

**SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**Present:**

Mr. Justice Manzoor Ahmad Malik  
Mr. Justice Syed Mansoor Ali Shah  
Mr. Justice Amin-ud-Din Khan

**C.A.17-L/2019, C.P.2646-L/2018 and C.A.364-L/2020**

(Against the judgment dated 20.11.2018 passed in E.F.A. No.17/2012, judgment dated 20.11.2018 passed in E.F.A. No.620/2011 and judgment dated 03.02.2020 passed in E.F.A No.231782/2018 respectively by the Lahore High Court, Lahore)

Mst. Samrana Nawaz, etc. (In C.A.17-L/2019 and C.P.2646-L/2018)  
Khalid Mujeeb Pervaiz Khan, etc. (In C.A. 364-L/2020)

..... **Appellants/Petitioners**

**Versus**

MCB Bank Ltd., etc. (In C.A. 17-L/2019 and C.P. 2646-L/2018)  
The Bank of Punjab, etc. (In C.A. 364-L/2020)

.....**Respondents**

For the appellants/petitioners: Mr. Shahid Ikram Siddiqui, ASC.

For the respondents: Mr. Umar Farooq, ASC.  
Mr. Ashar Elahi, ASC.  
Mr. Hafeez Saeed Akhtar, ASC.

Date of hearing: 16.03.2021

**ORDER**

**Syed Mansoor Ali Shah, J.**- The question before us requires interpretation of the second proviso to Rule 90 of Order XXI of the Code of Civil Procedure, 1908 ("CPC"), which is reproduced hereunder for ready reference:

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.

In C.P. No.756-L of 2020 (now numbered as C.A. 364-L of 2020), a two-member Bench of this Court after citing several judgments of this Court, and observing that "there appears to be some ambiguity in the law laid down by this court", granted leave to appeal to consider the question:

whether a 20% deposit of the auction price is obligatory for an objector without an order requiring the same being passed by the Banking Court in terms of second proviso to Rule 90 of Order XXI, CPC.

2. Learned counsel for the appellants/petitioners has contended that the deposit of an amount not exceeding 20% of the sum

realized at the sale, or the furnishing of security, by the applicant making an application under Order XXI Rule 90 of the CPC is to be directed by the court, and the said proviso does not come into action without such direction. He has further submitted that the maximum amount that can be directed to be deposited for the purpose of entertaining the said application, must not exceed 20% of the sum realized at the sale; however, the court can reduce the same or can order for furnishing any security instead of deposit of any sum. On the other hand, learned counsel for the respondents have maintained that the applicant making an application under Order XXI Rule 90 of the CPC has to deposit of 20% of the sum realised at the sale without waiting for direction of the court in this regard, and the said application is to be accompanied by deposit of such amount for being entertained by the court. They have, in this regard, placed reliance upon the judgments of this Court reported in Messrs Habib and Company and others v. Muslim Commercial Bank Limited and others (2019 SCMR 1453) and Messrs Habib and Company and others v. Muslim Commercial Bank Limited and others (PLD 2020 SC 227). The impugned judgments expressing the same view have relied upon the judgments of this Court reported in Messrs Nice 'N' Easy Fashion (Pvt.) Ltd. and others v. Allied Bank of Pakistan and another (2014 SCMR 1662) and Zakaria Ghani and 4 others v. Muhammad Ikhtlaq Memon and 8 others (PLD 2016 SC 229).

3. We have heard the learned counsel for the parties on the said question, and with their able assistance have noted that the following judgments of this Court, as well as, of our High Courts are relevant to be considered for answering the question. Some of these judgments have dealt with the question under consideration while the others have made only passing remarks as to the nature, scope and applicability of the provisions of second proviso to Rule 90 of Order XXI, CPC.

#### Judgments of this Court

1. Wali Khan v. Manager, ADB, PLD 2003 SC 500
2. Nadia Malik v. Makki Chemical Industries, 2011 SCMR 1675
3. Nice 'N' Easy Fashion v. ABL, 2014 SCMR 1662
4. Zakaria Ghani v. Muhammad Ikhtlaq, PLD 2016 SC 229
5. Muhammad Ashraf v. UBL, 2019 SCMR 1004
6. Habib and Company v. MCB, 2019 SCMR 1453
7. Habib and Company v. MCB, PLD 2020 SC 227

#### Judgments of the High Courts

1. Alhamdi Begum v. NBP, PLD 1976 Kar. 723 (DB)

2. Shafique Shah v. Irshad Begum, 1981 CLC 369
3. Rukhsana v. Muhammad Ilyas, 1993 CLC 1949
4. Ali Match Industries v. IDB, 1999 MLD 2127 Pesh. (DB)
5. Niamat Ali v. Muhammad Imran, PLD 2003 Lah 42
6. Sultan Mahmood v. HBFC, 2006 YLR 2776
7. Khursheed v. Inam-Ur-Rehman, PLD 2009 Lah 552 (DB)

4. The second proviso, under consideration in the present case, was added to Rule 90 of Order XXI of the CPC in the year 1972 by the Law Reforms Ordinance, 1972, and the study of the above-noted cases shows that the question of its interpretation arose for the first time in the year 1975 and was considered by a Division Bench of the Sindh High Court in the case of *Alhamdi Begum*.<sup>1</sup> The Bench was consisted of two distinguished Judges, namely, Justice Dorab Patel and Justice Zaffar Hussain Mirza, who both were later elevated to the bench of this Court. In the said case, Justice Zaffar Hussain Mirza, with whom Justice Dorab Patel agreed, answered the question thus:

7. ....A bare reading of the proviso in question shows that the bar on entertainment of the application results from the failure of the applicant to "deposit such amount not exceeding twenty per cent of the sum realised at the sale", or on the failure of the applicant to furnish "such security, as the Court may direct". Therefore, the bar on entertainment of application can become effective only when the Court first determines the amount to be deposited or security to be furnished and no applicant can possibly anticipate what the order of the Court would be in this regard, so that he could be put to the duty of tendering the requisite amount or security.

9. ....In my humble opinion, the Court had to pass an order either to direct the deposit of a sum up to twenty per cent of the auction amount or to direct furnishing of security as was deemed appropriate under the circumstances, and then give an opportunity to the appellant to comply with such order. It was only when the appellant had failed to comply with such an order that his application under rule 90 could be summarily dismissed.

This interpretation put by the Sindh High Court to the provisions of the second proviso to Rule 90 of Order XXI, CPC was later-on adopted and followed by the Peshawar High Court in the case of *Ali Match Industries*<sup>2</sup> and by the Lahore High Court in the cases of *Shafique Shah*,<sup>3</sup>

---

<sup>1</sup> PLD 1976 Kar. 723 (DB).

<sup>2</sup> 1999 MLD 2127 (DB).

<sup>3</sup> 1981 CLC 369.

*Rukhsana*,<sup>4</sup> *Niamat Ali*,<sup>5</sup> *Sultan Mahmood*,<sup>6</sup> and *Khursheed*.<sup>7</sup> In *Niamat Ali* and *Khursheed* the High Court held as under:

*Niamat Ali v. Muhammad Imran*, PLD 2003 Lahore 42

5. ....the said proviso is an enabling and directory provision, which empowers the Court either to direct for the deposit of the amount not exceeding 20% of the sum realized at the sale or for the furnishing of the security. This has been left to the discretion of the Court, obviously to be exercised according to the judicial standard, but the direction of the Court in this behalf is sine qua non, as is clear from the following words of the proviso:

"as the Court may direct."

which controls and regulates the earlier part of the proviso. It is only, if the direction of the Court is not complied with, the objections can be dismissed for non-compliance thereof.

*Khursheed v. Inam-Ur-Rehman*, PLD 2009 Lahore 552 (DB)

16.....Mr. Kazmi is right in arguing that the order for the deposit of 20% should not have preceded, rather succeeded the objections. The logic and wisdom behind the proviso to Order XXI, Rule 90, C.P.C. obviously is to curtail and circumvent frivolous and baseless objection and it is only after examining the same, the Court could assess the quality and nature thereof and to decide whether a security should be required or the deposit and what should be the quantum, if the deposit is directed; obviously it is only after considering the worth and strength of the objections, the law has conferred a discretion upon the Court to pass appropriate order and not before that, but from the tenor of the above order, the Court virtually before even examining the objections has shunned and stultified the appellants' remedy of filing those and such order can aptly be termed as placing a horse before the cart, which is absolutely impermissible and against the spirit of law.

It was thus the considered and consistent view of the High Courts of the country, without a single dissent, that the proviso contemplates a prior direction of the court to deposit the sum or furnish the security for entailing penal consequences of dismissing the objection petition due to non-deposit of the amount or non-furnishing of the security, which is required to be deposited or furnished under the proviso for entertaining the objection petition: the punitive action can be taken only when the applicant fails to comply with the direction of the court, and in absence of such direction the objection petition cannot be dismissed for non-deposit of the 20% of the sum realised at sale. It may be pertinent to

---

<sup>4</sup> 1993 CLC 1949.

<sup>5</sup> PLD 2003 Lah 42.

<sup>6</sup> 2006 YLR 2776.

<sup>7</sup> PLD 2009 Lah 552 (DB).

mention here that these judgments of the High Courts have not been considered, nor have they been specifically overruled, by this Court in any case.

5           Coming to the judgments of this Court, we have observed that in *Wali Khan v. Manager, ADB* (PLD 2003 SC 500) this Court set aside the order of the Banking Court, whereby that court had dismissed the objection petition of the judgment-debtors filed under Order XXI, Rule 90, C.P.C. mainly on the ground of non-deposit of the 20% of the auction-sale price, and remanded the matter to that court to decide the objection petition on merits. This Court made the said order with the following observation:

9. No doubt, the objectors had not deposited an amount up to twenty percent of the auction price in compliance with the orders passed by the Banking Court on 13-1-1998 and 4-3-1998 but the technical defect stood removed when a sum of Rs.2,50,000 was deposited by them before the target date fixed by the High Court. In the wake of the said deposit the matter ought to have been remanded to the Banking Court for decision on merits particularly when an application under section 148, C.P.C. was made at the lower forum by the objectors for enlargement of time for making the requisite deposit and appeal is a continuation of proceedings. The said deposit is envisaged by the second proviso to Rule 90, C.P.C. The rationale behind the proviso is to discourage frivolous objections. The deposit made by the appellants in the High Court, which far exceeds twenty percent of the auction price, certainly served the purpose for which the said proviso was incorporated in Rule 90 by means of an amendment through Law Reforms Ordinance, 1972.

It is evident that in this case the executing court had made direction for deposit of the 20% of the auction amount, which the judgment-debtors failed to comply with but they on appeal in the High Court made application for enlargement of the time for making the requisite deposit and also made the deposit within the time fixed by the High Court. Therefore, the question under consideration in the present case was neither raised nor decided in this case. In the case of *Nadia Malik v. Makki Chemical Industries* (2011 SCMR 1675), the executing court had not made any direction for deposit of the 20% of the auction amount nor had the objection petitioners made such deposit. The High Court on appeal of the objection petitioners set aside the sale on finding illegalities in the process of auction proceedings. The argument regarding non-deposit of the 20% of the auction amount was raised before this

Court; it was, however, not entertained by this Court with the following observations:

17. ....The issue of non-deposit of amount of 20% by the private respondents in exceptional circumstances can be condoned when the auction has been conducted in deviation of the mandatory provisions of Order XXI; Rules 54(2), 69, 85 and 86, C.P.C. and the executing court, in law, has erroneously confirmed the sale. The object of deposit of 20% of amount by a person objecting to sale under Rule 90 of Order XXI is meant to ensure that the objections are made by bona fide person and the rule is not misused to frustrate the sale, however, it could not be applied to the advantage of the appellant to have premium over his default.

The reading of other cases, except the review case of *Habib and Company v. MCB*,<sup>8</sup> also show that only the passing remarks (*obiter dicta*) were made by this Court without having been raised therein and deciding the question that is under consideration in the present case. Relevant observations made in those cases are reproduced hereunder for convenience of reference:

*Nice 'N' Easy Fashion v. ABL*, 2014 SCMR 1662

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.

*Zakaria Ghani v. Muhammad Ikhtlaq*, PLD 2016 SC 229

4. There is a great deal of difference between these two provisions of law. Under Order XXI, 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

---

<sup>8</sup> PLD 2020 SC 227.

accrued in favour of the auction purchaser. The second provision, namely, Order XXI, Rule 90, C.P.C., 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.

*Muhammad Ashraf v. UBL, 2019 SCMR 1004*

8. The mainstay of the contentions of the learned counsel for the Respondent Bank and the auction purchaser is the alleged non-deposit of 20% of the decretal amount in terms of Order XXI, Rule 90, C.P.C. Such is also the primary basis of the impugned judgment dated 06.06.2016 of the learned High Court. Without dwelling further on this aspect of the matter, we are constrained to observe that there can be no escape from the fact that even in the absence of an Objection Petition, learned Executing Court is not required to automatically confirm an auction mechanically and without application of mind by not even, considering the law applicable.

*Habib and Company v. MCB, 2019 SCMR 1453*

5. Having heard the learned counsel for the petitioners, we find that there was no material on record brought by the petitioners to show that the property had been sold at a throwaway price. Even otherwise, the objection petition filed by the petitioners was misconceived and not maintainable in view of the fact that the petitioners did not deposit 20% of the highest bid with their objection petition. The provisions of Order XXI, Rule 90, C.P.C. have come under discussion in various judgments pronounced by this Court in which it has conclusively been held that the statutory

deposit of 20% by the judgment debtor is mandatory and that without such a deposit the objection application under Order XXI, Rule 90, C.P.C. is not maintainable.

6. It was only in the review case of *Habib and Company v. MCB* (PLD 2020 SC 227) that the question, under consideration in the present case, was specifically raised by the counsel for the petitioners and decided by this Court. The argument of the counsel for the petitioners and the decision of this Court are as follows:

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 C.P.C. 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.

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 C.P.C. is concerned, we note that the requirement itself is derived from the second proviso of Order XXI, Rule 90 itself.....

.....

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 C.P.C. 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.

.....

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.

(Emphasis added)

With utmost respect, we are constrained to observe that the second proviso to Rule 90, Order XXI, CPC where an applicant is to "deposit such amount not exceeding twenty per cent of the sum realised at the sale", or "furnish such security", as the Court may direct, went unnoticed. The expression "as the Court may direct" leaves little room to speculate whether the applicant is to deposit the 20% of the sale amount at the time of filing the objection petition or at a subsequent stage under direction of the court. The expression "such amount not exceeding twenty percent" further strengthens the position that the amount required to be deposited by the applicant is to be determined by the court which must not exceed twenty percent of the sale amount but can be less than that. An applicant cannot anticipate what the direction of the court would be in this regard and, therefore, he cannot deposit the requisite amount at the time of filing the objection petition. The mandatory requirement of the second proviso appears to become operative only once the court determines the "amount not exceeding twenty percent of the sum realised at the sale" and directs the applicant to deposit the same. The observations made by the learned Bench that second proviso to Order XXI, Rule 90 of the CPC mandates every application under the provision to be accompanied by 20% of the auction price in order to be entertained and an objection petition which is not so accompanied by the deposit of 20% of the auction sale price is not maintainable from its inception, appears to be contrary to the language of the proviso. It appears that the learned Bench was influenced, in making these observations, by the expression "entertained" used in the proviso. The expression "entertain", as observed by the Sindh High Court in *Alhamdi Begum* case<sup>9</sup> and by the Indian Supreme Court in *Punnu Sahu* case<sup>10</sup> does not refer to the filing of the objection petition by the applicant, or receiving of the objection petition by the court. It means to "adjudicate upon" or "proceed to consider merits of" the objection petition; the barring clause of the proviso applies only to the consideration of the objection petition on merits for setting aside the sale, and does not prohibit the court from applying its judicial mind to the question as to determining the quantum of sum to be deposited or the nature of security to be furnished, instead of deposit of sum, by the applicant.

---

<sup>9</sup> *Alhamdi Begum v. NBP*, PLD 1976 Kar. 723 (DB).

<sup>10</sup> *Hindusthan Commercial Bank v. Punnu Sahu*, AIR 1970 SC 1384.

7. We are, however, bound by the judgment delivered by a Bench of co-equal strength, i.e., a three member Bench, in the said case and therefore cannot hold otherwise. It is now a well-established principle of practice and procedure of this Court that the earlier judgment of a Bench of this Court is binding not only upon the Benches of smaller numeric strength but also upon the Benches of co-equal strength; a Bench of co-equal strength cannot deviate from the view held by an earlier Bench, and if a contrary view has to be taken, then the proper course is to request the Hon'ble Chief Justice for constitution of a larger Bench to reconsider the earlier view.<sup>11</sup> For, the law declared by this Court should be clear, certain and consistent, as it is binding on all other courts of the country, under Article 189 of the Constitution of Pakistan, 1973. The doctrine of binding precedent promotes certainty and consistency in judicial decisions, and ensures an organic and systematic development of the law.

8. It would be important to mention here that our learned brother, Justice Umar Ata Bandial, was a member of the three member Bench that decided the case of *Habib and Company (supra)* and was also the member, and author of the order, of the two member Bench that granted leave in C.P. No.756-L of 2020 (now numbered as C.A. 364-L of 2020) to consider the question under discussion. This shows that his lordship also doubted the correctness of the view expressed in the said case and deemed it proper to re-consider the same. The two-Member Bench that granted the leave, however, did not make a request to the Hon'ble Chief Justice for constitution of a larger Bench to reconsider the question, for a smaller Bench cannot request for the constitution of a larger Bench to revisit the opinion of a larger Bench on any question or principle of law; only a Bench of co-equal strength can make such a request. As a judgment of a larger Bench is binding on the smaller Benches,<sup>12</sup> judicial discipline and propriety demand that a two member Bench should follow decision of a three member Bench, and if a two member Bench concludes that an earlier judgment of a three member Bench is so incorrect that in no circumstances can it be followed, the proper course for it is to set out the reasons why it could not agree with the judgment of the three member Bench and to refer the matter to the Hon'ble Chief Justice for constitution of a three member Bench. If the

---

<sup>11</sup> *Ardeshir Cowasjee v. KMCA*, 1999 SCMR 2883 (5-MB); *Ameer Zeb v. State*, PLD 2012 SC 380 (5-MB).

<sup>12</sup> See *Muhammad Saleem v. Fazal Ahmad*, 1997 SCMR 315; *Babar Shehzad v. Said Akbar*, 1999 SCMR 2518; *All Pakistan Newspapers Society v. Federation*, PLD 2004 SC 600; *Ata Ullah v. Surraya Parveen*, 2006 SCMR 1637; *Azhar Siddiqui v. Federation*, PLD 2012 SC 774.

three member Bench also comes to the conclusion that the earlier judgment of a three member Bench is not correct, then the reference of the matter to a five member larger Bench is justified. A two member Bench cannot jump over a three member Bench and directly ask for constitution of a Bench larger than three member Bench, to review the principle of law declared by that Bench.<sup>13</sup>

9. In these circumstances, we are of the opinion that only a Bench larger than a three member Bench can reconsider the question as to the interpretation of the second proviso to Rule 90 of Order XXI of CPC, and revisit (if found necessary) the view expressed by a three member Bench in the case of *Habib and Company v. MCB* (PLD 2020 SC 227). We, therefore, direct the office to place the matter before the Hon'ble Chief Justice of Pakistan for appropriate order.

10. It is always considered necessary that execution of a decree should be made in the most expeditious manner. The present matter involves execution of the decrees. The office shall, therefore, take it as an urgent matter and place it before the Hon'ble Chief Justice, forthwith.

**CMA No.3753-L/2019 in CA 17-L of 2019,**  
**CMA No.3409-L/2014 in CP 2646-L of 2018**

11. In the meanwhile, the status quo shall be maintained.

Judge

Lahore,  
16<sup>th</sup> March, 2021.  
Approved for reporting  
*Iqbal*

Judge

Judge

---

<sup>13</sup> See *Cherat Cement Co. v. Federation*, PLD 2021 SC 327; *Pradip Chandra v. Pramod Chandra*, AIR 2002 SC 296.