

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
(Judicial Department)

C.R No. 681-P/2021
With C.M 1030/2021

Bahadar Hilal.....(Petitioner)

vs

**Anwar Hayat through legal heirs &
others.....(Respondents)**

C.R No. 682-P/2021
With C.M 1031/2021

Bahadar Hilal.....(Petitioner)

vs

Shaukat Hayat & others.....(Respondents)

Present: Mr. Shah Salam Khan, Advocate for the
petitioner.

Date of hearing: 12.08.2021

CONSOLIDATED JUDGMENT

WIQAR AHMAD, J.- Through this single judgment,
I intend to dispose of the instant civil revision as well
as the connected civil revision No. 682-P of 2021, as
common questions of law are involved in both the
petitions.

2. Initially, Mst. Mehr-un-Nisa (predecessor-
in-interest of the respondents) had filed a declaratory
suit in the Court of Additional Deputy Commissioner,
Swat on 20.08.1992 under the Provincially
Administered Tribal Areas Civil Procedure (Special
Provisions) Regulation 1975 (hereinafter referred to as

“**Regulation**”), against the present petitioner and other defendants. The suit was then referred to civil Court after the Regulation was declared ultra-vires. It was partially decreed by the learned Senior Civil Judge, Swat vide his order dated 29.11.2000, which order had been maintained upto this Court. Feeling aggrieved of judgment of this Court dated 22.11.2006, respondents filed civil appeal No. 1214 of 2007 before the Hon’ble Supreme Court of Pakistan, which was allowed vide order dated 12.11.2015. Thereafter, decree-holder filed an application for execution of judgment and decree of the Hon’ble Supreme Court of Pakistan, which was objected by the judgment-debtor (petitioner herein). His objections were dismissed by the learned civil Court vide its order dated 09.01.2019, which order was also maintained by the learned appellate Court vide its judgment dated 21.09.2020. Petitioner had thereafter invoked constitutional jurisdiction of this Court by filing writ petitions, which has been disposed of vide consolidated judgment of this Court dated 18.01.2021 in the following manner;

“In light of what has been discussed above, both the writ petitions as well as C.M No. 1807-M of 2020 are disposed of with the direction that judgment and decree in both the cases shall be deemed to have been sent to the learned executing Court for execution under Rule 15 of Order XLV CPC. The learned executing Court shall try

its best to ensure swift and due execution of the judgment of Hon'ble Supreme Court of Pakistan.”

3. Thereafter, petitioner/judgment-debtor filed another objection petition before the learned civil Court by contending that the execution petition filed by the decree-holder had been time barred and liable to be dismissed. The learned civil Court vide its order dated 01.04.2021 held that the execution petition had been filed well within time and accordingly dismissed the objection petition of petitioner. Appeal filed there-against was also dismissed by the learned Additional District Judge-III, Swat vide his order dated 29.06.2021. Feeling aggrieved there-from, petitioner has filed the instant civil revision with the following prayer;

“It is respectfully prayed that this revision petition may please be accepted and the impugned order and judgment of the appellate Court dated 29.06.2021 in civil appeal No. 61/13 of 2021, and order and judgment of the trial Court dated 01.04.2021 in case No. 8/10 of 2017 titled as “Anwar Hayat etc vs. Bahadar Hilal etc” may please be set aside and the execution petition of respondents may please be dismissed as time barred.

Any other relief which this Hon'ble Court deems fit and proper may also be granted in favour of the petitioner.”

4. Arguments heard and record perused.

5. Perusal of record reveals that the decree under execution had been passed by the Hon'ble Supreme Court of Pakistan on 12.11.2015. Some of the decree-holders filed application for its execution on 13.02.2017 while others filed it on 27.02.2017. Said applications have admittedly been filed within the prescribed period of limitation of 03 years provided by Article 181 of the Limitation Act, 1908 (hereinafter referred to as the "**Limitation Act**"). Learned counsel for petitioner has been arguing that filing of such applications should be ignored as it had not been filed after getting authorization from this Court as required under Order XLV Rule 15 of Code of Civil Procedure, 1908 (hereinafter referred to as "**CPC**"). He also argued that the period of limitation should be counted from the date when such authorization had been accorded by this Court vide its order dated 18.01.2021 passed in W.P No. 1113-M of 2020. This Court while dealing with earlier objection of the petitioner made on the execution petitions, has *inter-alia* held;

“In the case in hand, it is apparent that both the petitions have been arising out of execution of one and the same judgment of Hon'ble Supreme Court of Pakistan in respect of which judgment as well as decree-sheet of the Hon'ble Court has been available before this Court. Objection of petitioner, if any, stands removed. When the matter has come in notice of this Court, it would not allow the petitioner to evade execution of the

decree in either of the execution petitions just for the reason that one of the decree-holder had not filed any application for sending the same to the learned civil Court. It is solemn duty of this Court as well as all the authorities functioning in State to ensure compliance of judgment of the Hon'ble Supreme Court of Pakistan according to Article 190 of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as "Constitution"). This Court has also jurisdiction to execute or order execution of any judgment, decree or order of Hon'ble Supreme Court of Pakistan under Article 187 of the Constitution. It is also duty of petitioner to submit to the dictates of law and not to hinder the process of execution of judgment and decree of the Hon'ble Supreme Court of Pakistan. Obedience to law and the Constitution is inviolable obligation of every citizen including the petitioner as per text of Article 5 of the Constitution. Petitioner should also realize his duty as citizen of the State and he should submit to the dictates of law and the Constitution. Such a duty would inter-alia require compliance of judgment and decree of the Hon'ble Supreme Court of Pakistan as well as all valid orders of learned executing Court."

It was further held that judgments and decrees in both the cases (*"Anwar Hayat & others vs. Bahadar Hilal & others"* and *"Shaukat Hayat vs. Bahadar Hilal and others"*) would be deemed to have been sent to the learned executing Court for execution under Rule 15 of Order XLV CPC. The subsequent objection relating to the execution being time barred, has not been holding any water and same has rightly been dismissed by the two Courts below. It needs mention here that the objector has filed a lengthy objection petition before the learned executing Court

but the learned counsel for petitioner has restricted his arguments to the question of limitation not only before this Court but before the two *foras* below also. While disposing of the earlier objection of petitioner, this Court had employed a deeming clause for validating the two applications from the date of its filing. After realizing that it had been duty of this Court under Article 187 of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as the “**Constitution**”) and the duty of the learned executing Court under Article 190 of the Constitution to ensure implementation of judgment of the Hon’ble Supreme Court of Pakistan, this Court had employed a deeming clause for validating the already filed execution petitions. As a result, same had been ordered to be deemed to have been sent to the learned executing Court for execution under Rule 15 of Order XLV CPC. Such deeming clause had been introduced with the aim to consider filing of the applications for execution before the learned executing Court as valid and according to law. Thereafter, raising of the second objection had therefore been nothing more than another attempt to frustrate the judgment and decree of the Hon’ble Supreme Court of Pakistan and to deny the decree-holders their declared rights.

6. The decree-holders had filed applications for execution of the decree well in time. Even if there was any defect in its initial filing, same stood rectified with order dated 18.01.2021 of this Court. Even otherwise, consequences of not following the provision of Rule 15 of Order XLV CPC have not been provided. Its consequences cannot be taken to the effect of nullifying the judgment of Hon'ble Supreme Court of Pakistan. Such provision has been enabling in nature as well as directory and not mandatory for the reason that no consequences have been provided. The word "**shall**" has no doubt been used in the rule but this word has not always been carrying the implication that it has been intended to be used as mandatory in all eventualities. A part from Understanding Statutes authored by **Mr. S.M. Zafar** would be beneficial to be reproduced hereunder regarding the fact as to when the word "**shall**" may be construed as permissive;

"The word "shall" may be construed as merely permissive, where the language of the statute as a whole, and its nature and object, indicate that such was the legislative intent, and where no public benefit or private right requires it to be given an imperative meaning. Where a statute makes that legal and possible which otherwise there would be no authority to do, it will be construed as permissive only, although using the word "shall". It is also a general rule that the word "shall" when used by legislature in a grant of authority to a Court, means "may" and that the use of the word "shall" in a statute directing a Court to

determine certain matters does not necessarily confine such power to that tribunal. It has been held that, as against the government, the word “shall” is to be construed as “may” unless an intent to the contrary is manifest. The word “shall” must also be construed as permissive when the statute thereby can be upheld, if a construction to the contrary would render it unconstitutional. Even the word “must” may be construed to be merely directory where, from the construction of entire statute and the object to be accomplished by it, such appears to have been the intention of the legislature, but it will not be so construed where the context shows that it was used in a mandatory sense.”

Similarly, Hon’ble the Supreme Court of Pakistan in case **Ghulam Qadir Versus Deputy Commissioner and others** reported as **1984 SCMR 493** has also elucidated that the word “**Shall**” and “**May**” might be considered interchangeably while determining the intention of legislature. Relevant findings in this respect, given in said judgment, are reproduced here for ready reference;

“Though in general sense the word “may” gives an impression of its being enabling or discretionary, and the word “shall” as obligatory, yet the connotation is not inelastic and inviolate. Cases are not wanting where the words “may”, “shall” and “must” are used interchangeably. Accordingly, in order to find out whether these words are being used in a directory or in a mandatory sense, the intent of the Legislature is the guiding factor. But this much is a settled proposition that where if, positive direction is given as in the instant case, the use of the word “may” has a connotation of compulsion or obligation.”

Similarly, Hon'ble Lahore High Court in the case **Majid Bukhari versus The State** reported as **PLD 2000 Lahore 108** has also recorded the following observations on the basis of the existing case law;

“The other limb of the argument of the learned counsel for the Appellant was that word ‘Shall’ has been used in section 159 of Act, 1969, therefore, the provision is mandatory. The word ‘Shall’ will not always make a particular provision mandatory in nature. In this behalf, reference can be made to the judgments in the case of Muhammad Saleh Vs. The Chief Settlement Commissioner, Lahore and 2 others (PLD 1972. SC 326), M/s Maple Leaf Cement Factory Ltd Vs The Collector of Central Excise and Sales Tax (Appeal), Lahore and 2 others (1993 MLD 1645) and Abdul Rahim and 2 others Vs Messrs United Bank Ltd, of Pakistan (PLD 1997 Karachi 62). The words ‘Shall’ and ‘May’ used in a provision are interchangeable as held in the case of Muhammad Saleh (Supra). One of the criteria for holding a provision directory was that when non-compliance was not visited by a penalty but in the case of Abdul Rahim (Supra) in spite of the fact that failure to deposit the decretal amount was to result in the dismissal of the appeal against the judgment of the Banking Tribunal still it was not treated as mandatory. There was in fact no universal rule to determine as to whether a provision is directory or mandatory in nature. The golden rule, however, for determining whether a particular provision is directory or mandatory in nature, was to determine the same in the light of the scheme of a particular statute. The nature and purpose of the provision was to be ascertained the intention of the Legislature.”

Further reliance in this respect may be placed on the Judgment of **the Hon'ble Sindh High**

Court, Karachi rendered in case **Qamaruddin Versus Muhammad Sadiq and others** reported as **2001 CLC 848**.

7. Rule 15 of order XLV CPC is also directory in nature and its non-compliance cannot be taken to the effect that an application for execution filed without its compliance would be *non est* to the extent that it cannot even be considered for stopping the period of limitation. When due diligence is there, then the time consumed in pursuing a remedy before a wrong forum may even be condoned under section 14 of the Limitation Act. Pursuing of a remedy before a wrong forum has been a much graver case of incompetent proceedings. When time can be relaxed under section 14 of the Limitation Act on the ground of pursuing a remedy before a wrong forum, despite the fact that such proceedings had totally been invalid and without jurisdiction, then an action initiated before a competent Court of law (but suffering from some technical defect) may easily be considered to be proceedings valid for the purpose of counting the period of limitation. The irregularity shall not come in the way of counting the period of limitation. Such application for execution filed directly before the

learned civil Court cannot be considered to be totally *non est* and none considerable for the purpose of determining the question of limitation. In the case in hand, even the execution applications filed without compliance of the provision of Order XLV Rule 15 CPC shall be taken as sufficient for the purpose of bringing the pending proceedings within the prescribed period of limitation. The defect if any, has also been removed subsequently and therefore the objection relating to limitation has rightly been discarded by the two Courts below.

8. In light of what has been discussed above, the instant civil revision as well as connected C.R No. 682-P of 2021 were found lacking any substance and same are accordingly dismissed in *limine*.

Announced
Dt: 12.08.2021

JUDGE