

ORDER SHEET
IN THE LAHORE HIGH COURT
MULTANBENCH, MULTAN
JUDICIAL DEPARTMENT

W.P.No.5969/2017

Muhammad Ramzan alias Jan Muhammad
 versus
 Addl. District Judge, Sahiwal, etc.

Sr. No. of order/ Proceedings	Date of order/ Proceeding	Order with signature of Judge, and that of Parties' counsel, where necessary
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12.12.2017

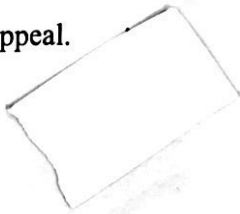
Mr. Zahid Mahmood Chaudhry, Advocate for petitioner.
 Rana Muhammad Shakeel, Advocate for respondents
 No.2 to 5.

Through this constitutional petition, the petitioner, Muhammad Ramzan alias Jan Muhammad (Judgment debtor), has called in question order dated 13.4.2017 passed by respondent No.1/Additional District Judge, Sahiwal whereby the appeal filed by respondents No.2 to 5 was allowed and order dated 21.2.2017 passed by Judge Family Court/Executing Court, Sahiwal whereby the court had dismissed application filed by the petitioner for restoration of execution petition consigned to record, was set aside and the execution petition was restored for further proceedings.

2. Concisely the facts of the case are that on 04.10.2006 a decree for recovery of maintenance allowance was passed by Judge Family Court, Sahiwal in favour of respondents No.2 to 5 (**Respondents/decreeholders**), who are wife and children of the petitioner. The decree-holders filed execution petition for the satisfaction of the decree. During the proceedings in the execution petition, the petitioner and respondent No.2 appeared on 30.07.2015 and apprised the court that a compromise had been reached between them out of court

and in this regard, statements of respondent No.2 (Mst. Jannat Bibi) and petitioner (Muhammad Ramzan) were recorded. After recording the statements of the parties the execution petition was dismissed as withdrawn and file was consigned to record vide order dated 30.07.2015. Subsequently the respondent No.2 filed an application before the executing court for restoration of the execution petition on the ground that petitioner/judgment debtor did not abide by the compromise and the minors (respondents No.3 to 5) have been deprived of their maintenance allowance. The petitioner was summoned, who filed reply to the application and objected to the restoration of the execution petition. The Judge Family Court/Executing Court, Sahiwal after hearing the arguments dismissed the application for restoration of the execution petition vide order dated 21.02.2017, which order was called in question through an appeal filed before respondent No.1/Additional District Judge, Sahiwal which was allowed by the court on 13.04.2017 and the afore-referred order dated 21.02.2017 was set aside and execution petition was restored. The petitioner has challenged the order of appellate court dated 13.04.2017 through the titled constitutional petition.

3. The learned counsel for petitioner has argued that the execution petition had been withdrawn by the petitioner and although the petitioner could file second execution petition but the earlier petition could not be restored, and claims that the orders passed by the appellate court be set aside and the execution petition be dismissed. It is also argued that the various objections raised by petitioner to the decree being executable have not been considered and decided by the appellate court before allowing the appeal.



4. On the other hand, learned counsel for respondents No.2 to 5 supports the order passed by the appellate court on the ground that respondent No.2 had not at any stage withdrawn the petition rather she had requested the court to consign the execution petition to record, further respondent No.2 had no authority to withdraw the execution petition filed on behalf of respondents No.3 to 5/minor children.

5. **Heard**, record perused.

6. It is an admitted fact that respondent No.2 is the wife and respondents No.3 to 5 are the children of petitioner. Decree for maintenance allowance was passed in favour of respondents No.2 to 5 and execution petition was filed for satisfaction of the decree. During the proceedings, the petitioner approached the respondent No.2 in order to settle the matter out of court. The respondent No.2 appeared before the executing court and got her statement recorded to the effect that she had patched up the matter with the petitioner and had agreed to reside with the petitioner; however, she specifically stated in her statement that the petitioner/judgment debtor had not paid any amount to her on account of the decree passed by the Judge Family Court and she reserves her right to receive the maintenance allowance in terms of the decree. Further it was stated that in terms of the settlement, she for the time being does not want to further pursue the matter and the file be consigned to record.

7. While getting her afore-referred statement recorded, the respondent No.2 did not state before the court that she wants to withdraw the execution petition, besides from the statement it is apparent that she had only got her statement recorded relating to her own claim. Nothing was stated relating to the claim of

respondents No.3 to 5 who are minor children of the parties, therefore, it is not established that she had prayed to withdraw the execution petition. The petitioner/judgment debtor accepted the statement of respondent No.2 and got recorded his statement that he had heard the statement of the decree holder which he agrees to be correct and in case he does not rehabilitate the respondent No.2, he would be bound to execute the decree in terms thereof. The learned executing court on the basis of afore-referred statements passed the following order on 30.07.2015:

“Present: Parties in person.

Parties intended to record their statements and statement of the parties have been recorded separately. In the light of statement of decree holder execution is hereby dismissed as withdrawn on the basis of compromise. File be consigned to the record room after its due completion.”

8. It is settled that once an execution petition is withdrawn, the same cannot be restored, although the decree holder may file second execution petition for execution of decree depending upon the circumstances of the case. Reliance is placed on Reliance is placed on *Ifthikhar Khan and another v. Mst. Amina Bibi and 2 others* (PLD 2012 Peshawar 159) wherein it is laid down that withdrawal of first execution petition on the basis of compromise was not absolute but was on the basis of settlement arrived at that time, and till the satisfaction of a decree, it could be executed within the given aggregate period of six years, from the date of decree.

9. However, in the present case it is to be seen, whether petitioner had withdrawn its execution petition or not. From the perusal of the statements of the parties recorded before the Executing Court and order dated 30.07.2015, it is observed that although the request to

withdraw the petition was not made on behalf of respondent No.2 who had only requested to consign the execution petition to record, the executing court observed that the execution petition was dismissed as withdrawn and file be consigned to record after due completion. The order to the extent of dismissing the petition as withdrawn on the basis of compromise is erroneous and does not depict the actual position pertaining to facts of the case. The learned trial court was required to pass an order in terms of the statement of parties and settlement reached between them, which the court omitted to do and added the words dismissed as withdrawn.

10. Although presumption of correctness is attached to all judicial acts but that presumption is rebuttable. The party may point out defect in the judicial record. Reliance is placed on Muhammad Sadiq v. Federation of Pakistan through Chairman, Pakistan Railways Board (1991 MLD 1) where in it laid down that presumption of correctness attached to judicial proceedings could be rebutted by evidence.

11. It is by now settled that where a court had omitted to pass an order in the manner prescribe by law then the litigants/parties cannot be penalized for such act or omission of the court. Reliance is placed on Muhammad Ijaz and another v. Muhammad Shafi through L.Rs. (2016 SCMR 834), wherein it is laid down as under:

“There is a well-known maxim “Actus Curiae Neminem Gravabit” (an act of the court shall prejudice no man) thus, where any court is found to have not complied with the mandatory provision of law or omitted to pass an order, required by law in the prescribed manner then, the litigants/parties cannot be taxed, much less penalized for the act or omission of the court. The fault in such cases does lie with the court and not with the litigants and no litigant should suffer on that account unless he/they are contumaciously

negligent and have deliberately not complied with a mandatory provision of law."

12. It is also by now settled that no act or omission of Court should be allowed to prejudice rights of parties and Court was bound to rectify error once it was brought to its notice. Reliance is placed on Iftikhar Baig v. Muhammad Azam and others (1996 SCMR 762).

13. The Executing Court in the present case was only required to consign the execution petition to record but it added the words dismissed as withdraw. By keeping in view the principles in the afore-referred judgments passed by the Supreme Court that act or omission of court should not prejudice anyone, the order passed by the executing court cannot be treated as an order for withdrawing the execution petition and order to the extent that "*File be consigned to the record room after its due completion*" only would be the real order in the present case. Besides, this Court is to see the injustice which has been done to the parties by the act of court and has to rectify the same. No prejudice would be caused to the rights of the petitioner by restoration of the afore-referred application because the decree could still be executed by filing a second execution petition in the given circumstance of the case. Reliance is placed on Iftikhar Khan's case (*supra*).

14. The decree is still in the field, respondent No.2 as well as the petitioner had agreed that in case of not rehabilitation of respondent No.2, the decree as originally passed could be executed. Even otherwise, the decree for maintenance allowance is based on recurring cause of action and the rights of the minors are involved whose execution petition could not even be withdrawn by their real mother/respondent No.2 unless it is established on the record that the withdrawal of execution petition

would be for the benefit of the minors. Reliance may be placed on Mst. Nasim Khatoon and others v. Syed Irshad Hussain and others (1991 MLD 1321) wherein it is held that withdrawal of execution petition was not for the benefit of the minors and therefore, the order passed by the executing court on the statement of minors' mother could not be construed as rendering decree for maintenance itself as ineffective for all times to come.

15. The order passed by the Additional District Judge, has cured a defect in the order passed by the executing court where instead of consigning the execution petition to record, the court had dismissed the same as withdrawn. This Court ordinarily does not interfere in an order passed by the courts below which has cured a manifest illegality of if interference would result in injustice. Reliance is placed on Nawab Syed Raunaq Ali, etc. v. Chief Settlement Commissioner and others (PLD 1973 SC 236) wherein it is held that where order cures a manifest illegality, then extraordinary jurisdiction ought not to be allowed to be invoked. Object of Constitutional Jurisdiction is to foster justice and not to perpetuate illegality and the jurisdiction must be exercised in aid of justice. Reliance is also placed on Messrs Bisvil Spinners (Pvt.) Ltd. v. Pakistan through Secretary, Ministry of Finance, Islamabad and 2 others (PLD 1992 SC 96), wherein it is held that no one can be permitted to reap benefit of wrongful gain.

This Court in exercise of its discretionary jurisdiction is not bound to interfere in all the circumstances and as such this Court would not exercise its constitutional jurisdiction to set aside the order passed by respondent No.1/Addl. District Judge, Sahiwal through which a judicious order for restoration of execution petition has been passed.

16. The claim of the petitioner that his certain objections relating to the decree being not executable have not been considered before restoration of the execution petition but this is not a ground not to restore the execution petition and the said ground can be taken care of by the executing court where the execution petition will be pending.

17. In view of the above, it is held that the order of the executing court, to the extent of dismissing the execution petition as withdrawn is without any legal justification and is based on erroneous interpretation of statement recorded by the parties and to that extent said order is declared to be ineffective against the rights of the respondents. Therefore, no ground to interfere in the order passed by appellate court/Additional District Judge, Sahiwal whereby it is restored the execution petition is made out and the same is upheld.

18. In view of what has been discussed above, this petition being devoid of merit is **dismissed**.

(Muzamil Akhtar Shabir)
Judge

•KMSubhani•

Approved for reporting.