

Form No: HCJD/C-121

ORDER SHEET**LAHORE HIGH COURT,
BAHAWALPUR BENCH, BAHAWALPUR
JUDICIAL DEPARTMENT****Case No. E.F.A. No. 16 of 2018**

Altaf Hussain and others Versus Z.T.B.L. and others.

S. No. of order/ Proceeding	Date of order/ proceeding	Order with signature of Judge, and that of parties or counsel, where necessary.
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12.3.2019. Mirza Muhammad Nadeem Asif, Advocate for the appellants.
Nemo for the respondents.

This Execution First Appeal filed in terms of Section 22 of the Financial Institutions (Recovery of Finance) Ordinance, 2001 is directed against the orders of the learned Judge Banking Court, Bahawalpur whereby non-bailable warrants of arrest of the appellants have been issued.

2. Factual matrix of the case is that the respondent-Bank filed a suit against the appellants for recovery of Rs.3,82,161/- which was ex-parte decreed by the learned Judge Banking Court, Bahawalpur vide judgment dated 29.6.2010. Subsequently, the suit was converted into Execution Petition and vide order dated 26.7.2011 court auctioneer was appointed by the learned Executing Court and pledged property of the appellants was directed to be put to auction. The court auctioneer, however, submitted report that auction could not be conducted as reserve price of property in question was so high that no purchaser showed his interest to participate in auction proceedings. Thereafter vide order dated 29.2.2012 the learned Executing Court issued show cause notice to the appellants. However, the appellants were not served with the

notice whereas on 8.5.2013 learned Executing Court consigned the file to record. On an application submitted by the respondent-Bank the file was resurrected by learned Executing Court vide order dated 7.10.2016 and thereafter on 23.11.2016 learned court issued non-bailable warrants of arrest against the appellants which could not be executed and were repeated for various dates and finally for 4.10.2018. Hence this appeal.

3. Learned counsel for the appellants submits that the appellants were not aware of any proceedings against them which had been conducted ex-parte and the learned trial Court without issuing show cause notice and giving an opportunity of hearing to the appellants, straight away issued their non-bailable warrants of arrest which was in violation of Order XXI Rule 37 of the C.P.C. and thus the same is not sustainable in the eye of law. Further submit that the appellants have not created any hurdle in execution of decree or any other condition enumerated in Section 51 of the C.P.C. and as such the impugned orders are not sustainable in the eye of law which are liable to be set aside.

4. Despite service of notice, no one has entered appearance on behalf of the respondent-bank to controvert the stance taken by learned counsel for the appellants, hence proceeded against ex-parte.

5. The interim order sheet of learned Executing Court appended with this appeal depicts that vide order dated 29.2.2012 learned Court issued show cause notice to the appellants but the same could not be served and on 8.5.2013 the file was consigned to record. However, it was restored vide order dated 7.10.2016 on the application of the bank and was fixed for 23.11.2017. On the said date while mentioning that show cause notice stood already issued, without issuing fresh show cause notice as per mandate of Order XXI Rule 37 C.P.C. non-bailable warrants of arrest of the appellants were

issued. Thus the process issued by the Banking Court is sheer violation of Section 51 of C.P.C. which requires that warrant of arrest can only be issued on the grounds i.e. (i) 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, (ii) judgment debtor has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or (iii) the judgment debtor has, or had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refused or neglected to pay the same. No such reasoning is forthcoming from the impugned orders of learned Executing Court, noted above. Therefore, the learned Executing Court has passed the impugned orders without resorting to the relevant mandatory provisions of law, as such the same are not sustainable in law. Reliance may be placed on cases *Precision Engineering Ltd. and others v. The Grays Leasing Limited* (PLD 2000 Lahore 290), *Inam Ullah Khan and 4 others v. Shahid Tabassum Advocate District Courts Sargodha* (2006 CLC 1908), *Sabar Ali Sajid v. Muhammad Maqsood* (PLD 2006 Lahore 607), *Kamran Elahi v. Judge Banking Court and others* (2007 CLD 936), *Mst Khalida Khanam v. State through Special Judge Banking Court* (1989 MLD 1553), *Muhammad Ashraf v. Mst. Safia Bibi* 2008 CLC 1583) and *Talib Hussain v. Mst. Perveen Akhtar* (PLD 2013 Lahore 129). In the first mentioned case it was held as under:

“9.Section 51 of C.P.C. requires existence of certain preconditions to detain the judgment-debtor in prison. Proviso to section 51 of C.P.C. contemplates that the 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 to be recorded in writing, if satisfied that the judgment-debtor, with the object of obstructing or delaying

execution of decree, is likely to abscond or leave the local limits of jurisdiction of the Court or has, after the institution of the suit, in which decree was passed, dishonestly transferred, concealed or removed any part of his property or committed any other act of bad faith in relation to his property or the judgment-debtor has, or has had since the date of decree the means to pay the amounts of decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same or that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.”

Likewise in case Messrs Azhar & Co. and others v. National Bank of Pakistan (2018 CLD 830) it was held that the Executing Court, if needed, was well within its powers to pass an order for arrest and detention of judgment debtors in civil prison under Section 51 C.P.C. read with Order XXI Rule 37 of C.P.C. however, language of Order XXI Rule 37 C.P.C. is very much clear that prior to issuing warrant of arrest show cause notice is mandatory.

6. As noted above, the record reveals that prior to passing of impugned orders for issuance of non-bailable warrants of arrest, no show cause notice had been issued to the appellants rather the Banking Court relied upon its earlier order for show cause notice which is not as per mandate of law. It is fundamental right of every individual to show cause/explain his position prior to initiation of any coercive measure against him. The previously issued show cause notice cannot be relied upon in the fresh proceedings as the circumstances may vary with the passage of time. It appears that the learned Judge, Banking Court started one after the other proceedings against the appellants for realization of the decretal amount and ultimately issued warrants of arrest through impugned orders without taking into consideration that the appellants had not caused any hindrance to execute the decree by auction. In absence of any obstruction in the auction proceedings by the appellants adopting coercive measures against them are against the law. Needless to

mention that Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 (the Constitution) ensures rule of law and rule of equality as against the rule of arbitrariness, whims and caprice. This article embodies inter alia the concept of dignity and save citizens from arbitrary/discriminatory actions of the authorities. Thus, to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen as enshrined in Article 4 of the Constitution. Under Article 9 of the Constitution no person shall be deprived of life or liberty save in accordance with law. Likewise even dignity of man has been made inviolable right of every citizen under Article 14 of the Constitution. Even under Article 10-A *ibid* for determination of his civil rights and obligations or in any criminal charge against him every person has been made entitled to a fair trial and due process.

7. We are well aware of the fact that in our society if some-one is arrested without due process of law, his honour as well as that of his family comes at stake and thus irreparable injury is caused to his reputation. To be more particular, in commercial/banking cases, such action results in damage to the reputation of business concern, firm, company and the individual, partners of the firm or the Management of the Company; as the case may be, face loss to their business and good will. Thus as a general rule while resorting to any penal provisions of law enabling any court, tribunal or the authority as the case may be utmost care and caution should be taken so that by their any act reputation/honour and business of any person/citizen is not unjustifiably put to such risk. Thus to our view keeping in sight all these rights of citizens of the State in order to secure and protect the same, the legislature in its wisdom has given detailed procedure under Section 51 of the C.P.C. to the effect that when any such process of arrest is to be issued, pre-requisite thereof should be

followed as far as possible so that individual's rights noticed supra are not infringed, violated or blatantly trampled.

8. Seen from another angle, the impugned action by the learned Judge Banking court is also in violation of universal principle of "audi alteram partem" i.e. nobody should be condemned unheard. Reference may be made to the cases The Murree Brewery Co. Ltd. v. Pakistan through the Secretary to Government of Pakistan, Works Division and 2 others (PLD 1972 S.C. 279) The Christian Educational Endowment Trust, Lahore v. The Deputy Commissioner, Lahore and others (1987 SCMR 1189) and Messrs Dewan Salman Fiber Ltd. and others v. Government of N.W.F.P., through Secretary, Revenue Department, Peshawar and others (PLD 2004 SC 441).

9. In this view of the matter this appeal is allowed and the impugned orders issuing warrants of arrest of the appellants are set aside with the observation that the Banking Court will be well within its right to execute the decree through auction of the mortgaged property and if need be to issue fresh order for arrest and detention of the appellants in civil prison in accordance with law and procedure laid down in Section 51 read with Order XXI, Rule 37 C.P.C. and this order will not be considered embargo on powers of the Executing Court.

(Jawad Hassan)
Judge

(Mujahid Mustaqeem Ahmed)
Judge

APPROVED FOR REPORTING:

JUDGE

*Riaz.

