

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

FAO No. 80 of 2015

M/s Capital Poultry Feed & Dall Mills, etc.

Vs

Presiding Officer of Banking Court, Islamabad, etc.

DATE OF HEARING: 09-2-2016.

APPELLANTS BY: Dr Babar Awan and Dr M. Salah-ud-Din Mangel Advocates.

RESPONDENTS BY: Raja Muqsit Nawaz Khan Advocate, for respondent No. 2.

Mr Arshad Mahmood Advocate, for respondents No. 3 & 4.

ATHAR MINALLAH, J.- This appeal is directed against order dated 01-10-2015 passed by the learned Judge Banking Court, Islamabad, whereby the application filed by the appellants under Order XXI Rule 89 of the Code of Civil

Procedure, 1908 (hereinafter referred to as the "CPC") was dismissed.

2. The facts, in brief, are that the respondent No. 2 filed a suit against the appellants in the Banking Court. The suit was decreed in favour of the respondent No. 2 to the extent of Rs.37,730,655/- (Rupees thirty seven million, seven hundred thirty thousand, six hundred and fifty five only). The proceedings were converted into an execution petition under the provisions of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as the "Ordinance") w.e.f. 29-10-2010. In the execution proceedings, the respondent No. 2 sought the sale of two properties mortgaged with the respondent/Bank. Notices were issued under Order XXI Rule 66 of CPC. The appellants raised objections against the notices and the same were dismissed. The dismissal order was assailed through W.P. No. 2484/2014 and the said petition was dismissed by a Division Bench of this Court vide order dated 21-5-2014. The property described as Capital Poultry Feed at I-9, Islamabad (hereinafter referred to as the "Property") was to be auctioned on 20-3-2014. The terms and conditions of the auction were settled and the auction schedule was announced on 11-4-2014. The reserve price was fixed as Rs.51,061,125/- (Rupees fifty one million sixty one thousand one hundred and twenty five only). The Property was

auctioned and the requisite report was filed by the Court Auctioneer, whereby the respondents No. 3 & 4 were declared as successful bidders. The entire bid amount of Rs. 5,75,00,000/- (Rupees fifty seven million and five hundred thousand only) was deposited in the Banking Court at Islamabad. The appellants filed an application under Order XXI Rule 90 of the CPC for setting aside the sale on the grounds mentioned therein. The application was contested by the respondent/Bank and was ultimately dismissed by the learned Banking Court vide order dated 12-9-2014. The learned Banking Court simultaneously confirmed the sale and a *sale certificate* was also issued in favour of the respondents No. 3 & 4. The appellants assailed the said order through filing EFA No. 02/2014, which was decided by a Division Bench of this Court on 23-4-2015. The appellants, through Civil Petition No. 838 of 2015, sought leave to appeal and the same was refused by the august Supreme Court vide order 11-6-2015. The review petition i.e. CRP No. 489/2015 in CP No. 838/2015 was dismissed as not pressed vide order dated 15-9-2015. The appellants then filed an application on 18-9-2015 under Order XXI Rule 89 of the CPC and the same was dismissed by the learned Judge Banking Court vide order dated 01-10-2015.

3. *Dr Babar Awan Sr ASC*, appearing on behalf of the appellants, has contended that; the learned Banking Court

failed to decide the application on merits; the review petition i.e. CRP No. 489/2015 in CP No. 838/2015 before the august Supreme Court was not pressed in order to avail the remedy available under the law; the available remedy was under Order XXI Rule 89 CPC; the said remedy is available to a person at any time and the said entitlement cannot be refused; Sub Section (2) of Rule 89 of Order XXI affirms that the person is entitled to file the application at any stage; Rules 89 and 90 of Order XXI are distinct; Rule 89 entitles the categories of persons mentioned therein to exercise this right even after an application under Order XXI Rule 90 has not been successful; the purpose and object of the enactment of Rule 89 of Order XXI is to provide a facility to the judgment-debtor to pay the liability and redeem the mortgaged or sold properties; the purpose of the enactment of Order XXI is at par with a mercy petition; reliance has been placed on cases of Muhammad Maherban Versus Muhammad Siparas and others [2014 CLC 1329], National Bank of Pakistan and 117 others Versus Saf Textile Mills Ltd. and another [PLD 2014 S.C. 283], Muhammad Attique Versus Jami Limited and others [PLD 2010 S.C. 993], United Bank Ltd. Versus Heryana Asbestos Cement Industries (Ltd.) and 20 others [2006 CLC 1272], Mian Muhammad Nawaz Sharif Versus The State [PLD 2009 S.C. 814], Messrs Lanvin Traders, Karachi Versus Presiding Officer, Banking Court No. 2, Karachi and others [2013 SCMR 1419], Muhammad Attique Versus Jami Limited

and others [PLD 2010 S.C. 993], Mst. Anwar Sultana through L.Rs. Versus Bank Al-Falah Ltd. and others [2014 SCMR 1222], Haji Zahid Saeed and another Versus Messrs Asif Brothers and 3 others [2015 CLC 183], Ehsan-ul-Haq and 13 others Versus Zulfiqar Khan and 7 others [2001 MLD 890], Hakim Ali Versus Muhammad Hanif and others [2014 SCMR 866]; perusal of the impugned order shows that the hearing was held on 01-10-2015 and was announced on the same date; the order sheet reveals otherwise, as announcement was made on 02-10-2015; the order is, therefore, void and it is a case of remand.

4. *Raja Muqsit Nawaz ASC* appeared on behalf of the respondent Bank and has argued that; the application under Order XXI Rule 89 was not competent as the appellants had earlier filed an Objection Petition under Order XXI Rule 90; the application filed under Order XXI Rule 89 was hopelessly time barred as the limitation provided under Article 166 of the Limitation Act, 1908 is 30 days from the date of sale; reliance has been placed on a recent judgment of the august Supreme Court of Pakistan dated 03-11-2015 passed in Civil Review Petition No. 383/2005 in Civil Appeal No. 670/2002 titled *Zakaria Ghani and 4 others Versus Muhammad Ikhlq Memon and 8 others*.

5. *Mr Arshad Mahmood Advocate*, appearing on behalf of the auction purchasers i.e. respondents No. 3 & 4, has argued that; vested rights have accrued in favour of the auction purchasers; the respondents had paid the entire amount and the sale was not only confirmed but the *sale certificate* was also issued in their favour; the application under Order XXI Rule 89 CPC was not competent and was also time barred.

6. The learned counsels have been heard and the record perused with their able assistance.

7. It is not denied that pursuant to judgment and decree dated 15-9-2010, passed by the learned Banking Court, execution proceedings were initiated and the Property was auctioned. The respondents No. 3 & 4 were the highest bidders. They deposited the entire amount and consequently vide order dated 12-9-2014 the sale was confirmed and the *sale certificate* was also issued in their favour. It is also admitted that an Objection Petition under Order XXI Rule 90 CPC was filed by the appellants and the same was dismissed by the learned Banking Court vide order dated 12-9-2014. The appeal of the appellants against the said order was also dismissed by a Division Bench of this Court vide order dated 29-4-2015. Leave was refused by the august Supreme Court of Pakistan and the Civil Review petition was later dismissed

as not pressed. Admittedly, an application under Order XXI Rule 89 CPC was filed before the learned Banking Court Islamabad on 18-9-2015. The sole question for our consideration is whether in the facts and circumstances of the case the application under Order XXI Rule 89 was competent, and whether the appellants were entitled to the remedy contemplated therein, particularly after the dismissal of the Objection Petition under Order XXI Rule 90 CPC?

8. Rules 89 and 90 of Order XXI CPC provides an opportunity to the persons specified therein to challenge an order passed in relation to the sale of property. These are two alternative remedies available to the persons. The august Supreme Court in its recent judgment dated 03-11-2015, passed in Civil Review Petition No. 383/2005 in Civil Appeal No. 670/2002 titled as Zakria Ghani and 4 others Versus Muhammad Ikhlaz Memon and 8 others, has considered and elaborately examined the provisions of Order XXI Rules 89 & 90 CPC. It would, therefore, be pertinent to refer to the relevant portions of the said judgment. The distinction between the two provisions i.e Rules 89 and 90 has been explained as follows:

"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."

9. In the context of Order XXI Rule 90 it has been held that the time period of 30 days, as specified under Article 166 of the Limitation Act 1908, is also attracted for the filing of an application there under. It has further been elaborated and held that failing to comply with Order XXI Rule 90 or 89 CPC has an inevitable consequence, that the judgment debtor is precluded from making any challenge to the validity of sale at a subsequent stage. Referring to Order XXI Rule 92 it has been unequivocally observed and enunciated that the said provision explicitly prescribes for the consequences of a failure to make an application under Order XXI Rule 89 or Order XXI Rule 90. Failure to invoke Order 21 Rule 89 or Order XXI Rule 90 of the CPC makes it mandatory for the learned Court to make an order confirming the sale, and thereafter the sale becomes absolute. The apex Court has further emphasized that 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 the same judgment the august Supreme Court has reiterated the principles and law enunciated in the landmark judgment titled *Hudaybia Textile*

Mills Limited Versus Allied Bank of Pakistan Ltd. [PLD 1987 SC 512]. In the latter judgment the august Supreme Court has highlighted the significance of upholding the sanctity and stability of judicial sales. The relevant passage, reaffirmed and reiterated in the case of Zakria Ghani and 4 others supra is as follows:

"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 stance. 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."

10. After reproducing the above passage the august Supreme Court has observed as follows:

"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."

11. It is obvious from the above that the law relating to exercising the alternate mode under Order XXI Rule 89 or 90 of challenging an order passed in relation to the sale of properties is well settled. The time period for making an application under either of the Rules is 30 days from the date of sale and the limitation prescribed under Article 166 of the Limitation Act shall be attracted. Sub Rule (2) of Rule 92 of Order XXI further affirms that in the case of an application under Rule 89 the deposit, as specified *ibid*, is to be made within 30 days from the date of sale. It is also obvious from the plain reading of Rule 89, read with Rule 90, that both the methods of challenging the sale cannot be invoked simultaneously. Sub Rule (2) of Rule 89 explicitly provides that where a person applies under Rule 90 to set aside the sale of his immoveable property then he loses his entitlement to make an application under Rule 89, unless the application under Rule 90 has been withdrawn. The remedy under Order XXI Rule 89 can only be availed within thirty days of the sale. It has been held by the apex Court that 'if a judgment debtor chooses not to take advantage of the opportunities afforded to him by the law the matter comes to an end'. As a corollary

the advantage is available within the time and in the manner prescribed. The argument advanced by the learned counsel for the appellants that the latter were entitled to file an application under Order XXI Rule 89 at any stage is misconceived. Moreover, there is no force in the argument that the order dated 15-9-2015, whereby the august Supreme Court dismissed the Civil Review Petition No. 489/2015 as not pressed, be construed as withdrawal of the Objection Petition under Order XXI Rule 90 CPC. The said Objection Petition had been dismissed vide order dated 12-9-2014, while the appeal was also dismissed by a Division Bench of this Court vide judgment dated 23-4-2015. In any case it is an admitted position that the appellants had not filed any application under Order XXI Rule 89 CPC within the prescribed period of limitation. The sale was confirmed in favour of the respondents No. 3 & 4 and the *sale certificate* has also been issued. As bonafide purchasers their interests have also intervened and need to be protected. At the same time the sanctity and stability of the judicial sale is also required to be upheld. This Court is also guided by the observations made by the august Supreme Court in the case of Zakaria Ghani and 4 others *supra* while referring to the case of Hudaybia Textile Mills Limited *supra*, as follows:

"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."

12. In the light of the above discussion we hold that the application filed by the appellants under Order XXI Rule 89 was barred by time and, therefore, incompetent. The argument regarding the date of hearing and the announcement of the order by the learned Judge Banking Court obviously appears to be a clerical/ typo error. The law, as discussed above, is settled by now and, therefore, it would be a mere formality and a futile exercise if the matter was to be remanded back. The appellants have also filed C.M. No. 102/2016 seeking that the delay in filing of the petition under Order XXI Rule 89 CPC be condoned. As already noted above, it is settled law that the limitation period attracted in case of an application under Order XXI Rule 89 is 30 days from the date of sale as provided under Article 166 of the Limitation Act, 1908. The application is hopelessly time barred and no sufficient reason has been given to make out a case for condoning the delay. Moreover, no such application was filed before the learned Banking Court. It may also be pointed out that the filing of the application in itself is an

acknowledgement that the application was barred by time. There is no force in the argument of the learned counsel for the appellant that the limitation for filing an application under Order XXI Rule 89 CPC would start from the date when the civil review was dismissed by the august Supreme Court vide order dated 15-9-2015. The instant C.M. is misconceived and, therefore, stands dismissed.

13. For the reasons discussed above, the appeal is without merit and is accordingly dismissed.

(NOOR-UL-HAQ N. QURESHI)
JUDGE

(ATHAR MINALLAH)
JUDGE

Tanveer Ahmed.

Approved for reporting.