

JUDGMENT

ATHAR MINALLAH, J.- The instant Executing First Appeal is directed against order dated 09-05-2013, passed by the learned Single Judge in Chambers in Execution Petition No.01 of 2004, titled "Allied Bank of Pakistan, Ltd. v. Messrs Fazal Vegetable Ghee Mills Ltd.". The learned Single Judge in Chambers, through the impugned order, had disposed of applications filed by respondents Nos.9, 10 and 11 respectively.

2. The facts, in brief, are that Messrs Fazal Vegetable Ghee Mills Ltd. (hereinafter referred to as the "Company") had obtained finance facility from the Appellant Bank. Two separate suits for recovery were filed by the latter Bank. Both the suits were decreed separately. The instant appeal arises out of the execution proceedings filed in case of C.O.S. No.01 of 2004 for recovery of Rs.17,35,16742.38. The suit was filed against respondents Nos.1 to 6 and the same was decreed vide judgment and decree dated 05-05-2004. The decree, as drawn up by the Lahore High Court, Rawalpindi Bench is as follows:-

"IT IS ORDERED THAT This Court decrees the suit and dismisses the application for grant of leave. The decree shall be recoverable firstly from all defendants except defendant No.6.

The decree will, however, not be executable with respect to the mark-up for the period of the first default until today for a period of 3 months from today enabling the parties to negotiate on this limited aspect of the case in view of the plaintiff agreeing to discuss this issue with the judgment-debtor. In case decree-holder does not fulfil its commitment with respect to serious considerations against the request of the judgment-debtor, the case in this limited sense may be re-agitated with proper proof by the judgment-debtor or before the expiry of 3 months' period from today, whereafter this portion of the decree shall also be executable.

In view of the position taken by all other defendants except defendant No.6, the case against defendant No.6 having not been pressed at this stage, he is excluded from the decree in his personal capacity."

3. The Appellant Bank filed execution proceedings vide Execution Petition No.01 of 2004. Respondents Nos.1 to 8 are the judgment-debtors. Independent of the execution proceedings, a winding up petition under the provisions of the Companies Ordinance, 1984 (hereinafter referred to as the "Ordinance") was also filed as C.O. No.06 of 2004, titled as "Securities Exchange Commission of Pakistan v. Fazal Vegetable Ghee Mills". In the winding up proceedings vide orders dated 10-02-2006 and 20-03-2006, the respondent No.10 were appointed as Liquidators, and it was ordered that the fee of the Liquidators shall be paid by the Company. The respondent No.09 claims to be the President of the workers of the Company. Respondent No.11 is established

under the Employees Old Age Benefits Institution Act, 1976. Respondent No.1, through C.M. No.2127 of 2010 filed in Execution Petition No.01 of 2004, prayed that the arrears/dues of the labourers/workers of the Company may be ordered to be paid by the Appellant Bank. The respondent No.10, vide application C.M. No.945 of 2010, inter alia, sought a direction to the Bank to pay the Liquidator's fee w.e.f. 20.03.2006. The respondent No.11 filed C.M. No.49 of 2013, seeking a direction to the Appellant Bank to pay claims of EOBI contribution outstanding against employees of the Company. The aforementioned respective applications of the respondents Nos. 9 to 11 were allowed/ disposed of vide impugned order passed in execution proceedings relating to judgment and decree dated 05-05-2004. The relevant portion of the impugned order relating to C.M. No.2127 of 2010, filed by the respondent No.9 is as follows:-

"In the circumstances, the liquidators are directed to determine claim of the workers; however, it has to be kept in view that the Hon'ble Lahore High Court, Rawalpindi Bench had observed that Messrs Fazal Vegetable Ghee Mills Limited was closed in the year 2002; so, the claim of the workers cannot be accepted that they had been working after 2002. The said judgment of the Hon'ble Lahore High Court had attained finality, as the same upheld up to the Hon'ble Supreme Court of Pakistan."

4. C.Ms. Nos.945 of 2010 and 449 of 2013, filed by the respondents Nos.10 and 11 respectively, was disposed of in the following terms:--

"As far as claim of the liquidators is concerned, there is nothing on record to show that the liquidators had been performing any duty. Admittedly, there was no asset; so, there can be no question of determining claim of any person. So, claim of the liquidators for past payment cannot be accepted. However, in future when the official liquidators would be performing their duties, they shall be paid same fee and the amount is to be deducted from the decretal amount, to be paid to the bank. The payment would commence from the date of the present order till filing of report by the liquidators after determining claims of the workers as well as EOBI. The EOBI may also approach the liquidators for determining of its claim. The liquidators shall file the report at the earliest; however, if the bank/decreet holder and Messrs Fazal Vegetable Ghee Mills Limited/judgment debtor refuse to extend cooperation, it shall be presumed that they have nothing to offer and the liquidators may proceed with the claims of the workers as well as EOBI, ex parte, However, the liquidators must inform the bank as well as Messrs Fazal Vegetable Ghee Mills Limited, through notices in writing. Till submission of report by the liquidators, the execution petition shall remain pending."

5. Malik Ghulam Sabir, ASC and Barrister Suleman Khan, appearing on behalf of the Appellant had contended that; it is settled law that an executing Court cannot go beyond the decree; the learned Single Judge in Chambers, while exercising powers under section 47 of the Civil

Procedure Code, 1908 (hereinafter referred to as "C.P.C.") could only have executed the Decree and noting alien to it; the impugned order has been passed on applications filed by respondents Nos.9 to 11, who were neither parties to the suit, wherein judgment and decree dated 05.05.2004 had been passed, nor could the respective prayers sought have been granted during the execution proceedings; the impugned order is against law and facts and, therefore, liable to be set-aside; the learned Single Judge in Chambers, while passing the impugned orders, did not take into consideration the fact that liquidators i.e. respondent No.10 had been appointed in winding up petition bearing No.CO-06 of 2004 wherein the Court had directed vide order dated 10.02.2006 that the liquidator's fee shall be paid by the Company; the orders dated 20.03.2006 and 10.02.2006 respectively, passed in C.O. 06 of 2004, could neither be reviewed, altered, amended or modified while exercising powers as an executing Court; the assets of the Company had been auctioned on 17-05-2004 and, therefore, no other asset was left for satisfaction of the claims of the respondents Nos.9 to 11; even if the respondents Nos.9 to 11 had a claim the same was to be raised in the winding up proceedings; the claims as raised through the respective applications allowed through the impugned order, were beyond the scope of the decree; the learned Single Judge in Chambers erroneously treated the decree dated 05-05-2004, passed in favour of the Appellant Bank as an asset of the Company; the Lahore High Court, Rawalpindi Bench vide order dated 14-04-2006 had restrained the respondent No.10 from interfering with the possession of the auction purchaser or from taking further action as liquidators; the order dated 14-04-2006 remains to be in field; the learned Single Judge in Chambers ignored Section 323 of the Companies Ordinance, 1984 read with 256 of the Companies Courts Rules, 1997 in the context of payment of remuneration to the liquidators; the undertaking referred to in paragraph 2 of the impugned order is neither part of the judgment nor the decree dated 05-05-2004; the learned Single Judge in Chambers excluded from his consideration that the execution proceedings had been filed by the Appellant Bank for the satisfaction of the decree dated 05-05-2004 and, therefore, the impugned order amounts to frustrating the decree; the claims made by the employees/labourers of the Company had been set-aside by the Lahore High Court, Rawalpindi Bench vide order dated 07-02-2008, passed in W.P. No.2242 of 2005; the manufacturing/production unit of the respondent No.1 had admittedly been closed in 2002 and, therefore, any claim by the workers/labourers thereafter has no leg to stand on; the claim of the respondent No.11 is against the Company i.e. respondent No.1 and, therefore, cannot be realized through execution of the decree dated 05-05-2004.

6. Ch. Fayyaz Ahmad Padana, ASC appeared on behalf of the respondent No.9 and argued that; clause-IV of paragraph 5 of letter dated 02-04-2004, addressed to the Appellant Bank by S Ijaz-ud-Din and Company, unequivocally stated that the former shall be liable to pay all charges, tax, sales tax, Labour claims etc and that the said undertaking was accepted by the Appellant Bank; the Appellant Bank is stopped from refusing to proceed with its own undertaking as is evident from letter dated 02-04-2004; the sale of the manufacturing/production unit of the respondent No.1 was accepted by the Lahore High Court, Rawalpindi Bench in terms of the offer made vide letter

dated 02-04-2004, as is evident from order dated 17-05-2004, passed in Appeal/Revision No.Ex-A.5/2002; the learned Single Judge in Chambers, while passing the impugned order, was also notified as a Company Judge and, therefore, was vested with power to exercise jurisdiction under the Companies Ordinance, 1984; the workers/labourers cannot be left without a remedy; the undertaking vide clause-IV of paragraph 5 of letter dated 02-04-2004, having been accepted by the Bank and made part of order dated 17-05-2004 by the Lahore High Court, Rawalpindi Bench is binding on the Appellant Bank; the learned Single Judge in Chambers, while passing the impugned order, has not committed any irregularity, and rather has given effect to the undertaking given by the Appellant Bank for payment of the dues of the workers/labourers.

7. Mr. Muhammad Tariq Khan Yousafzai, ASC appeared on behalf of respondent No.10 and has contended that; an amount of Rs.3.5 Million is outstanding as liquidator's fee; the Appellant Bank is under an obligation to pay the liquidator's fee; there is no other asset of the respondent No.1 and, therefore, the liquidator's fee also has to be paid through the execution of the decree dated 05-05-2004.

8. Ms. Shabih Zehra, ASC appearing for respondent No.11 has strenuously argued that the latter is a statutory entity and, therefore, its dues and outstanding liabilities against the respondent No.1 have to be realized against the execution of the decree dated 05-05-2004.

9. We have heard the learned counsel and perused the record with their able assistance.

10. It is not denied that the learned Single Judge in Chambers has passed the impugned order dated 09-05-2013, in execution proceedings filed by the Appellant Bank in respect of judgment and decree dated 05.05.2004. It is also not denied that separate and distinct proceedings for winding up of the Company i.e. respondent No.1 were also in progress, filed under the provisions of the Companies Ordinance, 1984. Admittedly, the manufacturing/production unit of the Company had been auctioned in distinct and independent execution proceedings by the Lahore High Court, Rawalpindi Bench vide order dated 17-05-2004 passed in Appeal/Revision No.Ex-A.5/2002 and had no relation whatsoever with the execution proceedings wherein the impugned order was passed.

11. The decree dated 05-05-2004 has been reproduced above. The decree, as drawn by the Lahore High Court, Rawalpindi Bench, is unambiguous and by no stretch of the imagination includes any claim raised by the respondents Nos. 9, 10 or 11 through their respective applications filed in execution proceedings pursuant to Executing Petition No.01 of 2004. The learned Single Judge in Chambers, while passing the impugned order dated 09-05-2013, was undoubtedly exercising powers as an executing Court and not as a Company Judge. Perusal of the impugned order indicates that the learned Single Judge in Chambers, while exercising powers as an executing

Court, also exercised powers under the Companies Ordinance, 1984, as if the proceedings were in the nature of winding up.

12. The question, therefore, for our determination is whether the learned Single Judge in Chambers while exercising powers as an executing Court could have gone beyond the Decree 05-05-2004 as it was drawn up.

13. Decree has been defined in section 2(2) of the C.P.C. 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 regards 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 C.P.C. 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 C.P.C. 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 C.P.C. 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. It is settled law that even if the judgment and decree are pursuant to an agreement, but the terms thereof are not mentioned in the Decree, though recorded in the judgment, yet such terms cannot be read in the Decree as having been granted. Reliance is placed on "Ghulam Muhammad v. Sultan Mahmud and others" PLD 1963 SC 265 and "Mst. Ashraf Bibi v. Barkat Ali" PLD 1956 Lahore 27.

14. Following the principles laid down in the Ghulam Muhammad case Supra, the august Supreme Court has consistently held 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 v. Dayal Singh College Trust Society and another" [1972 SCMR 237], "Muhammad Ali and others v. Ghulam Sarwar and others" [1989 SCMR 640], "Mst. Naseem Akhtar and 04 others v. Shalimar General Insurance Company Ltd. and 02 others" [1994 SCMR 22], "Fakir Abdullah and others v. Government of Sindh through Secretary to Government of Sindh, Revenue Department Sindh Secretariat and others" [PLD 2001 SC 131], "Allah Ditta v. Ahmed Ali Shah and others" [2003 SCMR 1202], "Rehmat Wazir and others v. Sher Afzal and others" [2005 SCMR 668] and "Muhammad Ali v. Zakir Hussain" [PLD 2005 Lahore 331]. Two judgments have referred to exceptions to the established rule an executing court cannot look beyond the decree or look into the judgment, and the same are as follows:

(1) 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 SC 131.

15. In the instant Appeal the learned Single Judge in Chambers, while exercising powers as an executing Court, could not have gone beyond the decree. The emphasis of the learned counsel for the respondent No.9 on the order dated 17-05-2004, passed by the Lahore High Court, Rawalpindi Bench in Appeal/Revision No.Ex-A.5/2002, particularly clause-IV of paragraph 5 of the offer letter dated 02-04-2004 is also misconceived and not relevant in the executing proceedings pursuant to Decree dated 05-05-2004. The order dated 17-05-2004 and the terms and conditions of offer vide letter dated 02-04-2004, relate to the execution of an independent and distinct Decree and, therefore, cannot have been considered or imported in the proceedings relating to Decree dated 05-05-2004. The three applications filed by respondents Nos. 9, 10 and 11 respectively were neither competent nor had any nexus whatsoever with the execution of the Decree dated 05-05-2004. We have also been informed that the winding petition C.O. 06/2004 has been dismissed for non-prosecution. The respondents Nos. 9, 10 and 11 shall be at liberty to seek remedy by initiating proceedings under appropriate law and before a competent Court vested with jurisdiction.

16. In view of the above, we allow the appeal and accordingly set aside the impugned order dated 09-05-2013.

17. Resultantly, the connected E.F.A. No.08/2013 is also allowed.

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