

IN THE HIGH COURT OF SINDH KARACHI

Constitutional Petition No. S –02 of 2021

Salman Bari

Versus

Mst. Samia Khan & another

Date of hearing & order : 04.01.2021
Mr. Naeemuddin, advocate for the petitioner.

ORDER

Adnan-ul-Karim Memon, J. Through the instant petition, the Petitioner seeks recall of order dated 01.12.2020 passed by the learned II-Civil & Family Judge, Karachi Central in Family Execution No.22 of 2019, whereby non-bailable warrants (NBWs) was issued against the petitioner.

2. At the outset, I asked the learned counsel for the petitioner as to how this petition is maintainable against the aforesaid order, which was/is in compliance with the judgment/order passed by the learned trial Court.

3. Mr. Naeemuddin, learned counsel for the petitioner submits that the learned trial Court failed to appreciate the legal aspect of the case and erroneously issued his warrants of arrest under Section 51, CPC i.e. to affect this appearance in court. He asserted that in such a situation the issuance of non-bailable warrants was not called for. He next argued that the learned executing Court without adhering to Section 51, CPC, and other enabling provisions, wrongly issued NBWs of the petitioner ; that aforesaid illegal action cannot be countenanced under any stretch of the imagination, therefore, the impugned order is liable to be struck down. In support of his contention, he relied upon the case of Inamullah Khan and 04 others V/S Shahid Tabbassum, advocate District Courts, Sargodha, 2006, CLC 1908 and emphasized that issuance of the warrant of arrest of the petitioner shall not serve any purpose on the premise that he had already paid partial, the minor's maintenance allowance i.e. Rs.2,71,000/- (Rupees Two Lac and Seventy-One Thousand) out of Rs. 4,69,300/- (Rupees Four Lac Sixty-Nine Thousand and Three Hundred Only) including the past maintenance. He lastly prayed for recalling of the NBWs issued by the learned trial court, enabling him to appear before the learned trial Court to defend himself in accordance with the law. In support of his contention, he relied upon the case of Muhammad Ashraf V/S Mst. Safia Bibi, 2008 CLC 1583.

4. I have heard learned counsel for the petitioner on the maintainability of the instant petition and perused the material available on record and case law cited at the bar.

5. Record reflects that respondent No.1 filed Family Suit No.1500/2015 for dissolution of marriage by way of *Khulla*, recovery of maintenance and dowry articles before the Court of II-Civil & Family Judge at Karachi Central, which was decreed vide judgment and decree dated 12.03.2019. The petitioner also filed Guardian & Wards Application No.1858/2015 before the II-Civil & Family Judge Karachi Central, which was disposed of vide order dated 12.03.2019 in terms of Issue No.3; and, his application for interim custody of the minor in the aforesaid proceedings was dismissed vide order dated 24.12.2020. Finally, the learned Family Judge to enforce its decision, issued NBWs against the petitioner vide order dated 01.12.2020. The petitioner being aggrieved by and dissatisfied with the aforesaid order has filed the instant petition on 01.01.2021.

6. It is well-settled law that judicial decisions become an authority so long as it stands unreversed unless it is shown that the law was misunderstood or misapplied in that particular case. *Prima facie*, every law-abiding citizen is bound to comply with the directions contained in the judicial decisions pronounced by the court of law, which has also the force of precedent under the law, in case of failure, the court of law is well within its rights to enforce its decision by taking coercive measures against the delinquents, which has been done in the present case.

7. To address the assertion of the petitioner that the learned executing Court without adhering to Section 51, CPC, and other enabling provisions, wrongly issued NBWs of the petitioner. At this stage, it would be beneficial to reproduce Section 51 which reads as under:-

“51. Powers of Court to enforce execution. Subject to such conditions and limitations as may be prescribed the Court may on the application of the decree-holder order execution of the decree—

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require;

Provided that, Execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court for reasons recorded in writing, is satisfied - -

(a) That the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,-

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of this property, or committed any other act of bad faith in relation to his property;

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation.-- In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree."

8. The law on the aforesaid proposition is clear in its terms that unless the pre-requisite of Section 51 of CPC is proved to exist, detention in prison cannot be ordered. The pre-conditions, as highlighted above, are that the judgment-debtor should be proved to have attempted to leave the limits of the Court, to obstruct the decree or execution thereof or dishonestly transferred the property after the institution of the suit to avoid the decree or that he has means to pay the decree but neglected to do the same. Without the satisfaction of these pre-conditions, no mechanical order for detention in prison can be passed.

9. At this stage, it would also be beneficial to refer to the scheme of Order XXI Rule 37 of CPC and Rule 40 and Rule 41 of CPC. Rule 37 of Order XXI of CPC contemplates that where an application is for the execution of the decree for payment of money by arrest and detention in prison of the judgment-debtor who is liable to be arrested, the Court shall, instead of issuing a warrant of arrest, issue a notice calling upon the judgment-debtor to appear in Court and to show cause, why he should not be detained in prison. Notice can be dispensed with only if the Court is satisfied by affidavit or otherwise that with the object of delaying execution of the decree, the judgment debtor was likely to abscond or leave the local limits of the jurisdiction of the Court. Sub-Rule (2) of Rule 37 of Order XXI of CPC provides that if appearance is not made in obedience to the notice, the Court shall if the decree-holder so requires issue a warrant for the arrest of judgment-debtor. Under Rule 40 or 41 of Order XXI of CPC when the judgment-debtors appears in the Court in the obedience of the notice or is brought

before Court, after being arrested in execution of the decree, the Court is required to proceed for the hearing of the decree-holder and to take such evidence as may be produced by it in support of the application for execution, where-after the judgment-debtor has to be given an opportunity of showing cause why he should not be detained in prison. It is only after the conclusion of the inquiry that the Court can order for detention of judgment-debtor in prison which order will be subject to the satisfaction of the pre-conditions of Section 51 of CPC.

10. Proviso to Section 51 of CPC contemplates that the execution for detention in prison shall not be ordered and the judgment-debtor should not be committed in prison unless the Court is satisfied, which reasons shall be recorded in writing that the judgment-debtor with the object of obstructing or delaying the execution of the decree, is likely to abscond or leave the local limits of the jurisdiction of the Court or has after the institution of the suit in which decree has been passed dishonestly transferred, concealed or removed any part of his property or committed any other act of bad faith concerning his property or the judgment-debtor has or has had since the date of the decree, the means to pay the amount of decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same. Without inquiring, the Court cannot straight away order detention in the civil prison.

11. In the present case, the petitioner has specifically, pleaded that he had already paid a partial payment of Rs.2,71,000/- (Rupees Two Lac and Seventy-One Thousand) to the private respondent vide statement dated 10.11.2020 (available at page 73 of memo of petition) and undertake to pay the remaining amount within a reasonable time as per his financial position.

12. In the light of the aforesaid legal position of the case and an undertaking of the petitioner, the operation of NBWs issued against him by the learned trial Court is converted into BWs, enabling him to furnish security / appropriate bond equivalent to the remaining amount before the learned trial Court. However, the petitioner is directed to appear before the trial Court on the next date of hearing and in case of failure, the order passed by the learned trial Court on 01.12.2020 shall be operative.

13. In view of the foregoing this petition stands disposed of in the above terms along with listed applications with no order as to costs.

J U D G E