

# IN THE HIGH COURT OF SINDH, KARACHI

Present:

Yousuf Ali Sayeed, J  
Arbab Ali Hakro, J

First Appeal No.26 of 2024

Appellant: Syed Ayaz Haider  
Through Mr.Muhammad Saleem Thepdawala, Advocate

Respondent No.1: National Bank of Pakistan  
Through Mr.Suleman Huda, Advocate

Respondent No.2: Arif Ikram  
Through Mr.Taimur Ahmed Qureshi, Advocate  
Mr. Ali Raza, Litigation Officer, NBP

Dated of hearing: 08.8.2024

Date of decision: 08.8.2024

## J U D G M E N T

**Arbab Ali Hakro, J:** Through this 1<sup>st</sup> Appeal under Section 22 of the Financial Institution (Recovery of Finances) Ordinance, 2001 (**FIO, 2001**), the Judgment Debtor (**appellant herein**) has impugned Orders dated 16.02.2024, passed by learned Banking Court-II, Karachi (**Executing Court**) in Suit No.89 of 2024 (Execution Appl. No.24 of 2017), whereby application under Order XXI Rule 89 r/w Section 151 C.P.C, filed by the appellant was dismissed and on the same day vide separate Order dated 12.02.2024, confirm the sale of mortgaged property.

2. Briefly, the fact is that the respondent-Bank instituted Suit No.89 of 2014 against the appellant under Section 9 of the FIO, 2001, for the recovery of Rs.14,537,837/-. This was decreed vide an ex-parte judgment dated 08.8.2016 by the Banking Court-II, Karachi, for the recovery of Rs.14,240,404/- in favour of the respondent Bank against the appellant jointly and severally with the cost of funds from the date of default until the realization of the entire decretal amount. The said ex-parte Judgment and Decree were then challenged by the appellant by filing an application under Section 12(2) read with Section 151 of the C.P.C, which was dismissed by the Banking Court.

3. During the execution proceedings, the mortgaged property bearing Plot No.B-105, measuring 240 Sq. Yds, Block-3 Gulshan-e-Iqbal, KDA Scheme

No.24, Karachi, was auctioned. The auction took place on 08.01.2024, and respondent No.2 emerged as the highest bidder with an offer of Rs.30,500,000/-, who deposited 25% of the bid amount with the Nazir of the Court. Subsequently, on 19.01.2024, the appellant filed an application under Order XXI Rule 89, read with Section 151 of the C.P.C, to set aside the auction proceedings on the grounds that the auction proceedings were held without calling/ascertaining the actual market value of the mortgaged property. The appellant conveyed his readiness to deposit the balance decretal amount and annexed a copy of the Pay Order dated 18.01.2024 for an amount of Rs.381,250/-, the 5% of the bid amount (i.e., purchase money) for payment to the respondent No.2. The said application of the appellant was dismissed vide the impugned Order dated 16.02.2024. Consequently, on the same day vide separate Order 16.02.2024, the Executing Court confirmed the sale of the mortgaged property. Therefore, the appellant preferred the instant appeal impugning both the above Orders.

4. Mr.Muhammad Saleem Thepdawala, appearing on behalf of the appellant, at the very outset, argued that the learned Executing Court had not considered the fact that the auction purchaser had failed to deposit the remaining 75% amount within 15 days and illegally confirmed the auction. He has argued that the appellant deposited 5% of the purchase amount through a Pay order and annexed the same with the application, but the learned Executing Court has not considered the same and illegally dismissed his application and confirmed the auction. He has also contended that the learned Executing Court has deprived the appellant of his valuable rights in the mortgaged property, so he also deprived more than 200 students of their educational careers. Therefore, application under Order XXI Rule 21 CPC filed by the appellant should be allowed. Lastly, he prayed for setting aside the impugned Order.

5. Conversely, Mr.Suleman Huda and Mr.Taimur Ahmed Qureshi, learned Advocates for respondents No.1 & 2, respectively, contended that impugned Orders passed by the learned Executing Court are in accordance with law and require no interference by this Court in the instant appeal. They further contended that respondent No.2 had already deposited the entire amount before the Executing Court, and the sale was confirmed; thus, a vested right was created in favour of respondent No.2.

6. We have heard the learned counsel for the respective parties and have also perused the record and the case law cited at the bar with their assistance. The question is whether the appellant has complied with the conditions

envisaged under Order XXI Rule 89 C.P.C. In such circumstances, it would be imperative to replicate the above provision as follows: -

*“89. Application to set aside sale on deposit. (1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in the Court—*

*(a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and*

*(b) For payment to the decree-holder, the amount specified in the proclamation of sale is for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree holder.*

*(2) Where a person applied under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.*

*(3) Nothing in this rule shall relieve the Judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.”*

7. The above provision stipulates and allows any person who either owns the property or holds an interest in it by virtue of a title acquired before the sale to apply to have the sale set aside. This is contingent on them depositing a certain amount in the Court. The first condition for setting aside the sale is that the person must deposit a sum equal to five per cent of the purchase money for payment to the purchaser/successful bidder. The second condition is that the person must deposit an amount for payment to the decree-holder. This amount is specified in the proclamation of sale for the recovery of which the sale was ordered. However, any amount received by the decree holder since the date of the proclamation of sale is deducted from this amount. There is also a restriction that if a person has applied under Rule 90 to set aside the sale of his immovable property, he cannot make or prosecute an application under this rule unless he withdraws his application under Rule 90. This Rule also does not relieve the Judgment-debtor (the person against whom the decree has been passed) from any liability he may have in respect of costs and interest not covered by the proclamation of sale.

8. Upon meticulous examination of the application under Order XXI Rule 89 of the Code of Civil Procedure (C.P.C), submitted by the appellant to the Banking Court, it is discernible that the appellant’s primary contention is that the auction proceedings were orchestrated without consideration of the actual

market value or price of the property. However, such a contention is circumscribed under Order XXI Rule 89 C.P.C. Order XXI Rule 90 C.P.C provides a legal avenue for the annulment of an auction sale on the grounds of fraud or material irregularity. Conversely, Order XXI Rule 89 C.P.C offers the judgment-debtor an alternative recourse to circumvent a sale post its valid execution. This rule endows the judgment debtor with a final opportunity post-auction to have the sale rescinded upon payment of the decretal amount and an additional sum as compensation for the auction purchaser. In light of these provisions, these remedies are mutually exclusive. Once the appellant has embarked on a course of action in accordance with Order XXI Rule 89, C.P.C, it is not permissible for the appellant to assert that the auction proceedings were conducted without soliciting the actual market value of the mortgaged property. This assertion is incongruous with the chosen course of action and is therefore untenable under the stipulations of Order XXI Rule 89, C.P.C.

9. as the appellant's second ground, he has deposited Rs.381,250/- (5% of the purchased amount) deposited by the purchaser. The record reflects that he has annexed the Photostat copy of the Pay Order along with his application without showing the original. Be that as it may, there is no explanation regarding the deposit of the decretal amount specified in the proclamation of sale, which, as per the second condition of Rule 89 (b) of Order XXI CPC, the appellant/person must deposit an amount for payment to the decree-holder. The Supreme Court of Pakistan, in the case of *Mst.Anwar Sultana*<sup>1</sup> held that *“Rules 89 requires that two primary conditions relating to deposit must be fulfilled. The applicant must deposit in the Court for payment to the auction purchaser 5% of the purchase money; he must also deposit amount specified in the proclamation of sale, lest any amount received by the decree holder since the date of proclamation of sale, for payment to the decree holder. Rule 89 of Order XXI, C.P.C. is intended to confer a right upon the judgment-debtor even after the property is sold to satisfy the claim of the decree holder and to compensate the auction purchaser by paying him the 5% of the purchase money. The provision is intended to defeat the claim of the auction purchaser unless the decree is simultaneously satisfied. Article 166 of the Limitation Act requires such an application as well as the deposit thereunder both are to be made within the period of 30 days from the date of sale. The deposit is a condition precedent to the entertainment of the application and the Court cannot extend time for deposit of the amounts under section 148 of the C.P.C. The date of sale used in the Rule relates to the date on which the property was knocked out to the highest bidder and not the date of confirmation. It may be observed that the Rules in the Civil Procedure Code are intended to secure proper administration of justice and it is, therefore, imperative that, they should be made to serve and be*

*subordinate to the purpose rather than be left to operate as tyrant master. The Rule does not provide a permission of the Court for depositing all the amounts referred to in clauses (a) and (b) of Sub-Rule (1) Order XXI, Rule 89, C.P.C. as these amounts are known to the judgment debtor and are required to be deposited to establish his bona fide. In the case in hand, admittedly, the application was made by the appellants within 30 days from the date of sale but no amount was deposited by them which was a condition precedent to the entertainment of such an application. The Executing Court in law, was neither competent to entertain the application of the appellant nor empowered to extend time for depositing the amounts specified therein, as such an extension was barred under Article 166 of the Limitation Act.”*

10. The learned counsel representing the appellant has proffered an objection, asserting that the purchaser-bidder, despite being explicitly directed by the executing Court to deposit the residual 75% of the bid amount within 15 days, has failed to comply with said directive. However, upon meticulous examination of the diary sheets furnished by the learned counsel for the appellant, it is evident that on 8.01.2024, the purchaser-bidder was indeed directed to deposit the aforementioned amount. The purchaser-bidder, in response, deposited the said amount through a pay Order dated 23.01.2024. Consequently, if one were to calculate the duration from 08.01.2024 to 23.01.2024, it unequivocally amounts to 15 days. Thus, it is incontrovertible that the purchaser-bidder has deposited the remaining 75% of the bid amount well within the stipulated time frame. Therefore, the contentions advanced by the learned counsel for the appellant are fundamentally flawed and devoid of merit.

11. The Court records reveal that the Executing Court had scheduled the sale of the mortgaged property on seven separate occasions, yet none stepped forward to participate in the auction. It was only on the eighth attempt, specifically on 8.01.2024, that the auction proceedings were successfully conducted. On this occasion, only respondent No.2 made an appearance and proffered the highest bid of Rs.30,500,000/-. This bid was accepted by the Court, and respondent No.2 was consequently declared the successful bidder. Subsequent to this declaration, respondent No.2 fulfilled his obligation by depositing the remaining 75% of the bid amount, leading to the confirmation of the sale. As a result of these proceedings, a vested right has been conferred upon the auction-purchaser, respondent No.2. This right, once established, could not be disturbed or invalidated, thereby solidifying respondent No.2's position as the lawful owner of the property in question.

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<sup>1</sup>Mst.Anwar Sultana through LRs vs. Bank Al-Falah Ltd and others(2014 SCMR 1222)

12. The foregoing are the reasons for the Short Order dated 08.08.2024, whereby this petition was **dismissed**.

**JUDGE**

**JUDGE**