

[Lahore]

Before Malik Shahzad Ahmad Khan, J

AMANULLAH KHAN----Petitioner

versus

DISTRICT JUDGE and 3 others----Respondents

Writ Petition No.25494 of 2011, decided on 8th December, 2011.

(a) West Pakistan Family Courts Act (XXXV of 1964)---

---S. 5, Sched., Ss.13 & 14---Constitution of Pakistan, Art.199---Constitutional petition--
-Suit for recovery of maintenance allowance---Execution of decree---Suit for recovery of
maintenance allowance filed by the plaintiff having finally been decreed, plaintiffs filed
execution petition, which was allowed---Execution proceedings remained pending for a
considerable period due to delaying tactics of the judgment-debtor---Petitioner, who was
father of the judgment-debtor stood surety for payment of decretal amount---Petitioner
paid Rs.10,000 and undertook to pay the remaining decretal amount in case of non-
payment by the judgment-debtor---Later on decretal amount having not been paid by the
judgment-debtor or the petitioner/surety, judgment-debtor was finally arrested---
Application filed by the petitioner/surety for discharge of his surety, had been dismissed
by the Family Court and Appellate Court---Validity---Petitioner's contention was that as
he himself was not judgment-debtor and was merely a surety of judgment-debtor, on
arrest of judgment-debtor, no further action could be taken against him, when he had
performed his duty by producing the judgment-debtor before the court---Contention of
the petitioner was misconceived as petitioner did not stand surety for appearance of
judgment-debtor, but he stood surety for the payment of decretal amount---Petitioner,
could not be absolved of his liability on account of arrest of judgment-debtor---Action for
recovery of decretal amount could validly be taken against petitioner/surety---No
interference was required by High Court in impugned orders passed by the Family
Court and Appellate Court below---Petition was dismissed.

Nawazo v. The State 2004 SCMR 563; Ghulam Qadir Siyal v. The State 1997 PCr.LJ
554 and Mst. Maqsooda Mai v. Bukhat Ali and another 2007 MLD 1264 distinguished.

(b) West Pakistan Family Courts Act (XXXV of 1964)---

---S. 14(3)---Constitution of Pakistan, Art.199---Constitutional petition---Appeal against
interim order---Petitioner in his constitutional petition had challenged an interim order of
Executing Court---When the legislation had specifically prohibited the filing of appeal or
revision against an interim order, filing of constitutional petition against such order
would amount to defeating and diverting the intent of the legislature---Constitutional
petition was dismissed.

Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary S&GAD, Karachi and others 1996 SCMR 1165; Muhammad Sabir v. Mst. Azra Bibi and 2 others 2011 CLC 417 and Muhammad Irfan v. Judge, Family Court, Sargodha and 2 others 2008 CLC 582 **rel.**

Kh. Muhammad Saeed for Petitioner.

ORDER

MALIK SHAHZAD AHMAD KHAN, J.--- This writ petition has been filed against order dated 10-6-2011 passed by learned Judge Family Court, Sheikhpura, as well as, against the order dated 11-10-2011 passed by learned Additional District Judge, Sheikhpura whereby, application and appeal of the petitioner, with the prayer to discharge his surety given in execution proceedings for recovery of maintenance allowance, have concurrently been dismissed.

2. As per brief facts of the present case Mst. Hajran Bibi (respondent No. 4) along with her minor children filed a suit for recovery of maintenance allowance against respondent No.3 (Asmat Ullah). The said Asmat Ullah is real son of the petitioner. The above mentioned suit was contested by respondent No.3 who filed his written statement before the learned trial court. Evidence of both the parties was recorded. It is pertinent to mention here that the suit for recovery of maintenance allowance was filed on 17-4-2008 by respondent No.4 along with her two daughters namely Zunera Bibi alias Zara and Aman alias Mano, which was finally decreed after completion of trial vide judgment and decree dated 9-4-2009. Respondent No.4, along with her minor children, on 2-3-2010 filed an execution petition in the court of learned Civil Judge/Judge Family Court, Sheikhpura. The said execution proceedings remained pending for a considerable period of time. Respondent No.3 (the judgment-debtor) kept on, delaying, the execution proceedings, on one pretext or the other. He initially filed an objection petition which was dismissed by the executing court. He, then, assailed the said order through revision petition. During pendency of the said revision the petitioner, who is father of the judgment-debtor stood his surety. He paid an amount of Rs.10,000/- before the learned Revisional Court and undertook to pay the remaining decretal amount in case of non-payment by the judgment-debtor. Later on the remaining decretal amount was neither paid by the judgment-debtor nor by the petitioner. The judgment-debtor was ultimately arrested. The petitioner, thereafter, moved an application for discharge of his surety, which was dismissed by the learned Judge Family Court, Sheikhpura vide impugned order dated 10-6-2011. The petitioner challenged the said order by filing an appeal which was also dismissed by the learned Additional District Judge, Sheikhpura vide the impugned order dated 11-10-2011. The petitioner has now challenged the above mentioned orders through present constitutional petition, under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

3. It is contended by the learned counsel for the petitioner that the petitioner is himself not the judgment-debtor and he was merely a surety of the judgment-debtor, therefore, on the arrest of judgment-debtor no further action can be taken against him; that the petitioner has performed his duty by producing the judgment-debtor before the court and

by effecting his arrest, therefore, the impugned orders have illegally been passed against the petitioner whereby he has been directed to show cause as to why the remaining decretal amount be not recovered from him as arrears of land revenue; that the impugned orders have illegally been passed against the petitioner and the same are not sustainable in the eyes of law. In support of his contentions the learned counsel for the petitioner has placed reliance on the cases of **Nawazo v. The State (2004 SCMR 563)** and **Ghulam Qadir Siyal v. The State (1997 PCr.LJ 554)** and **Mst. Maqsooda Mai v. Bukhat Ali and another (2007 MLD 1264)**.

4. I have heard the learned counsel for the petitioner and have also gone through relevant documents annexed with the present petition.

5. A suit for recovery of maintenance allowance was filed by Mst. Hajran Bibi (respondent No. 4) and her two minor daughters against Asmat Ullah (respondent No. 3), which was decreed on 9-4-2009. The decree holders, on 2-3-2010 filed an execution petition in the court of learned Judge Family Court, Sheikhpura. The judgment-debtor (respondent No.3) filed an objection petition which was dismissed. The said order was assailed by the judgment-debtor through filing a revision petition which was marked to the court of learned Additional District Judge, Sheikhpura. During the pendency of said revision petition, on 19-6-2010, the petitioner who is father of the above mentioned judgment-debtor appeared before the court and made a statement to the effect that he stands surety of the judgment-debtor and in case the judgment-debtor does not pay the amount of decree, he (the petitioner) will be bound to pay the decretal amount. The said statement was reduced into writing which contains his thumb-impression. The petitioner also produced an affidavit mark-A. According to the contents of said affidavit, he paid in the court, an amount of Rs.10,000/- to the decree-holder on 19-6-2010 and to the extent of remaining decretal amount he undertook to pay the said amount in instalments, as per direction of the court. The petitioner, later on, did not honour his above mentioned undertaking. The judgment-debtor was resultantly arrested. The petition moved an application for discharge of his surety, which was dismissed and the learned executing Court, vide impugned order dated 10-6-2011, directed the petitioner (surety) to show cause as to why the remaining decretal amount be not recovered from him as arrears of land revenue. The learned counsel for the petitioner has argued that, as the judgment-debtor has been produced by the petitioner who has also been arrested, therefore, no further action can be taken against the petitioner/surety. The said argument of the learned counsel for the petitioner is misconceived. It is evident from the perusal of order dated 19-6-2010 that the petitioner stood surety for the payment of the decretal amount and not for the appearance of the judgment-debtor. The petitioner undertook to pay the decretal amount in case of default by the judgment-debtor. It is manifest from record that the petitioner did not stand surety for appearance of the judgment-debtor rather he stood surety for the payment of the decretal amount, therefore, he cannot be absolved of his liability on account of arrest of the judgment-debtor. Under section 13(3) of the Muslim Family Courts Act, 1964, a decree is enforced which is passed by the learned Family Court and sub-clauses (3) and (4) of the said section are reproduced below:--

(3) Where a decree relates to the payment of money and the decretal amount is not paid within the time specified by the Court, [not exceeding thirty days] the same shall, if the Court so directs be recovered as arrears of land revenue, and on recovery shall be paid to the decree-holder.

(4) The decree shall be executed by the Court passing it or by such other Civil Court as the District Judge may, by special or general order, direct.

When the arrears under a decree are assessed as land revenue then the provisions of section 80 to onward, of the Land Revenue Act, 1967 are made applicable. Section 80 of the Land Revenue Act, 1967 reads as under:---

"Process for recovery of arrears.--- Subject to the other provisions of this Act, an arrear of land revenue may be recovered by anyone or more of the following processes, namely:---

(a) by service of a notice of demand on the **defaulter** under section 81;

(b) by arrest and detention of his person under section 82;

(c) by distress and sale of his movable property and uncut or un-gathered crops under section 83;

(d) by transfer, under section 84 of the holding in respect of which the arrear is due;

(e) by attachment, under section 85, of the holding in respect of which the arrears is due;

(f) by annulment, under section 86, of the assessment of that holding;

(g) by sale of that holding under section 88"

A "**defaulter**" under section 80 of the Land Revenue Act, 1967 is defined in section 4(7) of the said Act as meaning a person liable for an arrears of land revenue and also including a person who is responsible as "**surety**" for payment of the arrears".

Section 4(7) of the Act *ibid* is reproduced hereunder for ready reference:---

"**Defaulter**, means a person liable for an arrear of land-revenue, and includes a person who is responsible as surety for payment of the arrear"

It is manifest from the perusal of above mentioned provisions of law that action for recovery of decretal amount can validly be taken against a **surety** of a defaulter. The petitioner stood as a surety. He was under no obligation to bind himself but he did bind himself to pay the decretal amount, therefore, no interference is required by this court in the impugned order passed by the learned Civil Judge/Judge Family Court, as well as, in order dated 11-10-2011 passed by learned Additional District Judge, Sheikhpura.

6. The learned counsel for the petitioner has cited the cases mentioned above in order to establish that on arrest of the judgment-debtor no further proceedings can be taken against the surety. The above mentioned judgments cited by the learned counsel for the petitioner are not applicable to the facts of the present case. The said judgments have been passed with regard to criminal cases, wherein the liabilities of sureties of accused persons were discussed. In the case of **Ghulam Qadir Siyal vs. The State (1997 PCr.LJ 554)**, the proceedings against the surety were dropped on the ground that he produced the accused in compliance of the orders of the court. In the said case, the surety undertook to produce the accused in court and on production of the accused the proceedings of forfeiture of his bond were dropped against the said surety, whereas, in the instant case, as discussed earlier, the petitioner stood surety for the payment of the decretal amount and not for the production of the judgment-debtor, therefore, the above mentioned judgment is not helpful to the petitioner's case. Similarly judgments in the cases of **Nawazo v. The State (2004 SCMR 563)** and **Mst. Maqsooda Mai v. Bukhat Ali and another (2007 MLD 1264)** were given in criminal cases where the sureties took the responsibility for appearance of the accused and not for payment of decretal amount. The facts of the present case are entirely different and distinguishable from the facts of the above mentioned cases.

7. The petitioner had challenged an interim order of the learned executing court through filing an appeal before the learned Additional District Judge, Sheikhpura. He was directed vide said order of the executing court, to show cause as to why the remaining decretal amount be not recovered from him as arrears of land revenue. As interim order cannot be challenged through an appeal or revision, in view of the provisions of section 14(3) of the West Pakistan Family Courts Act, 1964, therefore, the said appeal was rightly dismissed being not maintainable vide the impugned order dated 11-10-2011 passed by the learned Additional District Judge, Sheikhpura. Impugned order was an interlocutory order, which had no effect of being a final order. Interlocutory order, unless bears characteristics and effect of a final order, could not be subjected to judicial scrutiny in proceedings under Article 199 of the Constitution. Notwithstanding the contentions raised by the learned counsel, to my mind, the present petition is incompetent and not maintainable on legal plane. Admittedly, the execution proceedings are still pending and during its pendency the learned Executing Court has passed the impugned order. Undoubtedly, order passed by the executing court, for all intents and purposes is an interlocutory order, as the lis is pending before the executing court and it has still to render its final verdict. The Legislature has made such order, as non-appealable by specifically making a provision in that respect by virtue of subsection (3) of section 14 of the West Pakistan Family Courts Act, 1964 which for facility of reference is reproduced below:--

"14. Appeal.--- (1) Notwithstanding anything provided in any other law for the time being in force, a decision given or decree passed by a Family Court shall be appealable:-

(a)

(b)

(2)

(a)

(b)

(c)

(3) No appeal or revision shall lie against an interim order passed by a Family Court.

(4) "

In these circumstances, when the Legislature has specifically prohibited the filing of an appeal or revision against an interim order and if the constitutional petition is allowed to be filed against such order, it would tantamount to defeating and diverting the intent of the Legislature. Reference in this context is made to the case of Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary S&GAD, Karachi and others (1996 SCMR 1165), in which the Hon'ble Supreme Court was pleased to hold as under:---

"Constitutional jurisdiction, exercise of statute excluding a right of appeal from the interim order could not be bypassed by bringing under attack such interim orders in constitutional jurisdiction. Party affected has to wait till it matures into a final order and then to attack it in the proper exclusive forum created for the purpose of examining such orders"

The petitioner has got an adequate remedy available to him by challenging the impugned order in appeal, which, he may file against the ultimate order/judgment if the same would be passed against the petitioner. This petition is also hit by Article 199(1) of the Constitution, hence cannot be entertained. For ready reference, I respectfully refer esteemed judgments of this Court in the cases of Muhammad Sabir v. Mst. Azra Bibi and 2 others (2011 CLC 417) and Muhammad Irfan v. Judge, Family Court, Sargodha and 2 others (2008 CLC 582). The petitioner has alternate remedy by filing an appeal after final decision of the matter by learned executing court.

The learned counsel for the petitioner could not point out any illegality or material irregularity in the impugned orders passed by the learned two courts below, calling for interference in the constitutional jurisdiction, therefore, this petition is, hereby, dismissed.

H.B.T./A-6/L

Petition dismissed.