ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal Nos.08 and 11 of 2016

Date | Order with signature of Judge

Present: Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Nazar Akbar

1. High Court Appeal No.08 of 2016

Appellant : Haroon, through
Mr. Mushtaq A. Memon, advocate.

Respondent : Abdul Aziz, through
Mr. Naraindas C. Motiani, advocate.

2. High Court Appeal No.11 of 2016

Appellant : Muhammad Hanif through
Mr. K.A. Wahab & Khilji Fahad Arif advocates

Respondent No.1 : Abdul Aziz, through
Mr. Naraindas C. Motiani, advocate.

Respondent No.2 : Haroon (None present).

Dates of hearing : 06.4.2017 & 07.04.2017.

JUDGMENT

NAZAR AKBAR, J:- We intend to dispose of the two High Court Appeals by a common Judgment, as both the Appellants have challenged the order dated **29.12.2015** whereby the learned single Judge of this Court has disposed of Execution Application No.32/2014 in the following terms:-

> *"I allow this execution application. Let the decree be executed in the mode and manner as mentioned by the decree-holder at serial No.10 of this application. The official assignee is appointed for this purpose to supervise partition of the property in terms of proposal prepared by Imran Associates, the Architect, which he has filed along with his reference No.1/2015 dated 20.10.2015, and make sure that possession of share to the decree-holder is handed over to him accordingly."*

2. Appellant in High Court Appeal No.08/2016 is Judgment Debtor and brother of Decree Holder. Appellant in High Court Appeal

No.11/2016 is tenant/occupier of one of the tenements in the subject property in dispute between the Judgment Debtor and the Decree Holder.

3. The Execution has arisen from the order dated **26.12.2012** whereby suit No.384/1997 was finally disposed of by way of compromise and decree was prepared on **29.01.2013**. The respondent on **12.06.2014** filed an Execution Application bearing Execution No.32/2014, which was decided by the impugned order reproduced above. Suit No.384/1997 was field by the Decree-Holder/ respondent against Judgment-Debtor/ Appellant for partition of the property bearing No.S.R-3/15 Frere Road, Shahra-e-Liaquat, Karachi, (hereinafter referred to as "the suit property"), by metes and bounds and separate possession to be delivered to the plaintiff/D.H.

4. Learned counsel for the appellant in High Court Appeal No.08/2016 has advanced three arguments against the impugned order. Firstly; he claimed that the Execution Application by itself was not maintainable, since the order dated 26.12.2012 in suit No.384/1997 was in the nature of a preliminary decree and not a final disposal of the suit; Secondly, since the order was a preliminary decree, it was not executable unless merged into final decree to be passed by the learned Court by speaking order settling all other dispute between the parties after further and necessary inquiry; thirdly the order impugned in these appeals whereby the Execution Application has been disposed of was patently illegal, since, according to him, on **29.12.2015** the Execution Application No.32/2014 was listed before the single Judge for hearing of only an application under **Section 151 CPC** (CMA No.219/2014) and **not** for final disposal of the main Execution Application.

5. In support of his contention he has vehemently referred to the various orders passed by single Judge in suit No.384/1997 even after passing of the order dated 26.12.2012 on various reports filed by the Nazir of this Court. He has referred to the definition of "decree" given in **Section 2(2) CPC,** and use of term "Preliminary decree" in **Order XX Rule 18 Sub Rule 2 CPC** in suit for partition of property or separate possession of a share therein. According to the learned counsel, the suit property was indivisible and therefore, in terms of **Section 2** of the **Partition Act, 1893** the only option for the Court was to order for sale of the joint property and distribute the sale proceeds amongst the co-owners. He has relied on the following case law.

i) Firdous Begum & 6 others vs. Mst. Salamat Bibi & another (2008 CLC 248);

ii) Iqbal Ahmed and 3 others vs. Mst. Aziz Bano and 2 others (2010 MLD 784);

iii) Abdus Shakoor vs. Muhammad Zafar Ullah Khan & others (2007 CLC 1661);

iv) Muhammad Zafar Siddiqui and 2 others vs. Muhammad Qamar Siddiqui and another (PLD 2011 Kar 37);

v) Nutan Chandra Mahajan vs. Srimati Charu Bala and others (PLD 1965 Dacca 557);

vi) Farid Bakhsh alias Ghulam Farid vs. Niaz Muhammad and others (1999 CLC 738);

vii) Aijaz Haroon vs. Inam Durrani (PLD 1989 Kar 304);

viii) Madhava Menon vs. Esthapanose and others (AIR 1952 Trav 428);

ix) Media Max (Pvt) Ltd through Chief Executive vs. ARY Communication Pvt. Ltd. Through Chief Executive and another (PLD 2013 Kar 555);

x) Muhammad Latif vs. Muhammad Hafiz (PLD 1954 Federal Court 184);

xi) Hashim Khan vs. National Bank of Pakistan (1992 SCMR 707);

xii) Ghulam Farid Muhammad Latif and others vs. The Central Bank of India Limited, Lahore (PLD 1954 Lah 575);

xiii) Qazi Muhammad Tariq vs. Hasin Jahan and 3 others (1993 SCMR 1949);

xiv) Abdul Sattar vs. Muhammad Akbar Shah (PLD 1990 S.C 285);

xv) Muhammad Hussain vs. Allah Dad and 13 others (PLD 1991 S.C 1104);

xvi) Saifullah Khan & others vs. Mst. Afshan & others (SBLR 2016 Sindh 1809).

6. Learned counsel for the respondent has vehemently opposed these appeals and contended that by the order dated **26.12.2012** the suit has been finally decreed since it was a consent decree. He has further contended that the plaintiff/ D.H has given up all the prayers (b) to (e) and the appellant and his counsel have consented for the final decree in terms of only prayer (a) reproduced below:-

> *a) The Plaintiff and the Defendant are holding equal shares in the building on plot bearing survey No.S.R-3/15, situated on Frere Road, Karachi as such the Collector or any Gazetted Sub-ordinate of the Collector or may be ordered to partition the property bearing No.S.R-3/15, situated on Frere Road, Shahra-e-Liaquat, Karachi by meats and bounds and separate possession thereof be delivered to the Plaintiff;*

The counsel for Respondents further contended that the decree drawn by the court was not a preliminary decree. Regarding the proceedings in the suit after the order dated **26.12.2016**, he contended, that were corium non-judice and the respondent/D.H has preferred execution before the expiry of limitation for filing an execution application. In support of his contention, learned counsel for the Respondent/D.H has relied upon the following case laws:-

i) Messrs Conforce Limited vs. Messrs Rafiq Industries Ltd. and others (PLD 1989 S.C 136(b);

ii) Venkata Reddy and others vs. Pethi Reddy (AIR 1963 S.C 992);

iii) Aijaz Haroon vs. Inam Durrani (PLD 1989 Karachi 304);

iv) Media Max (Pvt) Ltd through Chief Executive vs. ARY Communication Pvt. Ltd. Through Chief Executive and another (PLD 2013 Sindh 555);

v) Fazal Karim through Legal Heirs and others vs. Muhammad Afzal through Legal Heirs and others (PLD 2003 S.C 818(d);

vi) Zafeer Gul vs. Dr. Riaz Ali and others (2015 SCMR 1691);

vii) Pakistan State Oil Company Ltd. Karachi vs. Pirjee Muhammad Naqi (2001 SCMR 1140);

viii) Khwaja Muhammad Yaqub Khan and another vs. Sh. Abdur Rahim and others (1968 SCMR 734);

ix) Messrs Pakistan Burmah Shell Ltd. vs. Khalil Ahmed and another (PLD 1996 Karachi 467);

x) Bank Al Habib Ltd., vs. Abu Bakar Textile Mills (2016 CLC 837);

xi) Mahboob Khan vs. Hassan Khan Durrani (PLD 1990 S.C 778).

7. To appreciate the contentions of both the parties on the nature of order dated **26.12.2012**, we were pleased to order that the R&Ps of Civil Suit No.384/1997 and Execution Proceedings may be brought from the branch before further hearing the parties. We have, with the help of counsel, gone through the record and proceedings of suit and Execution Application No.32/2014. The contentious impugned order passed by the learned single Judge on **26.12.2012** when the suit was fixed for hearing of three miscellaneous applications. The order is reproduced below:-

(i) For hearing of CMA No.10531/2012 (U/O 39 Rules 1 & 2 CPC);
(ii) For hearing of CMA No.10532/2012 **(U/O 20 Rule 18(2) CPC)**;
(iii) For hearing of CMA No.10533/2012 (U/O 18 Rule 18 CPC).

26.12.2012

"This is a suit for partition, possession permanent injunction and declaration. Both the plaintiff and defendant have claimed that they are co-owners of plot No.S.R-3/15 Frere Road, Karachi. There is no dispute regarding co-ownership between the parties. Both the learned counsel as well as parties have resolved to settle down their dispute in the following terms:-

1. Nazir is appointed Commissioner to inspect the plot in question and determine whether the

property/plot can be partitioned between co-owners and if yes then the property will be partitioned by metes and bounds.

2. *This inspection will be carried out in presence of the parties or their representatives with advance notice to the parties to ensure their presence at the time of inspection.*

3. *If the Nazir is reached to the conclusion that partition is not possible then without disturbing the tenants/ occupants, the property shall be sold out on as is where is basis, through public notice.*

4. *The parties shall be allowed to participate in the auction proceedings and both the parties shall have preferential right to match the highest bid and the property will be transferred in the name of purchaser with constructive possession. Nazir's fee shall be Rs.30,000/- which will be equally borne by the parties. The publication charges of public notice will also be borne by the parties equally.*

5. *So far as prayers clauses (b) to (e) are concerned, the plaintiff had already stated in Court on 06.12.2012 that if the suit is decreed in view of clause (a) of the prayer, he will not press other relief(s) which fact is also reflecting in the order dated 06.12.2012. Order accordingly.*

***Suit is decreed in the above terms**. Pending applications are also disposed of accordingly.*

8. The background of these High Court Appeals in brief is that the appellant/J.D and the respondent/D.H are sons of Haji Abdul Karim Vayani, who was running a business as sole proprietor by the name and style of M/S VAYANI BROTHERS in a major portion of the suit property as tenant on payment of pagree since **1953**. By **1964** and **1967** both the brothers were inducted in the business of their father as partners and the sole proprietorship was converted into a partnership concern. On **01.06.1976**, after the death of their father, both the brothers, with intention to purchase the suit property entered into an agreement of sale with the actual owners namely M/S Muhammad Gulzar and others. Subsequently, a dispute arose between the brothers, as the respondent/J.D was not willing to

handover share of respondent/D.H in the suit property to him, therefore, the Decree-Holder**,** after almost 20 years, on **28.3.1997** filed a suit for Partition and Separate Possession and Declaration.

9. The appellant/J.D on **16.4.1997** filed written statement wherein he categorically admitted that the D.H and J.D were legal owners with equal share in the suit property since the agreement of sale/ purchase dated **01.6.1976**. However, since the previous owners had breached the terms and conditions of the said agreement to sell dated **01.06.1976**, both the appellant and the respondent have jointly filed **suit No.70/1978** for Specific Performance of the said agreement against the previous owners and at the time of filing of **suit No.384/1997** by the Decree-holder, a **High Court Appeal No.39/1997** having arisen out of their joint suit for Specific Performance was pending, therefore, in reply to prayer clause (a) the Judgment-debtor/appellant stated that it is premature and not maintainable owing to the pendency of litigation. However, both the parties filed their respective proposed issues in suit No.384/1997 and by order dated **26.10.1998**, the Court had been pleased to adopt the issues proposed by the plaintiff/D.H, which are as follows:-

1. *Whether the suit is legally maintainable?*

2. *Whether the suit is time-barred?*

3. *Whether the Defendant made the Plaintiff execute Declaration dated 9.1.1994 under duress and after pressuring the plaintiff took over possession of one front shop, store and an office inside the compound of the suit premises from the plaintiff? If so, to what effect!*

4. *Whether the Defendant entered into partnership with the deceased father of the plaintiff on 03.7.1993 which malafide intention to usurp the assets, tenancy rights and goodwill of the firm M/S VAYANI BROTHERS and dissolved the partnership on 31.10.1993?*

5. *Whether as a consequence of dissolution of partnership the Defendant took over all the assets, including the tenancy rights of M/S VAYANI BROTHERS and become exclusive owner of the firm M/S VAYANI BROTHERS and acquired possession of the suit premises" if so, to what effect.*

6. *Whether the plaintiff as co-owner of the suit premises is entitled to possession of the suit premises?*

7. *Whether the plaintiff is entitled to a decree as prayed?*

8. *What should be the decree?*

9. *Relief, if any.*

10. The parties were directed to record evidence before the Commissioner. It took about 10 years when ultimately by order dated **18.8.2009** the Commissioner's report with complete evidence of the parties was taken on record and the suit was fixed for final arguments. From **02.2.2010**, the suit was repeatedly listed for final arguments. However, on **04.10.2012** the learned counsel for the Decree-holder preferred to file three different miscellaneous applications which were disposed of as consequence of the consent order dated **26.12.2012** reproduced in para-7 above whereby the suit was decreed.

11. Adverting to the respective contentions of the counsel for the appellant in the light of the facts of the case discussed above, the first two contentions of the learned counsel for the appellant that the order dated 26.12.2012 sought to be executed through Execution cApplication No.32/2014 was in the nature of a "preliminary decree" and as such it was not executable has no force. While examining the proceedings of suit No.384/1997, we have noticed that from **1997** when the suit was filed till its disposal by a consent decree on **26.12.2012** all the formalities for passing a final judgment/order in

a civil suit have already been concluded. The parties have even concluded their evidence in support of the issues framed by the Court way back on **26.10.1998**, reproduced in para-9 above. The suit has already been listed for final arguments on several dates between **18.8.2009** to **26.12.2012**. The appellant and respondents on the date of disposal have agreed to dispose of the suit in their agreed terms instead of judgment on the issues framed by the Court and without any order of "preliminary decree" despite the fact that even an application under **Order XX Rule 18(2) CPC** (CMA No.15532/2012) for passing a "preliminary decree" was also pending. The record further shows that all the three applications were contested by the appellant through a consolidated counter affidavit wherein he declared that the said applications being unreasonable and unlawful are liable to be dismissed with special cost. In view of the fact that the appellant himself has opposed the passing of "preliminary decree" in a suit for partition by opposing an application under Order XX Rule 18(2) CPC, he is stopped from claiming that the orders dated **26.12.2012** were in the nature of preliminary decree. We are unable to appreciate that the request of the respondent for an order under **Order XX Rule 18(2) CPC** during the trial of a suit for partition was "unreasonable and unlawful" and at the same time instead of a decision of Court on merit on the basis of evidence, the appellant consented to a decree on specific terms and at execution stage he takes the plea that suit is still pending as the Court has yet to pass a final decree on the ground that the Court has passed certain orders even after the "consent decree". Merely because the single Judge has passed certain orders even after the order dated **26.12.2012** in suit No.384/1997, the "decree" obtained by consent cannot be treated to be a "preliminary decree". Nobody is supposed to be prejudiced by the act of the Court. In this context, as pointed out

by the counsel for the respondents, Court diaries of the single Judge in suit No.384/1997 are very material. Once the execution application No.32/2014 was filed by the respondent, the suit was ordered to be listed alongwith Execution Application 32/2014 and the learned single Judge has categorically observed in its order dated 20.4.2015 that the proceedings in suit No.,384/1997 were concluded by order dated **26.12.2012**. The observations of the learned single Judge dated **20.4.2015** are reproduced below:-

> *Both the learned Counsels submit that the listed applications have been dispose of vide order dated 26.12.2012, whereby, the instant Suit has been decreed in the terms, so recorded in the order. Perusal of the order sheet reflects that the copy of the order dated 26.12.2012 is not available at the relevant place, whereas, photo copy has been placed on record. Office is directed to place the order at appropriate place and* ***not to list these applications for hearing, as the instant Suit has been decreed in terms of the order dated 26.12.2012.***

And since then no orders were passed in the suit file and the proceedings for all practical purposes took place only in Execution Application No.32/2014. The appellant have never shown any grievance against the order dated **20.04.2015** nor have sought clarification of Court that the consent order dated **26.12.2012** was a preliminary decree.

12. In view of the above facts and circumstances, the case law relied upon and referred by the learned counsel for the appellant on the point which deals with the question of the nature of an order to be treated as “preliminary decree” even if it is not mentioned in the decree or otherwise further inquiry was needed to adjudicate any other issue between the parties are all out of context. These case laws mentioned in para-6 above from serial No.(i) to (x) except PLD 1989 Karachi 304 may be relevant in different facts of the case but not in

the given facts of the case in hand. Except **PLD 1989 Karachi 304**, which we would refer to in the latter part of this judgment, none of the case law is relevant and precisely distinguished on facts since the same do not deal with a situation in which co-owners/ shareholders have deferred an order on application under **Order XX Rule 18(2) CPC** and settled their dispute by a consent decree for partition and separate possession. A consent decree can never be treated a preliminary decree. In fact a consent decree is never an order of the court, it is precisely an endorsement of the Court on whatever is liked by parties to settle their dispute. In the case in hand the parties have agreed to seek partition of suit property through official of the court in case the suit property is found divisible. Once the parties have agreed to this proposition it means they have dropped any other possible dispute such as which of the portion of the suit property on partition should be possessed by whom. And it is possible by consent of the parties since it is not unlawful. Even otherwise, it is not necessary that in every case a "preliminary decree" is must in terms of **Sub-Rule 2 of Rule 18 of Order XX CPC** which is reproduced below:-

> 18. ***Decree in suit for partition of property or separate possession of a share therein***. *Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,*
>
> (1) *if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;*
>
> (2) *if and in so far as such decree relates to any other immovable property or to movable property,* ***the Court may, if partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the right of the several parties interested in the property and giving such further directions as may be required.***

13. On perusal, the above provision says that the passing of a preliminary decree is not mandatory. The Court may pass a preliminary decree **"if partition/ separation cannot be conveniently made".** In a case reported as **Aijaz Haroon ..Vs.. Inam Durrani (*PLD 1989 Karachi 304)*** my lord Mr. Justice Wajihuddin Ahmad (as he then was) has observed that the provisions of **Order XX** and **Order XXXIV CPC** may have specific provisions for a preliminary decree but the same are not mandatory and depends on the requirements of the case and the decree has to be examined in terms of **Section 2(2) CPC** which is the basic provision. The principle has been laid down by his lordship in para-64, which is reproduced below:-

> *"64. The relevant provision regarding Final and Preliminary Decrees is contained in section 2(2) of the Code of Civil Procedure, 1908, which provision defines such decrees. It is true that there are specific provisions for Preliminary Decrees in Order XX, Rules 12 to 16 and 18 and in Order XXXIV, Rules 2 to 5 and 7 to 8 C.P.C., but the same, in my view contain only examples in which **Preliminary Decrees may be passed** and such Decrees can be passed, wherever the requirements of a case so dictate, under section 2(2), C.P.C., which is the basic provision in the Code that behalf. I am fortified in this view by the decisions in Dattatraya Purshotam Parnekar and others v. Radhabai Balkrishna AIR 1921 Bom. 220, (Raja) Peary Mohan Mookerjee v. Manohar Mookerjee AIR 1924 Cal. 160 and a Travancore Full Bench decision reported in AIR 1953 T.C 220."*

In the case in hand, we are also of considered opinion that the order dated **26.12.2012** being a consent order and more particularly it was passed after exhausting all the procedural requirement for delivery of a final judgment on all the disputes between the parties that is to say; from filing of plaint and a written statement followed by framing of issues and even recording of evidence by both the sides. The suit was already fixed for final arguments. Not only this but the parties have consciously chosen to drop a proper order on an application

under **Order XX Rule 18(2) CPC**, therefore, we are also in agreement with the findings of the leaned single Judge that the execution application was maintainable and the order dated **26.12.2012** sought to be executed was final and not preliminary.

14. The other contention of learned counsel for the appellant that on **29.12.2015** only CMA No.219/2014 was listed for hearing and the execution application was not fixed for hearing, therefore, the Court has erred in passing an order whereby the main execution application was decided is belied by the conduct. The perusal of Execution proceedings shows that the D.H/respondent had also filed application under Section 151 CPC (CMA No.219/2014) requesting that the J.D may be restrained from creating any third party interest in the suit property and the vacant portion of the suit property may be sealed through the Official Assignee or Nazir of this Court pending the execution application. On **16.9.2014** copies of the application were supplied to the J.D whose counsel had already filed power on **12.8.2014**. Judgment Debtor/Appellant has filed a joint counter affidavit to both the execution application as well as CMA No.219/2014. In his counter affidavit on **14.01.2015**, for the first time he has taken a specific plea that the execution application is not maintainable as final decree has not yet been passed in the matter and the consent order dated **26.12.2012** was essentially in the nature of preliminary decree. However, on **26.8.2015**, pending his objection to the maintainability of execution application as well as CMA No.219/2014, the appellant consented for appointment a reputed architect to submit a report that whether the suit property can be partitioned in terms of the decree. The said **consent order** is as under.

> *Today both learned counsel, by consent, agreed that Official Assignee may be directed to engage well reputed and well experienced architect, revisit the site and submit the report whether the suit property can be partitioned in terms of the decree. The inspection should be carried out in the presence of the representative of the parties and* ***report should be submitted within 15 days****. The Official Assignee is directed to personally visit the plot in question with the Architect. Adjourned.*

Learned counsel for the respondent has contended that order of the executing Court dated **26.8.2015** whereby with consent of the appellant, Official Assignee was directed to appoint another Architect was not to decide CMA No.219/2014 and even on the said dated only CMA No.219/2014 was shown as listed for hearing. M/S Imran and Associates were appointed, and their report was placed on record of the executing court alongwith reference No.01/2015 filed by the Official Assignee on **20.10.2015**. The J.D and appellant have not filed any objection to the report of the Architect M/S Imran and Associates.

15. We have noticed that after the order dated 26.8.2015 and filing of report of Architect the execution was listed for hearing on **16.12.2015, 17.12.2015** and **23.12.2015,** however**,** on each date of hearing from the date of presentation of the Execution Application, the order sheet reflects only hearing of CMA 219/2014. But the parties have advanced arguments only on execution application. Therefore, on all material date, the hearing was not limited to the hearing of CMA only and the Execution Application was allowed after hearing the counsel on execution application and impugned order was announced on **29.12.2016**. The only contention of learned counsel before the executing court and this court to nullify the effect of the order dated **26.12.2012** was that it was an order in the nature of preliminary decree. This contention had been repelled by the

learned executing court and we have concurred with the findings of learned single Judge for the reasons given in the preceding paragraphs in the light of the facts of the case discussed in detail as well as the conduct of the appellant whereby on **26.12.2012** he himself has opposed the passing of preliminary decree and the suit was decreed on the terms consented by him. It is pertinent to note that the appellant have consented to the appointment of Architect to report whether the suit property can be partitioned or not. The Architect M/s. Imran Associates on **15.10.2012** have reported that the suit property can be conveniently partition into two portions in the following terms:-

> *"The suit property can be sub-divided into two portions without disturbing the tenants. Sindh Building and Town Planning Regulations also allow sub-division of plot of this size."*

Even in appeal, the appellant have not challenged the findings of M/s. Imran Associates and the matter ends on their report. The perusal of the impugned order dated **29.12.2015** as well as the objections filed by the appellant/J.D on CMA No.219/2014 clearly manifest that the learned counsel for the appellant had been contesting the main execution proceedings. The very fact that he had elaborately argued the point that the execution was not maintainable since according to him it was preliminary decree is sufficient to appreciate that he had been arguing the main execution application, though, according to him only CMA was listed for hearing. He had not advanced his arguments to CMA No.219/2014 and therefore, he cannot say that he was not given proper opportunity of hearing of main execution application before passing the order of disposing of the application in terms of para-10 of the execution application.

16. Once he has thoroughly advanced his argument on execution application, he cannot challenge the orders repelling his contention

on the ground that the order sheet does not reflect that the case was listed for hearing of execution. It could, indeed, be a ground for recalling the order of disposal of civil suit when it is disposed of on a date of hearing of a particular application when the suit is not listed for final arguments or even otherwise for final disposal. In execution proceedings the hearing of an execution application is not supposed to be separately listed for final orders on main application. From day one it is supposed to be the duty of the Court to hear the parties' objection on the execution application, if any, and execute the decree if it is executable in accordance with the terms of the judgment incorporated in the decree. The case laws relied upon by the learned counsel for appellant and mentioned in para-6 from serial No.(xi) to (xvi) on the proposition under discussions are all judgments in which suit were dismissed on account of non-appearance of counsel, or it was listed for hearing of application and not for final disposal of suit. All such situations to which case laws deal are possible before the suit is ripe for final disposal, but such situations are not possible in execution proceedings since it is ripe for disposal from day one.

17. Learned counsel for the appellant in **High Court Appeal No.11/2016** has adopted the arguments advanced by the learned counsel for the appellant in the High Court Appeal No.08/2016. The appellant in Appeal No.11/2016 is claiming to be tenant in tenement No.3 of the suit property and his only grievance is that in case of partition his tenement would be adversely affected. His other contention is that by consent order dated **24.12.2012** his rights as tenant/occupier in one of the portion of the suit property were protected. Learned counsel for respondent/D.H has contended that he is strange to the suit property. He has been set up by J.D to cause unnecessary delay in delivery of separate possession of the suit

property to the D.H. He has pointed out that both the main contestants, that is, the J.D and D.H are joint landlords and at one point of time both were apprehending occupancy of tenement No.3 by strangers pending their litigation since 1997. Therefore, both Abdul Aziz and Haroon (The D.H. & the J.D) had issued public notice in different newspapers for the information of public at large that nobody should deal with the suit property without consent and permission of either of them individually and separately. On **28.12.2004** and **25.4.2009** the D.H published notices in Daily News and Jung respectively. Similar notices were published by the J.D also in daily Jung dated **25.4.2009**. However, the appellant Muhammad Hanif entered in tenement No.3 on **28.11.2011** through appellant in the appeal No.08/2016 without consent and permission of respondent No.1/D.H. He further contended that D.H/Respondent No.1 has already filed an ejectment application against the original tenant and the right or entitlement of appellant in HCA No.11/2016 in the suit property are governed by the Sindh Rented Premises Ordinance, 1979. He has no right to contest the judgment and decree in favour of one of the owners of the property. If he has been inducted in the premises by concealments of facts by appellant in HCA No.08/2012 pending the dispute between the co-owners, he may have grievance against J.D /appellant in HCA No.08/2011.

18. In a civil suit between the owners of the suit property, the tenants are not supposed to have their civil rights as tenant on the ground of being a lawful or otherwise as occupier of the premises. Their status cannot be better than the status of their landlord. The tenants' rights are only protected under the Sindh Rented Premises Ordinance, 1979. The execution of a judgment and decree against the J.D is equally binding on the person claiming possession through J.D

irrespective of his right, he has to honour the decree and face the consequences of Judgment and Decree like the J.D himself. As far as the right of tenant/occupier in the suit property under the consent decree are concerned, the same were protected against the new buyer in case of sale of the suit property. The relevant clause-3 of consent decree is reproduced below:-

> *3. If the Nazir has reached to the conclusion that partition is not possible then without disturbing the tenant and occupants, the property shall be sold out on as is where is basis through public notice."*

The consent order has settled the dispute between the landlords of the suit property and the landlord through whom the appellant in HCA No.11/2016 has entered in the suit property has consented to the order in which the rights of tenants were protected only in case of sale of the suit property.

19. Before parting with the judgment, we may observe that the appellant was conscious of the fate of his appeal. Learned counsel for the appellant on hearing a short order whereby we had dismissed these appeals, instantly made a request at the bar about the portion of the property his client would like to retained. We had directed him to place his request on record in writing during the course of the day. He had filed an statement to that effect on same day that he will prefer to retain the portion adjacent to plot No.SR-3/16 Shahrah-e-Liaquat, Karachi. The statement was taken on record.

20. The above High Court Appeals were dismissed by short order dated **07.04.2017**, the above are the reasons for the same.

JUDGE

JUDGE

Karachi
Dated: .04.2017.

Ayaz Gul