

# THE HIGH COURT OF SINDH, KARACHI

Special H.C.A. No. 23 of 2016

Present: Mr. Justice Aqeel Ahmed Abbasi  
Justice Mrs. Rashida Asad

Date of Hearing: 12.11.2020, 26.11.2020, 03.12.2020 & 21.12.2020

Date of judgment: 04.02.2021

Appellants: M/s Muslim Cotton Mills (Pvt) Limited and others through Mr. Khawaja Shams-ul-Islam and Mr. Imran Taj advocates

Respondent No.1: Allied Bank Limited through Mr. Abid Naseem advocate

Respondent No.2: Liberty Mills Limited through Mr. Abid S. Zuberi advocate

## J U D G M E N T

**Rashida Asad J.** -The captioned Special High Court Appeal has been filed against the order dated 04.10.2016, whereby the learned Single Judge was pleased to dismiss CMA No. 236/2014 (application under section 47 CPC read with Order 21 Rule 90 and section 151 CPC) and CMA No. 237/2014 (application under Order 39 Rules 1 & 2 CPC read with section 151 CPC), filed by the appellants in Execution No.10/2011 (M/s Allied Bank Limited versus M/s Muslim Cotton Mills and others) and Nazir of this Court was directed to ensure that possession of the property was handed over/ restored to auction purchaser and the amount was directed to be released to the Decree Holder subject to delivery of possession.

2. Brief unfold of the facts involved in the matter are that on appellants' application for loan/finance of Rs.150 Million, the respondent No.1 (Bank) granted the following facilities:

- i) Running Finance Facility of Rs.750,000,00/-
- ii) Export Re-Finance Facility of Rs.650,000,00/-
- iii) Letter of Credit Facility of Rs.100,000,00 (LC Facility)

with applicable purchase price as mentioned in the Agreement(s) executed between the parties from 28.01.2008 to 31.12.2008, but the amount was not transferred/disbursed within time as per Agreement(s). It is averted by the appellants that the L.C facility of Rs.10.00 Million was converted into Running Finance on 25.03.2008 till 31.12.2008, but as per statement of accounts said amount was not disbursed. However, upon expiry on 31.12.2008, the appellant No.1 and respondent No.1 entered into supplemental Finance Agreement on 05.01.2009 till 30.01.2009 for 25 days and the same was rescheduled but the amount was not disbursed.

3. The respondent No.1 filed a Suit No. B-89 of 2009 before this Court for recovery of amount of Rs.166,630,737/-. The appellants filed leave to defend application, but the same was dismissed by learned Single Judge vide order dated 15.11.2010 and the suit was decreed as prayed, which order and decree was challenged by the appellants through High Court Appeal and according to appellants during pendency of such Appeal, the respondent No.1 filed Execution Application No.10 of 2011 for selling out the mortgaged property and hypothecated goods of the appellants. During pendency of such Execution Application, the respondent No.1 filed application under Section 19 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 for permission to sale the mortgaged property and hypothecated assets of the appellants. On 06.08.2013 Execution Application was allowed, consequently the Nazir was directed to put on sale the mortgaged property and hypothecated assets. On 14.10.2013 the Nazir reported that no offer was received in respect of mortgaged property and the hypothecated assets. On 12.12.2013, the Executing Court directed the Nazir for holding a fresh auction. The Nazir nominated M/s Zia Jafri Architects & Associates to evaluate the property with consent of the respondent No.1, who in his report assessed the market value of the factory of the appellant as Rs.25,36,60,447/- and forced value was determined as Rs.22,75,00,000/-. Accordingly, notices were published in Daily Dawn dated 09.04.2014. On 22.04.2014, the matter was fixed for auction before the Nazir, when one Abdur Rehman Awan, Admin Manager of respondent No.2 submitted a letter dated 22.04.2014 for a bid of Rs.125 Million for the factory and deposited pay order of Rs.31,250,00 as an earnest money being 25% of the price. The Nazir sent reference dated 30.04.2014 to the Court for orders. The learned Single Judge vide order dated 08.08.2014 accepted the offer of respondent No.2 and confirmed the sale.

4. The appellants moved CMA No. 236/2014 under Section 47 CPC read with Order 21 Rule 90 CPC and Section 151 CPC, seeking to set aside the sale confirmed by learned Single Judge vide order dated 08.08.2014 on the Nazir's reference depicted hereinabove and CMA No. 237/2014 under Order 39 Rules 1 & 2 CPC read with Section 151 CPC for injunction. The learned Single Judge after hearing the arguments of learned counsel for the parties, dismissed both the applications vide order dated 04.10.2016, hence this Special High Court Appeal.

5. Learned counsel for the appellants argued that the impugned order is perverse, bad in law and capricious by skipping a very pertinent and material argument that entire auction process/proceeding was unlawful in complete derogation and belittlement of Order 21 Rules 64 to 66, 68, 72, 83, 85, 89 and 90 read with Section 47 CPC; that Hon'ble Supreme Court has struck down the provision of Section 15 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 as being violative of fundamental rights guaranteed to the mortgagee in terms of Article 10-A of the Constitution; that learned Single Judge has not taken into consideration that reserved price was Rs.22,75,00,000/- whereas, the respondent No.2 offered Rs.12,50,00,000/-, that too without notice to the appellant and the same was less than the reserved price, but the same offer was accepted and confirmed by the learned Single Judge; that it has been held in numerous judgments that the much below bid amount to the reserved price would not be accepted; that in the auction notice the forced sale price was given as reserved price, which is also an illegality committed by the Nazir; that Nazir had neither issued any notice to the appellants at the time of preparation of proclamation in terms of Order 21 Rule 66 CPC nor issued any notice at the time of receiving 25% of the said amount from respondent No.2, however, the matter should have been referred to the learned Single Judge for re-auctioning or at least the appellants should have been provided an opportunity to match the price offered by respondent No.2; that notice of CMA Nos. 26, 48 and 75 of 2014 were not served upon the appellants and impugned order was passed without providing an opportunity of hearing to the appellants; that Ms. Sofia Saeed Shah advocate was not appearing on behalf of appellants/JDs and her name was wrongly mentioned in order sheets dated 30.05.2014 and 08.08.2014 as counsel for the appellants, rather she was appearing for objector (NIB Bank Limited), who filed CMA

No.48/2014, which was heard and decided in absence of the appellants; that appellants were not provided an opportunity of hearing and or matching with the offer made by the respondent No.2, hence grave illegality has been committed while passing the impugned order; that learned Single Judge has failed to consider that Order 21 Rule 68 CPC provides consent of the appellants if the property is being auctioned and sale proclamation is being issued; that it is well settled that auction proceedings must be fair and transparent and better possible price may be considered, however, in the present case no effort was made by the Nazir to obtain better price of the property; that as per Rules 333 to 351 of Sindh Chief Court Rules under the heading "Sale of attached property", it is specifically mentioned that Nazir has no authority to accept any offer below the reserved price and that there should be an application for leave to bid at the sale and the applicant shall swear an affidavit giving reasons as to why the applicant should be permitted to bid; that the offer of Rs.125 Million for the purchase of the land and building was accepted and confirmed by the learned Single Judge in complete negation of Order 21 Rules 1(2) CPC as well as the principle laid down by the Hon'ble Supreme Court of Pakistan in 2007 SCMR 1587; that the whole auction proceedings are against the law, hence same are required to be set aside. In support of his submissions, he has relied upon the following case law:-

**(i) Muhammad Umer Rathore vs. Federation of Pakistan (2009 CLD 257 (Lahore), (ii) National Bank of Pakistan and 117 others vs. Saf Textile Mills Ltd and another (PLD 2014 S.C 283), (iii) Messrs Lavin Traders, Karachi vs. Presiding Officer, Banking Court No.2, Karachi and others (2013 SCMR 1419), (iv) Mst. Nadia Malik vs. Messrs Makki Chemical Industries Pvt. Ltd through Chief Executive and others (2011 SCMR 1675), (v) Muhammad Ashraf and others vs. U.B.L and others (2019 SCMR 1004), (vi) Muhammad Khalil vs. Messrs Faisal M.B Corporation and others (2019 SCMR 321), (vii) Noor Badshah vs. House Building Finance Corporation through District Manager and another (2006 CLD 1451 (Lahore), (viii) Siraj Ahmed through LRs vs. Faysal Bank Limited and others (PLD 2018 S.C 91), (ix) Nand Lal vs. Askari Bank Ltd and others (2018 CLD 1167 (Sindh), (x) Kamran and another vs. Zonal Manager and another (2014 CLD 304 (Sindh), (xi) Alleged corruption in rental power plants etc. (2012 SCMR 773), (xii) Messrs Spinghar Textile Mills Ltd and another vs. United Bank Limited and another (2011 CLD 1683 (Peshawar), (xiii) Investment Corporation of Pakistan vs. Muhammad Bilal Ahmed and others (2008 CLD 313 (Lahore), (xiv) Messrs Super Traders through Proprietor vs. Aleem Khawaja and another (2012 CLD 1115 (Sindh), (xv) Qaid Jauhar another vs. Mst. Hajiani Hajra Bai and another (2002 CLC 551), (xvi) Muhammad Ovais and another**

**vs. Federation of Pakistan through Ministry of Works and Housing Pakistan, Islamabad and others (2007 SCMR 1587), (xvii) Muhammad Attique vs. Jami Limited and others (2015 SCMR 148), (xviii) Mir Wali Khan and another vs. Manager, Agricultural Development Bank of Pakistan, Muzaffargarh and another (PLD 2003 S.C 500) & (xix) an unreported judgment dated 19.06.2020 passed by Hon'ble Supreme Court in C.P.No.17 & 19 of 2019 and others (Justice Qazi Faez Isa and others vs. The President of Pakistan and others).**

6. Learned counsel for the respondent No.1 argued that instant Appeal is not maintainable and the same is liable to be dismissed; that impugned order is valid and proper; that the appellants have not challenged the order dated 08.08.2014, whereby the sale of the mortgaged property was confirmed and hence the same has attained finality; that Executing Court dismissed the application of the appellant on the ground that the appellants have failed to comply the mandatory requirement of Order 21 Rule 90 CPC; that suit of the respondent was decreed vide order dated 15.11.2010 and on 08.01.2011 execution application was filed and first bid was made in the year 2013, when no offer was received, thus the counsel for the appellants was well aware about the auction proceedings; that the re-valuation of the mortgaged property was conducted on the request of counsel for the appellants and second auction was conducted on 22.04.2014 but during the period of almost three years, appellants did not come to pay decretal amount; that appellants were also appearing before Banking Court No.II in Criminal Complaint No. 53 of 2010 on the charge of dishonor of cheque relating to same finance facilities; that though respondent No.1 in counter affidavit to application under Section 47 read with Order 21 Rule 90 CPC offered the appellants to buy the mortgaged property on same amount or to bring any potential bidder, but they failed to do so; that bid below the reserved price can be entertained and not barred by law; that Nazir adopted all procedures and formalities so also provided opportunities of hearings to the appellants and thereafter, the auction of the mortgaged property was made and the offer was accepted by learned Single Judge, which order does not require any interference by this Court. The learned counsel relied upon the cases law:-

**(i) Messrs Habib and Company and others vs. Muslim Commercial Bank Limited and others (2019 SCMR 1453), (ii) Zakaria Ghani and 4 others vs. Muhammad Ikhlaq Memon and 8 others (2016 CLD 480 (Supreme Court) & (iii) Messrs Tharparkar Sugar Mills Limited through Authorized Representative and 7 others vs. Bankers**



**Equity Limited through official Liquidator (2014 CLD 1343 (Sindh).**

7. Learned counsel for the respondent No. 2 has argued that application filed by the appellants is not maintainable as they have failed to deposit 20% of amount which is mandatory requirement of Order 21 Rule 90 CPC, hence the application filed by the appellants was not maintainable so also this Appeal; that sale was confirmed vide order dated 08.08.2014 and the issue of reserved price or any irregularity in the process would not come in the way of respondent No.2, who had deposited 25% of the amount as well as Rs.37,00,000/- as stamp duty. He has placed reliance on the following case law:-

**(i) Habib and Company and others versus Muslim Commercial Bank Limited and others (PLD 2020 S.C 227), (ii) Habib and Company and others vs. Muslim Commercial Bank and others (2019 SCMR 1453), (iii) Zakaria Ghani and 4 others vs. Muhammad Ikhlaq Memon and 8 others (PLD 2016 S.C 229), (iv) Messrs Nice 'N' Easy Fashion (Pvt) Ltd. and others vs. Allied Bank of Pakistan and another (2014 SCMR 1662), (v) Muhammad Ikhlaq Memon vs. Zakaria Ghani and others (PLD 2005 SCM 819), (vi) The Bank of Khyber vs. Muhammad Tariq Ikram and 4 others (2020 CLC 1344), (vii) Mian Shahid Nadeem vs. Bank Alfalah and others (2019 CLD 741) & (viii) Mrs. Yasmeen Yaqoob vs. Messrs Allied Bank of Pakistan and 3 others (2007 CLD 1511).**

8. We have heard learned counsel for the parties and have perused the record minutely. It seems expedient to record, at the very outset, that there is no anomaly or dispute between the parties hereto about the back ground, scenario, culmination and eventual outcome of impugned order, if it sustains. As such, there remains only legal question before us for adjudication that as to whether the impugned order is lawful and appropriate and sustainable or otherwise. The learned counsel for the appellants has assailed to the impugned order thrusting mainly on the ground that it was passed in utter disregard of provisions of Order 21 Rules 64 to 66, 68, 72, 83, 85, 89 and 90 read with Section 47 CPC and that the same is in violation of fundamental rights enshrined in Article 10-A of the Constitution of Islamic Republic of Pakistan. To appreciate the submissions of learned counsel for the Appellants inasmuch the purported illegality of the impugned order, the provisions of Order 21 are to be keenly examined. Rule 64 & 65 is about vesting power in the court executing decree for sale of attached property through a duly authorized officer in this behalf and payment of proceed to the party entitled for the same and it appears that

the executing court i.e. the learned judge on the original side has rightly exercised powers for satisfaction of decree. However, in the light of the arguments of the learned counsel the provisions of Rule 66 are significant and it would be advantageous to reproduce the relevant provisions of Rule 66 of Order 21 of the Code of Civil Procedure (CPC). which reads as under:-

**“Rule 66. ( O XXI) Proclamation of Sale 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 same, 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 encumbrance 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 purchaser to know in order to judge 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 proscribed 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 produce any document in his possession or power relating thereto.

9. The above provision draws our attention to argument of the learned counsel for the appellants assailing the impugned order and denoting the same to be bad in law for omission/absence of notice to the judgment debtor for drawing up proclamation as envisaged hereinabove vide sub-rule 2 ibid. A simple and plain reading of the provisions of Rule 66 (2)

quoted as above makes it mandatorily encumbrance for a notice to judgment debtor for drafting of notice of proclamation and the argument of learned counsel for the judgment debtor for absence of such notice has not been rebutted on behalf of the respondents. Rather, the learned counsel for the respondent No. 1, mainly objected the maintainability of the appeal on the ground that initial order for grant of execution application and confirmation of sale vide order dated 08.08.20114 has since not been assailed and both such orders have attained finality, therefore, the instant appeal is not maintainable. It is notable point that the order impugned in this appeal is about dismissal of application (CMA. No. 236/2014) wherein confirmation of sale was sought to be set aside and in case of grant of this appeal the very order of confirmation of sale shall receive a stroke and practically shall become redundant and ineffective. The other argument of the learned counsel for the judgment debtor; that consent of the judgment debtor for sale of property was also not sought in accordance with rule 68 of Order 21 CPC; has also not been rebutted and so also the record does not reflect for obtaining of such consent. We are of the considered view that such omissions must carry serious repercussions to the sustainability of the order for confirmation of sale on a much lower price than to force value and reserved price.

10. In the background and scenario of the arguments and counter arguments, the provisions of Rule 343 of the Sindh Chief Court Rules (O.S) appears to be significant which is reproduced as below:-

“343. **Leave to bid. Reserved Price.** (1) an application for leave to bid at the sale shall be supported by an affidavit giving reasons why the applicant should be permitted to bid.

(2) In case in which the Registrar (O.S) considered that this application should not be allowed to bid for less than sum to be fixed, it shall be competent to the Registrar (O.S) to give leave to bid at the sale only on the condition that the applicant's bid shall not be less than the amount so fixed, which amount shall as for as practicable, be determined with reference to the probable market value or the property or of the lot or lots into which the property is divided for sale.

11. The above rule makes it obligatory for the Registrar to conduct sale of property through auction, as far as possible, on market value and not less than the sum to be fixed. Perusal of the record, undisputedly, reveals that



market value of the factory of the appellants was assessed at a sum of Rs.25,36,60,447/- and forced value was determined as Rs.22,75,00,000/- but the sale was confirmed at a sum of Rs.12,50,00,000/- which is less than a half of the market and forced value of the auctioned property. Among the case law cited for and against by learned counsel for the parties, the case law reported as **NATIONAL BANK OF PAKISTAN AND 117 OTHERS v. SAF TEXTILE MILLS LTD. AND ANOTHER (PLD 2014 SC 283)** has the relevance to facts and the questions involved in the instant appeal, as it lays down the guiding principles for sale of the judgment-debtor/mortgagee's immovable property through auction and also to provide protection of J.Ds. rights. The ratio of this judgment is that property of the judgment-debtor to be sold in a free, fair and transparent manner so as to fetch the best possible price. Furthermore, the provisions of section 15 of the Financial Institutions (Recovery of Finances), Ordinance, 2001 were declared to be ultra vires to Article 3 of the Constitution of Pakistan, 1973. The relevant finding in respect of subject controversy has been recorded in Para 33 of the above judgment, which reads as follows: -

*"33. The matters pertaining to the financial claims secured by mortgagors as in the instant case, generally involves a two stage process, firstly the determination of the liability through due process and after a fair trial inclusive of a right of hearing and opportunity of show cause. Such determination under the general law, is evidenced by a decree of a Court of competent jurisdiction. And secondly, the recovery of the determined amount by way of the satisfaction or execution of such decree including through the sale of mortgaged property. Even if a liability has been determined by a decree of the Court, the mortgagor/debtor is not deluded of all his civil rights including with regards to the modes and methods of such recovery through the sale of the mortgaged property. The right of such debtor to ensure that the mortgaged property is sold in a free, fair and transparent manner so as to fetch the best possible price is now a well recognized principle of law, which finds its manifestation both in various statutory provisions, more particularly, Code of Civil Procedure (including Order XXI of C.P.C.) as well as the law, as laid down by this Court, including the case reported as Mir Wali Khan v. Agricultural Development Bank of Pakistan, Muzafargarh and another (PLD 2003 SC 500), wherein it has been held as follows:--*

*"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 jealously so with all the care and circumspection so that it may go for a sum it deserves."*

12. Another relevant case law though cited before the learned single Judge, however, appears to have escaped attention of the learned Judge, is also of much relevance to facts and law involved in the instant case i.e. **MESSRS LAVIN TRADERS, KARACHI v. PRESIDING OFFICER, BANKING COURT NO.2, KARACHI AND OTHERS (2013 SCMR 1419)**. Ratio of this case law as regards to adherence to the provisions of Order XXI Rule 66 is exactly as highlighted in the earlier discussed judgment of the Hon'ble Supreme Court. However, this judgment has also provided guide lines for the administration of justice by courts while dealing with any lis. Relevant finding of the Hon'ble Supreme Court reads as follows: -

*"-----Courts while proceeding with any lis, had to clear their mind from any predetermined notions **and had to examine the case of the parties before it in a fair and equitable manner**, giving due consideration to the case of all the litigating parties by placing it in juxtaposition and evaluating their respective claim in line with applicable law"."*

13. On the contrary, the learned counsel for the respondents have contested this appeal mainly on the grounds that the appellant had failed to deposit 20% of the bid money to object the confirmation of sale in terms of Order XXI Rule 90 CPC; therefore, any objection regarding reserve price of property could not be taken by the judgment-debtor after auction had taken place. In this regard the learned counsel for the respondent No.1 (Decree-Holder) has relied on the case law reported as **HABIB AND COMPANY AND OTHERS v. MUSLIM COMMERCIAL BANK AND OTHERS (2019 SCMR 1453)**. There seems no cavil to the legal position as settled by the Hon'ble Supreme Court in the cited case, however, the facts of case before us are quite different and distinguishable. On the face of the record of instant case, it appears that provisions of Order 21 Rule 66 CPC were ignored and so also the bid which was confirmed in a mechanical manner, not only below the market value of the property but also even less than the force value, whereas, neither any reasons have been disclosed for accepting the bid at an amount half of the market value and even forced value, nor reasonable efforts appears to have been made to ensure that auctioned property shall fetch maximum price, if not the price at market value. In such situation and in the facts and circumstances of instant case, we are of the considered view that the condition of deposit of 20% of sale amount by a party objecting to such sale could be condoned; provided, it is

not misused to frustrate the sale or auction proceedings, if conducted in accordance with law in a transparent manner. In this regard, reliance can be placed in the case of MST. NADIA MALIK v. MESSRS MAKKI CHEMICAL INDUSTRIES PVT. LTD. THROUGH CHIEF EXECUTIVE AND OTHERS (2011 SCMR 1675), wherein it has been held as under: -

*“16. The next issue is non-deposit of amount of 20%, in terms of Order XXI, Rule 90, C.P.C. by the private respondents at the time of filing of the objections to the sale. The sale in favour of auction purchaser must reflect transparency. The objections raised by the private respondents were not only based on the quantum of reserved price, but were based on the issues which showed that the sale/auction proceedings were being conducted in the manner to extend favour to the appellant. All provisions of law including the provisions of Order XXI, Rule 90, C.P.C. are to be read with exception. Any law without exception is a bad law. In the case in hand, the appellant had taken his time to deposit the balance sale consideration in violation of the mandatory provisions of Order XXI, Rule 85, C.P.C. The belated application for extension in time for deposit of balance amount was wrongly entertained by the executing court that too without notice. The record of the auction proceedings of 22-4-2002 and 29-4-2002 has neither produced before the executing court nor before the learned High Court to show that the actual auction proceedings were conducted\_ by the officer. The amount of 25% was deposited by the appellant through pay order on 29-4-2002 after the conclusion of auction proceedings, whereas the record shows that auction proceedings were concluded at 5-10 p.m., as per report of the court auctioneer. How come the appellant paid 25% of the auction amount by a pay order after the conclusion of the auction proceedings as by that time banks are closed. Moreover in the absence of fixation of proclamation on the court notice board, auction proceedings could not be held to be transparent. No venue of auction has been mentioned in the proclamations, which is violative of the provisions of Order XXI, Rules 54(2) and 69, C.P.C.”*

14. The core argument of the learned counsel for the appellant for want of notice for drawing up of proclamation in accordance with Order XXI Rule 66 CPC, has not been controverted and or repudiated by either of the respondents. Such requirement is mandatory. Moreover, the consent of the judgment debtor as required in accordance with rule 68 of Order XXI CPC also does not appear on record. More importantly, the bid which has been confirmed for sale of property is alarmingly low than to the force value of the property as per evaluation report. In juxtaposition, we have keenly considered the objections and arguments of the learned counsels for the respondents. The main argument and objection of the learned counsels for

the respondents is that since the grant of Execution Application has not been challenged the judgment debtor cannot object and/or assail the sale of property by auction; that conditions of Order XXI Rule 90 CPC, whereby the objector had to deposit 20% of the bid amount had not been fulfilled. Main reliance of the learned counsel for the respondent No.1, was on case law reported as 2011 SCMR 1675, which lays down that *“Sale/auction violative of provisions of O. XXI Rs. 54(2), 67, 85 & 86, CPC and condition of deposit of 20% of sale amount by a party objecting to such sale, else to frustrate sale, could be condoned in exceptional circumstances”*. We understand that this case does not completely bar to set aside sale rather it fortifies for exception to interfere the sale proceedings conducted in violation of mandatory provisions of various rules of Order XXI CPC. The other case law 2019 SCMR 1453 lays down a rule that after confirmation of sale, it becomes absolute and as such it cannot be called in question just for absence of reserve price. With utmost respect to the ruling of the apex court, it appears expedient to mention that entire process of auction of properties of a judgment debtor has to be transparent and strictly in accordance with the provisions of law and as such in case of material irregularities in holding auction proceedings and confirmation of bid the entire process of sale properties shall be deemed to be void and no party should suffer for any act of the court. Even otherwise, the facts involved in the referred case law are quite distinguishable. The confirmation of sale through auction was held to be absolute as the auction proceedings and confirmation of sale was done after due compliance of the provisions of Order XXI Rule 66 CPC.

15. Be that as it may, failure in making compliance of mandatory provisions of Order XXI Rule 66 and 67 CPC for sale of mortgaged property of the judgment debtor, if it caused serious prejudice and or injustice to the rights and interest of the party inasmuch violation of fundamental rights as envisaged vide article 10-A of the Constitution, cannot be ignored. In our view the utmost duty of the court dealing with the auction proceedings is to ensure free, fair and transparent sale and being considerate for fetching up sale price as near as to market and/or force value of the property as even if a liability had been determined by a decree of the court, the mortgagee/debtor was not deluded of all his civil rights including with

regard to the modes and methods of recovery through the sale of mortgaged property. It was not even remotely disputed by the learned counsel for the respondents that assessed market value of the mortgaged property was Rs.25,36,60,447/- and forced value was determined as Rs.22,75,00,000/-. At the face of record, undeniably, the bid for sale of the property of the judgment debtor accepted and sale was confirmed on almost half of the value of the property and that in a haphazard manner in derogation of mandatory requirements of law as enlightened hereinabove which amounts to breach of rights of the judgment debtor and violation of principle of holding auction proceedings in fair and equitable manner. The confirmation of sale is absolutely in disregard of the case law reported as 2019 SCMR 1004 which lays down a principle that "even in the absence of an objection petition, the Executing Court was not required to automatically confirm an auction mechanically and without application of mind by not even considering the law applicable". Above all, the prime and utmost function of the court for administration of justice seems to have been ignored. In view of such serious discrepancies and inherent flaws in holding the auction proceedings and confirmation are not sustainable and as such the facts constrained us to set aside the order for confirmation of sale. At the same time, we are not oblivious that courts are required to strike a balance to protect the rights and liabilities of the parties to keep transparency and administration of justice in a fair and transparent manner and cannot leave the satisfaction of decree to the whims and desire of the judgment-debtor to frustrate the execution proceedings. Accordingly, instant High Court Appeal stands disposed of in the following manner along with listed application: -

- a. The impugned order dated 04.10.2016 is hereby set-aside, and the order of confirmation of sale pursuant to the report dated 04.11.2016 submitted by the Nazir as assailed in this appeal is declared to be illegal, for having been passed in violation of the provisions of Order XXI Rule 66 CPC, whereas, the sale price being much below the market and even forced value of the property is also unjust and unreasonable, as such, the auction proceedings of subject property stands set-aside in the meanwhile.
- b. The auction purchaser/respondent No.2 is given an option to purchase the subject property at the forced value (22,75,000,00/-) as already determined in the instant case, by depositing the balance amount before the Nazir of this Court within one month from the date of this



order. In case the auction purchaser/respondent No.2 does not exercise such option, the same option is given to the appellant/judgment debtor, who shall either deposit the decretal amount with the Decree holder (bank) or shall deposit the balance amount before the Nazir of this Court within one month from the date of this order, whereas, on deposit of such amount by either party in the aforesaid terms, the sale shall be treated as final and concluded, and no further order would be required in this regard.

- c. However, if the auction purchaser/respondent No.2 and the judgment debtor/appellant do not opt to purchase the subject property in above terms, then Nazir of this Court shall make two (2) more attempts to sale the mortgaged property by auction in a transparent and fair manner to fetch maximum price by strictly complying with the provisions of Order XXI within a period of 2 (two) months, and in case, a higher bid for purchase of property is received, the report for confirmation or otherwise of the sale shall be placed before the court on original side for appropriate orders.
- d. In case, in spite of two (2) attempts for auction proceedings, no offer higher than the bid given by the respondent No.2 is received, either the appellant / judgment-debtor shall make payment to the decree-holder for satisfaction of decree within one month, otherwise, the sale in question as confirmed shall stand revived and absolute. The amount deposited by the auction purchaser shall be refunded along with profit thereon, plus the amount of profit to be calculated as per Bank rates for the period during which the said amount remained with the Nazir of this Court, to be paid by the judgment debtor/appellant.

16. In accordance with the above terms the instant appeal stands partly granted/disposed of.

**JUDGE**

**JUDGE**