

IN THE HIGH COURT OF SINDH AT KARACHI

First Appeal 48 of 2018

Present: **Muhammad Ali Mazhar and Agha Faisal, JJ.**

Mian Ejaz Ahmed and Another
vs.
Meezan Bank Limited

For the Appellants : Mr. Abdul Shakoor, Advocate

For the Respondent : Mr. Nabeel Kolachi, Advocate

Date of Hearing : 13.02.2019

Date of Announcement: 13.02.2019

JUDGMENT

Agha Faisal, J.: Present appeal was filed assailing the Order dated 11.04.2018 ("**Impugned Order**"), delivered by the learned Banking Court No. V, Karachi in Execution No. 28 of 2016 while deciding an application filed by the present appellants under Order XXI Rule 1(B) C.P.C. It may be pertinent to reproduce the brief content of the Impugned Order herein below:

"The judgment debtors above-named preferred to file application under Order XXI, Rule 1(B), Rule 2(2), C.P.C. read with section 7 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and section 151, C.P.C.

Upon notice; a counter-affidavit to the aforesaid application has been filed on behalf of the decree holder/bank.

Heard and record perused.

Per record the judgment debtors above-named had agreed to settle their outstanding liabilities with the decree holder under certain mutually agreed terms, which ultimately confirmed under the seal of this court vide Order and Decree dated 23.07.2015. In result thereof, the judgment debtors shall have

to pay an amount of Rs.10,000,000/- as full and final as settled amount towards the admitted liability of Rs.18,049,673/- and legal charges of Rs.108,861/-. However, an amount of Rs.1,000,000/- will have to be paid on or before 20.06.2015. Whereas, remaining balance of Rs.9,000,000/- shall be paid in six monthly installments as per below mentioned schedule:

S #	Date	Amount or Unit
Installment 1	02-June-2015	1,000,000
Installment 2	20-July-2015	1,000,000
Installment 3	20-Aug-2015	2,000,000
Installment 4	20-Sep-2015	1,000,000
Installment 5	20-Oct-2015	2,500,000
Installment 6	20-Nov-2015	1,500,000
Installment 7	20-Dec-2015	1,000,000
	Total	10,000,000

Record shows that the first four installments were made as per above schedule and thereafter the judgment debtors violated the terms of the compromise decree, hence the above execution filed on 11.04.2016.

The notice was duly served upon the judgment debtors, who subsequently made payment of Rs.3,200,000/- on 28.02.2017 through Cheque No. 97213103.

Since the judgment debtors have clearly violated the terms and conditions of the Para '7' of the compromise decree who admittedly failed to pay their liabilities as per agreed schedule, therefore, I am of humble view that the decree holder/bank are justified to file execution proceedings against the judgment debtors for adjudication on merits.

Keeping in view of the foregoing facts and circumstances, the plea raised on behalf of the judgment debtors have no force on merits. The application in hand stands dismissed accordingly with no order as to cost."

2. Briefly stated, Suit 536 of 2012 ("**Suit**") was filed by the present respondent against the appellants before the learned Banking Court No. V, Karachi and the said Suit was decided by virtue of a consent decree dated 23.07.2015, operative content whereof is reproduced herein below:

"3. The suit came up for final disposal on 23.07.2015 before Mr. Muhammad Shahid Shafiq, Judge Banking Court No. V, Karachi in presence of Mr. A.I. Chundrigar, advocate for the

plaintiff and Mr. Ali Asadullah, advocate for defendants. The plaintiff and defendants have agreed for a decree in favor of the plaintiff for the suit amount as per the following terms and conditions:

“Terms and Conditions of the settlement:

1. The defendants will pay an amount of Rs.10,000,000/- as full and final settlement amount towards defendants total outstanding/admitted liability of Rs.18,049,673/- and legal charges of Rs.108,86/- against the defendants.
2. By accepting this offer letter you hereby undertake that:
 - a. An amount of Rs.1,000,000/- will be paid on or before June 20, 2015.
 - b. Remaining balance of Rs.9,000,000/- shall be paid in 6 monthly installments as per below mentioned schedule.
 - c. Upon acceptance of this Offer Letter, an application shall be filed in the Court for obtaining consent decree in respect of suit amount along with costs of funds, in favor of the Plaintiff/Bank.
3. Post dated cheques of all above installments will be submitted to the bank as per mentioned plan.

S #	Date	Amount or Unit
Installment 1	02-June-2015	1,000,000
Installment 2	20-July-2015	1,000,000
Installment 3	20-Aug-2015	2,000,000
Installment 4	20-Sep-2015	1,000,000
Installment 5	20-Oct-2015	2,500,000
Installment 6	20-Nov-2015	1,500,000
Installment 7	20-Dec-2015	1,000,000
	Total	10,000,000

4. The bank will not demand charity amount and all other charges if the payment of full and final settlement amount is paid as per agreed plan.
5. In case any of the provided PDCs is dishonored due to any reason this offer letter shall stand cancelled/withdrawn and the Bank will file direct execution application against the defendants for sale of attached/mortgaged property in the Banking Court.
6. The Bank shall lodge the cheques for clearing without making and prior intimation and it is to be ensured that

sufficient funds are available in the account to clear the above mentioned cheques on the due dates.

7. *Upon committing any default in payment of settled liability(s) on due dates, the remission in profit, charity, cost of suit and other amounts shall automatically be withdrawn.*

(Underline added for emphasis.)

8. *After adjustment of total agreed amount within the time stipulated above, the bank shall issue NOC and release the mortgaged properties and documents there-against.*

4. *It is hereby ordered that the suit of the plaintiff is decreed in the above terms with no order as to cost”.*

3. It is an admitted fact that the aforesaid decree was delivered upon an application seeking the same, preferred jointly by the parties to the present proceedings. It is also a fact that the aforesaid judgment and decree has never been challenged by the appellants in any appeal whatsoever. The record reflects that upon default of the present appellants to satisfy the terms of the consent decree execution proceedings were initiated there against, being Execution No. 28 of 2016. During pendency of the said execution proceedings, the present appellants filed an application praying that since an additional amount had been paid by the appellants during pendency of the execution proceedings, therefore, the learned Banking Court may be pleased to pass an order for satisfaction of the compromise decree. The aforesaid application stated *inter alia* that the terms of the consent decree had in fact upon mutually agreed; and that the payment of the agreed amount on the agreed time could admittedly not be undertaken by the present appellants and the same was attributed to the lawlessness allegedly prevailing in the area where

place of the business of the appellants was situated. The said application was considered by the learned Banking Court No. V, Karachi and the same was decided by virtue of the Impugned Order, in which it was held that since the appellants have admittedly violated the terms and conditions of the compromise decree, therefore, the application preferred stands dismissed and the execution proceedings shall proceed on their merits.

4. Mr. Abdul Shakoor, Advocate argued on behalf of the appellants that the agreed decretal amount had been duly paid by the appellants and that no further amount could be claimed there from; that the delay in making payment of the amount could not render the appellants in default of the compromise decree; and that the additional amount now being claimed from the appellants were even otherwise not permissible to be recovered there from under the law. Learned counsel prayed for setting aside of the Impugned Order and in such regard relied upon the case of *Saeed Akhtar vs. Pervaiz Hanif* reported as 2007 CLD 524 ("**Saeed Akhtar**") and the case of *Dr. Faiz Rasool and Others vs. The Askari Bank Limited* reported as 2015 CLD 1710 ("**Dr. Faiz Rasool**").

5. Mr. Nabeel Kolachi, Advocate presented the case of the respondent bank and submitted that the Impugned Order was rendered in accordance with the law and merited no interference in the present proceedings. It was contended that the consent decree clearly stipulated the consequences of default and that the said consequences were dully agreed by the present appellants, hence, the appellants could not be permitted to resile from their position.

Learned counsel submitted that no appeal was ever filed against the judgment and decree and that even the application, resulting in the Impugned Order, was filed not assailing the judgment and decree but merely seeking for an order to the effect that the decree had been satisfied. Per learned counsel the present proceedings of assailing the judgment and decree could not be permitted at this stage and especially in the manner chosen by the appellants in such regard. Learned counsel submitted that the present appeal merited dismissal forthwith.

6. We have considered the arguments of the respective learned counsel and have also appreciated the documentation and case law arrayed before us. It is an admitted fact that the judgment and decree in the Suit was a result of a compromise application jointly filed by the parties and the agreed terms are accurately reflected in the resulting judgment and decree. It is also within our contemplation that the executing Court could not travel beyond the decree itself and, hence, the sole question for this Court to determine is whether there was any infirmity in the Impugned Order that would merit interference in appeal.

7. We have observed that while the Suit claimed an amount of Rs.18,049,673/- alongwith cost of funds etc. The compromise application stipulated that the respondent shall accept an amount of Rs.10,000,000/- in full and final settlement of its claim, provided that the same is received in accordance with the schedule prescribed in the said application. Paragraph No. 11 of the said application clearly stated that upon default in payment of any single installment on its

due date the remission in profit, charity, cost of suit and other amounts shall automatically stand withdrawn and the decree will be deemed to be a mortgage and personal decree as prayed for in the plaint, content whereof was expressly reproduced in the compromise application itself. It is noted that the said stipulation was succinctly mirrored in the terms of the judgment and decree; paragraph No. 7 of the decree stipulating that upon committing any default in payment of settled liability on due dates, the remission in profit, charity, cost of suit and other amounts shall automatically be withdrawn. It is an admitted fact that after payment of the first four (04) installments the terms of the judgment and decree were violated as the subsequent amount was not paid at any time prior to the pendency of the execution proceedings. The consequence of violation of the aforesaid terms was duly prescribed in the compromise application and accurately mirrored in the judgment and decree delivered in pursuance thereof. Since the judgment and decree was never assailed before any forum by any party, such challenge could not be permitted to be maintained in the manner presently adopted by the appellants. A Division Bench of the Honorable Lahore High Court maintained in *Saeed Akhtar* case that an executing Court could not go beyond a decree. Even though the aforesaid judgment was cited by the learned counsel for the appellants the same does not augment the appellants' case as the executing Court, while rendering the Impugned Order, clearly did not venture beyond the decree. *Dr. Faiz Rasool* was another pronouncement of the Honorable Lahore High Court wherein constituents of a judgment pronounced consequent to the conclusion of adversarial proceedings was determined. In the

present facts and circumstances, no constituent of the judgment and decree has ever been challenged by the appellants and on the contrary the said judgment and decree crystalized as a consequence of a joint compromise application made by the parties. In this backdrop the judgment cited by the learned counsel for the appellants are distinguishable herein.

8. It is also noted that Section 22(6) of the Financial Institutions (Recovery of Finance) Ordinance, 2001, precludes the consideration of an appeal against any interlocutory order of a Banking Court which does not dispose of the entire case. The learned counsel for the appellants was unable to demonstrate to the Court as to why the present appeal should even have been considered in the presence of the bar contained in the aforesaid provision of the law.

9. In view of the foregoing, we are of the considered view that the learned Banking Court has delivered the Impugned Order in due consonance with the law, hence, same is hereby maintained and upheld. The present appeal, alongwith pending application/s, is hereby dismissed with no order as to cost.

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