

Stereo.HCJDA 38.

Judgment Sheet
IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

....

Writ Petition No.5215 of 2022.

Masood-ul-Hassan.

Versus

Additional District Judge, etc.

J U D G M E N T.

Date of hearing: **02.07.2024.**

Petitioner by: M/s Muhammad Afzal Chaudhary &
Muhammad Akhtar Chaudhry,
Advocates.

Respondent No.2-4 by: Mr. Ejaz Hussain Mughal, Advocate.

AHMAD NADEEM ARSHAD, J. Through this Constitutional Petition filed under *Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973*, the petitioner assailed the vires of order dated 05.03.2022 whereby the learned Appellate Court while accepting the appeal of respondents No.2 to 4, set-aside the order dated 28.09.2021 and directed the learned Executing Court to proceed further in accordance with law to satisfy the decree.

2. Shorn of unnecessary details, respondents No.2 to 4 instituted a suit for recovery of maintenance allowance and dowry articles against the respondents No.5 & 6 on 20.11.2014; that suit was resisted by respondents No.5 & 6 through filing contesting written statement; that after failure of pre-trial reconciliation proceedings interim maintenance was fixed; that respondents No.5 & 6 failed to pay the interim maintenance allowance as well as cross-examine the plaintiffs' witnesses, hence, ex-parte proceedings were conducted vide order dated 25.04.2015 and learned Trial Court after recording ex-parte evidence decreed the suit vide judgment & decree dated 29.06.2015 and declared that respondent No.2/plaintiff No.1 is

entitled to recover maintenance allowance @ Rs.2,000/- per month from institution of the suit till subsistence of marriage, the respondents No.3 & 4 were declared entitled to recover maintenance allowance @ Rs.2,000/- per month from the institution of suit till their legal entitlement and also decreed alternate price of dowry articles as Rs.2,00,000/-; that respondents No.2 to 4 filed an execution petition for the satisfaction of the said decree on 24.07.2015; that respondents No.5 & 6 failed to appear before the Court despite issuance of notices, therefore, non-bailable warrants of arrest were issued against them and in the light of said warrants respondent No.5 was arrested and produced before the Court on 03.11.2015; that said judgment debtor (respondent No.5) moved an application for setting aside the *ex-parte* judgment and decree coupled with an application for suspension of said decree on 18.11.2015; that learned counsel for the decree-holders made a no objection statement qua suspension of ex-parte judgment and decree and release of judgment-debtor subject to furnishing surety bond in the sum of Rs.400,000/- with one local surety; that the learned executing Court subject to submission of surety bond in the sum of Rs.400,000/- with one local surety in the like amount to the satisfaction of the Court suspended the judgment and decree dated 29.06.2015 and released the judgment-debtor vide order dated 28.11.2015; that petitioner stood surety of said respondent No.5 to the tune of Rs.4,00,000/- and in this regard he submitted surety bond on 03.12.2015; that respondent No.6 (husband of respondent No.2) was also arrested and sent to civil prison for one year on 12.11.2019; that as the decree was not satisfied, therefore, proceedings against the petitioner/surety were initiated and his property was attached vide order dated 26.07.2019; that petitioner applied for staying the auction proceedings and got recorded his statement on 07.10.2017 to the effect that if the judgment debtor failed to pay the decree then he being the surety would be responsible to satisfy the decree and in case of default he will have no objection upon the auction of his property; that he also submitted an affidavit on 11.11.2019 by

maintaining that he has paid Rs.50,000/- today and will deposit further amount of Rs.50,000/- on 12.11.2019 and undertakes that he will be bound to pay the remaining decretal amount; that respondent No.5/judgment debtor moved an application for his release which was allowed by the learned Executing Court vide order dated 22.12.2020 with the observation that the father is bound to pay the maintenance allowance to his children and in case of his non-payment the grandfather is liable to pay the same if he has sufficient resources to pay the same but there is nothing on record to show that he has sufficient means to pay the decretal amount and keeping in view his old age he was released from the jail; that respondents No.2 to 4 assailed said order through preferring an appeal which was dismissed vide order dated 30.04.2021 by maintaining that as the surety (petitioner) got recorded his statement on 17.10.2017 that he will pay the decretal amount, therefore, for the satisfaction of remaining decretal amount of maintenance allowance the surety (petitioner) as well as his property is available; that the petitioner also moved an application on 17.11.2020 for his discharge being the surety of judgment debtor (respondent No.5) by maintaining that he has paid Rs.4,00,000/- for which he stood surety, therefore, he be discharged being the surety of the judgment debtor (respondent No.5). Learned Executing Court vide order dated 28.09.2021 allowed his application by declaring that surety (petitioner) is not responsible to pay any other amount and discharged him from his liability. Feeling aggrieved, respondents No.2 to 4 assailed said order through preferring an appeal. The learned Appellate Court vide judgment/order dated 05.03.2022 allowed the appeal by declaring that in the light of petitioner's statement dated 07.10.2017 and his affidavit dated 11.11.2019 he is responsible for remaining decretal amount and set aside the order dated 28.09.2021 with direction to the learned Trial Court to proceed further in accordance with law to satisfy the decree. Being dissatisfied, petitioner has filed this petition.

3. I have heard learned counsel for the parties at length and perused the record with their able assistance.

4. It is matter of record that the learned Trial Court decreed the suit of the respondents No.2 to 4 for recovery of maintenance allowance and dowry articles in the following terms:

“What has been discussed above, the plaintiff No.1 is entitled to receive maintenance allowance from the defendant @ Rs.2000/- per month from the institution of suit till the subsistence of marriage. While, the plaintiffs No.2 & 3 are also entitled to receive maintenance allowance @ Rs.2000/- per month from the institution of suit till they are legally entitled. The plaintiff No.1 is entitled to recover Rs.200,000/- as alternate price of dowry articles. Suit of the defendant for restitution of conjugal rights is dismissed.”

Although, the suit was instituted against husband of respondent No.2 and father of respondents No.3 & 4 namely Muhammad Nadeem (respondent No.6) and his father namely Muhammad Nizam (respondent No.5) but the decree is silent whether said suit was decreed against both of them and they are bound to pay the decretal amount jointly and severally or the said decree is only against respondent No.6.

5. It is evident from the record that respondent No.6 was sent to civil prison for a period of one year on 12.11.2019 and after facing the civil imprisonment he was released from the jail. It is also evident from the record that respondent No.5 was also arrested twice for satisfaction of the decree. First time he was released on submission of surety bond of the petitioner and secondly he was released by the Court keeping in view his old age by observing that he was not in easy circumstances to pay the decretal amount.

In view of above, both the judgment debtors were discharged by the Court from paying the decretal amount.

6. From perusal of order sheet it appears that in compliance of non-bailable warrants of arrest, respondent No.5 was arrested and produced before the Court on 03.11.2015; that he moved an application on 28.11.2015 for setting aside the ex-parte judgment and decree dated 29.06.2015 coupled with an application for suspension of said decree; that learned counsel for the respondents No.2 to 4 appeared before the Court and made a statement that he has no objection if the operation of impugned judgment and decree is suspended and judgment debtor Muhammad Nizam (respondent

No.5) be released subject to submission of surety bond in the sum of Rs.400,000/- with one local surety in the like amount to the satisfaction of the Court. The learned executing Court in the light of his statement vide order dated 28.11.2015 suspended the operation of the impugned judgment and decree and directed to release the judgment debtor Muhammad Nizam if he submits surety bonds of Rs.400,000/- with one local surety in the like amount to the satisfaction of the Court. The petitioner came forward and stood as surety of said respondent No.5 and submitted his surety bond of Rs.4,00,000/- on 03.12.2015 in the light of order dated 28.11.2015. Perusal of the surety bond submitted by the petitioner reflects that petitioner stood surety with the following undertaking:

"یہ کہ بروئے حکم عدالت جناب والہ حکم وڈگری مورخہ 15-04-25 جو کہ منسوخ ہو چکی ہے اور مدعا علیہ نمبر 2 نظام دین جو کہ بند جوڈیشل حوالات ہے جس کی ضمانت / رہائی کا حکم عدالت جناب والہ سے مورخہ 15-11-28 کو ہو چکا ہے۔ بروئے حکم عدالت جناب والہ ضمانت نامہ داخل کروایا جا رہا ہے۔ منکہ مسعود الحسن ولد محمد ابراہیم ذات ارائیں ساکن چک نمبر WB/24 تحصیل و ضلع دہاڑی کا ہوں اور بروئے حکم عدالت جناب والہ مالیاتی 04 لاکھ روپے کا ضمانت نامہ بطور ضامن پیش ہو کر لکھ کر دیتا ہوں اور اقرار کرتا ہوں کہ میں حکم عدالت جناب والہ کا پابند رہوں گا اور اپنے آپ کو بطور ضامن پیش کرتا ہوں۔ بصورت دیگر عدالت جو بھی کارروائی کرے اعتراض نہ ہو گا۔"

In the light of said surety bond, learned Executing court on 29.01.2016 passed the order in following terms.

"As per record, the judgment debtor Nizam in application for setting aside decree has submitted his surety bond of Rs.4,00,000/- and he has been released from custody. Now to come up for payment of decretal amount on 09.02.2016."

In this way, it appears that the petitioner was only surety for Rs.4,00,000/- and he submitted the surety bond in the light of statement of learned counsel for the decree holders and the direction of learned executing Court.

7. It is evident from the perusal of record that the application for setting aside of ex-parte judgment and decree dated 29.06.2015 of respondent No.5 was dismissed on 16.03.2016 and appeal against it also met the same fate and dismissed by the learned Appellate Court vide order dated 26.08.2016 and the writ petition (W.P. No.18033 of 2016) against said orders was dismissed as withdrawn on 29.05.2017.

8. After dismissal of respondent No.5's application for setting aside the ex-parte judgment and decree he was again arrested and sent to jail. He moved an application for his release from the jail and discharge him from the payment of decretal amount. The learned Executing Court while deciding his application for his release from the payment of the decree vide order dated 22.12.2020 observed as under:

"It further reflects from perusal of record that earlier judgment debtor Muhammad Nizam was arrested and one Masood-ul-Hassan stood surety for him and surety has paid Rs.4,00,000/- (four lac) for satisfaction of the decree. In the given circumstances, I am of the view that decree to the extent of dowry articles has been satisfied and further decree was partially satisfied decreed to the extent of maintenance is also satisfied. There is nothing on record to show that petitioner/judgment debtor Muhammad Nizam has sufficient resources to pay the decretal amount to the decree holder. Petitioner is an old-aged person, hence, it would not be appropriate to keep him in the civil prison. Hence, application of the petitioner is hereby accepted. Judgment debtor Muhammad Nizam is hereby released."

9. Said order was assailed by respondents No.2 to 4 and the learned Appellate Court dismissed their appeal vide judgment/order dated 30.04.2021 while observing as under:

"Perusal of the record depicts that earlier respondent No.2/judgment debtor /Muhammad Nazim was arrested during the proceedings of execution petition and was released on submission of surety for him namely Masood-ul-Hassan for the satisfaction of decree. It is admitted thing that Rs.4,00,000/- has been paid for the partial satisfaction of decree. Now the question before the Court is that to what extent of the decretal amount respondent No.2/judgment debtor/Muhammad Nazim is responsible. In this regard, it is observed that appellant/decreed holder filed a suit for maintenance allowance and dowry articles against the respondent No.1 Muhammad Nadeem and his father/respondent No.2/Muhammad Nazim and said suit was decreed vide judgment & decree dated 29.06.2015 to the extent of maintenance allowance of plaintiffs and dowry articles amounting to Rs.200,000/-. It is observed that the judgment and decree is not clear that it was also passed against the respondent No.2/Muhammad Nazim regarding maintenance allowance of plaintiffs while to the extent of decretal amount of dowry articles i.e. Rs.200,000/- has been paid. The respondent No.2/judgment debtor/Muhammad Nazim being grandfather of minor plaintiffs in the presence of father of minor plaintiffs respondent No.1, is not responsible to pay maintenance allowance of minors because it is primary responsibility of respondent No.1/judgment debtor being father to pay the maintenance allowance to his children and in case of non-payment of maintenance allowance, grandfather is duty bound to pay the maintenance allowance, if he has sufficient reasons to pay the same. But in this case, there is nothing on

record to show that respondent No.2 has the easy circumstances to pay the maintenance allowance to his grandchildren."

Said judgment was not assailed any further, hence, the same has attained finality. Through said orders, the learned Courts below discharged respondent No.5 for the satisfaction of the decree.

10. The petitioner failed to pay Rs.4,00,000/- of his surety, hence, his property was put to auction. In order to stop the auction proceedings, petitioner appeared before the Court and got recorded his statement on 07.10.2017 in the following manner:

"بیان کیا کہ میں مقدمہ ہذا میں ضامن مدیون ہوں۔ مقدمہ ہذا میں مورخہ 17-10-09 کو میری جائیداد کی نسبت نیلام عام کی کارروائی چل رہی ہے۔ آئندہ تاریخ پیشی پر زبردگری اگر مدیون کی طرف سے ادا نہ ہو تو بطور ضامن میں ادائیگی کا پابند رہوں گا۔ عدم ادائیگی کی صورت میں میری جائیداد نیلام عام کرنے پر کوئی اعتراض نہ ہو گا۔"

In the light of his statement auction proceedings was stayed.

11. The petitioner again defaulted to pay the decretal amount, therefore, his property was again put to auction, then he moved an application on 11.11.2019 by maintaining that he has already paid Rs.128,000/- and wants to pay further amount of Rs.50,000/- and prayed for stay of auction proceedings. In support of his application, he submitted his affidavit in the following terms:

"یہ کہ حلفاً بیان کرتا ہوں کہ اجراء مندرجہ عنوان بالا میں من مخلص مدیون نمبر 2 نظام کا ضامن ہوں اور کارروائی اجراء میں نیلامی کا حکم ہوا ہے۔ من مخلص نے امر و نہ مبلغ 50 ہزار روپے جمع عدالت کر دیے ہیں اور مبلغ 50 ہزار روپے مورخہ 19-11-12 جمع کروادوں گا۔ میری نیلامی روکی جائے۔ یہ کہ حلفاً بیان کرتا ہوں کہ باقی زبردگری بھی ادا کرنے کا پابند رہوں گا۔"

In the light of said submission, the learned Executing Court vide order dated 11.11.2019 stayed the auction proceedings and adjourned the matter to 12.11.2019. Petitioner submitted further amount of Rs.50,000/- on the given date.

12. The learned appellate Court keeping in view the petitioner's above referred statement dated 07.10.2017 and his affidavit dated 11.11.2019 declared him liable to pay the whole decretal amount vide impugned order dated 05.03.2022. Whereas, perusal of the above referred statement and affidavit reflects that the petitioner bind himself to pay the decretal amount being the 'surety' and not given any fresh surety bond for the satisfaction of whole decree.

Admittedly, the petitioner stood surety for Rs.4,00,000/- only and on 07.10.2017 the outstanding decree was also not more than Rs.4,00,000/-.

13. It is argued on behalf of the respondents No.2 to 4 that this Court also declared the petitioner is liable to pay the whole decretal amount while deciding Writ Petition No.11283 of 2019 titled “Masood ul Hassan V. Judge Family Court & others”. From the perusal of said order, it appears that the petitioner assailed the order dated 22.06.2019 of learned Executing Court whereby his property was put to auction. This Court while dismissing the said writ petition vide order dated 24.07.2019 observed as under:

“Having considered the submissions made by the learned counsel it is observed that the writ petition is wholly misconceived and untenable. Undeniably a decree was passed by the Family Court, execution proceedings started for the enforcement of decree, the petitioner opted to furnish surety on behalf of the judgment-debtor and that the judgment-debtor failed to discharge his liability under the decree. This being so, the learned Judge Family Court was legally justified to proceed against the surety who had committed and undertaken to satisfy the claim of decree-holder in the event of default on the part of judgment debtor. Undeniably, the judgment-debtor had failed to pay off the entire decretal amount and was not willing to satisfy the decree completely in result; the learned Judge Family Court was legally justified to proceed against the surety. Even otherwise, having furnished the surety to pay off the liability of judgment-debtor, the petitioner could not be allowed to find fault with order or to extend lame excuses to save his skin. The order for filing of the schedule for auction of the property of the surety and for its auction, in the given circumstances, does not suffer from any error of law. The order being interlocutory, no appeal being competent, the learned Addl. District Judge rightly declined interference.”

From the perusal of the above observation, it is clear that this Court only settled that in case of non-payment of decretal amount by the judgment debtor, the surety would responsible and in case of default on the part of surety, his property would be liable to be auctioned for the satisfaction of the decree. The only question before this Court was that whether the property of surety can be auctioned or not. A general observation was given by the Court and it was not decided to what extent the present petitioner/surety would be responsible, as this was not a fact in issue before the Court at that time.

14. From the perusal of the decree, it appears that no specific decree has been passed against respondent No.5. Said decree was consisting upon two parts i.e. a decree for recovery of maintenance allowance and a decree for recover of dowry articles. A decree for maintenance allowance also consisted upon two portions as it was passed in favour of respondent No.2/plaintiff No.1 wife of the respondent No.6 and in favour of respondents No.3 & 4 minors children of respondent No.6. Respondent No.5 is grandfather of the minors and he can be bound only to the extent of maintenance of the minors being their grandfather, if he has easy circumstances to pay the same. Therefore, when the Courts have let off/released respondent No.5 Muhammad Nizam from the responsibility of satisfying the decree, then how his surety is responsible to satisfy the same.

15. A surety's liability is co-extensive with that of the judgment debtor and he was as much bound by his undertaking as was the judgment debtor, and both were collectively and severally liable to make payment to the decree holder. While construing the tenure and extent of surety bond, the words and recitals of the surety bond must be taken into consideration to gather the intention of the executant of said bond and the bond must be strictly construed. A surety is liable only upto the extent to which he is clearly bound.

16. Through the order dated 28.11.2015 the learned executing Court directed respondent No.5 to submit surety bond of Rs.400,000/- with one local surety in the like amount and in compliance of said order, the petitioner submitted surety bond of Rs.400,000/- on 03.12.2015 and vide order dated 29.01.2016 the learned executing Court on submission of surety bond of Rs.400,000/- released respondent No.5 which facts clearly established that the petitioner was stood surety only of Rs.400,000/-. Contract of surety had provided that maximum he was liable to the tune of Rs.400,000/-. Orders of learned executing Court did not find mentioned that the respondent No.5 would arrange a surety for the payment of the entire decretal amount. Petitioner stood surety

amounting to Rs.400,000/- only, which he has paid before the learned Executing Court on different occasions as detailed in his application to discharge him from the liability as surety. Said fact was not denied by respondents No.2 to 4. In these circumstances, the petitioner has satisfied the amount for which he stood surety.

17. For the foregoing reasons, learned Appellate Court has erred in law while allowing appeal of respondents No.2 to 4 and dismissing the application of the petitioner. Hence, by accepting this petition impugned order passed by the learned appellate Court dated 05.03.2022 is set-aside and order dated 28.09.2021 passed by the learned Executing Court is restored.

(AHMAD NADEEM ARSHAD)
JUDGE.

APPROVED FOR REPORTING.

JUDGE.

*M. Arsalan**