

2015 C L C 916

[Sindh]

Before Muhammad Shafi Siddiqui, J

Messrs SAUDI ARABIAN AIRLINES----Applicant

versus

**Messrs INTERNATIONAL MARKETING CORPORATION and others----
Respondents**

Execution Application No.49 of 2009, Suit No.1101 of 2000, C.M.As. Nos.309 and 325 of 2013, decided on 22nd September, 2014.

Civil Procedure Code (V of 1908)---

---O. XXI, Rr. 22 & 66---Execution petition---Sale of attached property---
Objections---Notice to Judgment-debtor to settle terms of sale---Necessity---
Deposit of decretal amount, application for---Constructive res judicata, principle
of---Applicability---Contention of judgment-debtor was that neither notice for
sale proclamation nor for settling terms of sale were issued---Validity---No notice
under O.XXI, R.66, C.P.C. was issued to the judgment-debtor nor such
application had been preferred---Decree-holder was bound to apply for a notice
under O.XXI, R.66, C.P.C. so that judgment debtor had an opportunity of raising
objection to the sale, if any, or assist in settling terms to sale--- Judgment-debtor
was entitled for notice to settle terms of sale proclamation---Judgment-debtor
would lose right to object the execution petition after his service through public
notice---Service of earlier notice would not take away the right of judgment-
debtor to claim notice when property was put to auction---Sale could not be
considered to be a valid sale in absence of notice under O.XXI, R.66, C.P.C.---
When the judgment-debtor, in response to the notice, failed to appear, he was
precluded by the rule of constructive res judicata from raising such objection at a
later time and not by virtue of notice under O.XXI, R.66, C.P.C.---Non-
compliance to the provisions of O.XXI, R.66, C.P.C. might vitiate the sale on
account of material irregularity---Application for deposit of decretal amount was
accepted in circumstances.

Messrs Lanvin Traders, Karachi v. Presiding Officer, Banking Court No.2,
Karachi 2013 SCMR 1419; National Bank of Pakistan v. SAF Textile Mills Ltd.
PLD 2014 SC 283; Messrs Ripple Jewellers (Pvt.) Ltd. v. First Women Bank,
2003 CLD 1318; Khursheed Begum v. Inam-ur-Rehman Khan PLD 2009 Lah.
552; Muhammad Hassan v. Muslim Commercial Bank Ltd., 2003 CLD 1693;
Liaquat Ali v. Bashiran Bibi 2005 CLC 11 and Ali Match Industries Ltd. v.
Industrial Department Bank of Pakistan 1999 MLD 2127 rel.

Muhammad Amin for Decree holder.

Mrs. Sofia Saeed for Judgment debtor.

Mohsin Shahwani for Bidder/Auction purchaser.

Date of hearing: 18th April, 2014.

ORDER

MUHAMMAD SHAFI SIDDIQUI, J.---By this order, I intend to
dispose of application bearing C.M.A. No.309/2013, filed under Order XXI,
Rules 58, 66, 69, 77, 83, 86 and 90, C.P.C. and other application bearing C.M.A.
No.325/2013, under section 151, C.P.C., for depositing the decretal amount. The

judgment debtors have challenged the orders dated 17-6-2013 and 15th, 22nd and 29th July, 2013, which are a series of orders in pursuance of the sale of the property bearing Plot No.A-40, Block 7 and 8, Karachi Cooperative Housing Society.

2. In brief, the facts of the case are that the decree holder filed suit against the judgment-debtors in respect of some outstanding amount towards the sale of the air tickets. The suit was accordingly decreed ex parte by effecting service on the judgment-debtors through publication. Subsequently the instant execution application was filed and since no fresh address was available, the service was ordered to be made effective through substitute service through Daily "Jang", Courier Service, Registered Post and by pasting on the last known address of the judgment-debtors.

3. Since the service was effected through publication, it was held good and the Nazir was directed to attach any of the mentioned properties in the execution application which may satisfy the decretal amount. In the same order dated 14-10-2010 it was observed that the bids shall be placed before the Court for approval within one month. Subsequent to this order Nazir submitted his report dated 17-8-2011, however, it appears that no one appeared pursuant to the said public notice for auction and Nazir was directed to issue fresh publication for auction on cost, on 17-10-2011.

4. Pursuant to order dated 17-10-2011 second public notice was issued on 20-12-2011 for holding auction on 3-1-2012 when no bid was received per Reference dated 7-1-2012. Third notice appears to have been issued but copy of such publication and date of auction is not traceable. Such reference is available at page 25, filed on 1-12-2012.

5. On 5-4-2013 Mr. Amanullah Khan, advocate, appeared on behalf of one applicant and proposed to purchase the subject property in the sum of Rs.60,00,000, however, it was observed that thrice the matter was put to auction by Nazir of this Court but no offer was received as stated in the Nazir's reports dated 17-8-2011, 7-1-2012 and 1-12-2012. Nazir was further directed to examine the offer of the applicant and to submit his report and to assess the then existing value of the subject property through the Estate Agents.

6. On 26-4-2013 another applicant through Mr. Mohsin Shahwani, advocate, appeared and proposed to buy the subject property in the sum of Rs.10 million and both the applicants were directed to appear before the Nazir on 4-5-2013. On 6-6-2013 an urgency application was moved and the matter was adjourned to 17-6-2013 after issuance of notices to the decree holder/plaintiff only. On 17-6-2013 the bid of one of the applicants represented by Mr. Mohsin Shahwani, advocate, was accepted. The objections were raised by the second highest bidder, which objections were declined vide order dated 15-7-2013 and the Nazir was directed to issue sale certificate in accordance with law and on 29-7-2013 Nazir was directed to resume possession of the property in question. On 5-8-2013 the Nazir was further directed to break open the locks and obtain the requisite police aid from the concerned D.I.G.

7. It is at this stage when the judgment debtor No.1 moved to this Court and filed application bearing C.M.A. No.309/ 2013, referred to above, on 17-8-2013, whereupon the parties were directed to maintain status quo.

8. It is the case of the applicant that not only the judgment and decree were obtained by fraud and misrepresentation, but the orders impugned in one of the under consideration application are also obtained through misrepresentation and fraud. It is claimed that out of the four properties only one property mentioned above was ordered to be attached, however, no effective attachment was made and hence the subsequent proceedings in relation to the sale of the property are all illegal and void ab initio.

9. Learned counsel for the applicant submitted that despite the fact that the Nazir has placed his report that the subject property is/was mortgaged with the Allied Bank Limited, no heed was paid. It is contended that the process of auction since inception was conducted in an illegal and irregular manner and even the purported acceptance of bid and thereafter process followed were fraudulent in exercise, as neither any notice in respect of the settling terms of sale proclamation under Order XXI, Rule 66, C.P.C. was issued nor any such application was filed. It is contended that neither in the first nor in the second publication/sale proclamation the reserved price of property in relation to the market value was reserved, whereas the third publication is not available on Court file. It was further contended that in terms of clause (f) of the publication regarding sale of the subject property it was made conditional that the Court reserves right to reject all or any of the offers without any reason if the offers are not as per the market value. It is contended that despite three alleged publications no one came forward and the instant sale was done without causing or effecting any fresh public notice as required under the law.

10. An application by first bidder was made, which was fixed on 5th April, 2013, on which date the Nazir was directed to assess the existing market value, which came out to be seven times higher than the first offer made.

11. It is argued that another applicant came forward, who was also interested in the subject property and has offered a sum of Rs.10 million. It is contended that on 17-6-2013 the bid was accepted without notice to the judgment debtors, while it was fixed for orders. Learned counsel contended that the purported sale suffers from illegality and irregularity as no compliance of Order XXI, Rules 54, 66, 69, C.P.C. has been made. It is further averred that no sale proclamation in accordance with law was issued and no notice as required under the law was issued to the judgment debtors for settling terms of sale. The learned Counsel argued that market value at the very outset was not mentioned in the proclamation and the offered price was no-where near the estimated value of the Nazir which was already on record pursuant to the orders of the Court. Learned counsel for the applicant submitted that there is no specific denial of such facts and that the limitation would commence from the date of the knowledge, which was 17th of August, 2013. He submitted that no sale certificate could be ordered to be issued prior to the expiry of 30 days and the interest of the applicant has not been safeguarded despite the fact that there is difference of significant amount in the proposed offer and the estimated value ascertained by the Nazir through the assistance of the Estate Agent which was in between 30 million to 45 million rupees, whereas offer that was accepted was 19.5 million rupees. Learned counsel argued that attachment order was not made effective and the witnesses have not endorsed that such attachment was made in their presence.

12. In reply to the arguments of the learned counsel for the judgment debtors, the learned counsel for the auction purchaser after giving facts of the case submitted that the application under consideration is time barred by virtue of Article 166 of the Limitation Act. He submitted that the judgment debtors had notice of the execution proceedings when several publications in widely circulated newspapers viz., daily "Dawn", "Jang" and "Millat" were issued. He submitted that notice in the execution application was issued in 2009 and the writ of attachment of the subject property was executed on 28-4-2011.

13. He submitted that all rights in the property were transferred to the auction purchaser on completion of 30 days of the final bid and also on issuance of sale certificates. He submitted that the final auction took place on 25-5-2013 when the auction purchaser was declared as highest bidder. The judgment debtor had 30 days time to object this sale which he has failed and hence he lost all his rights in the property after completion of sale. He further contended that the provisions of Civil Procedure Code with regard to the proclamation of sale, its publication and the conduct of sale in execution are not material irregularities and cannot be termed or regarded as illegalities thereby rendering the sale as nullity. He submits that the objections in any case should be raised within the limitation and after

completion of sale such objections shall not ordinarily be allowed to be considered except on the ground of fraud.

14. He submitted that if at all there was any error in the proclamation, which, according to the learned counsel for the judgment debtors, was not in compliance of the Civil Procedure Code then no one shall be prejudiced or penalized on account of Court's inadvertence, mistake or error. He submits that the judgment debtor has failed to establish the fraud between the decree holder and the auction purchaser. He submits that the judgment debtors have failed to come forward and defend the proceedings since beginning and hence are not entitled to reply. Learned counsel further submits that applicant filed High Court Appeal No.101/2013 which was dismissed as withdrawn, wherein the same proceedings have been challenged, hence it is also hit by the principle of res judicata.

15. Learned Counsel for the decree-holder in reply to the arguments has argued that application is mala fide. He submitted that the judgment and decree passed in Suit No.1101/2000 and the orders dated 15-7-2013 and 29-7-2013 passed in this execution application have become final. He submitted that the High Court Appeal No.101/2013 was also filed which was withdrawn. He submitted that on 14-10-2010 the Nazir was appointed as commissioner to attach the properties to the satisfaction of the decretal amount, whereby the subject property was attached. He thus submitted that the instant application has no merit and is liable to be dismissed.

16. Heard learned counsel and perused the material available on record.

17. In order to reach to the real controversy involved in the suit it is necessary to give a very brief background of the proceedings resulting in the judgment and decree passed in Suit No.1101 /2000.

18. On account of the failure of the judgment debtors to pay outstanding amount, the decree holder filed the aforesaid suit and obtained judgment and decree dated 22-5-2002 in the sum of Rs.31,76,386. The decree holder filed the instant execution application after obtaining ex parte decree. After filing execution application, the decree holder filed statement on 13-6-2009 mentioning the market value of the property as Rs.30,674,000. The record of this file shows that two sale proclamations were issued in respect of the sale of the subject property but a reference dated 1-12-2012 filed by Nazir shows that there was a third publication as well. Perhaps copy of such publication is not placed on record by Nazir. The first publication was made on 1-7-2011 in daily "Jang", "The News" and daily "Millat", whereas the second publication was made on 20-12-2011 in daily "Jang", "The News" and daily "Millat" Nazir's reports in pursuance of such publications are also available mentioning therein that no bid was received. However, the date of third publication is not traceable from record.

19. On 5-4-2013 C.M.As. Nos.131 and 132 of 2013 were fixed, wherein one applicant desired to purchase the subject property for Rs.60,00,000 only. I may add that the offer was not in pursuance of any proclamation as it was filed after 4 months of last purported sale proclamation. On such application, Nazir was directed to examine the offer of the applicant and submit his report and "assess" the existing market value of the subject property through Estate Agents. Subsequently the Nazir submitted his report in pursuance of the aforesaid order and the assessed market value came as Rs,450,00,000 per Gulistan Estate and Rs.300,00,000 per S.A. Estate. This report was filed on 20-4-2013 (Page 49, Part-II) and the matter was fixed on 26-4-2013 for orders on the Nazir's report.

20. On 26-4-2013, Counsel for another applicant, Mr. Mohsin Shahwani filed Vakalatnama on behalf of one Aamir Ahmed who offered to purchase the subject property in the sum of Rs.100,00,000 and the parties were directed to appear before the Nazir of this Court on 4-5-2013 to offer their bids, while Nazir was authorized to entertain the bidders provided a better offer would be fetched and reference was required to be placed before the Court.

21. On 6-6-2013 during vacations the counsel Mr. Mohsin Shahwani filed an urgent application and the notices were issued to the plaintiff's/Decree Holder's counsel for 17-6-2013, on which date the Nazir's report dated 3-6-2013, which was filed in Court on 4-6-2013, was noticed wherein the highest bid of Rs.19,500,000 was considered to have been received for the property in question and the "decree holder" stated to have no objection on its acceptance. The bidder was directed to proceed in accordance with law and the bidder was directed to deposit the balance amount as per rules.

22. With this background the judgment debtor has placed his case in the frame of facts as referred above. It was only when the permission to break open the locks was granted to the Nazir with direction to take over the possession of the property was ordered, judgment debtors came to know about such proceedings.

23. The auction proceedings involved in the instant proceedings are to be seen on the touchstone of Order XXI, Rules 66, 69 and 90. It is also to be seen as to whether any fraud or illegalities have been committed to deprive the judgment debtors from the valuable rights in the property and the value of the property. The core issue started when public notice/sale proclamation was ordered to be issued for the first time without settling terms of proclamation. Again on 6-6-2013 when during summer vacations, on an application of one of the applicants/ auction purchasers the notices were issued to "plaintiff's counsel" (perhaps the decree holder) for 17-6-2013. It is significant to note that on 6-6-2013 the Nazir's report filed on 4-6-2013, though it is referred as of 3-6-2013, was fixed for orders. (I may note that since there is some confusion with reference to date of Nazir's report, I have considered the date of filing of report as actual dates). It is a matter of fact that notices were not issued to the judgment debtors despite the fact that the matter was fixed for an application filed by the applicant/auction purchaser during summer vacation and on a subsequent date, which also fell during summer vacations i.e., 17-6-2013. On a no objection given by the decree holder, the bid was accepted and the Nazir was directed to proceed in accordance with law subject to deposit of the balance amount. All this happened during summer vacation when the judgment debtor had no notice under Order XXI, Rule 66, C.P.C.

24. The order of 17-6-2013, when read along with order of 5-4-2013, shows that it does not provide a legitimate way-out for accepting the so-called highest bid of Rs.19,500,000, since the Nazir was directed to assess the existing market value of the subject property through Estate Agents, which he has done. Surprisingly the Nazir's reference of 20th April, 2013, which was referred as reference of 19-4-2013, has not been placed either on 6-6-2013 or on 17-6-2013 when such orders of acceptance were passed. The said report of the Nazir of 20th of April, 2013 was last fixed on 14-5-2013 when no orders on the said report was passed. This report was not fixed by office when the matter was placed in Court after sometime during summer vacations when an application was moved by one of the applicants, who desired to purchase subject property. The subsequent order of 15-7-2013 was passed only on account of the fact that the entire amount has been deposited as reflected from the Nazir's report dated 10-7-2013 and has also disposed of the applications of one Muhammad Aamir, who was the second highest bidder, however, on 15-7-2013 the objections of the learned counsel for the judgment debtors were not on record, nor there was any representation on behalf of the judgment debtors since the matter was taken up on an application of the applicant/auction purchaser during summer vacations and both June and July are scheduled as summer vacation. The auction of the subject property during summer vacations without notice to the judgment debtors and by consent of the decree holder would certainly raise questions as to why such report showing value of the property has not been placed on crucial dates for consideration and that during vacation it has been done surreptitiously and that too without notice to the judgment debtors.

25. When these facts are seen on the touchstone of the judgment passed by the Hon'ble Supreme Court in the case of Messrs Lanvin Traders, Karachi v. Presiding Officer, Banking Court No.2, Karachi reported in 2013 SCMR 1419, it clearly smells mala fide. No doubt, after the service was held good in terms of Rule 22 of Order XXI on the judgment debtors through public notice he loses rights insofar as objections to the execution application are concerned, but as far as settling terms of sale proclamation is concerned, still the judgment debtor is entitled under Order XXI Rule 66, C.P.C. for notice to settle terms of sale. The service of earlier notice shall not take away the right to claim notice when property is put to auction. In this particular case Court itself embarked upon one of such terms i.e., ascertaining the market value of the subject property which was complied with by the Nazir of this Court and which report was not placed before Court at the time of acceptance. Such concealment would certainly tend to damage the rights of the judgment debtors as a sale has been effected in favour of a party depriving the judgment debtor from his valuable rights and value of the property. Such ingredients including the assessed value of property would form a foundation for a judicial determination of the rights of the parties including auction of the subject property. When one of the foundation i.e., the true disclosure of the value of the property is concealed and apparently it was sold at a price which was less than 50%, the judicial determination confirming sale would be considered as based on irregularities, illegalities and fraud.

26. Though an order with regard to the attachment of property was passed, however, the record shows that the report of the Bailiff is silent as far as the requirement of the attachment is concerned. On 14-10-2010 the Nazir was appointed as commissioner to attach the property. In compliance of the attachment order the Nazir has submitted his report allegedly complying with the order, however, the Bailiff's report as accompanied with the Nazir's report of 14-5-2011 does not disclose as to whether the signatures of the witnesses have been obtained, hence the order of the attachment purportedly complied by the Nazir is not to the satisfaction of this Court. It appears that the entire process was cleverly maneuvered to deprive the judgment debtor of his valuable rights.

27. Considering the facts of the case it appears that it has been planned in a way as to keep the judgment debtors away from exercising his rights in terms of settling the terms of proclamation under Order XXI, Rule 66, C.P.C. Not only that the assessed value of the property was concealed, but the proceedings allegedly accepting the bid upto the issuance of sale certificates were exhausted during summer vacations and that too without notice to the judgment debtors. It has been held in the case of Messrs Lanvin Traders, Karachi (supra) as under:--

"Agreed that the expression "reserve price" does not find mention in the relevant rule but the words used in the rule pointedly hint thereto. A sale, in its absence, is apt to give walkover to manoeuvrers to fix any price of their choice. A sale thus effected is no sale in the eye of law especially when the number of bidders is meager, which, indeed is close to nil. A superstructure of sale built on such a shaky infrastructure cannot sustain itself. Neither the buttress of limitation nor the ministerial nature of the rule can prevent it from a fall. We, therefore, are constrained to hold that the whole proceedings from inception to the end have not been held in accordance with law and thus cannot be blessed with any sanctity."

28. In paragraph No.12 of the judgment in the case of Messrs Lanvin Traders, Karachi (supra), following observations were made by the Hon'ble Supreme Court:---

"12. Crux of what has been discussed above is that clever maneuvering forcing way for disposal of a property in execution of a decree for a paltry sum has to be guarded against and jealousy so with all the care and circumspection so that it may go for a sum it deserves. The judgments rendered in case of "Messrs Majid and Sons and another v. National Bank of Pakistan through Manager and another", "Messrs Magi Chemicals Industries v. Habib Bank", "Appu alias Subramania Patter v. O. Achuta Menon and others", "Mir Wali Khan and another

v. Manager, Agricultural Development Bank of Pakistan, Muzaffargarh and another" (supra) may well be referred to in this behalf. The learned counsel when faced with this situation also sought to invoke the application of section 99 of the Code by submitting that no decree or order could be reversed or modified for an error or irregularity not affecting the merits or jurisdiction but we are afraid the argument addressed on the strength of the aforesaid provision could not be of any help to him when it is rather incontestably clear on the record that such errors and irregularities have affected the merits of the case."

29. In the case of National Bank of Pakistan v. SAF Textile Mills Ltd. reported in PLD 2014 Supreme Court 283, it has been held as under:---

"40. As a supplement to the aforesaid, it may be noted that no doubt, some rudimentary procedure for conducting such sales is provided in subsection (4) of section 15 of the Ordinance of 2001 but yet again the time honoured and well entrenched principle of fixation of a "reserve price" is conspicuous by its absence. It is now well settled law that even where the sale is conducted by the Court a "reserve price" is essential and the absence thereof may be fatal."

30. In para No.41 of the said judgment in the case of National Bank of Pakistan (supra), it was further held as under:--

"41 The conscious exclusion of remedies and deliberate omissions provide for a due process of conduct of sale including the absence of the necessity to fix a reserve price becomes even more significant, as the Financial Institution has been clothed with the right to purchase the property put by it to public auction at the highest bid. No permission, in this behalf, is required from any Court, as is in the normal course in terms of C.P.C. Thus, in fact, it is a Financial Institution which is the seller, buyer, the auctioneer and the beneficiary, hence enabled to take full advantage of the misfortune of the mortgagor/ debtor thereby facilitating predatory and exploitative behaviour which perhaps would not sit well with Article 3 of the Constitution."

31. In the instant case as well, since the judgment debtor was absent, the compliance of such essentials referred above are extremely inevitable since the decree holder and auction purchaser have done it with consent.

32. It is also pertinent to point out that the last publication for sale of the subject property in pursuance of the order dated 13-8-2012 was published in a newspaper for the auction of the property on 28-11-2012, however, the said publication is not available along with reference of the Nazir dated 1-12-2012. It has been reported that no offer was received in pursuance of the alleged third publication and after 04 months of the purported third publication one applicant came forward and offered Rs.60,00,000 of the subject property. This cannot be deemed to be in pursuance of any sale proclamation.

33. I have noted that in the instant case no notice in terms of Order XXI, Rule 66, C.P.C. was issued. In fact no such application has been preferred. It is for the decree holder to have applied for a notice under Rule 66 so that the judgment debtor may have an opportunity of raising objection to the sale, if any, or may assist in settling terms to sale. It is material irregularity and in absence of such notice under Rule 66 of Order XXI the sale cannot be considered to be a valid sale. It is only when the judgment debtor in response to a notice under Order XXI, Rule 66, C.P.C. fails to appear, he is precluded by the rule of constructive res judicata from raising such objection at a later time and not by virtue of notice under Order XXI, Rule 22, C.P.C. Non-compliance of the provisions of Rule 66 may vitiate the sale on account of material irregularity.

34. Reliance is also placed on the case of Messrs Ripple Jewellers (Pvt.) Ltd. v. First Women Bank, reported in 2003 CLD 1318, wherein a Division Bench of Lahore High Court recorded the following observations:--

"6. We are of the view that by non-issuing the notices, under the said provisions of law, the learned Banking Court has committed glaring illegality, thereby vitiating the ultimate sale. It has been held in Brig. (Retd.) Mazher-ul-Haq and another v. Messrs Muslim Commercial Bank Limited, Islamabad and another (PLD 1993 Lahore 706), that contravention of provision of Order XXI, Rule 66, C.P.C. could render the sale nullity.

7. In the above perspective, we are of the view that non-issuance of notice, under Order XXI, Rule 66, C.P.C. to the judgment-debtor, has vitiated the entire ensuing proceedings, including the sale in favour of respondent No.2, thus, the sale is nullity in the eyes of law and the same had to be set aside. At this juncture, the learned counsel for the auction-purchaser/respondent No.2 has informed that, in fact, auction-purchaser has deposited total sale price of Rs.11,65,951 with the Court, which has ultimately been withdrawn by the respondent- bank. He has submitted that as the sale has been set aside, therefore, Bank may be directed to refund the said amount to the auction-purchaser."

35. In the same way it has been held in the case of Khursheed Begum v. Inamur-Rehman Khan (PLD 2009 Lahore 552) that the non-issuance of the notice and non-compliance of the provision of Order XXI Rule 66, C.P.C., which is mandatory, shall vitiate the sale on account of the material irregularity.

36. Further reliance was placed on the case of Muhammad Hassan v. Muslim Commercial Bank Ltd., reported in 2003 CLD 1693, wherein it has been observed as under:--

"7. We have heard the learned counsel for the parties. Where a decree is to be executed and satisfied through the sale of an immovable property belonging to the judgment-debtor, there are three mandatory steps, which the Court, in terms of Order XXI, Rules 64 to 66 is required to take. Firstly, to pass a specific order for the sale of the property sought to be sold. Secondly, to appoint the officer, who shall conduct the sale and thirdly, to effect the conduct of sale in the manner prescribed, which manner undoubtedly is provided in Rule 66. In the order dated 6-6-2001, first two requisites i.e. the decision for the sale of the property and appointment of officer in that behalf, are duly met. But for the prescribed manner, such as the settlement of the terms and conditions of the sale and drawing of the proclamation in that behalf under Rule 66, there is no order available on the record. The provisions of Rule 66, are mandatory in nature and without settling and causing a proclamation of the intended sale in terms of said rule by the Court itself, no sale shall be considered to have been lawfully made. The word "cause" appearing in Rule 66, requires a specific order of the Court, which produces the effect of drawing the proclamation envisaging the terms and conditions of the sale. This includes the settlement of the conditions etc., by the Court itself or to approve those, filed by the parties, after hearing them. In the case in hand, as has been conceded by the learned counsel for the decree- holder and also seen from the record that, though a notice was issued to the judgment-debtor for 27-6-2001 for the causing of the proclamation, but as the Court was on leave on that date, no order in that behalf was passed. Same remains the position till the auction conducted by the officers. The record also reveals that the decree-holder Bank never filed the proposed terms and conditions of sale along with their execution application or subsequently. The power to draw the terms and conditions and issue a proclamation has not been delegated by the Court to the Court auctioneers. Therefore, the Court auctioneers could not on their own, issue the proclamation of sale."

37. In paragraph No.9 of the judgment in the case of Muhammad Hassan (supra) following was observed:--

"9. In the instant case, not only that the Court itself has failed to perform its duty to settle or approve the terms and conditions of sale, there is even no order of the Court, through which, such power has been delegated to the Court auctioneer, which otherwise could not at all be so delegated. Resultantly, any publication of

notice of sale by the Court auctioneers, shall be an unauthorized act, and of no legal consequence. It is settled law that no superstructure or legal rights can be based upon the foundation, which is void in nature. Consequently, the sale conducted by the Court auctioneers on 13-10-2001 was void ab initio and, therefore, on account of the principle of avoiding technicalities or that act of the Court shall not prejudice any party, the impugned sale cannot be protected. The sale in favour of the respondent No.4, therefore, was liable to be set aside and could not have been confirmed by the Court, which has been so erroneously and illegally done through the impugned order."

38. Reliance was also placed on the case of Liaquat Ali v. Bashiran Bibi, reported in 2005 CLC 11, in which a Division Bench of Lahore High Court recorded the following observations:--

"23. As far as the first objection is concerned, we may, at the outset, observe that the question of confirmation of sale only arises in case of a valid sale. Although, the provisions of rule 92 as worded, provided no option to the Court but to confirm a sale in case no objections are filed under Rules, 89, 90 and 91 and if filed, have been dismissed. Rule 92, to our mind, does not exclude the duty of the Court to satisfy itself that the sale conducted by the Court auctioneer was bona fide and in accordance with law."

39. The provision of Order XXI Rule 90, C.P.C. has two provisos. The second proviso relates to entertaining such application subject to applicant depositing an amount not exceeding 20% of the sum realized at the sale or furnishes such security as the Court may deem fit. As is clear from the second proviso it is applicable at the time of entertaining such application. This second proviso provides that no such application shall be entertained unless such amount as aforesaid is deposited. It does not relate to passing of the final order under Rule 90 of Order XXI. The primary object of this proviso is to see that the provisions of this rule should not be misused. Such measures ought to have been taken at the time when such application was being entertained; when notices were issued or at the time when the application was heard.

40. At this juncture when I am deciding the application that there are material irregularities and fraud in publishing the sale proclamation and in conducting the sale, I do not see any reason to strictly construe or apply such proviso which, of course, are for those litigants who may misuse such law.

41. The above question came earlier in the case of Khursheed Begum v. Inamur-Rehman Khan (PLD 2009 Lahore 552). In Paras 16 and 17 of the said judgment the learned Division Bench of Lahore High Court has held as under:--

"...The logic and wisdom behind the proviso to Order XXI, Rule 90, C.P.C. obviously is to curtail and circumvent frivolous and baseless objection and it is only after examining the same, the Court could assess the quality and nature thereof and to decide whether a security should be required or the deposit and what should be the quantum, if the deposit is directed; obviously it is only after considering the worth and strength of the objections, the law has conferred a discretion upon the Court to pass appropriate order and not before that, but from the tenor of the above order, the Court virtually before even examining the objections has shunned and stultified the appellant's remedy of filing those and such order can aptly be termed as placing a horse before the cart, which is absolutely impermissible and against the spirit of law. Even otherwise, as mentioned above, the object of the deposit, etc. is to check the bona fides of the claims and to preclude that frivolous pleas should not impede the process of execution and also the confirmation of the sale in favour of the auction purchase, who has bought the property from the Court, which embodies an element of sanctity and guarantee, but in this case on account of the sale proceed; the appellants had much more to their share as against 20% (maximum); this amount could always be appropriated and taken to be akin to the deposit.

17. The arrangement of learned counsel for respondent No.25 in defending the impugned order have been quite lukewarm; he has withdrawn the money and does not seem to be much interested to have property back, except a submission has been made that his interest should be protected under Order XXI, Rule 89, C.P.C. by granting him 5% suffice it to say that in the instant case, such provision has no application; besides, the argument of his counsel that 75% share holders have not objected to the auction and the price, therefore, the claim of the appellants should also be discarded. We are not convinced, if the inaction on part of the others has any reflection upon the appellants, when a clear case about the material irregularity and fraud in the conduct of sale, is floating on the face of the record. It also is not a case simply about the inadequacy of the consideration, rather is a matter where the law has been flouted (as mentioned above) in a glaring and unparallel manner, and we cannot overlook and allow the subordinate judiciary to decide the rights of the parties in breach of law and on the basis of their whims and caprices and in any arbitrary way, as justice and arbitrariness are sworn enemies and cannot co-exist."

42. Similarly learned Division Bench of Peshawar High Court in the case of Ali Match Industries Ltd. v. Industrial Development Bank of Pakistan (1999 MLD 2127) has held that the punitive aspect of Order XXI Rule 90, C.P.C. can be invoked only after the objector/applicant fails to comply with such orders of deposit, which is certainly not a question here since no orders in this regard were passed. Such proviso to me loses its applicability at this stage when an application is being decided in favour of the objector/applicant on account of material irregularity and fraud, as is apparent, and so also on account of the fact that an application for deposit of the amount equivalent to the decretal amount is filed where permission is being sought for its deposit before the Nazir, which amount is more than 20% of sale price.

43. In view of the above facts and circumstances, both the listed applications (CMAs Nos.309 and 325 of 2013) are allowed as prayed.

AG/S-89/Sindh
accepted.

Applications