

IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Muhammad Shafi Siddiqui

C.P. No.S-1862 of 2016

Dewan Sugar Mills Limited

Versus

M/s. Trading Corporation of Pakistan (Pvt.) Limited & others

Date of Hearing: 17.11.2017

Petitioner: Through Mr. Khalid Jawed Khan Advocate

Respondent No.1: Through Mr. Raifq Ahmed Kalwar Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This petition involves a dispute between the petitioner/tenant and respondent No.1/landlord. Petitioner claimed to be in occupation of rented premises. There was a dispute of payment of rent which led to filing of ejectment application as Rent Case No. 04/2009. During pendency of the ejectment application a rent order in the sum of Rs.23,755,482/- was passed on 21.12.2010. It is the case of the petitioner that after filing of ejectment application i.e. on or before 27.7.2009, the correspondence started between the petitioner and respondent No.1. First letter cited by the petitioner's Counsel is of 07.5.2010 for eviction on the ground of personal requirement as well as default w.e.f 01.8.2008. On 02.1.2011 after passing of rent order petitioner wrote a letter to the respondent wherein the cheque was stated to be enclosed toward the rental outstanding followed by series of letters dated 12.2.2011, 08.3.2011, 04.4.2011, 05.5.2011 and 06.6.2011 along with cheques. The Counsel has next relied upon the letter of Trading Corporation of Pakistan/respondent No.1 dated 30.6.2011 with reference to last letter of the petitioner dated 16.6.2011 wherein the respondent No.1 had allowed in their meeting of Board of

Directors held on 31.1.2011 to pay the outstanding arrears in four installments in terms of schedule given therein as compared to the order of the Rent Controller dated 21.12.2010 requiring the petitioner to pay outstanding dues within 30 days. However the petitioner was appraised through the aforesaid letter that so far an amount of Rs.12,360,567/- was paid against the first and second installment leaving a deficit of Rs.6,360,576/- and the rent amount of second installment as arrears was payable by 28.5.2011. They were informed of the subsequent order dated 17.5.2011 whereby the defence on account of non-payment as per Court order was struck off. Through the aforesaid letter finally they gave an extension of time by 15.7.2011 for clearance of second installment with a hope that the 3rd and 4th installment will be paid on due dates. They were also cautioned that in case the amount in the above terms is not paid they would move application for execution of the order. Before this communication on 30.5.2011 respondent No.1 issued a letter for payment of the outstanding rent as per agreed schedule as by that time Rs.7,360,576/- was outstanding towards arrears.

2. It is the case of the petitioner that while the petitioner was making efforts for a settlement through the correspondence referred above, an order dated 17.5.2011 was obtained striking off defence of the petitioner and they were informed by letter dated 30.6.2011. By letter 06.7.2011 petitioner attempted to make payment of rent for the month of July 2011 and a sum of Rs.1:00 Million towards arrears in terms of the rent order referred above. Petitioner then relied upon the letter dated 10.8.2011 with reference to a meeting with the Chairman of TCP enclosing nine post dated cheques dated 05.8.2011 to 05.4.2012 towards arrears. It is urged that those cheques were stated to be misplaced by respondent/landlord, as informed by them through letter dated 17.8.2011 followed by another letter dated 20.9.2011 which is related to an alleged compromise agreement. Through this letter respondent No.1 stated that in their 274th meeting, Board of Directors have agreed to

settle the matter by accepting the payment in installments through postdated cheques and that a draft agreement was forwarded. The draft lease agreement includes the mode of payment and enhancement of rent w.e.f. 01.6.2010 as well as maintenance charges including air conditioning charges. Petitioner then relied upon their letter dated 21.11.2011 enclosing a compromise agreement and tenancy agreement dated 01.10.2011.

3. It is the case of the petitioner that the said order whereby the defence was struck off is unexecutable and unenforceable as the Decree Holder/respondent's right to seek possession of the premises on account of waiver and estoppel was aborted. The show cause notice in respect of execution application was issued and replied also followed by an application under section 12(2) CPC with the prayer that the respondent No.1 has obtained the order dated 17.5.2011 on the back of the opponent through misrepresentation of facts and fraud and has prayed for the dismissal of the rent case or in substance setting aside of order dated 17.5.2011. The application was contested by the respondent and an order dated 07.8.2012 was passed by the Rent Controller observing that the order was not obtained through misrepresentation or fraud and consequently dismissed the application under section 12(2)CPC. Petitioner has challenged the order of the Rent Controller through a petition bearing CP No. 923/2012 and the same also dismissed on 09.8.2016 upholding the findings and reasoning of the Rent Controller that the order was not obtained through misrepresentation and fraud.

4. Mr. Khalid Jawed Khan learned Counsel for the petitioner submitted that though the order passed in the aforesaid petition was suspended at the request of the petitioner to enable them to approach Hon'ble Supreme Court but on his advice the proceedings initiated under section 12(2) CPC was aborted as in view of the facts and circumstances referred and as they claimed that the decree has become unexecutable,

he advised his client to move application under section 47 CPC which he believed to be a remedy available to the petitioner under the law and under the facts and circumstances of the case. Accordingly an application under section 47 CPC was filed before the Executing Court based on development subsequent to passing of rent order followed by an order dated 17.5.2011 whereafter it is claimed that new understanding and mechanism for clearance of rental dues arrived between the parties, rendering the execution of the decree unexecutable. As against this a statement claimed to have been filed/ attached as annexure-Z-1 on 14.10.2016. The application under section 47 CPC was dismissed by order dated 01.11.2016 on the grounds and reasoning that earlier an application under section 12(2) CPC has already been dismissed on the same grounds and facts.

5. Aggrieved of the decision/order on an application under section 47 CPC, petitioner preferred a Revision Application No.156/2016 which too met the same fate certifying that the executing Court cannot allow the parties to re-agitate the same issues before the Executing Court as purpose of Section 47 CPC will be diminished. In addition to the above, it was also observed by the revisional Court that no appeal was preferred in respect of an order whereby the defence was struck off hence it was held as a futile effort to invoke section 47 CPC. The order passed on the revision application is now impugned in this petition.

6. With this background of facts, learned Counsel submitted that the decision and orders passed under Section 12(2) CPC can, under no stretch of imagination be considered or relied upon to oust the petitioner from invoking the provision of Section 47 CPC which in fact is a remedy available to the petitioner in view of the facts and circumstances of the case. Proceedings under section 12(2) CPC claimed to have been initiated under wrong and incorrect advice and without prejudice to such they were not ousted from availing a right remedy

under the law. The application under section 47 CPC is no doubt filed on the basis of common facts but recourse of law towards independent applications are different and distinct as the decree itself was never challenged by the petitioner in the present proceedings. It is the mode and mechanism of payment which was waived by the respondent No.1 through an arrangement and understanding which is other than the payment to be made in terms of rent order dated 21.12.2010. Learned Counsel for the petitioner has conceded to the extent that there is no ingredients of any fraud or misrepresentation but it is the agreement and arrangement and waiver of eviction in terms to settle payment of arrears and future rent. It is claimed that the compromise application was not signed because of the issues of maintenance charges which was never an issue until first draft came to the petitioner and hence only to such an extent, which relates to payment of maintenance charges the draft was not materialized whereas rest of the terms were not disputed including but not limited to enhancement of rent. Learned Counsel relied upon the following judgments:-

- i. Southern Gas Co. Ltd & another vs. Dr. Abdul Rashid Pirzada & other reported in 2000 CLC 414
- ii. Habib Bank Limited v. Mst. Parveen Qasim Jan & others reported in 2014 SCMR 322.
- iii. Riaz Hussain & others vs. Muhammad Akbar & others reported in 2033 SCMR 181
- iv. Fakir Abdullah & others vs. Government of Sindh & others reported in PLD 2011 SC 131 and
- v. Muhammad Yasin vs. Sheikh Ghulam Murtaza & another reported in PLD 1988 SC 163.

7. Mr. Rafiq Ahmed Kalwar learned Counsel for the respondent No.1 did not dispute the facts of the case and submitted that the petitioner has exhausted and over-exhausted remedies by not only replying to show cause notice issued by executing Court but also by moving an application under section 12(2) CPC on the same facts and ground followed by a petition, and the order therein provides an answer to all the questions

now raised in this petition as well as in the application under section 47 CPC. He submitted that it is an implied and constructive resjudicata and answer to the questions which are being raised are also available. He submitted that petitioner has not even followed the subsequent schedule which was provided by way of four installments. Learned Counsel has relied upon the cases of Habib Bank Limited v. Mst. Parveen Qasim Jan & others (2014 SCMR 322), Ghulam Akbar Lang vs. Dewan Ashiq Hussain Bukhari & others (2012 SCMR 366), Muhammad Mukhtar Rana vs. Special Tribunal, Punjab, Lahore & another (PLD 1977 Lahroe 524), Muhammad Akram Khan vs. Abrar Ahmed & others (2012 CLC 1621), S.A. Latif vs. Nadir Khan (PLD 1968 Lahore 144) and Messrs Haji Ahmed & Co vs. Muhammad Siddique & others (PLD 1965 9W.P) Karachi 293).

8. Heard the learned Counsel and perused the material available on record.

9. In order to deal with the case of the petitioner now presented it is necessary to understand the two jurisdictions exercised by Court one under section 12(2) CPC and the other under section 47 CPC. Section 12(2) CPC primarily and substantially deals with an order of the Court which claimed to have been obtained through fraud and misrepresentation whereas provisions of Section 47 CPC deals with the post decree scenario which materially relates to the executability, adjustment or satisfaction of the decree. It is matter of fact that the pleadings of the petitioner in terms of 12(2) CPC and in terms of Section 47 CPC are almost common but there was a thin line drawn by the petitioner by inserting and supporting it with an argument that the remedy lies with the executing Court as the decree whereby the defence was struck off and eviction order was passed was not challenged. It is the satisfaction and executability of decree to be seen in view of the above facts and circumstances whereby the parties reached to

understanding of payment of arrears and future rent, that the decree was claimed to have been rendered unexecutable and/or stands adjusted or satisfied hence the petitioner should not have been ousted by the executing Court as well as by the revisional Court on the strength of reasoning and decision on an application under section 12(2) CPC followed by reasoning provided in CP No.923/2012 wherein the order passed under section 12(2) CPC was challenged and a distinct jurisdiction was exercised.

10. Section 47 CPC as it reads deals with the “questions arising between the parties to the suit” in which the decree was passed relating to the execution, discharge or satisfaction of the decree to be determined by the executing Court. “Questions arising out of suit” are very important for the purposes of later part of this judgment. On the strength of correspondence referred above learned Counsel has made an attempt that the decree was rendered unexecutable or satisfied as there was a consensus not only to the recovery/payment of the outstanding arrears and future rent through correspondence but an attempt was made that such negotiation culminated into compromise draft which was prepared and exchanged which was not materialized on the ground which is “other than a question involvd in the suit” i.e. maintenance charges. Had it not been followed by a draft lease agreement it could have been understood that it (settlement and/or negotiation) relates to recovery only. It is thus not fraud and misrepresentation that the petitioner has earlier claimed to have been exercised. The decree may have been obtained on account of non-payment of rent as ordered by the Rent Controller but the post decree facts enabled the petitioner to invoke the provisions of section 47 CPC which is within the domain and functions of the executing Court. As to this contention relating to powers and jurisdiction of a Court deciding an application under section 12(2) CPC and powers and jurisdiction of executing Court deciding the application under section 47 CPC, I agree that they do not overlap or

supplement each other. These are two different and independent remedies to be availed according to the circumstances of the case. The case of the petitioner is not one which deals with obtaining decree under fraud and misrepresentation. It is rather to be seen whether it is in view of the facts mentioned and referred as above and in affidavit in support of application under section 47 CPC, the decree is rendered as unexecutable, discharged or satisfied, independently.

11. Lets have a microscopic view of the correspondence subsequent to passing of a tentative rent order dated 21.12.2010 and final order dated 17.5.2011. They claimed to have approached the respondent on 21.1.2011 for settlement and vide Board's decision on 31.1.2011 in their 269th meeting petitioner was allowed to pay the arrears in four installments. It is claimed that before the due date of the first installment the application for striking off defence was filed however there was a shortfall in the payment of the first installment by 28.2.2011 and consequently the application for striking off defence of the petitioner was allowed on 17.5.2011, eleven days before the next date of installment i.e. 2nd installment. The petitioner may not have been vigilant in pursuing their matter but it is not fraud or misrepresentation that they have now pleaded. The petitioner was informed of this order by letter dated 30.6.2011. The letter of 30.6.2011 provides an extension of time to the extent of 15.7.2011 for clearance of balance of second installment with expectation that 3rd and 4th installments shall be paid by due dates and they were further informed that in case the second installment of arrears would not paid by 15.7.2011, the respondent will be constrained to move application for execution. By a letter of 10th August, 2011 petitioner sent 18 cheques towards arrears and current rent. These cheques were stated to be misplaced and request for issuance of fresh cheques was made vide respondent's letter dated 17.8.2011. The minutes of, Trading Corporation of Pakistan, Board of Directors' 274th meeting are not available but in a letter dated 20.9.2011

it is stated that they have agreed to settle the matter through postdated cheques in installments against balance outstanding rent, arrears as well as monthly rent. However in the said letter they have also claimed maintenance charges including air-conditioning charges which is the bone of contention as far as the execution of the agreement is concerned.

12. Section 47 of Civil Procedure Code enables the executing Court to determine all questions arising between the parties regarding which decree was passed relating to the execution, discharge or satisfaction of a decree and not by a separate suit. An attempt was made in the above terms to show that there was consensus between the parties as to the mode and mechanism of payment of arrears and future rent which is the subject matter and “question arising out of rent case” which may culminate to the discharge and satisfaction of the decree by accepting the postdated cheques but apparently the decree was for eviction and not for the payment of arrears of rent. This is also an admitted position that there was no dispute as to the claim of maintenance until letter dated 20.9.2011 was issued as it was raised for the first time through the subject letter after the mode of payment was agreed. If at all there was any arrangement between parties to the extent of payment of arrears and “future rent” and a draft agreement was also prepared, the presumption and intention is not difficult to understand. Why would a landlord exchange a draft agreement if the intention was only to recover arrears of rent as only in presumptive situation the case of executing fresh lease could arise and not otherwise.

13. The findings of the two Courts below with reference to section 47 of Civil Procedure Code are somehow based on the findings of section 12(2) of Civil Procedure Code which is extraneous to the requirement of Section 47 of Civil Procedure Code for its disposal.

14. Dealing now to a critical question, requirement of Section 47 of Civil Procedure Code is that, to have a compromise recognized by the Court. It has to be recorded under Rule 2 Order 21 of Civil Procedure Code and the consequences of not having it so, is available under Sub-rule 3 of Rule 2 of Order 21 of Civil Procedure Code. Excluding the claim of maintenance charges, it could be said that the parties have attempted to resolve it amiably as the postdated cheques were accepted but such compromise was not signed and/or recognized as above. Whether the payment and acceptance of postdated cheques to clear the outstanding arrears, subject matter of rent case, is dependent upon maintenance charges, is a crucial question. That should have been answered by trial Court and revisional Court. Whether maintenance charges form “subject matter of case”, which is the requirement of Section 47 CPC.

15. I have the benefit of going through the judgment of Indian Courts on somehow identical issues which I reproduce.

16. In the case of *Lakshmi Navayn vs. S.S. Pindyal (AIR 2000 SC 2757) the Supreme Court of India* highlighted the rules of considering compromise which may come in the way of execution, discharge and satisfaction of the decree. Such compromise should, stated to have been recognized by the Court. This is the first hurdle that is required to be crossed by petitioner before executing Court.

17. In the case of *Padmanabha Pillai v. Sankaran Viswambaran* reported in AIR 1987 Ker 98, the Kerala High Court observed as under:

“—8. In this case the eviction petition was allowed. Even then till actual eviction the tenant is entitled to continue in possession. During that period by fiction of law his possession is that of a statutory tenant. He is bound to pay rent and the landlord is entitled to receive the same. In such a situation, payment and receipt of rent alone are not sufficient to create a new tenancy. The order of

eviction cannot stand discharged on account of such a situation alone. If such a position is accepted any tenant could defeat the order for eviction by raising such a contention. That will be opening floodgate to the tenants enabling them to deny the fruits of litigation to the landlords.—”

18. In the case of Lakshmi Narayanan vs. S.S. Pandian reported in AIR 2000 Supreme Court 2757, the Supreme Court of India observed as under:-

“----7. It may be pointed out here that after the rights of the parties are crystallized on passing of a decree by a competent Court, in law they are not precluded from settling their disputes outside the Court. But to have the compromise recognized by a Court, it has to be recorded under Rule 2 of Order 21 C.P.C. The consequences of not having it so recorded is contained in Rule 3 of Order 21 of the C.P.C. Rules 2 and 3 of Order 21 read as under:-..”

“2. Payment out of Court to decree-holder___(1) Where any money payable under a decree of any kind is paid out of Court, (or a decree of any kind is otherwise adjusted) in whole or in part to the satisfaction of the decree holder, the decree holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment debtor (or any person who has become surety for the judgment debtor) also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(2-A) ---- ---- ---- -----

(3) A payment or adjustment, which has not been certified or recorded as aforesaid shall not be recognized by any Court executing the decree.”

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13. *In a case where parties compromise after the decree in a case has been passed, the effect of the compromise on the executability of the decree depends upon the intention of the parties, which is a mixed question of law and fact and has to be determined by the executing Court on an application under Section 47 of the C.P.C on interpretation of the decree and the compromise in the light of the facts and circumstances of each case. If on such determination it is gathered that the intention of the parties is to extinguish the decree and either the decree holder or the judgment debtor got the compromise recorded under Rule 2 of Order 21 of the C.P.C by the Court whose duty it is to execute the decree, the execution of the decree cannot be proceeded with by the executing Court. But if the intention of the parties is to keep the decree alive and to give effect to it in the manner agreed upon between the parties in the compromise, the decree will be given effect to accordingly or executed as it is depending upon whether the compromise is recorded by the Court as aforementioned or not.*

14. *In the instant case, as noticed above, after the decree was passed in favour of the appellant for ejection of the respondent, the parties entered into compromise during the pendency of the execution proceedings which, inter alia, mentions that a portion of the suit premises was handed over to the appellant and in respect of rest of it the respondent was allowed three years to vacate the suit premises and hand over possession of it to the appellant for which an agreement of lease was also entered into between the parties. Clause (6) of the compromise memo is as follows:*

“(6) on the expiry of 3 years from the date of the agreement if the tenant does not surrender vacant possession of the above referred properties, the landlord shall be entitled to execute the order of eviction granted in RCOP No.2852/1989 without any notice to the tenant (except 3 pump sets and other movables).”

On filing of the compromise in the Court, the E.P. was dismissed as not pressed.

There is thus no recording of the compromise as contemplated in Rule 2 of Order 21, therefore, the Court cannot recognize the compromise having regard to the language of sub-rule (3)”

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16. *The fact that the parties entered into a new lease deed for three years pursuant to the compromise cannot be taken note of for reasons more than one. First, because the compromise was not recorded under Rule 2 of Order 21 and secondly, because the agreement of tenancy though for three years is not a registered documents as it should be in view of the provisions of Section 107 of the Transfer of Property Act and Section 17 of the Indian Registration Act. Be that as it may, we do not propose to rest our decision on the second ground as this point was not taken either before the executing Court or before the High Court. We are now left with the first reason only. The executing Court has simply dismissed the earlier E.P. as not pressed. It did not record the compromise between the parties, for this reason alone the compromise cannot be pleaded to bar the execution of the decree in view of the provisions of Rule 3 of Order 21 of the C.P.C--
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19. In the case of Prialal Das vs. Sadhana Kar reported in 84 CWN 322 the High Court of Calcutta in respect of a tenement regarding which the eviction was passed observed as under:

“2. Mr. Robin Mitra, learned Advocate appearing on behalf of the petitioner submits that the learned Munsif has exercised a jurisdiction not vetted in him by law by accepting an uncertified adjustment of the decree. Further he submits that the learned Munsif has made certain presumption under section 114 of the Evidence Act which he could not do as no such presumption arose. The principal question that was to be decided by the learned Munsif was whether there was an agreement between the petitioner and the opposite party about the creation of a new tenancy. There is a distinction between adjustment of

a decree either whole or in part and subsequent agreement creating a new right of liability between the parties. In the instant case, a new right has been created by the alleged agreement, viz, that the opposite party was granted a fresh tenancy in respect of the disputed premises at an enhanced monthly rent of Rs.25/-. Further she was to pay a sum of Rs.400/- to the decree holder petitioner. Her allegation was that she had paid the said sum to the petitioner, but he did not grant any receipt. That allegation has been believed by the learned Munsif. Indeed two witnesses were examined by the opposite party in support of her case that she had paid a sum of US 400/-. The learned Munsif has believed the evidence of these two witnesses. In the circumstances, I do not think that I shall be justified in interfering with the finding of the learned Munsif which is a finding of fact. The provision of Order 21 Rule 2 of the Civil Procedure Code has no application in the circumstances of the case.---

20. In the case of Behrulal vs. Ramautar reported in AIR 1981 MP 181, the High Court of Madhya Pradesh observed as under:

“—This question was examined by their Lordships of the Supreme Court in MANU/SC/0016/1966: AIR 1967 SC 1193 (supra) and it was observed: (at p.1195)

“But Order 21, Rule 2 prescribes a special procedure for recording adjustment of a decree, or for recording payment of money paid out of Court under any decree. However the plenary power conferred by Section 47 C.P. Code upon the Court executing the decree to determine all questions arising between the parties to the suit in which the decree was passed, and relating to execution, discharge or satisfaction of the decree, is not thereby affected. Whereas Order 21, Rule 2 deals with the procedure to be followed in limited class of cases relating to discharge or satisfaction of decrees, where there has been payment of money or adjustment or satisfaction of the decree by consensual arrangement. Section 47 C.P. Code deals with the power of the Court executing the decree.”

It is therefore clear that the power of the executing Court to determine the questions is different than the procedure prescribed in Order 21, Rule 2. By reading the language of

Order 21, Rule 2 Sub-rule (3) it can only be contended that if the satisfaction of the decree has not been certified as prescribed under Order 21, Rule 2, the executing Court could not go into that question; and to that extent with regard to the satisfaction of the decree the powers of the executing Court may be affected; but whether the decree could or could not be executed is a question altogether independent of Order 21, Rule 2 and if that question is raised, it could not be contended that the executing Court cannot go into that question because of Sub-rule (3) of Order 21, Rule 2 of the Code.

Learned Counsel for the petitioner placed reliance on the decision in Civil Revision No.997 of 1973 (1975 MPLJ 14) (supra). Unfortunately , the full report has not been placed before us; but what has been noted in the short-note reads:

“An adjustment is an agreement which extinguishes the decree in whole or part and results in satisfaction of the decree. When by an agreement the parties enter into a fresh contract of tenancy and thereby create a right in the tenant to continue in possession, a decree for ejectment passed earlier against the tenant gets extinguished and, therefore, such an agreement amounts to an adjustment of the decree.”

It is therefore clear that under Section 47 of the Civil Procedure Code the executing Court is conferred with powers to determine objections with regard to three things (i)execution, (ii) satisfaction, and (iii) discharge. So far as ‘satisfaction’ is concerned, a specific procedure has been provided under Order 21 Rule 2 and if that is not followed, Sub-rule (3) of Rule 2 provides that the Question cannot be gone into by the executing court. But there could be no difficulty when the objection pertains to the ‘execution’ of the decree and as discussed earlier the objection No.2 raised by the non-applicant Judgment debtor clearly pertains to the execution of the decree. Similar is the view taken in 1977 Jab LJ 29 (supra) and that also finds support from the decision of a Division Bench of this Court reported in MANU/MP/0128/1958: AIR 1958 Madh Pra 333 (supra).--”

21. In the case of Smt. Kalloo & others vs. Dhakadevi & others reported in AIR 1982 SC 813, the Supreme Court of India observed as under:

“----5. The only point urged before us by Shri Amlan Ghosh, learned Counsel for the judgment debtor was that the compromise dated 21.3.1968 created a fresh lease in favour of the judgment debtor in respect of the undelivered half of the shop, and the decree holder’s remedy was by a suit for recovery of its possession.

6. When a compromise petition is filed in an execution proceedings, and a contention is raised by the judgment debtor on a subsequent execution being started by the decree holder that the compromise has given rise to a fresh contract between the parties and that the decree sought to be executed is not executable, what is to be seen is whether the decree has been extinguished as a result of the compromise and a fresh contract has emerged. When a compromise takes place in the course of execution of a decree for eviction, the compromise may extinguish the decree and create a fresh lease, or the compromise may provide a mere mode for the discharge of the decree. What actually takes place depends on the intention of the parties to the compromise. And the intention has to be gathered from the terms of the compromise and the surrounding circumstances including the order recorded by the Court on the basis of the compromise.”

22. In the case of Suraj Kala vs. Mandir Kalisthan Ji, Nahan reported in 1994 RRR 304 the Himachal Pradesh High Court observed as under:

“---14. In Smt. Kalloo and others vs. Dhaka Devi and others (supra), the Supreme Court had pointed out in para-6 of the judgment that, “while a compromise takes place in the course of execution of a decree for eviction, the compromise may extinguish the decree and create a fresh lease, or the compromise may provide a mere mode for the discharge of the decree. What actually takes place depends on the intention of the parties to the compromise. And the intention has to be gathered from the terms of the compromise and the surrounding

circumstances including the order recorded by the Court on the basis of the compromise.” What happens to a decree on a compromise arrived at between the parties during the course of its execution depends upon the intention of the parties to the compromise. The two eventualities pointed out by the Supreme Court are not self exhaustive and there can be more depending upon the facts and circumstances of each case. In the present case, neither the decree has extinguished and fresh lease is created nor a mode has been provided for the discharge of the decree. Rather, on the interpretation of the orders of the Supreme Court and compromise arrived at between the parties it is clear that only the decree for possession was suspended, subject to payment of fixed amount of contract of fruit crop, which the Supreme Court had directed to give to the petitioner-judgment debtor. On the failure of payment of the amount of contract of fruit crop within the period stipulated by the orders of the Supreme Court and compromise order, the execution of the decree could be revived.---”

23. In the case of Rangaswamy Reddiar)died & Ors. Vs. Jaylakshmi Ammal reported in (1974) AIR 2Mad 167, the Madras High Court observed as under:

“---Mulla, in his Code of Civil Procedure, Volume I, 13th Edition, refers to Pamma v. Venkayya I.L.R (1935) Mad. 994; 69 M.L.J 451, AIR 1935 Mad. 860 as laying down the proposition that “ a distinction should be made between an agreement which relates to the mode of execution or satisfaction of a decree and one which had the effect of rendering the decree nugatory and inexecutable in whole or in part and that, while the former may be pleaded in execution, the latter could not be. “But this is not to say that a pre-decretal agreement was held by Papamma vs. Venkayya I.L.R (1935) Mad. 994: 69 M.L.J 451: A.I.R 1935 Mad. 860, as one in attack of the decree or as one which by itself rendered the decree a nullity or nugatory. A pre-decretal agreement not to execute a decree pre-supposes a decree which is valid and in full force as well as executable. Such an agreement does not, in any way, vary the terms of affect its validity or denies its existence.

There may be cases where a pre-decretal agreement possibly involves a fraud practiced on Court, on the basis of which it is made to pass a decree. We are not concerned in the instant case with such cases. Here, the agreement, made subsequent to the suit and prior to the decree, was merely an understanding that the decree passed should not be executed. That recognizes that such an agreement can well be pleaded, as it relates to execution of the decree and is within the purview of Section 47 of the Code of Civil Procedure.”

24. The reason of discussing the aforesaid judgments in respect of Section 47 and Order 21 Rule 2 of Civil Procedure Code is to ascertain that the criteria, reasoning and rationale of deciding two applications one under section 12(2) and the other under section 47 of Civil Procedure Code are different and distinct and the reasoning of the earlier cannot overlap the reasoning of the later.

25. The executing Court while deciding application got influenced by the findings of earlier round in respect of an application under section 12(2) CPC in CP No.923/2012. Findings of the trial Court and appellate Court should have been based on rationale as to whether there was any compromise to adjust or satisfy the decree to make it unexecutable? Whether there was any compromise between them in respect of a question arising out of suit/application i.e. arrears of rent and eviction? Whether maintenance claim in draft compromise or correspondence was extraneous to the “question arising out of pleadings” hence the trial Court can exercise jurisdiction in terms of Section 47 CPC? Whether an alleged compromise can “still” be certified by the Court under Order 21 Rule 2 CPC, executing the decree excluding the issue of maintenance charges or any other issue not arising out of pleadings?

26. Ousting the petitioner from availing their remedy which they could have before the executing Court amounts to a denial of fair trial. I am in agreement that such a compromise ought to have been recognized

by executing Court, however whether tenant can still make an attempt to have it recognized or otherwise, the jurisdiction vest with the executing Court to be exercised first and I refrain from passing on my observation as it may prejudice the case of parties.

27. The judgments cited upon by the learned Counsel for the respondent are not relevant in the sense that this is not a question of fraud and misrepresentation that has been agitated. None of the judgments relied upon by the respondent Counsel touches the question and grounds raised by petitioner. It is unexcitability, discharge and satisfaction of the decree that needed to be considered, hence the cases relied upon are distinguishable to the one in hand.

28. Hence, the two orders dated 09.11.2016 passed by the Vth District Judge, Karachi (South) and 01.11.2016 passed by the VIth Senior Civil Judge, Karachi (South) are set aside and the case is remanded to the executing Court for passing appropriate order on the application under section 47 CPC without being influenced by any observation here, which may embark upon merit.

Judge

Dated: 04.12.2017