

IN THE PESHAWAR HIGH COURT,
PESHAWAR
 (Judicial Department)

Cr.Misc.OP NO.211-P/2014

Date of hearing: _____

Petitioner (s) : _____

Respondent (s) : _____

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.- Through the instant petition under section 561-A Cr.P.C., petitioner Mst. Bibi Roza, seeks quashment of order dated 24.09.2014, passed by learned Judicial Magistrate/ SCJ, Swabi and order dated 11.10.2014, rendered by learned Revisional Court/ Additional Judge-III Swabi, whereby her application for redemption of house measuring 04 marals, situated inside Abadi Mohallah Khadar Khel Moza Punj Pir, attached in favour of the Provincial Government vide order dated 04.09.2014 in consequence of proceedings under section 88 Cr.P.C., has been turned down by both the courts below.

2. Facts in brief forming the background of the instant petition are that in consequence of case FIR No.1097 dated 04.10.2013 under sections 302/34 PPC in Police Station Swabi, Wilayat Shah (husband of the

petitioner) absconded, therefore, proceedings under sections 204 and 87 were initiated against and ultimately, under section 88 Cr.P.C., the house in question being allegedly owned said Wilayat Shah was attached to the Provincial Government vide order dated 04.09.2014, for redemption of which the petitioner applied before the two courts below but her request was turned down, hence, this petition.

3 . Learned counsel for the petitioner argued that the house in question is the sole ownership of the petitioner and in her occupation being transferred to her by her husband Wilayat Shah in the year 2007, much prior to registration of the case against him in the year 2010, therefore, the same has wrongly been attached in favour of the Provincial Government; that both the courts below without affording an opportunity to the petitioner to substantiate her claim in light of mandate of S.88 (6-A) Cr.P.C., haphazardly dismissed her application, therefore, the impugned orders being against the law and facts are liable to be quashed.

4. Conversely, learned AAG assisted by learned counsel for respondent contended that as per revenue record, the house in question was the ownership of absconder Wilayat Shah; that its alleged transfer through

an unregistered Tamleek nama in the name of his wife/ petitioner is after thought; that the revenue record having more weight than unregistered deed, the learned Judicial Magistrate by adopting the proper procedure under section 88 Cr.P.C. has rightly attached the same to the Provincial Government. They while supporting the impugned orders, sought dismissal of the petition.

5. I have heard the arguments advanced at the bar and perused the record carefully.

6. The ground which prevailed before the two courts below while dismissing the application of the petitioner is that as per revenue record that house in question was the ownership of Wilayat Shah absconder, therefore, the same has rightly been attached and that the claim of the petitioner being based on an unregistered deed, is not of much weight as compared to the revenue record. Sub-section (6-A) (6B) and (6C) of S.88 Cr.P.C., provides proper mechanism for the person having interest in the property attached under section 88 Cr.P.C. as well as the Court to be adopted in such situation. For convenience these are reproduced below:-

“6-A if any claim is preferred to, or
objection made to the attachment of, any
property attached under this section within

six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under this section, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part:

Provided that any claim preferred or objection made within the period allowed by this sub-section may, in the event of death of the claimant or objector, be continued by his legal representative.

(6B) Claims or objections under sub-section (6-A) may be preferred or made in the court by which the order of attachment is issued or, if the claim or objection is in respect of property attached under an order endorsed by (sessions Judge) in accordance with the provisions of sub-section (2) in the court of such Magistrate.

8. Perusal of sub-section (6A) of S.88 Cr.P.C., reveals that any person having interest in the attached

property can prefer claim or objection within a period of six months from the date of attachment. In the instant case the house in question has been attached on 04.09.2014 while the objection/ claim has been preferred by the petitioner against it on 23.09.2014, which is within the specified period. Besides, in sub-section (6A) of S.88 Cr.P.C . words that **“the claim or objection shall be inquired into”** are of much significance which absolutely speak about inquiry in light of evidence. In light of the provisions of above subsection of S.88 Cr.P.C. Claim or objection having been preferred in terms of S.88 Cr.P.C. is to be essentially put to a judicial inquiry by the Magistrate by recording the evidence giving a fair opportunity of proof and rebuttal to the parties. No doubt, the claim of the petitioner is based on an unregistered Tamleeq deed scribed in her favour by Wilayat Shah in the year 2007, i.e. much prior to the year of attachment, but it has been disbelieved by the two courts below without affording her an opportunity to prove the same by producing its marginal witnesses. Similarly, no opportunity has been provided to the petitioner to rebut the revenue record on the basis of which the house in question has been attached. The order of attachment has been passed on the back of the petitioner. Proper inquiry regarding the claim of the

petitioner as envisaged under section 88 (6A) Cr.P.C. should have been conducted by the Magistrate by affording full opportunity of leading evidence. Thus, the impugned orders of the two courts below are against the law and principle of natural justice that no one should be condemned unheard.

9. For what has been discussed above, this petition is allowed. Impugned orders of the two courts below are hereby quashed. The case is remanded to the learned Judicial Magistrate/ Senior Civil Judge Swabi, with the direction to provide an opportunity of producing evidence to the parties and then to deice the same afresh in accordance with law in light of the observations made in the judgment.

10. Office is directed to send the record to the learned Senior Civil Judge/Judicial Magistrate Swabi, who on receipt of the same, shall summon the parties and will proceed with the case.

Announced
11.01.2016

JUDGE

