

Execution proceedings in banking courts

by

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Section 19 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (*the Ordinance*) provides a mechanism to initiate process to execute decree of a banking court. It defines, in detail, steps to be followed. Upon pronouncement of judgment and decree by a banking court; the suit is automatically converted into execution proceeding. The decree holder is not required to file separate application, however mode of execution is highlighted by the decree holder and accordingly detail of assets, if any, is provided to the court. This provision of law empowers financial institution to initiate sale of mortgaged, pledged or hypothecated property. Section 19(3) & (4) of *the Ordinance* describes procedure to sell an immoveable property by a financial institution without intervention of the court. This mode is not in practice after declaring section 15 of *the Ordinance* as void by the Hon'ble Supreme Court of Pakistan in the case of *Baz Muhammad Kakar and others v. Federation of Pakistan through Ministry of Law and Justice, Islamabad and others* (PLD 2012 SC 870).

Auction process is initiated by the courts after assessing the liability judiciously. Sub-section 7 of section 19 of *the Ordinance* provides a procedure to entertain objection and investigate a claim of an objector/claimant within thirty (30) days from the date of filing the claim. A summary procedure is opted to decide the claim. Banking court may in its discretion proceed with the sale of property provided that the financial institution gives a written undertaking that in the event the objections are found to be valid, or are sustained, it shall in addition to compensating the aggrieved party by the payment of such amount as may be adjudged by the Banking Court also pay a penalty up to twenty percent of the sale proceeds.

2. Civil Procedure Code, 1908 (*the Code*) provides a comprehensive procedure to execute and enforce execution of a decree. Section 51 of *the Code* provides five modes to execute the decree, which are:

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require.

Arrest of a judgment debtor is avoided as there is limited scope when a person may be detained in prison. Section 51 of *the Code* elaborates circumstances when arrest can be affected. However in any case a woman is not arrested as to execute decree of a court.

3. Order XXI, Rule 11 of *the Code* explains information to be incorporated in execution application. It is a normal practice in the banking courts that the decree holder formally files written execution application in the manner as defined under Order XXI, Rule 11(2) of *the Code*.

4. In most cases those are filed before banking courts, finances are secured by executing a mortgaged deed. In a few cases finance is not secured, such as Personal Loan, Credit Card facility. In such cases for executing a decree the decree holder opts to cause arrest of judgment debtor. Order XXI, Rule 37 of *the Code* states that before issuing warrant of arrest a notice is to be issued to call upon the judgment debtor to appear before the court and show cause why he should not be detained in prison. Under Order XXI, Rule 38 of *the Code* warrant of arrest is issued and object of such warrant is to recover the decretal amount and if such amount is paid his arrest is not affected.

5. In the case of unsecured loan the decree holder may request to court to attach moveable and immoveable properties of the judgment debtor. Most of the time, after attachment, objections are filed by the judgment debtor or any person having claim or interest in the property. Under Order XXI, Rule 54 of *the Code*, courts attach immoveable property and under Rule 58 of Order XXI of *the Code* objections are filed and decided. During pendency of such application the sale can be postponed. In such situation claimant and/or objector is asked to adduce evidence as to show that on the date of attachment he had a title, right or interest in the property attached. Rule 62 of Order XXI of *the Code* states that all questions relating to right, title or interest shall be decided by the executing court and no separate suit shall lie. Order XXI, Rule 65, of *the Code* states that sale will be conducted by an officer of the court or by such other person as the court may appoint in this behalf. It also states that sale be made by public auction. This is the reason that most of the time Nazir of the court is appointed to conduct sale. Procedure for public auction has been defined in Order XXI of *the Code*. A Notice under Order XXI, Rule 66 of *the Code* is issued which explains description of property offered for sale, its forced value and terms and conditions of sale. In the first instance the notice is served upon the judgment debtor and upon the service of the notice he is given opportunity to file objections. In case objections are filed, these are examined and accordingly terms and conditions of sale are finalized. Most of the time judgment debtor disputes assessed value of the immoveable property. The court at the initial

stage normally considers valuation report filed by the decree holder. In case of differences, the judgment debtor may be asked to submit valuation report or the court may itself direct to an independent valuator for re-assessment. Once the terms and conditions are finalized a public auction notice is issued through publication in two daily newspapers. Notices are also affixed at the outer door of the mortgaged property. Banners are also affixed at the prominent places including the property going to be sold.

6. Sometimes on the day of sale or before it, objections are filed with the prayer to postpone the sale. Order XXI, Rule 65 of *the Code* empowers the courts to stop the sale. In case sale is adjourned for a longer period than seven (7) days, a fresh proclamation notice under Order XXI, Rule 67 of *the Code* is made unless the judgment debtor consents to waive it.

7. In case on the fix date sale is conducted, and the purchasers/bidders deposit 25% of their bid amount; the highest bidder is asked to deposit rest of the amount within fifteen (15) days. In case he fails to deposit remaining amount, initial deposit may be forfeited as provided under Order XXI, Rule 86 of *the Code*. Sometimes after the sale an application is filed under Order XXI, Rule 89 of *the Code* by an objector claiming his interest in the property sold. He, while applying under Order XXI, Rule 89 of *the Code*, has to deposit an amount equal to 5% of the purchase money for the purchaser and the amount specified in sale proclamation for the decree holder. Order XXI, Rule 90 of *the Code* also deals to set-aside sale on the ground of irregularity and fraud. For filing application under this rule, it is mandatory for the person filing application to deposit up to 20% of the sum realized the sale or furnishes such security. Once a sale is finalized, Sale Certificate is issued under Order XXI, Rule 94 of *the Code* and accordingly property is transferred by the concerned authority in favour of purchaser. The decree holder withdraws the amount equivalent to their claim and rest is return to the judgment debtor.

Comments are welcomed:

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