

**IN THE HIGH COURT OF SINDH,
AT KARACHI**

1st Appeal. No. 86 of 2019

Shaikh Kashif Imtiaz.....Appellant

Versus

Faysal Bank Limited & another.....Respondents

Mr. Nabeel Kolachi, Advocate for the Appellant.
Mr. Mujahid Bhatti, Advocate for the Respondent No.1.
Mr. Masood Anwar Ausaf, Advocate for the Respondent No.2.
Mr. Kafeel Ahmed Abbasi, DAG.
Mr. Ijaz Ahmed Zahid, Amicus Curiae.

Date of Hearing: 06.03.2020.

Present: Muhammad Ali Mazhar & Yousuf Ali Sayeed, JJ.

JUDGMENT

Yousuf Ali Sayeed, J: This Appeal under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the “**2001 Ordinance**”) impugns the Order made by the learned Presiding Officer of the Banking Court No. V, at Karachi on 20.11.2019 (the “**Impugned Order**”) in Execution No.35/2016 (the “**Execution**”) filed by the Respondent No.1/Decree Holder against the Appellant, whereby the Application filed by the Appellant/Judgment Debtor seeking the valuation of a mortgaged property through three valuers on the touchstone of Rules 3 and 4 of the Financial Institutions (Recovery of Finances) Rules, 2018 (the “**2018 Rules**”) was dismissed.

2. Succinctly stated, the backdrop to the matter is that during the course of the Execution, the Banking Court had proceeded towards auction of an immovable property mortgaged in favour of the Respondent No.1, with it being contended by the Appellant on application that by virtue of Rule 4, the procedure for valuation through three Valuators from the approved list of professional valuers maintained by the Pakistan Banks Association, as envisaged under Rule 3(b), was equally applicable where the sale was to take place through the Court within the framework of proceedings under Section 19 of the 2001 Ordinance, such contention then being dispelled vide the Impugned Order.

3. The central point arising for consideration under the circumstances thus essentially gravitates around the interpretation and interplay of Rules 3 and 4 of the 2018 Rules in the context of Sections 15 and 19 of the 2001 Ordinance, with the relevant provisions of the respective enactments stipulating as follows:

Rules 3 & 4:

“3. Procedure for sale of mortgaged property. - A financial institution shall observe the following procedure to sell the mortgaged property under section 15 of the Ordinance, namely:---

- (a) for determination of liability,---
- (i) before sending the first notice to the mortgagor under sub-section (2) of section 15 of the Ordinance, the financial institution, in order to get the outstanding mortgage money determined shall forward the case to a chartered accountant firm. Such chartered accountant firm shall neither be nor have been, during the last three years, a statutory auditor of, or employed or engaged as a consultant by, the concerned financial institution or the mortgagor. In case of more than one mortgagees of the mortgaged property, the financial institution shall also request these mortgagees to submit their respective claims for outstanding mortgage money to the chartered accountant firm so

nominated or appointed by the financial institution along-with complete documents to support their claims;

- (ii) in case of failure of the other mortgagees to submit their respective claims for outstanding mortgage money to the chartered accountant firm in term of clause (i) the chartered accountant firm shall proceed to determine the outstanding mortgaged money of the concerned financial institution only;
 - (iii) after seven days due notice to the parties, the chartered accountant firm shall examine the accounts and determine the extent of liability of the customer including cost of funds as per sub-section (2) of section 3 of the Ordinance and submits its report to the financial institution within thirty business days from the date of the appointment;
 - (iv) the fee of the chartered accountant firm shall be initially borne by the financial institution which may subsequently be adjusted and considered as the expense for the sale of the mortgaged property. In case of claims by more than one mortgagees of the mortgaged property, the fee of the chartered accountant firm shall be shared by the mortgagees on a pro rata basis; and
 - (v) the financial institution shall not send any notice of demand, first, second or final, to customer under sub-section (2) of section 15 of the Ordinance in excess of the liabilities so determined by the chartered accountant firm
- (b) for valuation of mortgaged property,---
- (i) within seven business days after the expiry of the thirty days period of the final notice issued to the mortgagor under sub-section (2) of section 15 of the Ordinance, the financial institution shall hire three valuers from the approved list of professional valuers maintained by the Pakistan Banks Association for valuation of the mortgaged property as on the date of the final notice;
 - (ii) within fifteen days of their appointment the valuers shall independently evaluate the mortgaged property and determine its forced sale value;
 - (iii) the highest among the three values determined by the valuers shall be considered as the reserve price under clause (d) of sub-section (1) of section 15 of the Ordinance; and

- (iv) if the valuation on the basis of which the reserve price is specified is older than six months at the time of publication of the notice under clause (b) of sub-section (4) of section 15 of the Ordinance, the financial institution shall get the property evaluated afresh as per clause (i); and
- (c) for bidding process,---
 - (i) after the valuation of the mortgaged property, the financial institution shall make a publication in terms of clause (b) of sub-section (4) of section 15 of the Ordinance;
 - (ii) the public auction for the sale of the mortgaged property shall take place after fifteen days of the publication of the notice under clause (b) of sub-section (4) of section 15 of the Ordinance;
 - (iii) in case there are more than one bidders with competitive offers, the financial institution shall determine and declare the highest bidder as the successful bidder;
 - (iv) if on the bidding day, only one bidder with the offer equal to or more than the reserve price of the mortgaged property comes forward, the financial institution may proceed to sell the mortgaged property to such bidder;
 - (v) on acceptance of the bid by the financial institution, the successful bidder shall deposit minimum twenty-five percent of the bid amount within two business days of the auction. The rest of the bid amount shall be deposited within fifteen days from the date of the initial deposit. In case of failure of the bidder to deposit the remaining amount within the prescribed time limit, the financial institution shall take the deposited amount as reduction of liability of the borrower and re-initiate the auction proceedings for recovery of the remaining amount; and
 - (vi) in case no bid is received, the auction shall be cancelled and the entire exercise shall be repeated by the financial institution, subject to the condition that if no bid is received in three auctions, the financial institution, at its discretion, may purchase the mortgaged property at a price ten percent higher than the reserve price, with due notice to the mortgagor under sub-section (6) of section 15 of the Ordinance: ---

Provided that a financial institution shall proceed under section 15 of the Ordinance in only those cases which involve a mortgaged property and in respect of which the Banking Court has not, on

or after the commencement of the Financial Institutions (Recovery of Finances) (Amendment) Act, 2016 (XXXVIII of 2016), passed a decree in terms of sub-section (11) of section 10 of the Ordinance or allowed the application for leave to defend in terms of sub-section (10) of section 10 of the Ordinance.

4. Sale of property after decree. - If the financial institution decides to proceed under sub-section (3) of section 19 of the Ordinance, then in addition to the conditions as contained in the said section, rule 3 where relevant shall also apply mutatis mutandis.”

Section 15:

“15. Sale of mortgaged property.- (1) In this section, unless there is anything repugnant in the subject or context ---

- (a) “mortgage” means the transfer of an interest in specific immovable property for the purpose of securing the payment of the mortgage money or the performance of an obligation which may give rise to a pecuniary liability;
- (b) “mortgage money” means any finance or other amounts relating to a finance, penalties, damages, charges or pecuniary liabilities, payment of which is secured for the time being by the document by which the mortgage is effected or evidenced, including any mortgage deed or memorandum of deposit of title deeds;
- (c) “mortgaged property” means immovable property mortgaged to a financial institution; and
- (d) “reserve price” means forced sale value of the mortgaged property determined by a reputable valuation company under clause (a) of sub-section (4).

(2) In case of default in payment by a customer, the financial institution may send a notice on the mortgagor demanding payment of the mortgage money outstanding within fourteen days from service of the notice, and failing payment of the amount within due date, it shall send a second notice of demand for payment of the amount within fourteen days. In case the customer on the due date given in the second notice sent, continues to default in payment, financial institution shall serve a final notice on the mortgagor demanding the payment of the mortgage money outstanding within thirty days from service of the final notice on the customer.

(3) When a financial institution serves a final notice of demand, all powers of the mortgagor in regard to recovery of rents and profits from the mortgaged property shall stand transferred to the financial institution until such notice is withdrawn and it shall be the duty of the mortgagor to pay all rents and profits from the mortgaged property to the financial institution:

Provided that where the mortgaged property is in possession of any tenant or occupier other than the mortgagor, it shall be the duty of such tenant or occupier, on receipt of notice in this behalf from the financial institution, to pay to the financial institution the rent or lease money or other consideration agreed with the mortgagor.

(4) Where a mortgagor fails to pay the amount as demanded within the period prescribed under sub-section (2), and after the due date given in the final notice has expired, the financial institution may, without the intervention of any court and subject to any rules made by the Federal Government under sub-section (5), sell the mortgaged property or any part thereof by public auction and apply the proceeds thereof towards total or partial satisfaction of the outstanding mortgage money in the following manner, namely:—

- (a) the financial institution shall have the mortgaged property evaluated by a reputable valuation company on the panel of the Pakistan Banks Association as on the date of the final notice sent to the mortgagor under sub-section (2);
- (b) the financial institution shall cause to be published a notice in one reputable English daily newspaper with wide circulation and one reputable Urdu daily newspaper with wide circulation in the Province in which the mortgaged property is situated specifying the following, namely:-
 - (i) detailed particulars of the mortgaged property;
 - (ii) name and address of the mortgagor;
 - (iii) amount of the outstanding mortgage;
 - (iv) any encumbrances which the mortgaged property may be subject to which the financial institution is aware of;
 - (v) the financial institution's intention to sell the mortgaged property through a public auction;
 - (vi) the reserve price below which the mortgaged property cannot be sold;
 - (vii) the time and place at which the public auction is to take place, provided that the public auction shall take place in the city where the mortgaged property is located and;

(viii) any other information, which may be relevant;

(c) the financial institution shall send a notice with the information, specified in clause (b), to the mortgagor and to all persons who, to the knowledge of the financial institution, have an interest in the mortgaged property as mortgagees; and

(d) the public auction for the sale of the mortgaged property shall not take place before the expiration of three business days of the publication of the notice as required under clause (b).

(5) In addition to its powers under sections 25 and 26, the Federal Government may, by notification in the official Gazette, make rules specifying the mode, conduct or method of sale of the mortgaged property and in addition to the conditions stipulated in sub-section (4).

(6) The financial institution shall be entitled, in its discretion, to participate in the public auction and to purchase the mortgaged property for an amount ten percent higher than the highest bid obtained in the public auction, provided that where the financial institution chooses to purchase the mortgaged property at the highest bid obtained in the public auction, it shall issue notice to the mortgagor who shall have three business days from the service of the notice to match the financial institution's bid. If the mortgagor is able to match the financial institution's bid, he shall be allowed to purchase the mortgaged property.

(7) Where the mortgagor or his agent or servant or any person put in possession by the mortgagor or on account of the mortgagor does not voluntarily give possession of the mortgaged property sought to be sold or sought to be purchased or purchased by the financial institution, a Banking Court on application of the financial institution or purchaser shall put the financial institution or purchaser, as the case may be, in possession of the mortgaged property in any manner deemed fit by it:

Provided that the Banking Court may not order eviction of a person who is in occupation of the mortgaged property or any part thereof under a bona fide lease, except on expiry of the period of the lease, or on payment of such compensation as may be agreed between the parties or as may be determined by the Banking Court to be reasonable.

Explanation.- (1) Where the lease is created after the date of the mortgage and it appears to the Banking Court that the lease was created so as to adversely affect the value of the mortgaged property or to prejudice the rights and remedies of the financial institution, it shall be presumed that the lease is not bona fide, unless proved otherwise.

(8) For purposes of execution and registration of the sale deed in respect of the mortgaged property, the financial institution shall be deemed to be the duly authorized attorney of the mortgagor and a sale deed executed and presented for registration by duly authorized attorneys of the financial institution shall be accepted for such purposes by the Registrar and Sub-Registrar under the Registration Act, 1908 (XVI of 1908).

Provided that no such sale deed shall be executed or registered until expiry of seven days after the completion of the public auction for the sale of the mortgaged property.

(9) Upon execution and registration of the sale deed of the mortgaged property in favor of the purchaser all rights in such mortgaged property shall vest in the purchaser free from all encumbrances and the mortgagor shall be divested of any right, title and interest in the mortgaged property.

(10) Net sale proceeds of the mortgaged property, after deducting all expenses of sale or expenses incurred in any attempted sale, shall be distributed ratably amongst all mortgagees in accordance with their respective rights and priorities in the mortgaged property. Any surplus left, after paying in full all the dues of mortgagees, shall be paid to the mortgagor.

(11) A financial institution which has sold mortgaged property in exercise of powers conferred herein shall file proper accounts of the sale proceeds in a Banking Court within fourteen days of the sale.

(12) All disputes relating to the sale of the mortgaged property under this section including disputes amongst mortgagees in respect of the mode, conduct or method of the sale or the distribution of the sale proceeds, shall be decided by the Banking Court to the exclusion of any other court of law, including the High Court.

(13) The Banking Court may grant an injunction restraining the sale or proposed sale of the mortgaged property, if

(a) it is satisfied that no mortgage in respect of the immovable property has been created; or

(b) it is satisfied that there is fraud in the proposed mode, conduct or method of the sale, provided that no injunction shall be granted on the ground of fraud unless upon the fact proved the Banking Court is satisfied that the applicant has sustained substantial injury by reason of such fraud and such injury cannot be compensated by damages; or

(c) all moneys secured by mortgage of the mortgaged property have been paid; or

(d) the mortgagor or objector deposits in the Banking Court in cash the outstanding mortgage money.

(14) Where any mortgaged property has been sold, the mortgagor or any person entitled to a share in the ratable distribution of assets or whose interest is affected by the sale, may apply to the Banking Court to set aside the sale on the ground of fraud:

Provided that no sale shall be set aside on the ground of fraud unless, upon the facts proved, the Banking Court is satisfied that the applicant has sustained substantial injury by reason of such fraud and such injury cannot be compensated by damages.

(15) An application for setting aside the sale under subsection (14) must be made within seven days of completion of the public auction for the sale of the mortgaged property and shall not be entertained by the Banking Court unless the applicant deposits an amount equal to twenty-five percent of the reserve price or furnishes security for the same amount to the satisfaction of the Banking Court.

(16) The rights and remedies provided under this section are in addition to and not in lieu of any other rights or remedies a financial institution may have under this Ordinance.

(17) The provisions contained in this section shall have effect notwithstanding anything contained in this Ordinance or any other law for the time being in force or any judgment of any court and in case of any conflict between the provisions contained in this section and any other law for the time being in force or any judgment of any court, the provisions contained in this section shall prevail.”

Section 19:

“19. Execution of decree and sale with or without intervention of Banking Court. - (1) Upon pronouncement of judgment and decree by a Banking Court, the suit shall automatically stand converted into execution proceedings without the need to file a separate application and no fresh notice need be issued to the judgment-debtor in this regard. Particulars of the mortgaged, pledged or hypothecated property and other assets of the judgment-debtor shall be filed by the decree-holder for consideration of the Banking Court and the case will be heard by the Banking Court for execution of its decree on the expiry of 30 days from the date of pronouncement of judgment and decree:

Provided that if the record of the suit is summoned at any stage by the High Court for purposes of hearing an appeal under section 22 or otherwise, copies of the decree and other property documents shall be retained by the Banking Court for purposes of continuing the execution proceedings.

(2) The decree of the Banking Court shall be executed in accordance with the provisions of the Code of Civil Procedure, 1908 (Act V of 1908) or any other law for the time being in force or in such manner as the Banking Court may at the request of the decree-holder consider appropriate, including recovery as arrears of land revenue.

Explanation. - The term assets or properties in sub-section (2) shall include any assets and properties acquired benami in the name of an ostensible owner.

(3) In cases of mortgaged, pledged or hypothecated property, the financial institution may sell or cause the same to be sold with or without the intervention of the Banking Court either by public auction or by inviting sealed tenders and appropriate the proceeds towards total or partial satisfaction of the decree. The decree passed by a Banking Court shall constitute and confer sufficient power and authority for the financial institution to sell or cause the sale of the mortgaged, pledged or hypothecated property together with transfer of marketable title and no further order of the Banking Court shall be required for this purpose.

(4) Where a financial institution wishes to sell mortgaged, pledged or hypothecated property by inviting sealed tenders, it shall invite offers through advertisement in one English and one Urdu newspaper which are circulated widely in the city in which the sale is to take place giving not less than thirty days time for submitting offers. The sealed tenders shall be opened in the presence of the tenderers or their representatives or such of them as attend:

Provided that the financial institution shall be entitled in its discretion, to purchase the property at the highest bid received.

(5) The provisions of sub-sections (5), (6), (7), (8), (9), (10), (11) and (12) of section 15 shall, mutatis mutandis, apply to sales of mortgaged, pledged or hypothecated property by a financial institution in exercise of its powers conferred by sub-section (3).

4. Learned counsel appearing on behalf of the Appellant and Respondents had stated at the outset that the matter was one of first impression, as there was no judicial ruling in the field on the subject, hence, as jointly proposed by them, we had deemed it appropriate to appoint Mr. Ijaz Ahmed Zahid, Advocate as *Amicus Curiae* to render due assistance on the question of whether the requirement of engaging three valuers as per Clause (b) of Rule 3 of the 2018 Rules would also apply where the sale of a mortgaged property was being conducted by a banking court seized with proceedings on an execution application.

5. In this regard, the learned Amicus submitted a comprehensive brief tracing out the evolution of the 2001 Ordinance, reflecting that two primary remedies had been provided at the outset to a 'financial institution' in case of a default by a 'customer' in respect of a 'finance', which were (a) to file a suit before a banking court under Section 9 of the 2001 Ordinance; or (b) in the event of a mortgage, to sell the mortgaged property by following the procedure that had been set out in Section 15 thereof. It was submitted that Section 15 of the 2001 Ordinance, as originally framed, had then been subject to judicial challenge and was set aside by the Lahore High Court in the case reported as Muhammad Umar Rathore v. Federation of Pakistan 2009 CLD 257, as then upheld by the Honourable Supreme Court in the case reported as National Bank of Pakistan and 117 others v. SAF Textile Limited and another as PLD 2014 Supreme Court 283, it being pointed out that the primary reason that had prevailed with the Apex Court was the absence of adequate safeguards for the rights of a mortgagor whose property was being sold by a financial institution instead of through a court process, paragraphs 36 and 37 of the judgment reading as follows:-

“36. The real import and effect of section 15 of the Ordinance of 2001 is revealed when examined in the above backdrop and the most significant aspect of the said provision is not what is provided thereunder but what is conspicuous by its absence. The Financial Institutions have been authorized to sell a particular mortgaged property without intervention of the Court by virtue of subsection (4) of section 15 of the Ordinance of 2001. After the sale takes place (real or fictitious), a sale deed, in respect of the property is to be executed by a Financial Institution, which is authorized in this behalf by virtue of subsection (7) of section 15 of the Ordinance of 2001. Upon the registration of the sale deed, all rights title in interest of the mortgagor/debtor in the mortgaged property stand extinguished and such property vests in the purchaser free from all encumbrances, as is provided by subsection (8) of section 15 of the Ordinance. Whereafter, the Financial Institution, which has sold the mortgaged property is required to submit a proper account to the Banking Court in terms of subsection (10) of section 15 of the Ordinance of 2001. There is no provision, which permits a mortgagor/debtor to object to the conduct of the sale after the fall of the hammer. He is in fact deprived of the right even to agitate that the alleged proceedings for sale were sham and fictitious or carried out mala fide behind closed doors.

37. No doubt subsection (11) of section 15 of the Ordinance of 2001 does refer to the resolution of disputes relating to the sale of the mortgaged property by the Banking Court. Even if an objection raised under subsection (11) of section 15 of the Ordinance of 2001, it is of no practical legal significance, as the property sold already vests in the purchaser free from all encumbrances by virtue of subsection (8) of section 15 of the Ordinance of 2001. Thus, it is clear and obvious that the real intent and purpose of the aforementioned provisions of section 15 of the Ordinance of 2001 is to deprive the mortgagor/ debtor of his right to object to the mode, the conduct of the mode and method of the conduct of the sale by barring all remedies their against. In the instant case, such extinguishment of right occurs without any process let alone after due process and fair trial, as envisaged by Article 10A of the Constitution. The right in property in terms of Article 24 of the Constitution also stands bruised and offended against.”

6. It was pointed out that Section 15 of the 2001 Ordinance had then been amended vide the Financial Institutions (Recovery of Finances) (Amendment) Act, 2016, through insertion of a revised provision so as to introduce the safeguards that were identified as being absent by the Apex Court, including that of the financial institution having to have the mortgaged property evaluated by a reputable valuation company on the panel of the Pakistan Banks Association as on the date of the final notice of demand under Section 15(2), and that such safeguards have since been further supplemented and bolstered vide the 2018 Rules, which now provides the procedure for determination of liability by appointment of a chartered accountant; the procedure for valuation of a mortgaged property by appointing three professional valuers; and also delineates the bidding process.

7. It was submitted by the learned Amicus that the additional safeguard relate to cases where a sale was undertaken by a financial institution under Sections 15 or 19 (3) of the 2001 Ordinance, where the process is conducted primarily by the institution instead of the Court, whereas, where the Court is conducting such a sale, it would be competent to implement such procedural measures as, in its discretion, were appropriate for safeguarding the interests of the decree holder and judgment debtors, in accordance with the Code of Civil Procedure and the 2001 Ordinance. In his opinion, keeping in view the evolution of the 2001 Ordinance in the backdrop of the judgment of the Apex Court in the case of SAF Textile (Supra) and ensuing advent of the 2018 Rules, Rule 3 was intended to apply to a *sale by a financial institution* as opposed to the *sale through the Court*, and imposing the multiple valuation requirement under Rule 3 to the banking court would serve to restrict its discretion,

which was neither the intent of the 2018 Rules or the 2001 Ordinance, the central purpose of which is to provide for expeditious recovery of the outstanding dues of a financial institution.

8. Having considered the arguments of counsel for the parties as well as the valuable assistance rendered by the learned Amicus, we are of the view that an appraisal of the matter in its proper perspective necessitates consideration at the outset of the import of Rule 4 of the 2018 Rules, as per which the valuation procedure prescribed under Rule 3 comes into play only where a “financial institution decides to proceed under sub-section (3) of section 19 of the Ordinance”, with it being specifically provided in that regard that “rule 3 where relevant shall also apply *mutatis mutandis*”.

9. In turn, it is apparent from a plain reading of Section 19(3) of the 2001 Ordinance that the provision envisages dichotomous measures as may be adopted for satisfaction of a decree in terms of the sale, *inter alia*, of a mortgaged property “with or without” the intervention of the Banking Court either “by public auction or by inviting sealed tenders”. When Rule 4 is viewed through the prism of this dichotomy, it is apparent from a holistic reading of the rule that the same would apply only when a financial institution acts so as to undertake the sale of a mortgaged property of its own accord, without the intervention of the banking court, the use of the words “where relevant” and the term *mutatis mutandis* signifying this to be the case, as in the alternative such words and term would be redundant.

10. It is pertinent to observe at this juncture that as per a well established principle of statutory interpretation, the statute is to be read as a whole and every part and word thereof is to be given effect, with an interpretation which renders any part redundant to be avoided, it being held as far back as the case of Queen v. The Bishop of Oxford (1879) 4 PBD 245 that whilst construing a statute, no part of it shall be 'superfluous, void or nugatory' and it also being observed by the Honourable Supreme Court in the case of East and West Steamship Co. v. Queensland Insurance Co. PLD 1963 SC 663 that "it is not permissible for us whilst interpreting a statute to hold that any part thereof or any word therein is surplusage. Every word as to be taken into account and a meaning given to it."

11. Needless to say, were Rule 3 intended to apply under both circumstances (i.e. a financial institution undertaking a sale with the intervention of the banking court as well as without such intervention), it would have sufficed to simply state that Rule 3 would apply to proceedings under Section 19(3) of the Ordinance, without further qualification as presently exists. As such, we concur with the assessment of the learned Amicus as to the *raison d'être* of the Rule from a purposive standpoint.

12. That being so, we find the Appeal to be misconceived and devoid of merit, with the result that the same is hereby dismissed, but with no order as to costs. However, while parting with this Judgment, we would once again commend the learned Amicus for his diligence and assistance.

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