

JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.65675/2021

Muhammad Naeem Vs. Additional District Judge etc.

Date of hearing	25-11-2024
Petitioner by	Syed Muhammad Usman Hadi Bukhari, Advocate.
Respondents No.3 & 4 by	Ms. Areesha Sajid, Advocate.

ABID AZIZ SHEIKH, J. Through this Constitutional Petition the petitioner has challenged the impugned orders dated 01.03.2021, 13.09.2021 & 18.09.2021 (**impugned orders**) passed by the Executing Court and the Appellate Court, whereby his Objection Petition against the attachment and auction of his immovable property was dismissed and the auction schedule was announced.

2. Relevant facts are that contesting-respondents No.3 & 4 (wife & minor-daughter — **contesting respondents**) filed a family Suit for Dissolution of Marriage, Recovery of Dower, Dowry Articles and Maintenance Allowance (**Suit**) against respondent No.5/defendant (Muhammad Akbar). Respondent No.6 (Abdul Aziz) appeared on behalf of the defendant through Special Power-of-Attorney/Exh.D2 (hereinafter referred to as **Special Attorney**). He contested the Suit by filing written-statement; however, the Suit was decreed on 06.05.2015 against respondent No.5. During execution, the said decree could not be satisfied against respondent No.5/Judgment-debtor (hereinafter referred to as **Judgment-debtor**), resultantly, the Special Attorney was sent to Civil Prison. The Petitioner stood Surety on behalf of Special Attorney by tendering his Surety Bond dated 31.05.2019 (**Surety Bond**). Subsequently, Petitioner’s immovable property, mentioned on the Surety Bond, was attached on account of failure to satisfy the decree by the Judgment-debtor and the Special Attorney. The Petitioner filed Objection Petition,

which was however dismissed through the impugned order dated 01.03.2021, which was assailed by the Petitioner in Appeal and his Appeal was also declined on 13.09.2024, thereafter, Petitioner's attached immovable property was put to auction while announcing the auction schedule *vide* impugned order 18.09.2021; hence, this Constitutional Petition.

3. Learned counsel for the Petitioner submits that the decree was passed against the Judgment-debtor and not against the Special Attorney, hence, since the Petitioner stood Surety on behalf of the Special Attorney, his attached immovable property could not be put to auction for satisfaction of the decree.

4. Learned counsel for contesting-respondents, on the other hand, supported the impugned orders and submits that the Petitioner executed Surety Bond on behalf of the Judgment-debtor and Special Attorney, therefore, his attached immovable property was lawfully put to auction for failure to satisfy the decree. She further submits that because respondents No.5 & 6 have common interest with the Petitioner and they are intentionally delaying this matter, therefore, this case may be decided on merits after hearing the contesting-respondents.

5. Arguments heard. Perusal of the record transpires that the Suit was filed by contesting-respondents against respondent No.5, which was decreed by the Trial Court on 06.05.2015. The Special Attorney on behalf of respondent No.5 was neither impleaded as defendant in the Suit nor the Suit was decreed against him, rather he appeared in the Court only in the capacity of Special Attorney on behalf of the Judgment-debtor. In absence of any decree against the Special Attorney or specific clause to this effect in Special Power-of-attorney (Exh.D2), the Executing Court could satisfy the decree only against the Judgment-debtor but not against the Special Attorney, who never appeared in the Suit in his personal capacity but only as Special

Attorney of the Judgment-debtor. In the circumstances, order for arrest of the Special Attorney and sending him in Civil Prison for execution of the decree was not warranted in law. Consequently, the Surety Bond by the petitioner for release of Special Attorney was also neither required nor enforceable.

6. The same view was also expressed by this Court in “Muhammad Aslam Vs. Ayyan Ghazanffar and 2 others” (PLD 2012 Lahore 392), where it is held as under:-

“12. Whenever the question of interpretation of Power of Attorney is considered, it is now a consensus on the point that deed of power of attorney is strictly to be construed and a power which has not been assigned in specific terms cannot be presumed to have been given by the principal to the attorney. The attorney in this case when extended the power to defend the suit on behalf of the defendant was never provided with any liability to the effect that in case of any possible decree against defendant/judgment debtor, the same can equally be executable against the attorney. Even in Muhammad Pervez’s case (Supra) the Hon’ble Supreme Court of Pakistan is of the view that it is the judgment debtor Fazal-e-Haq who is bound to satisfy the decree either himself or through attorney. Keeping in view such findings of the Hon’ble Supreme Court of Pakistan, the attorney in his independent capacity cannot be booked for satisfaction of decree which was never granted against him.”

Same opinion was expressed by this Court in “Muhammad Nawazish Ali Vs. Family Judge and others” (2021 CLC 1841) in following words:-

“27. The counsel for Respondents No.2 and 3 half-heartedly attempted to argue that the decretal amount payable to Respondent No.3 could be realized from the Petitioner as he was pursuing the cases on behalf of Sarfraz Hussain. This contention deserves a short shrift. The Petitioner is the special attorney of Sarfraz Hussain

and never assumed any liability on his behalf. He neither posted surety bond nor otherwise gave an undertaking to the Court at any point of time for payment of any money.”

The Islamabad High Court in “Muhammad Mohsin Fawad Vs. Hina Tayyaba Khalil and another” (2018 YLR 2199) reiterated this view as under:-

“25. The fact remains that the petitioner is not the judgment debtor. The petitioner was not a party to the suit instituted by the respondents. The petitioner happened to be pursuing the case on behalf of Dr. Qureshi before the Courts. It is not disputed that the Plot was owned by the petitioner and not by Dr. Qureshi. Therefore, the decree dated 03.10.2014 could not be satisfied by attaching or selling the property which belonged to the petitioner. The said decree is to be executed against the judgment debtor i.e., Dr. Qureshi, and none other.”

No doubt the Hon’ble Supreme Court in “Muhammad Pervez Vs. Mst. Nabila Yasmeen and 2 others” (2004 SCMR 1352) held that judgment debtor is bound to satisfy the decree either himself or through the attorney, however, in the present case it is not shown from the Special Power-of-Attorney (Exh.D2) that the Judgment-debtor required the Special Attorney to burden the liability for satisfaction of decree. This legal position is also explained by this Court in the case of Muhammad Aslam, *supra*.

7. From the above case law, there is no doubt that the Special Attorney was not liable for execution of the decree, consequently, the Surety Bond executed by the Petitioner for release of the Special Attorney cannot be made basis to attach his immoveable property for the satisfaction of decree. Though the Surety Bond is also on behalf of the Judgment-debtor besides the Special Attorney, however, when the Petitioner was not required at first place to execute the Surety Bond for release of Special Attorney, then the whole superstructure on the basis of illegal detention order will crumble down and

Petitioner's property cannot be auctioned merely because he mentioned the name of Judgment-debtor in his Surety Bond, which was not required to be executed at the first instance.

8. There is a clear distinction between "surety" & "special-attorney"; Rules 1 & 2 of Order III of the Code of Civil Procedure, 1908 (CPC) deal with the Special Attorney. For convenience Rules 1 & 2 of Order III of the CPC are reproduced hereunder:-

“1. Appearances, etc., may be in person, by recognized agent or by pleader.— Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader [appearing, applying or acting, as the case may be,] on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

2. Recognized Agents.— The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(b) persons carrying on trade or business for and in names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.”

9. Plain reading of Rule 1 of Order III of the CPC shows that a recognized agent can appear, file applications or act in or to any Court on behalf of any party; Rule 2 of Order III of the CPC refers to a class of persons who could be treated as recognized agents of parties, which include a person holding power-of-attorney

authorizing him to make and do such appearance, application and act on behalf of a party. The words “appearance”, “application” and “act” used in Rules 1 & 2 *ibid* are not defined therein. However, applying ordinary meaning to these words the word “appear” means to be present and to represent the party at various stages of litigation. The words “application” or “act” mean necessary steps, which can be taken on behalf of a party in the Court or in the offices of the Court in the course of litigation. Thus, the recognized agent or Special Attorney is entitled to appear, file application and act for a party but not liable for satisfaction of the decree passed against the Judgment-debtor; whereas a “surety” is governed under Section 128 of the Contract Act, 1872 (**Act**) and enforceable for performance of any decree or any part thereof under Section 145 CPC. Though CPC does not strictly apply in family matters but its principles are applicable.

10. From the above legal position, it is evident that the Special Attorney will only appear on behalf of a person and will not be liable as a surety unless he executes surety bond on behalf of a judgment-debtor for the satisfaction of decree.

11. In view of above discussion, this Writ Petition is **allowed** and the impugned orders are set-aside being without lawful authority and of no legal effect. However, this judgment will not preclude the Executing Court to proceed against the Judgment-debtor through all modes available under the law for satisfaction of the decree.

(ABID AZIZ SHEIKH)
JUDGE

Approved for Reporting.

JUDGE