

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.1296 of 2005

DATE ORDER WITH SIGNATURE OF JUDGE

Plaintiff: Bashir Ahmed
Through Mr. Mushtaq A.
Memon assisted by Mr.
Muhammad Amin, Advocate.

Defendant No.1: United Sugar Mills Limited
Through Mr. Mamoon
Chaudhry, Advocate.

Defendant Nos.2 & 3: Sheikh Abdul Wahid & Sheikh
Muhammad Saeed, Through Mr.
Amel Khan Kasi & Ms. Heer
Memon, Advocates.

For hearing of CMA No. 5809/2015 (U/O 18 Rule 2 & 3)

Date of Hearing: 03.04.2018
Date of Order: 27.04.2018

ORDER

Muhammad Junaid Ghaffar J. This is an Application under Order 18 Rule 2 & 3 CPC, whereby, the Plaintiff has prayed to fix instant matter for recording evidence in respect of Issues as well as additional issues settled vide orders dated 05.11.2013 and 14.01.2015.

2. Learned Counsel for the Plaintiff has contended that on 07.10.2005, an order was passed which was in essence a preliminary decree, whereafter a report was placed before the Court on 30.05.2006. Subsequently on 09.10.2013 read with order dated 05.11.2013, four issues were settled. According to the learned Counsel, thereafter CMA No.102/2014 was filed under Order 14 Rule 5 for framing of additional Issues

and the same was allowed as prayed vide Order dated 14.01.2015 as the Defendants failed to contest such application. Learned Counsel has contended that since Issues have been settled, the matter should have been fixed for evidence and on 18.03.2015, such fact was brought to the knowledge of the Court as the Office was wrongly fixing the matter for arguments, and the Court observed that a proper application be moved, hence the Plaintiff has filed the listed application. Learned Counsel has contended that firstly the order dated 07.10.2005 was in the nature of a Preliminary Decree as in the very order, there were certain things, which were yet to be finalized; and secondly since the Court has already settled the Issues, therefore, evidence to the extent of such Issues is to be led by the parties, therefore, listed application be allowed. Per learned Counsel such orders of the Court have attained finality as the Defendants never contested, and therefore, this Court even otherwise cannot review such orders. In support learned Counsel has relied upon the cases reported as **1999 CLC 738 (Farid Bakhsh alias Ghulam Farid v. Niaz Muhammad and others)**, **PLD 1954 Federal Court 184 (Muhammad Latif v. Muhammad Hafiz and others)** and **AIR 1935 PC 12 (L. Guran Ditta v. T.R. Ditta)**.

3. On the other hand, learned Counsel for the Defendants has contended that the order dated 07.10.2005 was a consent order, whereby, the entire Suit was disposed of, and therefore, the argument that a Preliminary Decree was passed, is misconceived. According to the learned Counsel subsequently, two applications bearing CMA

No.2678/2006 and 2709/2006 were filed by the Plaintiff in furtherance of the order of disposal of Suit, and in fact the amount determined by the Chartered Accountant appointed by the Court has also been paid to the Plaintiff, and there is nothing left on merits, on which evidence could be led by the Plaintiff. Learned Counsel has contended that once the Plaintiff has acted upon the consent order, he cannot thereafter turn away, and say that the Suit is not finally disposed of and he wants to proceed further. He has further contended that it is only the objections on the Chartered Accountant's Report, which was coming up for hearing before the Court and the Court to have some clarity in adjudicating the matter, framed certain issues but by no means, the Court intended to permit leading of evidence and in support he has referred to Orders dated 9.10.2013 & 5.11.2013. According to the learned Counsel, the issues settled by the Court as well as the additional issues cannot be equated with the issues settled under Order 14 C.P.C. as this Suit already stands finally disposed of. In such circumstances, according to the learned Counsel the application should be dismissed, and matter be listed for final argument on the report of Chartered Accountant only.

4. I have heard both the learned Counsel and perused the record. On 07.10.2005 when this Suit was placed before the Court, at the joint request of all learned Counsel present before the Court, the following order was passed:

The counsel for the parties jointly request that the office may be directed to register and number the present suit **and the suit may be disposed of in the terms as under.** The office is directed to register and number the present suit. **The suit along with the**

pending applications, is by consent, disposed of in the following terms.

- 1(a). That out of Rs. 446,047,247/- claimed by the plaintiff through the present suit, the Defendant Company shall pay to the plaintiff an amount of 200,000,000/- through a Pay Order, by 11.10.2005.
- 1(b). The balance amount of 246,047,247/- shall be deposited by the Defendant Company with the Nazir of this Court by 11.10.2005. The Nazir shall invest the amount in some profitable Government scheme.
2. The plaintiff shall submit his claim, along with the relevant record, including books of accounts, ledger and vouchers etc. to M/s. Ferguson & Co. who are appointed Commissioner for determining the amount due and payable by the Defendant Company to the plaintiff under and in terms of the agreement dated 17.01.2001, being Annexure 'A' to the plaint. The Defendant Company shall also furnish to M/s. Ferguson & Co. their statements of account along with all the relevant record. The parties shall also exchange between them the authenticated copies of the entire material furnished by them, to M/s. Ferguson & Co. Such exercise shall be completed within two weeks from today. M/s. Ferguson & Co. shall, after examining and scrutinizing the respective accounts and records, submit their report before this court within five weeks from today and shall supply copies of the report to the parties. Both the parties shall fully co-operate with the Chartered Accountants in undertaking the above exercise and shall provide to them all the relevant material in that regard without any delay.
3. The amount found due and payable by the Defendant Company to the plaintiff, if any, shall immediately be paid to the plaintiff out of the amount deposited with the Nazir of this Court in terms of 1(b) above. In the event the amount deposited by the Defendant Company with the Nazir as above is found in excess of the Defendant Company's liability to the plaintiff, as determined by M/s/ Ferguson & Co., such amount shall be refunded to the Defendant Company.
4. So soon the amounts are paid/deposited as prescribed by 1(a) and (b) above, the plaintiff shall hand over the possession of United Sugar Mills to the Defendant Company and shall have no concern with the Control and management of the said Mill. The plaintiff shall not remove or damage and machinery, tools, equipment or any other property and assets of the Defendant Company from the said sugar mill. The plaintiff may however hand

over such record of the mills to M/s. Ferguson & Co. as may be required by the latter for conducting the exercise as prescribed above.

5. The fee of the Chartered Accountants is tentatively fixed at Rs. 100,000/- to be shared equally by the plaintiff and the Defendant No.1 Company. Such amount shall be paid by the parties to the Chartered Accountants within two weeks from today."

Thereafter various orders have been passed in this matter and it is not in dispute that the parties have acted upon the above order. When the matter was listed for final arguments on Chartered Accountant's Reference dated 30.05.2008, on 09.10.2013, the following order was passed:-

"Attention of Court has been drawn to the Order dated 07.10.2005 whereby M/S. Ferguson & Co, a Company of Chartered Accountant was appointed with specific directions. Today this case is fixed for final arguments as well as hearing on report of Chartered Accountant. The Report of Chartered Accountant dated 30.05.2008 has been examined in the light of objections raised by the Plaintiffs. The Defendants No.2 and 3 have also filed reply to objections raised by the Plaintiff on the report of Chartered Accountant. In view of the dispute arising from the objection to the report and reply to the objections, before finally deciding this case, **parties are directed to submit their respective issues with reference to the dispute arising out after the report of Chartered Accountant. These issues may be filed within two weeks and it is also clarified that after framing of issues, the case will not go for evidence and the issues so proposed will be decided on the basis of record as well as report of Chartered Accountant.**

To come up on 05.11.2013."

Subsequently on 05.11.2013, the following order was passed:-

"On the last date of hearing learned counsel for the plaintiff, Mr. S,M M. Baqir and Mr. Kanwar Majid, appeared on behalf of plaintiff and they were directed to file issues within two weeks. Today Mr. Kanwar Majid present in Court and he has not filed issues. He is unable to even justify that why he has failed to communicate with Mr. S.M. Baqir Advocate . Learned counsel for Defendant No.1 files proposed issues which have also been adopted by learned counsel for Defendants. No.2 and 3. Copy of the proposed issues has been supplied to Mr. Kanwar Majid. The

issues are taken on record and after going through the same following issues are framed:-

1. Whether the plaintiff in light of order dated 07.10.2005 is entitled to raise any subsequent objections to the report submitted by the Commissioner?
2. Whether the plaintiff should be required to deposit the amount of Rs.236,885,991.00 with the Hon'ble Court received by it pursuant to the report of the Commissioner? If not, then can the report be challenged?
3. Whether the plaintiff is entitled to any relief as prayed for in the suit?
4. What should the order be?

It has already been mentioned in the order dated 9.10.2013 that no further evidence is required in this matter and the case can be disposed of on the basis of proposed issues. The case is adjourned for a date in the first week of December 2013 with clear warning to the learned counsel for the plaintiff that this case will be proceeded whether counsel for the plaintiff is present or not on the next date of hearing on the basis of record available."

And finally an application was filed under Order 14 Rule 5 CPC and on 14.01.2015 the request for framing of additional issues was allowed as prayed.

5. The entire case of the Plaintiff is to the effect that Court has settled additional issues, whereas, for leading of evidence, pursuant to Order dated 18.03.2015, the Plaintiff has filed an application seeking permission to lead evidence on the issues already settled. However, it is to be kept in mind that all subsequent orders passed by the Court including the order for settlement of Issues as well as additional issues are dependent on the manner, in which the Order dated 07.10.2005 is read and understood. The said order very clearly states that the Suit along with pending applications is by consent disposed of in the terms as stated above. It is not in dispute that settlement terms "**1(a)**" and

“1(b)” were immediately acted upon and after furnishing of report by the Chartered Accountant, the Plaintiff on his own application has been paid the amount determined as due by the Chartered Accountant from the amount deposited with the Nazir by the Defendants, whereas, the balance amount has also been refunded to the Defendants. In all fairness, the order even does not say so that any challenge to the report will be permissible, as it had provided for all such mechanism within it. And when the report of Chartered Accountant was submitted, and balance amount was paid to respective parties, even the possession was handed over. In my view the report was only for perusal and not otherwise. Nonetheless, at the most, if anything which was left after passing of Order dated 07.10.2005 was at the maximum the report of the Chartered Accountant for consideration of the Court. The exercise assigned to the Chartered Accountant was very clearly stated in Para-2 of the said order, and the entire assessment was to the effect to determine the amount due and payable by the Defendant Company to the Plaintiff under and in terms of the Agreement dated 17.01.2001. Once such report was furnished at the relevant time, the Plaintiff acted upon the said report and withdrew the amount due to him. Though the Plaintiff while making such application reserved its right to file objections on the Chartered Accountant’s Report; but firstly, it was never provided in the consent order of disposal that any objections would be heard and decided; and secondly, merely reserving such right, does not in any manner permit the Plaintiff to contest the case afresh on merits in its entirety. The Plaintiff

chose for disposal of the entire Suit with consent, and therefore, the said order was a final order Under Order 23 Rule 3 CPC in the nature of a self-executing decree. It is not in dispute that such order has been acted upon, parties have taken their share and it is only the objections on the report of Chartered Accountant which remain in field. Even if, the Court has settled certain issues, it is certainly not within the powers of the Court to permit leading of evidence on such issues. This would in effect defeat the very purpose of the consent order of disposal. In fact the issues which were settled by the Court vide order dated 9.10.2013 was to enable the parties to lead arguments with clarity and more specifically as far as the objections on the Chartered Accountant's Report is concerned. Same would be the position of the additional issues, as the said order flows out from the first order, whereby, issues on objections on report of Chartered Accountant were settled. It was only an exercise for the benefit of Court to easily and finally adjudicate such objections. The intention of the Court in its order dated 9.10.2013 was clear and specific. In fact the Court had specifically observed in the Order dated 09.10.2013 **that the parties would not be permitted to lead any evidence on the issues settled by the Court.** However, while passing Order dated 05.11.2013, whereby, additional issues were also settled such fact was not brought to the knowledge of the Court, or had skipped the attention of the Court, whereas, even otherwise, the Court has neither permitted leading of evidence nor the Court could have done so as it was not empowered to do so. As to the objection that this

would amount to reviewing of order dated 5.11.2013, whereby additional issues were settled, it may be observed, that such contention is entirely misconceived, inasmuch as if that be so, then even the very said order could be termed as reviewing the original order dated 7.10.2005, whereby, the entire Suit was disposed of by consent and acted upon by the parties. The order of settling additional issues is only in extension and continuation of order dated 9.10.2013, whereby, for the first time the Court itself settled certain issues, and as already stated, the same were for having clarity in the matter, and by the same order it was further observed that no evidence will be permitted, and which order has attained finality and has never been challenged any further by the plaintiff himself. Hence, this argument in fact amounts to blowing hot and cold at the same time and is hereby repelled.

6. It is settled law that when a Court passes a final order for disposing of a Suit and specially by consent as has been the case in this matter, the Court becomes *functus officio*, and is, thereafter, precluded from passing any order, which could disturb or modify the same, which in fact opens up the entire case. In view of hereinabove facts and circumstances of the case and the discussion made thereunder, I am of the view that listed application is misconceived and must not be entertained. Accordingly the same is dismissed. Matter be listed for arguments on the report of Chartered Accountant.

Dated: 27.04.2018