

Judgment Sheet
IN THE LAHORE HIGH COURT, LAHORE.

JUDICIAL DEPARTMENT

W.P. No.6955/2017

JUDGMENT

Khurram Ghulam Rasool Vs. Shazia Khurram and others.

Date of hearing: - 24.03.2017

Petitioner by: - Ch. Riaz Akhtar, Advocate

Respondents by: Mr. Yasir Ali, Advocate.

Ms.Sadia Malik, Assistant Attorney General
for Pakistan on Court's call.

Mr. Ahmad Khan and Amad-ud-Din Fazil,
Research Officers/Civil Judges, Lahore
High Court, Multan Bench, Multan.

JAWAD HASSAN, J:- Through instant petition, the
Petitioner has prayed to set-aside the order dated 30.11.2015
passed by Civil Judge Class-III/Family Court, Lahore, whereby
he accepted the application under Section 21-A of the West
Pakistan Family Courts Act, 1964 (the “Act”) filed by the
Respondents No.1 to 3.

2. Brief facts for the disposal of this constitutional petition
are that the Respondents No.1 to 3 on 13.06.2015 filed a suit for
recovery of maintenance allowance against the Petitioner before
the learned Judge Family Court, Lahore and on the same day
also moved an application under Section 21-A of the Act and
obtained the stay order upon the property measuring 4-Marlas
situated at Main Sham Nagar Road near Barf Khana Chowk

bearing Khewat No.70,, Khatoni No.223, Khasra No.8270/4918-4916/2285-2284 (the “**Property**”) owned by Petitioner from Judge Family Court, Lahore vide impugned order dated 13.06.2015. The Petitioner filed written statement alongwith reply of application under Section 21-A of the Act on 12.11.2015. Subsequently vide order dated 30.11.2015, the learned Judge Family Court, allowed the application under Section 21-A of Act (the “**impugned order**”). Thereafter, the Respondent No.3 filed application under Section 17-A of the Act, for interim maintenance. The Petitioner filed reply on 30.11.2015 and finally after hearing the parties, the Family Court passed the interim maintenance allowance vide order dated 13.04.2016 entitling the minor Plaintiffs to receive Rs.5000/- per month for each Plaintiff i.e. Plaintiffs No.1 and 2, which the Petitioner/Defendant was directed to keep paying on or before the 14th of each month. Against that order, the Respondents No.2 and 3 filed WP No.19447/2016 before this Hon’ble Court and on 17.01.2017, with concurrence of the parties, the said order dated 13.04.2016, was set aside with the direction to decide the matter afresh after recording evidence of both the parties.

3. Learned counsel for the Petitioner contended that the Respondents No.1 to 3 filed a suit for maintenance allowance alongwith application under Section 21-A of the Act, seeking restraining order regarding alienation of his property. The counsel submits that when the application under Section 21-A

of the Act, was filed seeking direction to restrain the Petitioner from alienating the property, on the same day the learned Judge Family Court, passed restraining order from alienating the property of the Petitioner without hearing him. Further adds that learned Family Court cannot pass an order under Section 21-A of the Act, without going through the procedure laid down and steps to be taken under the Act. Further argued that under Section 21-A of the Act, the Court cannot exercise its powers unless a proper application under Section 17-A of the Act, is filed by the parties in the suit. Next argued that although the Respondents filed this application after six months in the same Court in November, 2015 after the impugned order has been passed under Section 21-A of the Act in which the interim maintenance was fixed by the Family Court. The counsel for the Petitioner has relied on MUHAMMAD SALEH VS SALAHUDDIN (1996 MLD 809), BANK ALFALAH LIMITED VS Messrs CALLMATE TELIPS TELECOM LTD and 5 others (2016 CLD 1202), Mst. AZRA PARVEZ and 3 others vs Sheikh ASHFAQ HUSSAIN and 7 others (2005 CLC 1695), Mrs. RUKHSANA YASMEEN (YAHYA) VS NAZAZ ALI and 7 others (2012 MLD 171).

4. On the other hand, learned counsel for the Respondents argued that the Respondents filed application under Section 21-A of the Act because of the apprehension that the Petitioner might sell the disputed property and aforesaid application has only been filed to secure the rights of Respondents. The counsel

for the Respondents has placed reliance upon MOHIUDDIN MOLLA VS THE PROVINCE OF EAST PAKISTAN, (2) ABDUS SOBHAN AND (3) KETAB ALI (PLD 1962 SC 119), M/s SPORTS WORLD and others VS LATEES FABRICS and others (1995 MLD 1707).

5. Arguments heard and record perused.

6. The instant constitutional petition has been filed to question whether the provision of Section 21-A of the Act can be exercised on the first day of hearing when there is no cogent and confidence inspiring evidence is available on record and mere on the basis of apprehension, that the Petitioner may sell the property and expected decree may be executed by restraining the Petitioner to sell the property. The moot point in this petition is that whether the provisions of Section 21-A of the Act can be invoked without any order of interim decree under Section 17-A of the Act.

7. It is reflected from perusal of record that a suit for maintenance allowance was filed by the Respondents No.1 to 3 before Judge Family Court, Lahore. Along with the suit an application under Section 21-A of the Act restraining the Petitioner/Defendant to sell or alienate the property was also filed. The suit and the said application were duly contested by the Petitioner by filing written statement and the reply, wherein he took certain preliminary objections and prayed for dismissal of the said application. Consequently, the learned Judge Family Court, Lahore vide order dated 30.11.2015, allowed the

application and restrained the Petitioner/Defendant from alienating the property mentioned/detailed in the application under Section 21-A of the Act.

8. The grievance voiced through this constitutional petition is that Judge Family Court was not justified to pass restraining order from alienating the property of the Petitioner before judgment under Section 21-A of the Act as there were no compulsory circumstances existed which are mandatory for passing such restraining order before judgment. The pivotal questions to be determined by this Court are that (i) Whether learned Judge Family Court was justified in passing the order for restraining the Petitioner from alienating his property before the passing of the interim or final decree; (ii) Whether there exist compulsory circumstances which compelled the learned Judge Family Court to pass restraining order; (iii) Whether the order passed by learned Judge Family Court is based on mere presumptions and apprehensions and such a harsh order could be passed in the prevailing situation; (iv) Whether before passing the impugned order, the learned Judge Family Court considered the conduct of the Petitioner and passed the order straightaway in a hasty manner; (v) Whether the plaintiff has made specific allegations with evidence with regard to disposal of the Property and (vi) Whether the Plaintiff has specifically established the intention of the Defendant to defeat and delay the proceedings of the case.

9. I have minutely gone through the record and it is reflected from perusal thereof that learned Judge Family Court was not justified in passing the order restraining the Petitioner from alienating his property which is not subject matter of the suit because there were no hard circumstances exist which made learned Judge Family Court to pass an order which otherwise amounts to attachment before judgment. From the perusal of record it is very clear that the Respondent No.3 on the first date of hearing filed application under Section 21-A of the Act, on the ground that the Petitioner is living abroad and is going to sell the property, therefore, he be restrained from alienating his property. It is also pertinent to mention here that learned Judge Family Court on the first date has passed the status-quo order of the property by holding that the Petitioner is restrained to alienate or sell the property so that expected decree be executed effectively.

10. From the record it transpires that it was a premature act of the Respondent No.3 to file this application on the first day because it is against the mandate of procedure provided in Act as the interim or final decree, has not been passed. Due to the amendments made in the Act, interim maintenance is allowed under Section 17-A of the Act, then after recording of evidence and hearing the parties final decree is to be passed and when the maintenance is not being paid in pending suit, then Section 21-A of Act can be invoked, if all the ingredients of the Section 21-A are fulfilled. Also in order to conclude the case in

time, the Family Court under Section 12-A of the Act shall decide the case within six (6) months. Once the final decree is passed, it is then enforced under Section 13 of the Act. The wording of Section 21-A of the Act is reproduced as under:-

“The Family Court may pass an interim order to preserve and protect and property in-dispute in a suit and any other property of a party to the suit, the preservation of which is considered necessary for satisfaction of the decree, if and when passed.”

The wording used in the above section is, in order to preserve and protect the property, in dispute, in the suit, the preservation of which is considered necessarily for satisfaction of the decree, then the Family Court **may pass an interim restraining order** restraining the Petitioner from alienating his property. On the attachment before judgment, the intention of the legislature is very clear in this regard on the following wordings;

- i) To preserve and protect the property, which is in dispute and for the satisfaction of the decree, then interim order is to be passed.
- ii) The basic criteria given for passing restraining order of the property in dispute for the satisfaction of the decree.
- iii) If it is considered necessary.

11. Ms. Sadia Malik, Assistant Attorney General of Pakistan has argued that since Civil Procedure Code (the “CPC”) is not applicable on the Act as per Section 17 of the Act, but if on any matter, the provisions of the Act is silent, then provisions of the CPC are applicable. She has placed reliance upon **GHULAM MURTAZA vs ADDITIONAL DISTRICT JUDGE (ii)**,

D.G. KHAN and 2 others (1999 CLC 81), wherein it has been

held as under:-

“Applicability of provision of C.P.C. in proceedings before Family Court. Provisions of Civil Procedure Code, 1908, would not be applicable in stricto sensu to proceedings before Family Court; principles of Civil Procedure Code, would, however, be attracted specially when there was no conflict between provisions of Civil Procedure Code, 1908 and provisions of Family Courts Act, 1964.”

Therefore, the principles of Section 21-A of the Act of 1964 are similar to the principles of Order XXXVIII Rule 5 of CPC. Hence, the objective of Order XXXVIII Rule 5 CPC is only preventive and not punitive. Reliance is placed upon **MUHAMMAD ATHER HAFEEZ KHAN VS Mssrs SSANGYONG & USMANI JV** (PLD 1962 SC 119) and **MOHIUDDIN MOLLA VS (1) THE PROVINCE OF EAST PAKISTAN, (2) ABDUS SOBHAN AND (3) KETAB ALI** (PLD 2011 Karachi 605).

12. It is important to note that restraining order was passed on the first date under Section 21-A of the Act without filing any application for interim maintenance under Section 17-A. It is very explicit that interim maintenance was passed on 13.04.2016 after the final order (impugned order) for restraining the Petitioner from selling property, was passed on 30.11.2015. The learned Judge Family Court merely on presumptions and apprehensions assumed without any cogent and convincing evidence on record that after passing of maintenance order, the Petitioner would abscond out of country and decree

would not be satisfied. In this case, the Petitioner is paying regularly maintenance allowance to the minor, therefore, learned Judge Family Court was not amply justified to pass restraining order which amounts to attachment. Further, the learned Judge Family Court has not followed the prescribed procedure provided in the law. The Court has to follow that the power given in Section 21-A of West Pakistan Family Court Act, 1964 is presumptive and not punitive. The jurisdiction of the Court in restraining the property before Judgment is of an extraordinary in nature and should be exercised sparingly and strictly in accordance with the procedure prescribed by the law. Reliance in this respect is placed upon **BANK AFALAH LIMITED VS Messrs CALLMATE TELIPS TELECOM LTD. and 5 others (2016 CLD 1202).**

13. The learned Division Bench of Peshawar High Court in a case titled **Messrs STFA C. & Co. vs Naeem Khan (2005 CLC 1270)** has held as under:-

“Application under O.XXXVIII, R.5, CPC could only be granted when sufficient material was on record that defendants were planning to leave the country with a view to defeat the recovery of plaintiff’s claim. No such circumstance existed in the present case. Vague allegation about intentions that defendant would leave the country were not sufficient. Definite evidence was required to be led before the Court in support of such contentions. Court was required to satisfy itself that defendant was about to dispose of his assets, only then such order could be made. Merely by establishing a prima facie case attachment before judgment could not be granted unless necessary ingredients of Order XXXVIII, R.5, C.P.C had been established. Attachment before judgment was not to be lightly ordered and Court had to satisfy itself before

making such order whether defendant was about to leave the country of dispose of his property with a view to frustrate or delay execution of decree that could be passed against him.”

In another case titled Mrs. Rukhsana Yasmeen (Yahya) vs Nazaz Ali and 7 others (2012 MLD 171), it has been held as under:-

“The crucial element must be that the concerned defendant intends to dispose of the subject property with intent to delay, defeat or otherwise frustrate any decree that may be made in the suit. Clearly, such intent would hardly ever been expressly spelt out and in the normal course, must be gathered or inferred from the relevant facts and circumstances. The primary circumstance relied upon by learned counsel for the plaintiff in this regard was the alleged disobedience of the interim orders made in the litigation. However, after reviewing the material and considering the interim orders which have been placed on record, I am not satisfied that such an intent can be clearly spelt out.”

14. In the instant case, which relates to a suit for maintenance, the learned Judge Family Court has misconstrued the provision of Section 21-A of the Act, which could only be exercised in a suit subject matter of property, if the decree (interim or final) is not satisfied by the Defendant. In other words, the party, who files the suit, should have a semblance of right or title over the property. While exercising the above said provision of Section 21-A of the Act, the following criteria should have been fulfilled:-

- i) Who files the suit, should have a semblance of right or title over the property;
- ii) Compelling cause of action is to be stated;

- iii) Previous record of the defendant/petitioner should be furnished that he has entered into an agreement to sell;
- iv) Or he is trying to further alienate his property through any other mode, like gift or exchange;
- v) Whether interim maintenance is not being paid.

15. Even otherwise, if stance taken by the Respondents/Plaintiffs in her application under Section-21-A of the Act is presumed true, the same has got nothing to do with the suit property. It is pertinent to mention here that the Petitioner has never refused to maintain his family and is steadily paying maintenance @ Rs.5000/- per month, hence complying with the interim decree which is being satisfied. Lastly, the present suit is only a suit for maintenance and the relief sought is being adhered with in the form of payment of interim maintenance, so issuance of restraining order is undesirable in the given facts and circumstances of the case.

16. The intention of the Petitioner has to be proved with reference to any attempt or negotiation made by the Petitioner with regard to the Property. The intention of the Defendant to delay or avoid execution of the decree if passed, has to be proved by the Respondent/Plaintiff through cogent and strong evidence. By merely filing a suit/application under Section 21-A of the Act, or raising any claim against the Petitioner does not constitute a right to restrain the Petitioner from alienating his Property. The facts from which the intention of the Petitioner may be inferred for selling/disposing of the Property or portion of the Property are to be proved through satisfactory

evidence i.e. an attempt to sell property, benami transfer, rapid sale of the property, past conduct. The transaction of the disposing of property must be subsequent to the suit. The mere fact that the Respondents have claim of maintenance allowance against the Petitioner and has an apprehension that the Petitioner will abscond because he is living abroad for earning his livelihood, is not enough to pass the impugned order. Hence, Section 21-A of the Act is preservative order and not punitive order as discussed in the judgment of Hon'ble Supreme Court of Pakistan in case of **Muhammad Athar Hafeez Khan** (supra) (PLD 1962 SC 119).

The above said facts and circumstances demonstrate that the learned Judge Family Court has passed the impugned order merely on apprehension and restrained the Petitioner from alienating his property which is not subject matter of suit in a slipshod manner without application of judicious mind, therefore, the instant petition is allowed and the impugned order dated 30.11.2015 is hereby set aside.

Before parting with the judgment I wish to acknowledge with gratitude the assistance rendered by M/S Mr. Ahmad Khan and Amad-ud-Din Fazil, Research Officers/Civil Judges, Lahore High Court, Multan Bench, Multan.

(JAWAD HASSAN)
JUDGE

Approved for reporting

JUDGE

*ZAHoor**