest by the proviso to rule 90 of Order XXI of the Code of Civil Procedure which clearly prescribes that "no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud." In the absence of proof of any such substantial injury, no sale can be set aside.

Under Order XXI, rule 67 of the Code of Civil Procedure itself, all that is required is that "every proclamation shall be made and published, as nearly as may be in the manner prescribed by rule 54, sub-rule (2)" and in this sub-rule it is provided that the proclamation shall be "by beat of drum or other customary mode." Publication by beat of drum, therefore, is not the only mode by which the order can be proclaimed.

In the case of Karachi, publication in newspapers is also required by rule 339 of the Sind Chief Court Rules and, therefore, that is the customary mode of publication in Karachi.

The Rules are not mandatory in nature and substantial compliance with them is sufficient. The object of these Rules is to give the order of attachment or the sale proclamation as wide a publicity as possible in the circumstances of the case, having regard to the nature of the property to be sold and the place of its location. If this has substantially been done and fair offer received at the auction, then the Courts would be inclined to hold that there has been substantial compliance with the Rules, unless, of course, a person can

establish by cogent evidence that the irregularity has resulted in prejudice to him.”

Similarly judgement of the Hon’ble Supreme Court reported as **2014 CLD 1404**, supra is instructive, wherein it was observed as follows:

“10. The appellants have filed objection petition apparently on the ground that auction proceedings were irregular and the Banking Court has failed to follow the procedure provided under Order XXI, C.P.C. The appellants themselves moved the Banking Court under section 19(7) of the Ordinance and have not made an application under Order XXI, Rule 89 or 90, C.P.C. Even if the objection petition of the appellants is treated as an Application under Order XXI, Rule 89 or 90, C.P.C., then the said Rules mandate that the objector should deposit the amounts mentioned therein along with the application. In absence of the deposit, as mandated by the Rules, the application and or objections cannot be entertained by a Banking Court. In the case in hand, the appellants have not deposited any of the amounts required under the aforesaid Rules, therefore, the objections were rightly rejected by the Banking Court.

11. Section 19(2) of the Ordinance authorizes the Banking Court to adopt summary procedure provided under section 19(7)(a), (b) and (c) which also exclude application of the provisions of Civil Procedure Code for satisfying a decree in execution proceedings. The aforesaid provisions of section 19 contain inbuilt mechanism of execution proceedings. In the case in hand, the Banking Court issued notices in terms of section 19(7) of the Ordinance in the execution proceedings and thereafter it followed the inbuilt mechanism provided therein, which is summary in nature. In such like situation, the objections of the appellants that the provisions of Order XXI, Rule 66 or any other Rule under Order XXI of the C.P.C. have not been followed, will be of no consequence in terms of the language of section 19 of the Ordinance.

12. The Ordinance is a special law and section

19(7) contains a non obstante clause, excluding the application of Civil Procedure Code or any other law for the time being in force, therefore, once the Banking Court adopts summary procedure provided under section 19 of the Ordinance, it is not bound to follow the procedure provided under Order XXI in execution proceedings and the contention of the learned Counsel for the appellant is without force.

13. We, for the aforesaid reasons, are of the considered view that no inherent defect has been found in the procedure adopted by the Banking Court in terms of section 19(7) of the Ordinance, under which the auction was conducted and the respondent No. 2 was rightly declared the highest bidder, who deposited the auction amount within the stipulated time besides during pendency of the proceedings, possession of the property in dispute has already been delivered to the respondent No.2.”

6. In the present case notice for sale/auction was published in Daily Khabrin which constitutes ample knowledge to the appellants. In so far as the objection of the appellants with respect to the description of the property is concerned the bidders made their bids at the site of mortgaged property which was to be auctioned and, therefore, knew that the property being sold is land building and fixtures and made the bid accordingly, therefore, no prejudice has been caused to the appellants on that score. Moreover the property has been auctioned at a price much more than reserved price and the auction report indicates that bidders actively participated in the process and reservation by the appellants with respect to the subsequent substitution of the property for sale auction are also not tenable inasmuch as it is the prerogative of the decree holder to have any or all the mortgaged properties sold in the execution of the decree. Application was made to the Banking Court, Islamabad for the sale of the property in question, which was allowed by the Court and the terms & conditions of the auction

were settled and the sale was duly publicized by way of pasting of notices as well as publishing in a newspaper.

7. In view of above, we do not find any infirmity in the impugned order dated 12.09.2014, therefore, present appeal is dismissed.

(ATHAR MINALLAH)
JUDGE

(AAMER FAROOQ)
JUDGE

Altaf Malik

Announced in open Court on April ,2015

Judge

Judge

Approved for reporting.

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