61

ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

High Court Appeals Nos.319 to 321, 323, 336 and 337 of 2008

Date	Order with signature of Judge

Appellants World Automobiles and others through Mr. Kazim Hasan, advocate.
Respondents Muslim Commercial Bank Limited and others through Mr. Qazi Faez Issa, advocate.

.....

MUHAMMED KARIM KHAN AGHA J : These High Court Appeals have been filed against the order dated 31.10.2008 (hereinafter referred to as the **"Impugned Order"**), passed by a learned Single Judge of this Court in Execution Applications Nos.70 to 72 of 2007, whereby the learned Single Judge allowed the Execution Applications of the respondents.

2. There are six High Court Appeals, bearing Nos.319, 320, 321, 323, 336 and 337 of 2008, all filed against the Impugned Order. Since all the Appeals involve common points of law and facts they will all be disposed of by this single order.

3. The brief facts of the case are that by order dated 01.6.2006 an application under Order XXIII, Rule 3 read with Section 151, CPC, filed by the parties with the prayer that the suit filed by the plaintiff may be decreed in terms of the compromise application (hereinafter referred to as the **"Compromise Decree"**), was allowed. In effect, the suit was, therefore, decreed with the consent and agreement of all the parties to the Banking Suit No.B-29/2001. The Compromise Decree was based on a Settlement Agreement dated 30.5.2006 between the appellants and respondent No.1. Under the terms of the Settlement Agreement following mortgaged properties were to be sold in order to repay the decreed amount:-

S.NO.	PROPERTY
1.	408/2/1 to 408/2/8, 408/4/1 to 4084/15, Deh Nerather Tappo, Songel Taluka Distt. Karachi West 5.280 Acres 25,000 square yard

63

2.	408/3/1 to 408/3/16, Deh Nerather Tappo, Songel Taluka Distt. Karachi West 4 Acres 19,360 square yards.
3.	409/4/1 to 409/4/16, 412/1/20, Deh Nerather Tappo Songel Taluka District Karachi West, 7.30 Acres 35,332 square yards
4.	409/1/1 to 409/1/8, 411/2/1 to 411/2/16, 412/1/1 to 412/1/11, 412/5/4 to 412/5/6 Deh Nerather Tappo Songel Taluka Distt. Karachi West 10.12 Acres 48,981 square yards.
5.	Survey No.113, Deh Drigh Road, Taluka Distt. East, Karachi 1.00 Acre.
6.	408/1/1 to 408/1/17, Deh Nerather Tappo, Songel Taluka, Distt. Karachi West 3.31 Acres
7.	Naclass No.255/F, Deh Lal Bakhar Tapo Bagopat Taluka Distt. Karachi West, Hawksbay Road, Karachi 2.18 Acres
8.	Plot No. Commercial 4, Survey No. Chalta No.5, Queens Quarters, Southern Express ByePass, Mai Kolachi Road, Karachi West, 2. 88 Acres
9.	Survey No.177, Deh Safoora, Taluka Distt. Malir, KDA Scheme No.36, Block 7, Gulistan-e-Jauhar, Karachi, 1.15 Acres, 6655 square yards.
10.	B-1/A, KDA Scheme No.24, Block 17, Gulshan-e-Iqbal, Karachi, 560 square yards.
11.	61/1, 20th Gizri Street, Phase IV, DHA, Karachi, 516.50 square yards
12.	12/11/1, 2nd Gizri Street, Phase IV, DHA, Karachi, 500 square yards
13.	44-A, 28th Street, Phase V (Extension), DHA, Karachi, 1000 square yards.
14.	43-1, Khayaban-e-Shamsheer, Phase V, DHA, Karachi, 1000 square yards.
15.	3-A, M.A.C.H.S., Shahrah-e-Faisal, Karachi, 2222 square yards.

4. After the Compromise Decree, the parties entered into an Agreement brokered by the National Accountability Bureau (NAB), (hereinafter referred to as the "**New Agreement**"), whereby they attempted to supersede the Settlement Agreement that was confirmed by the Court with their consent through the Compromise Decree. In essence, the parties agreed in the New Agreement that the decretal amount should be paid in "one go" through the sale of property bearing No.A-1-CF/1-5, measuring 4808 square yards, Clifton Quarters, Karachi (hereinafter referred to as the "**Clifton Property**"). A copy of the New Agreement is reproduced herein below:-

"Dear Sir,

SALE OF A-1 CF 1-5, CLIFTON KARACHI FOR ADJUSTMENT OF BANK'S DUES

Reference is made to the latest decision between NAB, MCB and World Group made in SUPER-SESSION to the terms related to repayment schedule from 2007 to 2009 mentioned in the

compromise agreement 30.5.2006 by virtue of which decision, it is mutually agreed that the schedule from 2007 to 2009 mentioned in compromise agreement now stands superseded with the new schedule i.e. The entire payment will now be immediately in "one go" by sale of subject plot, you are as such requested to get this latest decision implemented at your earliest so that the entire amount of MCB may stand paid off at its earliest.

Yours faithfully,

Muhammad Ali Manjee
SVP & Divisional Head"

5. The appellants' case, in a nutshell, is that as this New Agreement had superseded the Compromise Decree, execution of the Compromise Decree could not be ordered by this Court as the Compromise Decree was no longer in the field having been replaced by the New Agreement.

6. According to the appellant, under Section 19(7)(a) of the Financial Institutions (Recovery of Finances), Ordinance, 2001 ("**Ordinance, 2001**") this Court should have ordered on the request of the appellant an investigation to determine whether the Compromise Decree had now been substituted by the New Agreement between the parties to sell the Clifton Property and payoff the decretal amount in full rather than sell off all the mortgaged properties piecemeal in order to settle the decretal amount as per the Compromise Decree.

7. The learned Single Judge in the Impugned Order failed to properly interpret and apply Section 19(7)(a) of Ordinance, 2001 and thereby failed to order an investigation into the new position in the light of the existence of the New Agreement setting out the new manner in which the parties had agreed the decretal amount would be paid.

8. The appellants further contend that the learned Single Judge in his Impugned Order had failed to properly consider the record which, in fact, revealed that the cheque in question of Rs.50,000,000/- (fifty million), which the Appellant had paid in accordance with the Compromise Decree had not been

dishonored but at the request of the appellants had not been presented by the respondents on account of the existence of the New Agreement.

9. Learned counsel for the appellants in support of his submissions has relied upon the following case law: -

(i) MUHAMMAD ASHRAF v. ARSHAD MALIK (2003 CLD 1310);
(ii) NOOR HAYAT INDUSTRIES (PVT) LTD. v. JUDGE, BANKING COURT NO.I (2004 CLD 1281);
(iii) FARASAT JABEEN v. UNITED BANK LTD. (2004 CLD 1586);
(iv) HABIB ULLAH v. BANK OF KHYBER (2007 CLD 875)

10. The case of the respondents is that the appellants were not honoring the Compromise Decree and as a matter of forbearance had reluctantly agreed to enter into the New Agreement, whereby the Clifton Property would be sold and the decretal amount would be paid to them in full.

11. According to the respondents, a cheque of Rs.50,000,000/- (fifty million), given by the appellants pursuant to the Compromise Decree, had already been dishonored before they had entered into the New Agreement. The respondents considered that the appellants were avoiding to payoff on one pretext or the other. The respondents in desperation, had, therefore, entered into the New Agreement as they simply wanted to be paid the entire amount which the appellants owed to them as soon as possible.

12. The appellants refute that there has been any deliberate or unreasonable delay in the circumstances in making payment. According to the appellant a slight delay was caused whilst the Clifton Property was commercialized which was a part of the agreement which was brokered by themselves and NAB to ensure that the Clifton Property reached at a minimum the entirety of the decretal amount on an auction sale.

13. The respondents having lost patience with the appellants moved execution application for enforcement of the Compromise Decree, which was allowed by this Court through the Impugned Order.

69

14. With regard to Section 19(7) of Ordinance, 2001, the respondents contended that this section was not applicable to the given situation.

15. Learned counsel for the respondents has referred the following cases in support of his contentions:-

(i) MEHRAN SOLVENT EXTRACTION (PVT.) LTD. V. I.D.B.P (2008 CLD 844);
(ii) MUHAMMAD HUSSAIN & CO. v. HABIB BANK LTD. (2005 CLD 1400);
(iii) NAZIR AHMED VAID v. HABIB BANK A.G. ZURICH (2005 CLD 1571);

16. We have reviewed the file in detail and carefully considered the submissions of learned counsel for the respective parties.

17. In our view all the appeals turn on the interpretation of Section 19(7) of Ordinance, 2001 and whether individual parties through agreement have the power to set aside a decree of this Court.

18. Before turning to Section 19 of Ordinance, 2001, it is worth mentioning a brief history of the Ordinance and its rationale. Initially, recovery of loans made by the Financial Institutions was governed by the Banking Companies (Recovery of Loans) Ordinance, 1979 and the Banking Tribunal Ordinance 1984. These Ordinances, however, largely proved ineffective in expeditiously enabling the financial institutions from making recovery of defaulted loans.

19. Recovery cases were stuck up in Courts for years on end as defaulters deliberately used legal proceedings to delay repayment. This lead to many loans being written off or regarded as non-performing, which adversely effected both the balance sheets and profitability of the financial institutions as well as the interests of their depositors. The State owned financial institutions were particularly adversely affected in this way.

20. With the onset of the expansion of consumer banking and in order to facilitate the recovery of stuck up loans the Banking Companies (Recovery of

71

Loans, Advances, Credits and Finances) Act, 1997 was promulgated. With the above background in mind the scheme and objective of the Act was to streamline and expedite the process for the recovery of loans by financial institutions against defaulters. 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.

21. Building on and with a view to improving the Act, Ordinance of 2001 was promulgated which attempted to further streamline and expedite the recovery process in favor of financial institutions in cases of genuine default.

22. For ease of reference we set out Section 19 of the Ordinance, 2001, as follows:-

> "19. Execution of decree and sale with or without intervention of Banking Court.---(1) Upon pronouncement of 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.
>
> (2) The decree of the Banking Court shall be executed in accordance with the provisions of the Code of Civil Procedure, 1908 (Act V of 1908) or any other law for the time being in force or in such manner as the Banking Court may at the request of the decree holder consider appropriate, including recovery as arrears of land revenue.
>
> (3) In case of mortgaged, pledged or hypothecated property, the financial institution may sell or cause the same to be sold with or without the intervention of the Banking Court either by public auction nor by inviting sealed tenders and appropriate the proceeds towards total or partial satisfaction of the decree. The decree passed by a Banking Court shall constitute and confer sufficient power and authority for the financial institution to sell or cause the sale of the mortgaged, pledged or hypothecated property together with transfer of

marketable title and no further order of the Banking Court shall be required for this purpose.

(4) Where ac financial institution wishes to sell, mortgaged, pledged or hypothecated property by inviting sealed tenders, it shall invite offer through advertisement in one English and one Urdu newspaper which are circulated widely in the city in which the sale is to take place giving not less than thirty days' time for submitting offers. The sealed tenders shall be opened in the presence of the tenderers or their representatives or such of them as attend.

Provided that the financial institution shall be entitled in its discretion, to purchase the property at the highest bid received.

(5) The provisions of sub-section (5), (6), (7), (8), (9), (10), (11) and (12) of section 15 shall, *mutatis mutandis*, apply to sales of mortgaged, pledged or hypothecated property by a financial institution in exercise of its powers conferred by sub-section (3).

(6) The Banking Court and the financial institution shall be entitled to seek the services and assistance of the police or security agency in the exercise of powers conferred by this section.

(7) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (Act V of 1908), or any other law for the time being in force---

(a) *the Banking Court shall follow the summary procedure for purposes of* investigation of claims and objections in respect of attachment or sale of any property, whether or not mortgaged, pledged or hypothecated, and shall complete such investigation within 30 days of filing of the claims or objections;

(b) if the claims or objections are found by the Banking Court to be *mala fide* or filed merely to delay the sale of the property, it shall impose a penalty upto twenty percent of the sale price of the property;

(c) the Banking Court may, in its discretion, proceed with the sale of the mortgaged, or pledged or hypothecated property if, in its opinion the interest of justice so require.

Provided that the financial institution gives a written undertaking that in the event the objections are found to be valid, or are sustained, it shall in addition to compensating the aggrieved party by the payment of such amount as may be adjudged by the Banking Court also pay a penalty upto twenty percent of the sale proceeds and such amounts shall be recoverable from the financial institution in the same manner as in execution of decrees passed hereunder.

23. Section 19 of Ordinance, 2001, deals with the execution phase of decrees. A plain reading of Section 19 (which is similar to the old Section 18 of

the Act) reveals that its aim is to expedite the recovery process but at the same time protect genuine aggrieved parties from being prejudiced by a fast moving process.

24. Section 19(7) of Ordinance, 2001, has been inserted for the purpose of protecting the interests of genuine aggrieved parties prior to the execution being permitted. Under this section prior to execution, the Court may order investigation into any claims or objections which must be completed in 30 days. To ensure that such claims/objections are not frivolously made with a view to delay the sale of property through execution a penalty can be imposed by the Banking Court if it finds this to be the case.

25. A review of the case law provided by both sides supports the contention of the appellant that Section 19(7) of Ordinance, 2001, does provide for investigation prior to execution where an aggrieved party is to be adversely affected by the sale. These cases, however, in the majority either relate to cases where the parties have been in dispute throughout the proceedings or where the interest of a third party may well be unjustly affected by the order.

26. These authorities make it clear that each case will turn on its own particular facts and circumstances.

27. In this case the parties were initially not in dispute as they requested the Court to give its seal of approval to their Settlement Agreement which the Court duly did at their request by the Compromise Decree. The parties now however find themselves in dispute to the extent that the appellant claims that the Compromise Decree has now been superseded by the New Agreement.

28. If it is possible under the law for a Court sanctioned compromise decree to be varied by the parties outside of the court then we consider that this would be a fit case for investigation as provided under Section 19(7), namely to see whether the Compromise Decree remains in the field or whether it has been superseded by the New Agreement.

77

29. In our view in order to prevent further delay and avoid a fruitless investigation under Section 19(7) it first needs to be determined whether a Court sanctioned compromise decree can be varied by private parties under the law without further reference to the Court. If this is not possible it would not serve any useful purpose to remand the matter back to the learned single Judge for the invocation of Section 19(7) of Ordinance, 2001.

30. The law in this area does not seem to be fully settled as there are contrasting Judgments on the point.

31. On the one hand there is authority that the Executing Court (as in this case) will not look behind the Decree. Reliance is placed on the cases of MUHAMMAD ALAMGIR v. BANK OF PUNJAB (2005 CLD 1408) and HABIB BANK LIMITED v. SERVICE FABRICS LTD. (2004 CLD 1117).

32. In the case of INTERCITY TRANSPORT SYSTEM v. JUDGE, BANKING COURT NO.II (2004 CLD 466) it was held in paragraphs 3 and 4 at pages 468 and 489 as under:-

> "3. Today learned counsel for the respondent-Bank has argued, firstly, that the provisions of any incentive scheme do not have any relevance in execution proceedings as a decree validly passed by the Appellate Court is to be executed by the Executing Court in accordance with the terms of the decree itself. According to learned counsel, the Executing Court has no power to go behind the decree or to modify it on the basis of any incentive scheme, which may have been issued by the respondent-Bank. Secondly, it is contended that the appellants have not even paid a single rupee although the decree against them was passed on 15.1.1995 for a sum of Rs.1,36,70,824.64. On this basis, it is argued by learned counsel for the Bank that the appellants are not even entitled to claim the benefit of the incentive scheme which, as a condition precedent, required a borrower to deposit the amount required under the incentive scheme within the time period stipulated therein.
>
> 4. The contentions of learned counsel for the respondent-Bank are well-founded. Learned counsel for the appellants was not in a position to controvert the same by reference to any legal provision. He merely reiterated his contentions that the appellants were entitled to the benefits of the incentive scheme and sought further time to deposit the sum of Rs.90,00,000/-. As we are in agreement with the arguments advanced by learned

79

counsel for the Bank noted above, we find no merit in this appeal, which is, therefore, dismissed."

33. Likewise in a case which is similar to the instant case and also concerned a compromise decree reported as PAKISTAN INDUSTRIAL LEASING CORPORATION LTD. v. NOORANI INDUSTRIES (PVT.) LIMITED (2003 CLD 259), the following observations were made:-

> ".....After the passing of the consent decree, which is not even appealable under section 96(3), Civil Procedure Code, which has attained finality, no body can challenge the terms of the decree and both the parties are bound to execute the same as it is. Undoubtedly, the learned Banking Court is under legal obligation to execute the decree as it is and cannot go behind the decree. The learned Judge Banking Court has to see only as to whether the consent decree has been satisfied or not and how much amount remains to be paid by the judgment-debtors. The executing Court is concerned only with the payments made after the passing of the decree and after deduction of the said amounts, the learned Banking Court had to execute the remaining decree....."

34. On the other hand, in a case directly on point regarding compromise agreements/decrees, it was held in the case of WAPDA v. ABDUL RAUF (PLD 2002 Lahore 268) as under:-

> "..... *The law is well-settled on the status of a compromise decree that such a decree only amounts to an agreement between the parties, superimposed by seal of the Court, wherefor, superimposition of Court's seal does not make compromise decree untouchably sacred.* The parties still have the option to amend the terms thereof mutually. Such facility, however, is not available in the case of a decree passed on merits by a Court of competent jurisdiction like the 1986 decree. The parties cannot amend the same at their own option or deem the same to have been amended by their agreement. Such decrees have to be executed by the Executing Court in terms that the same were passed. The Executing Court has no power either to amend the decree or to deem the same to have been amended by the parties without obtaining an appropriate order/judgment from the Court that passed the decree. *The question, therefore, arises that is Executing Court powerless to cater for a situation where the parties entered into an agreement, relating to the subject-matter of the decree or as to such decree's satisfaction or adjustment? The answer should be no. It will be illogical and unreasonable to shelve an Executing Court as powerless* (italics added). The Legislature in its supreme wisdom has well-provided for such eventualities and cases, in the provisions of rule 2 of Order XXI which is reproduced hereunder:-

81

"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 the decree 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 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.

(3) Any payment not made in the manner provided in rule 1 or any adjustment not made in writing shall not be recognized by the Court executing the decree."

8. A bare reading of the above quoted provisions show that the parties have been allowed the option to adjust their respective rights and liabilities under a decree mutually by payment or adjustment, either wholly or partly, out of Court or in the Court in terms of sub-rule (1) of Rule 2 of Order XXI, C.P.C....."

35. Furthermore, in the case of MUHAMMAD SALEEM v. FARIDA SALEEM (PLD 2006 Karachi 410), it was held as under:-

".....After examining the law as discussed above, it appears that it is a recognized principle of law that where by agreement of the parties a compromise decree is passed by the Court, the parties are at liberty to have it amended or modified by their mutual consent....."

36. Having carefully considered the law on the variation/amendment of compromise decrees outside of the Court by the parties we find the latter mentioned two authorities to be more persuasive. To us, there seems to be no logical reason why two parties by consent, out of Court, cannot vary/amend their own Court sanctioned agreements. This is more so, if the variation/amendment does not materially affect the substance of the earlier Court sanctioned agreement (as in this case) which simply by consent purported to substitute one form of security with another which was also sufficient to repay the debt.

83

37. Accordingly we find that Court sanctioned compromise decrees, as opposed to decrees, passed on merit by a Court of competent jurisdiction, can be varied/ amended by the parties by consent outside of the Court but same may need seal of the Court. The failure to have such agreed variations/amendments endorsed by the Court may be fatal to the parties, or one party, seeking to rely on them.

38. The preferred approach in order to avoid later disputes/uncertainty regarding the variations/amendments agreed to between the parties, or to guard against one party backing out of the agreement (as in this case) would, of course, be for these variations/amendments again to be endorsed by the Court which passed the original consent order.

39. Another aspect on which we are not making any comment at this stage, as none of the parties had argued it, is whether by alleged compromise the mortgage charge stands relinquished without any order of Court and/or parties entered into an arrangement by which they agreed that in the first instance the Clifton Property may be disposed of and thereafter if decree remained unsatisfied, mortgaged property may also be put to auction. We leave this to be decided by the learned Single Judge.

40. Accordingly, High Court Appeals Nos.319, 320, 321, 323, 336 and 337 of 2008, are hereby allowed alongwith all the applications pending therein and are remanded back to the learned single Judge to enable him to order an investigation as contemplated under Section 19(7) of Ordinance, 2001 to determine whether based on the facts and circumstances of this case the Compromise Decree has been varied by the New Agreement and if so to what extent.

Order Issued on. 25/7/09

Karachi,
Dated: __.5.2009

21/5/09

21-5-09