

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Execution Application No.08 / 2019

(Habib Bank Limited v. Amin Soap & Oil Industries (Pvt) Ltd & Others)

DATE: **ORDER WITH SIGNATURE(S) OF JUDGE(S)**

For Orders on Execution Application along with Office Objection & reply of the Advocate thereon (as flagged)

Date of Hearing: 27-10-2023

Decree-Holder: Habib Bank Limited
Through Mr. Rahman Aziz Malik, Advocate

ORDER

1. **Sana Akram Minhas, J:** The Office has raised the following objection:

“ How the compromise decree is executable. The latest view of the Honourable Supreme Court, taken in 2009 SCMR 1268 (Peer Dil and Others versus Dad Muhammad), is that a compromise decree is not an executable decree and the parties if found not performing their obligations under the compromise decree that [sic] the aggrieved party is supposed to file a fresh suit for enforcement of his right under the compromise decree.”

Case Profile

2. The facts leading to the Office objection are that the Decree-Holder Bank instituted a Banking Suit No.B-132/2009 (*Habib Bank Limited v. M/s Amin Soap & Oil Industries (Pvt) Ltd*) in this Court (Banking Jurisdiction) against the Judgment-Debtors under the provisions of the *Financial Institutions (Recovery of Finances) Ordinance, 2001 (“FIO”)*. This Suit was decreed vide a compromise decree dated 5.12.2014 and for its enforcement, the Decree-Holder Bank on 28.11.2018 instituted the instant execution proceedings which was immediately met with the aforesaid Office objection.

Basis Of Office Objection

3. To begin with, the aforesaid Office objection based on *Peer Dil v. Dad Muhammad*¹ (“**Peer Dil**”) is not new but a recurring one. It appears this

¹ 2009 SCMR 1268 (*Peer Dil v. Dad Muhammad*)

objection stems from the standing instructions of a learned Single Judge of this Court given vide order dated 12.3.2018 in Execution No. NIL of 2018 as follows:

“ 3. The office is directed that on receiving execution applications in suit disposed of by way of compromise, an objection as to the maintainability of execution application should be raised by referring to the judgment of Hon’ble Supreme Court reported in 2009 SCMR 1268 alongwith any other objection, if any.”

Reply Of Counsel To Office Objection

4. As per learned Counsel for the Decree-Holder, *Peer Dil* decision has no application in the present case as the instant Execution Application arises from a Banking Suit filed pursuant to a compromise decree passed under the FIO. He maintains that under section 19(1) of FIO, the suit automatically stands converted into execution proceedings on announcement of judgment and decree. In support of his submissions, he has cited case law.²

Compromise Decree & Consent Decree

5. The term “compromise decree” has been equated to and described as a contract with superadded command of a judge.³ Terming a compromise decree as a "contract" implies that the compromise decree is based on mutual consent and agreement between the parties. The phrase "superadded command of a judge [or court]" underscores the added weight of a court’s authority, reflects the legal recognition and enforceability of the agreement, making it more than just a private arrangement between the parties. So, while a compromise is characteristically a private agreement between parties, a compromise decree goes further by receiving approval and endorsement from a judge/court. The court's involvement and sanction add a layer of authority, sanctity and enforceability to the agreement.
6. The *Black’s Law Dictionary* defines “consent” as an agreement, approval or permission regarding some act or purpose especially given voluntarily by a

² 2009 CLD 922 (*Muslim Commercial Bank Ltd v. Hirra Farooq Ltd*); 2013 CLC 2080 (*Samba Bank Ltd v. Syed Bhaïs*); 2015 CLC 1278 (*National Bank of Pakistan v. Sultan Ali Lakhani*); 2015 CLD 1590 (*Montgomery Flour & General Mills v. MCB Bank Ltd*); 2021 CLD 113 (*Ejaz Ahmed v. Meezan Bank Limited*)

³ 2009 SCMR 1268 (*Peer Dil v. Dad Muhammad*); 2014 SCMR 33 (*Muhammad Iqbal v. Khair Din*); PLD 2015 Sindh 336 (*Abdul Hafeez v. Pakistan Defence Officers Housing Authority*); 2020 CLC 721 (*Port Qasim Authority v. Industrial Management & Investment Co.*); 2020 CLC 1173 (*Muhammad Jamil v. Waheeda Aslam*)

competent person.⁴ The term “compromise” means an agreement for the settlement of a real or supposed claim in which each party surrenders something in concession to the other.⁵ Whilst the terms “compromise decree” and “consent decree” have often been used synonymously, they are not the same though they may share similarities.⁶ Whereas both consent decrees and compromise decrees involve voluntary agreements and require court approval, a compromise decree, on the other hand, involves a negotiated settlement between the parties to a suit and it often implies that the parties have reached a middle ground or agreement to settle their dispute. In both, the court reviews the terms to ensure, inter alia, fairness, legality and that it is in the public interest.

7. For sake of clarity, the instant Order, in ensuing paragraphs, uses the terms compromise decree and consent decree interchangeably.

Compromise under Order 23 rule 3 of Code of Civil Procedure, 1908 (“CPC”)

8. The expression "agreement or compromise" which appear in Order 23 rule 3 CPC are not defined in the CPC. The agreement or compromise visualised by Order 23 rule 3 is such that it is not contingent upon happening of another event, and upon the terms thereof a decree can straightaway be passed by the court.⁷
9. A consent decree is not only a decree that is passed with the consent of parties given or expressed at the time the decree is passed but it also includes a decree passed on the basis of an agreement, settlement or compromise recorded under Order 23 rule 3 CPC.⁸ Where a decree is passed under the provisions of Order 23 rule 3 CPC, it should be essentially recorded as a consent decree and, therefore, not appealable in view of the provision of section 96(3) CPC.⁹ However, where the very recording of an agreement, compromise or satisfaction has been questioned for being

⁴ Black’s Law Dictionary [10th Edition]. According to *Concise Oxford English Dictionary* [12th Edition] “consent” is permission for something to happen or be done

⁵ Black’s Law Dictionary [10th Edition]. As per *Concise Oxford English Dictionary* [12th Edition] “compromise” is an agreement that is reached by each side making concessions

⁶ 1990 MLD 379 (*Muhammad Siddique v. Noor Hussain*)

⁷ PLD 1991 SC 1131 (paragraph 5) (*Jaffar Abbas v. Ahmad*)

⁸ PLD 2007 SC 343 (paragraph 17) (*Fazal Mehdi v. Allah Ditta*)

⁹ Ibid

invalid or is denied to have been made or given, the same would be appealable under Order 43 rule 1(m) CPC.¹⁰

10. The question whether a particular term of compromise relates to subject matter of suit was considered by Noor ul Arfin, J in Messrs Country Products Export Ltd v. Messrs Bawany Sugar Mills Ltd¹¹ wherein he held:

“ The words “that relates to suit” in Order XXIII rule 3 C.P.C. are sufficiently wide to embrace the terms and conditions which constitute consideration of the compromise, and in all such cases the Court cannot refuse to record the compromise merely on the ground that certain terms and conditions are not strictly within the scope of the suit. It is not the policy of the Code of Civil Procedure to discourage compromises of litigation. The Courts are under duty to record lawful compromises and a decree based on compromise, though it includes terms and conditions which were not initially within the scope of the suit but are considerations for compromise, would, nevertheless be the decree of the Court, and unless there is express legal prohibition, such a decree would be executable under Order XXI C.P.C.”

In Nooruddin Hussain v. Diamond Vacuum Bottle Karachi¹² Saleem Akhtar, J held:

“ Where a compromise relating to the matter outside the scope of the suit is a part of the consideration for the agreement as to matter in suit, the entire compromise as an integral whole must be recorded and decreed as relating to the suit whether they otherwise relate to the suit or not.”

In Ghulam Muhammad v. Zubaida Begum¹³ it was held that:

“ A property or right forming consideration for the subject-matter of litigation as per terms of compromise would be considered as the subject of litigation resulting in the compromise for all intents and purposes, and such subject-matter of consideration would not be treated as an extraneous property for purposes of execution proceedings.”

¹⁰ Ibid

¹¹ PLD 1968 Kar 115 (paragraph 6) (Messrs Country Products Export Ltd v. Messrs Bawany Sugar Mills Ltd)

¹² PLD 1981 Kar 720 (725, A) (Nooruddin Hussain v. Diamond Vacuum Bottle)

¹³ 1984 CLC 874 (paragraph 6) (Ghulam Muhammad v. Zubaida Begum)

Various Opinions Of Courts Regarding Executability Of Compromise / Consent Decree:

11. The *Peer Dil* case is not the first decision to broach on the subject of enforcement of compromise decrees. In fact, this subject has a long lineage and the superior courts have had many an occasion to deliberate upon it in their decisions. The principles that can be extracted from these opinions that define the boundaries for enforcement of compromise decrees are:
- i) The order passed by the court can operate as a decree only if it relates to the subject-matter of the suit. An agreement extraneous to the suit cannot operate as a decree but can be enforced through alternative means other than by way of execution.¹⁴
 - ii) Where the terms of compromise incorporated in the compromise decree are beyond the scope of the original suit it cannot be treated as a decree executable in the original suit. The same constitutes a fresh contract which could be endorsed only by a fresh suit for specific performance of the contract.¹⁵
 - iii) Where the matter is not covered by the compromise and is beyond the scope of the consent decree, the consent decree cannot be executed.¹⁶
 - iv) A compromise decree cannot be executed when time has been made essence of the contract with the consent of parties and due to failure to perform the requisite act on time (such as making payment), third-party interest has been created. In other words, a unilateral change in or non-compliance of material terms and conditions makes the compromise decree inexecutable.¹⁷
 - v) Third party who is not a party to the compromise is not bound by it and court would not allow execution of a compromise decree against it.¹⁸

¹⁴ PLD 1966 Dacca 234 (*Muhammad Idris Mia v. Abdul Matleb Mia*)

¹⁵ 1991 SCMR 425 (paragraph 10) (*Sindh Road Transport Corporation v. S.M. Ali Zaheer Khan*)

¹⁶ 2020 CLC 721 (paragraph 14) (*Port Qasim Authority v. Industrial Management & Investment Co.*)

¹⁷ 1994 SCMR 349 (paragraph 4) (*Muhammad Nawaz v. Rehmat Ali*)

¹⁸ 2014 SCMR 33 (paragraph 12) (*Muhammad Iqbal v. Khair Din*); PLD 2015 Sindh 336 (*Abdul Hafeez v. Pakistan Defence Officers Housing Authority*); SHC's order dated 8.5.2018 in JM No.33/2018 (*Dr. Pehlaj Mal v. Seetal Das*) of Junaid Ghaffar, J

The aforesaid tenets derived from rulings make it amply clear that each case will turn on its own particular facts and circumstances. In essence, a non-executable consent decree is characterized by unresolved disputes or issues that may need further determination or adjudication by the court before the decree can be implemented. Similarly, any limitations or restrictions that apply to the execution proceedings of a court decree passed after adjudication will also apply to the execution of consent decrees.

Peer Dil Case And Its Context

12. The facts in the case of *Peer Dil* were that the parties involved in arbitration reached a compromise, leading to a consent award that was later made a rule of court by a decree. Subsequently, the party claiming a breach of the consent award filed a suit for specific performance. The opposing party argued that the suit was barred by res judicata due to the earlier decree that made the award a rule of court.
13. The Supreme Court addressed this objection by stating that since the decree stemmed from a compromise agreement, it essentially represented a contract. The breach of this contract created a fresh cause of action, rendering the suit for specific performance maintainable despite the earlier decree. Regarding the question whether a compromise decree is executable, the Court noted that the determination depends on the existence of a decree that is executable for the relief sought in the subsequent suit. The Court emphasized that the bar under section 47 of CPC hinges on the executability of the decree for the purpose of enforcing the relief sought in the subsequent suit.
14. The following paragraphs of *Peer Dil* are significant:

“ 4. In such like eventualities the judicial consensus seems to be that a compromise decree is a contract between the parties and its breach would give cause of action to the other party to approach the Court to seek remedy. Compromise decree is but a contract with superadded command of a Judge. Whether a subsequent suit is barred by reason of section 47, Civil Procedure Code, 1908 **depends upon the existence of a decree which is executable for the purpose of the reliefs sought to be enforced in subsequent suit whether an earlier contract is superseded by a later contract, on account of a certain alteration, depends on whether the parties intended to rescind the original contract.** [Emphasis added]

5.

6.

7.

“ 8. If we agree with the view point as canvassed at bar by Mr. Jamal Khan Mandokhail, learned Advocate Supreme Court it would mean that a consent decree based on compromise can be violated and its compliance depends on the whims and wishes of a party and in such an eventuality no remedy would be available to an aggrieved party which does not appeal to logic and reason and **more so it would make the provisions redundant as contemplated in Order XXIII, rule 3, CPC.**” [Emphasis added]

15. It can be seen that the Supreme Court is expressing concern that accepting the particular viewpoint presented by the counsel would undermine the enforceability of consent decrees, potentially leaving parties that are aggrieved by the violation of the consent decree without legal recourse and making the legal provisions of Order 23 rule 3 CPC redundant.
16. Thus, *Peer Dil* does not lay down that a compromise decree can never ever be executed. Instead, it supports the principle that if a compromise decree was not executable, the compromise itself could be regarded as a new contract between the parties and a fresh suit could then be filed to seek enforcement of the compromise
17. Similar views have been expressed by this Court on similar objections in *National Bank of Pakistan v. Sultan Ali Lakhani*,¹⁹ *Mena Energy DMCC v. Hascol Petroleum Ltd*²⁰ and *Khaliluddin v. Rafiq Ahmed Qandhari*.²¹

Automatic Conversion Of Suit Into Execution Proceedings Under *Financial Institutions (Recovery of Finances) Ordinance, 2001*

18. Initially, recovery of loans advanced by the financial institutions were governed by the *Banking Companies (Recovery of Loans) Ordinance, 1979* and the *Banking Tribunals Ordinance, 1984*.²² With the expansion of consumer banking and in order to facilitate recovery of stuck-up loans, the *Banking Companies (Recovery of Loans, Advances, Credits & Finances) Act, 1997* was promulgated.²³ Building on and with a view to improving the Act, the FIO was promulgated in an attempt to further streamline and

¹⁹ 2015 CLC 1278 (*National Bank of Pakistan v. Sultan Ali Lakhani*)

²⁰ PLD 2022 Sindh 388 (*Mena Energy DMCC v. Hascol Petroleum Ltd*)

²¹ 2021 CLC 877 (*Khaliluddin v. Rafiq Ahmed Qandhari*)

²² These Ordinances did not achieve the intended goal of facilitating a rapid and efficient process for financial institutions to recover defaulted loans – see 2009 CLD 1276 (*World Automobiles v. Muslim Commercial Bank Ltd*)

²³ Ibid – This Act, to a large degree, achieved these objectives by greatly expediting loan recovery and making it much more difficult for defaulters to avoid repayment for years on end by dragging the process out through the courts

expedite the recovery process in favour of financial institutions in cases of default.

19. The FIO is a complete code in itself and being a special law, in case of conflict between a special law and a general law, the former will prevail over the latter.²⁴ Since the instant Execution Application emanates from a Banking Suit filed under the provisions of FIO, its section 19(1) is germane to the instant Office objection which stipulates as follows:

“ 19. Execution of decree and sale with or without intervention of Banking Court: (1) Upon pronouncement of the judgment and decree by a Banking Court, the suit shall automatically stand converted into execution proceedings without the need to file a separate application and no fresh notice need be issued to the judgment-debtor in this regard. Particulars of the mortgaged, pledged or hypothecated property and other assets of the judgment-debtor shall be filed by the decree-holder for consideration of the Banking Court and the case will be heard by the Banking Court for execution of its decree on the expiry of 30 days from the date of pronouncement of judgment and decree:

Provided that if the record of the suit is summoned at any stage by the High Court for purposes of hearing an appeal under section 22 or otherwise, copies of the decree and other property documents shall be retained by the Banking Court for purposes of continuing the execution proceedings.”

20. It is evident from the above that the moment the court issues its verdict, section 19 of FIO comes into play, whereunder after the pronouncement of judgment and decree (the FIO makes no distinction as to type of decree i.e. whether it is a compromise decree or otherwise), the proceedings do not come to an end but the lawsuit automatically transitions into the execution phase and the banking court assumes the role of an executing court without a break in the proceedings (and all that the decree-holder is required to do is to file particulars of the mortgaged, pledged, hypothecated properties and other assets of the judgment-debtor).²⁵ This means the decree-holder can now take steps to enforce the judgment. The judgment-debtor does not need to be issued a new notice. This implies that the judgment-debtor is expected to be aware of the proceedings and the potential consequences. The execution proceedings are set to commence 30 days after the pronouncement of the judgment and decree.

²⁴ PLD 1991 SC 258 (*Packages Limited v. Muhammad Maqbool*)

²⁵ 2011 CLD 92 (*Habib Bank Ltd v. Faiqa Trading Company*); PLD 2013 Kar 430 (*NIB Bank Limited v. Apollo Textile Mills*); 2014 CLD 582 (*Saeed Ullah Paracha v. Habib Bank Limited*); 2019 CLD 437 (*Ghulam Fareed v. Muslim Commercial Bank*); 2019 SCMR 1679 (*Nazli Hilal Rizvi v. Bank Al-Falah*); 2023 SCMR 374 (*Summit Bank Limited v. M.M. Brothers*)

21. Although, as a practice and for sake of convenience, banking courts allow decree-holders to file formal execution applications under the CPC,²⁶ but this practice does not alter the fundamental nature of the proceedings in banking courts, and the specific powers granted to these courts under the FIO remain intact.
22. In post *Peer Dil* era, execution proceedings for enforcement of compromise decrees (which do not run afoul of the non-exhaustive list of principles outlined in paragraph 11 above) passed under FIO have been regularly instituted in courts²⁷ and at times orders passed in execution proceedings after being assailed have been adjudicated upon by the appellate courts²⁸ (including by learned Division Benches of this Court) without them being invalidated on the basis of *Peer Dil* case.
23. In the absence of, inter alia, any material variation or modification in the terms of the compromise decree as a result of subsequent events and agreements arrived at between the decree-holder and judgment-debtor after passing of the compromise decree or the compromise decree becomes inexecutable in view of the changed circumstances in the compromise decree or the terms of compromise decree travel beyond the frame of the suit, the executing court would be in a position to execute the decree under section 47 CPC²⁹ and in exercise of this jurisdiction under the latter provision it can also question the executability of a decree as well as take into consideration subsequent events even after passing of the decree.³⁰

A Universal Prohibition Against Execution Of Compromise Decrees & Public Policy

24. Merely because a decree is a compromise/consent decree, it does not mean it is lesser in terms of value, importance or effectiveness. Such decrees ought to be accorded the same level of solemnity, respect and consideration as any other type of decree. This is all the more essential considering that on one hand the compromise/consent decrees are not challengeable in view of section 96(3) CPC which stipulates that no appeal shall lie from a decree passed by the Court with consent of parties (unless the same are proved to

²⁶ 2014 CLD 243 (*Pearl Fabrics Corporation v. KASB Bank Limited*)

²⁷ 2015 CLC 1278 (*National Bank of Pakistan v. Sultan Ali Lakhani*); 2018 MLD 1293 (*Standard Chartered Bank v. Johar Associates*)

²⁸ 2015 CLD 1590 (*Montgomery Flour & General Mills v. MCB Bank Ltd*); 2020 CLD 310 (*Pak Land Corporation v. Khadim Ali Shah Bukhari (KASB) Bank Ltd*); 2021 CLD 113 (*Ejaz Ahmed v. Meezan Bank Limited*)

²⁹ 2013 CLD 2080 (*Samba Bank Ltd v. Syed Bhais*)

³⁰ PLD 2001 SC 131 (*Fakir Abdullah v. Government of Sindh*)

have been obtained by way of fraud and misrepresentation) and that, on the other hand, any fresh suit will have to overcome the challenge posed by section 11 CPC (i.e the principle of res judicata). By recognizing the efficacy and importance of compromise decrees, litigants are more likely to consider alternative dispute resolution mechanisms, promoting a more cooperative and less adversarial approach to conflict resolution. Whereas, imposing a blanket prohibition against institution of execution proceedings for enforcement of compromise decrees, without factoring individual situations or contexts, would foster the misconception of its efficaciousness, diminish its value, which would in turn persuade parties to shun compromises and discourage them from seeking settlements. Instead, they might be inclined to lock horns in prolonged, obstinate legal battles, leading to increased strain on resources and an overburdened judiciary.

25. Thus, an overbroad generalization and an inflexible approach (which does not consider individual circumstances or exceptions) which requires parties to initiate new legal proceedings for every violation of a compromise decree, would deprive the decree-holder of the fruit of its labour and would reduce the earlier rounds of agonizing, draining and long-winded litigation (which resulted in compromise decree) into mere dress rehearsals for future litigation. This cannot be the intent of any law nor can it be in line with the purpose of compromise decrees, which is to settle disputes and avoid prolonged legal battles. And in this particular case, it would also undermine the purpose of tailoring a special statute viz. FIO.
26. The terms of the compromise decree herein are perused and appear to be executable. Therefore, for what has been discussed above, the Office objection is overruled. Issue notice to the Judgment-Debtor(s) for a date to be fixed in the second-week of January, 2024.

JUDGE

Karachi
Dated: 14th December, 2023

Announced On 14th December, 2023 By:
