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**JUDGMENT SHEET**

**LAHORE HIGH COURT, LAHORE**

**JUDICIAL DEPARTMENT**

Writ Petition No.25771 of 2022

**Muhammad Waqas**          Versus      **Executing Court, etc.**

**J U D G M E N T**

<b>Date of Hearing:</b>	04.09.2023
<b>Petitioner by:</b>	Ch. Mahmood-ur-Rehman, Advocate.
<b>Respondents No.3 to 5 by:</b>	Mr. Ghulam Fareed Sanotra, Advocate.

**Anwaar Hussain, J.** Respondents No. 3 to 5 (“**the respondents**”) instituted a suit against the petitioner, for dissolution of marriage of respondent No.3 with the petitioner as also for recovery of her dowry articles as well as the maintenance of respondents No.4 and 5 (“**the minors**”) who are real children of the petitioner born from his wedlock with respondent No.3. Through an *ex-parte* judgment and decree dated 03.04.2018, the suit was decreed, where-after execution proceedings were initiated by the respondents. The petitioner did make some payments, however, on 13.02.2019, respondent No.3 got recorded her statement that she does not want to proceed with the execution petition and the matter was consigned to the record. However, subsequently, on 10.05.2019, the execution proceedings were restored on the application of the respondents. Thereafter, on 21.06.2019, after issuing warrant of attachment of the property of the petitioner, auction schedule was chalked out on 20.07.2019 while calculating the decretal amount till the year 2035. Thereafter the property was auctioned. Respondent No.3 purchased the said property,

as recorded in order dated 25.11.2019 passed by the Executing Court, by adjusting the amount of maintenance, which was calculated by considering the future maintenance amount, of the minors, till 2032.

2. The petitioner assailed order dated 20.07.2019 by way of filing an application under Section 12(2) of the Code of Civil Procedure, 1908 (“CPC”), *inter alia*, with the averments that the execution petition was earlier withdrawn by the respondents on 13.02.2019, which had been restored, subsequently, without serving any notice upon the petitioner; that his property was attached without fulfilment of legal formalities; and that the decretal amount was wrongly assessed till 2032 that is also not permissible under the law. The application of the petitioner was dismissed by the Executing Court, *vide* impugned order dated 31.03.2021 against which the petitioner filed a revision petition that was also dismissed by the learned Additional District Judge, Chiniot, *vide* judgment dated 28.01.2022. Hence, this constitutional petition.

3. Learned counsel for the petitioner submits that after the execution petition was consigned to the record, no notice was issued for its restoration and hence, the entire execution proceedings are nullity in the eyes of law, particularly, given the fact that prior to consigning the execution petition to record, the petitioner had been making payment(s) in order to satisfy the decree. Adds that it was mandatory on part of the Executing Court that notices under Order XXI Rule 66 of the CPC should have been issued before putting the property of the petitioner to auction, however, needful has not been done. Concludes that the Court Auctioneer, instead of acting as per the auction schedule chalked out by the Executing Court, has himself opted to postpone the auction, which was later on held on 23.10.2019 instead of 18.09.2019, as ordered by the Executing Court, and this fact alone

merits interference by this Court. Voluntarily states that the petitioner is willing and ready to pay the entire amount of maintenance due in favour of the minors, as of today.

4. Conversely, learned counsel for the respondents submits that even if there are irregularities in the auction proceedings, the petitioner was obligated to deposit 20% of the decretal amount in compliance of Order XXI Rule 90 of the CPC, which he failed to do despite direction by the Executing Court and hence, the learned Court has rightly passed the impugned order and in compliance of the same, the sale deed has been executed in favour of respondent No.3 and the matter has become past and closed transaction. Places reliance upon “Mst. Kalsoom Malik and others v. Assistant Commissioner and others” (1996 SCMR 710) and “Messrs Habib and Company and others v. Muslim Commercial Bank Limited and others” (PLD 2020 Supreme Court 227) in support of his contention.

5. Arguments heard. Record perused.

6. Admittedly, the decree passed in the suit instituted by the respondents has attained finality which is required to be executed and satisfied. However, it is the process adopted and the extent to which the decretal amount has been calculated by the Executing Court that has been called into question by the petitioner. The petitioner has put forth the contest that the auction proceedings are nullity on account of procedural irregularities committed by the Executing Court as also the Court Auctioneer whereas it is the case of the respondents that even if the said auction is marred by procedural irregularities, the same could have only been examined, if the petitioner had deposited the amount directed by the Executing Court and since the said direction has not been complied with, therefore, the petitioner is not entitled to any relief. Record depicts that the petitioner also filed applications, *inter*

*alia*, to clear the arrears of maintenance in installments but said applications were dismissed *vide* order dated 26.03.2022 that reads as under:

“12. Perusal of record reveals that when execution petition was filed it was mentioned at column No.8 of the form of execution petition that Rs.14250/- has been paid as the interim maintenance allowance before the learned Judge Family Court. Later on, during execution proceedings Rs.20000/- was paid on 29.09.2018 and Rs.20000/- on 15.10.2018. Subsequently, judgment debtor has paid Rs.2,00,000/- on 10.02.2022. In this way judgment debtor has paid Rs.254250/- in cash. On 25.11.2019, after the auction proceedings when sale certificate was issued, Rs.26,00,000/- has been adjusted in terms of decretal amount. In this ways, till today judgment debtor has paid (Rs.2,54,250 + Rs.26,00,000 =Rs.28,54,250/-).

13. Decree holder has calculated the decree money till the year 2034 at the time of the issuance of auction schedule. If the calculation of the decree holder is considered then the decretal amount till 29.02.2032 is Rs.28,44,000/-. The remaining amount Rs.10250/- shall be adjusted in the maintenance due on 29.03.2032 and on that day judgment debtor would pay only Rs.12750/- to the decree holders. In this way, the whole decree money and auction money shall be adjusted in compliance of the decree dated 29.03.2018.”

*(Emphasis supplied)*

7. Record further depicts that an amount of approximately Rs.340,000/-, *inter alia*, on account of arrears of maintenance was outstanding when the execution was filed. As reflected in the order dated 26.03.2022, the petitioner did make substantial payments *albeit* irregularly and not in time. However, instead of recovering the amount due till the date of attachment and/or the auction, the arrears of maintenance have been calculated till year 2032 by considering annual increase that was yet to accrue and the same has been deemed to be the arrears of maintenance and the decree has been executed by auction of property

of the petitioner, which has been purchased by respondent No.3/mother of the minors. Thus, the analysis of the factual matrix of the case entails the following questions to be answered by this Court:

- i) Whether the future maintenance could be anticipated to remain unpaid and notionally deemed as arrears of maintenance?
- ii) Whether the procedure adopted by the court auctioneer suffers from the material procedural irregularities?
- iii. Whether the petitioner was required to comply with the condition precedent of deposit of 20% of the auction price to get the same set aside as directed by the learned Executing Court when such an order was based on calculation of arrears having no legal backing?

8. Taking up the first question, it is imperative to note that maintenance of the children is the obligation of every father who is morally, socially and legally bound to pay such a living expense in order to provide food, clothing, education and other necessities of life, in accordance with his financial resources. Failure to pay maintenance may constrain a minor, through a guardian/mother, to have recourse to institution of suit and that is usually decreed and certain amount is determined and awarded by the Courts, alongwith annual increase. The purpose is to maintain a minor by provision of the necessities of life such as food, clothing and education etc., which necessarily implies that the same are to be fulfilled as and when the same arise. One cannot lose sight of the fact that the needs of the minor as well as the financial resources of the father may undergo change. Any such change may be brought before the Court for the re-fixation and re-determination of the maintenance as held in case reported as “Samia Anwar and another v. Nasir Hussain and 2 others” (2022 MLD 731). If regular maintenance is not paid despite being decreed, the same becomes arrears of maintenance that can be enforced through different modes adopted for

the execution of the decree. Thus, it is the failure of the father to make payment of maintenance for a particular period which renders the same recoverable as arrears. This necessarily implies that arrears are with respect to the past period and maintenance for a future period cannot be notionally deemed as arrears as it is the crucial aspect of failure to make payment of maintenance decreed that transforms the same into arrears. As further explication, maintenance is a debt which becomes due when a minor is not maintained at a particular period and it is passage of that time period coupled with the failure to pay the decretal amount, which transforms the said obligation into arrears. Maintenance of a time period which is yet to arrive cannot be considered as arrears as the fundamental and pivotal condition of failure to maintain cannot be anticipated in advance inasmuch as there is every likelihood that the father (in this case the petitioner) fulfils his obligation to maintain the minor when said obligation arises in future. Therefore, the notional conversion of future maintenance of a future period into arrears of decretal amount, as done in the instant case while calculating and recovering the maintenance till year 2032, cannot be countenanced, under the law.

9. Insofar as the question regarding the material irregularities in auction proceedings is concerned, suffice to observe that admittedly when the auction schedule was chalked out, no place of auction as well as time of auction was mentioned in order dated 20.07.2019. Moreover, the auction was to be held on 18.09.2019 as directed by the Executing Court, however, admittedly, the same was not conducted on the said date. There is nothing available on record to substantiate that the Court Auctioneer sought the permission of the Executing Court to reschedule the auction for any future date. This fact alone indicates that the auction proceedings were not carried out in accordance with law and as per the schedule chalked out by the Executing Court. Rather, the auction

proceedings were conducted by the Court Auctioneer on his own, on 23.10.2019, without seeking permission of the Court. Without addressing irregularities committed by the Court Auctioneer, the Executing Court has non-suited the petitioner, merely, on the ground that since he has neither paid regular monthly maintenance to the minors nor assailed the order of attachment of his property, therefore, he is not entitled to any relief. In this regard, it is imperative to note that even the said inappropriate conduct on part of the petitioner does not empower the Executing Court to confirm an auction that was not conducted in accordance with the just and equitable principles. This is more so when the decree has been executed for future maintenance that was neither due nor permissible under the law.

10. Insofar as the third and the most crucial question as to whether the deposit of 20% of the sale price was a condition precedent to maintain an application for setting aside of sale through auction by the Executing Court is concerned, it would be pertinent to observe that the decree in favour of the respondents has been passed by the Trial Court under the West Pakistan Family Courts Act, 1964 (**the Act, 1964**) that excludes the applicability of the CPC and Qanoon-e-Shahadat Order, 1984 (**“the QSO”**). The Family Court is not bound by the procedural technicalities of the CPC as envisaged by Section 17 of the Act, 1964. The Family Court is vested with the power to formulate its own procedure. The Supreme Court of Pakistan in case reported as *“Farzana Rasool and 3 others v. Dr. Muhammad Bashir Ahmad and others”* (2011 SCMR 1361) held that the object of the Act, 1964 was to shorten the agony of litigants and provide them speedy justice. It was also held therein that the object and purpose of exclusion of applicability of the CPC and QSO was to avoid technicalities by providing short, simple and speedy methodology for settlement of disputes. Thus, the necessary condition incorporated under Order XXI Rule 90 of the

CPC for deposit of certain percentage of the sale price is not applicable to the proceedings before the Family Court, which makes the application for setting aside the auction proceedings, though such an application in the instant case has been filed under Section 12(2) of the CPC, maintainable. Needless to mention that wrong mentioning of a provision of law makes no difference if the order or the proceedings challenged are nullity in the eye of law and this Court in its supervisory jurisdiction can rectify such an error and mould the relief claimed in order to ensure justice. As has been held above that the future maintenance cannot be considered to be part of an amount payable under the decree, without the same becoming due and then transforming into arrears on account of default of the petitioner/judgment debtor, such recovery of arrears in itself was not recoverable/executable, therefore, the sale of the property effected in execution thereof cannot sustain and all subsequent proceedings carried out also fall to the ground.

11. There is another angle from which the case can be examined. The fact that the property of the petitioner auctioned has been purchased by the respondent No.3 herself further goes onto reflect the arm-twisting at play, instead of the fair and just desire, to make the petitioner pay the maintenance of the minors, which is also evident from the fact that earlier the execution had been withdrawn and was later on got revived and execution proceedings were carried out without notice to the petitioner. This fact alone establishes that the petitioner was condemned unheard from the outset of restoration of the execution proceedings. The fact that notice was not issued to the petitioner when respondents filed an application to revive the execution proceedings is substantiated by learned Counsel for the petitioner by producing certified copy of application to procure the attested copies (*naql form*). Report on the said *naql form* by the



record keeper of the Executing Court depicts that there is neither mentioning of issuance of notice under Order XXI Rule 66 of the CPC in the order sheet of the Executing Court nor such notices are available on record. Meaning thereby that when the execution petition was revived, no notices were served upon the petitioner, therefore, the sale of the property belonging to the petitioner through auction cannot sustain as it offends principle of *audi alteram partem*. The said certified copy of *naql form* has been taken on record as 'Mark-A'.

12. Moreover, both technical aspects as well as the merits of the case aside, the case turns on another important aspect as well. There is no cavil to the proposition that the petitioner, as father of the minors, is obligated to maintain the latter and the arrears of maintenance once recovered during the execution proceedings are to be used for the benefits of the minors by fulfilling necessities of life, however, in the instant case, the future maintenance has been calculated till year 2032 and respondent No.3/mother has adjusted the said amount against purchase price of the property belonging to the petitioner in her own name. Particularly, this leaves the minors again with no maintenance. This Court while exercising the parental jurisdiction is perturbed from such state of affairs that on failure of the petitioner/father to maintain the minors, on the one hand, the former has been deprived of his property, which may form the inheritance of the minors in future and on the other hand, the same has not been transferred in the names of the minors, rather admittedly, sale deed in favour of respondent No.3/mother has been executed. Hence, it is the minors who are on the losing side in both eventualities.

13. Before parting with, suffice to note that the reliance of the respondent side on cases of Kalsoom Malik and Habib and Company , *supra* is misconceived as said cases do not relate to the family matters

which are special proceedings under a special law that specifically excludes the applicability of the CPC and QSO. The Supreme Court in “Hudaybia Textile Mills Ltd and others v. Allied Bank of Pakistan Ltd and others” (PLD 1987 SC 512) while interpreting the interplay of CPC and Banking Companies (Recovery of Loans) Ordinance, 1979 (“**the Ordinance, 1979**”) observed that in case of any repugnancy between the CPC and the Ordinance, 1979, the latter would override to the extent of repugnancy. On the basis of same principle, the provisions of the CPC having been excluded by the Act, 1964 are inapplicable to the proceedings before the Family Court.

14. In view of the above, this petition is **allowed** and the sale of the disputed property is held to be illegal and thus set aside. However, the petitioner, on whose behalf it has been voluntarily submitted before this Court that the arrears of decretal amount including monthly maintenance, as of today will be cleared, is directed to make payment of an amount of Rs.1,000,000/- (Rupees One Million), with the learned Executing Court, within 30-days from the date of receipt of certified copy of this order, and the said amount shall be adjusted against the arrears of decretal amount including monthly maintenance due till that date. In case the petitioner fails to deposit an amount of Rs.1,000,000/- (Rupees One Million) as directed hereinabove, this order shall be deemed to be recalled and the present petition shall be deemed to have been dismissed. No order as to costs.

(ANWAAR HUSSAIN)  
JUDGE

*Approved for reporting*

*Judge*

*Maqsood*