

**IN THE HIGH COURT OF SINDH AT KARACHI**

**Execution No 01 of 2015**

**Mrs. Amber-----Decree Holder**

**Versus**

**Mrs. Nasreen Jahan Siddiqui & Others-----Judgment Debtors**

**Date of hearing: 25.05.2018**

**Date of Order: 31.05.2018**

**Decree Holder: Through Mr. Haider Imam Rizvi & Ahsan  
Imam Rizvi Advocates.**

**Judgment Debtors: Through Mr. Naveed Ahmed Khan Advocates.**

**ORDER**

**Muhammad Junaid Ghaffar J.-** This Execution arises out of a compromise judgment and decree dated 01.04.2014, passed in Suit No.48/2014, whereby, parties settled their dispute on the basis of an agreement, which required certain modalities to be observed in respect of the property bearing No. SU-8, Askari IV, Rashid Minhas Road, Gulistan-e-Johar, Karachi, in question. It is the case of the decree holder that judgment debtors have defaulted, hence, instant Execution Application. Notice was ordered and counter affidavit and affidavit in rejoinder were filed and on 10.11.2016 following order was passed;

**10.11.2016.**

Mr. Haider Imam Rizvi Advocate for Decree Holder.

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This Execution Application is arising out of Judgment passed on 1.4.2014 and Decree passed on 14.11.2014. Learned Counsel for the Decree Holder submits that despite passing of the Decree the Judgment Debtors / Defendants have failed to satisfy the same in terms thereof.

Under circumstances, Nazir of this Court is appointed as Commissioner to get the Sale Deed executed in favour of the Decree Holder, however, strictly in terms

of the Decree in field and thereafter, submit his report within 02 months. Objections to the execution application stand rejected.

2. Thereafter on two CMA Nos. 150 & 151 2018 notice were ordered and on 11.05.2018 following order was passed;

**11.05.2018.**

Mr. Naveed Ahmed Khan, Advocate for J.D.

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Urgency granted. To come up on **16.05.2018** when the matter is already fixed. However, till the next date of hearing, Nazir shall maintain status-quo and shall not execute the Sale Deed as ordered on 10.11.2016.

3. Learned Counsel for the decree holder has contended that order dated 11.5.2018 was obtained by concealment of facts and the order dated 23.02.2018 passed in High Court Appeal No.53 of 2017, whereby, the appeal against order dated 10.11.2016 was dismissed was not brought to notice; that Nazir was about to execute the sale deed as directed; that objection regarding delay in deposit of the balance sale consideration is not warranted in law, as the matter was pending in dispute between the tenant and owner firstly, and thereafter between the decree holder and judgment debtors in JM 76 of 2014; that all payment has been deposited in time as various interim orders were in field, therefore, the decree holder could was not obligated in law to deposit the same within the time mentioned in the compromise decree; that judgment debtor No.1 in connivance with her brother had filed Suit No.2324/2014 and had obtained compromise decree which was set aside in JM 76/2014, on 2.3.2016; that timely payment has been made; that instant Execution stands allowed vide order dated 10.11.2016 against which Appeals also stands dismissed; hence both applications be dismissed and Nazir be directed to execute the Sale Deed in compliance of order dated 10.11.2016.

4. Conversely, learned Counsel for Judgment Debtors has responded by arguing that the order dated 10.11.2016 is clear and unambiguous as it states that Nazir to execute sale deed strictly in terms of decree in field, and for that the balance payment should have been deposited before 31.7.2014, which is not the case as admittedly it was deposited on 9.1.2017, for which the Nazir had no authority to accept and his explanation be called; that there was no interim order in field as admittedly, JM 76 of 2014 was finally decided on 2.3.2016; that decree holder has defaulted and judgment debtor has sold the property to someone else; that the objections of judgment debtor have been dismissed summarily without appreciating the facts and ground realities; that order dated 10.11.2016 be clarified to the extent that it has to be executed strictly in terms of the decree and not beyond that; that High Court Appeal was only to the extent that the said order be implemented in its true intent and spirit as Nazir was acting against the said order; that dismissal of Appeal was only on the point of limitation and not on merits; that this Court can competently implement its order dated 10.11.2016 in accordance with the decree.

5. I have heard both the learned Counsel and perused the record. The parties earlier had dispute in respect of the Suit property and Suit No.48 of 2014 was filed by the decree holder against judgment debtors wherein, they reached a settlement agreement and filed an application under Order 23 Rule 3 CPC (CMA No.4206/2014), and on 1.4.2014 a consent decree was passed in the following terms;

“1. That the Defendant No. 1 & 2 have agreed to sell and Plaintiff is agreed to purchase the property bearing No. SU-8, Askari IV, situated at Rashid Minhas Road, Gulistan-e-Johar, Karachi, measuring 500 square yards herein referred to as subject property in the sum of Rs. 30 million from Defendant No. 1 in supersession of earlier agreement dated 17.11.2011 and after execution of this compromise between the Plaintiff

and Defendant No. 1 & 2; the Sale Agreement dated 17.11.2011 will be no more in field and further Defendant No. 1 & 2 are willing to transfer the subject property in favour of Plaintiff / her nominee / third party on following terms and conditions:-

2. That Plaintiff named above has already paid to Defendant No. 1 an amount of Rs. 4,361,000/- (Rupees Forty Three Lac Sixty One Thousand only) in the following manner:-

(a) Rs. 1,000,000/- (Rupees One Million only), through cheque bearing No. 7378066 dated 17.11.2011, drawn on MCB Bank Ltd; Karachi.

(b) Rs. 3,000,000/- (Rupees Three Million only), through cheque bearing No. 7378068 dated 17.11.2011, drawn on MCB Bank Ltd; Karachi.

(c) Rs. 361,000/- (Rupees Three Lac Sixty One Thousand only), through Pay Order No. 1849475 dated 21.12.2012, drawn on NIB Bank Ltd; Karachi.

3. That Defendant No. 1 has duly acknowledge the payment of aforesaid amount and it has been agreed between the Plaintiff and Defendant No. 1 that an amount of Rs. 4,361,000/- (Rupees Forty Three Lac Sixty One Thousand only) shall be deducted from the total sale consideration of Rs. 30 million to be paid to the Defendant No. 1.

4. That through this compromise, it has been agreed the Plaintiff and Defendant No. 1 & 2 that the Plaintiff can also sell out the Suit property to any third party on or before 31<sup>st</sup> July 2014 and shall deposit the balance sale consideration of Rs. 25,639,000/= (Rupees Tow Crore Fifty Six Lac and thirty Nine Thousand only) in the name of the Defendant No. 1 at the time of photo session in favour of Plaintiff / her nominee / third party to the learned Nazir and the learned Nazir shall hand over / pay the aforesaid balance sale consideration to the Defendant No. 1 at the time of registration of Sale Deed and delivery of the peaceful and vacant possession of the Suit property to the Plaintiff / her nominee / third party.

5. The Defendant No. 1 shall hand over the peaceful and vacant possession of Suit property to the Plaintiff / her nominee / third party at the time of receiving of the balance aforesaid sale consideration.

6. It is specifically agreed, time is essence of this understanding between the parties and that procurement of NOC from GHQ shall be mutual efforts of parties and entire proceedings as mentioned above shall be completed by the Plaintiff and Defendant No. 1 and 2 on or before 31<sup>st</sup> July 2014 and in case of failure for Plaintiff to make the payment of settled amount to the tune of Rs. 25,639,000/= (Rupees Two Crore fifty six Lac Thirty Nine Thousand only) in favour of Defendant No. 1 through learned Nazir on or before 31<sup>st</sup> July 2014 this compromise Agreement shall be revoked and Defendant No. 1 shall pay back / refund an amount of Rs. 4,361,000/= (Rupees Forty Three Lac Sixty One Thousand only) to Plaintiff.

7. If the Plaintiff makes payment in terms as stated herein before, but the Defendant No. 1 & 2 fail or refuse to execute the Sale Deed, Mutation and / or NOC in favour of Plaintiff / her nominee / third party the learned Nazir will execute Sale Deed after obtaining NOC from GHQ through Defendant No. 3 to 5 in favour of Plaintiff / her nominee / third party.

8. That it is agreed between the parties that the entire conveyance and transfer of subject property should be completed on or before 31<sup>st</sup> July 2014, as time is the essence of this Agreement.

9. That from the date of execution of this compromise till finalization of aforesaid process the Plaintiff shall have the reasonable access to the subject property along with prospective buyer with the prior permission of Defendant No. 1 for the purpose of visit and renovation and allied work, which shall be carried out at the expenses of the Plaintiff.

10. That it has also been agreed that the Plaintiff and Defendant No. 1 & 2 shall cooperate with each other in respect of aforesaid transaction for the purpose to implement the compromise in its true spirit.

11. That Plaintiff shall withdraw Criminal Case No. 2863 of 2013, pending adjudication before learned XVIII Judicial Magistrate, Karachi (East) arising out of FIR No. 471 of 2013, under Section 420/406/506-B/34 of P.S. Shahrah-e-Faisal, Karachi."

6. The parties categorically agreed to the above modalities and it also required that the balance sale consideration was to be paid on or before 31.7.2014. It was further agreed that time is the essence of this understanding between the parties. It further appears from the record that a tenant was occupying the property in question, and on getting information about this compromise decree, he filed an application under Section 12(2) CPC bearing JM No.24 of 2014 and on 26.05.2014 certain he holder, the Court suspended the requirement of depositing the balance sale consideration of Rs:2,56,39,000/-. Finally the said JM was disposed of on 17.10.2014. However, the decree holder, neither before, nor thereafter, made any effort to make payment of the balance sale consideration. In fact the decree holder by that time had made no effort to even seek execution of the decree as this Execution Application has been filed on 31.12.2014, whereas, office endorsement dated 2.1.2015 reflects that no amount had been deposited. Learned Counsel for the decree holder was time and again confronted to that and has contended that firstly the property was occupied and not vacant, and secondly, there was an order in JM 24/2014, therefore the balance sale consideration was not deposited. He also made reference to another Suit No.2324/2014 between judgment debtor No.1 and her brother and so

also a compromise decree therein and a challenge to it by the present decree holder through JM No.76/2014 which was allowed vide order dated 2.3.2016. However, it may be observed that in that case there were no orders to dispense with the deposit of the balance sale consideration. Even if the contention of the decree holder's Counsel is considered, JM 24/2014 was finally disposed of on 17.10.2014 and JM 76/2014 on 2.3.2016, whereas, Nazir was only approached with pay orders of balance sale consideration on 9.1.2017. No satisfactory reply was given as to why this delay was caused, as even if some proceedings were pending, they ended up at the most on 2.3.2016. Even otherwise, perusal of the terms of decree passed on the basis of the agreement clearly reflects that time was essence of the agreement, whereas, balance sale consideration was to be made on or before 31.7.2014. This has been admittedly violated on the part of decree holder, even if the orders so referred are considered as granting extension. If the judgment debtor has failed to honor commitment as contended, then the decree holder is also on the same footing. Rather a step ahead as if the decree holder was keen to keep the promise intact, this Court could have been easily approached to make the deposit and invest the same in some profit bearing instrument, and to show its bonafide. It is not that if the other party has defaulted, this gives any advantage or premium to the other. In fact, both sail in the same boat. If one has defaulted, the other has too, and both of them lose their right to seek execution of it. An Executing Court cannot travel beyond the decree. And on 10.11.2016, it was already observed that *"Under the circumstances, Nazir of this Court is appointed as Commissioner to get the sale deed executed in favour of the Decree Holder, however, strictly in terms of the decree in field and thereafter, submit his report within 02 months"*. How the Nazir has

acted beyond the mandate of the decree is not clear and for that an explanation is deemed necessary. The Court while passing the aforesaid order has not disposed of the Execution as contended, as it is not in clear terms so stated, whereas, the objections have been dismissed without any reasoning, and in absence of the judgment debtors Counsel. But notwithstanding this, as well as the order of the Appellate Court in Appeal, the order itself is qualified and is restrictive to the contents and terms of the decree. And this is for a very good reason as the Executing Court must not go beyond the decree. The parties had agreed to certain terms and one of it was that payment has to be made on or before 31.7.2014, which has admittedly not been made by the decree holder. This disentitles the decree holder from seeking execution of the decree which is otherwise in a form of an agreement by consent. It is not a Court's judgment. The Executing Court can only execute the same in its true letter and spirit. It cannot enlarge the time for making the balance payment as it has no authority and power to do so. It is only the parties to the decree who can seek further modification in certain exceptional circumstances. In such circumstances, it is not material that an appeal was preferred against such order and that has been dismissed (on limitation even otherwise), as the order itself has to be interpreted and proceeded with.

7. It is also a matter of record that on 20.01.2015 when the matter was fixed for the first time before the Court after notice, Counsel for decree holder was confronted as to how this Execution Application was maintainable in view of the judgment of the Hon'ble Supreme Court in the case of PEER Dil & others v Dad Muhammad (2009 SCMR 1268), wherein it has been observed that a compromise decree is not an

executable decree and the parties if found not performing their obligations under the compromise decree then the aggrieved party is supposed to file a fresh suit for enforcement of his right under the compromise decree. Though there are certain exceptions to this rule which are not relevant for the present purposes, but one thing is clear that from day one the Court had shown its reluctance in proceeding with this Execution in the given facts. And the primary reason being that parties had agreed that time was the essence of the agreement, and balance payment was to be made on or before a certain date. This aspect of the case and the observation of the Court has been overlooked while passing order dated 10.11.2016.

8. It is further noticed that Nazir has furnished his report dated 15.5.2018 which is also listed for orders and on perusal it is not clear as to how he has acted on the basis of order dated 10.11.2016, by accepting the balance payment on 9.1.2017, whereas he was supposed to act strictly in accordance with the decree which required that balance sale consideration is to be paid on or before 31.7.2014. Para 4 as above of the decree clearly provides ***“that if plaintiff makes payment in terms as stated herein before, but the defendant No.1&2 fail or refuse to execute the sale deed, mutation and /or NOC in favor of plaintiff/ he nominee/third party the learned Nazir will execute the sale deed.....”***. How the Nazir has acted in violation of this part of the decree is not understandable. He could only execute the sale deed if payment had been made before 31.7.2014 and judgment debtors were not performing their part of the agreement. He ought to have immediately approached the Court before accepting the belated payment from the



decree holder. Accordingly he is directed to submit his explanation in this regard for perusal in chambers.

9. It is also a matter of record that judgment debtor No.1, after decree holders failure to make payment within the agreed time entered into another agreement and also filed a Suit bearing No.2324 of 2014 and tendered refund of the amount paid by the decree holder as contemplated in Para 6 of the decree in question and Rs: 4,361,000/- are lying with the Nazir of this Court pursuant to orders of the said Court in the name of the decree holder. This appears to be an act in furtherance as provided in the decree itself and cannot be ignored so lightly by this Court.

10. However, before parting I may observe that all compromise decrees are not executable and instant case appears to be one of them. This Court is not supposed to give a declaration or finding that who has defaulted and who is responsible for its consequences, and can only execute which is permissible. This leaves the parties to seek enforcement of their rights, if any, under the agreement entered into and passing of such compromise decree.

11. In view of hereinabove facts and circumstances of this case I am of the view that the decree in question is not executable as the time to perform as agreed between the parties has already expired, whereas, the order dated 10.11.2016 also was in line with the decree itself and not beyond that and cannot be performed, hence, this Execution Application cannot be entertained and is hereby dismissed with all pending applications as well. The Decree Holder may approach the Nazir of this Court to seek refund of money deposited on 9.1.2017.

12. Execution Application is dismissed as not being capable of execution and is accordingly consigned to record.

Dated: 31.05.2018

**Judge**