

Before Attaullah Khan and Waqar Ahmad Seth, JJ

IFTIKHAR KHAN and another---Petitioners

Versus

Mst. AMINA BIBI and 2 others---Respondents

Writ Petition No.1030 of 2011, decided on 22nd March, 2012.

(a) West Pakistan Family Courts Act (XXXV of 1964)---

---Ss. 17, 13 & 5---Civil Procedure Code (V of 1908), S.48---Constitution of Pakistan, Art. 199-
--Constitutional petition---Second execution petition, maintainability of---Suit for recovery of
maintenance allowance and dower was decreed and execution petition for the same was filed by
the wife (respondent); when the parties entered into a compromise and the execution petition was
withdrawn by the wife---Subsequently, the wife filed a second execution petition which was
dismissed by the Executing Court, but the Appellate Court accepted the same---Contention of the
husband (petitioner) was that second execution petition was not maintainable and that after the
compromise, the case was a fresh cause of action which required evidence to be recorded---
Validity---After the compromise, the husband/judgment-debtor had not taken any ground that
any amount towards the satisfaction of the decree was paid privately to the wife---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 the decree---Family Court could exercise its
own powers to prevent the course of justice being deflected from its path---Family Court had to
regulate its own proceedings in accordance with provisions of the West Pakistan Family Courts
Act, 1964 and in doing so, it had to proceed on the premise that every procedure was permissible
unless a clear prohibition for the same was found in law, meaning thereby that the Family Court
could exercise its own powers but was not debarred to follow the principles of the Civil
Procedure Code, 1908 coupled with the facts of a case---West Pakistan Family Courts Act, 1964
and the Rules made thereunder had not expressly prohibited the filing of a second execution
petition especially in the circumstances when there was nothing on record that after the
compromise and withdrawal of the first execution petition, any payment had been made or
efforts were completed for satisfying the decree privately---Constitutional petition was
dismissed.

PLD 2011 Kar. 24; PLD 2010 SC 891 and 1999 CLC 555 rel.

(b) West Pakistan Family Courts Act (XXXV of 1964)---

---S. 17 & 5--- Civil Procedure Code (V of 1908), Preamble---Jurisdiction of Family Court--- Scope---Family Court could exercise its own powers to prevent the course of justice being deflected from its path---Family Court had to regulate its own proceedings in accordance with provisions of the West Pakistan Family Courts Act, 1964 and in doing so, it had to proceed on the premise that every procedure was permissible unless a clear prohibition for the same was found in law, meaning thereby that the Family Court could exercise its own powers but was not debarred to follow the principles of the Civil Procedure Code, 1908 coupled with the facts of a case.

Kamaluddin Khattak for Petitioners.

Hassan U.K. Afridi, for Respondents.

Date of hearing: 22nd March, 2012.

JUDGMENT

WAQAR AHMAD SETH, J.--Petitioners have asked for setting aside order/judgment dated 22-2-2011 passed by learned District Judge, Kohat and for restoration of the judgment/order of the learned executing court dated 31-1-2011.

2. Precise facts leading to the writ petition are that respondent No.1 instituted a suit for recovery of dower and maintenance against the petitioner No.1, in the Family Court of Kohat on the basis of agreement/ Mehr Nama dated 3-3-1992, Exh.PW 1/1, which suit was decreed in her favour vide judgment and decree dated 5-11-2009. The petitioner No.1 also filed a suit for restitution of conjugal rights which was decreed, conditionally in his favour vide the above said judgment.

3. Respondent No.1 filed first execution petition on 25-11-2009 for the recovery of dower and maintenance decree before the respondent No.3, executing court and during the pendency of the said proceedings petitioner No.1 and respondent No.1 entered into a compromise dated 22-1-2010, by patching-up the matter privately, outside the court, through the elders of the locality, with their free consent and without coercion. In this respect an agreement was also executed. The parties appeared before the executing court on 29-1-2010, respondent No.1 got recorded her statement on oath, by exhibiting the compromise deed as Exh.PA and prayed for withdrawal of execution petition without any further proceedings and without seeking permission of filing fresh execution petition, as such the learned executing court vide order dated 29-1-2010 consigned the execution proceedings to the record room, dismissed as withdrawn.

4. After the compromise once again the relationship

between the parties became strained, resultantly the respondent No.1 again filed second execution petition on 26-5-2010 on the basis of dower and maintenance decree passed on 5-11-2009; that the learned executing court dismissed the second execution petition of respondent No.1 vide order dated 31-1-2011. The respondent No.1 preferred an appeal against the said judgment and order of the learned executing court, before the appellate forum and the respondent No.2 vide impugned judgment and decree dated 22-2-2011 while accepting the appeal, set aside the findings of executing court, remanded the execution to the executing court to proceed with the execution petition in accordance with law, hence this writ petition.

5. Learned counsel for the petitioners contended that impugned judgment of the learned District Judge Kohat dated 22-2-2011 is illegal, against the law, without jurisdiction and of no legal effect, hence not tenable in the eyes of law; that important and legal question are involved in the matter which needs to be adjudicated on merits, and as to whether the second execution petition is maintainable or not after withdrawal of the first execution petition, without the permission to file fresh one; that when compromise was effected during the first execution petition and parties resided jointly then second execution petition cannot be filed as the Civil Procedure Code is not applicable to the family court; that the wilful and deliberate withdrawal of first execution petition on the basis of voluntarily compromise wherein no permission to file fresh one was asked, cannot be filed, therefore, the compromise in the eyes of law is absolute and the chapter of execution stand closed; that when first execution was withdrawn unconditionally the second execution is not maintainable and competent; that the provision of C.P.C. are not applicable as the proceedings in family court are governed by West Pakistan Family Courts Act, 1964, the Muslim Family Law Ordinance, 1961 and the Rules framed thereunder, wherein no provision regarding filing of second execution proceedings after voluntarily withdrawal of first execution, exist; that petitioner No.1 and respondent No.1 cohabitated in the house of the petitioners for about four months after the withdrawal of execution, therefore, executing court has rightly held that the dispute regarding payment of dower and maintenance requires evidence and the case is of fresh cause of action and that the appellate court without discussing all these matters, while accepting the appeal has remanded for proceedings on the execution petition which needs to be set aside. In this respect relied on PLD 2011 Karachi 24.

6. As against this, learned counsel for respondents contended that findings of the learned executing court are perverse, illegal, unsound and against the law, therefore, not sustainable and the findings of the appellate court are just legal and proper; that the quantum of dower and maintenance was already determined by the court which judgment and decree had attained finality as the same was not disturbed by any competent court of law, he pleaded that till the execution of the decree, respondent No.1 was entitled to submit successive application and there is no bar on the rights of the decree-holder, specially in the circumstances when judgment-debtor had admitted that decree has not been satisfied as he had made an offer that he will divorce the respondent No.1/decree-holder in lieu of her waiving the decretal amount. In this respect relied on PLD 2010 SC 891 and 1999 CLC 555.

7. Arguments heard and record perused.

8. The learned executing court has not held nor has formed the opinion that second application for execution of the decree was not maintainable or not competent but has simply dismissed the same on the ground that the decree holder has lived with the judgment-debtor for some period i.e. four months, therefore, it could not be ascertained that how much maintenance and dower amount was paid to her. The learned executing court decision that determination of

the maintenance allowance and dower required further evidence is based on surmises and conjectures. The observation that whether any dower amount has been paid during the period when she remained with her husband after the compromise and withdrawal of the execution proceedings, the same requires evidence and is a fresh cause of action seems to be based on uncertainty because the grounds urged in the objection petition states that if the decree holder seek divorce then she should withdraw from the decree in her favour and the dower will be in lieu of Khula'.

9. In the objection petition nor at the appellate stage and even in the writ petition, the petitioners/judgment-debtors have not taken any ground that any amount towards the satisfaction of the decree was paid privately.

10. Respondent No.1/decreed-holder recorded her statement in the executing court while exhibiting the compromise deed has submitted that she withdraws from the execution of the decree due to settlement of the jirga and in the said settlement deed Exh. PA there is no mention that the decretal amount has been paid outside the court. The judgment-debtor/petitioner No.1 recorded his statement in reference to the said compromise deed and he has never stated that anything privately has been paid or the decree was waived or was satisfied.

11. The withdrawal of the earlier execution proceedings on the basis of compromise was not absolute but was on the basis of a settlement arrived at between the parties and till the satisfaction of a decree it can be executed within the given aggregate period of six years, from the date of decree, second time.

12. The objection that there is no provision of second execution proceedings, after the withdrawal of first execution proceedings on the basis of compromise, without the permission to file fresh one, under the Family Court Acts and Rules thereof is concerned, in this respect we are not convinced with the arguments, as family court can exercise its own powers to prevent the course of justice being deflected from the path. The applicability of C.P.C., the family court has to regulate its own proceedings in accordance with the provision of Family Courts Act and in doing so it has to proceed on the premises that every procedure is permissible unless clearly prohibition is found in law, meaning thereby that Family Court can exercise its own powers but is not debarred to follow the principle of C.P.C. coupled with the facts.

13. Even otherwise, a decree is to be executed unless and until it is satisfied. The Family Courts Act and Rules made thereunder have not expressly prohibited the filing of second execution proceedings specially in the circumstances when there is nothing on record that after the compromise and withdrawal of the first execution petition, any payment has been made or efforts were completed for satisfying the decree, privately.

14. In view of the above, the learned appellate court very rightly concluded that the executing court wrongly held that determination of maintenance allowance and dower required further evidence because the same had already been settled by the competent court of law and that judgment had attained finality. The findings of the learned appellate court does not warrant interference in the constitutional jurisdiction as no illegality, irregularity or jurisdictional defect has been pointed out nor established. This writ petition is dismissed, with no order as to costs.

K.M.Z./107/P

Petition dismissed.