

**JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT**

W.P. No.26960 of 2021

Mian Rehan Arshad

Versus

Saba Gul & others

J U D G M E N T

Date of hearing: 20.05.2021.
Petitioner by: M/s. Muhammad Shahzad Shaukat, Taha Shaukat, Muhammad Ali Raza Saeed, Muhammad Uzair and Mirza Waqas Baig, Advocates.
Respondents by: Ch. Abdul Majeed-III, Advocate.

MUHAMMAD SAJID MEHMOOD SETHI, J.- Through instant petition, petitioner has challenged order dated 08.04.2021 & judgment dated 16.04.2021, passed by learned Judge Family Court and Additional District Judge, Faisalabad, respectively, whereby petitioner's objection petition was concurrently dismissed.

2. Brief facts of the case are that suit for recovery of maintenance allowance and dowry articles, filed by respondents No.1 to 3, was partly decreed by learned Judge Family Court, Lahore vide judgment and decree dated 03.09.2018, which was modified by learned Additional District Judge, Lahore vide consolidated judgment dated 18.03.2019. Feeling dissatisfied, the parties approached this Court by filing constitutional petitions, which were partly allowed vide order dated 24.12.2020, passed in **W.P.No.22863 of 2019**, whereby judgment and decree passed by learned appellate Court was modified. Later on, respondents No.1 to 3 filed execution petition, which was subsequently transferred to learned Senior Civil Judge, District Faisalabad for its onward

entrustment to any Court of competent jurisdiction on the ground that petitioner / judgment debtor was residing at District Faisalabad. During the course of proceedings, petitioner filed objection petition contending therein that the execution petition has been transferred in violation of the provisions of Section 25-A of the Family Courts Act, 1964 (“**the Act of 1964**”). Learned Executing Court, after hearing arguments from both the sides, dismissed said petition vide order dated 08.04.2021. Being dissatisfied, petitioner preferred appeal before learned Additional District Judge, which was also dismissed vide judgment dated 16.04.2021. Hence, this petition.

3. Learned counsel for petitioner submits that impugned decisions have been rendered in total oblivion of Sections 17 & 25-A of the Act of 1964. Adds that in presence of mechanism for transfer of cases including execution petition in the Act of 1964, the provisions of the Code of Civil Procedure, 1908 (“**CPC**”) could not have been invoked. Further submits that a Judge Family Court has no jurisdiction to transfer a case out of district inasmuch as a District Judge cannot direct an executing Court outside its jurisdiction to execute a decree of another Family Court and power to transfer a matter / case to another district rests with the High Court, but this aspect of the matter has been overlooked by learned forums below while passing impugned decisions, which are unsustainable in the eye of law. In support, he has relied upon Wazir Laiq v. The State and others (PLD 1987 Supreme Court 35), Muhammad Farash Khan v. Mst. Nishadar Jan [PLD 1983 SC (AJ&K) 43], Noor Muhammad v. Member (Judicial) Board of Revenue, Punjab Lahore and 4 others (PLD 1986 Lahore 237), Iqbal Sultan v. Miss Chand Sultan and 2 others (1990 CLC 366), Muhammad Naseem Khan and another v. Government of N.-W.F.P. through Secretary, Department of Cooperative, Peshawar and 24 others (1990 CLC 1693), Muhammad Ramzan and others v. Civil Judge and others (2003 YLR 2767) and Nargis Naureen v. Judge Family Court, Multan and others (PLD 2018 Lahore 735).

4. On the contrary, learned counsel for respondents No.1 to 3 defends the impugned order as well as judgment. He submits that the District Judge within the district and High Court outside the district can transfer all kinds of proceedings during pendency of suit or any proceeding till termination of proceeding of the suit and as soon as suit is finally decided, it becomes *functus officio*, thus, Section 25-A of the Act of 1964 becomes inapplicable. He submits that as per Section 13(3) of the Act of 1964, the Family Court can exercise all powers to execute decree like a collector has, for the purpose of recovery of payment of decree. He adds that Section 13(4) clearly enables the Court passing the decree to execute it and at the same time empowers the District Judge to transfer a decree to any other Civil Court. He further submits that Section 39 of CPC provides following guidelines for transfer of decree:-

“39. Transfer of decree.-- (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,___

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has no property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the Jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.”

He contends that Order XXI Rule 5 CPC also prescribes that where the Court to which the decree is to be sent for execution, is situated in a different district, the Court which passed it shall send it to the District Judge of the district in which the decree is to be executed. He contends that even if any irregularity is committed during the

process of transfer, that is immaterial and cannot be challenged in the constitutional jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. Learned counsel for respondents, in support of his submissions, has referred to Ghulam Murtaza v. Additional District Judge (II), D.G. Khan and 2 others (1999 CLC 81) and Tahir Farooq v. Judge Family Court and others (2002 MLD 1758).

5. Arguments heard. Available record perused.

6. The provision of Section 25-A of the Act of 1964 manifestly states that High Court, on application of any party or *suo motu* has jurisdiction to transfer (i) any suit or proceeding, under the Act of 1964, from one Family Court to another Family Court in the same district or from a Family Court of one district to a Family Court of another district; and (ii) any appeal or proceeding from the District Court of one district to the District Court of another district. However, a District Judge is empowered to transfer any suit or proceeding under this Act from one Family Court to another Family Court in a district or to itself and dispose it of as a Family Court. Similar powers are available to the Hon'ble Supreme Court to transfer any suit, appeal or other proceedings pending before a Court in one Province to a Court in another Province, competent to try or dispose of the same. In the presence of such explicit provisions of law, a Family Court, acting as an executing Court, is not authorized to make an order to directly transfer an execution petition to any other Court of competent jurisdiction not only in the same district but also to other district. The other contention of respondents that decree can be executed by the Court, passing it or by such other Civil Court as directed by the District Judge in terms of Section 13(4) of the Act of 1964, suffice it to say that aforesaid power is within district, not outside district, as aforesaid provision is required to be read in juxta position with the express provision of Section 25-A of the Act of 1964. In presence of comprehensive procedure for transfer of decree available in the Act of 1964,

provisions of Section 39 and Order XXI Rule 5 of CPC, could not have been invoked. It would be advantageous to reproduce relevant portion of Section 25-A of the Act of 1964, which reads as under:-

“25-A. Transfer of cases.– (1) Notwithstanding anything contained in any law the High Court may, either on the application of any party or of its own accord, by an order in writing–

(a) transfer any suit or proceeding under this Act from one Family Court to another Family Court in the same district or from a Family Court of one district to a Family Court of another district; and

(b) transfer any appeal or proceeding under this Act, from the District Court of one district to the District Court of another district.

(2) A District Court may, either on the application of any party or of its own accord, by an order in writing, transfer any suit or proceeding under this Act from one Family Court to another Family Court in a district or to itself and dispose it of as a Family Court.

(2a) Where a Family Court remains vacant or the presiding officer remains on leave or absent for any reason, except due to vacations, for more than thirty days a District Court may, either on the application of any party or of its own accord, by order in writing, transfer any suit or proceeding from such Family Court to another Family Court in a District or to itself and disposed it of as a Family Court.

(2b) On the application of any of the parties and after notice to. the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the Supreme Court may at any stage transfer any suit, appeal or other proceedings under this Act pending before a Court in one Province to a Court in another Province, competent to try or dispose of the same.

(3)”

7. The term “proceeding” is not defined in the Act of 1964 as well as CPC, however, it has elaborately been defined by Edwin Eustace Braynt in “The Law of Pleading Under the Codes of Civil Procedure” and reproduced in the Black’s Law Dictionary, 9th Edition, p 1324 and reads as under:-

“Proceeding is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word ‘action’, but it may include in its general sense all the steps taken or measures adopted in the prosecution or defence of an action, including the pleadings and

judgment. As applied to actions the term proceeding may include—(1) **The institution of the action;** (2) the appearance of the defendant; (3) **all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat*;** (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) **the execution;** (10) **proceedings supplementary to execution, in code practice;** (11) the taking of the appeal or writ of error; (12) the *remittitur*, or sending back of the record to the lower court from the appellate or reviewing court; (13) the enforcement of the judgment, or a new trial as may be directed by the court of last resort.”

[emphasis supplied]

Furthermore, the term “proceeding” has also been explained by Hon’ble Apex Court in N.-W.F.P., Peshawar v. Naeemullah Khan (2001 SCMR 1461) to include all possible steps in an action from its commencement to the execution of the judgment. The operative part of the observations is reproduced hereunder:-

“we are of the opinion that the word 'proceedings' is a comprehensive expression which includes every step taken towards further progress of a cause in Court or Tribunal, from its commencement till its disposal. In legal terminology the word "proceedings" means the instituting or carrying on of an action of law. Generally, a 'proceeding' is the form and manner of conducting judicial business before a Court or judicial officer, including all possible steps in an action from its commencement to the execution of a judgment and in a more particular sense it is any application to a Court of justice for aid in enforcement of rights, for relief, for redress of injuries, or damages or for any remedial object. It in its general use comprehends every step taken or measure adopted in prosecution or defence of an action”.

[emphasis supplied]

It is evident from the above that execution proceedings / execution petition squarely come within the expression “proceeding” appearing in Section 25-A of the Act of 1964.

8. So far as the objection of learned counsel for respondents that power is vested in Family Court to execute decree like a collector for the purpose of recovery of payment of decree keeping in view Section 13(3), therefore, provisions of C.P.C. are applicable, is concerned, it is

not denying the fact that the Act of 1964 is a special enactment and it is well settled that provisions of special law would have overriding effect over the provisions of general law. Provisions of C.P.C. would not be applicable in *stricto sensu* to proceedings before Family Court. It has also been mandated in Section 17 of the Act of 1964 that provisions of Evidence Act and CPC would not apply in matters specified in Part 1 of the Schedule. The provision of Section 17 is reproduced hereunder:-

“17. Provisions of Evidence Act and Code of Civil Procedure not to apply.– (1) Save as otherwise expressly provided by or under this Act, the provisions of the Qanun-e-Shahadat, 1984 (P.O. No. 10 of 1984), and the Code of Civil Procedure, 1908, except sections 10 and 11, shall not apply to proceedings before any Family Court in respect of Part I of Schedule.

(2) Sections 8 to 11 of the Oaths Act, 1872, shall apply to all proceedings before the Family Courts.”

However, general principles of CPC can be invoked by a Family Court for due determination of justice only when no procedure is provided in the Act of 1964 and there is no conflict between the provisions of CPC and the Act of 1964. Reference is made to Ghulam Murtaza v. Additional District Judge (II), D.G. Khan and 2 others (1999 CLC 81), Muhammad Aslam v. Ayyan Ghazanffar (PLD 2012 Lahore 392) and Muhammad Majid Iqbal v. Judge Family Court, Dunya Pur (2021 CLC 644).

9. Resultantly, instant petition is allowed and impugned order dated 08.04.2021 & judgment dated 16.04.2021 are declared to be illegal and without lawful authority to the extent that whatever transfer has been made, and record sent to learned Executing Court at Faisalabad, same shall be deemed to have been transferred under Section 25-A of the Act of 1964 by this Court today. Learned Executing Court at Faisalabad is directed to proceed in the matter for satisfaction of the decree in accordance with law. In future, execution proceedings / execution petition, arising out of decree passed by learned Judge Family Court, would be transferred keeping in view the spirit of Section 25-A of the Act of 1964 as well as observations recorded hereinabove. Copy of this

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judgment be sent to all District & Sessions Judges in the Punjab for its further circulation amongst all Judicial Officers.

(Muhammad Sajid Mehmood Sethi)
Judge

APPROVED FOR REPORTING

Judge

** Sultan /A.H.S **