

2015 C L C 1278

[Sindh]

Before Muhammad Shafi Siddiqui, J

NATIONAL BANK OF PAKISTAN and 5 others----Appellants

versus

SULTAN ALI LAKHANI----Respondent

Execution Application No.64 of 2013, decided on 5th March, 2015.

Civil Procedure Code (V of 1908) ---

---S. 47 & O. XXI, R. 23-A---Arbitration Act (X of 1940), S. 14---Application for making award as rule of court---Consent decree---Execution petition---Objections---Contention of decree holders was that objections to execution petition could not be considered unless judgment debtor had deposited the decretal amount or furnished security in lieu thereof---Validity---Validity of decree could only be challenged before the Executing Court if the same was void or had been passed by the court having no jurisdiction---Provisions of O.XXI, R.23-A, C.P.C. were mandatory and objections to the execution by a judgment debtor could not be considered unless judgment debtor had deposited the decretal amount or furnished security in lieu thereof---Executing Court could not go beyond the decree---Judgment debtor could not escape from his obligation under the decree---Requirement of notice and hearing were duly complied with at the time of trial---Executing Court could not be burdened with re-trial---Compromise decree was in fact a contract, breach of which might give rise to fresh cause of action to decree holder---Decree was neither void nor it had been passed by a Court having no jurisdiction---Objections to execution application taken by the judgment debtor were over-ruled, in circumstances.

Fakir Abdullah v. Government of Sindh PLD 2001 SC 131; Abdul Wahid v. Abdul Ghani PLD 1960 Kar. 990; Tauqir Ahmed Qureshi v. Additional District Judge Lahore PLD 2009 SC 760; Rasheed Ahmed v. Government of Punjab PLD 2005 SC 193; Riaz Hussain v. Muhammad Akbar 2003 SCMR 181; Mrs. Zia Farhat v. Presiding Officer, Special Court 1996 MLD 680; Muhammad Aslam Siddiqui v. Hasina Begum 1986 MLD 735; Alhamdi Begum v. National Bank of Pakistan PLD 1976 Kar. 723; Ch. Muhammad Nawaz v. Ch. Rehmat Ali 1994 SCMR 349; Shaikh Ateeq ur Rehman Sarwar v. Sajjad Hussain 2009 SCMR 684; Hamida Begum v. Additional District Judge Lahore 1986 CLC 1697; Sharaf Faridi v. Federation of Pakistan PLD 1989 Kar. 404; Muhammad Nadeem Arif v. I.G. Police Punjab 2011 SCMR 408; Fauji Foundation v. Shamimur Rehman PLD 1983 SC 457; National Bank of Pakistan v. SAF Textile Mills PLD 2014 SC 283 and Abdul Rahim v. United Bank Limited PLD 1997 Karachi 62 distinguished.

Habib Bank Limited v. Parveen Qasim Jan 2014 SCMR 322; Islamic Republic of Pakistan v. Muhammad Saeed PLD 1961 SC 192 and Peer Dil v. Dad Muhammad 2009 SCMR 1268 rel.

Khalid Anwar along with Mustafa Ali and Jawwad Qureshi for decree-holders.

Rasheed A. Razvi along with Jamal Bukhari for judgment-debtor.

Dates of hearing: 19th, 24th, December, 2014, 12th, 22nd January and 6th February, 2015.

ORDER

MUHAMMAD SHAFI SIDDIQUI, J.--- By this order I would consider and dispose of the objections to this execution application filed under section 47 of Code of Civil Procedure as well as an application bearing CMA No.471 of 2013.

In very brief the facts of the case are that in pursuance of a decree passed in Suit No.824 of 2010 this execution application has been filed. The said consent decree was in fact an Award passed by the Arbitrator dated 19-5-2010 which was made Rule of the Court through application under section 14(2) of the Arbitration Act, 1940; jointly preferred by the decree holders and the judgment debtor. Through this execution application the amount sought to be recovered is Rs.1355.496 Million.

Learned counsel for the judgment debtor while arguing in support of the objections as well as application under section 12(2), C.P.C. has taken me to the history that culminated into consent decree. Learned counsel has traced out the history as to how such settlement terms were arrived while the judgment debtor was in custody and the matter was referred to the Arbitrator who had decided as many as 24 issues, mostly in favour of judgment debtor where he was not held to be at default.

Learned counsel for the purposes of this execution application has in fact raised five questions of law which he has sought to be determined. Since the counsel has filed a statement insofar as these questions are concerned, I would like to reproduce the same as under:---

- (1) Whether an executing Court is competent to examine the pleadings, judgment and subsequent events to ascertain whether the decree is executable or otherwise before giving any direction under Order XXI, Rule 23-A, C.P.C.
- (2) Whether in case of a decree which is based on performance of mutual and reciprocal obligations, an execution application would be maintainable without performing such obligations?
- (3) Whether in the circumstances of the case, Sultan Ali Lakhani (SAL) could be treated as "Judgment Debtor" in stricto-sensu?
- (4) What is the legal consequence of Article 10-A of the Constitution of Pakistan, 1973; on the scope of Order XXI, Rule 23-A, C.P.C.?
- (5) In view of the facts and circumstances of the case, whether the objections could be treated as an independent suit pursuant to section 47(2), C.P.C.?

For the purpose of Question 1, learned counsel for the judgment debtor has relied upon case of Fakir Abdullah v. Government of Sindh reported in PLD 2001 SC 131 and in addition submitted that since time was essence of the agreement, which culminated into a decree, this Court cannot extend the time which would amount to travelling beyond the limits prescribed for the executing Court.

Next learned counsel has pointed out that in case of a consent decree passed on mutual and reciprocal obligations the question of its execution cannot be raised until the reciprocal obligations are performed by other party which in this case is the decree holder. In this regard learned counsel for judgment debtor has relied upon the case of Abdul Wahid v. Abdul Ghani reported in PLD 1960 Karachi 990.

Insofar as third question is concerned, learned counsel for the judgment debtor contended that under these circumstances the judgment debtor cannot be considered as a stricto sensu judgment debtor since compliance on the part of the decree holder has not been made. Learned counsel on this proposition has relied

upon the case of *Tauqir Ahmed Qureshi v. Additional District Judge Lahore* reported in PLD 2009 SC 760.

Insofar as fourth question is concerned learned counsel submitted that in relation to the scope of applicability of Order XXI, Rule 23-A, C.P.C., Article 10-A of the Constitution would prevail and any restrictions or liabilities which are to be imposed would take away the right of the judgment debtor as provided in terms of Article 10-A of the Constitution. Learned counsel in this regard has relied upon the case of *Rasheed Ahmed v. Government of Punjab* reported in PLD 2005 SC 193.

Lastly learned counsel submitted that in view of such objections as raised these are to be treated as an independent suit in pursuance of section 47, C.P.C. In this regard teamed counsel for judgment debtor relied upon the case of *Riaz Hussain v. Muhammad Akbar* reported in 2003 SCMR 81.

Learned counsel for the judgment debtor in addition to the above has also relied upon other case-laws, which are discussed in detail herein below and submitted that in view of aforesaid facts and circumstances and the case-law relied upon by him the execution application is not maintainable and is liable to be dismissed.

On the other hand learned counsel for the decree holders has taken me to the provisions of Order XXI, Rule 23-A, C.P.C. and without prejudice submitted that its compliance is mandatory and objections to execution application cannot be considered unless the judgment debtor deposits the decretal amount or furnishes security in lieu thereof. Learned counsel for the decree holder further submitted that the language of Rule 23-A, C.P.C. is clear in terms whereof when the judgment debtor objects to the decree it shall perform its obligation and which need to be fulfilled.

Learned counsel further submitted that section 47, C.P.C. and Order XXI, Rule 23-A, C.P.C. are to be read independent to each other and any point or objection as to non-executeability of the decree would relate to the execution of a decree which is subservient to the provisions of Rule 23-A of Order XXI, C.P.C. Learned counsel has relied upon case of *Sardar Ahmed Yar Khan v. Province of Balochistan* reported in 2002 SCMR 122 and others and submitted that the executing Court cannot go beyond the decree and it must take decree as it stands as it is binding and conclusive between the parties to the suit.

Learned counsel for the decree holder has further submitted that insofar as the application under section 12(2), C.P.C. is concerned the same is not maintainable under the law as it only amount to drag the execution proceedings. Even otherwise, per learned counsel, such application was preferred in respect of an interlocutory order which is not final and hence on this score alone such application is liable to be dismissed.

In support of his arguments, learned counsel for decree holders relied upon the cases of *Happy Family Associate v. Pakistan International Trading Company* (PLD 2006 SC 226), *Messrs Nowshera Bricks v. RDFC* (2002 CLC 904), *Gul M. Mir Bhar v. NLC* (2001 YLR 837), *Nawab and another v. Fazal Abbas* (PLD 2005 Lahore 83), *M. Yasin Khan v. Aftab Ahmed Khan* (PLD 1976 Karachi 1133), *Qadir Ahmed Siddiqui v. Ramzan Ali and others* (PLD 1977 Karachi 273), *Hanifa Begum v. M. Qamaruzzaman* (1992 CLC 1699), *Abdul Majid v. Allied Bank of Pakistan* (2003 CLD 288), *Allied Bank of Pakistan v. Fateh Textile Mills Ltd.* (PLD 2007 Karachi 397), *Lilaram v. Ghulam Ali* (1991 SCMR 932), *Messrs Dadabhoy Cement Industries v. NDFC* (2002 CLC 166), *Sardar Ahmed Yar Khan v. Province of Balochistan* (2002 SCMR 122), *Abdul Kalik v. Haji and another* (PLD 1983 Lahore 445), *State Bank of Pakistan v. Khyber Zaman* (2004 SCMR 1426), *Mst. Saeeda Begum v. Al-Haj Syed Masood Akhtar* (1989 CLC 1091), *Pakistan Fisheries Ltd. v. United Bank Limited* (PLD 1993 SC 109), *Pakistan Kuwait Investment Co. v. Bank Al-Falah* (2003 CLD 676), *Gold Star*

International v. MCB (2000 MLD 421) and Hatimbhai v. Karimbhai (1990 MLD 1700).

I have heard the learned counsel for the parties and perused the material available on record.

Insofar as the first question regarding executeability of the decree, as raised by learned counsel for the judgment debtor, is concerned that will be taken up subsequently as I would like to first determine as to whether any ground is available to the judgment debtor insofar as the executability of the decree is concerned. Once this Court would come to the conclusion that such decree is void or that the Court had no jurisdiction only then the compliance of provision of Order XXI, Rule 23-A, C.P.C. could be dispensed with. Hence, I would deal with this question as raised by learned counsel for the judgment debtor which deals with the maintainability of the execution application on account of reciprocal obligations.

With the assistance of the counsel I have perused the consent decree. In terms of Para 4 of the decree a schedule is being prescribed to implement the transfer process as per time frame stipulated in paragraph 3. The steps prima facie are required to be taken in this schedule by the Arbitrator, Surveyor and NAB authorities. For the sake of convenience I reproduce the schedule as under:---

Steps	Period	To be completed by the end of
1. Appointment, confirmation of the Surveyor by the Arbitrator.	One week	1st week
2. The Surveyor to carry out the physical survey of site including Verification of assets and properties as provided by the respondents in the schedule attached to the settlement agreement. This schedule shall be read as integral part of this Award. The Surveyor shall furnish the report to the Arbitrator.	Five Weeks	6th week
3. The report of Surveyor shall then be sent to NAB and all the parties by the Arbitrator.	One week	7th week
4. Study the report by respondent, SAL and NAB and for comments, if any.	One week	8th week
5. In case of any dispute on survey report with regard to the assets and properties, the matter shall be referred to Arbitrator whose decision shall be final.	One week	9th week
6. The auction process to be initiated by the respondents including publication of the auction notices in newspaper etc and response thereof.	Six week	15th week
7. The respondent shall then forward, to the Arbitrator the bids received from the prospective buyers, if any.	One week	16th week
8. On completion of the above steps, the Arbitrator shall direct the respondents to prepare and complete all documents necessary for transfer of properties to SAL including preparation of redemption deeds, share transfer certificates and share	Two weeks	18th week

	transfer deeds, NOC's lease documents and preparation of sale deeds for transfer of judgment debtor company.		
9.	That on completion of all documents as mentioned in Step No.8 above, the respondents shall intimate the Arbitrator along with the list thereof. After checking the Arbitrator shall direct the Respondents to send copies of such documents to SAL.	One week	19th week
10.	SAL to convey his acceptance with regard to the completion of all documents as mentioned in Step No.8 above the Arbitrator.	Two weeks	21st week
11.	In case of any dispute between the parties with regard to documentation, the parties shall approach Arbitrator whose decision in this regard shall be final.	One week	22nd week
12.	All executions, handing and taking over the assets and properties to the judgment debtors company.	Two weeks	24th week

I have perused all such steps available from 1 to 12 and there is no such reciprocal obligation on the part of the decree holders which could restrict them from execution of the decree. As is apparent it is the Surveyor who has to carry out physical survey of site including the verification of assets and it cannot be presumed as reciprocal obligation on the part of the decree holders.

In terms of Step 3 it is the Surveyor who is to send such report to NAB and all other parties and this obligation also cannot be put on the shoulders of the decree holder. In terms of Step 4 whatever time consumed by the respondents/judgment debtor cannot be attributed to the decree holders.

The only step that is Step No.6 which requires auction process to be initiated by the decree holder was shown to have been delayed by 13 to 14 months however much of it in fact was the earlier delay caused by other parties and such auction process was required to be completed by third week of August, 2011 which was published on 2-11-2012. Hence, any delay in effecting public notice for auction cannot be attributed to the decree holder as this was in fact the delay that was carried forward. Hence, this execution application is not dependent upon any reciprocal obligations on the part of the decree holder. In addition to above it is nobody's case that on account of such delay of few weeks judgment debtor has suffered losses. In addition, these steps, which were claimed to be completed within a time frame, are only directory and not mandatory as no consequence as, to its delayed or belated compliance is provided. Hence, such belated compliance would gain nothing for judgment debtor.

The question No.3 also relates to Question No.2 i.e. as to whether Sultan Ali Lakhani could be treated as judgment debtor in stricto sensu. In terms of Para 7 of this consent decree the parties have agreed that entire balance outstanding along with markup shall be payable in case judgment debtor fails to take over assets and properties of both the judgment debtors company.

As regards the provisions of Article 10-A of the Constitution is concerned, it is not such right which is available to the judgment debtor at this stage of execution. Article 10-A deals with the rights to fair trial. I am afraid the stage of fair trial has already been exercised by the judgment debtor which involved long process of arbitration followed by Award which was then by consent became Rule of Court when they have jointly filed application for making Award Rule of the Court and now at this stage when the execution application has been filed such

right cannot be re-exercised as this stage does not relate to the trial of the case; it is meant for execution of a consent decree and the legislature in its wisdom has provided Order XXI, Rule 23-A, C.P.C. in this regard. Hence, in my view neither Article 10-A of the Constitution at this stage could come in aid of the judgment debtors nor it could act to circumvent the provisions of Order XXI, Rule 23-A, C.P.C. None of the objections, as raised above, could be considered to be treated as an independent suit.

Indeed, the points as raised by the judgment debtor amounts to re-opening the matter which has been decided in the proceedings in which the decree was passed. Before executing Court the validity of decree could only be challenged to the extent if it is void or that it has been passed by Court having no jurisdiction, which are not the grounds of the judgment debtor herein.

In the cases of Happy Family Associate and Gul M. Mir Bhar (Supra) it has been held that the provisions of Order XXI, Rule 23-A, C.P.C. are mandatory and the objections to the execution by a judgment debtor cannot be considered unless the judgment debtor deposits the decretal amount or furnishes security in lieu thereof.

Insofar as the applicability of section 47 and Order XXI, rule 23-A, C.P.C. to be read independent to each other is concerned, it has been held by this Court in the case of Qadir Ahmad Siddiqui (Supra) as under:---

"I am of the view that there is no warrant for the contention that section 47 and Order XXI, rule 23-A, C.P.C. are to be read 'Independent' of each other or that section 47 furnishes as an independent right to remedy relating to execution of a decree. The objection as to the non-executability of the decree obviously relates to the execution of the decree and a Court would clearly be barred from considering the same under the provisions of rule 23-A unless the judgment debtor deposits the decretal amount in the Court or furnishes the security for its payment."

It is also a settled principle of law laid down by the Superior Courts that the Court cannot go beyond the decree and such view also finds support from the case of Sardar Ahmed Yar Khan (Supra).

As far as the application under section 12(2) is concerned it has been held by the Hon'ble Supreme Court in the case of Happy Family Associate (supra) that such application is not substitute to regular appeal or revision or review nor these provisions can be construed as something over and above the normal modes of questioning a decree by way of appeal. On the same line in the case of Pakistan Fisheries (Supra) the Hon'ble Supreme Court has observed as under:---

"It is a fundamental rule that where an enactment creates a new jurisdiction, prescribes the manner in which that jurisdiction is to be exercised and further specifies the remedy, such remedy is exclusive and the party aggrieved by an order made in exercise of that jurisdiction must seek remedy and not others."

As far as case-laws relied upon by learned counsel for the judgment debtor are concerned, the same have no nexus to the facts and circumstances of the present case, which are discussed as under:---

The cases of Fakir Abdullah v. Government of Sindh reported in PLD 2001 SC 131 and Habib Bank Limited v. Parveen Qasim Jan reported in 2014 SCMR 322 are cited by learned counsel for the judgment debtor in respect of executeability of the decree. Hon'ble Supreme Court has observed in the aforesaid judgment while relying on the cases of Islamic Republic of Pakistan v. Muhammad Saeed reported in PLD 1961 SC 192 that there is no cavil with the proposition that the Court executing a decree is not supposed to travel beyond its terms as held in a number of judgments pronounced by the Superior Courts but simultaneously the executing Court while exercising jurisdiction under section 47,

C.P.C. can question the executeability of a decree if it is satisfied that the decree is a nullity in the eye of law or it has been passed by a Court having no jurisdiction or the execution of a decree would not infringe the legal right of the decree holder, if refused to be executed, or the decree has been passed in violation of any provisions of law.

Insofar as the above observation is concerned it is nobody's case that the decree is nullity in the eye of law or that it has been passed by a Court having no jurisdiction. Furthermore, undoubtedly if the decree could not be executed it would certainly infringe the legal rights of the decree holder as it appears to have been passed in consideration of law and facts of the case and is not passed in derogation of any provisions of law. Hence, for all intent and purposes this would not come in aid of the judgment debtor insofar as the objections are concerned.

As far as the case of Mrs. Zia Farhat v. Presiding Officer, Special Court 1996 MLD 680, Muhammad Aslam Siddiqui v. Hasina Begum reported in 1986 MLD 735 and Alhamdi Begum v. National Bank of Pakistan reported in PLD 1976 Karachi 723 are concerned, even these case-law would have no application since I have determined the questions/objections as raised by the judgment debtor first prior to burdening him (judgment debtor) to provide security as envisaged by Order XXI, Rule 23-A, C.P.C.

Insofar as mutual and reciprocal obligations are concerned, learned counsel for judgment debtor has relied upon the case of Ch. Muhammad Nawaz v. Ch. Rehmat Ali reported in 1994 SCMR 349. It is the case of the judgment debtor that the time was essence of the agreement which culminated into a decree and hence parties were under obligation to perform their duties strictly in terms thereof. I am afraid the facts and circumstances of the instant case are such that it was the Arbitrator and the Surveyor who were to perform their obligations and such lapse of time, if at all is there, cannot be attributed to the decree holders which otherwise as I observed are directory, and the judgment debtor cannot escape from his obligation under the decree. Hence, the facts and circumstances of the aforesaid case are totally different and distinguishable from the facts and circumstances of the instant case. It is nobody's case that by default the right of any other/third party was created and the decree as it stands cannot be executed.

Similarly the questions raised and resolved by the Hon'ble Supreme Court in the case of Shaikh Ateeq ur Rehman Sarwar v. Sajjad Hussain reported in 2009 SCMR 684 involved payment of decretal amount beyond the time granted by the appellate Court which are totally different and distinguishable from the questions as raised in this execution application by the judgment debtor.

The cases of Hamida Begum v. Additional District Judge Lahore reported in 1986 CLC 1697, Sharaf Faridi v. Federation of Pakistan reported in PLD 1989 Karachi 404 and Muhammad Nadeem Arif v. I.G. Police Punjab reported in 2011 SCMR 408 are of no help for the judgment debtor as the question as to Order XXI, Rule 23-A, C.P.C. was considered and it is already settled that none of the objections are tenable to circumvent the applicability of Order XXI, Rule 23-A, C.P.C. Even otherwise, in terms of Order XXI, Rule 23-A, C.P.C., no right of the judgment debtor is violated under Article 10-A of the Constitution. Hence these case-law are of no help for the judgment debtor.

In case of Fauji Foundation v. Shamimur Rehman reported in PLD 1983 SC 457 relied upon by learned counsel for the judgment debtor the Hon'ble Supreme Court has held as under:---

"154. Dilating further due process clause has a dual concept-procedural as well as substantive, which expression is not capable of any exact definition. Broadly stated in its procedural concept, it means that no part of a person's personal property including ownership, can be taken away from him except by the observance of certain formalities, such as notice and hearing which are essentials to the acquirement of jurisdiction of persons, but that is only a minimal

requirement as the American Courts have on its foundation developed imposing structure of formal adjudicatory procedure with the result that there has been a judicialisation of an administrative process, an attribute of a courtroom procedure, unlike the British system, which is not unduly dominated by the judicial formalities. Here I would point out that the requirements of due process are most fully developed in the procedures of the Courts, which over the centuries, have been evolved so as to ensure fair trial."

Hence, such requirement of notice and hearing which were and are essential were duly complied with at the time of trial and at this stage when the decree is to be executed, the executing Court cannot be burdened with re-trial. Even the above case law made emphasize to ensure "fair trial" which is not the subject here in the instant case.

The case of National Bank of Pakistan v. SAF Textile Mills reported in PLD 2014 SC 283 provides a mechanism as the modes and methods of recovery through sale of mortgaged property but the recovery itself cannot be disputed in a manner which could involve a de novo trial. Hence, this case-law is not applicable to the facts and circumstances of the present case.

Insofar as the case of Abdul Rahim v. United Bank Limited reported in PLD 1997 Karachi 62 is concerned in that case the proceedings were pending under the Banking Tribunal Ordinance, 1984 and the provisions of section 6(6) thereof were discussed which is meant to furnish security which was held to be directory and not mandatory, at the stage of trial which perhaps is not the case here.

Insofar as the case of Riaz Hussain v. Muhammad Akbar reported in 2003 SCMR 181 is concerned it only highlights the rights as available to the judgment debtor in terms of section 47, C.P.C. is concerned which has neither been curtailed nor denied in the present case. Hence, the case, as cited, is distinguishable from the facts and circumstances of this case.

Lastly, the question that a compromise decree is in fact a contract breach of which may give rise to fresh cause of action to decree holder as held in the case of, Peer Dil v. Dad Muhammad reported in 2009 SCMR 1268, is concerned, in my view all these terms of compromise which are within the frame of the suit are executable however all those terms of decree which travel beyond pleading of suit may have an application of such principle to be treated like a contract, which is not the case here. In addition, it is the prerogative of the decree holder, depending upon the nature of the decree itself, as to whether it is executable or any of its point needs to be adjudicated in case of its non-compliance. If any of the consequential remedies are left unattended, as was in that cited case, it may give rise to fresh cause of action however where the decree of a Court or compromise provides all consequential remedies in case of non-compliance the course as to the execution of the decree is certainly available to the decree holder, as is in the instant case. Hence, the case-law relied upon by the learned counsel is distinguishable from the facts and circumstances of the instant case.

Hence, in view of above facts and circumstances and the case law, I do not consider the objections of the judgment debtor which could circumvent the applicability of the provisions of Order XXI, Rule 23-A, C.P.C. as the decree is neither void nor it is claimed to have been passed by a Court having no jurisdiction. Thus after analyzing the questions raised by the judgment debtors I am of the view that it is a case where provisions of Order XXI, Rule 23-A, C.P.C. are ought to have been invoked. Hence, the objections to the execution application taken by the judgment debtors are not tenable in law and are over ruled.

Insofar as the application under section 12(2), C.P.C. (CMA No.471 of 2013) is concerned in view of above order and/or provisions of law, as held, such application has become infructuous and the order dated 20-12-2013 passed thereon is recalled.

Similarly, application bearing CMA No.323 of 2014 whereby judgment debtor seeks to place on record certain documents, is also disposed of as it has already served its purpose.

AG/N-3/Sindh

Order accordingly.