

The Effects of Selling Property at Auction by Ordinary Creditor Barrier on Mortgagee Creditor Rights Analytical Study in Jordan Execution Law

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Abstract

The study titled The Effects of Selling Property at Auction by Ordinary Creditor Barrier on Mortgagee Creditor Rights has taken place under the provisions governing the sale of ordinary creditor barrier contained in Execution law. The study has concluded that the Jordanian legislature did not take into account in organizing the sale of real estate by auction by the ordinary creditor barrier guarantees that in law of an immovable security for debt, including minimum bidding began. So does the creditor, if the mortgagee creditor and debtor collusion only recourse to annul the sale, leading to wasted time, effort and money. The legislature did not indicate a situation which action of contract or by auction and the impact on the debt secured by the mortgage, which affects the result on the right of the mortgagee creditor intervention or further implementation. The study concluded that a set of recommendations that wished the Jordanian legislature to be adopted.

1. Introduction

Provided in the sale of real estate by auction as a way of implementation is critical, as is the property of great economic importance as one of the most important access to financial facilities, and is one of the most important guarantees for debt collection, and selling property by auction to clear the property and rights of transferred rights to the price, as provided for in article 96 of execution law where the "The referral decision on registration of real estate sales clearance of deterministic franchising, insurance, mortgage, and moving them to the price subject to the provisions of private laws."

There for may any of the ordinary creditors or the mortgaged creditors or holders of concessions to take a direct action for selling property by auction. Through competent execution department which may result in prejudice to the rights or guarantees provided by law for a group of creditors according to the type of bond.

The study has come to clarify the effects of selling property at auction by ordinary creditor barrier on mortgagee creditor rights, and that under the provisions of the texts governing the sale of ordinary creditor barrier contained in repealed interim Procedural Act No. 75/1951 and repealed Procedural Act No 31/1952, and regarding to Jordan civil Act No. 43/1976, and law of an immovable security for debt No. 46/1953.

The importance of the study is shown through answering next questions:

- What is the effect of taking a legal action by ordinary creditor barrier to sell a property by auction on mortgagee?
- And is there any difference between insured debt and insured debt by delay mortgage?
- And cheats or collusion or fraud could be expected between ordinary creditor barrier and debtor to damage mortgagee creditor? And what expected solution to mortgagee creditor in this case?
- And do starting the ordinary creditor barrier selling property by caution prevent mortgagee creditor from taking same procedure?
- And do the creditors have the right to interfere in process of selling property by caution which started by creditor barrier?
- And does Jordan legislature committed to keep on an enacted guarantees in law of an immovable security for debt No. 46/1953. When ordinary creditor barrier started process of selling property by caution?
- And does the Jordan legislature situation in excluding regulated provisions in both repealed Acts (interim procedural Act No. 75/1951 and procedural Act No. 31/1952) was right or not?

The answer to those questions is one of the objectives of the study to the legal system of selling property by auction through one of ordinary creditors, and ensuring the rights of the mortgagee creditor secured debt and creditor's rights in legal proceedings, the mortgagee for the deed, and indicate how to address credit mortgagee creditor normal barrier and the debtor be collusion or fraud.

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The study will follow the analytical method for regulated provisions supported with Jordan cassation verdicts related to study.

2. The Effects of Starting the Normal Barrier Creditor Action Selling Property by Auction the Debt Secured by the Mortgage.

Jordanian legislator defined in article 1322 of the civil law the mortgage that: "contract by the creditor gains a real right on specific estate to fulfill his payment with primacy right to ordinary creditors and the creditors following him in fulfilling the right to price that real estate in any hand is ⁽¹⁾. This definition shows that mortgage grants the mortgagee and progress tracking feature of the mortgaged ⁽²⁾, and in this regard the cassation court decided that the mortgagee creditor to gain his debit from the mortgaged as a private concessionaire and the priority set by the law, as has the right and the trace ⁽³⁾.

Here the question arises about the direct effects of normal barrier of creditor of the mortgaged property to the mortgagee creditor's right in terms of the direct impact of these actions on the collateral real right of itself? Under the mortgage contract of formal contracts which need to take place and is registered with the competent land registry department. and thus provides for all the obligations and legal actions of the property, and the mortgagee creditor right registered and installed on the property sheet, and it is the right of the mortgagee creditor guaranteed fulfillment of the money pledged in this respect ⁽⁴⁾. But the sale of the mortgaged property auction by an ordinary creditors barrier passed this mortgage to return for price subject ⁽⁵⁾. Here risk arise regarding to article 96 of execution law enacts that "the registration of preemptory decision clearing the property sales of franchises, insurance, mortgage, and moving them to the price subject to the provisions of private laws. Regarding this case many questions arise, whether the sale in this case proceed in accordance with execution law? Or in accordance with the law of an immovable security for debt? And if the property is sold by public auction in accordance with execution law, does the Act contains the guarantees provided by the law of an immovable security for debt to ensure the mortgagee creditor debt? And what is the ruling on a mortgage that is guaranteed by delay a debit if initiated procedures for auction of an ordinary creditor's barrier?

It should be noted that the execution Act regulated procedures for selling property by auction by one of the ordinary creditor's barrier, and is therefore applicable in the event that the desired by one ordinary creditor's barrier direct sale auction property even if that property is mortgaged, and no provisions in the execution law refers to the need to take into account the guarantees created by the law of an immovable security for debt ⁽⁶⁾.

What if a creditor of the normal barrier in proceedings to sell the mortgaged property by public auction and sold for less than the value of the property, and the mortgage is less than the value of the auction. Procedures are legal although collusion between the barrier and the debtor, the creditor is the mortgagee? it simply to check the sale price or the other way? If the mortgagee creditor knows that the sale has been initiated it can intervene, either through observation or by entering the auction for sale, no problem arises in this case ⁽⁷⁾, but the problem

¹ This definition has been criticized as a mortgage that he knew as a contract while it is a right, as well as to make the Jordanian legislature has a certified real estate mortgage is dedicated to keeping the mortgage debt, the property not only ensures that the mortgage debt, but may include other debts in the case where the value of the property for the value of the mortgage. Mohamed Waheed Deen Sesar, explaining of civil law collateral real rights, Mortgage, possessory pledge, concession rights, Book III, the library of the House of culture publishing, Aman, first edition, Fifth Edition, 2006, p. 29.

² Article 1366 of the Civil Code enacts that: "the mortgage expires the sale of mortgaged property under the law of procedure and the private laws and pay to creditors according to the rank-dependent or deposit", and article 96 of the execution Act No. 25 of 2007 that "the registration of preemptory decision clearing the property sales of franchises, insurance, mortgage, and moving them to the price subject to the provisions of private laws."

³ Cassation decision number 3804/2010 dated 9/2/2011 Adalah's publications.

⁴ Dr. Al-Sayed Nilel, Rules of personal and real guarantee, the warranty – mortgage – Franchise – jurisdiction – scientific publishing – printing presses, King Saud University, Riyadh, without number and year of publication, Edition, p. 193-194.

⁵ The Cassation court adopted to the sale by auction of the estate of any; cleanse the property and proceeds of these rights to the price. Cassation. No. 658/2004 of 9 June 2004. Adalah publications.

⁶ The guarantees provided for in article 13/3/c of the law of the immovable security for debt No. 46 of 1953 which enacts "3. c. after the report of the seizure and the final value by putting money in the bidding for five days by three successive announcements for fifteen days and wish to engage in a bid to have the Court Fund (10%) Of the estimated value in insurance and may not start the bidding less than (50%) Of the estimated value and each bid a fourth Declaration for a period of fifteen days and during this period included less than (2%) The latest bid "allowance.

⁷ Article 78 of execution law enacts "the Commissioner shall notify the debtor and creditors who have signed up for their reservation and creditors owners mortgages and insurance and the franchise who have restricted their rights before booking of procedures." Article 82 of the Act indicates that creditor is the mortgagee is not prohibited in the auction terms stated that "the trial judge barred from or any of the staff or lawyers and agents of any of the parties under penalty of nullity proceedings jointly bid or participate in and even by others and forbidden to subscribe on behalf of other persons or on their behalf." See execution disputes, Chancellor Medhat Mohammad Al-Hasani, disputes, the judge, the procedure for raising disputes timely and substantive execution, without publishing and Edition, 2005, pp. 643 ff.

arise when the mortgagee creditor didn't know that the auction has begun!

In fact, if the bid on a mortgaged property through ordinary creditor embarked on the barrier, there is no minimum for this auction if has sold the real estate in much less than the estimated price. In this case the execution act enacts if the bidding less allowance by 25% over reopening the property to bid for 30 days and once, then transferred the property to the highest bidder the last definite assignment, regardless of the amount of the bid is the cost ⁽¹⁾.

With reference to article 57 of the code of procedure the repealed No. 57 of 1951 it was stated that: "may sell things reserved for ordinary debt if reserved for debit is franchise. In this case met the first at their debt holders and then pay the rest to the ordinary debt holders. "

It also, is according to the law of an immovable security for debt. if that value of mortgaged more than the debt secured by the mortgage, here may be sold to owners of ordinary debt and give over debt secured by the mortgage to them.

In this case, bidding not open in the amount less than the debt secured by the mortgage. This article prevents collusion between ordinary creditors, debtor, where the barrier required to open the bidding at least secured to protect the right of the mortgagee creditor and precludes the possibility of collusion or fraud that may occur from normal credit barrier and the debtor.

Regarding afore point the need to adopt the Jordanian legislature in execution law as set out in article 57 of the repealed procedure code No. 57 of 1951 to protect the mortgagee creditor of accessory to leading to protect the mortgage system because of its great economic importance in the community.

In this regard, the cassation Court decided that the rapid execution of the promissory notes of the execution Department and informing the debtor with legal actions on the same day shows collusion between the creditor and the debtor, And to sell the property at a lower price than the price much indication that too, so all this false execution procedures in the face of the mortgagee creditor and that the auction in this case must not be less than the value of the debt secured by the mortgage ⁽²⁾.

On the other hand a question arise about the situation when the ordinary barrier creditor start action selling property by auction with mortgage insurance without entitlement debt secured by the mortgage, or entitlement condition not met, can prevent a subject not worthy of his debit from directly selling property procedures barrier creditor auction, and the question arises whether the debt secured by the mortgage payment date lapse when the ordinary creditor initiated barrier action selling property by auction?

In this regard we think that, as long as the normal creditor's barrier proceeding selling of property through auction according to legal articles governing the matter, it does not change a mortgage secured by the mortgage debt payment date due or not ⁽³⁾.

However, this point was clear under the repealed procedural Act No. 31 of 1952 article 88 as follows "the debt holders who did not secured their debts with immovable money which secured to insure someone else, has the right to distrain on it and sell it even the payment date of secured debt with immovable money has come, and if sold pays first lien secured debt in accordance with the deed, the more it pays to the others.

In this regard we recommend the Jordanian legislature to adopt what was applied in the repealed procedure law No.31/ 1952.

In case the ordinary barrier creditor actions commenced the sale of mortgaged property auction real estate was a guarantor of a debt deferred, that does not lead to drop the term, with the consequence that the mortgagee creditor is not entitled to intervene to sell the property as its creditor, and to take advantage of the exemption from the requirement to pay 10% if it is the first mortgagee creditor, as this does not exempt him from payment of the bid if it was docked and was equal to the value of the debt secured by the mortgage Or less, so that the debt secured by the mortgage is delinquent.

Some jurisprudence went to selling property by auction cleanses the estate of mortgages and no difference between to guarantee delinquent debt or not ⁽⁴⁾.

However, this applies to the case of selling property by auction and the auction on a bidder and transmit it to a final transmit; this is the date of debt lapse, and not before. Therefore we recommend the legislature to address this issue, so that the law provides guarantees to the creditor from attempting a kind of collusion or fraud between the creditor and the debtor.

In short, that under the current provisions, that the mortgagee creditor whether secured by the mortgage

¹ Article 86 of execution law enacts that "if it appears that the allowance auction property for sale decreases by 25% more than the estimated value, then the head must return the money raised in the auction for 30 days and once then decides to transfer to the last highest ".

² Cassation decision No. 1967/2001 of 26 November 2001, Adalah's publications.

³ For further detail see Dr. Mahmoud Omar althioy, reservation and its general effects in civil and commercial procedure code, the new University Publishing House, Cairo, 1999, p. 222, and beyond.

⁴ See Dr. Mohamed Sewar, *ibid.*, p. 161, as well as Dr. Ramadan Mohammed Abu Al-so'ud, Dr. Humam Mohammed Mahmoud Zahran, personal and real securities, University publications House Alexandria, 1998, pp. 440-441.

debt immediately or deferred only recourse to procedures for the sale by auction of the suspicion of collusion between the ordinary creditor barrier, that pledgee creditor has interest to take this action, this procedure may lead to prolonged litigation and transactions, as well as wasting money, effort and time, add to that the weakening credit on real estate and economic importance in the community.

3. The Effects of Starting the Normal Barrier Creditor Action Selling Property by Auction on the Right of the Mortgagee Creditor Actions through the Execution Department

The Jordanian legislature enacts in article 67 of the execution law as follows "If direct creditor didn't request the sale of things seized to the other creditor barrier and to the debtor to request sale reserved after the action the declaration provided for in this Act and in this case the requested sale of the reserved notify to the debtor to the creditor before the three-day sale At least ".

Through this provision raised the question whether it extends to the mortgagee creditor? It could say in this regard that the text contained in the articles dealing with reserve money, on the one hand and, on the other hand, the text limit on creditors barrier only, therefore we believe that this text does not help credit mortgagee⁽¹⁾.

However, with reference to the text of article 71 of the code execution, it stated that "The head decides after the deadline in article (70) of this Act at the request of any of the persons concerned or the convict a real estate auction, and ordered the seizure of property using one or more designated by the head."

Regarding fore for article does it mean any 'person concerned' mentioned in the text of other ordinary creditors or mortgagee creditor only? The answer to this is no, surprisingly, it cannot give this right to any creditor barrier or mortgagee if they did not direct the implementation procedures. Beside it could make the process of implementation is complicated, through making numerous requests in the same case, as well as the process under this provision are not regulated.

From the above, we find that this issue need to interfere of the legislature to enacts a fit rules regulate this issue, accordance with some legislations,² With reference to article 56 from interim repealed procedure Act No. 75 of 1951, which enacted "property of the debtor that has seized more than a creditor does raise reservations only with the consent of the credit barrier and their satisfaction, and if the first barrier negligent process tracking to the end it is a legal right to request another barrier to execution".

Thus we find that the Jordanian legislature under repealed law was more successful in the statement and clarify this issue, so we need to adopt text similar to the text in the current execution law, and taking into account the extension of this provision to cover ordinary creditor and mortgagee creditor and other rights holders, which leads to prevent delays in execution and benefit both creditors group.

Meanwhile, the question arises as to whether a creditor directs procedures action for selling property by auction; do prevent the other creditors from taking same action through different case?

With reference to current execution Act and law of an immovable security for debt, we find out that they do not include any answer to prevent or to allow it.

Regarding to, it could be said that to each creditor to take legal steps to ensure and guarantee his right, without affecting the procedure before other credit.

But we see at the same time that the creditor has the right to intervene within the framework of a legally organized in the execution process, it is not permissible to allow a creditor to initiate proceedings on the same afford property on auction procedures to avoid wasting money and time and effort and to avoid instability especially that the creditor's right of control and the sale and interference is guaranteed.

This issue has been under the interim repealed procedure Act No. 31 of 1952 more organized as stated in article 89 that: The immovable reserved bid by malty parties shall be started by the request of any party, and procedure department is committed to notify other parties about procedure of bidding. And all reserved moved to the price, and all parties shall to wait the result of the caution'.

We believe that this text does not preclude further action but it prevents opening other auctions at

¹Article 12 of the law of an immovable security for debt enacts as follows: "If, at the end of a period of conviction and not debt or due to the condition of conviction to maturity before the expiry of that period if the debtor to fulfill the pledge ,the execution department sale the mortgaged, at the request of the creditor or his heirs (if passed) or request one of the creditors in the ratings (if there are creditors In the second grade or third ... Etc) Regardless of whether the debtor had died or declared bankrupt or did not leave behind any of the owners move and without the creditor to obtain a judgment or a decision of the courts or be obliged to refer to the deceased debtor's estate or bankruptcy: agent.

notes on this text that takes into account not only the demand of the same kind creditor in this case being only a fascination that is right where the law of an immovable security for debt ruled The provisions of the mortgage insurance and does not extend to the provisions of the ordinary creditors opposed the execution act which must be the reference year in which no provision in the law of an immovable security for debt.

² Like the Egyptian legislation in section 402 of the code, for more detail, see, Dr. Mahmoud Omar althioy, op.cit, p. 239 and beyond.

same time for same subject. What revolutes a question about legislature position, why not to adopt a text similar to the text under the current execution law, although it achieves justice as stated provides time, effort and money and bring stability to law positions.

Finally, we believe that the issue of procedures for selling property by auction with a number of ordinary creditor's barrier mortgagee creditors need to reorganize into account all possible hypotheses, also taking into account the observance of laws in certain cases which achieves the goal of preserving the value of the property.

4. Conclusion

After studying the subject of selling property by auction by a ordinary creditors or creditor barrier the study reached to several results and recommendations as follows:

5. Results:

- 1- The direct procedures estate sale by auction by ordinary creditor and its law of such procedures did not take into account the guarantees provided by the legislature in the law of an immovable security for debt and their minimum bidding began.
- 2- The Jordanian legislature has not regulated the issue of plurality of auctioning property contrary to the law of procedure the repealed law No. 31 of 1952.
- 3- Only to go to court to recourse caution in case the mortgagee creditor find that a collusion between creditor and debtor, what lead to wasted time, effort and money, unlike the situation in the interim procedure law repealed 75 of 1951.
- 4- The Jordanian legislature has not regulated the issue when direct auction proceed by the ordinary creditor barrier.
- 5- The Jordanian legislature did not indicate the status of selling property proceedings by public auction and the impact on the debt secured by the mortgage, which affects the result on the right of the mortgagee creditor to intervene or to proceed with execution.

6. Recommendations:

- 1- A legislator of text in the execution Act take into account the law of an immovable security for debt and keep the guarantees provided by the law of the mortgagee creditor, and bearing in mind what may arise from mortgages on money after reserving so had no such guarantees.
- 2- Regulate of the situation in which several auctions on the same property to prevent multiple bids on condition of ensuring the rights of all creditors.
- 3- Expressly the right of the mortgagee creditor and ordinary creditor's barrier to intervene in the proceedings in case the creditor neglected minors or in direct actions.

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