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JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Crl.Misc.No.27723-M of 2025
(*Ghulam Abbas* v. *Muhammad Ijaz, etc.*)

JUDGMENT

Date of hearing:	<u>24.09.2025</u>
Petitioner by:	Mr. Ajaz Khalid Khan Niazi, Advocate
State by:	Syed Farhad Ali Shah, Prosecutor General Punjab Mr. Fakhar Abbas, DPG Malik Umar Tahir, AAG Barrister Karim Ullah Sraw, <i>amicus curiae</i>
Respondent No.1 by:	Mr. Muhammad Zeeshan Malik, Advocate

MUHAMMAD JAWAD ZAFAR, J.:- Through this petition, filed under Section Section 561-A of the Code of Criminal Procedure 1898 (“**Code**” or “**Cr.P.C**”), Ghulam Abbas (“**petitioner**”) has assailed the *vires* of order dated 05.04.2025 passed by the learned Judicial Magistrate, Ist Class, Khushab (“**Magistrate**”) and order dated 11.04.2025 passed by the learned Additional Sessions Judge, Khushab (“**Court of Sessions**”).

2. The facts giving rise to the present petition are that the brother of the petitioner Zafar Iqbal, along with another brother of petitioner Muhammad Aslam and other co-accused persons, was implicated in crime report bearing No. 3 of 2005 dated 09.01.2005, for offences under Sections 302, 148, 149 of the Pakistan Penal Code 1860 (“**PPC**”), registered with the Police Station Katha Saghral, Khushab (“**crime report**” or “**FIR**”). Zafar Iqbal has absconded, while Muhammad Aslam was convicted and passed away during the execution of his sentence. To procure the attendance of Zafar Iqbal, the learned Magistrate carried out the necessary proceedings under the Code and eventually declared him a proclaimed offender and ordered

for the attachment of his property, which is situated at *Mouza Dhak* and *Mouza Talokar Shumali*, measuring approximately 736 *kanals* and 12 *marlas* (“**property**”), in toto *vide* order dated 24.11.2005, despite the property never being partitioned and owned by four co-sharers in equal shares, with the share of the proclaimed offender Zafar Iqbal being 184 *kanals* and 3 *marlas*. Said order was assailed, *inter alia*, on the plea that *superdar* Muhammad Jahangir is related to the proclaimed offender Zafar Iqbal, which eventually led to the *superdar* being changed from Muhammad Jahangir and the District Officer (Revenue) was directed to appoint a person as a receiver/custodian of the property who shall not be below the rank of *Naib Tehsildar* as opposed to a private person. Meanwhile, the complainant of the crime report filed an application before the learned Magistrate for auctioning the property so attached in terms of Sections 87 and 88, of the Code; however, the same stood dismissed *vide* order dated 07.09.2009. A second application for the same purpose was filed, this time by the Station House Officer (“**SHO**”), Police Station Katha Sughral, which was allowed *vide* order dated 04.02.2025, and permission was granted to auction the property. The order of auction passed by the learned Magistrate was assailed by invoking the revisional jurisdiction of the learned Court of Sessions in terms of Section 435 read with Section 439-A of the Code, and the matter was remanded to the learned Magistrate *vide* order dated 17.03.2025. In the post-remand proceedings, the matter was referred to the Deputy Commissioner, Khushab, concerned, for carrying out further proceedings in accordance with law, i.e., in terms of subsection (7) of Section 88 of the Code to proceed with the auction, *vide* order dated 05.04.2025. This order was challenged by the petitioner by again invoking the revisional jurisdiction of the learned Court of Sessions; however, the same was of no avail as the revision petition was dismissed *in-limine vide* order dated 11.04.2025. Hence, this petition.

3. The main thrust of the averment of the learned counsel for the petitioner is that due to the fact that the property in question is a joint property in a joint *khata* with three other co-sharers as owners of the same along with the proclaimed offender Zafar Iqbal, and said property was never partitioned, therefore, auctioning of the property in toto, without first partitioning the same, would contravene the cardinal rights of the petitioner as well as the other co-sharers as enshrined under Article 23 and 24 of the Constitution of the Islamic Republic of Pakistan 1973 (“**Constitution**”), and beside the point since a receiver has already been appointed, there was no necessity to auction of the property.

4. Conversely, the learned counsel for the respondent contended that there is no embargo under the law to auction of a property owned by co-sharers and supported both the impugned orders as well as the sale of the property *via* the auction.

5. Due to the intricate question of law involved in the present *lis*, *amicus curiae* were appointed to appraise this Court, and assistance was also sought from the learned Prosecutor General, Punjab, on as to whether a Magistrate has the jurisdiction and authority to order for the auction of a property, owned by co-sharer in a joint *khata* which has not been partitioned, in toto.

6. The arguments of the learned counsel for the petitioner, learned counsel for the complainant, the learned *amicus curiae*, the learned Prosecutor General, Punjab, and the learned law officer were heard, and the material available on record was perused with their able assistance.

7. Before delving into the main question of law, the contention of the learned counsel for the complainant that the petitioner lacks *locus standi* is addressed. The question of *locus standi* was addressed by the Honourable Supreme Court of Pakistan in “*Naila Trantum Jamshed v. Haji Muhammad Abbas*” (2001 SCMR 383) and it was held that attachment of property in

terms of Section 87 and 88 of the Code is a matter between the state, the absconding accused, and the person having any right or interest in the property. It is an admitted fact that the petitioner is a joint owner in the joint *khata* of the property; as such, he has *locus standi* because he is a person having right/interest in the property.

8. Under the law, the property of an accused can be attached under Section 88 of the Code by the order of a competent court, if such person has absconded or is concealing himself from execution of warrants issued against him and consequently declared as a proclaimed offender under Section 87 of the Code after following the due process of law. Section 88(3)(a) of the Code deals with the attachment of immovable property through seizure.¹ The basic purpose and primary objective behind the provisions pertaining to the issuance of process through notice, summons, bailable warrants, non-bailable warrants, as well as proclamation and attachment of property is to procure the attendance of an accused, who may or may not have since absconded, to face the proceedings pending against him/her before the court concerned in accordance with law² and the order of attachment would stand annulled, the very moment, the accused person appears, whether voluntarily or is apprehended and brought,³ in the court concerned on his appearance⁴ or the acquittal of the accused⁵ and the court shall have to make an order for the release of the property so attached.⁶

9. It appears from the above that these provisions have never been meant to be treated as corporal in nature, entailing penal consequences as a means of punishing the accused. The provisions governing the aforementioned

¹ See “*Sheikh Rasheed Ahmed v. SHO Police Station Kohsar, Islamabad*” (2024 PCr.LJ 113 Islamabad).

² See “*Muhammad Hussain v. The State*” (2025 PCr.LJ 915 Lahore (dB)).

³ Section 89 of the Code.

⁴ See “*Imtiaz Sharif v. The State*” (2012 MLD 1342 Lahore); and, “*Rana Muhammad Ramzan v. The State*” (1991 PCr.LJ 2059 Lahore).

⁵ See “*Abdul Saboor v. Federation of Pakistan*” (2023 PTD 1434 Lahore).

⁶ See subsection (6E) of Section 88 of the Code.

transactions are strictly to be utilised against the accused who is connected with the criminal case, and due to such reasons, he/she is evading the process of law. They were never meant to deprive or harass any other person or be used as a sword of Damocles against the latter. It was for this reason of ensuring non-violation of the rights of others connected with the property so attached that the provision of Section 88 of the Code expressly mentions Order XL of the Code of Civil Procedure 1908 (“CPC”) in subsection (6) and provides that the powers, duties and liabilities of a receiver appointed under the section *ibid* shall be the same as those specified in Order XL of the CPC, so that due process of law is not contravened. Imperative to observe that Order XL of the CPC is complemented by Order XXI of the CPC, and under Rule 64 of Order XXI, it is provided that the executing court can order the sale of property only to the extent which is necessary for the satisfaction of the decree or the lawful objective, and not exceeds the same.

10. Under the CPC, a share in an undivided joint property cannot be lawfully auctioned without partition of the same by a court of competent jurisdiction because each of the co-sharers has, in such a scenario, an unidentified share in the joint property until it is partitioned and auctioning the property without realization of the same amounts to the infringement on the rights of the co-owner/co-sharer. In “*Haji Khalid Dad Nasir v. Standard Chartered Bank (Pakistan) Limited*” (2024 CLD 1421 Lahore (dB)), the learned division bench of this Court observed that:

‘10. The appellants, who were neither the defendants, customers, borrowers, mortgagers, indemnifiers of guarantors of the decree holder Bank-respondent No.1, have been held by the Banking Court vide order dated 19.01.2016 to be not prejudiced in the auction proceedings of the property belonging to the judgment-debtor/Ali Hassan-respondent No.3. This Court has been informed that the sale certificate has been issued in favour of respondent No.4 pursuant to the aforementioned sale through auction. The impugned sale has been conducted without demarcation of the property vis-a-vis the appellant-

Noor Hassan as well as the judgment debtor, namely, Ali Hassan-respondent No.3. In the peculiar facts and circumstances of the case, we are inclined to set aside the impugned order dated 06.11.2018’.

Consequently, without such demarcation of the joint property, no order for auction can be passed, and any such order which has been passed will be outside the jurisdiction vested in the court.

11. The learned Prosecutor General, Punjab, pointed out that no direct precedent exists in our jurisprudence to support or substantiate the claim of either party, he did invite the attention of this Court to “Sheikh Mehdi v. The State” (2017 PCr.LJ 488 Gilgit-Baltistan Chief Court), which case pertains to an attachment order being passed under Section 145 of the Code and not Section 88 *ibid*. In this case, it was opined that an order of attachment is not the appropriate mechanism to procure the attendance of the accused where the property belongs to co-owners. The precedent, as stated above, pertains to Section 145 of the Code, which has its own parameters and governs an entirely different transaction compared to Section 88 of the Code. As a consequence of lack of jurisprudence in our jurisdiction, the Court inquired from the learned Prosecutor General, Punjab as to whether any precedents from our neighbouring countries existed, against which query, reference was made to the cases of “The Secretary Of State For India In Council vs Rangasamy Aiyangar” (1916 (31) MLJ 84 (fB) = AIR 1917 Madras 366 (fB)). In this case, the full bench of the Madras High Court held that ‘2. *The provisions of Section 88 of the present Code of Criminal Procedure are wider than the Regulation in so far as they include moveable as well as immoveable property, but as regards procedure they deal with the matter in greater detail specifying the manner in which each description of property is to be attached. What has to be attached under the section in a case such as this is the share of the defaulting member of the joint family, which is of course*

subject to the right, of the other members of the family'. Simply put, it was observed by full bench of the Madras High Court that since the Government had not taken any further action, that is to say that neither the property was expressly ordered to be confiscated by the Government nor sold out to a third party, it was held that the apparent intention of the Government was to hold the property till the absconder surrendered himself and the attached property is subject to the rights of the other family members and the appointment of a receiver to realize the share of the absconder would not necessarily take the property out of hand of the other members of the property.⁷ Pertinently, reference was made to "Tigala Veeraya v. Hyderabad State" (AIR 1951 Hyderabad 81), in which case the accused was a member of a Hindu Joint Family and had certain share in the dwelling house and other joint family properties. As all these properties were attached, objection was raised, and the learned Magistrate directed the sale of the undivided 1/18 share in all these properties under Section 77 of the Hyderabad Criminal Procedure Code, which substantially corresponds to Section 88 of the Criminal Procedure Code.

12. It has been observed that the provisions interpreted by the courts of India are *pari materia* to our Code. In this regard, it is trite that where two provisions are *pari materia*, by applying the doctrine of statutory construction, there cannot be a different interpretation for them.⁸ In addition to the above, the legislature has in subsection (4) of Section 88 of the Code, itself deployed the term "or" after listing down the possible actions which may be taken as a means of compelling/motivating the accused to face proceedings before the court concerned, meaning thereby that either of the modes can be preferred over the other while issuing the attachment order.⁹ Further, in

⁷ See "Daya Nand Kalu v. The State of Haryana" (AIR 1976 Punjab and Haryana 190).

⁸ See "The Intelligence Officer, Directorate of Intelligence and Investigation, FBR v. Abdul Karim" (2025 SCMR 969).

⁹ See "Suo Motu Case No. 8 of 2018 and Civil Misc. Application No. 649-L of 2018" (PLD 2019 Supreme Court 201).

“Narayan Kondaji Temkar v. Govind Krishna Abhyankar” (AIR 1929 Bombay 200), it was held that the words ‘*at the disposal of Government*’ in subsection (7) of Section 88 do not imply that from the moment, the absconder fails to appear on the date ordered, all his right, title, and interest in the property immediately pass over to the Government as the right passes to the Government only with effect from the date of actual attachment and that the attachment confers no title, but merely prevents alienation of the property so attached. Reference may be made to the language of the order of attachment, as contained/specified in Schedule V of the Code, which provides that ‘*You are hereby required to attach the said property by seizure, and to hold the same under attachment pending the further order of this Court...*’.

13. Wisdom is also drawn from the case of “Naila Trantum Jamshed v. Haji Muhammad Abbas” (2001 SCMR 383), wherein it was contended before the Honourable Supreme Court of Pakistan that:

‘He has placed reliance upon ... (iv) Hirschom v. Evans (Barclays Bank Limited (2 King's Bench 801 (C.A.1938), wherein it was held that there was no evidence upon which the county Court Judge could find that the money in the joint account belonged solely to the husband and that the joint account of the husband and the wife could not be attached in answer to judgment against the husband. The learned counsel has also referred to page 66, paragraph 88 of Halsbury's Laws of England, Fourth Edition, Volume 3, wherein it has been observed that "A joint account cannot be attached in respect of a debt due by one of the parties, nor can an order be made against a liquidator's account in respect of a debt due by the company of which he is liquidator’.

Based on the above-quoted contentions, the Honourable Supreme Court held that:

‘The learned SDM prima facie found that the interim

orders of attachment were not sustainable in law after inquiring into the objections of the petitioner when he found that the joint bank account and the immovable property which he found to be of the petitioner were not liable to attachment consequently lie (sic) recalled the same. The orders, dated 13-10-1998 could not be said to be illegal, invalid, without jurisdiction or abuse of the process of law’.

14. In the present *lis*, while ordering the attachment of property, a receiver was appointed under clause (f) of subsection (4) of Section 88 of the Code, which suffices considering the property was never demarcated and shares of co-sharers were unidentified, and because there has never been any direction of the Government that the property be sold at an auction nor any necessity to auction the property arose at any given junction in the given facts and circumstances of the case, therefore, auction of the property in *toto*, at the expense and detriment of the co-sharers/joint owners, without first demarcation of the property *vis-a-vis* the shares of the joint/co-sharers should not have been ordered. Furthermore, at present, two conflicting orders passed by the learned Magistrate are in field, giving rise to unnecessary confusion. Considering that no new circumstance arose before the learned Magistrate at the time when the second application for the auction of the property was filed or when the impugned order was pronounced. Paramount to observe herein that after the dismissal of the previous application for auction of the property, the learned Magistrate had become *functus officio*¹⁰ and no order could have been passed until the previous order was assailed/revised.

15. It follows that all state subjects, by virtue of Article 4 of the Constitution, are to be dealt with in accordance with the law. Likewise, state subjects have been granted the cardinal right to hold any property¹¹ and the property so held by

¹⁰ See “*Imran Ahmad Khan Niazi v. Federation of Pakistan*” (PLD 2024 Supreme Court 102).

¹¹ See Article 23 of the Constitution.

a person is further protected from compulsory acquisition of property.¹² To this end, the learned *amicus curiae* Barrister Karim Ullah Sraw relied on the judgement of “Jehangir Rustum Kakalia v. Messrs Hashwani Sales & Services (Pvt.) Ltd.” (2002 SCMR 241) pronounced by the honourable Supreme Court of Pakistan wherein it was held that no unreasonable restriction can be placed on the exercise of their right which would offend the fundamental rights guaranteed under Article 23 of the Constitution; the judgement of the learned division bench of the Karachi High Court in “Suleman v. Manager, Domestic Banking, Habib Bank Ltd.” (2003 CLD 1797 (dB)), wherein it was observed that ‘Article 23 stipulates that the right can be regulated only through reasonable restrictions imposed by law in the public interest. It is well settled that in such situation, both the validity of the law and the action taken become justifiable from the standpoint of reasonableness as well as public interest’; and the judgement of the learned division bench of the Peshawar High Court in “Aamir Khalil v. Government Of Pakistan” (PLD 2004 Peshawar 251 (dB)), wherein the learned division bench held that ‘Article 24 of the Constitution in a firm command prohibits that no person shall be deprived of his property save as in accordance with law’. This Court is in agreement with the learned *amicus curiae* that no public interest exists in the auction of the property of the petitioner without adhering to the reasonability of partition and the right of the petitioner to hold property under Article 23 of the Constitution shall be violated if he is dispossessed from his property, or if his share in the property is not identified before auction of the property, which amounts to an unreasonable restriction on such a right. Likewise, the deprivation of the right to property of the petitioner through the order of auction is not protected under the “specific prohibition” in terms of Article 24 of the Constitution.

¹² See Article 24 of the Constitution.

16. In view thereof, the impugned orders are patently illegal, invalid, and amount to abuse of process of the law, and have been passed in sheer contravention of the law; the illegalities elucidated hereinabove warrant the impugned orders being set aside.

17. Resultantly, both the impugned order dated 05.04.2025, passed by the learned Judicial Magistrate, Khushab and the impugned order dated 11.04.2025, passed by the learned Additional Sessions Judge, Khushab, are **set aside**; and any and all subsequent actions taken based on the impugned order dated 05.04.2025, passed by the learned Judicial Magistrate, Khushab and the impugned order dated 11.04.2025, passed by the learned Additional Sessions Judge, Khushab, are also declared to be **without legal effect**.

(MUHAMMAD JAWAD ZAFAR)
JUDGE

Approved for Reporting.

JUDGE

Ejaz/*