

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE AMIN-UD-DIN KHAN
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL PETITION NO. 2056 OF 2022

(Against the judgment dated 27.04.2022
passed by the Lahore High Court, Lahore in
E.F.A.No.35845/2020)

Summit Bank Limited, Lahore

...Petitioner

VERSUS

M/s M.M. Brothers, Proprietorship Concern, through its proprietor
Mehboob Elahi Qadri Ansari and others

...Respondents

For the Petitioner

Mr. Iftikhar Ullah Malik, ASC
Mr. Anis Muhammad Shahzad, AOR

For Respondents:

N.R.

Date of Hearing:

04.10.2022

JUDGMENT

MUHAMMAD ALI MAZHAR, J. This Civil Petition for leave to appeal is directed against the Judgment dated 27.04.2022 passed by the Lahore High Court, Lahore in E.F.A. No.35845/2020, whereby the appeal of the respondents was allowed and the matter was remanded to the Executing Court.

2. The short-lived facts of the present case are that the respondent No.2 had applied for running finance in the sum of Rs.75 million, along with finance against trust receipt amounting to Rs.40 million, with sub-limit of SLC of Rs.30 million which was sanctioned against mortgage of properties owned by respondent No.2 to 4 and hypothecation of stock-in-trades owned by respondent No.1 and 2 with their personal guarantees. Due to default, the petitioner filed suit on 28.03.2015 in the Banking Court for recovery of Rs.4,27,38,259.44, along with costs of fund. Though the respondents were served with notice, but they failed to file any application for leave to defend hence an ex-parte decree was passed on 11.06.2015, thereafter the matter was converted into execution proceedings in accordance with law. The Banking/Executing Court issued notices under Order XXI, Rule 66 of the Code of Civil Procedure, 1908 ("**CPC**") and two auctioneers were appointed *vide* order dated

09.01.2016. Thereafter the respondents filed an application for setting aside the ex-parte judgment and decree, but their application was dismissed *vide* order dated 28.06.2016. The auctioneers, in compliance of the orders, presented the Schedule for auction on 27.06.2016 which was approved by the Executing Court but the auction remained unsuccessful, hence the petitioner had filed an application under Order XXI, Rule 72, CPC and submitted a bid equal to the reserve price of Rs.10,81,71,850/- which was accepted. After adjustment of decretal amount, the amount was deposited in the Executing Court and the application filed by the judgment debtors wherein they had raised various objections was dismissed and sale was confirmed by the Executing Court. The respondents then approached the learned Lahore High Court through EFA No.35845/2020, which was accepted and the sale of the property through auction was set aside.

3. The learned counsel for the petitioner argued that the reference given in the impugned judgment with regard to the Lahore High Court amendment dated 15.08.2018 in sub rule (2) (ii) of Order XXI, Rule 66, CPC is not applicable to the present case, as the auction was held in the year 2016. It was further contended that no objection could be considered without depositing 20% of the bid price at the time of filing the objection petitions, which the judgment debtors failed to deposit in the Executing Court. The objection regarding the reserve price could not be taken by the judgment debtors after the completion of the auction proceedings. It was further averred that Rules 54 and 67 of Order XXI, CPC are contradictory in nature and not mandatory. In the case in hand, the learned court auctioneers advertised the auction on a large scale by pasting auction posters in the area where the property is situated and also adopted the mode of beat of drum in this regard but nobody participated in the auction.

4. Heard the arguments. The record reflects that the judgment debtors in the Executing Court filed the objections to the Auction proceedings and alleged, *inter alia*, that on the date of auction i.e. 08.09.2016, no auction proceedings were conducted and with the connivance of the decree holder, fake auction proceedings were shown and the decree holder bank was declared successful bidder when no prospective buyer other than the decree holder had participated. It was further alleged in the objections that the said Court auctioneers were instrumental in favoring the decree holder/bank which was the sole participant and declared it the successful bidder in the so-called auction proceedings. The judgment

debtors further alleged that the price offered by bank was 15 times lesser than the actual value of the auctioned property.

5. An appeal was preferred by the respondents in the learned High Court under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 ("**2001 Ordinance**"), whereby the order passed by the learned Banking Court on 29.07.2020 was challenged. The learned High Court, while keeping in mind the niceties of Section 166 of the Limitation Act, 1908, and in view of the dictum laid down by this Court in the cases of Muhammad Attique v. Jami Limited and others (PLD 2019 SC 993) & Muhammad Jawed v. First Women Bank (2021 CLD 39 Supreme Court), held that the objection petition filed by the respondents in the Banking Court was not barred by limitation and the order of Banking Court was erroneous. However, the learned High Court further observed that the objection regarding reserve price could not be taken by the judgment debtor after the auction is held and also referred to another judgment of this Court rendered in the case of Habib and Company v. Muslim Commercial Bank Limited (2019 SCMR 1453). However, the main reason for setting aside the order dated 29.07.2020, as well as the sale of property and remanding the matter back to the Executing Court was dealt with by the learned High Court in the following paragraph:-

"9. From the perusal of record it is manifest that none other than the decree holder participated in the auction held on 08.09.2016 in order to purchase the property subject matter of the auction against the reserve price i.e. Rs.10,81,71,850/-. Rule 67 of Order XXI of CPC, prior to the Lahore High Court Amendment dated 15.08.2018, conferred authority upon the executing Court to direct that proclamation of auction shall be published in the official gazette or in a local newspaper or both and the cost of such publication shall be deemed to be costs of the sale. The purpose behind the enactment of Rules 54 and 67 of Order XXI of CPC is to give wide publicity to the sale of the property so that maximum number of people may turn up to deserves. Although Rule 67(2) ibid is directory, however, it has been held by the Hon'ble Supreme Court of Pakistan in the case of Muhammad Attique v. Jami Limited and others (2015 SCMR 148) that failure to comply with such provision cannot be brushed aside without due application of mind and the Court has to undo a sale if such failure causes injustice. To ensure wide publicity, the Lahore High Court Amendment has substituted sub-rule (2) of Rule 67 of the CPC to make it mandatory for the Court to order proclamation to be published in at least one widely circulated national daily newspaper in every case where the reserve price fixed by the Court exceeds rupees two million, and the costs of such publication are deemed to be costs of the sale.

In the instant case where the reserve price of the property was fixed at Rs.10,81,71,850/-, we are of the opinion that to ensure proper publicity, the learned Court below ought to have exercised authority vested in it under Rule 67(2) of CPC to order proclamation to be published in at least one widely circulated daily newspaper and failure to do so has caused injustice to the

judgment debtors which is evident from the fact that none other than the decree holder participated in the auction held on 08.09.2016 and it provided a convenient walkover to the decree holder to purchase the property at the reserve price".

6. According to Section 19 of the 2001 Ordinance which is related to the execution of decree and sale with or without intervention of the Banking Court, it is lucidly spelled out that the judgment and decree shall be automatically converted into execution proceedings. Concomitantly, it is further provided sub-section (2) that the decree shall be executed in accordance with the provisions of C.P.C., or any other law for the time being in force or in such a manner as the Banking Court may at the request of decree holder consider appropriate, including the recovery as arrears of land revenue. The execution proceedings before the Banking Court in general commenced under the provisions of C.P.C. but, in unison, the decree holder has been given a right to request the Banking Court for execution of decree in such a manner as it considers appropriate, but while exercising its civil jurisdiction the Banking Court has to follow the procedure laid down in regard to the suits in the C.P.C. except to the extent of any contrary provision made in the special enactment. Without further ado, it is the function of the Executing Court to execute the decree, but on the other hand it is also the duty of the Court to protect the rights of the judgment debtor which should not be put in jeopardy or hardship. While making efforts for satisfaction of decree through the auction of property of the judgment debtor, sincere and genuine efforts ought to have made for fetching the price commensurate to the market value of the property, rather than selling it at throwaway price. If Order XXI, C.P.C. is opted or invoked for execution then departure should not be made from the express provisions of C.P.C. relating to auction proceedings and the issuance of public notice of sale through newspapers.

7. According to the command of Order XXI, Rule 64, C.P.C., the Court executing the decree may order that any property attached by it as may seem necessary to satisfy the decree shall be sold and proceeds of sale shall be paid to the party entitled under the decree. While Rule 65 of the same Order provides that every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint, and shall be made by public auction in the manner prescribed. Rule 66 of Order XXI of C.P.C is germane to the proclamation of sale by public auction, which is reproduced as under:--

"66. Proclamation of sales by public auction.---(1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree holder and the judgment debtor and shall state the time and place of sale, and specify as fairly and accurately as possible--

(a) the property to be sold;

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;

(c) any encumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the Court considers material for a purchaser to know in order to judge the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto."

8. The procedure stipulated in the aforesaid Rule of Order XXI, C.P.C. for the proclamation of sale and/or drawing up proclamation with other terms and conditions are required to be incorporated in the proclamation of sale and non-adherence or non-compliance would be fatal for the whole exercise of sale by public auction. The mode of making proclamation is provided under Order XXI, Rule 67, C.P.C which is for the ease of convenience reproduced as under:-

"67. Mode of making proclamation.-- (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

(2) Where the Court so directs, such proclamation shall also be published in the [official Gazette] or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given."

9. It is translucent from the aforesaid provision that the proclamation is required to be published, as nearly as may be, in the manner prescribed by Rule 54, sub-rule (2), and if the Court so directs, such proclamation shall also be published in the official Gazette or in a local newspaper or

in both. So far as the Rule 54 of Order XXI is concerned, it is related to "Attachment of immoveable property" but adoption of sub-rule (2) of Rule 54, Order XXI, C.P.C in Rule 67 by reference is somewhat related to the mannerism that the order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate. In the case of Muhammad Attique Vs. Jami Limited and others (2015 SCMR 148=2010 PLD SC 993), a plea was taken before this Court that the provisions contained in Rule 54 as well as 67 of Order XXI, CPC are directory in nature and failure to comply therewith cannot undo an auction, this Court held that it would be correct so long as it does not cause prejudice to any of the stakeholders. But where it is otherwise, failure to comply with the provisions cannot be brushed aside without due application of mind. The Court has to undo a sale if failure to comply with the provisions causes injustice. Needless to reiterate that these provisions have been enacted to advance and not to impede the cause of justice.

10. The purpose of incorporating and encompassing the aforesaid cited provisions from Order XXI, C.P.C divulge the sole intention that, while attempting the sale of property of a judgment debtor for execution and satisfaction of decree, wide publicity should be given to the proclamation of sale in order to fetch the highest and most handsome price for the property and another purpose is to invite the maximum numbers of persons for participation in the auction proceedings through wide publications and the best course is the publication of auction notice in the vernacular newspapers to attract maximum participants. In this advanced era of information technology and print and electronic media diversity and polarization, it seems to be totally illogical to avoid publication of proclamation in the newspapers and solely depend upon the beat of drum or other customary methods. Besides complying with other formalities, the publication of auction notice with the reserve price and other salient features must be published in the newspapers to attract the attention and participation of public at large, the *more the merrier*, so that all interested persons may take part in the auction proceedings for submission of their bids before fall of the hammer which will maintain balance and will also protect the rights and liabilities of the parties. The fetching of fair market price through auction is not

only in favour of decree holder to realize its debts but also in favour of judgment debtor for discharging his debts, so while conducting an auction efforts should be made by the Executing Court that the provisions contained for proclamation and its publication should not be disregarded or unheeded to render such provisions redundant which have been incorporated by the legislature with logical purpose. The guiding principle or course of action triggering in the scheme of Order XXI, C.P.C is to ensure appropriate publicity for Court auction sales so that a fair and reasonable price can be realized for the properties. All these provisions are laid down in the law with a solitary underlying principle that the properties must fetch the best possible price in the auction and, in case of violation, the sale can be regarded as illegal under Rule 90, Order XXI, CPC.

11. It is well-known that an auction is a form of sale of property to the highest bidder, usually as a result of competition between bidders who compete among themselves by offering competitive prices and the highest bid is normally approved, but according to the established norms and standards, the presence of at least two potential bidders is indispensable to carry out an auction in which competitive bidding is a key factor for free and transparent public auction. In the case in hand there was no competitive bidding conducted by the Court's auctioneers, nor any notice was published in the newspapers. The sole bid was tendered by the decree holder bank which was accepted without considering whether the price offered matches the actual value of the property or not, nor anything was mentioned as to why publication of auction notice was not ordered to be published in the newspapers for information of general public or for inviting them to attend the auction on the given date. We agree with the finding recorded by learned High Court in the impugned judgment that in order to ensure proper publicity, the Executing Court ought to have exercised the authority vested in it under Rule 67 (2) of the CPC to order the publication of proclamation in at least one widely circulated daily newspaper and failure to do so has caused injustice to the judgment debtors.

12. In the case of M/s Lanvin Traders, Karachi v. Presiding Officer, Banking Court No. 2, Karachi (2013 SCMR 1419), this Court, while taking into consideration Rule 66 of Order XXI, held that an exhaustive procedure for the proclamation of sales by public auction is provided, how the proclamation of the intended sale shall be caused to be made; how shall it be drawn up after notice to the decree holders and the

judgment debtors and how would it state the time and place of sale and specify as fairly and accurately as possible (a) the property to be sold, (b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government, (c) any encumbrance to which the property is liable, (d) the amount for the recovery of which the sale is ordered, and (e) every other thing which the Court considers material for a purchaser to know in order to Judge the nature and value of the property. In the absence of any of the particulars listed above, the purpose of sale cannot be achieved. Once these particulars are ignored or overlooked, wild and wayward, would rule the roost. If, in this state of things, it is also ignored who suffers and who gains whether lawfully or otherwise, God knows what would become of the administration of justice. Yes, this provision which was ministerial before 1908 does not un-necessarily become judicial, according to the observations made by his lordship Mr. Justice B. Z. Kaikus, as he then was, in the judgment rendered in the case of "Mst. Manzoor Jahan Begum v. Haji Hussain Bakhsh" (supra), but the failure to comply therewith cannot be defended under any canons of law and propriety, when it tends to damage the rights of the decree holders or those of judgment debtors, simply because a sale has been effected in favour of a third party. A balance, therefore, has to be struck to protect the rights and liabilities of the parties which could either be imperiled or even extinguished by not complying with the provision which has been inserted by the legislature with design and purpose.

13. In the wake of the above discussion, we do not find any irregularity or perversity in the impugned judgment passed by the learned High Court. The Civil Petition is therefore dismissed and leave is refused.

Judge

Judge

Judge

Islamabad the
4th October, 2022
Khalid
Approved for reporting.