

Stereo.HCJDA-38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

W.P. No.25007 of 2016

Mst. Safia Bibi, etc.
v.
Addl. District Judge, etc.

J U D G M E N T

Date of Hearing	23.4.2019
Petitioners By	Muhammad Naeem Afzal Rehan, Advocate
Respondent No.4 By	Ch. Umair Ahmad, Advocate

Rasaal Hasan Syed, J. This order will decide the Constitutional petition wherein order dated 14.3.2016 of the learned Judge Family Court adjourning the execution petition *sine die* and also the order dated 24.5.2016 of the learned Addl. District Judge, Kamalia, dismissing the appeal against the same have been challenged.

2. Facts as may be relevant for the decision of this petition are that petitioner No.1 was married to respondent No.3 (judgment-debtor) on 22.1.2006, out of the wedlock two children (petitioner Nos.2 and 3) were born, the petitioner No.1 was thereafter expelled from the house who filed a suit for recovery of maintenance allowance for herself and also for the minor children. Vide judgment and decree dated 10.9.2011, the suit of the petitioner was decreed in terms whereof petitioner No.1 was held entitled to recover maintenance allowance @ Rs. 2,000/- per month from the date of institution of suit till the subsistence of marriage including Iddat period. Minors (petitioner Nos.2 and 3) were

allowed maintenance allowance @ Rs. 2,000/- per month per child from the date of institution of suit till majority of petitioner No.2 (son) and marriage of petitioner No.3 (daughter) respectively.

3. In execution proceedings, property of respondent No.3 was attached vide order dated 25.11.2015. At this stage, an objection petition was filed by respondent No. 4 (Mst. Sumaira Bibi) claiming that respondent No. 3, who was the former husband of petitioner No.1, had married her and that at the time of marriage, respondent No.3 *inter alia* gave her 08 kanals of land and 05 tollas jewellery. Later she came to know that he was owner to the extent of 03 kanals 07 marlas which was located in Tehsil Kamalia and that respondent No.3 allegedly executed an agreement in her favour committing to transfer as gift the property in her favour as his second wife and that she had filed a suit for declaration which was pending wherein injunctive order restraining the respondent No.3 from alienating the property was confirmed and that in these circumstances the property which was attached in execution of decree of petitioner be released from attachment. The objection petition was responded by petitioner No.1, stating that the objection petition was collusive, respondent No.4 was living in the house of respondent No.3, the property was attached in execution of decree for the maintenance of the minor children, which was the responsibility of respondent No.3 as father and that the judgment-debtor never owned 08 kanals of land nor he had ever transferred any of his property to Sumaira Bibi, objector and that the objection petition was based on falsehood and

concoction and was in fact a result of conspiracy between respondent Nos.3 and 4.

4. The learned Judge Family Court vide order dated 14.3.2016 observed that if further coercive measures were adopted against the judgment-debtor in respect of attachment and auction of property it will cause prejudice to the objector and therefore, in his own wisdom he opted to order that the execution petition be consigned to record room till the decision of the civil suit titled "*Sumaira Bibi v. Habib ur Rehman, etc.*" and that either party could seek restoration of execution after the decision of civil suit.

5. Petitioners filed an appeal against the order which was dismissed by the learned Addl. District Judge, vide order dated 24.5.2016, observing that there was no illegality in the order and that the petitioners should wait for the decision of the civil suit.

6. In this Constitutional petition, the two orders are subject-matter of challenge.

7. Learned counsel for the petitioners vehemently argued that the order of the learned Judge Family Court is illegal; the execution could not be consigned to record room merely on the filing of some civil suit and that the order of the Executing Court is without jurisdiction and further that the proceedings in the civil suit were collusive, the alleged claim of intended gift was bogus, the property vested in the judgment-debtor and was available for the realization of his debts and that the Family Court could not stay the proceedings but was bound to proceed with the execution to

enforce the liability of father who was illegally attempting to avoid it in conspiracy with his second wife/objector.

8. In contrast, learned counsel for respondent No. 4 (Sumaira Bibi) supported the impugned order and submitted that the property was validly given to her in lieu of dower and that in the presence of the civil litigation interest of justice demanded that the decision in the civil suit be awaited as any alienation pending the suit will prejudice the rights of respondent No.4. Finally argued that the order in the circumstances being fair and just does not violate any law.

9. Perusal of the record annexed with this petition reveals that marriage of petitioner No.1 with respondent No.3 took place on 22.1.2006, two children were born out of the wedlock, the marriage terminated as a result of divorce, the petitioners filed suit for recovery of her maintenance and also the maintenance of minors, the suit was decreed by the learned Judge Family Court on 10.9.2011 whereby petitioner No.1 was allowed maintenance allowance @ Rs.2,000/- per month from the date of institution of the suit till Iddat period while petitioner Nos. 2 and 3 were allowed maintenance @ Rs.2,000/- per month per head with 10% annual increase, from the date of institution of the suit, till the majority of petitioner No.2 while petitioner No.3 was entitled to get maintenance till her marriage. The execution proceedings to enforce the decree were initiated on 25.5.2012 and vide order dated 25.11.2015 the attachment order in respect of the property of respondent No. 3 (judgment-debtor) was issued. It was thereafter that the objection petition was filed by respondent No. 4 (Sumaira Bibi) second wife of

respondent No.3 whereby she claimed that she had filed a civil suit and that her claim was that the property was allegedly given as dower at the time of her marriage.

10. It is noteworthy that the suit for declaration was instituted by respondent No.4 on 20.11.2014 wherein she moved an application to restrain respondent No.3 who was respondent No.1 in the suit, from alienating the property till the decision of the suit, which application appears to have been allowed on 13.7.2015. Copy of the order has been annexed with this petition which reveals that the injunctive order was only against respondent No.3 and that too to restrain him from alienating the suit property during the suit. It is also observed that the suit was filed on 20.11.2014, which means after a period of more than three years from the date of decree dated 10.9.2011 of maintenance of minors granted in favour of petitioners by the Judge Family Court which was being executed. Respondent No. 4 claimed that she had married the respondent No.3 on 20.11.2010 and that the purported agreement by which the respondent No.3 allegedly agreed to transfer 03 kanals 9 marlas to the respondent No.4 was of 10.7.2014. In the suit for declaration she was seeking enforcement of this purported agreement which was allegedly executed three years after the decree for maintenance was passed against respondent No.3.

11. The learned Judge Family Court through impugned order directed that the execution petition be consigned to record room and that the petitioner should wait for decision in the suit, little realizing that there is no injunctive order qua the execution proceedings nor execution process could be suspended in this manner by any competent court. In fact

there was no restraint against the petitioners or the minors qua execution of decree and the interim injunctive order itself was limited to the extent of alienation by respondent No.3. The property was attached for the satisfaction of his debts and to pay off his liability which under the law he could not escape. Being so, merely on receiving an objection petition informing the Executing Court that some civil suit was filed, the execution proceedings which were to be independently dealt with, could not be held in abeyance nor could be ordered to be consigned to record room.

12. It is manifest from the facts noted hereinabove that the maintenance decree was passed three years before the alleged agreement on the basis of which the respondent No.3 asserted to have agreed to transfer the property to respondent No.4. Under section 53 of Transfer of Property Act, 1882 any alienation with intent to defeat the claim or to defraud the creditors is nullity in law and cannot be used detrimental to the interest of the claimant in a decree passed against its executant. Undeniably in this case the decree was passed on 10.9.2011, respondent No.3 after divorcing petitioner No.1 entered second wedlock with respondent No.4, so called agreement was fabricated three years after the decree, the decree being executed in the matter of maintenance of the minors wherein respondent No.3, being a father, could not be allowed to carve out pleas in conspiracy with his second wife for the purpose of avoiding his paternal obligation of making payment of maintenance to the minors. The respondent No.3 was under religious and legal obligation to maintain his minor children instead of

fetching tactics and devices to avoid his liability and any such device could not countenanced.

13. The Family Court under section 13(3) of Family Courts Act, 1964 was fully empowered to execute the decree for the payment of maintenance. The provisions of the said Act empowered the court to adopt the mode provided for recovery of arrears of land revenue. In West Pakistan Land Revenue Act, 1967 various modes to recover the arrears of land revenue were spelt out and one of the modes was to recover the arrears through sale of the immovable property of the defaulter. The Family Court in this case was fully competent to proceed with the execution proceedings, particularly when there was no injunctive order qua the proceedings of execution nor the execution of decree was under suspense from any competent court. The learned Judge Family Court while ordering to consign the file to record room, acted unlawfully, unjustifiably and illegally refused to exercise jurisdiction in accordance with law being influenced by the plea of a subsequent gift taken by the second wife in conspiracy with her husband, judgment-debtor. Reference in this respect is placed on “Amjad Iqbal v. Nida Sohail and others” (2015 SCMR 128). The order passed suffers from serious illegality and error of jurisdiction which cannot be countenanced. Even the appellate court committed illegality and the same error of law in affirming the order of the trial court.

14. For the reasons above, this writ petition is **allowed**, the impugned orders are declared to be without jurisdiction and lawful authority, which are accordingly annulled and set aside. In result the objection petition filed by respondent

No.4 (Sumaira Bibi) shall stand dismissed, the execution petition of petitioners shall be deemed to be pending wherein the Executing Court shall proceed in accordance with law.

(Rasaal Hasan Syed)
Judge

Announced in open court on 02.5.2019

JUDGE

Approved for reporting.

JUDGE