

EP No.87/2024

ORDER

23rd May, 2024 1. Applicant alongwith his counsel present. Respondent

present through his counsel.

2. Vide detailed judgment of today placed on file, having no merits in this application, it is dismissed with costs. Consign.

3. *Pronounced in open Court at Peshawar and given under my hand and the seal of the Tribunal on this 23rd day of May, 2024.*



(Kalim Arshad Khan)
Chairman

Mutazem Shah

executable part of the decree and may proceed with the execution of the rest of the decree. In the case of Mst. Naseem Akhtar and 4 others v. Shalimar General Insurance, Company Limited and 2 others reported as 1994 SCMR 22, it was also held by the Hon'ble Apex Court that it is a well-known rule that the Court executing the decree cannot go beyond it and allow its validity to be impugned. Further reliance in this respect may also be placed on the following judgments:-

- i. Province of Punjab through Secretary Industries, Government of the Punjab, Civil Secretariat, Lahore v. Burewala Textile Mills Limited (2001 SCMR 396); and*
- ii. Muhammad Ali and others v. Ghulam Sarwar and others (1989 SCMR 640)"*

13. For what has been discussed above, having no merits in this application, it is dismissed with costs. Consign.

14. Pronounced in open Court at Peshawar and given under my hand and the seal of the Tribunal on this 23rd day of May, 2024.



KALIM ARSHAD KHAN
Chairman

whereby their predecessor's suit was disposed of without grant of relief prayed for, or the other judgment of the Supreme Court dated 18.6.1995, dismissing their petition and confirming the judgment of the Lahore High Court dated 8.12.1993. Rather, after the death of Mst. Margret in the year 1996, there was nothing in the said judgments which was executable at the request of the present petitioners. Similarly, in the case of Tauqeer Ahmad Qureshi v. Additional District Judge, Lahore and 2 others reported as PLD 2009 Supreme Court 760, the Hon'ble Apex Court has held that there is no cavil to the proposition that the executing Court cannot go beyond the decree but at the same time the executing Court can look into the questions whether the decree or part thereof is executable or in-executable and if for any reason the decree has become in-executable, the executing Court is empowered to declare so and if a part of the decree is in-executable and that part is severable from other part(s) of the decree then the executing Court is empowered to refuse the execution of the in-



Margret, the predecessor-in-interest of the petitioners, it is for all intents and purposes now a past and closed transaction. It is for this reason that in the order under review dated 22.10.2009 this Court has endorsed the view of the High Court contained in the judgment dated 11.11.2002 by merely making reference to the observations that "the moment Mst. Margret died, the property would revert back to the legal heirs of Arora under section 30-A of the Colonization of Government Lands (Punjab) Act 1912. Respondents being sons of Mst. Margret were thus left with no locus standi to file execution petition on 19.6.1998, after the death of Mst. Margret". This being the undisputed factual position in the present case, as rightly held by the High Court in its judgment dated 11.11.2002, the order of remand passed by the learned Additional District Judge Sahiwal dated 25.1.2001 was not sustainable in law, as the executing Court cannot go beyond the mandate of the said judgment and thus the present petitioners had no locus standi to seek execution of either the judgments dated 20.1.1969,



proposition that the executing Court could not go behind the decree and would only be allowed to do so to examine whether the decree or part thereof was executable or in-executable. It was held that only in such a situation was the Court empowered to refuse execution but that only to the extent of the in-executable part of the decree and was bound to proceed with the execution for the rest."

12. Similarly in PLD 2023 Peshawar 78 titled "Bakht Alam Khan versus Waseem Khan and others", the honourable Peshawar High Court has held as under:

*"8.....
..... since the executing Court is bound to execute the decree only and it can neither amend nor alter nor add to the decree, therefore the two Courts below have rightly declined the desired relief to the present petitioner. It is settled law that the executing Court cannot go beyond the decree and it has to execute the decree in terms in which it has been passed. In the case of Irshad Masih and others v. Emmanuel Masih and others reported as 2014 SCMR 1481, the Hon'ble Apex Court has held that thus, whatever was the entitlement of Mst.*



*Textile Mills Limited (2001
SCMR 396)*

*(iv) Tauqeer Ahmad
Qureshi v. Additional
District Judge, Lahore
(PLD 2009 SC 760)*

*which, respectively lays
down as under:-*

*In the case of Muhammad
Ali (supra), the Court
recognized that it was
well-settled principle of
law that unless the
judgment and decree was
patently a nullity, the
executing Court could not
go behind the decree and
was bound to execute the
same as it stands.*

*In the case of Mst. Naseem
Akhtar (supra) it was held
that it was an established
principle of law that the
Court in execution
proceedings could not be
allowed to embark on an
inquiry to determine
whether the Court passing
the decree had the
jurisdiction to do so. The
Court emphasized that if
such broad discretion was
given to executing courts
there could be no finality
attached to any judgment
and decree.*

*In the case of Province of
Punjab v. Burewla (supra)
this Court reiterated the
above principle by stating
that the Executing Court
could not travel behind the
terms of the decree, nor
could it alter the terms or
examine its correctness or
proprietary.*

*In the last case of Tauqeer
Ahmed (supra), apex
Court affirmed that there
could be no cavil with the*



remand passed by the learned Additional District Judge Sahiwal dated 25-1-2001 was not sustainable in law, as the executing Court cannot go beyond the mandate of the said judgment and thus the present petitioners had no locus standi to seek execution of either the judgments dated 20-1-1969, whereby their predecessor's suit was disposed of without grant of relief prayed for, or the other judgment of the Supreme Court dated 18-6-1995, dismissing their petition and confirming the judgment of the Lahore High Court dated 8-12-1993. Rather, after the death of Mst. Margret in the year 1996, there was nothing in the said judgments which was executable at the request of the present petitioners. If any case-law is needed to fortify the view regarding limited jurisdiction of the executing Court, reference can be made to the following cases:--

- (i) Muhammad Ali and others v. Ghulam Sarwar and others (1989 SCMR 640)
- (ii) Mst. Naseem Akhtar v. Shalimar General Insurance Company Limited (1994 SCMR 22)
- (iii) Province of Punjab through Secretary Industries v. Burewala



therefore, assessment of actual costs, which the applicant might have incurred on the proceedings before this Tribunal, could not be made nor any certificate regarding counsel fee was furnished prior to disposal of appeal. True that the appeal was dismissed with costs and it is also true that details of the costs were not mentioned in the judgment but it is equally true that only directions, with respect to costs of the litigation and by whom the costs are to be borne, are mentioned in the judgment and it is the memorandum of costs, which contains the details costs, incurred by a party and also the direction by whom such costs are to be borne. It is clear that the stage of determination of costs is the time, when a matter is being finally disposed of, which, of course, does not include the stage of execution of the order or judgment. So, in an execution application the Executing Court could not determine and impose the costs upon a successful party nor could this Tribunal, while executing its judgment, enhance such costs. Therefore, the counsel fee could also be not granted at this stage.

11. Reliance is placed on a judgment of Supreme Court of Pakistan reported as 2014 SCMR 1481 titled "Irshad Masih and others versus Emmanuel Masih and others" as under:

*"13.....
.....This being the
undisputed factual
position in the present
case, as rightly held by
the High Court in its
judgment dated 11-11-
2002, the order of*



reimburse to a successful party for the expenses actually incurred by them. Sub-section (2) of section 35 of the Code of Civil Procedure makes it mandatory for the Court to state its reasons in writing in case it directs that costs shall not follow the event meaning thereby that in case the Court considers that the successful party shall not be entitled to receive the costs from unsuccessful party, then in that eventuality the Court has to give reasons for that.

10. Directions as to costs are not made separately, but are contained in the order disposing of the matter. Such directions may be contained in a decree, an appealable order or a non-appealable order but not in an Execution application. In an Execution application the Executing Court cannot sit on the judgment of the Court passed in the suit/appeal as an appellate or revisional Court. It is nowhere disputed and is rather more than a clear fact that the Executing Court cannot go beyond the terms of the decree/judgment and there are numerous rulings of the superior Courts of the country in this respect. When we say that the Executing Court cannot go beyond the terms of the decree/judgment, it means that it has to execute the decree/judgment strictly in its terms neither less nor more than what is provided in terms of a decree/judgment and (in this case) the judgment. A Parcha Decree or memorandum of costs is/are drawn by the Trial Court and in case of appeal by the appellate Court. Since no memorandum of costs was drawn in this matter,



Civil Procedure granting such costs requires reasons and not granting such costs does not require any reason.

7. Section 35 read as under:

"35. Costs...(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

(3) The Court may give interest on costs at any rate not exceeding six per cent, per annum, and such interest shall be added to the costs and shall be recoverable as such."

8. Similarly, there is Rule-22 in the Khyber Pakhtunkhwa Service Tribunal Rules, 1974 pertaining to costs, which reads as under:

"22. Order regarding costs, etc.--- (1) The Tribunal may make such order as to the costs of proceedings before it as it deems fit.

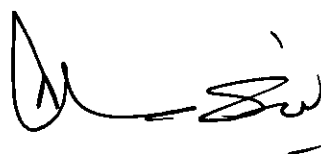
(2) Any cost awarded by a Tribunal which cannot be paid out of the cash security deposited by the appellant under rule 10, if not paid by the appellant within one month of the order awarding the costs, shall, on the certificate of the Tribunal, to be recoverable from the appellant as arrears of land revenue."

9. The contents of the above provisions of law/rules are very much clear that these are the actual costs incurred on the litigation, which a successful party has to get on conclusion and decision of the matter. They are not awarded by way of penalty or punishment nor are they to be made a source of profit for the successful party. These costs are not awarded by way of compensation but by its very nature actual costs are awarded to



certificate and issued on 03.09.2023 i.e. after decision of the appeal. This Tribunal is empowered to execute its judgment under section 7 of the Khyber Pakhtunkhwa Service Tribunal Act, 1974. The Tribunal has thus two capacities one as an appellate jurisdiction and while executing its judgments it acts as executing court. In its capacity as executing court, it cannot go beyond the terms of the judgment. The costs prayed in this application being not part of the judgment could not be granted.

6. Costs of litigation or proceedings, as aforesaid, are those costs which a party incurs on litigation or proceedings, which may include court fees, process fees, stamp paper etc and of course counsel fees. There are a number of costs provided in the Code of Civil Procedure, 1908, which are imposed upon the parties or any of them at different occasions and stages of the litigation(s). Two of such costs are provided under section 35 & 35-A of the Code of Civil Procedure. Section 35 provides costs of litigation while section 35-A of the Code of Civil Procedure is with respect to special compensatory costs. While awarding costs under section 35 of the Code of Civil Procedure it is not necessary for the Court to record reasons but in case the Court considers that there is no need to award costs to any of the parties it has to record reasons for not awarding costs to successful party against an unsuccessful party whereas in case of special compensatory costs under sections 35-A of the Code of




dismissed with costs. That he had incurred Rs.90,000/- which should be paid to him by the respondent.

3. Alongwith the application filed in this Tribunal, the applicant has annexed three receipts, of Rs.10,000/- each regarding car rent, while fourth receipt is by the counsel signed on 03.09.2023, wherein, it was stated that he had also charged Rs.60,000/- as counsel fee.

4. I have heard the learned counsel and have gone through the file and have gone through the available record.

5. Although, the appeal was dismissed with costs, but there is no memorandum of costs prepared by the Tribunal. The original file also does not show that the applicant had incurred any amount of cost on the proceedings of the appeal. There are three receipts of rent a car, each of Rs.10,000/-, which are shown to have been issued on three different dates but the rent of car, even if paid by a party, would not come under the purview of the costs of litigation because the costs of litigation are those costs which a party had incurred on proceedings conducted by the court inside the court, which may not include those, expenses or costs, incurred outside the court and those too of the choice of a party. As regards the counsel fee, that could only be granted, where the counsel furnishes a certificate during the pendency of appeal or proceeding on the prescribed format. The appeal was decided by the Tribunal on 28.08.2023 while the counsel for the applicant issued a receipt showing that to be a counsel fee



KHYBER PAKHTUNKHWA SERVICE TRIBUNAL, PESHAWAR

BEFORE: **KALIM ARSHAD KHAN ... CHAIRMAN**

Execution Petition No.87/2024

In

Service Appeal No.1473/2023

Date of presentation of Application.....19.01.2024

Date of Hearing.....23.05.2024

Date of Decision.....23.05.2024

Fazal Rehman S/O Jabbar Khan R/O Jungle Khel Kohat posted as Senior Clerk in the office of the District Education Officer (Male) KDA Complex, Kohat.....(***Applicant***)

Versus

Muhammad Tahir S/O Usman Ghani Senior Clerk, in office of the District Education Officer (Male) KDA Complex, Kohat...(***Respondent***)

Present:

Mr. Hassan UK Afridi Advocate General.....For the Applicant

Mr. Muhammad Amin Khattak Lachi, Advocate.....For the respondent

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**APPLICATION FOR IMPLEMENTATION/COMPLIANCE
OF JUDGMENT OF THIS HONORABLE TRIBUNAL VIDE
DATED 28.08.2023**

JUDGMENT

KALIM ARSHAD KHAN CHAIRMAN: This application is with the prayer that respondent may be directed to pay the applicant an amount of Rs.90,000/- which, according to him, was cost of litigation incurred by him.

2. The learned counsel for the applicant submitted that the respondent had filed an appeal against the applicant and others, which was dismissed with costs. That the applicant wrote an epistle to the respondent for payment of Rs.90,000/- as costs of litigation because respondent had filed appeal in the Tribunal, in which the applicant was also made party and the appeal was

