

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Jawad Akbar Sarwana

First Appeal No.82 of 2023

Muhammad Ifrahim and another
Versus
M/s. J.S. Bank Limited and others
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Date of hearing: 20.12.2023

M/s. Mukesh Kumar G. Karara and Nabi Bux Laghari, Advocates for the Appellants.

Mr. Suleman Huda, Advocate for Respondent No.1.

Mr. M. Mubin Khan, Advocates for auction purchaser.
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J U D G M E N T

Muhammad Shafi Siddiqui, J.- This First Appeal under Section-22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, arises out of two orders of the same date that is 17.08.2023. The first order was passed on an application under Section-XXI Rule-90 CPC, whereas, the other order confirms the sale of the mortgaged property. A banking suit No.10/2021 was decreed against a mortgaged property for the recovery of the outstanding loan. The said judgment & decree attained finality in its normal course.

2. The judgment-debtors/appellants moved an application after two years under section 12(2) CPC which was dismissed on 06.04.2023 by the Banking Court No.II, Karachi. Record shows that the judgment-debtors/appellants, against the said order on application under section 12(2) CPC preferred an appeal before this court as Banking Appeal No.51/2023, which is pending adjudication. It is not requested to be heard along with this appeal and was traced by court when the file of this appeal was

scrutinized. Record further shows that the availability of an application after dismissal of the application under Section 12(2) CPC by the Banking Court No.II, i.e. for re-ascertaining the value of the mortgaged property, which application was “not recognized” to have been lawfully filed by banking court. There was neither a presentation date on it nor any sworn affidavit in support thereof, whereas another application under Order-XXI Rule-90 was filed on 21.07.2023. The two orders thus, that is, the first order that disposes off application under Order-XXI Rule 90 CPC and the other that confirms the sale, are impugned in this appeal.

3. We have heard learned counsel for the parties and perused the material available on record.

4. The Banking Suit No.10/2021 was decreed on 13.02.2021. In pursuance of such judgment and decree, the mortgaged property was put to auction. Terms were settled under Order-XXI Rule-66 CPC. Sale proclamation was issued on 25.02.2023.

5. The appellants disputes the value of the property. In support of their application under Order-XXI Rule-90 CPC, this appeal only says that during pendency of an application for re-ascertaining the market value, the application under Order-XXI Rule-90 should not have been dismissed. The sale proclamation disclosed the forced sale value of the property which was never objected at the relevant time. The application for re-ascertaining the value does not disclose any value which the appellants/J.Ds claimed to be correct and/or could have been fetched. There was no offer suggested. More importantly, the terms as set out in the sale proclamation in terms of Order-XXI Rule-66, were never challenged either (i) at the time of sale proclamation (ii) when the offer was accepted. The offer

was accepted on 17.08.2023 on which date no better bidder came forward, even the judgment-debtors could not bring a buyer who could offer a better price. The application under Order-XXI Rule-90 CPC requires the judgment-debtors to prove the irregularity and fraud in the sale of the property first. The banking court dismissed the application as terms of sale proclamation were never objected when settled. Last diary of Banking Court 06.04.2023 written when application under Section 12(2) CPC was dismissed with cost of Rs.100,000 and when application for revaluation was filed, there is neither any diary of Reader nor date of presentation. The other ground however that prevailed in dismissal of application under Order XXI Rule 90 CPC is non-deposit of requisite amount for entertaining the application under Section-XXI Rule-90 CPC and absence of fraud/irregularity.

6. Appellant here has not presented a case that they were anticipating a discretion to be exercised by the court in directing them to secure the amount which may be adjudged by the Bench as deemed appropriate. The grounds for setting up a case of second proviso of Rule-90 of Order-XXI CPC could be applied when the appellants/ judgment-debtors had crossed the first hurdle of establishing a case of material irregularity and fraud, which has not been demonstrated at all.

7. The first part of Rule-90 of Order-XXI provides that the judgment-debtor or anyone showing interest that has been affected by the sale could, on disclosing substantial injury sustained, may apply to Court on the ground of material irregularity or fraud in publishing or conducting it. Publishing means issuance of sale proclamation and conducting means auction process, which was

undertaken pursuant to sale proclamation. Appellant presented a case which seems to be based on surmises and conjectures as only insufficiency of price was pleaded without any support. The judgment-debtors thus have not made out a case of the first proviso to Rule-90 of Order-XXI.

8. To be in a frame of first proviso and also to pass through, appellants had to show that they had sustained substantial injury by such irregularity and fraud. Appellants never proved that fact of insufficiency of price to sustain injury in terms of first proviso. Second proviso comes later as “further” to first proviso; means on being satisfied of sustaining substantial injury, the Court then only assume frame of second proviso. It is not appellants’ case in the application that the court would direct them to secure and deposit the amount not exceeding 20% of the sum realized on the sale or furnish such security, hence, the case of the appellants cannot be framed directly within the second proviso to Rule-90 of Order-XXI.

9. The case of Samrana¹, which attempted to disagree with the earlier pronouncement relating to the second proviso, cannot be applied for the benefit of the appellants/ judgment-debtors, directly, unless a case of fraud and irregularity is made out first, which may have caused substantial injury to those identified in first part of Order XXI Rule 90 CPC.

10. The latest case that covers the controversy under Order-XXI Rule-90 CPC is of Samrana above which formed a different view than the one formed in the earlier case of Habib & Company² both decided by Supreme Court. Since the earlier pronouncement of equal strength of Judges is binding on the subsequent bench of

¹ PLD 2021 SC 581 [Samrana Nawaz and others v. M.C.B. Bank Ltd. and others]

² PLD 2020 SC 227 [Habib & Company and others v. Muslim Commercial Bank Limited & others]

equal strength of Judges, the Hon'ble Bench in Samrana referred the matter to Hon'ble Chief Justice for constitution of larger bench to reconsider the view formed earlier. However, appellants, as stated above, are yet to fall directly within the frame of second proviso of Order-XXI Rule-90 CPC. Firstly, appellants never passed the first hurdle and in the application they never prayed or requested to ascertain amount other than 20% of the sale price. All he said was that value of property not properly ascertained in the sale proclamation and that constitute fraud and irregularity. Secondly, the appellant never challenged terms of sale proclamation. Auction took place on 04.07.2023 and offer was accepted. Appellant did not bring better buyer to establish injury. Sale was confirmed on 17.08.2023 and even on that day, there was no better offer than the one in who's favour sale was confirmed.

11. Without prejudice to above, it is not the frame of Order-XXI Rule-66 CPC to exactly suggest a value of property in the sale proclamation. Order XXI Rule 66(2)(b) CPC above is other than market value of property, however the cumulative effect of rule suggest that for a transparency estimated value should have been there. Under sale proclamation only following pre-requisites are essential:-

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 incumbrance 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 of 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.

12. The value and/or forced sale value is provided in the sale proclamation only as equity and to have an idea about the possible price. This jurisprudence developed later and summarized in the case of M/s Lanvin Traders Karachi³. The observations made in para 11 and 12 of the judgment made the interpretation clear.

13. The judgment-debtors/appellants have failed to make out a case of any irregularity or fraud that was committed either by the decree-holder or by the auction purchaser and we maintain the conclusion by our own reasons.

12. These are the reasons of our short order dated 20.12.2023.

Dated: - _____

JUDGE

JUDGE

Ayaz Gul

³ 2013 SCMR 1419 (M/s Lanvin Traders Karachi v. Presiding Officer Banking Court No.2, Karachi).