

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No. **4900 of 2016**

RASHEED AHMAD (DECEASED) THROUGH L.Rs.

VERSUS

NAZAR HUSSAIN MALIK ETC.

Date of hearing: **21.02.2018**

Petitioners by: **Sh. Usman Karim-ud-Din, Advocate.**

Respondent No. 1: **Sh. Naveed Shahryar, Mr. Shahid Mehmood Khan Khilji and Ms. Fatima Malik, Advocates.**

AMIN-UD-DIN KHAN, J. Despite service, no one has shown appearance on behalf of respondent No. 2 and as such he is proceeded against **ex-parte.**

2. Through this single judgment, I intend to decide the instant Civil Revision as well as Civil Revision No. 4949 of 2016. Through the revision petitions, the order dated 23.11.2016 passed by a learned Additional District Judge, Faisalabad whereby the appeal filed by the petitioners was dismissed and the judgment/order dated 09.03.2016 handed down by a learned Civil Judge 1st Class, Faisalabad whereby objection petition filed by the petitioners was dismissed have been called in question.

3. Brief facts of the case are that on 08.03.1999, respondent No. 1 filed a suit against respondent No. 2 for recovery of Rs.

80,00,000/- through auction of property of defendant (mentioned in the agreement) on the basis of agreement to sell dated 17.12.1996 before learned Senior Civil Judge, Faisalabad. During pendency of the suit, petitioners in both the revision petitions stood sureties for satisfaction of the decree. On 14.10.1999, statement was recorded in the Court that in case of decree against Latif Ahmad, if he does not pay the decretal amount, petitioners will abide by the orders of the Court. Subsequently, matter between the parties to the suit was settled through written compromise dated 01.03.2001 exhibited as Ex.C-1. Statement of the parties to the suit was recorded on 22.03.2001 and learned trial Court decreed the suit in the light of Ex.C-1 i.e. the compromise effected between the parties. Decree sheet was prepared in accordance with the compromise,

4. It will not be out of place to mention here that in the original suit, claim for recovery of Rs. 80,00,000/- was made on the basis of agreement dated 17.12.1996 and it was sought that the said amount be paid to the plaintiff after auction of the property of defendant mentioned in the headnote of plaint situated in Chak No. 229-RB Tehsil Jaranwala District Faisalabad in accordance with Jamabandi for the year 1994-1995 measuring 24-kanals 17-marlas 6-sarsai whereas through the compromise, it was settled between the parties to the suit that defendant (Latif Ahmad) will get the property mentioned in Ex.C-1 situated in Chak No. 109-RB Tehsil Jaranwala District Faisalabad transferred in the name of plaintiff (Nazar Hussain)

from the name of Mst. Parveen Akhtar who is owner of the property and wife of defendant. It was further settled that the other property situated in Chak No. 216-W owned by Mst. Parveen Akhtar will also be got transferred in the name of plaintiff and further, the property situated in Chak No. 216-W mentioned in Ex.C-1 owned by Latif Ahmad (defendant) will also be transferred in the name of plaintiff. As per compromise deed, the property owned by the defendant measuring 32-kanals 16-marlas Khewat No. 1, Khatooni No. 1 situated at Tehsil Nankana Sahib District Sheikhpura shall also be transferred in the name of plaintiff. It was further stated in Ex.C-1 that an amount of Rs. 2,00,000/- will be paid to the plaintiff on 01.10.2001 and four shops situated in Chiniot will be given to the plaintiff. Compromise deed further contains the term that if there will be any defect or hurdle in the transfer of the properties mentioned therein in favour of plaintiff, defendant will be bound to pay Rs. 5,000/- per marla of the property situated in Chak No. 109-RB and Rs. 8,000/- per marla regarding the property situated in Chak No. 216-RB to the plaintiff. It was further written in the compromise deed that a promissory note of Rs. 6,00,000/- will also be given to the plaintiff by defendant.

The compromise deed referred to (Ex.C-1) was also thumb marked by Mst. Parveen Akhtar and decree was passed in accordance with the terms of said document.

5. Lengthy arguments have been advanced by both the learned counsel. I have heard learned counsel for the parties and

examined the record appended with both the revisions petitions with the able assistance of learned counsel for the parties.

6. It is on the record that subsequently, Mst. Parveen Akhtar filed an application under Section 12(2) of the CPC and challenged the judgment and decree passed with regard to the properties owned by her. On 30.10.2003, learned counsel for the decree holder made a statement that decree holder has no objection if name of Mst. Parveen Akhtar is deleted from the decree. In the opinion of learned counsel for the respondent No. 1 (decree holder), according to para-8 of the compromise deed (Ex.C-1), the amount is to be recovered from the judgment debtor and handed over to the decree holder, therefore, the persons who stood sureties are also obliged to satisfy the decree.

7. Execution petition was filed on 25.10.2001. In the previous round of litigation, when the property was attached, the sureties filed an appeal before this Court in shape of F.A.O. No. 87 of 2012 to challenge the order qua attachment of property. The appeal was though dismissed but with an observation that the appellant will be at liberty to raise all the objections before the learned executing Court. Thereafter, revision petitioners filed objections before the learned executing Court which were dismissed and appeal preferred thereagainst was also dismissed. Hence the instant Civil Revision as well as Civil Revision No. 4949 of 2016.

8. Learned counsel for the petitioners has pressed that the suit had not been decided on merits after recording evidence regarding the subject matter but it was a result of compromise between the parties and that too decree was granted with regard to the property which was not subject matter of the suit. Therefore, petitioners are not bound by the decree and they cannot be compelled to satisfy the decree.

9. On the other hand, learned counsel for the respondent No.1 (decree holder) argues that objection under Order XXI Rule 58 of the CPC must be within reasonable time but the objection was filed after a long delay, therefore, prays for dismissal of both the revision petitions.

10. When a decree was granted on the basis of compromise with regard to the property which was not subject matter of the suit, I am afraid that the decree cannot be executed by the Court. Admittedly, petitioners never consented for satisfaction of the decree regarding the properties which were not subject matter of the suit. The suit was not decided on merits and decree was passed on the basis of compromise with regard to the properties which were not subject matter of the suit. Even the decree for recovery of money was granted in accordance with Ex.C-1 with the understanding that in case of non-transfer of the properties mentioned therein in the name of decree holder, money would be recovered in accordance with the ratio settled therein after auction of the subject properties. Therefore, by no stretch of imagination, it can be said that sureties are bound to satisfy the decree

of the Court granted on the basis of compromise deed, especially when they were not privy to the contract of compromise.

11. To strengthen the view taken by this Court, reliance can be placed upon “M.C.B. BANK LTD. versus DEPUTY FREE SHOP LTD.” (PLD 2011 Karachi 586). I quote paragraphs No. 13 and 14 of the judgment:-

“13. The other point to be noted with regard to the substituted proviso (i.e., as presently applicable) is that it expressly refers to the sale of the attached property, a reference missing entirely in the sub-rule prior thereto. It appears that earlier there was a divulgence of opinion as to whether objections under Rule 58 could only be taken upon attachment but before sale or whether, even if they could be taken after sale, the application under Rule 58 had to be filed prior to the confirmation of the sale. In my view, the express reference to the sale of the attached property sets this controversy at rest, and this is all the more so given that the only remedy now available to the objector is by way of an application under Rule 58 and not by means of a separate suit. It therefore follows that an objection or claim as now envisaged in Rule 58 can be taken (subject to the terms thereof) at any time after attachment and may even be taken after confirmation of the subsequent sale.

14. The next point to be noted with regard to the proviso is that the “first attachment” referred to therein (which, in my view, continues to have the same meaning as in the original Lahore High Court amendment) must comply with the requirements in relation to attachment. Of these, the most important is the well settled proposition

that an attachment is not effective simply on the making of the attachment order, but only when it has been given effect to in the prescribed manner, namely as per the requirements of Rule 54. Now, it is well settled that substantial compliance of Rule 54 is sufficient for the attachment to become effective. However, in my respectful view, when the question of whether the modalities of Rule 54 have been complied with or not arises in the context of considering an objection under Rule 58, a substantial gloss must be placed on the case-law, and even greater care must be taken to ensure that there has been such sufficient compliance of Rule 54 as meet the ends of justice. This is so because once it is held that attachment has been properly effected, then the proviso of Rule 58(1) may become engaged in appropriate circumstances and that can, for the reasons given above, have materially adverse consequences for the objector, up to and including completely shutting out his objection or claim altogether, which would effectively leave him remediless.”

12. I can further rely upon “Narsingh Mahton and others v. Nirpat Singh and others” (A.I.R. 1932 Patna 313). I quote the relevant extract therefrom:-

“A term in a contract of suretyship was as follows: If the suit is decided against the defendants and a decree for mesne profits is passed in favour of the plaintiffs, the plaintiffs would realize the amount of decree of mesne profits from the property mentioned in this deed. The suit with regard to claim of possession was decided against the defendants and the plaintiffs and the defendants compromised their dispute as to the mesne profits and agreed upon a definite sum exceeding the amount for

which surety was given and a certain time was given to defendants within which to make the payment.

Held: that both by the making of the compromise and the granting of time the surety was discharged. (P-315 C-1)”

13. Light can also be taken from the rule of law enunciated in “Muhammad Yusaf v. Ram Govinda Ojha” [A.I.R. 1928 Calcutta 177(2)] wherein it was concluded as under:-

“When a surety agrees that if the creditor is unable to obtain payment of the decretal amount from the debtor, to liquidate any sum which the Court after contest should hold payable by the debtor to the creditor but the suit was compromised and decree was obtained on the basis of the award of the arbitrator:

Held: that such an arrangement operated as a discharge of the surety. (P 178 C2)”

14. Reliance can be placed upon “National Coal Co., Ltd. v. Kshitish Bose and Co.” (A.I.R. 1926 Calcutta 818) and relevant portion of the judgment is reproduced below:-

“If a consent decree is passed without the knowledge and consent of the surety for judgment debtor, the surety is discharged. (P-818 C-2)”

15. The rule of law expounded in “Mahomedalli Ibrahimji v. Lakshmibai Anant Palande” (A.R.I. 1930 Bombay 122) can also be relied upon wherein it was held that surety for defendant is discharged if suit is compromised and if compromise is not contemplated by surety and is prejudicial to his rights.

16. I would further like to rely upon “N.D. LEASING CORPORATION versus NATIONAL FIBERS LTD.” (2002 CLD 643) and to quote the relevant portion thereof as follows:-

“The principle underlying the revocation or discharge of guarantee are provided in sections 133 to 141 of the Contract Act. Under section 133 a variance, made without the surety consent, discharge a surety in respect of transactions subsequent to the date of the variance. Under section 134 the surety is discharged by any contract between the Creditors and Principal by which Principal debtor is released or by any act or omission by the Creditor, the legal consequence of which is the discharge of the Principal debtor. These provisions clearly state that the surety could be discharged of their liability in the event of any occurrence as mentioned therein.”

17. The case law referred to by learned counsel for the respondent No. 1 in shape of “SHAHAMAD KHAN versus Sh. MUHAMMAD AKBAR and others” (2005 CLC 641), “Messrs ASIM TRADERS through Sole Proprietor and others versus NATIONAL BANK OF PAKISTAN through Manager” (2016 CLD 1654), “INDUSTRIAL DEVELOPMENT BANK OF PAKISTAN versus HYDERABAD BEVERAGE COMPANY PRIVATE LIMITED and others” (2016 CLD 560) and “INDUSTRIAL DEVELOPMENT BANK OF PAKISTAN versus HYDERABAD BEVERAGE COMPANY PRIVATE LIMITED and others” (2016 SCMR 451) is

absolutely not applicable to the facts of the case, therefore, not helpful for respondent No. 1.

18. I am of the further view that when terms were settled between the parties to the suit through a compromise, surety is discharged in the light of Sections 133, 134 and 135 of the Contract Act, 1872.

19. Pursuant to above, the findings recorded by both the learned Courts below are nullity in the eye of law and as such not sustainable. Hence, both the revision petitions are **allowed** and resultantly, the order dated 09.03.2016 as well as judgment dated 23.11.2016 passed by learned Civil Judge, Faisalabad and learned Additional District Judge, Faisalabad respectively are set aside.

(AMIN-UD-DIN KHAN)
JUDGE

APPROVED FOR REPORTING

JUDGE

~Abis Ali~