

Stereo.HCJDA 38.
Judgment Sheet
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

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Execution First Appeal No.926 of 2015

Mrs. ISHRAT MALIK

Versus

JAMIL AHMAD MANJ and another

JUDGMENT

Date of hearing: 07.02.2017

Appellant by: Mr. Ashfaq Qayyum
Cheema, Advocate.

Respondents by: Rana Zulfiqar Khan,
Advocate.

MIRZA VIQAS RAUF, J. This appeal in terms of Section 104 read with Order XLVII Rule 1 of The Code of Civil Procedure (V of 1908) (hereinafter referred as “CPC”) assails the vires of judgment and decree dated 05th of May, 2015, whereby the objection petition filed by the appellant before the learned executing court was dismissed.

2. Precisely the facts necessary for adjudication of instant appeal are that the respondents instituted a suit for specific performance and permanent injunction on the basis of an agreement to sell dated 25th of February, 2005 wherein the appellant was arrayed as defendant. The suit was initially resisted by the appellant, who filed her written statement controverting the assertions contained in the plaint. During the proceedings, the parties have effected compromise and in

terms thereof, suit was dismissed as withdrawn vide order dated 23rd of July, 2011. The respondents thereafter filed an execution petition seeking execution of above said order. The appellant while resisting the execution petition filed an objection petition raising multiple grounds including the objection qua maintainability of the petition. The learned Civil Judge/Executing Court after receiving reply from the respondents to the objection petition, framed necessary issues to the following effect :-

ISSUES

- i. Whether the respondent Mst. Ishrat Malik has violated terms of agreement/Exh.C-1 and has paid only Rs.27,75,000/- to the petitioners out of total and Rs.1,50,00,000/- and the remaining amount is still payable? OPA
- ii. Whether the respondent has paid full amount of Rs.1,50,00,000/- to the petitioner in consequence of Exh.C-1? OPR
- ii-A. Whether an executable decree in favour of the execution petitioner exists or not? OPA & OPR
- iii. Relief.

After framing of the above referred issues and recording evidence of both the sides, the learned Civil Judge, while dismissing the objection petition held entitled to the respondents to receive an amount of Rs.1,22,25,000/-, hence this appeal.

3. Learned counsel for the appellant submitted that suit was since dismissed on the basis of a compromise and no decree was passed in terms thereof, so execution petition was not

maintainable. Learned counsel maintained that no amount was due towards the appellant and the respondents if were aggrieved of the violation of compromise deed, have to file a suit for the said purpose. It is contended that learned executing court has exercised its jurisdiction illegally and unlawfully. Learned counsel further contended that impugned judgment is not tenable under the law.

4. Conversely, learned counsel for the respondents, while referring to Section 36 of “CPC” submitted that the provisions of said Code relating to the execution of decree are equally applicable to the execution of orders. He added that suit was decided on the basis of a compromise effected between the parties which was placed on record as Exhibit-C1. Learned counsel contended that said order was executable and the assumption of jurisdiction by the learned executing court, is justified.

5. After having heard learned counsels for both the sides at some length, I have examined the record in the light thereof, in order to properly appreciate their respective contentions.

6. It is an admitted fact that suit instituted by the respondents was dismissed as withdrawn vide order dated 23rd of July, 2011 on the basis of compromise deed which was placed on record as Exhibit-C1. The moot question thus involved in the instant appeal is as to ***“whether learned executing court is vested with the authority to execute order dated 23rd of July, 2011 or not?”***

7. Before advertng to this question, it is important to note that in previous round the matter in issue went before the Honourable Supreme Court of Pakistan in Civil Petition

No.387 of 2013 which was decided vide order dated 10th of September, 2013 with the following observations :-

“2. Learned counsel for the parties after having argued the case at some length jointly requested that the executing court may be directed to decide the issue whether the petitioner has paid entire amount agreed to be paid by her i.e. Rs.15 million or not after recording of evidence within a period of six months and the respondents will raise no objection about the payment, if any made to him on the basis of Order XXI, rule 1 & 2 CPC.

3. We have taken into consideration the contentions raised by the learned counsel for the parties and perused the record. Without going into the question whether any decree was drawn or not, we are of the view that such controversy cannot be decided without recording evidence in terms of Order XXVII, rule 58 CPC. This petition is, therefore, converted into appeal and allowed. The impugned judgment is set-aside and the executing court is directed to decide the objections filed by the petitioner regarding payment of Rs.15 million to the respondents within a period of six months from the date of receipt of copy of this order.”

The learned executing court, however, dismissed the objection petition filed by the appellant by way of impugned judgment and decree.

8. There is no cavil that parties to the suit are always at liberty to enter into compromise at any stage of the proceedings. Rule 3 of Order XXIII of “CPC” recognizes such practice which reads as under:-

“3. Compromise of suit.- Where it is proved to the satisfaction of the Court that a suit has been adjusted

wholly or in part by any lawful agreement or compromise, or where the defendants satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.”

It is manifest from the above that after entering into a compromise by the parties if it is proved to the satisfaction of the court trying the lis that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendants satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court can pass an order that such agreement, compromise or satisfaction to be recorded which shall pass a decree in accordance therewith so far as it relates to the suit.

9. Part II of “CPC” deals with the matter of execution. Though in terms of Section 36 of the Code *ibid*, it is laid that the provisions of the Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders. But powers of a court to enforce execution can only be exercised in pursuance to a decree or executable order. The terms “decree” is defined in Section 2(2) of “CPC” as under :-

“(2) “decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint the determination of any question within section 144, and an

order under rule 60, 98, 99, 101 or 103 of Order XXI but shall not include --

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.”

Whereas Section 2(14) provides the definition of “order” in the following manner :-

“(14) “order” means the formal expression of any decision of a Civil Court which is not a decree.”

The joint analysis of both the above noted provisions clearly indicates that a decree is the formal expression of an adjudication by the court by virtue of which it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit which may either be a preliminary decree or final decree whereas order contemplates the formal expression of any decision of a Civil Court which does not qualify to be a decree. It is well recognized principle of law that decree always follows a judgment and the judgment is the statement given by the judge of the grounds of a decree or order.

10. The parties to the suit have entered into an agreement settling their dispute in terms thereof whereafter suit was dismissed in the light of said compromise deed vide order dated 23rd of July, 2011. It is though an admitted fact that no decree was passed on the basis of compromise deed but had there been any such decree in terms of Order XXIII Rule 3 of “CPC” even then same can be termed as a contract between the parties and its breach would give cause of action to the aggrieved party to approach the court to seek remedy in terms thereof. While dealing with this question the Hon’ble Supreme

Court of Pakistan in the case of “*PEER DIL and others versus DAD MUHAMMAD*” (2009 SCMR 1268) held as under :-

“4. We have carefully examined the above mentioned contentions in the light of relevant provisions of law and record of the case. We have minutely perused the judgment and decree of learned Qazi, Zhob/Sherani, the judgment and decree passed by Majlis-e-Shoora, as well as the judgment impugned. After having gone through the entire record and perusing the judgment as mentioned hereinabove, we are not persuaded to agree with the prime contention of Mr. Jamal Khan Mandokhail, learned Advocate Supreme Court that the suit should have been dismissed pursuant to the provisions as enumerated in Order VII, rule 11, C.P.C. because the controversy has been set at naught completely by means of judgment dated 1-10-1985 passed on the basis of award which was made rule of the Court for the reason that the earlier judgment/decree being a consent decree was obviously passed pursuant to the provisions as enumerated in Order XXIII, rule 3, C.P.C. and being a consent decree based on compromise between the parties can safely be equated to that of a contract, breach whereof would give rise to the fresh cause of action and a fresh suit can be filed by an aggrieved person for the redressal of his grievances. In such like eventualities the judicial consensus seems to be that "a compromise decree is a contract between the parties and its breach would give cause of action to the other party to approach the Court to seek remedy. Compromise decree is but a contract with superadded command of a Judge. Whether a subsequent suit is barred by reason of section 47, Civil Procedure Code, 1908 depends upon the existence of a decree which is executable for the purpose of the reliefs sought to be

enforced in subsequent suit whether an earlier contract is superseded by a later contract, on account of a certain alteration, depends on whether the parties intended to rescind the original contract. It is possible to vary a term of an original contract in such a way as to keep alive the original contract. Where a decree is passed on a compromise, the decree and not the compromise in the decree bound the parties especially in view of the parties' intention, indicated in the compromise preceding the decree itself that a "decree should be obtained on the basis of the compromise". Arunachallam v. Sethupathi AIR 1925 Mad. 1260, C.J. Smith v. A. Kenny AIR 1924 Pat. 231, Jahuri Lal v. Kandhai Lal AIR 1935 Pat. 123, Hiralal v. Durga Bai AIR 1937 Nag. 413, Mitha v. Ramal Dass AIR 1937 Lah. 828, Amin Cotton Co. Ltd. v. Muhammad Jamil and Co. PLD 1967 Karachi 795, A.R. Khan v. P.N. Bogha through Legal Heir PLD 1987 SC 107, Haji Muhammad Asghar v. Malik Shah Muhammad Awan and other PLD 1986 SC 542, Abdul Wahab and others v. Habib Ali and others PLD 1969 Lah. 365, Muhammad Hussain and others v. Walayat Shah and others PLD 1959 Lah. 526, Zahirul-Said Alvi v. Lachhmi Narayan AIR 1932 Privy Council 251, Surendra Nath Mitra and others v. Tarubala Dasi AIR 1930 Privy Council 158, Sajjad Hussain v. Musarat Hussain Shah 1989 SCMR 1826.”

The above view was even followed by this Court in the case of ***“MUHAMMAD FAZIL versus Ch. MUHAMMAD ASHRAF (deceased) represented by HIS LEGAL REPRESENTATIVES & OTHERS” (PLD 1999 Lahore 1260).***

11. Since question of jurisdiction is always important and it plays a pivotal role, so the same always be decided in the first

instance. The learned executing court though framed issue No.ii-A to this effect but decided the same against the appellant, while observing as under :-

“10. It is held that the section 36 of the CPC speaks as under:-

“Section 36”

“**Application to orders.** The provisions of this Code relating to the execution of decrees shall, so far as they are applicable to deemed to apply to the execution of orders”

So according to section 36 like the execution of decree the orders can be executed, whereas perusal of the order dated 23.07.2011 reveals that the court has clear cut given the findings as under :-

”بروئے بیان مورخہ 13-7-11 دعویٰ بصیغہ دستبرداری خارج کیا جاتا ہے
فریقین راضی نامہ مارک C-1 کے پابند رہے گے“

So the said order is binding upon the parties and the same can be executed through the court, therefore, by keeping reliance upon 2003 CLC 148 the execution petition can be filed by the petitioner. So far as the case law submitted by the respondent is concerned the same is not relevant to the present proposition in question, hence, this issue is hereby decided in favour of the petitioner and against the respondent/objection petitioner.”

When the findings of the learned executing court are analyzed on the touchstone of above noted principles and the relevant law, it can safely be inferred that the court, while proceeding with the execution has erred in law and committed a material irregularity. When once it is established that no decree or order was executable and the assumption of jurisdiction by the

learned executing court is unwarranted then there is no need to dilate upon other aspects of the matter.

12. This being so, I am inclined to **allow** this appeal, resultantly judgment and decree dated 05th of May, 2015 is set aside with no order as to costs. The respondents would be, however, at liberty to institute a separate suit for redressal of their grievance, if any arising out of alleged non-compliance of the compromise deed (Exhibit-C1).

(MIRZA VIQAS RAUF)
JUDGE

*Shahbaz Ali**

APPROVED FOR REPORTING