

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
J.M. No. 59 / 2017

DATE ORDER WITH SIGNATURE OF JUDGE

Applicant: **M/s Walia Steel Industries PLC through
M/s. Jawad A. Sarwana, Abdul Razzak and
Anis Ahmed Pechuho Advocates.**

**Respondent
No. 1:** **M/s Saga Shipping & Trading Corporation
Ltd. through Mr. Azhar Maqbool Shah
Advocate.**

**Respondent
No. 4:** **Ajmair Steel Industries (Pvt.) Limited
through Mr. Choudhry Muhammad Iqbal
Advocate.**

**Respondent
No. 5:** **Collector of Customs, Customs House
Karachi through Mr. Muhammad Rashid
Advocate.**

- 1) For hearing of CMA No. 17667/2017.
- 2) For hearing of CMA No. 13839/2017.
- 3) For hearing of main application.
- 4) For orders on Nazir's report dated 20.12.2017.

Date of hearing: **06.03.2018**
Date of order: **21.03.2018**

ORDER

Muhammad Junaid Ghaffar, J. This Judicial Miscellaneous [J.M.] arises out of order dated 06.10.2017 passed in Suit No. 1300/2017 whereby, on an application bearing CMA No.13710/2017, the Suit stands dismissed as not pressed. It is the case of the Applicant that such application and the order so passed is a case of fraud and misrepresentation.

2. The precise facts are that the Applicant filed the above Suit against Defendants / Respondents praying therein, that the Applicant is the lawful owner of 4953 metric tons of Hot Rolled Steel

Coils purchased from Vilmeks Ve Dis Tic Ve Metal San A.S. Levant Cad Sumbulo SOK. Gonuller Yolu No. 3,34330 I. Levant, Istanbul Turkey, being transported on “MV Fortune Express” from Adabiya Port Egypt and discharged at Karachi. In such Suit on two dates i.e. 19.05.2017 and 22.05.2017 restraining orders were passed in respect of the Suit goods. It is the precise case of the applicant that goods in question have been fraudulently transported to Karachi, in the name of Respondent No.4 by Respondent No.1, whereas, they were originally destined for Djibouti.

3. Learned Counsel for the Applicant has contended that the Suit in respect of subject goods was filed on behalf of a Company stationed at Ethiopia on the basis of a Power of Attorney which was issued for some specific purpose as stated and was in favour of five employees of the Law Firm namely “M/s Abraham and Sarwana” whereas, in utter disregard to the interest of the Applicant, on 06.10.2017 in connivance with Respondent No.1, CMA No. 13710/2017 was filed and the impugned order was obtained for which no instructions were ever imparted to the attorney. According to the learned Counsel, instant Suit was filed by one of the attorneys namely Syed Ghaffar Ali Shah (Respondent No.6) who is a court clerk and employee of the Law Firm “Abraham & Sarwana” and who in absence of the principal Lawyer from Pakistan, filed the said application and such withdrawal of Suit is nothing but misrepresentation and fraud with the Court. Learned Counsel has further contended that for such purposes the said attorney engaged another Counsel namely Mr. Irfan Ali Advocate (Respondent No.8), whereas, the Attorney was neither present before the Court on the said date, nor has signed the application and such order was obtained when the Principal Lawyer of the firm “Abraham &

Sarwana” was on general adjournment from 4.10.2017 to 14.10.2017 and he was informed regarding such conduct through other Counsel then appearing for Defendants No.1 and 4 in the Suit and thereafter, immediately on 7.10.2017 an application was filed in the Suit wherein, restraining orders were passed and subsequently, instant J.M. was filed. Per learned Counsel, the application filed was for compromise whereas, the order which has been passed is a simplicitor withdrawal and dismissal for not pressing the Suit; however, in the Power of Attorney, neither any authority for withdrawal of any proceedings is provided nor for compromise and the only power available is in respect of *comprise* and not compromise. But even otherwise, per learned Counsel even if a power of compromise is available, there is no such compromise nor any material has been placed to satisfy the claim of the Plaintiff for entering into the purported compromise. According to the learned Counsel, the Court has been misled and misrepresented; resultantly fraud has been committed and therefore, this is a fit case for grant of relief under Section 12(2) CPC. Learned Counsel has also read out the provision of Order 23 Rule 3 CPC and has contended that while filing such application for compromise or for that matter withdrawal, no specific instructions have been placed on record on behalf of the principal, whereas, the Registrar of this Court was immediately approached on 13.10.2017 by the principal informing the learned Registrar regarding the fraud committed by one of the attorneys. Per learned Counsel in the entire exercise the Respondent No. 1 has been part and parcel of the fraud so committed, as he himself has sworn an affidavit in support of the application though it is a case of not pressing the Suit and not of a compromise. Learned Counsel has also pointed out that in the application it has been stated that matter has

been settled in respect of other Defendants / Respondents and there is no claim left, whereas, no other Defendant / Respondent had come forward in support of the application except Respondent No.1 / Defendant No.1, and therefore, the Court has been misrepresented to that effect. In support of his contention he has relied upon ***Muhammad Akram Shaikh V. Messrs Pak Libya Holding Company (Pvt.) Ltd and 14 others (PLD 2010 Karachi 400), Lahore Development Authority V. Firdous Steel Mills (Pvt.) Ltd. (2010 SCMR 1097), Agricultural Workers' Union, Baluchistan V. The Registrar of Trade Unions, Baluchistan, Quetta and others (1997 SCMR 66), Syed Nizam Ali and 2 others V. Ghulam Shah and another (PLD 2000 Lahore 168), Mobina Begum V. The Joint Secretary, Ministry of Religious Affairs, Government of Pakistan, Islamabad and 2 others (1994 MLD 1441), Munir Ahmed Khan V. Sameeullah Khan and 7 others (1986 CLC 2655), Muhammad Riaz Khan V. Sardar Rahim Dad and 12 others (PLD 1990 SC (AJ&K) 13), Dada Steel Mills (Pvt.) Limited V. m.v. I. Van and 2 others (1997 MLD 866), Muhammad Yousuf Siddiqui V. Haji Sharif Khan through L.Rs. and others (PLD 2006 SC 705) and Muhammad Aslam and others V. Mst. Kundan Mai and others (2004 SCMR 843).***

4. On the other hand, learned Counsel for the Respondent No. 1 / Defendant No. 1 submits that Respondents No. 6 to 8 were never parties to the Suit and therefore, they could not be joined as Respondents in this J.M. and the same is liable to be dismissed on this ground. He has further contended that initially an application was filed in the Suit with similar relief and then an independent J.M. has also been filed, therefore, the Applicant is not justified in claiming the same relief through two different applications. According

to the learned Counsel, the Suit was filed by attorney Ghaffar Ali Shah who also filed various applications, whereas, the Suit of the Plaintiff was withdrawn by the same attorney, therefore, it is not a case of any fraud or misrepresentation with the Court whereas, the only remedy available to the Applicant is to proceed against its own attorney. Learned Counsel has also pointed out that in fact when this Suit was filed no Vakalatnama was signed by the attorney in favour of "Abraham & Sarwana" therefore, the present Counsel has no locus standi to contest the Suit. Per learned Counsel even subsequent applications in the Suit as well as J.M. have been filed incompetently as there is no Vakalatnama to that effect and in fact subsequent applications have been filed by a person whose name is not mentioned in the Power of Attorney. Learned Counsel has referred to Order 3 Rule 1 CPC regarding appointment of Pleader and then contended that it is settled law that Pleader / Counsel can act independently and all acts done and performed are to be treated as acts of the party. Whereas, the attorney once appointed can act independently and does not need any further instructions from time to time. According to the learned Counsel, the order dated 6.10.2017 was lawfully passed as there is no prohibition in engaging a fresh Counsel for filing of an application and the attorney at the relevant time was fully competent to do so. Learned Counsel has also contended that the present proceedings do not fall within the ambit of Section 12(2) CPC as it is only a matter between principal and the agent, therefore, no case is made out on behalf of the Applicant. Learned Counsel has relied upon ***Mst. Shabana Irfan V. Muhammad Shafi Khan and others (2009 SCMR 40), Noor Muhammad and others V. Muhammad Siddique and others (1994 SCMR 1248), Faqir Muhammad and 6 others V. Ferhat***

Hussain and others (2016 YLR 2355), Mrs. Sara Ahmed Soomro V. Mrs. Sarwat un Nisa & others (SBLR 2016 Sindh 1476), Jamia Khair ul Madaris, Aurangzeb Road, Multan V. Manzar and 5 others (PLD 2017 Lahore 219), Muhammad Ejaz and 18 others V. Noor Khan and 3 others (2018 CLC 75), Messrs Abhoy Cement Industries Ltd. and 6 others V. National Development Finance Corporation Karachi (PLD 2002 SC 500), Imam Din and 4 others V. Bashir Ahmed and 10 others (PLD 2005 SC 419), Fateh Khan V. Manzoor and 5 others (PLD 1993 Lahore 76), Khushi Muhammad and others V. Muhammad Ashfaq and others (PLD 2014 Lahore 26), Punjab Cooperative Board of Liquidation V. Muhammad Ilyas (PLD 2014 SC 471), Muhammad Kazam through Legal Heirs V. Mst. Janat Bibi (PLD 1985 Lahore 637) and Muhammad Saleh V. The Chief Settlement Commissioner, Lahore, and 2 others (PLD 1972 SC 326).

5. Learned Counsel for Respondent No.4 in addition to adopting the arguments of the learned Counsel for Respondent No.1 has contended that the Suit was competently withdrawn on the basis of Power of Attorney and it is immaterial that any express authority was available or not, whereas, if any fraud is committed by attorney relief under Section 12(2) CPC is not a relevant and appropriate remedy but an independent Suit can only be filed. In support he has relied upon ***ANSW Enterprises and 2 others V. Askari Commercial Bank Limited, Lahore through Head Office Rawalpindi (2001 PSC 120) and S. Zaheer Hussain Naqvi V. Mrs. Sahebzadi Anna Saeed and others (2002 YLR 1984).***

6. I have heard all the learned Counsel and perused the record. Suit bearing No. 1300/2017 was filed by the present Applicant

against six Defendants and it is the case of the Applicant that a consignment of 4953 metric tons of Hot Rolled Steel Coils purchased from Vilmeks Ve Dis Tic Ve Metal San A.S. Levant Cad Sumbulo SOK. Gonuller Yolu No. 3,34330 I. Levant, Istanbul Turkey and was shipped on “MV Fortune Express” owned by Respondent No. 1. The cargo was supposed to be transported from Port Adabiya in Egypt to Djibouti Ethiopia and during this transit the same has been stolen and by preparation of forged and fabricated documents, it has been brought to Karachi in the name of Respondent No.4 who was under the process of clearance of the same from Customs when the Suit was filed and certain restraining orders were obtained. It is further case of the applicant that Suit was being vigilantly pursued and was at the same time hotly contested by the Respondents / Defendants, whereas, several hearings took place, when suddenly, during pendency of this Suit on 6.10.2017 the Application bearing CMA No. 13710/2017 was filed under Order 23 Rule 3 CPC and it would be advantageous to reproduce the contents of the said application which reads as under:-

“APPLICATION UNDER ORDER 23 RULE 3 CPC
RED WITH SECTION 151 CPC

For the reasons disclosed in the accompanying affidavit, it is respectfully prayed on behalf of the Plaintiff and Defendant No.1 that this Hon’ble Court may be pleased to disposed of the present Suit as both the parties have patched up their differences outside of this Hon’ble Court and the grievance of the Plaintiff against the Defendants have been redressed so there is no claim of the Plaintiff remains against the Defendants.” (Emphasis supplied)

7. This application was supported by the affidavit of the attorney Syed Ghaffar Ali Shah (Respondent No.6) and the contents of the affidavit read as under:-

“I, Syed Ghaffar Ali Shah S/O Abdul Wali Shah, Muslim, Adult, R/O District Chitral Tehsil Mastuj, P.O. Box Parkusab, Chitral do hereby state on oath as under:-

- 1) I say that I am attorney of Plaintiff in this matter and as such am well conversant with the facts of this case.
- 2) I say that the application U/O 23 Rule 3 R/w Section 151 CPC has been drafted and filed under my instructions and the contents of the same may be treated as part and parcel of this affidavit for the sake of brevity.
- 3) I say that the matter has been settled between **the Plaintiff and Defendant No. 1 which is main contesting party** and all the grievances of the Plaintiff was against the Defendant No. 1 **so compromise has been arrived between them outside the Court, there is no any further claim or grievance against the Defendants** of the Plaintiff after settlement outside the Court.
- 4) Whatever stated above is true and correct to the best of my knowledge and belief.”

8. This application was also supported by one Naveed Ahmed S/o Nazeer Ahmed (arrayed as Respondent No.7) claiming to be the Director of Respondent No.1 (Defendant No.1) and the contents of the affidavit read as under:-

“I, Naveed Ahmed S/O Nazeer Ahmed, Muslim, Adult, R/O House No. 788-F2 Johar Town Lahore and permanently resident of Vestre Haugen 30, Oslo 1054 Norway, now in Karachi do hereby state on oath as under:-

- 1) I say that I am Director of Defendant No. 1 in this matter and as such am well conversant with the facts of this case.
- 2) I say that I have been read over the contents of application U/O 23 Rule 3 CPC R/w Section 151 CPC and I understand and accept the contents of the application and has no objection to disposal of the case **in terms of compromise application filed by the Plaintiff in this matter.** I have to leave for Norway. (Emphasis supplied)
- 3) Whatever stated above is true and correct to the best of my knowledge and belief.”

9. On the basis of this application on 6.10.2017 the following order was passed:-

“06.10.2017.

Mr. Irfan Ali Advocate for Plaintiff.
Naveed Ahmed Director of defendant company is present.

!. Granted.

2. By means of this application, the counsel for the plaintiff seeks disposal of the suit on the ground that the parties have patched up their differences outside the Court and grievance of the Plaintiff against the Defendants have been redressed, hence there remains no claim of the Plaintiff against the Defendants. Accordingly, the suit stands dismissed as not pressed, along with listed applications.”

The case of the Applicant in this J.M. is to the effect that the above order has been obtained through misrepresentation and fraud, whereas, the attorney had no instructions and or lawful authority to withdraw the Suit, and neither any compromise has been reached outside the Court, nor any such compromise is on record.

10. First I would like to respond to the objection raised on behalf of Respondent No.1 that initially an application was filed in the main Suit and thereafter, a separate J.M. has been filed, whereas, both seek the same and or identical relief. To that I may observe that it is by now a settled law that the heading of the application or for that matter the plaint and or petition is immaterial vis-à-vis. the contents and the relief being sought. We are not unaware that as long as the power to hear and decide a matter vests in a Court, mere reference to a wrong provision of law, for invocation of that power is not a bar to the exercise of that power.¹ It needs no mention that all rules of procedure framed for regulating the proceedings before a Court or Tribunal are meant for advancing the course of justice. Therefore, procedural laws and rules cannot be used as a means for denying the relief to an aggrieved party on ground of technical non-observance of these rules or procedural laws. Keeping these principles in view the Courts have always liberally allowed conversion of proceedings of one kind into another and misdescription in the title of proceedings or mention of a wrong provision of law have never been considered fatal

¹ Pakistan Fisheries Ltd v United Bank Ltd. (PLD 1993 SC 109)

to the grant of relief if it is otherwise available under the law to an aggrieved party.² It cannot be denied that mention of a wrong provision of law in an application would not deprive the Court of the power and jurisdiction if otherwise the same is available under the law.³ It has been held time and again by this Court that the procedures are meant only to regulate and foster the cause of justice and not to thwart the same.⁴ Therefore, by filing of application firstly in the Suit, and thereafter a separate J.M. does not disentitle the applicant to claim the appropriate relief, as admittedly, it is not the case of Respondent No.1 or for that matter, Respondent No.4, that this Court has no jurisdiction otherwise.

Moreover, in the procedure prevalent before this Court normally when an application is filed under Section 12(2) CPC it is assigned a separate J.M. number and is fixed before the Court ordinarily along with the Suit file. However, this case has its peculiar facts and circumstances, in that the Suit was withdrawn on 06.10.2017 when the lead Counsel of M/s Abraham & Sarwana Mr. Jawad A. Sarwana was out of country and therefore immediately on the next day i.e. 07.10.2017 another associate Counsel filed application in the main Suit bearing CMA No. 13786/2017 under Order 38, 39 Rule 1 & 2 CPC and Section 12(2) CPC. This application was entertained by the office by assigning a CMA number and was placed before the Court in the same Suit file without treating it as an independent application under Section 12(2) CPC and on 07.10.2017 the Court after recording the contention of the Counsel for the Plaintiff passed the following order in the main Suit:-

² Jane Margerete William v Abdul Hamid Mian (1994 SCMR 1555)

³ Mst. Safia Bibi v Mst. Aisha Bibi (1994 SCMR 494)

⁴ Rauf B Kadri v State Bank of Pakistan (PLD 2002 SC 1111)

"7.10.2017.

Mr. Abdul Razzak Advocate for the Plaintiff.

1. Urgency granted.

2. Yesterday on urgent motion this matter was fixed before Mr. Justice Zafar Ahmed Rajput for orders on an application moved under Order 23 Rule 3 CPC (CMA No. 13710/2017) whereby the Suit was dismissed as not pressed. Counsel for the Plaintiff pointed out the power of attorney available at Page 29 in which 05 attorneys were appointed by the Plaintiff and one of the attorney is Syed Ghulam Ali Shah who is also court clerk of the Plaintiff's Advocate "M/s Abraham & Sarwana Advocates." Learned Counsel argued that without the Plaintiff's instructions compromise application was filed on 6.10.2017, through Irfan Ali, Advocate. The application was supported by the personal affidavit of Syed Ghaffar Ali Shah and Naveed Ahmed Director of the Defendant No. 1. It is contended that no such instructions were issued by the Plaintiff to the attorney Syed Ghaffar Ali Shah to enter into compromise or to withdraw the Suit nor issued any instructions to appoint Mr. Irfan Ali, Advocate. On the basis of order obtained fraudulently the customs authorities are releasing consignment that was restrained to be released in view of earlier orders passed by this Court on 19.5.2017 and 22.5.2017. Today on urgent motion, the case was marked to Mr. Justice Zafar Ahmed Rajput who seized of the matter yesterday and passed the order for withdrawal of the suit as not pressed but the Roster informed my Court Associate that his lordship was not available after 03:30 p.m. which fact was also confirmed by the Counsel for the Plaintiff. Let notice of this application be issued to the Defendants as well as D.A.G. for 10.10.2017 at 11:00 a.m. Office is directed to fix this matter before his lordship Mr. Justice Zafar Ahmed Rajput for further orders. However, till the next date of hearing the parties are directed to maintain status quo."

11. After that when the main Counsel of "Abraham & Sarwana" Mr. Jawad Sarwana was back, instant J.M. has been filed on 10.10.2017 and thereafter, it is coming up along with main Suit. It may also be observed that application in Suit bearing CMA No.13786/2017 was also filed under Order 38 & 39 in addition to s.12(2) CPC, and therefore, event otherwise it cannot be held that same and or identical relief is being sought through same set of applications. In view of such fact and the position stated hereinabove, I am of the view that even if the objection for entertaining the application under Section 12(2) CPC with other relevant provisions filed in the Suit is sustained, subsequently a separate J.M. has been filed and heard by the Court and therefore, no useful purpose will be served if such

objection is to be sustained. Moreover, it is also settled law that an act of the Court (by entertaining CMA 13786/17 in main Suit as contended) shall not prejudice any of the litigants and therefore, this objection is overruled.

12. Insofar as the question of entering into compromise and so also withdrawal of the Suit is concerned, it would be advantageous to refer to the salient features of the Power of Attorney in question. The Power of Attorney appoints five different persons as its agents and admittedly all these five persons have a common address of "Abraham & Sarwana" Law Firm. It has not been disputed that all these five persons were and or are employees / representatives / court clerks of the Law Firm. None of the Attorneys including Respondent No.6 have come before the Court to plead otherwise. It further appears that the Power of Attorney is for a specific purpose and also permits the attorneys certain acts which are to be performed. The relevant Para of the Power of Attorney reads as under:-

"BY THIS POWER OF ATTORNEY, We, Walia Steel Industry Plc, ("the Company") do hereby appoint the Agents, severally as the Company's attorney in Pakistan in the Company's name and on the Company's behalf to do the following acts, deeds and things in connection with and arising out of, inter alia, VILMEKS IC VE DIS TICSARET VE METAL SANAYI A., Levant, - Istanbul, Turkey, shipper of consignment of 4953 Metric Tons Hot Rolled Steel Coils for delivery to Walia Steel Industry plc, Addis Ababa, Ethiopia the consignee for delivery of such consignment transported from the Adabiya, a port closed to Suez to Djibouti carried by MV Fortune Express, a vessel with Head Owners, Saga Shipping & Trading Corp. Oslo, Norway managed by Nav Tech International EZC, Sharjah, UAE and chartered by Tagus Seatrade Ltd. London, U.K. with Albaharia Shipping Authorized to collect freight on behalf of the owner and the consignment certified by Bureau Veritas and vessel inspected by Tank Oil/Adabiya which was consignment was stolen and is currently placed at the Berth Yard 21 at KPT at Karachi.

1. To file, prosecute, defend civil and criminal proceedings in relation to the above matter to safeguard the legal interests of the Company to sign and verify plaint, executions, written statements, petitions, claims, objections, affidavits, memoranda of appeal, petitions and applications and to file them in any court, tribunals or office and to file and defend proceedings up to the Supreme Court of Pakistan if

necessary, including but not limited to powers to file revisions, review and appeals up to the Supreme Court of Pakistan if necessary;

2. To produce or summon or receive back documentary evidence;
3. To appoint advocate(s) or legal practitioner(s) to act on behalf of the Company and for their own assistance in relation to the affairs of the Company;
4. **To comprise, negotiate** or to execute judgments;
5. To file and receive back documents;
6. To apply to courts and offices for copies of documents and papers;
7. To apply for the inspection of and to inspect judicial and other records;

Generally to do all lawful acts necessary for the above mentioned purposes and in the premises.”

13. Perusal of the aforesaid provision reflects that the Applicant had appointed the agents severally as the company’s attorneys in question to do the acts deeds and things in connection with and arising out of the subject consignment and for its delivery and transportation from Adabiya to Djibouti. The purpose has been so stated and it clearly spells out that the principal wants these attorneys to act in furtherance of the said act. The Power of Attorney authorizes the attorneys to file, prosecute, defend civil and criminal proceedings in relation to the above purposes and *to safeguard the legal interest of the principal* and to sign and verify complaints, written statement, execution etc. etc. It is of utmost relevance to note that (and it must be kept in mind while interpreting it) all the powers being derived by the attorneys as above are and in relation to what has been stated in the main part of the power of attorney and that is “....in connection with and arising out of, inter alia, VILMEKS IC VE DIS TICSARET VE METAL SANAYI A., Levant, - Istanbul, Turkey, shipper of consignment of **4953 Metric Tons Hot Rolled Steel Coils for delivery to Walia Steel Industry plc, Addis Ababa, Ethiopia** the consignee for delivery of such consignment.....”. Therefore, at all times the attorney can and must act

in furtherance of the main operating part of the power of attorney and the authority so conferred in Para No.1 to 7, is subservient to the main part of the power of attorney. And this needs to be materially and crucially noted at all times.

It further authorizes to appoint Advocate(s) and legal practitioners and finally it authorizes to **comprise, negotiate** or to execute judgments. Though a specific power for compromise is not available but even if we are to understand the word “comprise” as “**compromise**” (treating it as an inadvertent error or a typographical mistake) by no stretch of imagination it could be held that this also provides power for withdrawing the proceedings. The word of withdrawal has been purposely left out from the Power of Attorney and when the application filed before the Court on which the impugned order has been passed is examined in juxtaposition with the Power of Attorney, it transpires that there is something wrong in the statement so made in the application as well as in the affidavit. Admittedly, no separate withdrawal power is available in the power of attorney, and this fact is not disputed before the Court, and therefore, to mislead the Court, the application has been couched in a manner so as to give it an impression and or status of a compromise [so as to bring it within the ambit of word “comprise” (May be)] so that for a moment it is not objected to straightaway by the office or the Court. It may be relevant to observe that the Power of Attorney provides the authority **to safeguard the legal interest of the principal** and one such incident and action of safeguarding may be called as compromise (comprise); however, when the application in question is perused, it uses word that *parties have patched up their differences outside the Court and the grievances of the Plaintiff against the Defendants have been redressed, so there is no claim of the Plaintiff remains against the Defendants*. But no such compromise material

has been placed on record either by Respondent No.1 or the attorney himself Respondent No.6, whereby, any inference could be drawn that interest of the Plaintiff / Applicant was safeguarded while filing this application. Even otherwise, for a compromise to be termed or called as being valid there ought to have been some material on record in favor of the Applicant, which could have compelled the Applicant / Principal to instruct the Attorney to withdraw the Suit. And if no such material is on record (and it is not), then it can be safely concluded, that the Attorney has failed **to safeguard the legal interest of the Principal** as mentioned in the Power of Attorney. In fact the attorney / Respondent No.6, despite service through various modes, has chosen not to contest these proceedings. Nor the Respondent No.1 has pleaded with vehemence that a compromise was reached and entered into with it, therefore, the Principal cannot resile.

It further appears that the heading of this application states that it is under Order 23 Rule 3 CPC and in the affidavit it has further stated that matter has been settled between the Plaintiff and Defendant No.1, which is the main contesting party and it has been settled outside the Court. Whereas, if that had been the case, the application ought to have been under Order 23 Rule 1 CPC and not under Rule 3 CPC *ibid*. No compromise agreement was placed before the Court and it is only the words in the application / affidavit which states so, but in all fairness, this cannot be termed as an application for compromise. It ought to have been a simplicitor withdrawal application which is not the case. More surprisingly, one of the Defendants i.e. Defendant No.1/ Respondent No.1, through its Director Naveed Ahmed (Respondent No.7) has also filed an affidavit in support of this very application and has further stated that I understand and accept the contents of the application and has no

objection for disposal of the case in terms of the compromise application filed by the Applicant in this matter. Now it is an admitted position that an affidavit of a Defendant is only filed for an application which is for compromise under Order 23 Rule 3 CPC. This is not the case here as there is no compromise in this case on record. Insofar as a simplicitor withdrawal of a Suit is concerned, the application has to be filed under Order 23 Rule 1 CPC and it can always be entertained if the same is supported by the affidavit of the Plaintiff as it is a mere withdrawal simplicitor. Whereas, if it is under Order 23 Rule 3 CPC, it is a compromise for which the Court is required to pass a decree on the terms so settled through an agreement between the parties. This ordinarily must be signed and supported by the parties who have entered into such agreement. In this case there is no agreement on record and it appears that the Court has been misled or at least an attempt has been made to mislead the Court by filing an application under Order 23 Rule 3 CPC with supporting affidavits of Plaintiff and Defendant No.1, whereas, what has been stated in the order is entirely contrary to the contents of the application and finally on such application Suit has been dismissed as not pressed.

14. It is also very important to observe that this is not a case of executing a Power of Attorney with any consideration but merely it is executed in favour of a Law Firm for proceedings before this Court as usually the law Firms nominate its employees / court clerks to be the attorney(s) of principal abroad so that they can proceed before the Court on a day to day basis for filing complaints, Vakalatnama etc. At no point of time any attorney who has been authorized can claim any independent and or direct authorization by the principal in such matters. The principal is in fact appointing the Law Firm itself as its

attorney, but through their authorized employees / court clerks or representatives. The Court while interpreting and examining such Power of Attorneys, has to keep in mind the distinguishing features as these power of attorneys are only in respect of facilitating the Law Firms operating in this Court or for that matter in the entire country. These Power of Attorneys are by no means affording any rights in respect of any property or ownership. These are for specific purposes and are to be construed accordingly. In this matter, it appears to be an admitted position that the attorney Ghaffar Ali Shah while acting under instructions of *Abraham & Sarwana* law firm had filed instant Suit and filed the plaint as well as applications. Interestingly, the Vakalatnama of *Abraham & Sarwana* filed along with the plaint is not signed by the attorney and on this the learned Counsel for Respondent No.1, has also raised objection that “Abraham & Sarwana” was never appointed as lawyers in this case by the attorney Mr. Ghaffar Ali Shah / Respondent No.6. However, if that is the case, then it cannot be said that the attorney has authorized even anybody to file instant Suit and therefore, if Suit was not before the Court through an Advocate then the question of its withdrawal does not arise as well. It is needless to mention that the defect, if any, in non-signing of Vakalatnama by a Counsel is always treated to be a curable defect. Reliance may be placed on the case of ***Muhammad Riaz Khan v Sardar Rahim Dad (PLD 1990 SC AJ&K 13)***. It further appears that for filing the withdrawal application or that matter the compromise application the said attorney engaged another Counsel / Respondent No. 8. Now it is very strange that why would an attorney who has already filed a Suit through a Law Firm *Abraham & Sarwana* of which he is an employee, engage suddenly a new Counsel to file a withdrawal application. He himself is an attorney and was

present while filing such application. He need not engage any Counsel for such purposes and his personal affidavit was already on record, and it would have sufficed, but in my view this again has been done to mislead the Court for obtaining the impugned order. It is also a matter of record that earlier Defendant No 1 / Respondent No 1 was being represented by Mr. Mansoor Ahmed Shaikh Advocate and on 6.10.2017 the Respondent No.7 / Defendant No.1 (being authorized representative of Respondent No.1) was present before the Court, whereas, the Counsel was called absent. Now for contesting this J.M. and subsequent applications, a fresh Counsel has been engaged. Though there is no bar in doing so, but all these acts and incidents do not give any credibility to the assertion of Respondent No.1 or for that matter to Respondent No.4. The fraud and misrepresentation has been committed with the Court, as I am of the view that withdrawal of a Suit and or its compromise should be in clear terms and shall not have attached or clothed with it any iota of doubt. The peculiar facts and circumstances of this case show that neither a proper application was drafted; nor it was filed through the same Counsel, whereas, even affidavit of one of the Defendants was also attached for supporting the case of withdrawal. All these acts create serious doubts when the authority of the attorney itself is under challenge. The principal has also addressed a letter to the Registrar of this Court to this effect, and has also sworn an affidavit by appearing before the High Commission at Ethiopia and brought before the Court, that such act was an act of misrepresentation as well as fraud not only with him but with the Court as well. It is also settled law that it was not necessary that fraud is obtaining the decree should have been played on the Court which passed the decree but if a

decree had been obtained through fraud between the parties inter se by concealment of true facts, the same could also be set aside.⁵

15. It may also be observed that while interpreting the contents of a power of attorney, the acts done by the attorney in furtherance to the main purpose for which the power of attorney has been issued, and which are for the benefit of the principal, the same are to be protected and may be considered as valid irrespective of the fact that such authority or power was not specifically mentioned in such power of Attorney. However, if the acts performed by the attorney are detrimental or against the interest of principal, then the same has to be strictly constructed and in such exceptional cases exercise of such power by the attorney will not be considered as valid. Reference in this regard can be made to a judgment of the Hon'ble Supreme Court in the case of **Qadir Bakhsh & 10 others Vs. Kh. Nizam-ud-din Khan & 4 others**, reported in **2001 SCMR 1091**, wherein it was contended by one of the parties that since the power of attorney was only to manage the immoveable properties, and, therefore, the attorney was not competent to file suit or prefer appeal there against, as the power of attorney is to be construed strictly, whereas, the authority in question is to be found within the four corners of the instrument; either in express terms or by necessary implication. Such objection was repelled by the Hon'ble Supreme Court while interpreting the contents of the power of attorney and it was observed that the power of attorney vests full rights in the agent to perform the specified acts and to vest in him all the present and future property rights and interest of the principal including filing of suit or appeal in respect of the said property. The relevant portion of the judgment is reproduced as under:

⁵ Muhammad Aslam v Mst. Kundan Mai (2004 SCMR 843)

“19. The underlined portion of the impugned power of attorney is in essence of the operative part and a bare reading thereof would show that the authority conferred on the attorney in the underlined portion of the power of attorney was much higher and extensive rather than the filing of the suit or of the appeal. Generally, in interpreting the power of attorney, it is ignored that it has two aspects: (i) the power to do something on behalf of the principal which is generally beneficial to him and (ii) the power to exercise the discretion depriving the principal of his right to his assets, properties etc. The part of the power of attorney which tends to accretion of the right to the proprieties and assets to the principal may not be interpreted in stringent terms for instance to file a suit or appeal as has been clearly laid down in the power of attorney in the instant case authorizing the attorney to file suit/action either civil or criminal or to defend them if filed against the principal and to peruse it from the lower Court to the High Court. In the instant case the attorney has been authorized even to sell, bequeath the immovable property of the pre-emptors. Such a right tends to deprive the principal of his valuable rights in the immovable property. If the attorney has been given that much power there is no earthly reason as to why he should be deemed to be deprived of the power to file suit or appeal on behalf of his principal”.

16. The Hon’ble Supreme Court in the case of *Imam Din v Bashir Ahmed* (**PLD 2005 SC 418**) has been pleased to deal with a question relating to a power of attorney being not a valid document. The relevant observation of the Hon’ble Supreme Court is in the following terms:

The power of attorney is a written authorization by virtue of which the principal assigns to a person as his agent and confers upon him the authority to perform specified acts on his behalf and thus primary purpose of instrument of this nature is to assign the authority of the principal to another person as his agent. The main object of such type of agency is that the agent has to act in the name of principal and the principal also purports to rectify all the acts and deeds of his agent done by him under the authority conferred through the instrument. In view of nature of authority, the power of attorney must be strictly construed and proved and further the object and scope of the power of attorney must be seen in the light of its recital to ascertain the manner of the exercise of the authority in relation to the terms and conditions specified in the instrument. The rule of construction of such a document is that special powers contained therein followed by general words are to be construed as limited to what is necessary for the proper exercise of special powers and where the authority is given to do a particular act followed by general words, the authority is deemed to be restricted to what is necessary for the purpose of doing the particular act. The general words do not confer general power but are limited for the purpose for which the

authority is given and are construed for enlarging the special powers necessary for that purpose and must be construed so as to include the purpose necessary for effective execution. This is settled rule that before an act purported to be done under the power of attorney is challenged as being in excess of the powers, it is necessary to show on fair construction, that the authority was not exercised within the four corners of the instrument. (Emphasis supplied)

17. Much stress was also laid by learned Counsel for Respondents 1 & 4 on the provisions of Order 3 Rule 1 CPC and the case law on such proposition, that the power to plead a case before a Court also enjoins upon a Counsel to withdraw the same and there cannot be any exception to it. This may be true in ordinary circumstances when a litigant signs a Vakalanama in person and engages a Counsel for all acts, which at times also empowers the Counsel to withdraw or even compromise the case. However, with utmost respect I may observe, the facts are a bit different in this matter. Here the principal abroad has executed a power of attorney to a Law Firm who in turn has nominated its employees to act as attorneys. In this entire transaction it is not the case of Respondent No.6 that he had any direct instructions either for instituting the Suit or for withdrawing it. In fact he has not come to contest instant proceedings and defend himself. Coupled with this when the power of attorney itself is examined it has no specific powers either for compromise and or withdrawal. For a moment if it is assumed that what would have happened when the principal itself wanted to withdraw the proceedings? Definitely a separate memo of instructions would have been issued to the Law Firm (again not to any of the attorneys individually) and on its presentation before the Court, appropriate orders could have been passed. But as already stated, this is lacking in this case. And the reason is obvious. The attorney was acting without any such instructions, and if there were any direct instructions to him, then

the same should have been on record, which is not the case. Therefore, the provisions of Order 3 Rule 1 will not apply to this case *stricto-senso*, hence, the case law relied upon in that context will also become irrelevant.

18. Learned Counsel for Respondents 1 & 4 have vehemently and emphatically opposed this J.M., on various grounds already discussed hereinabove. But it is to be kept in mind that this is a case against a wrongful withdrawal of the Suit as alleged on behalf of the applicant. It is not a case wherein some compromise was reached with these respondents and that has been challenged by the principal on the ground that the attorney was not authorized to do so. If that would have been the case, then perhaps, the said Respondents may have been justified in raising the aforesaid objections, as in that case some rights might have accrued in their favor, as in a compromise it is always a bilateral agreement on certain terms and conditions agreed upon by the parties. Here it is not so. There is no compromise and it is a simple withdrawal couched in a language which is more akin or analogous to a compromise. And that is all. Therefore, in such circumstances there should not be such a hue and cry on its restoration, if the Court has come to a conclusion otherwise. There is no justifiable reason made out and it is settled law that matters should always be decided on merits and not on technicalities.

19. In view of hereinabove facts and circumstances of the case I am of the view that the order passed and obtained on 6.10.2017 was by way of misrepresentation and fraud in that the Attorney (Respondent No.6) had no lawful authority on behalf of the Applicant (Principal) to withdraw the Suit, whereas, there was no occasion for Respondent No.1 to file any affidavit through Respondent No.7 in support of such

application for withdrawal as materially it was not a case of any compromise before the Court in terms of Order 23 Rule 3 CPC, but a simplicitor withdrawal, but was couched in a language making it akin to a compromise. Resultantly, this J.M. under section 12(2) CPC stands allowed. The order dated 6.10.2017 passed in Suit No. 1300 of 2017 stands set-aside and the Suit is to proceed on merits for which a separate order has been passed.

20. J.M. stands allowed.

Dated: 21.3.2018

J U D G E

ARSHAD/