

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

**Present:**

Muhammad Ali Mazhar and  
Yousuf Ali Sayeed, JJ

**1<sup>st</sup> Appeal No. 01 of 2019**

Appellant : M/s Moin & Sons Electronics,  
through Abdul Qayyum Abbasi,  
Advocate3.

Respondent No.1 : SME Bank Limited, through  
Haris Rashid, Advocate.

Respondent No.4 : Nadeem Ahmed Malik, through  
Muhammad Saleem Thepdawala,  
Advocate.

Date of hearing : 09.09.2020

**JUDGMENT**

**YOUSUF ALI SAYEED, J -** This Appeal under S.22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the “**Ordinance**”) impugns an Order made by the learned Judge of the Banking Court No. V at Karachi (the “**Executing Court**”) on 18.12.2018 in Execution No.38 of 2011 (the “**Proceedings**”) ensuing from Suit Number 1529 of 2010 (the “**Suit**”) instituted by and decreed in favour of the Respondent No.1 as against the Appellant and others, dismissing the Appellant’s Application under S. 19(7) of the Ordinance read with Order 21, Rules 66, 68, 69 and 90 CPC (the “**Underlying Application**”) against the auction sale of an immovable property measuring 120 square yards, bearing No. 457, Sector 16, Gulshan-e-Behar, Orangi Town, Karachi, (the “**Subject Property**”). It warrants mention that the Underlying Application and this Appeal have both been preferred through one Habibullah, in his professed capacity as the attorney of Muhammad Moinuddin (“**MM**”), the proprietor of M/s. Moin & Sons Electronics, the significance of which will come to be discussed in due course.

2. Briefly stated, the Appeal arises in the following factual backdrop:

- (a) The Suit had been filed by the Respondent No.1 under S.9 of the Ordinance for recovery of a sum of Rs.6,334,257/- said to be due in relation to a Running Finance Facility availed by MM, and for enforcement against the security furnished in that regard, comprising of a mortgage over the Subject Property belonging to him, a mortgage over a separate immovable property created by his wife, the Respondent/Judgment Debtor No.2, namely Mujeeba Khatoon (“**MK**”), and the personal guarantees individually executed by them and their son.
- (b) The Suit culminated in judgment being entered in favour of the Respondent No.1 as against MM, MK and other defendants on 21.01.2011, and a decree then being drawn up on 31.01.2011. No Appeal was preferred, with the matter thus attaining finality, and the Proceedings then ensued upon presentation of an Application under S.19 of the Ordinance on 01.03.2011.
- (c) Following commencement of the Proceedings, MM filed an Application under S.12(2) CPC on, seeking that the Judgment and Decree be set aside, alleging that there was no default and that the Respondent No.1 had obtained judgment in the matter by suppressing a new address that had been provided by him for purpose of future correspondence and instead filed the Suit mentioning his old address. That Application was dismissed on 05.04.2016, with it being observed by the Executing Court *inter alia* that it had not been specifically denied that notice/summons issued to the Appellant at the specified address had not been served and that no document had been filed to demonstrate communication of a new address, as contended. No appeal was filed against that Order.
- (d) Importantly, following an initial process of auction on 03.11.2011, Habibullah, had also himself filed an application under Order 21, Rule 90 CPC on 10.11.2016, as an intervener, and taken the plea that he had purchased the mortgaged property from Judgment Debtor No.1, through a sale

agreement dated 14.03.2016, and 27.09.2016, for a total sale consideration of Rs.1,200,000/-. However, this fact had not been disclosed in the instant Appeal, and only came to the fore through the Counter-Affidavit of the Respondent No.4.

- (e) MK had also maintained participation in the Proceedings in her capacity as the Judgment Debtor No.2 and after the Subject Property had initially been put to auction on 03.11.2016, then moved an Application under Order 21, Rule 90 dated 04.05.2017, with it being ordered in view of the no-objection given by the parties in respect thereof that the properties be reauctioned, subject to revaluation.
- (f) Thereafter, a fresh auction was conducted on 27.03.2018 (the "**Auction**"), following which a further Application under Order 21, Rule 69 was filed on behalf of MK on that very date seeking suspension of the auction on the ground of non-compliance with Order 21, Rule 66, with it being contended inter alia that she had never been served with notice issued for purpose thereof. That application was also dismissed by the Executing Court vide Order dated 27.03.2018, which was also not assailed, and the auction then proceeded, with the Respondent No.4 being declared the highest bidders in respect of the Subject Property.
- (g) It is in this backdrop that the Underlying Application came to be filed in the Proceedings by Habibullah on behalf of MM on 25.04.2018, praying that the process of Sale with respect to the Subject Property be set-aside/postponed; it being averred therein that "the process of sale has not been initiated/commenced according to law as the Judgment Debtor No.1 had not been provided an opportunity to participate in process of settling the terms of the proclamation of sale as Judgment Debtor No.1 has not been served with any notice regarding issuance of proclamation of sale with respect to sale of mortgaged property mentioned above". (emphasis supplied)

3. Keeping in view the chequered history of the Proceedings, marked by MM's plea for grant of time for purpose of settlement coupled with his Application under S.12(2) CPC, as well as the objections raised from time to time by MK and by Habibullah in his own professed right, the Executing Court dismissed the Underlying Application, while observing that:

"It is clearly reflected from the record that since filing of the execution application all the judgment debtors very much are in the knowledge of the proceedings who time and again moved applications of different natures, which have been decided on merits and lastly when they failed to achieve their desired goals; the application in hand has been filed through attorney. It is a matter of record that at first instance; the judgment debtor No.1 has filed the application under section 12(2), C.P.C. supported with the affidavit and a forged letter in order to mislead this court, which have been discussed and turned down vide Order, dated 05.04.2016. Prior to such exercise on 02.02.2016, the Judgment debtor Nos. 1 and 3 appeared in person on 02.02.2016 and filed a statement before the court, stating therein that they would pay entire outstanding amount on or before 02.03.2016, but they failed to honor their words. Subsequently, the mortgaged properties were put for public auction held on 03.11.2016. Perusal of the record further reveals that on one hand the judgment debtors tried to gain time by filing applications, on the other hand the judgment debtor No.1 has sold out mortgage property bearing *House on Plot No.457 measuring 120 square yards situated in Sheet No.IV, Sector 16, Gulshan-e-Behar Colony, Orangi Township Karachi* to the attorney namely Habibullah vide General Power of Attorney, dated 10.05.2017, who no doubt file the instant application in his personal capacity. Clause '10' of the said Power of Attorney reflects that the judgment debtor No.1 has categorically admitted that he had obtained loan from the bank, which the attorney has to re-pay. Such aspect is sufficient to establish that the judgment debtor No.1 and the attorney are fully aware of the proceedings and the judgment debtor No.1 instead of fulfilling his obligations as provided under section 3 of the *Ordinance, 2001*. On the contrary he has created third party interest in the mortgaged property, amounts to causing delay and hamper the execution proceedings in order to frustrate the decree.

Section 19(7)(a) of the *Ordinance 2001* provides a procedure for the purpose of investigation of claims and objections in respect of attachment and sale of any property but the case in hand, previous conduct of the judgment debtors left no room to believe that any investigation is required at this stage. Since the mortgaged property bearing *House No. Plot No.457 measuring 120 square yards situated in Sheet No.IV, Sector 16, Gulshan-e-Behar Colony,*

*Orangi Township Karachi* has been sold out to one Habibullah, who obviously has no locus-standi to file application in hand before this court, except to repay the loan/outstanding amount or to fulfil the obligations of the judgment debtors to the decree holder. The entire conduct of the judgment debtor No.1 in connivance with the alleged attorney transpires that he with malafides intention for ulterior motives tried to frustrate the decree and hampered the sale of the mortgaged property by moving instant application. Such apparent malafides conduct of the judgment debtor No.1 and his attorney is manifests. Hence, in my humble view they are liable to be penalized as provided under clause 'b' of sub-section 7 of section 9 of the *Ordinance, 2001*. The judgment debtor No.1 and his attorney shall pay 20% penalty of the sale price of the property within fifteen (15) days from this order."

4. Learned counsel for the Appellant broadly assailed the Impugned Order on the grounds that notice under Order 21, Rule 66 CPC had not been served upon MM so as afford him an opportunity to participate in settling the terms of sale and that the valuation of the Subject Property relied upon by the Executing Court for purpose of the Auction was incorrect. It was contended that while an order had been passed on 11.5.2017 on the Application of the Judgment Debtor No.2, whereby directions were given to the decree holder to file a revaluation report, the Executing Court then erred in accepting a report dated 15.02.2017, filed by the Respondent No.1/DH under cover of a Statement dated 3.8.2017. Furthermore, per learned Counsel, when the notice under Order 21, Rule 66 CPC was drawn up, the Subject Property was described as a house instead of residential cum commercial building, with that description then also being incorporated in the notices published in newspapers advertising the Auction. On that basis, it was contended that the Auction was conducted improperly and the price fetched was not in consonance with the actual value, but the Underlying Application was nonetheless dismissed without proper investigation. As to the applicability of Order 21, Rule 66 CPC and the scope of S.19(7) of the Ordinance, he relied upon the judgments reported as *Muhammad Attique v. Jami Limited & others* PLD 2010 SC. 993, *Javed Iqbal v. National Bank of Pakistan*

through Manager and others 2017 CLD 833, Asif Ali Khan and another vs. Standard Chartered bank Limited and another 2015 CLD 1813, Messrs. NIB Bank Limited vs. Messrs. Apollo Textile Mills Limited and 2 others 2013 CLD 1398, Khursheed Begum and others v. Inam-ur-Rahman Khan and others PLD 2009 Lahore 552, Messrs. Ripple Jewellers (Pvt.) Limited through Chief Executive and another v. First Woman Bank through Officers/General Attorneys/Principal Officers and 6 others 2003 CLD 1318, Muhammad Hassan v. Messrs. Muslim Commercial Bank Limited through Branch Manager and 3 others 2003 CLD 1693, Mst. Zainab Bibi v. Allied Bank of Pakistan Limited and others 2003 YLR 3274, Mrs. Shahida Saleem and another v. Habib Credit and Exchange Bank Limited and 4 others –2001 CLC 126, Brig. (Retd.) Mazhar-ul-Haq and another v. M/s. Muslim Commercial Bank Limited, Islamabad and another – PLD 1993 Lahore 706, Muhammad Khalil v. Messrs. Faisal M. B. Corporation and others – 2019 SCMR 321, National Bank of Pakistan and 117 others v. SAF Textile Mills Limited and another PLD 2014 SC. 283, Captain-PQ Chemical, Industries (Pvt.) Limited v. Messrs. A.W. Brothers and others 2004 SCMR 1956, and Samba Bank Limited through Authorized Officer/Attorney v. Messrs. Paramount Enterprises and another 2013 CLD 801.

5. Conversely, learned counsel for the Respondents Nos. 1 and 4 (i.e. the DH and Auction Purchaser respectively), submitted that the Impugned Order had been correctly made and the Executing Court had rightly dismissed the Underlying Application. They argued that the Underlying Application was vexatious and represented yet another attempt on the part of the Judgment Debtor to protract the Proceedings so as to frustrate the Judgment and Decree. Both of them also pointed out that subsequent to the dismissal of the Underlying Application, the Executing Court had separately made an Order on 18.12.2018, confirming the sale of the Subject Property in favour of the Respondent No.4 and directing the Nazir to issue the Sale Certificate and put him in possession.

6. Having considered the arguments advanced at the bar in light of the material on record, we have noted that the so-called error in description of the Subject Property for purpose of the Auction was not a ground raised in the Underlying Application or affidavit filed in support thereof, with the challenge essentially being predicated on the absence of notice and consequent deprivation of a chance of participation. This is apparent from the Affidavit sworn in support of the Underlying Application, the relevant excerpts of which are as follows:

“3. It is most respectfully submitted that the Judgment Debtor No.1 has not been personally served with the Notice issued by this Hon’ble Court as per the provision of Order XXI Rule 66 read with Section 68, 69 and 90 CPC which is mandatory requirement of the law, and the recently published Sale proceeding have been conducted without the knowledge of the Judgment Debtor No.1 which is in clear violation of law as the Decree Holder was under obligation to follow the law developed in this regard.

4. It is submitted that No Notice of the Auction was ever been served upon the Judgment Debtor No.1 and due to such reason the judgment Debtor No.1 has not been provided any opportunity to defend his position and to procure/save his property from sale/auction which seriously offends the principles of natural justice and Article 10-A of Constitution of Islamic Republic of Pakistan. It is further submitted that the issuance of Notice as per mandatory requirement and its service is mandatory in nature and non-compliance thereof would vitiate the entire process of sale initiated in violation of law.

7. That the Judgment Debtor No.1 reserved the right of an opportunity by fixing a reasonable time to procure better offer with respect to the Mortgaged Property. It is further submitted that the Decree Holder failed to mention the correct amounts in the Execution Application and in the Proclamation of Sale, the Decree Holder has prevented the Judgment Debtor No.1 from satisfying the decree for which the valuable property of the Judgment Debtor No.1 has been sold at throwaway price and has cause substantial loss to the Judgment Debtor and he will sustained substantial injury by not disclosing the actual due amount either in the Statement under Order XXI Rule 66 CPC or in the Proclamation of Sale.

8. That the law provides the remedy to the Judgment Debtor No.1 under Order 21 Rule 90 of the CPC to prevent sale of the Mortgaged property which is intended to be sold at inadequate prices.”

7. As is apparent, the case set up vide the Underlying Application gravitates around the assertion that the Notice issued by the Executing Court under Order 21, Rule 66 CPC for purpose of the Auction had not been “personally served” upon MM, due to which he had been prevented “from satisfying the decree” and had not been provided any opportunity to save his property, which had been sold at a throwaway price, causing substantial injury and loss to him. Keeping in view that the Auction was effectively a repeat of an earlier exercise carried out in the Proceedings, the judgment in the case reported as Messrs Capital Poultry Feed and Daal Mills through Managing Partner and 5 others vs. Atlas Bank Limited through Managing Partner and 3 others 2015 CLD 1149 aptly sheds light on the requirement of such notice in the context of the underlying facts and circumstances, with it having been held by a learned Division Bench of the Islamabad High Court that:

“5. The objection by the appellants that no notices under Order XXI, Rule 66 of C.P.C. were issued to them is not tenable inasmuch as sale had been done previously and the property was admitted to be auction in past but could not. The fact that it was ordered again to be auctioned did not require fresh issuance of the notice under Order XXI, Rule 66, *ibid*. In case cited as 2014 SCMR 1371 the Hon'ble Supreme Court of Pakistan observed that where the judgment debtor was aware of auction proceedings he could not challenge the auction on grounds that notice was sent to him on incorrect address, as notice was also published in the newspapers. In PLD 1972 SC 337 *supra* the Hon'ble Supreme Court observed as follows:

*"Held: There is nothing in this to show that the provisions of Order XXI, rule 54 of the Civil Procedure Code are mandatory and substantial compliance is not enough. Indeed, it would appear that the view of the Courts has consistently been that the non-compliance with the provisions of the Code of Civil Procedure, with regard to the proclamation of sale, its publication and the conduct of the sale, in execution, are only material irregularities but not illegalities which render the sale in disregard of those provisions a nullity. A sale cannot be set aside unless "direct evidence of substantial injury resulting from the irregularity has been given", and the onus of proving this prejudice is on the party complaining thereof.*



*If there was any doubt as to the correctness of the above view, this doubt is laid at rest by the proviso to rule 90 of Order XXI of the Code of Civil Procedure which clearly prescribes 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." In the absence of proof of any such substantial injury, no sale can be set aside.*

*Under Order XXI, rule 67 of the Code of Civil Procedure itself, all that is required is that "every proclamation shall be made and published, as nearly as may be in the manner prescribed by rule 54, sub-rule (2)" and in this sub-rule it is provided that the proclamation shall be "by beat of drum or other customary mode." Publication by beat of drum, therefore, is not the only mode by which the order can be proclaimed.*

*In the case of Karachi, publication in newspapers is also required by rule 339 of the Sindh Chief Court Rules and, therefore, that is the customary mode of publication in Karachi.*

*The Rules are not mandatory in nature and substantial compliance with them is sufficient. The object of these Rules is to give the order of attachment or the sale proclamation as wide a publicity as possible in the circumstances of the case, having regard to the nature of the property to be sold and the place of its location. If this has substantially been done and fair offer received at the auction, then the Courts would be inclined to hold that there has been substantial compliance with the Rules, unless, of course, a person can establish by cogent evidence that the irregularity has resulted in prejudice to him."*

8. Moreover, when the matter is examined in its proper light, through the prism of earlier events, it becomes evident that MM was well aware of the Proceedings and the developments ensuing during the course thereof, including the steps being taken for disposal of the Subject Property by way of the Auction. This is evinced by the fact that MM had himself submitted a Statement before the Executing Court on 02.02.2016 seeking time to enable him to deposit the decretal amount, but had then failed to come forward, with the Subject Property resultantly being put to sale. The fact that the steps being taken in the Proceedings were or ought to have been in the knowledge of MM is also borne out by the fact

that the Power of Attorney on the strength of which Habibullah preferred the Underlying Application is shown in the Affidavit sworn by him in support thereof to be dated 10.05.2012, whereas he had filed an application under Order 21, Rule 90 CPC on 10.11.2016 following the initial auction of 03.11.2016, by when he had already been appointed by MM as his attorney. The state of MM's knowledge is also apparent from the Power of Attorney, which refers to the Suit and liability arising therefrom, while authorizing Habibullah to represent him for purpose of settlement and redemption. Furthermore, MK's role also has to be borne in mind, as it is inconceivable that MM remained in the dark as to the fate of the Proceedings, as suggested vide the Underlying Application, whilst his wife maintained representation therein. Yet neither MM nor any of the other judgment debtors ever came forward to invoke Order 21, Rule 89 CPC. Such circumstances serve to demonstrate and irresistibly lead to the conclusion that they colluded, along with Habibullah, to thwart the Proceedings, and negate the contention that the absence of notice kept MM unaware and prevented him from coming forward to satisfy the Decree. As such, any semblance of a case arising on the pretext of MM not being served stands shorn away and it is apparent that the entire edifice of the opposition built against the Auction on that foundation is completely bereft of substance in law or fact. In the wake of the preceding events marking the Proceedings, the fact that Habibullah, having donned a different hat, had the temerity to file the Subject Application and this Appeal espousing such a claim under the garb of an attorney speaks volumes of the *mala fides* on his part as well as that of MM and the other judgment debtors. The judgments relied upon by learned counsel for the Appellant are thus clearly distinguishable on the facts and inapplicable to the mater at hand.

9. With the very substratum of the Appellant's case thus being eroded, the further objections raised as to the description and valuation of the Subject Property largely pale into insignificance. Be that as it may, if the same are examined, it merits consideration that in his Application under Order 21, Rule 90, Habibullah had himself described the Subject Property as "House No.457", and in the Sale Agreement dated 14.03.2016 shown to have been executed between him and MM, the Subject Property is also described as "Makan Number 457". Furthermore, as for the point of the valuation report predating the Order of 11.5.2017, this could at best be regarded as an irregularity, rather than an illegality serving to vitiate the Auction, with it also falling to be considered that the Respondent No.4's bid of Rs.7,700,000/- was even otherwise in excess of the forced sale value (i.e. Rs.7,648,000/-), as per that valuation report. We are fortified in this assessment by the judgment of a learned Division Bench of this Court (of which one us, namely Muhammad Ali Mazhar, J, was a member) in the case reported as Nazli Hilal Rizvi v. Bank Alfalah Limited and others 2019 CLD 808, where it was held as follows:

"8. The next contention advanced on behalf of the appellant was that the valuation of the mortgaged property was understated and the same was manifest from the valuation reports relied upon by the judgment debtors in the Execution. Learned counsel for the respondents had argued that the valuation reports relied upon by the judgment debtors were fallacious and even otherwise not issued by valuers approved by the Pakistan Banking Counsel. Learned counsel for the appellant took no effort to controvert the assertion that the valuation relied upon was given by uncertified persons. However, notwithstanding the foregoing it is pertinent to observe that a Division Bench of this Court has earlier maintained in the case of Muhammad Mohammad Jameel v. Eridania (Suisse) SA and others reported as 2018 CLD 1478 that an alleged inadequacy of sale price is not a valid ground to set aside auction proceedings and that once a sale has been confirmed, the same creates vested rights in favour of the auction purchaser. An earlier Division Bench of this Court was seized of a similar matter, in Muhammad Rafiq v. Federation of Pakistan and others reported as 2013 CLD

1667, and the challenge to auction proceedings upon unjustified allegations of inadequate sale price was deprecated in the following manner:

"12. The first ground urged on behalf of the petitioner is hardly a ground on which any order in favour of the petitioner could be passed. It is very well known to a person of ordinary prudence that a property sold through auction will not fetch the market value and will always be sold for a price below the market value. In the case reported as East Yarn Trading Company and others v. United Bank Limited and others (2007 CLD 1555), a Division Bench of this Court has held that "merely raising objections as to inadequacies of sale price is not sufficient." We are, therefore, of the opinion that mere inadequacy of sale price in court sale, is no valid ground for setting aside the sale. A buyer is always reluctant to purchase a property in Court sale as it involves litigation, it is time consuming and has the element of uncertainty. The Court sales do not fetch market price for the reason and sale through auction cannot be set aside on this score alone."

10. Another point to also be borne in mind is that the sale stands confirmed in favour of the Respondent No.4, and whilst examining the argument raised on the touchstone of Order 21, Rule 66 vis-à-vis the rights of a bona fide auction purchaser, one need look no further for guidance than the judgment of the Honourable Supreme Court in the case reported as Messrs Lavin Traders, Karachi vs. Presiding Officer, Banking Court No.2, Karachi and others 2013 CLD 1581, where that aspect was examined with reference to certain earlier decided cases and it was observed that:

47. In the case of Rashad Ehsan v. Bashir Ahmed (PLD 1989 SC 146), with reference to the provisions of Order XXI, Rule 85, qua maxim "Actus curiae neminem gravabit" (an act of the Court shall prejudice no man), was discussed and it was held that the technicalities of law shall not be allowed to defeat the ends of justice. In the case of Muhammad Ikhlaq Memon v. Zakaria Ghani (PLD 2005 SC 819), the scope of section 18 of the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 was viewed in conjunction with the provisions of Order 21, Rules 84, 85, 92 and 65 of the Code and it was reiterated that Banking Court is not bound to follow the procedure laid down in the Code, therefore, in appropriate cases, while executing decree, it can depart from the provisions of the Code. It was further held that even where the Court had failed to pass an order for confirmation of

sale that would not lead to deprivation of right of auction purchaser or cause prejudice to him and in such a case, it would be deemed that the sale stood confirmed and purchaser would be deemed to have become absolute in his title by virtue of section 65, C.P.C. which would relate back to the date of sale. In the case of Mumtaz ud Din Feroze v. Iftikhar Adil (PLD 2009 SC 207), the provisions of section 18 of the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997, qua Order XXI, Rule 66, C.P.C. were considered and it was held that non-compliance of the provisions of Code with regard to proclamation of sale, its publication and conduct of sale in execution are mere irregularities, which cannot be termed as illegalities, thereby rendering the sale as nullity. As regards the rights of auction purchaser, it was further held that after completion of sale, objections as regards irregularity are not to be allowed except on limited ground like fraud etc., as auction purchaser was a bona fide purchaser for valuable consideration, therefore, his interest in sale by auction has to be protected.

11. In view of the given facts and circumstances underpinning the matter at hand, we are of the opinion that the Executing Court rightly found MM and Habibullah to be acting in connivance with mala fide intent, for the ulterior motive of frustrating the Proceedings and thwarting satisfaction of the Judgment and Decree, hence acted correctly in dismissing the Underlying Application.
  
12. As such, no case for interference stands made out. The Appeal fails and stands dismissed accordingly, along with all pending miscellaneous applications. Whilst the matter otherwise presents a fit case for imposition of costs, we have consciously exercised restraint in view of the penalty already imposed by the Banking Court.

**JUDGE**

**JUDGE**

Karachi  
Dated \_\_\_\_\_