

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
SUIT NO. B-61 of 2012

DATE

ORDER WITH SIGNATURE OF JUDGE

For hearing of CMA No.6259/17

12.12.2017.

Mr. Behzad Haider, Advocate for Plaintiff.
Ms. Alizeh Bashir, Advocate for Defendant

This is an Application under Order 23 Rule 3 CPC requesting for passing a consent decree between Plaintiff No.1 and the Defendant No.1 on the terms so agreed upon through Settlement Agreement dated 18.04.2017.

On 18.04.2017 when this application was placed before the Court for orders, the Court after recording the contention had observed that in the agreement there is reference to other plaintiffs and Defendants to some extent, and before the application could be allowed, notice was ordered to the remaining Plaintiffs and Defendants. On that objections have been filed on behalf of Defendants No.2/Guarantor.

Learned Counsel for the Plaintiffs submits that the Agreement entered into between the Plaintiff No.1 and Defendant No.1 is valid and a decree be passed accordingly. He was confronted as to the interest of the Defendant No.2 / Guarantor, to which learned Counsel has referred to Section 128 of the Contract Act and submits that the Guarantee of Defendant No.2 will continue notwithstanding the compromise by the borrower/Defendant No.1. He further submits that as per Clause 1 & 2 to Guarantee dated 30.07.2008, the liability of the Guarantor will subsist and continue notwithstanding the part payment and/or any settlement.

I have heard the learned Counsel and perused the record. Insofar as reliance on Section 128 of the Contract Act is concerned, the same appears to be misconceived inasmuch as it has no relevance on the facts presently before the Court. It is a Suit under Section 9 of the Financial Institution (Recovery of Finances) Ordinance, 2001, wherein, the Defendant No.1 is the Customer/Borrower and Defendant No.2 is the guarantor. Through listed application, some settlement/compromise has been reached between the Plaintiff No.1 and Defendant No.1, however, the Guarantor/Defendant No.2 has been left out. Under Order 23 Rule 3 CPC a compromise decree could only be passed when the terms of the agreement are lawful. In this matter either the Suit against the Defendant No.2/Guarantor is to be dismissed to the extent of the compromise entered into between the parties, or in the alternative, the Defendant No.2 is to be joined in the Settlement Agreement but the Plaintiff No.1 and Defendant No.1 are not agreeable to that extent. It is to be appreciated that the guarantee of the Guarantor was issued when there was no Settlement Agreement between the parties. If subsequently the original agreement has been altered then the Guarantor has to be made privy to such Contract and Agreement. The guarantee is to be altered failing which it would not be possible to enforce the same. It cannot remain in force after a compromise as to default has been reached. In such circumstances, I am of the view that listed application cannot be granted in the manner so stated and is accordingly dismissed. However, the Plaintiff No.1 and Defendant No.1 may file a fresh application in which either Defendant No.2 is joined to the Agreement or in the alternative it is prayed to dismiss the Suit against Defendant No.2 to the extent of the Settlement Agreement.

J U D G E