

# IN THE HIGH COURT OF SINDH AT KARACHI

**Present:**

Irfan Sadat Khan &  
Sana Akram Minhas JJ

**First Appeal No.15 of 2020**

Appellant: Anwar Ahmed Ansari  
Through Mr. Muhammad Saleem Mangrio, Advocate

Respondent No.1: Pak Libya Holding Company (Pvt) Ltd  
Through Mr. Aijaz Shirazi, Advocate

Respondent No.2: Muhammad Zakaria Habib  
Through Mr. Khaleeq Ahmed, Advocate

Date of hearing: 4.5.2023

Date of Decision: 23.5.2023

## **J U D G M E N T**

1. **Sana Akram Minhas, J:** Through this First Appeal under section 22 of the *Financial Institutions (Recovery of Finances) Ordinance, 2001* the Appellant (who is the Judgment Debtor) has impugned an order dated 28.1.2020 (“**Impugned Order**”) of a learned Judge of the Banking Court No.II at Karachi (“**Banking Court**”) rendered in Execution No.99 of 2015 (emanating from Suit No.175 of 2014 which Suit was decreed in favour of the Respondent No.1 Bank i.e. the Decree Holder). By virtue of the Impugned Order, the Appellant’s application (“**Underlying Application**”) under Order XXI Rule 89 (“**Order 21 Rule 89**”) of the *Code of Civil Procedure, 1908* (“**CPC**”) was dismissed and the auction sale of the mortgaged immovable property, being a residential plot with G+1 house bearing Plot No.R–58, Sector 16–A, Buffer Zone, North Karachi Township, Karachi measuring 120 square yards (“**Subject**

**Property”)** which had earlier been confirmed in favour of the Respondent No.2 (**“Auction Purchaser”**) was left undisturbed.

2. The essential facts of the case relevant for this First Appeal are that the Respondent No.1 on 8.8.2014 filed recovery proceedings by way of Suit No.175 of 2014 against the Appellant which was decreed ex parte vide judgment dated 2.12.2014 and decree dated 11.12.2014 in the sum of for Rs.4,421,953/- along with cost of funds from the date of default i.e. 13.6.2009 till its realization. No appeal was preferred against the judgment and decree by the Appellant and the same attained finality. Subsequently, on 13.4.2015, the Appellant filed an application under section 12(2) CPC before the Banking Court for setting aside the judgment and decree. This 12(2) CPC application was dismissed by the Banking Court on 18.9.2017 and the Appellant's First Appeal (bearing No.219/2017) against its dismissal was also dismissed as withdrawn unconditionally by this High Court by order dated 24.9.2019.
3. In the meantime, the Respondent No.1 in November, 2015 filed Execution No.99 of 2015 for recovery of Rs.8,168,913/-. The Banking Court put up the Subject Property for public auction which was held on 8.4.2017 and the same was purchased by the Auction Purchaser for a sum of Rs.6,700,000/-. The auction was confirmed by the Banking Court by order dated 5.3.2018 and Sale Certificate was issued by the Nazir on 3.2.2020.
4. The Appellant on 9.3.2018 filed the Underlying Application in Execution No.99 of 2015, inter alia, praying for the setting aside of the sale confirmation order dated 5.3.2018 and conveying his readiness to deposit the balance decretal amount along with 5% of the bid amount (i.e. purchase money) for payment to the Auction Purchaser. It is this Underlying Application that has been dismissed by the Impugned Order.
5. It is in the backdrop mentioned above that the instant First Appeal has been filed before this Court, inter alia, seeking to set aside the Banking Court's Impugned Order, the sale confirmation order dated 5.3.2018 and release/redemption of the mortgaged property (i.e. Subject Property) in favour of the Appellant.
6. The learned counsel for the Appellant primarily argued before us that the Banking Court erred in dismissing the Underlying Application as the Appellant had deposited almost the entire decretal amount. He next contended that on learning about the ex parte judgment and decree, the Appellant had on 13.4.2015 filed a section 12(2) CPC application and instead of deciding the same the Banking Court hastened to auction the Subject Property. He lastly contended that the Subject Property had

been auctioned at a throwaway price. In this regard he cited 2019 SCMR 321 (*Muhammad Khalil vs. Faisal M.B. Corporation*).

7. Mr. Aijaz Shirazi, Advocate and Mr. Khaleeq Ahmed, Advocate appeared for the Respondents No.1 & 2 respectively and controverted the Appellant's arguments. Both the learned counsels averred that the Banking Court's order dated 18.9.2017 dismissing the section 12(2) CPC application had attained finality since the First Appeal No.219 of 2017 (*Anwar Ahmed Ansari vs. Pak Libya Holding Co. (Pvt) Ltd & Another*) was unconditionally withdrawn on 24.9.2019. They further argued that the Underlying Application did not meet the requirements of the very provision of law under which it had been filed and what is more it was time barred. Lastly, it was contended that valuable rights had been created in favour of the Auction Purchaser which could not be set aside. In support of their contention, Mr. Aijaz Shirazi referred to the case citations 1981 SCMR 108 (*Asma Zafarul Hasan vs. United Bank Ltd*), 2007 CLD 1511 (*Yasmeen Yaqoob vs. Allied Bank*) and PLD 2005 SC 819 (*Muhammad Ikhtlaq Memon vs. Zakaria Ghani*) while Mr. Khaleeq Ahmed cited 2019 SCMR 1453 (*Habib & Company vs. Muslim Commercial Bank*).
8. We have heard the learned counsel for the parties and perused the record of the case which includes the record and proceedings ("R & P") of Suit No.175 of 2014 and Execution No.99 of 2015. The key points which emerge for determination are whether the Appellant complied with the provisions of Order 21 Rule 89 CPC and whether vested rights had accrued in favour of the Auction Purchaser.
9. We would first take up the Appellant's contention regarding the dismissal of his Underlying Application when according to him he had deposited almost the entire decretal amount. The pertinent dates in this context are:

DATE	EVENT
7.3.2017	Sale proclamation published in newspapers
8.4.2017	Public auction of Subject Property held & Auction Purchaser purchased the same as highest bidder for Rs.6,700,000/- (who deposited 25% of the bid amount on the same day)
24.4.2017	Auction Purchaser deposits balance 75% of the bid amount
5.3.2018	Auction confirmed by Banking Court
9.3.2018	Underlying Application filed by Appellant
3.2.2020	Sale Certificate issued

10. An appraisal of the Appellant's assertions in the Underlying Application as well as in the present First Appeal regarding actual payments made by him show constantly contradictory and vacillating claims. The relevant excerpts are reproduced below:

Contents of Underlying Application (filed under Order 21 Rule 89 CPC):

1. *That against the decretal amount of Rs.44,21,953/= the Judgment debtor has already deposited the sum of Rs.32,00,000/= with the Nazir of this Hon'ble Court on 24-04-2017 & 24-05-2017, whereas the judgment debtor also on 01-03-2018, alongwith his application under Order 21 Rule 1 & 2, also annexed the copy of the Pay Order No. 50629705, dated 21-02-2018, drawn at Summit Bank Ltd. for the sum of Rs.500,000/= **and also on 05-03-2018 attempted to deposit Pay-Order of Rs.700,000/=** under his statement dated 05-03-2018, which is on record of court and thereby the total amount comes to the sum of Rs.44,00,000/= against the decretal amount of Rs.44,21,953/= **and only pea-nut [sic] amount of Rs.21,936/- remained outstanding against the decretal amount.** It is pertinent to mention here that the said amount of Rs.44,00,000/= **was arranged** prior to the confirmation of the auction vide order dated 05-03-2018.*

P R A Y E R

*In light of the above mentioned facts and circumstance, and keeping in view that **the judgment debtor has deposited maximum decretal amount** before the Nazir of this Hon'able Court **and also ready to deposit the original two pay orders for the sum of Rs.12,00,000/= and also the remaining sum of Rs.21,953/- besides 5% Bid amount to the auction purchaser,** as per under Order 21 Rule 89(1)(a) CPC ... ..*

***[Emphasis added by us]***

Contents of memo of Appeal filed in the instant First Appeal:

3. *... .. however, **the Appellant partially deposited the decretal amount,** i.e. Rs,32,00,000/- with the Nazir of the learned Banking Court on 24.4.2017 and 24.5.2017, with the prayer to stop further proceedings of the auction.*
5. *That in the meanwhile, **the Appellant on 1.3.2018 deposited two Pay Order for Rs.500,000/- and Rs.700,000/- thereby fully liquidating the decretal amount of Rs.44,00,000/-** for releasing the mortgaged property, however, despite the fact **that the Appellant had almost fully deposited the decretal amount (leaving a meagre balance of Rs.21,935/-),** the learned Banking Court ... ..*
8. ***That since the Appellant had already paid the decretal amount** and there remained no need to set aside the judgment and decree ... ..*

***[Emphasis added by us]***

11. The above quoted extracts of the Appellant's own pleadings show that the Appellant on one hand claims in his Underlying Application (in its paragraph 1) that he has

deposited a sum of Rs.4,400,000/- (which includes deposit through two Pay Orders of Rs.500,000/- and Rs.700,000/-) and that only a so-called “peanut” amount of Rs.21,936/- remains outstanding while on the other hand the Appellant in the same Underlying Application (in its prayer clause) conveys his willingness to deposit the original aforesaid two Pay Orders totalling Rs.1,200,000/- as well as 5% of the purchase money (for payment to the auction purchaser). This demonstrates that neither the two Pay Orders nor the 5% of purchase money had been deposited till then. Similarly, the Appellant in paragraph 5 of the present Appeal once again claims to have deposited the two Pay Orders (of Rs.500,000/- and Rs.700,000/-) on 1.3.2018 which is a blatantly false claim since, as demonstrated above, the Appellant in his Underlying Application (which is later in time and is dated 9.3.2018) has merely expressed his readiness to deposit the two Pay Orders thereby establishing that the Pay Orders had still not been deposited till 9.3.2018.

12. In order to further ascertain for ourselves, we have combed through the R & P of the Banking Court and have not been able to find either the photocopy of the alleged Pay Order of Rs.700,000/- or the alleged Statement dated 5.3.2018 through which the Appellant claims to have “*attempted to deposit the Pay Order of Rs.700,000/-*” (as alleged in paragraph 1 of the Underlying Application). It is also noticeable that in his Underlying Application (in paragraph 1), while the Appellant has mentioned the complete particulars of only one Pay Order of Rs.500,000/- (viz. Pay Order No.50629705 dated 21.2.2018 drawn on Summit Bank Ltd whose photocopy is available on the record), the Appellant’s pleadings are completely silent on the material particulars of the alleged second Pay Order of Rs.700,000/- (such as its date, the Pay Order number, the bank on which it is drawn). It, therefore, becomes woefully obvious that the decretal amount deposited by the Appellant is short by at least Rs.1,221,935/- and not merely Rs.21,935/- in addition to the 5% of purchase money which too has not been deposited. The number of times the Appellant has deliberately flipped-flopped regarding the actual amount allegedly deposited by him to satisfy the decretal amount lays bare the Appellant’s deceptive and malafide conduct and attempts to deceive the court. Such conduct of the Appellant is highly deprecated.
13. The Appellant has filed the Underlying Application under the provisions of Order 21 Rule 89 CPC. This said provision affords an opportunity and a means to the judgment debtor of setting aside the sale after it has been validly carried out by making payment of the amount specified in the proclamation of sale minus any amount received by the decree holder since the date of proclamation of sale along with a further sum of 5% of the purchase money for payment to the auction purchaser. But, in order to avail this opportunity, the judgment debtor is required under Article 166 of the *Limitation Act, 1908* to file the application as well as make the deposit within a period of 30 days from the date of sale. Such a course of action

draws support from a long line of judgments of the Supreme Court which include Asma Zafarul Hasan vs. United Bank Ltd (1981 SCMR 108), Muhammad Ikhlag Memon vs. Zakaria Ghani (PLD 2005 SC 819), Anwar Sultana vs. Bank Al Falah (2014 SCMR 1222), and Zakaria Ghani vs. Muhammad Ikhlag Memon (PLD 2016 SC 229). The *Muhammad Ikhlag Memon* judgment (reported in PLD 2005 SC 819) was delivered by the Supreme Court in civil appeal and later affirmed by it in review in the *Zakaria Ghani* case (reported in PLD 2016 SC 229).

14. In *Asma Zafarul Hasan*, the Supreme Court ruled:

[At page 111] *The plea of the inadequacy of the sale price was also rejected on the premise that as the petitioner or her counsel had failed to object at the time the offer was accepted, it was not open how [sic] to make a grievance of it.*

*In seeking leave to appeal, the learned counsel for the petitioner contended that the application was not time barred. In contending so, his plea was that the time should be reckoned from the date of the issuance of the sale certificate; but having regard to the language of Article 166 of the Limitation Act, the date of sale is the date on which the hammer falls at a public auction or in case of private sale when the offer is accepted.*

15. The Supreme Court in *Muhammad Ikhlag Memon* (the civil appeal judgment) determined:

19. *The negotiated offer made by the appellant having been accepted by the Banking Court, the appellant had acquired legal rights and interests in the properties purchased by him. In Janak Raj's case (AIR 1967 SC 608), it was held that once payment of the sale price by the auction-purchaser in compliance with the orders of the Court had been made, it was the duty of the Court to confirm the sale as required by Order XXI, rule 92, C.P.C. Even where the Court fails to pass an order of confirmation that could not lead to deprivation of right of auction-purchaser or cause prejudice to him. In such a case, it could be deemed that the sale stood confirmed and would be deemed to have become absolute in title by virtue of section 65, C.P.C. which would relate back to the date of sale. In the case of Hudabia Textile Mills (supra), the legal rights and interests of auction-purchaser were recognized which would not be defected [sic].*

16. In *Anwar Sultana*, the Supreme Court held:

8. *Rules 89 requires that two primary conditions relating to deposit must be fulfilled. The applicant must deposit in the Court for payment to the auction purchaser 5% of the purchase money; he must also deposit amount specified in the proclamation of sale, lest any amount received by the decree holder since the date of proclamation of sale, for payment to the decree holder. Rule 89 of Order XXI, C.P.C. is intended to confer a right upon the judgment-debtor even after the property is sold to satisfy the claim of the decree holder and to compensate the auction purchaser by paying him the 5% of the purchase money. The provision is intended to*

*defeat the claim of the auction purchaser unless the decree is simultaneously satisfied. Article 166 of the Limitation Act requires such an application as well as the deposit thereunder both are to be made within the period of 30 days from the date of sale. The deposit is a condition precedent to the entertainment of the application and the Court cannot extend time for deposit of the amounts under section 148 of the C.P.C. The date of sale used in the Rule relates to the date on which the property was knocked out to the highest bidder and not the date of confirmation. It may be observed that the Rules in the Civil Procedure Code are intended to secure proper administration of justice and it is, therefore, imperative that, they should be made to serve and be subordinate to the purpose rather than be left to operate as tyrant master. The Rule does not provide a permission of the Court for depositing all the amounts referred to in clauses (a) and (b) of Sub-Rule (1) Order XXI, Rule 89, C.P.C. as these amounts are known to the judgment debtor and are required to be deposited to establish his bona fide. In the case in hand, admittedly, the application was made by the appellants within 30 days from the date of sale but no amount was deposited by them which was a condition precedent to the entertainment of such an application. The Executing Court in law, was neither competent to entertain the application of the appellant nor empowered to extend time for depositing the amounts specified therein, as such an extension was barred under Article 166 of the Limitation Act.*

17. The Supreme Court case of *Zakaria Ghani* (the review judgment) holds:

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 accrued in favour of the auction purchaser.*

18. Having regard to the above principles and applying the same to the facts of the present First Appeal, the record reflects that the sale by auction of the Subject Property took place on 8.4.2017 whereas the Appellant himself admits (in paragraph 3 of this Appeal) that he partially deposited a sum of Rs.3,200,000/- (out of the decretal amount of Rs.4,421,953/-) with the Nazir of the Banking Court on 24.4.2017 and 24.5.2017 i.e. 15 days after the auction. Besides this, the Underlying Application was filed 11 months late on 9.3.2018, which is well beyond the stipulated period of 30 days and, thus, violative of Article 166 of the *Limitation Act, 1908*. To make matters worse, as demonstrated in the preceding paragraphs, the Appellant has not even deposited the decretal amount (of Rs.4,421,953/-) as required by Order 21 Rule 89 and a substantial portion amounting to Rs.1,221,935/- plus the 5% of purchase money (and not just a sum of Rs.21,935/- as repeatedly claimed by him) has not been deposited by him prior to filing the Underlying Application.

19. Conversely, for the sake of argument only, even if we were to take a view most favourable to the Appellant and accept his submission that only an amount of Rs.21,935/- remained undeposited (to borrow his words a “*peanut amount*”), this too is of no help to the Appellant and this amount which he belittles as trivial and puny shall also be the cause of his undoing since even non-deposit of this allegedly meagre amount constitutes under the law a failure on his part to make the requisite deposit under Order 21 Rule 89 CPC. Reference in this regard is made to *Muhammad Suleman vs. Allied Bank* (1987 CLC 1338) wherein a learned Division Bench of the Lahore High Court held:

5. ....  
 ....  
 .... In *Amritlal Narsilal v. Sadashiv* AIR 1944 Bom. 233 [sic – NB: Correct citation is 1944 (46) BomLR 432] it was held that rule 89 of Order XXI, C.P.C., must be strictly complied with if judgment-debtor wants to take advantage of concession given by that rule. In this case the judgment-debtor had in fact deposited the amount within limitation but by mistake in calculation, the deposit was short by small amount. It was held that rule 89 cannot be considered to have been complied with although the deficiency was made good on discovery of mistake but after limitation. Similar view was taken in *Lutfur Rahman v. Mst. Tahera Khatun and others* PLD 1961 Dacca 303. As such, *Hudaybia Mills*, one of the judgment-debtors whose property was sold by the Court-auctioneer having failed to make requisite deposit under rule 89 of Order XXI, C.P.C., the Court was left with no choice except to confirm the sale.

The *Muhammad Suleman* (supra) judgment was upheld by the Supreme Court in appeal in *Hudaybia Textile Mills vs. Allied Bank* (PLD 1987 SC 512) and then reaffirmed by the Supreme Court in review (as reported in 1991 SCMR 51).

20. In the absence of deposit of the required amount mandated by Order 21 Rule 89 CPC by the Appellant and his Underlying Application also being time barred, the submission of the Appellant that he has complied with or substantially complied with Order 21 Rule 89 CPC requirements is, thus, without force. The Supreme Court of Pakistan in the case of *Ghulam Qadir v. Abdul Wadood* (PLD 2016 SC 712) has ruled that limitation is not a mere technicality of form but is a part of positive law that has to be construed, applied and is to be given due effect.
21. Moving on to the next argument of the Appellant’s counsel (pertaining to holding of sale auction on 8.4.2017 without first deciding his section 12(2) CPC application), the record displays that no appeal was filed by the Appellant against the ex parte judgment and decree which, therefore, attained finality. As per the Appellant, on learning about the judgment and decree he filed a section 12(2) CPC application on 13.4.2015 which was dismissed by the Banking Court vide order dated 18.9.2017. The Appellant challenged its dismissal by instituting First Appeal No.219 of 2017 in October 2017 in this High Court. Later, the Appellant withdrew the said First Appeal



and the same was dismissed as withdrawn unconditionally by the High Court through order dated 24.9.2019. The explanation given by the Appellant (in paragraph 8 of the instant Appeal) for this unconditional withdrawal was that since he had already paid the decretal amount (which is untrue as demonstrated in preceding paragraphs) there, thus, remained no need to set aside the judgment and decree. Whatever may be the Appellant's reasons or wisdom for withdrawing the First Appeal No.219 of 2017, the hard reality is that as soon as he withdrew it (i.e. the primary proceedings), the Banking Court's order dated 18.9.2017 dismissing the 12(2) application attained finality which dismissal order cannot now be attacked and interfered with or made ineffective, by direct or indirect means, in a collateral proceeding i.e. through this present First Appeal. In *Hudaybia Textile Mills* (supra), the Supreme Court has observed that a proceeding withdrawn with the permission of the court is wiped off from the record as non-existent.

22. The final submission raised by the Appellant's counsel is regarding the sale of the Subject Property allegedly at a throwaway price of Rs.6,700,000/- when according to him its actual market value at the relevant time was more than Rs.20,000,000/-. As per the R & P of Execution No.99 of 2015, the auction was held on 8.4.2017 and the Auction Purchaser deposited 25% (amounting to Rs.2,500,000/-) of the bid amount on the same day. The balance 75% (amounting to Rs.4,200,000/-) was deposited on 24.4.2017 i.e. within 15 days as mentioned in the sale proclamation. In October 2017, the Appellant filed an application for re-valuation of auction price of the Subject Property (in which contradictorily he alleged the market value to be Rs.9,800,000/- which is half of what he has now alleged in paragraph Ground (e) of this Appeal). This application was dismissed as infructuous by the Banking Court through order dated 7.2.2018 and the matter ended there as the Appellant did not take any further steps regarding it. On 5.3.2018, the Banking Court confirmed the auction. The record indicates that as per the property valuation report dated 8.2.2016 in respect of the Subject Property (and as stated in the sale proclamation published on 7.3.2017), its assessed market value was Rs.7,016,005/- and forced sale value was Rs.5,600,000/-. The Auction Purchaser's bid of Rs.6,700,000/- being the highest amongst the participants and also being higher than the forced sale value was, thus, accepted. It can be seen that there is hardly a difference of Rs.300,000/- approximately between the then assessed market value and the auction price at which the Subject Property was sold. It, therefore, cannot be said that there was a huge gulf between the auction price and the then assessed market value. Noticeably, no report of any valuator or any other document has been produced by the Appellant to support his bare assertion regarding the then prevailing market value alleged by him. Coming to the case of *Muhammad Khalil vs. Faisal M.B. Corporation* (2019 SCMR 321) cited by the Appellant's counsel, the facts of the referred case are quite distinguishable from the facts of the present case. In *Muhammad Khalil* case, the sale price was not only less than the actual

market value but it was also substantially less than the District Collector valuation rate. The auction proceedings were also not conducted on the spot and nor had the executing court confirmed the auction as a result of which the Supreme Court observed that no vested rights had, thus, accrued in favour of the auction purchaser. The reliance placed by the Appellant's counsel on the said reported case is, therefore, misplaced. In the present case, having deposited the entire bid money within the time stipulated by law, and in addition, upon confirmation of sale by the Banking Court, the Auction Purchaser had acquired valuable rights in the Subject Property which rights, lawfully conferred by the Court, have to be protected and cannot be taken away.

23. For the above reasons, no case for interference in the Impugned Order is made out and we find no merit in this First Appeal which is accordingly dismissed along with pending application with no order as to costs.

**JUDGE**

**JUDGE**

Karachi  
Announced on: 23<sup>rd</sup> May, 2023