

THE HIGH COURT OF SINDH, KARACHI

Execution No. 68 of 2016

[Jawaid Sarwar versus Rana Munir & another]

Decree Holder : Jawed Sarwar through Mr. Raj Ali Wahid Kunwar alongwith Mr. Jamshed Ahmed Abbasi, Advocates.

Judgment Debtor 1 : Rana Munir Ahmed Khan through Mr. Salim Salam Ansari, Advocate.

Judgment Debtor 2 : Mst. Abida Munir through M/s. Ch. Muhammad Khalid Naseem and Rana Azeem, Advocate.

Dates of hearing : 31-03-2022, 16-05-2022 & re-hearing on 30-03-2023.

Date of decision : 07-04-2023.

ORDER

Adnan Iqbal Chaudhry J. - Upon a compromise application under Order XXIII Rule 3 CPC, Suit No. 1244/2015 was decreed on 27-07-2015 in following terms:

- “2. That Defendants confirm that they shall, without any excuse of whatsoever nature, make payment in full and final of an amount of Rs.14,100,000/- (Rupees Fourteen Million and One Hundred Thousand) on or before 01.03.2016 to Plaintiff.
3. That in case Defendants feels that he shall not be in position to make compliance of above said term No.02 the Defendant No.2 on or before 01-03-2016 shall bifurcate her Plot No. 26, Field Street No.19, ad-measuring 791-9 sq. yds., Model Colony Malir, Karachi, and against four plots which were taken by Defendants from Plaintiff's daughters to adjust against his debts to be paid to Rana Ahsan, give four plots each ad-measuring 125 sq. yds. to four daughter of Plaintiff and also get the title said four plots transferred and registered in favor of daughters of Plaintiff respectively.
4. That above said four plots shall be adjusted against an amount of Rs.11,600,000/- (Rupees Eleven Million and Six Hundred Thousand) and for remaining amount of Rs.2,500,000/- (Rupees Two Million and Five Hundred Thousand) Defendant No.2 out of her remaining portion of above said plot shall get the title registered for a plot of land measuring 15 x 72 feet equal to 120 sq. yds. in favour of Plaintiff.”

2. The Defendants 1 and 2 were/are spouses. The compromise decree was to the effect:

- (a) that to settle the debit of Rs. 11,600,000/- owed by the Defendant No.1 to the Plaintiff, the Defendant No.2 shall sub-divide her Plot No. 26, measuring 791.09 square yards [**suit property**] into smaller plots, and convey one plot of 125 square yards to each of the four daughters of the Plaintiff (total 4 plots);
- (b) similarly, to settle the debit of Rs. 2,500,000/- the Defendant No.2 shall convey a plot of 120 sq. yards out of the suit property to the Plaintiff.

3. Following the compromise decree, the Defendant No.2 proceeded to sub-divide the suit property into 8 sub-plots. The subdivision was apparently approved by the Assistant Commissioner, Model Colony by letter dated 14-04-2016 and a certificate for sale was issued by the Mukhtiarkar (Revenue), Model Colony on 15-04-2016. Thereafter, six of those sub-plots were conveyed by the Defendant No.2 to the Plaintiff and his children by executing six sale deeds, duly registered on 18-04-2016 as follows:

- (i) sale deed in favour of Maryam, daughter of the Plaintiff, for sub-divided Plot No. 26/5 measuring 120.12 square yards;
- (ii) sale deed in favour of Fatima, daughter of the Plaintiff, for sub-divided Plot No. 26/3 measuring 119.15 square yards;
- (iii) sale deed in favour of Muhammad Ali, son of the Plaintiff, for sub-divided Plot No. 26/7 measuring 117 square yards;
- (iv) sale deed in favour of Ahmed Raza, son of Plaintiff, for sub-divided Plot No. 26/8 measuring 84.16 square yards;
- (v) sale deed in favour of the Plaintiff for sub-divided Plot No. 26/6 measuring 86.64 square yards;
- (vi) sale deed in favour of the Plaintiff for sub-divided Plot No. 26/4 measuring 86.66 square yards.

4. Apparently, after the Defendant No.2 had executed the aforesaid sale deeds a dispute arose between the parties on the further course of action. Therefore, the Plaintiff/decree-holder filed this execution application, whereas the Defendants filed an application under section 12(2) CPC (J.M. No. 56/2017) for setting-aside the compromise decree, and the Defendant No.2 also filed Suit No. 780/2017 for cancellation of the aforesaid sale deeds. The application under section 12(2) CPC was dismissed by this Court on 21-01-2020.

5. Learned counsel for the decree-holder submitted that the compromise decree was performed only in part by the judgment-debtor No.2 to the extent of executing the aforementioned six sale deeds, whereas physical possession of those sub-plots was not delivered, hence this execution application for a writ of possession. On the other hand, objections by learned counsel for the judgment-debtors were as follows:

- (i) that the compromise decree was essentially a contract between the parties, and in view of the case of *Peer Dil v. Dad Muhammad* (2009 SCMR 1268) the remedy of the decree-holder to enforce such contract was a suit not an execution application;
- (ii) that execution proceedings should be stayed under Order XXI Rule 26 CPC until Suit No. 780/2017 filed by the judgment debtor No.2 is decided.
- (iii) that the compromise decree does not award possession and therefore no writ for possession can be issued;
- (iv) that while sub-division of the suit property into 8 sub-plots was approved by the competent authority, it was never physically sub-divided and the structure of a bungalow exists on the suit property which is the residence of the judgment-debtors.

6. Heard the learned counsel and perused the record.

7. It was contended by learned counsel for the decree-holder that even though registered sale deeds were executed by the judgment-

debtor No.2 in favor of the decree-holder and four of his children for six sub-plots out of the suit property, the compromise agreement remained unfulfilled without delivery of possession of those sub-plots, hence this execution application. Learned counsel accepted that a decree passed pursuant to a compromise under Order XXIII Rule 3 CPC is essentially a contract between the parties which is superadded with the command of the Court, and therefore a compromise decree is subject to the incidents of a contract.¹ That being settled law, the fact of the matter was that none of the children of the decree-holder were parties to the suit or the compromise agreement. Though the daughters of the decree-holder were mentioned as beneficiaries in clause 3 of the compromise agreement, there was no privity of contract between them and the judgment-debtor No.2. They had also not initiated any proceedings to contend that the compromise agreement could be enforced by them by way of an exception to the doctrine of privity of contract.² As for the sons of the decree-holder, they find no mention in the compromise agreement and therefore they could not even claim to be beneficiaries thereof.

8. It was subsequent to the compromise agreement that the judgment-debtor No.2 executed sale deeds in favor of 2 daughters and 2 sons of the decree-holder thereby establishing privity of contract directly with them. Thus, if those children of the decree-holder, who are all majors, are aggrieved that possession has not been delivered to them despite the sale deed, it is for them to sue for the same. The decree-holder has no *locus standi* to seek such possession for them in his personal capacity and that too by way of this execution application. Reliance placed by learned counsel for the decree-holder on Order XXI Rule 15 CPC is misplaced. That provision allows for any one or more of the “joint decree-holders” to apply for execution of the whole decree for the benefit of them all. Here, only the Applicant himself is decree-holder. There are no ‘joint decree-

¹ See *Nazir Ahmad v. Ghulama* (1987 SCMR 1704).

² The doctrine of privity of contract and its exception was discussed by this Court in *Karachi Water & Sewerage Board v. Karachi Electric Supply Corporation* (2012 CLD 1225).

holders'. The case of *Abdul Salam v. Shah Saood* (1992 SCMR 1208) relied upon by learned counsel has no application to this execution.

9. Therefore, for implementing clause 3 of the compromise agreement, and thereby for possession of sub-plots conveyed by the judgment-debtor No.2 to the daughters and sons of the decree-holder, this execution application is not maintainable. However, it can be examined for clause 4 of the compromise agreement as between the decree-holder and the judgment-debtor No.2.

10. The first objection taken on behalf of the judgment-debtors to the execution of clause 4 of the compromise decree was that *Peer Dil v. Dad Muhammad* (2009 SCMR 1268) had held that a compromise decree cannot be enforced through execution proceedings. But *Peer Dil's* case does not lay down that a compromise decree can never be executed, rather it states that a fresh suit to enforce the compromise agreement can be filed where the compromise decree does not cover the relief sought in the fresh suit. A similar objection taken to the execution of a compromise decree was discussed and rejected by this Bench in the case of *Mena Energy DMCC v. Hascol Petroleum Ltd.* (PLD 2022 Sindh 388) as follows:

"16. Nevertheless, *Peer Dil's* case does not expound the argument of learned counsel for the JD. In that case, the facts were that during arbitration the parties arrived at a compromise resulting in a consent award which was then made rule of court by decree. Subsequently, the party who alleged breach of the consent award filed suit for specific performance. The other party contended that the suit was barred by *res judicata* by reason of the decree whereby the award was made rule of court. To that objection to the maintainability of the suit the Supreme Court answered that since the decree was of a compromise agreement, it was essentially a contract, and on the breach thereof a fresh cause of action had arisen making the suit maintainable. Regards the question whether a compromise decree is executable, it was observed that: "Whether a subsequent suit is barred by reason of section 47 CPC depends upon the existence of a decree which is executable for the purpose of the relief sought to be enforced in subsequent suit." Thus, *Peer Dil* does not lay down that a compromise decree can never be executed, but that a fresh suit to enforce the compromise agreement can be filed where the compromise decree does not cover the relief sought in the fresh suit. In *Montgomery Flour and General Mills v. MCB Bank Ltd.* (2015 CLD 1590) a learned Division Bench of the Lahore High Court had also

observed that *Peer Dil* does not bar execution of all compromise decrees.”

11. Learned counsel for the judgment-debtors had then submitted that the execution application is liable to be stayed under Order XXI Rule 26 CPC as the judgment-debtor No.2 had filed Suit No. 780/2017 for cancellation of the sale deeds. Suffice to state that Order XXI Rule 26 CPC only enables the judgment-debtor to approach the court which passed the decree or the appellate court for an order relating to the decree or its execution. Suit No. 780/2017 is neither of such proceedings. The compromise decree remains intact as the application filed by the judgment-debtors against it under section 12(2) CPC had been dismissed.

12. The last objection of the judgment-debtors was that the compromise decree did not award possession of any part of the suit property. That objection too is misconceived. Clause 4 of the compromise decree is for specific performance of the compromise agreement whereby the judgment-debtor No.2 had agreed to convey part of the suit property to the decree-holder. It is not disputed by the judgment-debtors that it was in furtherance of such decree that the judgment-debtor No.2 went ahead and executed registered sale deeds of two plots out of the suit property in favor of the decree-holder. It is settled law that a decree for specific performance entails not only execution of necessary documents to convey the subject property to the decree-holder, but also the delivery of it possession. Reliance is placed on the cases of *Hakam Bibi v. Khushi Muhammad* (2007 SCMR 983); *Abdul Hameed v. Panwar Construction* (2001 YLR 1843); *Wali Muhammad v. Zaib-Un-Nisa* (2001 MLD 1705); *Jahiruddin Ahmed v. Joynal Abedin Khan* (PLD 1963 Dacca 849); and *Birjis Jahan Bajiga Malik v. Muhammad Hasan* (PLD 1964 Dacca 202). The case of *Jahiruddin Ahmed* had also relied upon section 55 of the Transfer of Property Act, 1882 to explain that in a transaction of sale it is the obligation of the seller to deliver possession of the property to the buyer. After all, there will be no point in decreeing specific performance of an

agreement to sell immovable property if the decree-holder is then required to file a separate suit for possession.

13. In view of the foregoing, the compromise decree is executable to the extent of taking possession of Plot No. 26/6 measuring 86.64 square yards and Plot No. 26/4 measuring 86.66 square yards, which have already been transferred by the judgment debtor No.2 to the decree-holder by registered sale deeds dated 18-04-2016 bearing registered numbers 794 and 793, Book-I, Sub-Registrar, Malir Town. The execution application is allowed accordingly. The Nazir shall associate the Survey Superintendent and the Mukhtiarkar, Model Colony and inspect the suit property *viz.* Plot No. 26, Field Street No.19, measuring 791-9 square yards, Model Colony, Malir, Karachi, to report whether Plot No. 26/6 and Plot No. 26/4 as laid out in the aforementioned sale deeds are capable of separate physical possession from the house constructed on the suit property. If not, the Nazir shall give the occupants of the house 2 months' time to vacate the same, failing which he shall get the same vacated with police aid if need be, and thereafter proceed to attach the same for further orders of this Court for demolition of the house or otherwise.

JUDGE

Karachi
Dated: 07-04-2023