

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Objection Diary. No.16605-2023

Ishrat Bano etc.
Vs.
Fateh Muhammad

Sr. No. of Order/ Proceeding	Date of Order/ Proceeding	Order with signatures of Judge and that of parties or counsel, where necessary.
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09.02.2023. Sh. Habib Ullah and Ch. Adnan Sarwar, Advocates.

The instant matter alongwith other application [Diary No.21059/2023] are fixed as objection cases. The learned counsel for the applicant has submitted that under Section 25-A of the West Pakistan Family Courts Act, 1964 this Court is competent to transfer an execution petition from one District to other District and in this regard he placed reliance on the judgment reported as Mian Muhammad Arshad Vs. Saba Gul and 5 others (2022 MLD 1280). But the office raised objection regarding maintainability of the petition on the basis of a judgment reported as Sawera Ikram Vs. Amir Naveed (PLD 2022 Lahore 600). Thereafter, the matter was referred by the Single Bench to the Hon’ble Chief Justice for placing the matter before a larger Bench so as to settle conclusively this issue. Accordingly, the matter is fixed before this Division Bench to answer following question:-

Whether a Family Court can transfer a suit, decree or execution petition, or can issue precept to a Family Court of the same district or of another district on its own?

2. To answer the above question it is appropriate to examine the Family Courts Act, 1964. Section 2(1)(b) of the Act *ibid* provides the definition of the “Family Court” as under:-

“Family Court” means a Court constituted under this Act;”

Section 3 of the Act *ibid*, deals with the establishment of Family Courts and Section 5 defines the jurisdiction of Family Courts, whereas Section 13-A of Act *ibid* describes the *modus operandi* for execution of decrees of the Family Court. Section 13 of the Act *ibid* is reproduced as under:

“Enforcement of decrees.— (1) The Family Court shall pass a decree in such form and in such manner as may be prescribed, and shall enter its particulars in the prescribed register.

(2) If any money is paid or any property is delivered in the presence of the Family Court, in satisfaction of the decree, it shall enter the fact of payment [or] the delivery of property, as the case may be, in the aforesaid register.

(3) Where a decree relates to the payment of money and the decretal amount is not paid within time specified by the Court [not exceeding thirty days], the same shall, if the Court so directs be recovered as arrears of land revenue, and on recovery shall be paid to the decree-holder.

(4) The decree shall be executed by the Court, passing it or by such other Civil Court as the District Judge may, by special or general order, direct.

(5) A Family Court may, if it so deems fit, direct that any money to be paid under a decree passed by it be paid in such installments as it deems fit.”

(emphasis supplied)

Under Section 25-A of the Act *ibid* the procedure is prescribed for the transfer of family cases. For ready reference it is reproduced as under:-

25A. 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) Any Court to which a suit, appeal or proceeding is transferred under the preceding sub-sections, shall, notwithstanding anything contained in this Act, have the jurisdiction to dispose it of in the manner as if it were instituted or filed before it:

Provided that on the transfer of a suit, it shall not be necessary to commence the proceedings before the succeeding Judge de novo unless the Judge, for reasons to be recorded in writing directs otherwise.

(emphasis supplied)

The legislature inserted the non-obstante clause in sub-section 1 of Section 25-A of the Act *ibid*, i.e. “notwithstanding anything contained in any law” and that has to be read in the context of what is intended in the enacting part of the provision and/or an overriding provision of law become apparent. The Hon’ble Supreme Court of Pakistan has elaborately explained the definition of non-obstante clause in Syed Mushahid Shah’s¹ case as under:-

1. *Syed Mushahid Shah & Others Vs. Federal Investment Agency & Others* (2017 SCMR 1218)

“9. Section 7(4) of the Ordinance, 2001 confers exclusive jurisdiction on the Banking Courts with respect to certain matters albeit subsection (5) creates an exception to the exclusive jurisdiction of the Banking Courts. This confers a right on the financial institution to seek any remedy before any court or otherwise which may be available to it under the law by which the financial institution may have been established [Section 7(5) (a)]. According to section 4 of the Ordinance, 2001 reproduced above, its provisions “*shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.*” This is essentially a non obstante clause which is defined as “*A phrase used in documents to preclude any interpretation contrary to the stated object or purpose.*” ‘Notwithstanding’ means despite, in spite of a regardless of something. In this respect Justice G. P. Singh has aptly explained:-

“A clause beginning with ‘notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force’, is sometimes appended to a section in the beginning, with a view to give the enacting part of the section in case of conflict an overriding effect over the provision or Act mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision or Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provisions embraced in the non obstante clause will not be an impediment for the operation of the enactment.”

In the judgment reported as Packages Limited through its General Manager and others v. Muhammad Maqbool and others (PLD 1991 SC 258) this Court observed:-

“In our opinion a ‘non obstante’ clause operates as an ouster of the earlier provisions only where there is a conflict and inconsistency between the earlier provisions and those contained in the later provision and, therefore, must be read in the context in which it is operating. Accordingly, a non obstante clause will operate as ouster only if an inconsistency between the two is found to exist.”

In the judgment reported as Muhammad Mohsin Ghuman and others v. Government of Punjab through Home Secretary, Lahore and others (2013 SCMR 85), this Court cited with approval a passage from Interpretation of Statutes by N. S. Bhindra which reads as under:-

“It has to be read in the context of what the legislature conveys in the enacting part of the provision. It should first be ascertained what the enacting part of the section provides on a fair construction of words used according to their natural and ordinary meaning and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing law which is inconsistent with the new enactment. The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously, for even apart from such clause a later law abrogates earlier laws clearly inconsistent with it. The proper way to construe a non obstante clause is first to ascertain the meaning of the enacting part on a fair construction of its words. The meaning of the enacting part which is so ascertained is then to be taken as overriding anything inconsistent to that meaning in the provisions mentioned in the non obstante clause. A non obstante clause is usually used in a provision to indicate that that provision should prevail despite anything to the contrary in the provision mentioned in such non obstante clause. In case there is any inconsistency between the non obstante clause and another provision one of the objects of such a clause is to indicate that it is the non obstante clause which would prevail over the other clauses. It does not, however, necessarily mean that there must be repugnancy between the two provisions in all such cases. The principle underlying non obstante clause may be invoked only in the case of ‘irreconcilable conflict’.”

From the above it is clear that the non obstante clause of section 4 of the Ordinance, 2001 has been used by the legislature to give the provisions of the said Ordinance an overriding effect over any other law for the time being in force which may be contrary thereto. The use of

the word ‘notwithstanding’ in section 4 *ibid* indicates the legislative intent to avoid the operation of conflicting provisions, by providing that in the event of such conflict, the provisions of the Ordinance, 2001 would take precedence over any such inconsistent law.”

Under Sub-Section (2) of Section 25 of the Act *ibid*, the District Judge has the power to transfer suit or proceeding from one Family Court to another Family Court in a District or to itself or dispose it of as a Family Court. Under Sub-Section 2-A, if any presiding officer of the Family Court remains on leave or is absent for any reason for more than 30 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 for disposal as a Family Court. Sub-Section 2-b of Section 25-A of the Act *ibid* empowers the Hon’ble Supreme Court of Pakistan to transfer suit, appeal or proceeding pending before a Court in one Province to a Court in another Province. Reliance in this regard is placed on *Rabia Ahmad’s case*² wherein the August Apex Court has observed as under:-

2. Be that as it may, it is apparent from section 25-A(2-B) that all parties before a Court in proceedings under the Act have a remedy to seek the transfer of such proceedings to a competent Court in another province on the ground of, inter alia, expeditious disposal and convenience of the parties, particularly females and minor children. This is the law laid down in respect of transfers made under the afore-noted provision. In the present case, however, the said statutory remedy is not available to litigants seeking transfer of their proceedings to and from the ICT. There is no ground to justify the denial of this relief to litigants in Islamabad, especially when litigants in other parts of the country are entitled to it. Therefore, it is our considered view that in such circumstances the Court can resort to its extraordinary jurisdiction under Article 187 of the Constitution to provide for the transfer of proceedings.

2 *Rabia Ahmad versus Bilal Ejaz* (2022 SCMR 733)

For case of reference, the said provision is reproduced below:

"187. Issue and Execution of Processes of Supreme Court. Subject to clause (2) of Article 175, the Supreme Court shall have power to issue such directions, orders or decrees as may be, necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document."

(emphasis supplied)

The ambit of this Court's power to do complete justice in matters pending before it was discussed in detail in the case of Dossani Travels Pvt.Ltd. v. Messrs Travel Shop, Pvt. Ltd. (PLD 2014 SC 1). The relevant portion from this judgment is produced below:

"41: While seized of petitions under Article 199 of the Constitution, the High Courts at times are faced with prayers to pass order and Provide relief for "doing complete justice". But such powers in constitutional jurisdiction are vested in the Supreme Court under Article 187 of the Constitution. These powers are distinct both in scope and the manner of their exercise. The Apex Courts in most of the democratic countries enjoy such powers. The powers of this Court to pass any order or give any direction "for doing complete justice" are similar to those which the Supreme Court of India enjoys under Article 142 of the Constitution of India.

42: In both the above quoted provisions, the paramount consideration and the constitutional intent is common i.e. "for doing complete justice". These powers being inherent are complementary to those which are specifically conferred on the Court by the Constitutions of these two countries. These powers remain undefined so that the Court can cater to an situation and could even mould the relief... The rationale appears to be that in situations which cannot be resolved by existing provisions of law and warrant an intervention by the Court it may pass an order to ensure "complete justice". This can also be used where the Court finds a gap in legislation and a solution is required till the Legislature acts and covers the field."

(emphasis supplied)

A perusal of the above quoted passages makes it clear that the power of this Court to do complete justice has intentionally been left undefined to ensure that it can

cater to any and all situations where the law as it exists leads to injustice. Such power can in fact even be used, as has been recognized in the Dossani Travels case (supra), to cover up gaps in the legislation. In the present case, we are also faced with a similar problem in that section 25-A(2-B) of the Act does not provide for the transfer of cases from the Courts in ICT to the Courts of another Province and vice versa. Therefore, to fill in the said lacuna in the Act, this Court has power under Article 187 of the Constitution to do complete justice by transferring proceedings to and from the ICT in deserving cases.

In the above referred case, the Hon'ble Supreme Court transferred the execution proceeding for expeditious disposal from the Family Court, Rawalpindi to District Judge, Islamabad.

In Mst. Kulsoom Rasheed's³ case, the Hon'ble Supreme Court of Pakistan while invoking jurisdiction under sub-section (2b) of Section 25-A of the Act ibid, transferred the execution proceedings from Islamabad to Karachi for its expeditious disposal, and held as under:-

“3. In view of the above stated legal position and looking into the facts and circumstances of the case, it would be cumbersome to issue notice to the respondent, who is resident of Karachi. Even otherwise it will burden the respondent with heavy cost on travelling or contesting the matter here. In order to protect the rights and interest of the parties and to ensure that right as conferred by Article 10A of the Constitution “fair trial” is protected, this Court can always make an order of transfer and the transferee court may take further proceedings from where it is left by the Court from which matter is transferred, only after due service of notice on the respondent. In view of the fact that the matter in issue relates to the execution of a decree passed in favour of the petitioner, who is also the wife of the respondent, the execution proceedings, in order to facilitate expeditious disposal, are ordered to be transferred from the Family Court/Guardian Judge, Islamabad-West to the District Judge, Karachi (concerned) who shall assign the matter to the competent Family Court concerned for the purpose of the execution of the judgment and decree noted above after due service on the respondent.”

(emphasis supplied)

³ *Mst. Kulsoom Rasheed Vs. Noman Aslam* (PLD 2021 SC 579)

In the said case, the execution petition was transferred from Islamabad to Karachi for its expeditious disposal while invoking jurisdiction under Sub-Section 2b of Section 25-A of the Act *ibid*.

3. Now it is settled law that under Section 25-A of the Act 1964, High Court has the power to transfer suit, appeal, execution petition and other proceedings within District or outside the District. The execution procedure is defined under Section 13 of the Act *ibid* and the Family Court is competent to enforce money decree under the very act as well as it can recover the decretal amount as arrears of land Revenue and a complete mechanism for the satisfaction of the decree is defined in Chapter 8, Section 80 of the West Pakistan Land Revenue Act and the Family Court may adopt any procedure for execution of a decree. Under Section 25-A (2), the District Judge is competent to entertain application to transfer a suit or proceeding from one Family Court to another Family Court in a District to itself and dispose it of as a Family Court. Section 13 (4) also empowers the District Judge in this regard. Family Courts Act, 1964 is a special law enacted to provide facilities to litigants in Family matter. The Family Court has power to pass any order to meet the ends of justice and also has power to take steps for substantial justice. In the judgment reported as *Mian Muhammad Arshad Vs. Saba Gul and 5 others* (2022 MLD 1280), the Family Court transferred the execution petition on its own while relying upon the provision of Section 39 read with Order XXI Rule 5 CPC and transfer the said execution petition to another District. For ready reference Order XXI Rule 5 CPC is reproduced as under:-

5. Mode of transfer.— Where the Court to which a decree is to be sent for execution is situate within the same District as the Court which passed such decree

such Court shall send the same directly to the former Courts. But, where the Court to which the decree is to be sent for execution is situate in a different District, the Court which passed it shall send it to the District Court of the District in which the decree is to be executed.

Whereas, the learned Single Judge in Chamber in his pronouncement reported as “Sawera Ikram Vs. Amir Naveed” (PLD 2022 Lahore 600) has declared that the order passed by the learned executing Court/Family Court transferring the execution petition from Lahore to another District was in violation of Section 25-A of the Act, 1964 and the Family Court is competent to only transmit precept for the purpose of attachment of property and for further proceeding to be taken in accordance with law. The concept of precept is defined under Section 46 CPC, which is reproduced as under:-

46. Precepts.— (1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree.

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

Whereas, under Section 17 of the Family Courts Act *ibid* the Code of Civil Procedure except the provisions of Sections 10 & 11 whereof shall not be applicable to the proceedings before any Family Court. Section 17 of the Act *ibid* is as under:-

“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.

(2) Sections 8 to 11 of the Oaths Act, 1873, shall apply to all proceedings before the Family Courts in respect of Part I of Schedule.

The execution proceedings initiated for the satisfaction of the decree passed in respect of the Part 1 of the Schedule and under Section 13 of the Act *ibid* read with Section 80 of the Land Revenue Act, Family Court is competent to execute the same, as such Section 46 CPC is not applicable upon the execution proceeding of the Family Court. It is settled law that Courts are bound for rule of law and should perform its duties within the parameters prescribed under the law. The Family Court Act is a special law and the Family Judge is competent to do the needful for substantial justice, however, the CPC in *stricto sensu* is not applicable to the proceeding before Family Court. Thus, the learned executing Court/Family Court is not competent to transfer the execution petition within District or outside the District and if it does so, it would be violation of Section 25-A of the Family Courts Act, meaning thereby the Family Court is not competent to issue any precept under Section 46 CPC for the attachment of any property rather it shall adopt the procedure mentioned under Section 80 of the Land Revenue Act, 1967.

4. The word “proceeding” has defined by the Hon'ble Supreme Court of Pakistan in a Mst. Karim Bibi⁴ case as under:

“8. After giving our anxious consideration to the arguments urged in support of this appeal we are, however, not impressed by any of the contentions raised. The test laid down by the Legislature in the proviso is that if the law applicable to the proceedings from which the Constitutional Petition arises provides for at least one appeal against the original order, then no appeal would be competent from the order of a Single

⁴ Mst. Karim Bibi and others Vs. Hussain Bakhsh and another (PLD 1984 SC 344)

Judge in the constitutional jurisdiction to a Bench of two or more judges of the High Court. The crucial words are the “original order”. It is clear from the wording of the proviso that the requirement of the availability of an appeal in the law applicable is not in relation to the impugned order in the Constitutional Petition, which may be the order passed by the lowest officer or authority in the hierarchy or an order passed by higher authorities in appeal, revision or review, if any, provided in the relevant statute. Therefore, the relevant order may not necessarily be the one which is under challenge but the test is whether the original order passed in the proceedings subject to an appeal under the relevant law, irrespective of the fact whether the remedy of appeal so provided was availed of or not. Apparently the meaning of the expression “original order” is the order with which the proceedings under the relevant statute commenced. The word “proceedings” has been used in different enactments and has been subject to judicial interpretation in a number of cases wherein it has received either restricted or wide meaning according to the text and subject-matter of the particular statute. I do not consider it necessary to notice the various judgments in which this word was so construed. Suffice it to refer to the case of *Nawab Din v. Member Board of Revenue* (1) in which this Court had occasion to examine the scope and meaning of the word as it occurs in section 2 (2) of the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975. A useful discussion will be found in this case with reference to precedents as the meaning of the term “proceedings”. An earlier case of *Jan Muhammad and another v. Home Secretary, West Pakistan and others* (2) was referred to in this connection and the view taken therein was declared by this Court as the correct enunciation of the law on the subject. In the latter case reference was made to the definition of the term “proceedings” in the book “Words and phrases” which may usefully be reproduced as under:

“The term ‘proceedings’ is a very comprehensive term, and, generally speaking, means a prescribed course of action for enforcing a legal right, and hence it necessarily embraces the requisite steps by which judicial action is invoked. A ‘proceeding’ would include every step taken towards the further progress of a cause in Court or before a Tribunal, where it may be pending. It is the step towards the objective to be achieved, say for instance the judgment in a pending suit. The proceeding commences with the first step by which the machinery of the law is put into motion in order to take cognizance of the case. It is indeed a comprehensive expression and includes all possible steps in the action under the law, from its commencement to the execution of the judgment.”

(emphasis supplied)

The Hon'ble Apex Court affirmed the view rendered in the judgment (supra) in Muhammad Abdullah and SME Bank Limited cases.⁵

5. In the light of the aforesaid discussion, we are of the considered view that under Section 17 read with 25-A of the West Pakistan Family Courts Act, 1964, the provisions of the Code of Civil Procedure, 1908 are not stricto sensu applicable, therefore, a Family Court cannot transfer a suit, decree, execution petition or issue a precept to another Family Court within the same district or any other district on its own and the only mode to transfer a suit, appeal, decree or execution petition under the Act *ibid* is to approach this Court. As such, under Section 25 of the Family Courts Act, 1964 this Court is empowered to transfer any suit, proceeding under the Act *ibid* from one Family Court to another Family Court in the same District or from one Family Court in one District to another Family Court in other District. This Court has also power to transfer an appeal or proceeding under the Act *ibid* from one District to other whereas the District Judge is competent to transfer any such suit/proceedings from one Court to another within such district.

⁵ *Muhammad Abdullah Vs. Deputy Settlement Commissioner, Centre-I, Lahore* (PLD 1985 SC 107)
SME Bank Limited through President Islamabad & Others Vs Izhar ul Haq (2019 SCMR 939)

6. The legal question has since been accordingly answered, therefore, the objection raised by the office is overruled. Office is directed to number the petitions and fix the same before a Single Bench for its decision on merits.

(Muzamil Akhtar Shabir)
Judge

(Ch. Muhammad Iqbal)
Judge

Approved for reporting.

Judge