

JUDGMENT SHEET  
IN THE PESHAWAR HIGH COURT,  
MINGORA BENCH (DARUL QAZA) SWAT.  
(Judicial Department)

**SCANNED**

Civil Miscellaneous No.971-M/2024 in C.R No.630-P/2007

(Muhammad Rasool and others Vs. Syed Akbar Shah and others)

**Present:** Mr. Alam Khan Adenzai, Advocate for Applicants.

Date of hearing: 30.05.2024

**JUDGMENT**

**MUHAMMAD NAEEM ANWAR, J.**- Muhammad Nawaz Khan and others, the legal heirs of Muhammad Rasool, the petitioners of C.R No.630-P of 2007 decided by this Court on 06.02.2023, being aggrieved from the order of this Court filed Civil Petition for Leave to Appeal (CPLA) No.1909/2023 before the Hon'ble Supreme Court, has filed this application under order XLI rule 5 (2) of the Code of Civil Procedure, 1908 (C.P.C) for stay of execution of the decree pending adjudication before the Sub-Registrar/ Tehsildar *Balambat* on the ground that they have filed CPLA before the apex Court but same has not yet fixed for hearing.

2. Learned counsel for the applicant contended that under the provision of order XLI rule 5 (2) C.P.C, this Court has got jurisdiction/ powers to stay the execution proceedings till the fixation of the CPLA before the Hon'ble Supreme Court. In order to fortify his submission, he placed reliance on the cases of 'Bashir Ahmad Qamar and another Vs. Shakeel Express (private) Ltd.' (2000 SCMR 1277) and "Muhammad Akram

**Zahid Chaudhry Vs. Multi Professional Co-operative Housing Society Limited through General Secretary Victor Plaza Islamabad** (1996 SCMR 1105).

**3.** Arguments heard and record perused.

**4.** Insofar as the case law relied upon by learned counsel for the applicants is concerned, suffice it to say that in both the matters, leave was refused by the apex Court against the orders of the Lahore High Court, where in the former case the execution of the decree was stayed by the High Court subject to furnishing a bank guarantee for the decretal amount, against which, CPLA was filed before the apex Court but same was dismissed and leave was refused while in the latter case, the High Court directed the stay of execution of the decree subject to the petitioner's depositing the decretal amount in the executing Court, against which, the leave was refused by the apex Court. In the cases of **Muhammad Salman versus Naveed Anjum (2021 SCMR 1675)** & **Tariq Badr versus NBP (2013 SCMR 314)** it has been ruled that leave-refusing orders do not constitute binding precedents. Order XLI rule 5 (2) C.P.C is in respect of the application submitted for stay of execution of an appealable order/ decree before the expiry of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown, order the execution to be stayed. It has been provided in explicit terms that before the expiry till filing of the appeal, the Court on sufficient ground direct the stay, however, in the instant matter, CPLA is pending adjudication before the apex Court and that too filed on

22.05.2023. Once the applicant has approached to the higher forum and challenged the validity and correctness of the order of this Court than the jurisdiction could not be exercised by this Court under the provision of order XLI rule 5 (2) C.P.C. It is undisputed that mere filing of appeal is not a ground for stay of execution proceedings rather the applicant is required to be equipped with the order of the Court of appeal. In the instant matter, CPLA has been filed before the apex Court on 22.05.2023 against the order of this Court whereas, this application has been filed on 15.05.2024, almost a year later. Supreme Court of Pakistan in the case of "Kohinoor Sugar Mills Ltd., Lahore versus Kohinoor Textile Mills Ltd., Lahore" (1996 SCMR 1883) has held that satisfaction of the Court through reasonable ground that irreparable loss would be caused if injunction is not granted. Mere reference that irreparable loss will accrue in case stay is not granted is not enough unless through cogent reasons it is proved. The Court observed that:

**Mere reference of the word of "substantial loss" will accrue if stay is not granted, is not sufficient compliance of the duty cast on the applicant seeking stay of the execution decree without elaborate such ground or grounds. No doubt as argued by the learned counsel for the respondent substantial loss is different from irreparable loss as for as satisfaction of the Court is concerned, but that by itself does not absolve an applicant from expressly stating the fact leading to substantial loss being sustained in absence of stay of execution of decree.**

This provision of order XLI rule 5 CPC would be applicable if there is a decree capable of execution, however, important condition for grant of stay is that in case the stay is not granted, the substantial loss will be resulted into execution, if the execution

petition is allowed to proceed. Adverting to the ground taken in the application and urged at the bar is the delay in fixing CPLA already filed which find nowhere mentioned in Order XLI rule 5 C.P.C, hence, the application is misconceived. Reliance is placed on the case of "Messrs SIGN SOURCE through Partner Vs. Messrs ROAD TRIP ADVERTISERS through Partner and another" (2005 MLD 1976).

5. In addition, the object of order XLI, rule 5 (2) C.P.C., is that mere filing of an appeal does not operate as a stay of the decree. The Appellate Court, is, however, empowered to order the stay of the execution of such decree meaning thereby, that the decree-holder may not be deprived of the relief to which he has been found entitled by the Court, and at the same time to ensure that by execution of the decree the appeal is not rendered infructuous. Reference may be made to the case of "Bakhtiar Ahmed Vs. Mst. Shamim Akhtar and others" (2013 SCMR 5).

In essence, the prayer of the applicant through his application is for stay of execution of the decree till fixation of the appeal against the order of this Court before the apex Court and the provision of the *ibid* rule itself envisages that execution proceedings as well as other proceedings on the decree are however not to be stayed as a matter of course merely because an appeal is pending against the decree and the party seeking the stay must show that there is likelihood of substantial loss to it. More-so, the revision petition was decided by this Court while exercising powers u/s 115 C.P.C whereas the provision of sub-rule 2 of rule 5 of order XLI C.P.C

reflects that the Court which passed a decree may stay the proceedings of execution while this Court has not passed any decree rather the civil revision was dismissed after considering the facts and law therefore, execution proceedings cannot be stayed. Rel: "Hilbro Instruments (Pvt) Ltd Vs. Mst. Sikandar Begum through Special Attorney" (PLD 2008 Lahore 57).

6. It is significant to mention that the provisions of order XLI rule 5(2) C.P.C could not be invoked in favour of applicant for the reasons:

(i) that there is a reasonable delay in filing of application;

(ii) the application has not been appended with the execution application, the execution of which was sought to be suspended as without execution application, it could not be stayed in view of the dicta laid down in the case of Ibrahim and others versus Muhammad Ismail A.H. Memon Collector of Lasbela and others (PLD 1066 (W.P) Karachi 371);

(iii) Civil Petition for leave to appeal is already pending before the Hon'ble Supreme Court;

(iv) the provision of order XLI rule 5 deals with the subject of appeal which is the continuation of suit but the revision petition being not the continuation of suit has limited scope; and lastly

(v) the applicant could not point out irreparable loss as the loss which could be estimated in terms of money is not an irreparable loss. Reference may be made to the

case of Muhammad Siddique and 59 others Versus  
Pakistan Engineering Company (1986 PLC 316).

7. Thus, for the afore-stated reasons, the instant petition,  
being without substance, is hereby dismissed in limine.

Announced.  
30.05.2024.

  
JUDGE

Office

3/6/2024

Sabz Ali/\* (S.B)

HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR