

FORM NO.HCJD/C
JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD
JUDICIAL DEPARTMENT

C.R. No. 1192 of 2010

**Mian Muhammad
Ajmal.**

Versus

**Syed Nazar Hussain Shah Bukhari,
etc.**

Date of hearing: 13.03.2015.

Petitioner by: Mr Mehboob Alam, Advocate.

Respondents by:- Raja Abdul Qayyum and Imran Hassan,
Advocates.

Athar Minallah, J:

The facts, in brief,
are that the respondents No.2 to 4 are the legal heirs of
Syed Nazar Hussain Shah Bukhari, deceased. The
predecessor of the respondents had executed an agreement
to sell with the petitioner for the sale of a building unit
consisting of basement, shops and two flats, situated at Plot
No.1-Z, Sea Sun Plaza, Markaz F-10, Islamabad (hereinafter
referred to as the "Property"). The sale agreement, dated
23-08-1999, alongwith supplementary agreements dated 18-
09-1999, 22-11-1999 and 24-01-2000 (hereinafter referred
to as the "Agreement to sell") is admitted. The buyer

instituted a suit in the Court of learned Civil Judge, Islamabad on 03-12-2001, for specific performance of the agreement. The parties entered into a compromise and the decree was passed on 21-10-2003. Execution proceedings were initiated by the decree holder and the petitioner filed an objection petition. The objection petition was dismissed by the learned Executing Court vide order dated 07-07-2009. The petitioner filed an appeal, which was decided by the learned Additional District Judge, Islamabad; vide order dated 06-10-2010, whereby the appeal was dismissed. On 25-11-2010, the petitioner filed a revision petition before the Lahore High Court, Rawalpindi Bench, Rawalpindi, which was later transferred to this court. The instant revision was decided vide order dated 22-03-2012. The legal heirs of the respondent No.1 filed C.P. No. 505 of 2012, which was decided by the august Supreme Court vide order dated 18-12-2014. The order of this Court, dated 22-03-2012, was set aside, and the matter was remanded back to this Court for decision afresh. The relevant portion of the judgment of the august Supreme Court is as follows:

"To our mind the premises thus recorded are neither legal nor logical within the parameters of Section 47 of the CPC. The points urged before the High Court could well have been decided by itself without having recourse to remand of case, that too

when no fresh evidence was required to be recorded for the just and proper decision of the case. The material available on record is by all means sufficient to enable the Court to pronounce a balanced and befitting judgment”.

2. The learned counsel for the petitioner has contended that; the decree dated 21-10-2003 was in pursuance of the compromise / settlement between the parties, duly recorded by the Banking Court, Rawalpindi vide its order dated 07-10-2003; on 08-10-2003, the petitioner recorded his statement before the learned Trial Court; the decree was passed in terms of the consent between the parties and in terms of the compromise / settlement dated 07-10-2003 before the Banking Court, Rawalpindi; the suit was decreed in the light of the respective statements recorded before the learned Trial Court, particularly the statement of the petitioner, dated 08-10-2003; the terms and conditions of the compromise / settlement made between the parties before the Banking Court, Rawalpindi on 07-10-2003 are to be read with the decree dated 21-10-2003; the agreement/settlement arrived at between the parties was unambiguously intended to be an integral part of the decree; the terms and conditions of the agreement to sell, including the roof rights in favour of the petitioner, are to be treated as an integral part of the decree; the decree is

not in accordance with the compromise / settlement, which had been effected and reduced into writing before the Banking Court, and pursuant to which the petitioner had recorded a statement dated 08-10-2003 before the learned Trial Court; this Court, as well as the Civil Court, does not become functus officio and retains control over the action, and has the jurisdiction to modify the decree even at this stage; the respondents, without fulfilling their part of the compromise / settlement, initiated execution proceedings for the transfer of the property; the respondents were dismissed from service and they had committed fraud; the respondents obtained the decree through misrepresentation, undue influence and without the free consent of the petitioner; this Court at this stage has the jurisdiction to set aside the decree, so as to incorporate the terms and conditions of the compromise / settlement, which ought to have been made part of the decree; reliance has been placed on the cases "*Mst. Kishwar Naseem versus Hazara Hill Tact and others*" [PLD 2005 Peshawar 136], "*Mahram Khan versus Fateh Khan and 03 others*" [2003 CLC 1434], "*Miss Kiran Arif Mian versus Miss Kinza Khalid and another*" [PLD 2008 Islamabad 11], "*Habib Ullah versus The State*" [2005 MLD 558], "*Mst. Bashiran versus Muhammad Sharif and 09 others*" [1988 CLC 2236], "*Ali Rehman, etc versus Haji Muhammad Suleman etc*" [NLR 1990 Civil 246]. Stress has been laid on the scope of this Court while exercising its revision jurisdiction, in support of the argument that in order to do

complete justice the decree, even at this stage, can be brought into conformity with the terms of the agreement/settlement between the parties.

3. On the other hand, the learned counsel for the respondents have contended that the instant revision petition has been filed against the concurrent findings of the two learned Courts below dismissing the objection petition; the two learned Courts below have exercised jurisdiction in accordance with law and no illegality or material irregularity has been pointed out by the petitioner; the Executing Court cannot go beyond the decree; the scope of Section 47 of the CPC 1908 (hereinafter referred to as the "CPC") is to the extent of the questions relating to the execution, discharge or satisfaction of the decree and, therefore, under no circumstances can the Executing Court modify, alter or go beyond the decree; reliance in this regard has been placed on the cases *"Irshad Masih and others versus Emmanuel Masih and others"* [2014 SCMR 1481], *"Humayun Hassan versus Arslan Humayun and another"* [PLD 2013 S.C. 557], *"Muhammad Tariq Khan versus Khawaja Muhammad Jawad Asami and others"* [2007 SCMR 818], *"Mst. Naseem Akhtar and another versus Shalimar General Insurance, Company Limited and 02 others"* [1994 SCMR 22], *"Mazhar ud Din Siddique and another versus M/s Industrial Development Bank of Pakistan"* [2014 CLD 998], *"M/s Habib Bank Limited versus Banking Court No.II and 02 others"* [2012 CLD 218],

"Mst. Yasmeen versus National Insurance Corporation and others" [2004 CLC 979]; the petitioner cannot rely on a document or the agreement/settlement in the execution proceedings; even in the case of a consent or compromise decree, the Executing Court cannot go beyond the compromise decree, and the same has to be enforced as it is; reliance in this regard has been placed on the case *"Precision Engineering Ltd and others versus The Grays Leasing Ltd."* [PLD 2000 Lahore 290]; a pre-decreetal agreement / compromise affecting the executability of the decree cannot be considered by the Executing Court, unless the same is incorporated in the decree; reliance in this regard has been placed on the cases *"Asif Latif versus Additional District & Sessions Judge, Mian Channu and 02 others"* [2005 MLD 122], *"Azad Government of the State of Jammu and Kashmir through its Chief Secretary versus Brig. (Retd.) Muhammad Aslam Khan"* [1994 MLD 1825], *"Krishna Raj Trading Corporation versus Ram Saran Dass and Brothers"* [AIR 1962 Allahabad 374], *"Robert Hercules Skinner versus R.M. Skinner and others"* [AIR 1937 Lahore 537] and *"Bhaskar Dattatraya Subnis versus Nilkanthdattatraya Subnis"* [AIR 1938 Nagpur 265]; the scope of the jurisdiction of this Court under Section 115 of CPC is limited, and it can neither amend a decree at this stage, nor read or consider a document not incorporated therein; the right of appeal against the decree was provided to the petitioner, and the same was not availed; the

petitioner cannot agitate the error in the decree at this stage i.e. after 12 years of passing the decree; the petitioner is trying to take an undue advantage; the decree has to be read as it is; the roof rights as claimed by the petitioner, even assuming to have been incorporated in the decree, could not have been executed, as the same is not permissible under the relevant law i.e. the Capital Development Ordinance 1960 and the Rules / Regulations made there under; the petitioner has not made out a case for interference with the concurrent findings of the two lower Courts.

4. The learned counsels also submitted their respective arguments in writing and the same were placed on record.

5. The learned counsels have been heard and the record perused with their able assistance.

6. As the learned counsel for the petitioner has laid great stress on the scope of the jurisdiction of this Court while exercising its powers under section 115 of the CPC, therefore, the said contention shall be addressed first. The other question arising from the arguments, and to be considered, is whether the executing court can go beyond the decree and thus treat the terms and conditions of the

agreement/settlement thereof. Lastly whether, considering the facts and circumstances, interference is warranted by this Court when the two learned Courts have given concurrent findings.

**Scope of the Revisional Jurisdiction of
this Court**

7. The august Supreme Court in the case "Kanwal Nain and 03 others versus Fateh Khan and others" [PLD 1983 S.C. 53] has quoted a passage from a judgment of the Privy Council in the case "N.S. Venkatagiri Ayyangar and another versus Hindu Religious Endowments Board, Madras" relating to interpretation of Section 115 of the CPC, wherein it has been held that the provision empowers the High Court to satisfy itself upon three matters.

- (a) That the order of the subordinate Court is within its jurisdiction;*
- (b) that the case is one in which the Court ought to exercise jurisdiction; and*
- (c) that in exercising jurisdiction that Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision.*

8. It was further observed that Section 115 applies only to cases in which no appeal lies, and where the legislature has provided no right of appeal. The Privy Council, therefore, held that the manifest intention of the legislature is that the order of the Trial Court, right or wrong, shall be final, except in the circumstances highlighted above. It was, therefore, held that unless the case was not covered under Section 115 of CPC and the High Court was satisfied in this regard, then in such a case no power could be exercised to interfere simply because it differs, however profoundly, with the conclusions of the subordinate Court regarding questions of law and facts. This view of the Privy Council was affirmed and quoted with approval in a earlier judgment of the case of Supreme Court in "*Umar Dad Khan and another versus Tila Muhammad and 14 others*" [PLD 1970 S.C. 288]. The said principles were further affirmed by the Supreme Court in a chain of judgments and the principles as elucidated and enunciated may be summarized as follows:

(a) The scope of revisional jurisdiction is limited and discretionary and should not be exercised if substantial justice has been done between the parties;

(b) The scope is limited in interfering with concurrent findings of the lower Courts, however exceptions to this rule are when the findings are based on; (i)

insufficient evidence (ii) misreading of evidence (iii) non-consideration of material evidence (iv) erroneous assumption of facts (v) patent errors of law (vi) consideration of inadmissible evidence (vii) abuse of jurisdiction (viii) arbitrary exercise of power (ix) unreasonable view has been taken which is not in consonance with law (x) conclusion drawn is perverse or contrary to law (xi) when based on conjectural presumption or erroneous presumption or wrong preposition of law;

(c) Ordinarily erroneous decision of facts are not revisable;

(d) Mere fact that the High Court may differ on a question of fact or mixed question of law and fact is not a valid ground for interference with concurrent findings;

(e) The concurrent findings recorded on the basis of evidence is not susceptible to further review to justify interference by the High Court in revisional jurisdiction;

(f) Court having the jurisdiction to determine the question in issue cannot be said to have acted illegally or with material

irregularity, merely for the reason that the decision arrived at was erroneous;

(g) Interference in such jurisdiction would not be possible for mere fact that reappraisal of evidence might suggest another view of the matter;

(h) High Court may undertake reappraisal of evidence, if it finds that there is gross misreading of evidence by the Trial Court or by the lower Appellate Court and material evidence was ignored.

9. The above principles have been quoted from and enunciated by the august Supreme Court in the cases of "*Umar Dad Khan and another versus Tila Muhammad and 14 others*" [PLD 1970 S.C. 288], "*Kanwal Nain and 03 others versus Fateh Khan and others*" [PLD 1983 S.C. 53], "*Mai. Rashid Beg versus Rehmat Ullah Khan and 04 others*" [PLD 2001 S.C. 443], "*Khan Mir Daud Khan and others versus Mahrullah and others*" [PLD 2001 S.C. 67], "*Suleman versus Mst. Zeenat Jan and 02 others*" [PLD 2003 S.C. 362], "*Imam Din and 04 others versus Bashir Ahmed and 10 others*" [PLD 2005 S.C. 418], "*Asmatullah versus Amanat Ullah through Legal Representative*" [PLD 2008 S.C. 155], "*Atiq-ur-Rehman through (Real Father) and another versus Muhammad Amin*" [PLD 2006 S.C. 309], "*Ahmad Nawaz Khan versus Muhammad Jaffar Khan and others*" [2010 SCMR 984],

"Administrator, Thal Development through EACO Bhakhar and others versus Ali Muhammad" [2012 SCMR 730] and "Noor Muhammad and others versus Mst. Azmat-e-Bibi" [2012 SCMR 1373].

10. The above principles have recently been reiterated and clinched in the judgment of the august Supreme Court titled as *"Mandi Hassan alias Mehdi Hussain and another versus Muhammad Arif" [PLD 2015 S.C. 137]*. The relevant portion is as follows;

"In other words the revisional jurisdiction is meant to rectify; to obviate, forehand and stave off the exercise of jurisdictional errors/defects and illegalities and/or material irregularity committed by the subordinate court in that regard. But the 'case decided' (order/judgment assailed) has to squarely fall within the scope and purview of section 115 CPC"

11. The august Supreme Court further held that once the case is covered under section 115 of the C.P.C, then approaching the Court for the redressal of a grievance is not a mere privilege but a valuable right of an aggrieved party.

12. This Court, therefore, can only exercise its revisional power and jurisdiction as circumscribed by the principles and law discussed above. There is, therefore, no force in the argument of the learned counsel for the petitioner that this court has unfettered powers under Section 115 of the CPC.

What is the Scope and power of an Executing Court and whether it can go beyond the decree

13. Decree has been defined in Section 2(2) of CPC as meaning "a formal expression of an adjudication, which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all the matters in controversy in the suit or any of the matters in controversy in the suit". A decree may be preliminary or final. The explanation of Section 2(2) of the CPC draws the distinction between a preliminary and final decree. In the case of the latter, the adjudication completely disposes of the suit, while the former does not have such an effect. The powers of an executing court are provided under Section 47 of the CPC. It, inter alia, provides that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court having jurisdiction to execute the decree. Order XXI of the CPC governs the procedure for the execution of decrees and orders. A combined reading of the

provisions unambiguously shows that after a decree has been drawn up, the same is to be executed. The decree drawn up following a judgment is distinct and separate. It is by now settled law that a decree by definition is an expression of conclusively determining the matters placed before a Trial Court for adjudication.

14. What if the judgment and decree are pursuant to an agreement, but the terms thereof are not mentioned in the latter? The earliest judgment of the august Supreme Court on the question is "*Ghulam Muhammad versus Sultan Mahmud and others*" [PLD 1963 S.C. 265]. The facts of the case in the said judgment were that a suit for declaration and possession was decreed. The judgment granted both the reliefs i.e. the declaration and the possession. However, while drawing up the decree, the relief of possession was not incorporated therein. The decree remained unexecuted and, therefore, another suit was filed for possession of the same property. The matter went up to the august Supreme Court. It was an admitted fact that the decree did not agree with the judgment. However, it was held that the relief of possession even in such circumstances could not be read in the decree as having been granted. The august Supreme Court further observed that two remedies were available concurrently i.e. filing a subsequent suit, provided the subject matter of the previous suit was different and distinct, or to amend the decree under Section 152 of the CPC. It

was further observed and held that the remedy under Section 152 of the CPC could also be provided suo moto by the competent court by amending the decree, so as to make it conform to the judgment.

15. It would be pertinent to refer to observations made by the Lahore High Court in the case "*Mst. Ashraf Bibi versus Barkat Ali*" [PLD 1956 Lahore 27]. His lordship *Mr Justice B.Z. Kaikaus* (as he then was) had observed in the said judgment that "as soon as the Court discovered that the decree did not in fact follow the compromise on account of a slip or clerical mistake, it became its duty to correct the mistake for no person could be prejudiced by an act of the Court". It was also held that the Court was vested with the power of acting suo moto and correcting the decree under Section 152 of the CPC.

16. Following the principles laid down in the *Ghulam Muhammad case Supra*, the august Supreme Court has held a consistent view that an executing court cannot extend its jurisdiction to go behind the decree and question its correctness. Reference may be made to the cases "*Syed Riaz Ahmad Shah and another versus Dayal Singh College Trust Society and another*" [1972 SCMR 237], "*Muhammad Ali and others versus Ghulam Sarwar and others*" [1989 SCMR 640], "*Mst. Naseem Akhtar and 04 others versus Shalimar General Insurance Company Ltd. and 02 others*"

[1994 SCMR 22], "Fakir Abdullah and other versus Government of Sindh through Secretary to Government of Sindh, Revenue Department Sindh Secretariat and others" [PLD 2001 S.C. 131], "Allah Ditta versus Ahmed Ali Shah and others" [2003 SCMR 1202], "Rehmat Wazir and others versus Sher Afzal and others" [2005 SCMR 668] and "Muhammad Ali versus Zakir Hussain" [PLD 2005 Lahore 331]. Two judgments have referred to exceptions to the established rule that an executing court cannot look beyond the decree or look into the judgment, and the same are as follows:

- (i) When the decree is silent regarding what property was the subject matter of execution, then only in such an eventuality the executing court can look into the judgment in order to find the said property. 2003 SCMR 1202.*
- (ii) The executability of a decree can be questioned by the executing court if it is satisfied that (a) the decree is a nullity in the eyes of the law, (b) it has been passed by a Court having no jurisdiction (c) the execution of the decree will not infringe the legal rights of the decree holder, if refused to be executed or (d) the decree has been passed in violation*

*of any provision of law. PLD 2001 S.C
131.*

17. Now this Court will examine the orders passed by the two lower Courts, so as to determine whether in the light of the above discussed principles, an interference by this Court in exercise of its revisional jurisdiction is warranted or not. The judgment was passed on 21-10-2003 pursuant to the statement made by the present petitioner / defendant No.1. Following the judgment the decree was drawn up, which is as follows:

"Suit of the plaintiff is decreed in the way that defendant No.2 is directed to substitute the name of plaintiff Syed Nazar Hussain Bukhari s/o Syed Nijabat Ali Shah, as co-allottee / co-sharer in place of Mian Muhammad Ajmal, in its record with regard to Plot No.1-Z, F-10, Markaz, Islamabad, subject to the payment of all dues according to the rules and regulations of the CDA. Plaintiff would step into the shoes of defendant No.1. so for liability on suit property are concerned. No order as to the costs".

18. The above decree is unambiguously an expression of the adjudication, and conclusively determines the rights of the parties in the suit. The objection petition

filed by the petitioner raised matters which are neither expressed in the decree, nor can be construed as part thereof. The learned Trial Court, vide order dated 06-07-2009, dismissed the objection petition on the grounds that the matters raised by the petitioner / defendant No.1 were not an expression nor part of the decree and, therefore, the petition was found to be frivolous. The petitioner, thereafter, preferred an appeal, which was also dismissed by the learned Additional District Judge, Islamabad, vide impugned order dated 06-10-2010. The learned Appellate Court held that the decree passed in favour of the plaintiff is not subject to any condition. It was further observed that in case the petitioner / defendant No.1 was aggrieved on the ground that the decree had not been drawn up according to the compromise / settlement, or that there was some other error, then an appeal ought to have been preferred. Admittedly, no appeal was preferred by the petitioner / defendant No.1. The objection petition was also filed belatedly, and raised grounds which were not tenable, as the decree is unambiguous and the executing court could not go beyond the decree. Moreover, it has been conceded before this Court by the learned counsel for the petitioner / defendant No.1 that the terms and conditions of the compromise / settlement are neither reflected nor incorporated in the decree dated 21-10-2003. On the basis of the settled principles and law as discussed above, the Executing Court could neither modify nor take into

consideration documents or the agreement, which is not reflected or incorporated in the decree. The petitioner / defendant No.1 also did not exercise his right to assail the decree by preferring an appeal. The learned Trial Court as well as the Appellate Court have correctly appreciated the facts and law in the instant case. The learned counsel for the petitioner has not been able to satisfy this Court that interference is required nor a case is made out so as to exercise jurisdiction under section 115 of the C.P.C. The concurrent findings are in accordance with law and well reasoned. This Court has been informed that a fresh suit has been filed by the petitioner, while an application under section 152 of the C.P.C is also pending before the trial court for amendment of the decree. In the circumstances, this Court is not inclined to interfere in exercise of its revisional powers.

18. For what has been discussed above, there is no merit in the instant petition and, therefore, the same is ***dismissed.***

(Athar Minallah)
Judge

Announced in the Open Court on _____

Judge

Approved for reporting.

*Asad K/**

