

**ORDER SHEET**  
**THE HIGH COURT OF SINDH, KARACHI**  
**EXECUTION APPLICATION NO.26 of 2012**

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Dated: Order with signature of Judge(s)

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1. For orders on Official Assignee Reference No. 04 of 2023
2. For hearing of CMA No. 1041 of 2023

Date of Hearing : 20 September 2023

Decree Holder : Allied Bank of Pakistan through Mr. Muhammad Ilyas, Advocate

Judgment Debtor No.1 : Nemo

Judgment Debtor No.1 : Pakistan Steel Mills (Private) Limited through Mr. Adnan Ahmed Zafar, Advocate

Objector : National Bank of Pakistan through Mr. Assadullah Shaikh, Advocate

Auction Purchaser : Mr. Jumma Shah through Mr. Zeeshan Abdullah, Advocate and Mr. Ahmed Ali Ghumro, Advocate

Official Assignee of the High Court of Sindh : In Person

**ORDER**

**MOHAMMAD ABDUR RAHMAN, J.** This order will dispose of a Reference bearing No. 4 of 2023 that has been maintained by the Official Assignee of this Court seeking to approve a bid submitted by one Mr. Jumma Shah (hereinafter referred to as the "Auction Purchaser") in auction proceedings, that had been conducted by the Official Assignee of this Court in his capacity as a receiver of an immovable property bearing Plot No. DSU 24, 25, 28 and 29, Sector II, Pakistan Steel Industrial Estate, Bin Qasim, (Deh Pipri) admeasuring 81,600 square meters (20.164 Acres) (hereinafter referred to as the "Said Property"), and CMA No. 1041 of 2023 being an application that has been maintained by the Auction Purchaser under

Section 151 of the Code of Civil Procedure, 1908 seeking the return of the same amount.

2. Suit No. B-10 of 2003 was maintained by the Decree Holder against the Judgment Debtors for the recovery of a sum of Rs. 518,536,386.72 (Rupees Five Hundred and Eighteen Million Five Hundred and Thirty Six Thousand Three Hundred and Eighty Six Thousand and Paise Seventy Two) and which was decreed in favour of the Decree Holder on 26 October 2007. The Decree was amended by consent and an Amended Decree was issued on 8 September 2009 for a lesser amount.

3. The Said Property had been mortgaged by the Judgment Debtor No. 1 in favour of the Decree Holder and was attached by this Court on 21 February 2018 and by which order the Execution Application was also allowed as prayed and the Official Assignee of this Court was appointed as a receiver to execute the Decree. By a Reference bearing No. 2 of 2022 the Official Assignee of this Court sought permission for a Proclamation of Sale to be issued in respect of the Said Property and which this Court, on 6 February 2023, had allowed.

4. The Official Assignee had thereafter on 22 February 2023 placed advertisements in various newspapers inviting bids for the acquisition of the Said Property on an "AS IS WHERE IS" basis indicating therein a reserve price of Rs. 393,631,168. (Rupees Three Hundred and Ninety Three Million Six Hundred and Thirty One Thousand One Hundred and Sixty Eight) for bids to be received in respect of the Said Property. The Auction Purchaser had on 28 March 2023 initially made a bid of Rs. 400,000,000 (Rupees Four Hundred Million) for the purchase of the Said Property and which he had on the same date subsequently revised to an increased bid of Rs. 600,000,000 (Rupees Six Hundred Million) and which was on 28 March 2023 certified by the Official Assignee of this Court as the highest bid that was received. A

sum of Rs. 150,000,000 (Rupees One Hundred and Fifty Million) was thereafter deposited by Mr. Jumma Shah with the Official Assignee of this Court and which amount has been invested by the Official Assignee in a profit bearing scheme.

5. The Official Assignee has now maintained Reference bearing No. 4 of 2023 seeking permission to accept the bid made by the Auction Purchaser of Rs. 600,000,000 (Rupees Six Hundred Million) and which was placed before this court for orders. In the interim the Auction Purchaser has filed his objections to Reference bearing No. 4 of 2023 and has stated that he wishes to withdraw his bid and has maintained CMA No. 1041 of 2023 being an application under Section 151 of the Code of Civil Procedure, 1908 seeking the return of the sum of Rs. 150,000,000 (Rupees One Hundred and Fifty Million) that had been deposited by him

6. Mr. Zeeshan Abdullah, Advocate appeared on behalf of the Auction Purchaser and has contended that the process that had been adopted by the Official Assignee of this Court in conducting the public auction of the Said Property was flawed inasmuch as the Proclamation of Sale that was issued was issued in violation of the provisions of Order XXI Rule 66 of the Code of Civil Procedure, 1908 as:

(a) He contended that when the Auction Purchaser examined the title documents a clause was noted in the lease which read as under:

“ ... 4. *The Lessee hereby covenants with the Lessor as follows that is to say ...*

*aa. Not to mortgage, under let or part with possession of the premises or any part thereof without the previous consent in writing of the Lessor first being had and obtained and any such assignment shall only be permitted on such terms and payment of such sums as the lessor alone shall determine.”*

He maintained that such a clause in the lease amounted to an “encumbrance” on the title of the Said Property and which the Official Assignee of this Court was mandatorily required to disclose under

the provision of clause (c) of Rule 66 of Order XXI of the Code of Civil Procedure, 1908 in the Proclamation of Sale. Expanding on this proposition he submitted that such a clause in the lease, which impaired a lessee's right to either "mortgage", "assign", "under let" or "part with possession" without the written permission of the lessor and subject to the lessor, having the right to make any of those actions taken by the lessee subject to such terms and payment as the lessor determines, is clearly an "encumbrance" on the Said Property. He maintained that such a clause would seriously impact the "marketability" of the title that the Auction Purchaser would hold to the Said Property and which necessarily should have been disclosed by the Official Assignee of this Court in the Proclamation of Sale. He states that the Official Assignee of this Court was well aware of this fact as the restriction on the Said Property had been considered in the valuation report that had been prepared while determining the reserve price of the Said Property and which should have compelled the Official Assignee of this Court to have made such a disclosure in the Proclamation of Sale;

- (b) That the permission having not been obtained from the Lessor, prior to the issuance of the Proclamation of the Sale, in light of the above quoted covenant, had invalidated the entire process of the Public Auction that had been conducted by the Official Assignee of this Court; and
- (c) the Auction Purchaser was never given sight of the original title documents of the Said Property and which being a violation of Rule 338 of the Sindh Chief Court Rules had invalidated the entire process of the Public Auction. In this regard Mr. Zeeshan Abdullah had maintained that the Official Assignee of this Court did not have the title documents of the Said Property on 9 March 2023 and which

were in fact only received by the Official Assignee of this Court on 10 March 2023.

7. In support of his contentions. Mr. Zeeshan Abdullah relied:

- (i) on a decision of the Supreme Court of Pakistan reported as **Shahid Ali vs. Mrs. Aziz Fatima**<sup>1</sup> wherein when an immovable property which was the subject of a Suit for Partition was put to auction, the Supreme Court of Pakistan while holding that the provisions of Order XXI Rule 66 of the Code of Civil Procedure, 1908 would be applicable held that it as mandatory to indicate a reserve price and all details about the title of a property in the Proclamation of Sale and a failure to do the same would invalidate the auction;
- (ii) on a decision of the Supreme Court of Pakistan reported as **Lanvin Traders Karachi vs. Presiding Officer Banking Court No. 2, Karachi and others**<sup>2</sup> wherein while considering an appeal in respect of an auction carried out by a Banking Court in execution of a decree, the Supreme Court of Pakistan had been divided as to whether the failure to indicate a “reserve price” in the Proclamation of Sale was a mandatory requirement which invalidated the Public Auction or not. In that decision the finding of the Majority of the Supreme Court of Pakistan was that it was a mandatory requirement and the failure to comply with the provisions of Order XXI Rule 66 of the Code of Civil Procedure, 1908 would invalidate the auction that had been carried out;

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<sup>1</sup> PLD 2010 SC 38

<sup>2</sup> 2013 SCMR 1419

- (iii) on a decision of the Supreme Court of Pakistan reported as **Summit Bank Limited, Lahore vs. Messrs. M.M. Brothers, Proprietorship Concern**<sup>3</sup> in which it was held that the a public auction that is conducted under Order XXI Rule 66 of the Code of Civil Procedure, 1908 is premised on a course of action to ensure that an appropriate level of publicity is given to the Court Auction to allow for a fair and reasonable price to be realised for the properties and if that was not complied with, then the auction could be treated as illegal under Order XXI Rule 90 of the Code of Civil Procedure, 1908;
- (iv) on a decision of this Court reported as **Messrs NIB Bank Limited vs. Messr Apollo Textile Mills Limited and 2 others**<sup>4</sup> in which it was held that the provisions of Order XXI Rule 66 of the Code of Civil Procedure, 1908 were mandatory in nature and if not complied with the auction carried out without the compliance of such mandatory provisions would be considered as illegal;
- (v) on a decision of this Court reported as **Unsia Bano vs. Habib Ali**<sup>5</sup> wherein it was held that the right to a refund of an amount deposited pursuant to a Proclamation of Sale was, under the provisions of Order XXI Rule 86 of the Code of Civil Procedure, 1908, within the discretion of the Court and must be considered by a Court on a case by case basis;
- (vi) on a decision of this Court reported as **National Bank of Pakistan vs. Messrs Nasir Industries Karachi and others**<sup>6</sup> and a decision on a decision of the Madras High Court reported as **Annamalai Vs. Nagoorgani and Ors.**<sup>7</sup> wherein it was held the obligation to make the balance payment of 75 % of the purchase price was mandatory and not directory and the Court did not have the discretion to extend the time for the depositing of the balance sale consideration. It was held that the failure to perform the obligation to make the balance payment of 75 % of the purchase price would render the sale as

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<sup>3</sup> 2023 CLC 297

<sup>4</sup> PLD 2013 Sindh 430

<sup>5</sup> 1999 MLD 3370

<sup>6</sup> 1982 CLC 388

<sup>7</sup> (2007) 1 MLJ 778

“void” and oblige the court to order a resale of the property in terms of Order XXI Rule 86 of the Code of Civil Procedure, 1908. It was also considered that the right to a refund of an amount deposited pursuant to a Proclamation of Sale was within the discretion of the Court and must be considered by a Court on a case by case basis;

- (vii) Regarding the interpretation of the expression “AS IS WHERE IS” he relied on two judgments of Division Benches of this Court reported as **Mir Amjad Ali vs. Official Assignee Hugh Court of Sindh and others**<sup>8</sup> and **United Bank Limited vs. Messrs Al Noor Enterprises and another**<sup>9</sup> and a decision of a single judge of this Court reported as **Messrs Bismillah Textile Ltd. vs. Habin Bank Limited**<sup>10</sup> and wherein in each of those decisions it was held that such an expression was only referable to the physical attributes of the property being sold and could not be construed as a representation as to the title of the property or as towards the liabilities, dues and taxes payable on the property.
- (ix) a decision of the Lahore High Court, Lahore reported as **Punjab Small Industries Corporation through Regional Director, Gujranawalla vs. Muslim Commercial Bank Limited**<sup>11</sup> wherein it was contended that where there was a condition in a lease that the property could not be mortgaged without the lessors consent a failure to obtain such a consent would invalidate the mortgage.

8. The Official Assignee of this Court has appeared and contended that the notice of proclamation of sale that was sanctioned by this Court had clarified that the sale was on an ‘AS IS WHERE IS’ basis and as such the Auction Purchaser had taken on the obligation to purchase the Said

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<sup>8</sup> 2001 CLC 671

<sup>9</sup> 2006 CLC 822

<sup>10</sup> 2008 CLC 504

<sup>11</sup> 2006 CLD 1842

Property on such a basis. He contended that the circumstances of the withdrawal of the bid on the part of the Auction Purchaser warranted the amount deposited by him to be forfeited under Order XXI Rule 86 of the Code of Civil Procedure, 1908 and thereafter for the Said Property to be reauctioned.

9. I have heard the counsel for the Auction Purchaser as well as the Learned Official Assignee of this Court and have perused the record. Order XXI Rule 66 of the Code of Civil Procedure 1908 reads as under:

“ ... 66- (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 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 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.”*

Regarding the contents of the Proclamation of Sale, Rule 338 of the Sindh Chief Court Rules supplements the provisions of Sub-Rule 2 of Rule 66 of Order XXI of the Code of Civil Procedure, 1908 and clarifies that:

“ ... 338. *Contents of sale proclamation. In addition to the particulars specified in sub-rule (2) of rule 66 of Order XXI of*



*the Code the proclamation shall contain a notice that only the right, title and interest of the judgment-debtor is to be sold, that purchasers must satisfy themselves as to the judgment-debtors title to the property and **that the title deeds or an abstract of the judgment debtors title will be open for inspection at the office of the Nazir.***

The nature of the rights that stem from identifying the particulars of a Proclamation of Sale have been put into context by the Supreme Court of Pakistan in the decision reported as **Mst. Manzoor Jahan Begum vs. Haji Hussain Bakhsh**<sup>12</sup> wherein B.Z. Kaikaus J. held that the publication of the proclamation of sale under Order XXI Rule 66 of the Code of Civil Procedure, 1908 were clearly “ministerial” and not “judicial” in nature and wherein it was clarified that:

“ ... *It should be explained here that sub-rule (3) was added for the first time in 1908 and the words in sub-rule (2) "be drawn up after notice to the decree-holder and the judgment-debtor and shall" were also introduced in 1908. Under the-earlier Code the Court could draw up the proclamation of sale without the help of parties. Obviously the Court was not performing any judicial function under rule 66 as it stood before 1908. If the function of the Court under Order XXI, rule 66 was ministerial before 1908 it does not unnecessarily become a judicial one, because the proclamation is to be drawn up after notice to the parties. The object of the notices to the parties was to guard against the appearance of wholly wrong particulars in the proclamation. When one turns to the particulars which are to be mentioned and to the language used by the Code with respect to specification of particulars it hardly remains a matter of doubt that the Court does not record any judicial determination on the matters to be specified. With respect to specification the words used are "specify as fairly and accurately as possible". The particulars include the revenue payable, any incumbrance to which the property is liable and any other matter "which the Court considers material for a purchaser to know in order to judge the nature and value of the property". It is hardly possible to contend that in respect of every other matter" which the Court considers the purchaser should know the Court will, when the parties appear before it, inform them as to what it intends to put in the proclamation and will then allow the parties an opportunity to lead evidence as to that matter. In order that a proceeding may be judicial every party should have a proper opportunity of proof of relevant facts by evidence. Order XXI, rule 66 does not envisage a proper judicial proceeding with opportunity to both parties to establish the facts which are to be entered in the sale proclamation. It should be pointed out that even if a notice under Order XXI, rule 66 contained a description of property which the judgment-debtor did not accept, and on objection by the judgment-debtor the Court determined the identity of property covered by the decree, the proceeding relating to such determination would be under section 47, C. P. C. and not under Order XXI, rule 66."*

Notwithstanding the above, it is clear to me that the intention of the legislature in warranting that the particulars of the property being put to

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<sup>12</sup> PLD 1996 SC 375

auction through the proclamation of sale are correctly identified, is premised on the Court attempting to getting the “correct” price for the property so as to ensure that the amount received from such a sale, while clearly reducing the decretal amount, would correspondingly reduce the liability of the Judgement Debtor to the Decree Holder. It would naturally follow, that a failure to correctly identify the particulars of the property in the proclamation of sale would not only prejudice the Decree Holder by “minimizing” the recovery made by the Decree Holder it would also prejudice the Judgement Debtor who would not be able to “maximise” the reduction of his liability under the Decree. In addition to the interests of the Decree Holder and the Judgement Debtor, the intention of legislature is also to ensure that the auction purchaser’s bid, pursuant to a proclamation of sale, is premised on a correct description of the particulars of a property to safeguard that the court does not inadvertently misrepresent information that would have a bearing on the value of the property through such an incorrect description.

10. Such an interpretation of the provisions of Order XXI Rule 66 of the Code of Civil Procedure, 1908, apparently, was the basis of the judgement of the Supreme Court of Pakistan reported as **Lanvin Traders Karachi vs. Presiding Officer Banking Court No. 2, Karachi and others**<sup>13</sup> wherein while considering whether a Proclamation of Sale, that was made by a Court in its capacity as a Banking Court exercising its jurisdiction under the provisions of the Financial Institutions (Recover of Finances) Ordinance, 2001, the majority of the Supreme Court of Pakistan had held that:

“ ... 8. A look at the above quoted provision would reveal that it has provided an exhaustive procedure for the proclamation of sales by public auction, How the proclamation of the intended sale shall be caused to be made; how shall it be drawn up after notice to the decree holders and the judgment debtors and how would it 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 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 a purchaser to know in order to Judge the nature and value of the property. In the

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<sup>13</sup> 2013 SCMR 1419

*absence of any of the particulars, listed above, the purpose of sale cannot be achieved. Once these particulars are ignored or overlooked, wild and wayward, would rule the roost. If, in this state of things, it is also ignored who suffers and who gains whether lawfully or otherwise, God knows what would become of the administration of justice. Yes, this provision which was ministerial before 1908 does not un-necessarily become judicial, according to the observations made by his lordship Mr. Justice B. Z. Kaikus, as he then was, in the judgment rendered in the case of "Mst. Manzoor Jahan Begum v. Haji Hussain Bakhsh" (supra), but the failure to comply therewith cannot be defended under any cannons of law and propriety, when it tends to damage the rights of the decree holders or those of judgment debtors, simply because a sale has been effected in favour of a third party. Agreed that proceedings under the aforesaid rule do not involve any judicial determination, but at the same time it cannot be disputed that they lay a sure foundation for judicious and judicial determination of the rights and liabilities of the parties. A balance, therefore, has to be struck to protect the rights and liabilities of the parties which could either be imperiled or even extinguished by not complying with the provision which has been inserted by the legislature with design and purpose."*

*(Emphasis is added)*

While there is a strong dissenting note that had recorded in that judgment and which is premised on the argument that the provisions of the Code of Civil Procedure, 1908 would not limit the jurisdiction of the Banking Court under the Financial Institutions (Recover of Finances) Ordinance, 2001, however, as the majority of the Supreme Court of Pakistan had come to the conclusion that the same principles as applicable to a sale conducted under the provisions of the Code of Civil Procedure 1908 would be applicable to the Banking Court in that jurisdiction, I am bound to follow the same.

11. The provisions of Order XXI Rule 66 of the Code of Civil Procedure, 1908 have been held to be mandatory. In the decision of the Supreme Court of Pakistan reported as **Shahid Ali vs. Mrs. Aziz Fatima**<sup>14</sup> it was held that:

“ ... 8. A review of the authorities, cited at the Bar by the learned counsel for the parties as well as study of the relevant provisions including rule 66 of Order XXI C.P.C, makes it amply clear that in a partition suit when the situation to sell the property arises the Court, as a rule, must ask the parties concerned to state before it estimated price of the property which in their opinion is likely to be fetched and although it is not essential for a Court to give its own estimate in the order but in drawing publication, having regard to the express provision of rule 66 of Order XXI, C.P.C. the Court while passing an order must take into consideration all the material facts, which are necessary for a purchaser to know in forming an opinion regarding valuation of the property. In 'the instant case order dated 6-12-1995, whereby Ch. Abdul Majeed was appointed as auctioneer, as well as the auction notices do not indicate as to whether reserve price of the property was ascertained or parties were asked to

<sup>14</sup> See PLD 2010 SC 38 and

*furnish their estimates, nor it finds place in the publication nor relevant details qua title of the property, nature of constructions e.g. number of rooms, etc. has been provided therein enabling the buyer to ascertain actual value of the property in question."*

In a decision of this Court reported as **Messrs NIB Bank Limited vs. Messr Apollo Textile Mills Limited and 2 others**<sup>15</sup> and which was relied on by Mr. Zeeshan Abdullah it was held that the provisions of Order XXI Rule 66 of the Code of Civil Procedure, 1908 were mandatory the court concluding that:

" ... 14. *The learned counsel for the judgment debtor referred to plethora of legal precedents and after minute examination of the law cited at bar, the following propositions of law are deducible: ...*

*(c) Provisions of Order XXI Rule 66 C.P.C. are mandatory in nature and without fulfilling basic requirements, if auction is taken place it would not be considered to have been lawfully made."*

12. I have perused the Proclamation of Sale that had been issued by the Official Assignee of this Court and which had proposed to auction the property on an "AS IS WHERE IS" basis. While the tenure of the lease has also been identified along with the address of the property there is little else which has been included in the Proclamation of Sale that would be of assistance to an auction purchaser in placing a correct value for the purchase of the Said Property. It was also admitted by the Official Assignee of this Court that the original title documents of the Said Property were not made available to the auction purchaser for inspection, as mandated by Rule 338 of the Sindh Chief Court Rules, to the Auction Purchaser prior to him making his bid.

13. Mr. Zeeshan Abdullah has premised his arguments on the provisions of Order XXI Rule 66 of the Code of Civil Procedure, 1908 and on Rule 338 of the Sindh Chief Court Rules to state that the covenant contained in sub-clause (aa) of Clause 4 of the Lease of the Said Property to obtain the

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<sup>15</sup> PLD 2013 Sindh 430

permission of the lessor prior to conveying the rights under the lease amounted to an “encumbrance” which having not disclosed in the Proclamation of Sale as mandated by clause (c) of Sub- Rule 2 of Rule 66 of Order XXI of the Code of Civil Procedure had invalidated the public auction and on account of such non-disclosure entitled him to be returned an amount of Rs. 150,000,000 (Rupees One Hundred and Fifty Million) that had been deposited by him in the auction proceedings. I am clear that a covenant of the nature as contained in sub-clause (aa) of Clause 4 of the Lease cannot be considered to be an encumbrance. An encumbrance has been defined to mean:<sup>16</sup>

“ ... *A claim, lien, charge or liability attached to and binding real property; e.g. a mortgage; judgment lien; mechanics’ lien; security interest; easement or right of way, accrued and unpaid taxes.*”

The right of a lessor to retain the right to approve the transfer of a property can neither be considered to be a “claim,” or a “lien,” or a “charge” or a “liability” attached to and binding on a property.<sup>17</sup> That being the case the failure to give notice of the covenant in the Proclamation of Sale would not fall foul of clause (c) of Sub- Rule 2 of Rule 66 of Order XXI of the Code of Civil Procedure, 1908 to render the public auction as invalid. I am equally not impressed with the contention of Mr. Zeeshan Abdullah that the permission of the lessor i.e. the Judgment Debtor No. 2 had not been obtained under clause (aa) of Clause 4 of the Lease of the Said Property prior to the issuance of the Proclamation of Sale. It is a matter record that on 6 February 2023, when the Proclamation of Sale of the Said Property was placed before the Court for orders by the Official Assignee of this Court through Reference No. 2 of 2022, no objection whatsoever was raised by any person and in fact the Proclamation of Sale was consented to by the lessor i.e. the Judgment Debtor No. 2. The consent of the lessor to the auction of the Said Property had therefore clearly been obtained.

<sup>16</sup> Brian A. Garner, Editor in Chief, **Black's Law Dictionary**, St. Paul, MN :Thomson Reuters, 2014.

<sup>17</sup> See **Fomento Resorts & Hotels & Anr vs Minguet Martins & Ors** (2009) 3 SCC 571

14. That being said, I do however believe that such a covenant should have necessarily been disclosed in the Proclamation of Sale under clause (e) of Sub- Rule 2 of Rule 66 of Order XXI of the Code of Civil Procedure, 1908 as being a fact that would be “material for a purchaser to know in order to judge the nature and value of the property” as such a clause would invariably impact the “marketability” of the title that was being acquired by the Auction Purchaser and hence would have a bearing on the price of the Said Property. This having not been done would be enough to invalidate the auction process that had been conducted by the Official Assignee.

15. In addition, I do believe that the obligation on the Official Assignee to make a disclosure of the entire title documents of the Said Property or at the very least as to make available an abstract of the title documents was mandated by Rule 338 of the Sindh Chief Court Rules. Clearly, the ability of an auction purchaser to examine the title documents would inter alia allow an auction purchaser to understand the rights, title and interests that would be acquiring and therefore enable him to place a proper value at the time of auction. This having not been done would also to my mind render the auction process that had been conducted by the Official Assignee as invalid

16. The contention of the Official Assignee that the Proclamation of Sale being indicated to having been made on an “AS IS WHERE IS” basis therefore dispensed with the requirement to make the requisite disclosures under Order XXI Rule 66 of the Code of Civil Procedure, 1908 or under Rule 338 of the Sindh Chief Court Rules cannot be sustained. Firstly, The provisions of Order XXI Rule 66 of the Code of Civil Procedure, 1908 are mandatory provisions and cannot be deemed waived on the basis that an auction purchaser participated in an auction on the basis of a Proclamation of Sale containing such an expression. Clearly such participation would not dispense with the obligation on the receiver, as contained in that rule, to

oblige him to make a fully disclosure of the details of the property. Secondly the expression “AS IS WHERE IS” has been held by this Court in the decisions reported as *Mir Amjad Ali vs. Official Assignee Hugh Court of Sindh and others;*<sup>18</sup> *United Bank Limited vs. Messrs Al Noor Enterprises and another*<sup>19</sup> and *Messrs Bismillah Textile Ltd. vs. Habin Bank Limited*<sup>20</sup> as being a reference to the physical attributes of the property being sold and not a representation as to the title of the property or as towards the liabilities, dues and taxes payable on the property and that being the interpretation cast, the obligation as contained in Order XXI Rule 66 of the Code of Civil Procedure, 1908 would continue to endure on the receiver.

17. For the foregoing reasons I am of the opinion that the auction that had been carried out by the Official Assignee of this Court of the Said Property had not been conducted in compliance with the provisions of Order XXI Rule 66 of the Code of Civil Procedure, 1908 read with Rule 338 of the Sindh Chief Court Rules and is hence invalid and is set aside. Official Assignee Reference No. 4 of 2023 is therefore rejected with directions that the auction of the Said Property should be conducted de novo. The Public Auction having been declared to be invalid, CMA No. 1041 of 2023 as maintained by the Auction Purchaser is allowed and the Official Assignee is directed to return the sum of Rs. 150,000,000 (Rupees One Hundred and Fifty Million) that had been deposited by the Auction Purchaser along with all the mark up that has accrued from the date of the deposit of the amount until the date the amount is returned to the Auction Purchaser.

**J U D G E**

**Karachi dated 28 November 2023**

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<sup>18</sup> 2001 CLC 671

<sup>19</sup> 2006 CLC 822

<sup>20</sup> 2008 CLC 504

**ANNOUNCED ON 29 NOVEMBER 2023**

**BY**

**SANA AKRAM MINHAS, J.**