

JUDGMENT SHEET
LAHORE HIGH COURT, MULTAN BENCH,
MULTAN.
JUDICIAL DEPARTMENT

EFA No.15 of 2022

Atta Muhammad versus Zarai Taraqiati Bank Ltd.

JUDGMENT

Date of hearing: 09.05.2023
Appellant by: Rana Muhammad Nazir Khan Saeed, Advocate.
Respondent by: Rao Riasat Ali Khan, Advocate.

MUZAMIL AKHTAR SHABIR, J: Through this Execution First Appeal filed under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (**FIO**), the appellant has called in question order dated 27.04.2022 (**impugned order**) passed by Judge Banking Court No.1, Multan whereby non-bailable warrants of arrest have been issued against the appellant.

2. Learned counsel for the appellant states that the impugned order is not sustainable as the Executing Court has issued warrants of arrest against the appellant, who is the judgment debtor, without proceeding further for disposal of the movable or immovable property of the appellant through auction which was against the mandate of law and the procedure on the subject and in conflict with principles of judgments reported as Muhammad Shahbaz Sharif v. Meezan Bank Limited and others (2019 CLD 729) and Mirza Shahid Baig v. National Bank of Pakistan and 8 others (2002 CLD 623) (Lahore). Seeks setting aside of impugned order.

3. On the other hand, learned counsel for the respondent/decreed holder has defended the impugned order by stating that despite efforts by the court, auction proceedings were not successful as no bidder had turned up to purchase the mortgaged property necessitating the

initiation of remaining process of execution through arrest and detention of the judgment debtor/appellant.

4. Perusal of record shows that suit for recovery of amount of Rs.898,437/- was instituted by respondent-Bank against appellant on 25.11.2013 which was partially decreed for Rs.738,752/- with costs on 14.05.2014 with further direction that the amount deposited, if any, by the judgment debtor but not credited in the statement of account shall be deducted from the decretal amount at the time of execution of the decree. The execution proceedings for recovery of decretal amount were initiated against the appellant and vide order dated 17.05.2017, notice under Order XXI rule 66 Code of Civil Procedure, 1908 was issued through ordinary modes, registered post and courier service as well as through bailiff with direction that *Fard Taleeqa* be also submitted. On 08.06.2017 *Fard Taleeqa* was submitted mentioning the mortgaged property i.e. agriculture land measuring 64 Kanals situated at Mouza Qutub Pur, Tehsil Mailsi, District Vehari and the same was ordered to be put to auction by fixing reserved price of the same as Rs.600,000/-. The court auctioneer was directed to hold auction of the mortgaged property and to submit report; it was stated in the report filed on 21.02.2018 that as the judgment debtor and the decree holder were not available at the spot and no bidder appeared to purchase the property on the date fixed for auction i.e. 15.11.2017, the auction proceedings were adjourned after waiting for some time at the spot i.e. property to be put to auction. Subsequently, as auction proceedings were not successful because the buyers were not approaching to purchase the property, the court on application of decree holder bank filed on 05.01.2019 issued notices to the appellant under Order XXI rule 37 CPC and on receipt of the report that the appellant had refused to receive said notice initiated proceedings for arrest of appellant/judgment debtor vide order dated 11.02.2019 and issued bailable/non-bailable warrants of arrest against him on various dates whereafter the judgment debtor filed an application for setting aside *ex parte* proceedings with application for leave to defend, upon

which on 22.02.2022, the court directed the judgment debtor to submit 1/4th of the decretal amount of Rs.738,752/- and suspended the auction proceedings; however, due to non-compliance of the said order, the court again issued warrants of arrest vide order dated 09.03.2022 and repeated the same on 27.04.2022; whereafter the appellant filed the instant Execution First Appeal before this Court against the said order which was listed for hearing on 23.05.2022 and operation of impugned order was suspended.

5. The grievance of appellant is that not only the appellant had not been allowed to contest the suit against him but his application for setting aside *ex parte* decree as well as PLA have also not been considered on merits solely for the reason that 1/4th of the decretal amount could not be deposited by the appellant in court and the said applications i.e. PLA, application for setting aside *ex parte* decree and application for condonation of delay were dismissed and non-bailable warrants of arrest were issued against him despite the fact that mortgaged property could be put to auction to recover the decretal amount.

6. It is not the case of the respondent-Bank that the appellant was instrumental in stopping, preventing or causing hinderance in the proceedings for auction of mortgaged property or had obstructed the same in any manner or had tried to dishonestly transfer the mortgaged property to prevent its sale in execution of decree by putting the same to auction or tried to abscond or leave the jurisdiction of the court to avoid execution of decree or had sufficient funds to pay the decretal amount but avoiding to do the same resulting in necessity for issuance of his warrants of arrest rather the failure of auction proceedings was due to the fact that no person appeared at auction proceedings for bidding to purchase the mortgaged property, which *inter alia* may have been due to the reason that auction proceedings had not been properly advertised. The aforesaid inference drawn by this Court is strengthened by the report submitted by the court auctioneer wherein

it is specifically mentioned that neither the representatives of the decree holder bank nor the judgment debtor was available on the spot and buyer has also not approached to purchase the mortgaged property being put to auction and conclusion could be drawn that serious effort to put the property to auction had not been made. Besides no other effort to put the property to auction was subsequently made by the decree holder bank rather application for arrest and detention of the judgment debtor was filed on which proceedings by issuance of warrants of arrest had been initiated, hence, in the said circumstances conduct of appellant could not be treated as contumacious for drawing adverse inference against the appellant; besides, on the basis of aforementioned reasons in terms of principles laid down in the afore-referred reported judgments in the cases of Mirza Shahid Baig and Mian Muhammad Shahbaz Sharif, warrants of arrest could not be issued against the appellant. The relevant portion of judgment passed by this Court in Mirza Shahid Baig's case (supra) is reproduced below for reference:

“2. We have heard both the learned counsel and, in particular, the learned counsel of the judgment-debtor Bank. It is evident that the decree obtained by the respondent-Bank is to be satisfied through sale of the properties mentioned in the Fard Taleeqa. The Banking Court should, in the first instance, attempt to sell the said properties and only in the event the sale proceeds are not sufficient to satisfy the decree, or the judgment-debtor impedes the sale or commits other prejudicial acts that it would be proper to proceed against the judgment-debtor personally. In this view of the matter, we would modify the impugned order and hold that there was no justification on 31.10.2001, for issuing warrants of arrest against the appellant Mirza Shahid Baig.”

7. The afore-referred passage from the judgment of case of Mirza Shahid Baig (supra) was considered as valid ground not to arrest the judgment debtor in the case of Muhammad Shahbaz Sharif (supra), in which this Court held as under:-

“In the instant case the Executing Court has not dealt with the application of the appellant with procedural fairness which is right of every citizen without creating distinction between decree-holder or the judgment debtor. The impugned order clearly offends the modes of execution of a decree as prescribed in section 51 of the C.P.C. In order to better appreciate the issue in hand I feel it expedient to reproduce section 51 of the C.P.C. as under:

"51. Powers of Court to enforce execution.-Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree --

(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:

Provided that, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied -

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree, --

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account."

A thoughtful study of the above said provisions of law keeping in view the facts and circumstances of the instant case leads to hold that in this case there existed none of reasons explained in the above said provisions of law for detention of the judgment-debtor in prison. The learned Executing Court was not justified in refusing application for cancellation of warrants of arrest of the appellant/judgment debtor. Needless to state that the legislative intent is to ensure that a decree of the court is satisfied in full, in the shortest possible time. The intent, behavior, attitude, conduct etc. of the judgment debtor is very much essential to determine how the Executing Court should deal with the judgment debtor. Where the Court finds that the judgment debtor has, or has had since the date of decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same only then it can commit the judgment debtor to prison. Notwithstanding the above vast powers given to the Executing Court it is also the legislative intention to protect the citizens from personal humiliation in the capacity of a judgment debtor, therefore, the law provides the mode of execution of the decree by way of attachment and auction of his/her movable and immovable property at the first instance to satisfy the decretal amount and in the absence of satisfaction of the decretal amount only in terms of the

provisions envisaged in section 51 of the C.P.C. supra, the court can resort to committing a judgment debtor to prison. As the Executing Court in this case has passed the impugned order against the legislative intent and mandate of the law supra, therefore, the same is not sustainable in the eye of law.

6. *In view of above, the instant appeal is allowed and the impugned order dated 15.7.2013 is set aside.”*

8. It is important to note here that in the judgment reported as Aftab Saleem Choudhary and another v. Soneri Bank Limited through Attorneys (2005 CLD 401), a learned Division Bench of this Court while setting aside the warrants of arrest of the judgment debtor held as under:

“4. As mentioned above suit for recovery of Rs.48,19,411 brought by respondent-Bank against the appellants was decreed but appellants failed to pay decretal amount, therefore, respondent filed execution petition. However the property mortgaged by the judgment-debtors was not auctioned, therefore, learned trial Court issued warrants of arrest of the appellants/judgment debtors. The case of appellants is that learned Executing Court had issued warrants of arrest of the appellants in violation of provisions of section 51, C.P.C. and the case of Precision Engineering Limited and others v. The Grays Leasing Limited PLD 2000 Lahore 290 and that no serious effort was made for auction of the property already mortgaged by them. According to section 51, C.P.C. the pre-conditions for issuance of warrant of arrest are that judgment-debtor should be proved to have made attempt to leave the limits of Court to obstruct the decree or execution thereof or dishonestly transferred the property after the institution of the suit to avoid the decree or had the means to pay the decree and neglected to do the same. So without satisfaction of these pre-conditions no mechanical order for detention in prison can be passed. Reliance can also be placed on the case cited above. However it is clear from the record that learned Court below passed the impugned order only on the ground that property mortgaged by judgment-debtor-appellant could not be auctioned. The appellants have mentioned in Para. No.4 of memo. of appeal, the detail of property mentioned in 'Farad Taleeka' filed by decree-holder/bank and the same could satisfy the decree. As such in the circumstances of the case, there was no justification for issuance of warrants of arrest of appellants. So impugned order is not sustainable in the eye of law and the same is liable to be set aside.

5. *The upshot of the above discussion is that this appeal is accepted and impugned order is accordingly set aside. However learned Executing Court would be competent to issue warrants of arrest subject to satisfaction of conditions stated in section 51, C.P.C. No order as to costs.”*

9. Later on, the Banking Court in its capacity of Executing Court again issued warrants of arrest of Aftab Saleem Choudhry, the judgment debtor in the afore referred case which were again set aside by this Court through judgment reported as Aftab Saleem Choudhary

and another v. Soneri Bank Limited through Attorneys (2007 YLR

107 Lahore) by observing as under:

“3. Learned counsel for the appellants contends that the warrants of arrest of appellant No.1 were issued without complying with the requirements of proviso to section 51, C.P.C. and in complete ignorance of the previous judgment rendered by this Court in EFA No.510 of 2003. Conversely the learned counsel for the respondent, while supporting the impugned order, submits that the appeal is not competent and is premature, as the warrants of arrest were never executed.

4. We, after hearing the learned counsel and examining the available record, are of the view that both the contentions raised by the learned counsel have considerable force. It is evident from the bare perusal of the impugned order that the learned executing Court, after finding that the judgment-debtors are delaying the execution proceedings and they have no bona fide claim, proceeded to dismiss their application and abruptly issued warrants of arrest of the judgment-debtor. Admittedly, the learned Banking Court issued the warrants of arrest without adhering and advertent to the provisions of proviso to section 51, C.P.C. It is settled law by now that an executing Court without satisfaction of the pre-conditions and prerequisites of proviso to section 51, C.P.C., viz. the judgment-debtor is likely to abscond or leave the local limits of jurisdiction of the Court; to obstruct the decree has transferred the property; the judgment-debtor has no means to pay the amount of decree and refuses or neglects to pay and that the decree is for a sum for which the judgment-debtor is bound in a fiduciary capacity to account to the satisfaction of the Executing Court, is not competent and empowered to issue warrants of arrest of a judgment-debtor and is precluded from passing a mechanical order in this regard. Reference can be made to Aftab Saleem Choudhary and another v. Soneri Bank Limited through Attorneys 2005 CLD 401; Messrs 3-A Trade Impex through Partner and 2 others v. Askari Commercial Bank Ltd. through Branch Manager 2005 CLD 1379 and Bashir Ahmad v. Judge Banking Court-I, Gujranwala Division Gujranwala and another 2005 CLD 1728.

5. Obviously, the learned executing Court passed the impugned order in complete oblivion and derogation of the decisions of this Court and consistent principles of law decided by this Court in the aforesaid judgments. Needless to mention that the decisions of this Court to the extent that it decides a question of law or based upon or enunciated a principle of law, are binding on all the Courts, per force of Article 201 of the Constitution of Islamic Republic of Pakistan.

6. There is another aspect of the case. The appellants, under the similar circumstances, on a previous occasion, filed the appeal (EFA No.510 of 2003). This Court, while allowing the appeal observed that "the learned executing Court would be competent to issue warrants of arrest subject to the satisfaction of conditions stated in section 51, C.P.C.". Strangely enough, the learned Judge Banking Court passed the impugned order in violation of the said observations and reiterated the legal error.

7. Seeing from any angle the impugned order suffers from grave legal infirmities and we are persuaded to set it aside.

8. In view of the above, the present appeal is allowed and the impugned order is set aside with no order as to costs. Before parting with the order, it may be observed that in case the respondent-Bank's application under

section 51, C.P.C. is pending or is filed in future, the same shall be decided by the learned executing Court on its own merits and in view of the provisions of proviso to section 51, C.P.C., as discussed above.”

10. The same principles were adopted in a judgment reported as Mansoor Ali v. Haji Liaquat Ali and another (2016 CLC Note 82). Moreover, in the case reported as Messrs Azhar & Co and others v. National Bank of Pakistan (2018 CLD 830), the warrants of arrest of judgment-debtor were set aside; a passage of the said judgment was later referred in the judgment reported as Muhammad Shafeeq v. United Bank Limited (2021 CLD 1002) to set aside the warrants of arrest issued against the judgment debtor in the said case; the operative portion of which is reproduced below:-

“7. Before passing any order of arrest, finding is required to be recorded by the Court to the effect that the Court is satisfied that decree cannot be executed by delivery of any property or by attachment and sale or sale without attachment of any property. This preposition has already been settled in number of cases including case titled “Messrs Azhar and Co. and others v. National Bank of Pakistan (2018 CLD 830), the relevant part of the same is as under:-

“6. In fact the provisions of section 51 and Order XXI, Rule 37, C.P.C. intend to provide an opportunity to the judgment-debtor to pay the amount or to show cause, as to why he was defaulting to pay the decretal amount. Chance must be given to the judgment-debtor to pay the decretal amount unless the conduct of the judgment-debtor is not bona fide or his object is to effect the delay of the execution of the decree or the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court or after the institution of the suit, he has transferred dishonestly his property or any part of his property concealed or removed any part of his property or has done any other act or committed any act of bad faith with regard to his property so as to deprive the decree holder in the satisfaction of the decree. When these or other acts of these kinds are not found in a case, the Execution Court cannot order straightway the arrest or detention of the judgment-debtor in the execution. It may be pointed out here that these pre-conditions are not exhaustive. There may be other conditions and circumstances of exceptional cases, which could satisfy the judicial conscience of the Court to adopt such course of arrest and detention of the judgment-debtor in a given case. Furthermore, the Respondent has not submitted any written application for issuance of warrants of arrest against the Appellants as per requirements of the Order XXI, Rule 37, C.P.C.

8. Adopting the coercive measures, without due course of law will also violate Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. This Court in the case titled “Dr. Rauf Ahmad Azhar v. Banking Court No.II, Lahore and 6 others” (2007 CLD 964) involving similar facts, has taken the following view:

“4. Perusal of the record appended with this petition reveals that the contentions raised on behalf of the petitioner are not without force. There is no allegation on the record that the petitioner is guilty of any

act or omission specified in section 51 C.P.C. which would make him liable for detention in pursuance of execution of a decree. No preliminary inquiry appears to have been conducted and it was not even prima facie established that the petitioner was liable to be arrested and detained. No citizen can be deprived of his liberty without due process of law.

9. Further reliance, in this regard, can be placed on cases titled “Muhammad Ashraf v. Mst. Safia Bibi” (2008 CLC 1583), “Altaf Hussain and others v. Z.T.B.L. and others” (2019 LHC 857), “Muhammad Mobeen v. A.B.N. Amro Bank Limited through Manager” (2015 CLD 1904), “Muhammad Shahbaz Sharif v. Meezan Bank Limited and others” (2019 CLD 729), “Bashir Ahmad v. Judge Banking Court-I, Gujranwala Division Gujranwala and another” (2005 CLD 1728), “Habib Ahmad v. Haji Munir Ahmad” (2004 YLR 1540), “Mehboob Alam v. Federation of Pakistan through Secretary Finance and 2 others” (2003 CLD 1705), “Mst. Munawar Khanum v. Messrs. Habib Bank Ltd. and 3 others” (2006 CLD 1508), “Major (Retd.) Mahmood Hussain v. Habib Bank Limited and another” (2001 CLC 2016), “Ghulam Nabi v. Banking Court No.II, Gujranwala and others” (2001 YLR 625), “Aftab Saleem Choudhary and another v. Soneri Bank Limited through Attorneys” (2005 CLD 401) and “Abdul Qayyum Arif v. Agha Gul and 2 others” (2002 YLR 2541).

10. *Request on the basis of bald allegations without reference to any material evidence or fact merely to procure a coercive order, without adequate efforts to satisfy the decree by adopting the other modes provided in law is highly unjustified. No mechanical order for detention or arrest can be passed. The pre-condition for issuing of warrants of arrests should be proved to have satisfied and the Courts should ensure that the debtor is likely to leave the limits of the Court to frustrate the decree or execution thereof or debtor has dishonestly transferred the property to avoid the decree or he has means to pay the decree and neglecting to do the same must be reflected from the record before adopting such coercive measures.”*

11. The perusal of Section 51 of the Code of Civil Procedure, 1908 and principles laid down in the afore-referred judgments make it clear that warrants of arrest of judgment debtor can only be issued in cases where the Court was satisfied that in order to obstruct or delay the execution of decree, the judgment-debtor is likely to abscond or leave the limits of Court or has after the institution of the suit in which decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property, or the judgment-debtor has, or has had since the date of decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account for, and

without satisfaction of these pre-conditions no mechanical order for detention in prison can be passed. Although it can safely be pointed out here that the aforementioned pre-conditions are not complete and there may be other conditions and circumstances of exceptional cases, which could satisfy the judicial conscience of the Court to adopt such course of arrest and detention of the judgment-debtor in a given case yet where there was nothing attributable to the judgment-debtor to show that his acts were instrumental to frustrate the decree, which has caused prejudice to the other side and his property is available for satisfaction of the amount of decree, ordinarily warrants of arrest should not be issued.

12. We have gone through the entire record and have reached conclusion that none of the afore-mentioned conditions exist in the present case for warranting issuance of warrants of arrest against the appellant-judgment debtor for the reason that property of judgment debtor is available for putting the same to auction for satisfaction of the decree and the mere fact that no one had attended the auction proceedings to purchase the mortgaged property (which is already observed by us above, may *inter alia* have been due to the fact that the auction proceedings of the said property had not been properly advertised and there had not been made any serious attempt to put the mortgaged property to auction to recover the decretal amount) could not in the said circumstances of case be used against the appellant to declare the conduct of the appellant/judgment-debtor as contumacious and failure of auction in such circumstances was not sufficient reason to satisfy the court that the case of the appellant was hit by the mischief of Section 51 CPC for issuance of warrants of arrest against him. Request for issuance of warrants of arrest to arrest and detain the judgment-debtor on the basis of bald allegations without reference to any material evidence or fact merely to procure a coercive order, without adequate efforts to satisfy the decree by adopting the other modes provided in law, is highly unjustified. Obviously, the learned Executing Court passed the impugned order in complete oblivion and

derogation of the decisions of this Court and consistent principles of law decided by this Court in the aforesaid judgments. Needless to mention that the decisions of this Court to the extent that it decides a question of law or is based upon or enunciates a principle of law, are binding on all the Courts subordinate to this Court, per force of Article 201 of the Constitution of the Islamic Republic of Pakistan, 1973. Consequently, we are of the view that the impugned order whereby warrants of arrest of the appellant/judgment-debtor have been issued is not sustainable and serious attempt for sale of mortgaged property through open auction was required to be made so that the outstanding decretal amount could be recovered from the judgment-debtor/appellant without straightaway adopting the process of issuance of warrants of arrest against him for execution of decree through arrest and detention of judgment-debtor.

13. In view of what has been discussed above this Execution First Appeal is **allowed** with the result that by setting aside impugned order dated 27.04.2022, whereby warrants of arrest have been issued against the appellant, this Court directs the learned Executing Court to proceed further with execution proceedings by holding auction of mortgaged property, in accordance with law. No order as to costs.

14. However, without prejudice to what has been decided above, it is observed that the learned Executing Court would not be precluded from and shall be competent to issue warrants of arrest subject to satisfaction of conditions stated in Section 51 C.P.C.

(TARIQ SALEEM SHEIKH)
JUDGE

(MUZAMIL AKHTAR SHABIR)
JUDGE

KMSubhani

Approved for reporting.