

10/20

IN THE SUPREME COURT OF PAKISTAN
(REVIEW JURISDICTION)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL.
MR. JUSTICE FAISAL ARAB.
MR. JUSTICE IJAZ UL AHSAN.

AER
1. **CIVIL REVIEW PETITION NO.537 OF 2019**
IN
CIVIL PETITION NO.2013 OF 2017
(AGAINST ORDER DATED 21.06.2019 OF
THE SUPREME COURT OF PAKISTAN IN CP
NO.2013 of 2017).

M/s Habib & Company and others.

...Petitioner(s)

Versus

Muslim Commercial Bank Limited and others.

...Respondent(s)

For the Petitioner(s): Mr. M. Munir Piracha, ASC.
Mr. Mehmood A. Sheikh, AOR.

For the Respondent(s): N.R.

Date of Hearing: 19.11.2019.

JUDGMENT

IJAZ UL AHSAN, J.- Through this Civil Review Petition No.537 of 2019, the Petitioners seek review of an order of this court dated 21.06.2019, passed in Civil Petition No.2013 of 2017, wherein we refused to grant the Petitioners leave to appeal against a judgment of the Lahore High Court, Lahore dated 17.04.2017 and had accordingly dismissed the petition in question (the "**Impugned Order**").

2. Briefly stated the facts necessary for decision of this *lis* are that a suit for recovery of Rs.490,092.51 was filed against the Petitioners by Respondent No.1, which was decreed on 31.03.2003.

The Petitioners filed RFA No.213 of 2003 against the judgment and decree dated 31.03.2003, before the High Court. However, in the meanwhile, Respondent No.1 initiated execution proceedings, in which a property mortgaged by the Petitioners was ordered to be auctioned *vide* order dated 14.05.2003. The auction took place on 09.09.2003, where Respondent No.2 was the highest bidder. Aggrieved by this, the Petitioners filed an objection petition under Order XXI, Rule 90 of the Code of Civil Procedure, 1908 ("CPC"). This application was dismissed for non-prosecution on 05.07.2004, when the auction was also confirmed in the favour of Respondent No.2.

3. The Petitioners challenged the order dated 05.07.2004 by way of FAO No.317 of 2004, which was dismissed by the High Court *vide* order dated 17.04.2017. It is also pertinent to note that RFA No.213 of 2003 filed by the Petitioners before the High Court was allowed on 01.12.2011, whereby judgment and decree of the Banking Court dated 31.03.2003 was set aside along with the order dated 05.07.2004. This was challenged by Respondents No.3 and 4 before this Court. The matter was remanded to the Lahore High Court, which dismissed the FAO filed by the Petitioners on 17.04.2017. This decision was challenged before us by the Petitioners in Civil Petition No.2013 of 2017, where leave to appeal was refused and the petition was dismissed *vide* the Impugned Order. In the instant case, the Petitioners now seek review of the Impugned Order.

4. Learned Counsel for the Petitioners has based his arguments mainly on the contention that there was no specific order passed by the court directing the Petitioner to deposit 20% of the

auction price with the objection petition filed by the Petitioners under Order XXI, Rule 90 of the CPC. In the absence of such an order by the executing court, the learned counsel contends, the Petitioners' objection petition could not be dismissed by the executing court and that consequently both the High Court and this Court in the Impugned Order have erred in correctly applying the law. The learned counsel also placed reliance in this respect on judgments of this Court in Nice 'N' Easy Fashion (Pvt.) Ltd. v. Allied Bank of Pakistan (2014 SCMR 1004) and Zakaria Ghani v. Muhammad Ikhlaq Memon (PLD 2016 SC 229), as cited in the Impugned Order, to argue that they do not examine the question of whether an objector under Order XXI, Rule 90 of the CPC is bound to deposit 20% of the auction price with or without directions of the executing court.

5. Learned Counsel has also argued that the Impugned Order is liable to be set aside on the ground that even in the absence of an objection petition, the court is not required to automatically confirm an auction without due application of mind. In this regard, Learned Counsel placed reliance on the judgments of this court in Muhammad Ashraf v. UBL (2019 SCMR 1004) and National Bank of Pakistan v. SAF Textile Mills Ltd. (PLD 2014 SC 229).

6. In addition to the aforementioned grounds for review, Learned Counsel has also argued that the Petitioners had deposited Rs.535,000/- with the executing court on 05.03.2004, before the sale was confirmed on 05.07.2004, and that the value of the property had appreciated almost three times its original value since 1995 when it was originally evaluated. He maintains that this factor

escaped consideration of the lower fora which is sufficient for this Court of review its judgment.

7. We have heard the Learned Counsel for the Petitioners and have also perused the record with his assistance. As far as his first contention regarding the requirement of depositing 20% of the auction price with an objection petition under Order XXI, Rule 90 of the CPC is concerned, we note that the requirement itself is derived from the second proviso of Order XXI, Rule 90 itself – which for ease of reference is reproduced below:

"90. Application to set aside sale on ground of irregularity or fraud.

Where any immoveable property has been sold in execution of a decree, the decree holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided 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:

Provided further that no such application shall be entertained unless the applicant deposits such amount, not exceeding twenty per cent of the sum realised at the sale, or furnishes such security, as the Court may direct."

A bare reading of the second proviso to Order XXI, Rule 90 clearly shows that the deposit of a sum of 20% of the auction price is mandatory for the application to be *entertained* in the first place, i.e. an application will not be maintained unless such a sum is deposited. A closer reading of the provision also shows that the discretion provided to the court is not with respect to furnishing of the security *at all*, but rather the amount of the security to be deposited.

8. In our view, the correct reading of the second proviso to Order XXI, Rule 90 of the CPC is that it *mandates* every application under the provision to be accompanied by 20% of the auction price in order to be entertained. If the argument of the learned counsel were to be accepted the entire legislative intent of adding the said proviso to Order XXI, Rule 90 would clearly be defeated.

9. In any event, the judgments of this Court in Nice 'N' Easy Fashion (Supra) and Zakaria Ghani (Supra) clearly hold that the requirement to deposit 20% of the auction price, or such other security as directed by the court, along with an application under Order XXI, Rule 90 of the CPC is mandatory, and any application that fails to fulfil this requirement cannot be entertained and is liable to be dismissed by the Banking Court. This court clearly stated this view in Zakaria Ghani (Supra), wherein it was held that:

"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."

Hence, we reject the interpretation of the proviso advanced by the Learned Counsel for the Petitioners.

10. It is also evident from the record and the same has also been admitted by Learned Counsel for the Petitioners, that the Petitioners filed the objection petition under Order XXI, Rule 90 on 22.09.2003 and the cheques deposited by the Petitioners in support of this objection petition were submitted on 03.03.2004. As such, the objection petition was not maintainable from its inception and any later deposit of money cannot be used to argue otherwise, as was held by us in the Impugned Order.

11. We also find no merit in the arguments advanced by the Learned Counsel for the Petitioners that the order of the High Court dated 17.04.2017 should be set aside on the basis that even in the absence of an objection petition the Banking Court should have applied its own mind and set aside the sale of the property. Learned Counsel has been unable to substantiate this contention by providing evidence of any irregularity or fraud in the sale order or the auction proceedings. Further the Banking Court examined all facts, circumstances and peculiarities of the case and passed the order after due application of mind. In the absence of any grounds for setting aside the order of the Banking Court, we find no reason to review the Impugned Order or set aside the order of the High Court dated 17.04.2017, whereby the Petitioners' appeal against the order of the Banking Court was dismissed for not being able to substantiate any grounds for interference in the findings of the Banking Court.

12. The grounds for review as provided in Order XXVI of the Supreme Court Rules, 1980 read with Order XLVII, Rule 1 of the CPC clearly state that an application for review of an order will only succeed if new and important evidence, which was not within the

knowledge of the applicant after the exercise of due diligence and could not be produced at the time when the order was made, is produced or a mistake or error apparent on the face of the record has been made in the order under review.

13. In light of the aforementioned provision, we note that the objections taken by the Petitioners in the present case have failed to point out any error or mistake apparent on the face of the record and have also failed to bring to light any new evidence or material that was not considered by us in the Impugned Order. In fact, the Petitioners' contentions with respect to the effect of inflation in the sale price and other grounds were conclusively dealt with by us in the Impugned Order, where we upheld the existing law on the matter and stated that "*an objection regarding reserve price cannot be taken by the judgment debtor after the auction has taken place. The duty to raise such an objection at the initial stages is cast on the judgment debtor.*" In light of the fact that no such objection was taken by the Petitioners at the time of the auction, we find this to be too late a stage to advance such an argument.

14. In light of the above and the fact that the sale of the Petitioners' property had already taken place, had become absolute, and sale certificate had already been issued before the Petitioners' RFA No.213 of 2003 was allowed, we confirm the view adopted in the Impugned Order that the sale in question had indeed become absolute once the order for its confirmation was passed by the executing court. The law laid down by this Court in Hudaybia Textile Mills v. Allied Bank of Pakistan Ltd. (PLD 1987 SC 512) in light of Order XXI, Rule 92 of the CPC, is designed to protect the interests of the third-party once a sale has been validly made and to

ensure that a valid sale in execution is not made invalid to the prejudice of the auction purchaser because the decree was later reversed.

15. In light of the above, we find that no valid grounds for review have been made out in the instant case. Consequently, this review petition is dismissed.

Sd/- J
Sd/- J
Sd/- J

ISLAMABAD, THE

19th of November 2019.

NOT APPROVED FOR REPORTING

~~MDA/~~*

(M/Q)

30/11/20

