

2018 C L C 801

[Lahore]

Before Jawad Hassan, J

MUHAMMAD AFZAL----Petitioner

Versus

JUDGE FAMILY COURT and others----Respondents

W.P. No.39379 of 2016, heard on 12th June, 2017.

Family Courts Act (XXXV of 1964)---

---S. 5 & Sched.---Suit for recovery of maintenance allowance of wife---Execution proceedings---Modification of decree---Jurisdiction of Executing Court---Scope-Conditional order of the Court---Non-compliance---Effect---Petitioner/husband contended that Executing Court had no jurisdiction to go beyond the decree---Respondent/wife contended that Executing Court had rightly passed the order to pay her arrears of maintenance allowance---Validity---Appellate Court had passed the order of maintenance allowance subject to perform matrimonial obligations by wife---Decree could only be enforced and executed if the condition was fulfilled---Record revealed that wife had categorically denied to live with the petitioner and to perform her matrimonial obligations, therefore, Executing Court had to execute the decree in the manner the same had been passed---Petitioner, though had not challenged the judgment of Appellate Court but it did not give power to the Executing Court to go beyond the decree---High Court set aside impugned order of the executing Court being without jurisdiction---Constitutional petition was allowed accordingly.

Sardar Ahmed Yar Khan Jogezai and 2 others v. Province of Balochistan through Secretary, C&W Department 2002 SCMR 122 ref.

Uzman Umar Khokhar for Petitioner.

Syed Samar Abbas Naqvi for Respondents.

Date of hearing: 12th June, 2017.

JUDGMENT

JAWAD HASSAN, J.--- Through this Constitutional Petition, the Petitioner has called in question orders dated 19.03.2016 and 22.11.2016 passed by the learned Executing Court, Gujranwala.

2. Facts briefly for the disposal of this Constitutional Petition are that as a consequence of

suit for maintenance and recovery of dowry articles Judgment and Decree dated 16.05.2013 (the "Judgment and Decree") was passed by Judge Family Court, Gujranwala, whereby the Respondent No.2, was not held entitled to get maintenance allowance beside this she was entitled to get dowry articles or in the alternate value of Rs.1,50,000/-. The said Judgment and Decree was assailed by the Respondent No.2, which was partially allowed vide judgment dated 18.03.2015 (the "Appellate Judgment") with modification whereby she was deserved entitled to get maintenance allowance at the rate of Rs.4000/- per month subject to performance of her matrimonial obligations and not otherwise. The said judgment and decree was not further assailed before the higher forum. However, during pendency of execution proceedings, the learned Executing Court vide order dated 19.03.2016 observed that since Talaq has been effected on 30.11.2015, therefore, judgment debtor/Petitioner is under legal obligation to pay maintenance till 30.11.2015. Subsequently, the learned Executing Court on 2.11.2016 passed the order, whereby the Respondent No.2 was entitled to recover her arrears of maintenance allowance from the period of 16.05.2013 to 30.11.2015 (the "Impugned Orders"), which is beyond the Judgment and Decree. Hence this petition.

3. Learned counsel for the Petitioner has argued that Impugned Orders have been passed by learned Executing Court in an arbitrary manner as the Executing Court had no jurisdiction to go beyond the decree. He has further argued that Executing Court has no jurisdiction to modify the Judgment and Decree. Lastly, he prayed for setting aside of the said Impugned Orders.

4. On the other hand counsel for the Respondent No.2 has supported the Impugned Orders and contended that Impugned Orders passed by the learned Executing Court are inline with the Appellate Judgment passed by the learned Additional District Judge, therefore, no exception can be taken to it. Lastly, he prayed for dismissal of the writ petition.

5. Arguments heard and record perused.

6. It is reflected from perusal of record that pivotal question to be determined by this Court is whether the learned Executing Court, Gujranwala was justified to pass an order in execution proceedings, which was not passed in Judgment and Decree out of which execution proceedings were arisen. In order to resolve this issue, it is pertinent to mention and reproduce the Appellate Judgment of the learned Additional District Judge, Gujranwala, the relevant extract whereof is reproduced hereunder:-

"15. So far as maintenance allowance of the appellant is concerned, it is submitted that wife is entitled to get maintenance only when she is performing the matrimonial obligations but in the present case, she is not performing the matrimonial obligations because admittedly, criminal litigation is pending between the parties, even otherwise at the time of pre-trial reconciliation proceedings, she made statement before the court that she does not want to reconcile with the respondent, even during the cross-examination, she refused to live with the respondent, therefore, learned trial court rightly disentitled her from past maintenance allowance. However, as marriage inter se the spouses is still intact and she is still legal wedded wife of the respondent, therefore, she deserves maintenance allowance at the rate of Rs.4000/- per month subject to perform her matrimonial obligations not otherwise."

7. It is evident from the record that during the execution proceedings, the Executing Court went beyond its jurisdiction and passed the Impugned Orders not warranted by law. The relevant extract from the said order is reproduced hereunder:-

"File has been perused. Interim order dated 19.03.2016 reveals that divorce has been effected on 30.11.2015 and my learned predecessor court has ordered the payment of decretal amount under the ambit of conditional maintenance allowance holder. Same order has not been challenged and attained finality. In the larger interest of justice, decree holder is held entitled to recover her arrears of maintenance allowance from the period of 16.05.2013 to 30.11.2013. Judgment debtor is bound to pay the arrears of monthly maintenance allowance to decree holder."

8. From the perusal of above order it reveals that said order was a conditional order and could only be enforced and executed if the condition imposed in the said order was fulfilled, but from the perusal of above said order it transpires that the Respondent No.2 categorically denied to rehabilitate with the Petitioner and to perform her matrimonial obligations, therefore, passing of said order in such circumstances was not justified, perverse and contrary to the dictates of Apex Courts. So far as Executing Court whose orders are impugned in this Court is concerned, it also acted beyond its jurisdiction and passed the orders in jurisdiction not vested in it. The Executing Court cannot go beyond the decree and it has to execute the decree in the manner in which the decree has been passed. Reliance in this respect is placed upon *Sardar Ahmed Yar Khan Jomezai and 2 others v. Province of Balochistan through Secretary, C&W Department (2004 SCMR 122)*, wherein it has been held as under:-

"Executing Court at the time of execution of the decree, modified the decree by changing the rate of interest specified in the decree. Substitution of amendment could not have been made by the Executing Court as the same amounted to attempt to frustrate the object of the judgment and decree which had already attained finality. Such order passed by the Executing Court was arbitrary, capricious and coram non judice. Executing Court could not go behind the decree. When decree passed attained finality, it had got to be executed even if it was erroneously passed. Executing Court could not rectify any mistake in decree which would tantamount to going behind the decree."

Although the Petitioner had not challenged the Appellate Judgment of Additional District Judge, Gujranwala, but it does not give power to the Executing Court to pass an order in the executing proceedings not warranted by law, which go beyond the decree.

9. In view of the above and by relying on the Judgment of the Hon'ble Supreme Court in '*Ahmad Yar Khan Jomezai*' case supra, this petition is allowed and Impugned Orders are set aside and learned Executing Court is directed to implement the Appellate Judgment of the learned Additional District Judge in its true sense and perspective manner.