# IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar** and **Agha Faisal**, **JJ**.

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| HCA 86 of 2013 | : | United Mobile & Others vs. Abdul Rauf Essa & Others |
| HCA 87 of 2013 | : | United Mobile & Others vs. Abdul Rauf Essa & Others |
| For the Appellants | : | Mr. Mushtaq A. Memon & Mr. Ishtiaq Memon, Advocates<br><br>Mr. Muhammad Anwer Tariq Advocate<br><br>Mr. M. Anas Makhdoom Advocate<br><br>Mr. Ahmed Farhaj, Advocate |
| For the Respondents | : | Mr. Khalid Jawed Khan Barrister at Law<br><br>Mr. Salim Thepdawala Advocate<br><br>Sheikh F.M. Javaid, Advocate |
| Dates of Hearing | : | 27.11.2018, 05.12.2018, 13.12.2018, 19.12.2018, 17.01.2019, 06.02.2019, 20.02.2019 & 06.03.2019 |
| Date of Announcement | : | 31.05.2019 |

## JUDGMENT

**Agha Faisal**, **J**: The present appeals assail the order dated 01.06.2013 ("**Impugned Order**") delivered by a learned Single Judge of this Court in Suit 323 of 2012 ("**Suit**"). The appellants impugned the findings of the learned Single Judge with respect to CMA 7278 of 2012 ("**Attachment Application**"), filed by the respondent No. 1 seeking attachment of bank accounts and inventories of the appellant No. 1, and CMA 9078 of 2012 ("**Recall Application**"), filed by the appellants *inter alia* challenging a purported consent order, in HCA 86 of 2013 and by

virtue of HCA 87 of 2013 the same appellants impugned the findings of the learned Single Judge with respect to CMA 3175 of 2012 ("**Arbitration Application**"), filed by the appellants seeking the stay of the Suit pending arbitration. Since the order impugned vide the subject High Court Appeals is the same, therefore, the said appeals shall be determined by this common judgment.

2. Briefly stated, the facts relevant to the present controversy are that the respondent no.1 had filed the Suit for dissolution, rendition of accounts, recovery and injunction against *inter alia* the appellants and the learned Single Judge was seized of the matter. The record reflects that the learned Single Judge issued initial notice in the Suit on 29.03.2012 and immediately thereafter the matter was demonstrably listed in quick succession, as is apparent from the orders dated 03.04.2012, 09.04.2012, 10.04.2012 and 12.04.2012. The order dated 12.04.2012 ("**12th April Order**") records that the matter was listed for hearing of six applications, inclusive of the applications determined vide the Impugned Order, and for hearing of an Official Assignee's Reference. The said order records that the parties settled their dispute in presence of their learned counsel and sought a compromise decree upon detailed terms stated therein. The 12th April Order concluded by adjourning the matter for a future date, however, the signatures of some of the parties are also observed as having been annotated to the said order sheet. After a few subsequent dates of hearing the Impugned Order was delivered and it is clearly stated therein that the matters listed on the said date were fourteen applications and further orders in view of the Court Orders culminating from the initial 12th April Order. The Impugned Order sought to enforce the 12th April Order and disposed of certain applications listed therein. The operative constituent of the Impugned Order, wherein findings were recorded in respect of the applications mentioned in the subject appeals, is delineated herein below:

> "24. In the instant case as could be seen from the detailed narrative above that not only the defendants in furtherance of the order dated 12.04.2012 stepped into proceedings, took various steps, paid a substantial amount but have also obtained almost 100% benefit from the plaintiffs, now they cannot be allowed to press into service Section 34 of the Arbitration Act through CMA 3175 of 2012. Another reason that do not favour Arbitration is that

> the Arbitration Clause contained in the Partnership deed between the partners of Defendant no.1, is not binding between other parties to the dispute. Even if it is presumed that the learned Counsel had no authority to compound the suit which has not been established as the record shows that the learned counsel had the power to compromise. Defendants 1 to 4 have failed to show that Mr. Ashraf Machyara and Mr. Ashraf Nara both of whom have signed the order sheet dated 12.04.2012 had no authority on behalf of the parties to the suit, they are partners and beneficiaries of the settlement recorded by the Court on 12.4.2012. It is settled law that acts of partners bind the other partners of the Firm, if at all it is a case of Defendant no.2 to 4 that the partners have breached the fiduciary duties they may file suit for damages against such partners. It has come on record that beside the parties to the suit rights and interest of number of other business concerns and persons is associated with the subject controversy who are not party to the Arbitration clause therefore, I do not consider now to drive the plaintiff to resort to arbitration, therefore, the application under section 34 of the Arbitration Act, 1940 (CMA no.3175 of 2012) as well as CMA 9078 of 2012 filed by the Defendant no.1 to 4 are hereby dismissed……
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> 29. Once the signatories to the statement filed on 12.09.2012 have drawn benefit of the order passed by the learned Senior Judge on 12.04.2012 they have acquiescence to the order, more particularly when their duty constituted agent Mr. Khawaja Shamsul Islam has fully own the responsibly on their behalf besides other partners and beneficiary of the orders Ashraf Nara and Ashraf Machiyara who are also Partner of Firms Defendant no.1 and 5, they are now estopped from challenging the same. As observed earlier that this court has inherent jurisdiction to implement its own order, therefore CMA no.7278 of 2012 under Section 151 CPC is granted since in all a sum of Rs.200/- million in two installments of Rs.100 million each, had fallen due on 3rd July, 2012 and on 30th August, 2012 in terms of settlement recorded on 12.04.2012 has not been paid by the defendants, therefore, the accounts of the defendant no.1 to the extent of Rs.200 million is attached order may be issued against the Banks maintaining the account of Defendant no.1. In case the amount in the account of the defendant no.1 is short of the amount attached, the stock in trade of the defendant no.1 to such an extent be attached and the official assignee to execute the order. As noted above the court is fully competent to enforce and execute the orders passed by it during pendency of the proceedings. Till such time the amount is deposited the documents executed by the plaintiff in favour of the defendants and or their nomine may not be returned or resorted to them by the Nazir. CMA no.7278 of 2012 under section is disposed of in above terms".

3. The scope of this judgment is demarcated by the ambit of the appeals under scrutiny and in such regard it is considered illustrative to reproduce the prayer clause in the respective appeals herein below:

HCA 86 of 2013

"It is, therefore, prayed that this Hon'ble Court after hearing the parties may be pleased to allow this appeal and pass the following orders:

A) Order dated 01.06.2013 passed by the learned Single Judge (O.S) by which application under section 151 (CMA 9078 of 2012) filed by the appellants has been dismissed allowing CMA 7278 of 2012 filed by the respondent no. 1, be set aside and order for revoking the purported settlement dated 12.04.2012, as sought in the said application.

B) It may be declared that the issuance of Garnishee order and / or attachment of the properties of the appellant no.1 to the extent of the claim of the respondent no. 1, is illegal, without jurisdiction and hence the same is to be set aside and suspended.

C) The respondent no. 1 may be directed to refund the amount of Rs. 275 Crores which he has received from the appellants under the garb of the purported settlement without any justification……"

HCA 87 of 2013

"It is, therefore, prayed that this Hon'ble Court after hearing the parties may be pleased to allow this appeal, stay the proceedings of Suit 323 of 2012 i.e. Abdul Rauf Essa vs. United Mobile & Others and refer the matter to the arbitration as per clause (20) of the Partnership Deed or pass any other or further order which this Hon'ble Court may deem fit and proper in the circumstances of the case."

4. Mr. Mushtaq A. Memon, Advocate set forth the case for the appellants and submitted that under no circumstances could the 12th April Order be considered to be a consent decree; firstly because there was no consent and finally because the said order is admittedly not a decree. Per learned counsel, the appropriate course to be adopted in the Suit should have been to first pass a preliminary decree, however, the entire due process of law was circumvented vide the 12th April Order and the subsequent orders passed to implement the same. It was contended that the Arbitration Application was filed immediately after institution of the Suit and the said application should have been decided at the very first instance, however, the same was not done as is apparent from the Impugned Order. Per learned counsel, the 12th April Order and the Impugned Order ventured well beyond the meets and bounds of the Suit and affected unrelated and un-impleaded entities, notwithstanding the settled law that strangers may not be bound by the

orders in a case. It was argued that the 12th April Order was void, therefore, any order in pursuance or in purported execution thereof, including the Impugned Order, was also void. Per learned counsel, when the basic order itself fails the superstructure built thereupon also crumbles. It was argued that if 12th April Order is to be treated as a compromise decree then the learned Single Judge would have become *functus officio* and thereafter would be incapable of passing any orders in such regard. It was thus sought to be argued that the Impugned Order has been rendered by the learned Single Judge without any authority or justification whatsoever. Learned counsel demonstrated from the record that the learned Single Judge has passed the order dated 01.10.2012 wherein the assets sought to be exchanged, pursuant to the 12th April Order and orders subsequent thereto, were required to be deposited / secured with the Nazir of this Court. It was submitted that it is imperative that the 12th April Order and the pertinent constituents of the Impugned Order be set aside. It was further contended that allowing the appeals in the manner sought would not cause any prejudice to the parties to the Suit as restitution is entirely possible on the basis of the order of the learned Single Judge dated 01.10.2012.

5. Mr. Muhammad Anwer Tariq, Advocate also carried the brief for the appellants and argued that the purported consent decree was prima facie devoid of consent and even otherwise demonstrably not a decree. Learned counsel adverted to the 12th April Order and submitted that it was novel that an order of the Court was signed by some of the parties and their legal counsel in addition to the learned Single Judge. It was submitted that if a compromise was being contemplated by the parties then the requisite application should have been moved by all the respective parties and orders should have been passed thereupon in consonance with Order 23 Rule 3 CPC. Learned counsel also drew the Court's attention to the order dated 14.06.2012 and submitted that the same contained a threat of a garnishee order, which could not have been passed since the learned Single Judge was not seized of execution proceedings and the Suit remained / remains pending. It was argued that if the 12th April Order was lawful then the learned Single Judge ought to have decreed the Suit in terms thereof, however, in the absence of such a decree it was imperative for the learned Single Judge to conduct a detailed enquiry and arrive at a judicial determination with

respect to the validity of the purported settlement / compromise as the same had been specifically sought by the affected parties *inter alia* vide the Recall Application. It was submitted that the learned Single Judge adopted neither course and proceeded to enforce the 12th April Order by a subsequent interim orders in the very Suit culminating in the Impugned Order, which cannot be sustained in law.

6. Mr. Salim Thepdawala, Advocate appeared on behalf of the respondent no.1 and controverted the arguments advanced by the learned counsel for the appellants. The primary thrust of his arguments was that the appellants have already enjoyed the benefit of 12th April Order, however, have filed the present proceedings in an attempt to subvert the due process of law and to absolve themselves from honoring their commitments pursuant to the judicially recognized compromise / settlement. It was submitted that the 12th April Order was in fact a compromise and settlement between all the parties and the belated challenge to the same was *mala fide*. Learned counsel adverted to constituents of the record and argued that knowledge of the 12th April Order was demonstrable in respect of the each of the appellants herein. Learned counsel submitted that while the appellants are objecting to orders delivered post the 12th April Order on the basis that the Court had no authority to deliver the same, it was apparent from the record that the appellants had themselves sought and obtained interim orders of the very Court to enforce their interpretation of the 12th April Order. Learned counsel submitted that the issue of arbitration clause was irrelevant as the same was contained in the partnership deed and if it was contention of the appellants that the respondent no.1 had already been expelled from the partnership then there was no question of the enforcement of the constituents of the same partnership deed there against. It was contended that notwithstanding the forgoing arguments the issue of arbitration was rendered irrelevant in view of the consensual nature of the 12th April Order. Learned counsel submitted that the exchange of assets already undertaken pursuant to the 12th April Order was irreversible as third party interest had been created in constituents so exchanged, therefore, restitution was in any event no longer possible. The learned counsel also adverted to relevant observations in the Impugned Order wherein the exchange taken place till the said date had been recognized, and submitted that it was correctly inferred by the

learned Single Judge that the said process did not merit reversal. It was thus concluded that the present appeals were misconceived and devoid of merit, hence, may be dismissed forthwith.

7. Mr. Shaikh F. M. Javaid, Advocate filed a written synopsis on behalf of the respondent no.2(iv) and submitted that the respondent no.(2iii) Ashraf Nara ("**Nara**") and the respondent no.(2ii) Ashraf Machiyara ("**Machiyara**") were present in Court, along with their advocate, when the 12th April Order was passed and they appended their signatures upon the said order under consideration. It was added that in the 12th April Order no liability was apportioned to the said respondent and no directions were passed in respect of the said respondent as the entire transaction was to take place between the appellants and the respondent no. 1. It was thus argued that the respondent no. 2(iv) had no concern with the appellant no. 1 and had been impleaded in the Suit without any cogent reason.

8. We have heard the respective learned counsel at length and have also appreciated the documentation and authority arrayed before us. It is observed at the very onset that the Suit does not stand decreed and remains pending as of date. The diary, in HCA 86 of 2013 dated 14.06.2013, succinctly encapsulates the controversy and records it in the manner appearing herein below:

> "…The appellants have challenged the order dated 01.06.2013 passed in Suit 323 of 2012. The learned counsel for the appellant argued that the respondent no. 1 had filed the above suit for dissolution, rendition of accounts, recovery and injunction. The matter was fixed for hearing of various applications before the learned Single Judge of this Court. Learned counsel for the appellant further argued that on 12.04.2012, apparently parties agreed on settlement of dispute and the compromise was reduced in writing by the learned Single Judge and after passing of the order, few steps were also taken in pursuance of the compromise. Subsequently, an application for recalling of the compromise order was filed by the appellants on the ground that they had not consented to the compromise. The matter was referred to the Honorable Chief Justice and his lordship dismissed the application and also ordered that contempt proceedings be initiated.
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> The learned counsel for the appellants further argued that the appellants have not challenged the portion of the impugned order in which the Honorable Chief Justice ordered for issuance of show cause notice for contempt, as mentioned in para 30 of the

> impugned order, but they want the operation of the remaining portion of the impugned order be stayed for the reason that the suit was filed for the rendition of accounts hence proper procedure was to pass a preliminary decree. Alternatively, it was averred that if no preliminary decree was required to be passed then the matter was for dissolution of partnership, for which a clear clause for arbitration was provided in the partnership deed, hence, instead of approaching this Court directly, a remedy of arbitration should have been availed and for that an application under Section 34 of the Arbitration Act was also filed to stay the proceedings, which was not decided on merits and the matter was disposed of. It was further contended that the compromise shows that the suit was decreed but it was ordered to be fixed in Court again and again while under Section 36 CPC an execution application was required to be filed as after disposing the suit the court had become functus officio. Points raised require consideration. Let counter affidavit be filed with advance copy to the appellants and they may also file rejoinder, if any, meanwhile the operation of the impugned order is suspended, except paragraph 30 which relates to the initiation of contempt of court proceedings…"

9. The pleadings of the present High Court Appeals circumscribe the scope of the proceedings to an adjudication upon whether the findings rendered in the Impugned Order with respect to the Arbitration Application, Attachment Application and Recall Application are sustainable in law. However, the necessary precursor in this regard would have to be the determination of whether the 12th April Order could be sustained and enforced against the purported parties thereto and / or against those not party thereto but impleaded in the Suit. All the learned counsel sought to argue the present appeals at the *kutcha peshi* stage, with the assistance of the record and proceedings of the Suit, hence, the appeals were heard to length to adjudicate the following points for determination, framed in pursuance of Order XLI rule 31 CPC:

*i. Whether the Order dated 12.04.2012, rendered by the learned Single Judge in Suit 323 of 2012, constitutes an enforceable compromise between all the parties to the Suit.*

*ii. Whether the findings in the Impugned Order with respect to the Arbitration Application, Attachment Application and Recall Application could be sustained in view of the determination arrived at by this Court in respect of the 12th April Order.*

10. It may pertinent to record at the very onset that while the 12th April Order expressly sought to scribe the terms of a compromise decree, yet the said order did not decree the Suit and on the contrary was primarily in the nature of an interim order in respect of the applications listed on the said day. The term *decree* has been defined in Section 2(2) CPC *inter alia* as being the formal expression of an adjudication that conclusively determines the rights of parties with regard to matters in controversy in a suit. While the said definition contemplates the existence of a preliminary as well as a final decree, it is apparent that the 12th April Order falls into neither classification. It may also be poignant to observe that the list of applications, scheduled to be heard on the said date, did not contain any application seeking a compromise between the parties *inter se*.

11. Since the 12th April Order was not predicated upon an Order 23 rule 3 CPC application, hence, the express consent of all the parties to the Suit to the purported compromise is not apparent. The aforesaid order records the presence of the plaintiff (respondent no. 1 herein) and two defendants, being Nara and Machiyara, and the signatures of the aforesaid persons are also appended to the order sheet. It may be pertinent to record at this juncture that the Suit was filed by the respondent no. 1 / plaintiff against five persons, comprising of three natural legal persons and two partnerships firms. Nara and Machiyara did not fall into either category and were mentioned as partners of the defendant no. 5 in the Suit, said to be a partnership firm. The record shows that other than the two partners of a defendant partnership firm, no other defendant was present or had expressly conveyed his consent for the compromise contemplated vide the 12th April Order. It thus stands to reason that present appellants were not expressed as parties to the 12th April Order and so it remains for this Court to consider whether the partnership firm, of which Nara and Machiyara were stated to be partners, could be considered bound by the action taken by the said respondents ostensibly on its behalf.

12. The authority of partners, in a partnership firm, is demarcated by the Partnership Act 1932. Section 18 thereof signifies that a partner is the agent of the firm merely for the purposes of the business of the firm.

Section 19 of the said act delineates the meets and bounds of the implied authority of a partner and sub sections 2(c) and 2(e) thereof explicitly stipulate that in the absence of any usage or custom or trade to the contrary, the implied authority of a partner does not empower him to compromise or relinquish any claim or portion of a claim by the firm and also does not empower him to admit any liability in a suit or proceedings against the firm. The honorable Supreme Court has given due recognition to the statutory principles governing the authority of partners in the case of *Combined Enterprises vs. WAPDA Lahore* reported as *PLD 1988 Supreme Court 39* and Muhammad Haleem, CJ (as he then was) observed that a partner is the agent of the firm for the purposes of business of the firm as this is so provided in section 18 of the Partnership Act. It was maintained that section 18 is subject to the provisions of section 19 and other provisions of the said act, and the authority of a partner to bind the firm conferred by section 19(1) of the Partnership Act is controlled by the limitations enumerated in section 19(2) of the Act Subsection (2) of section 19, therefore, specifies acts in respect of which a partner has no implied authority to bind his co-partners while purporting to act on behalf of the firm without their express authority or usage or custom of trade. An earlier judgment of this High Court in the case of *New Era Builders Karachi vs. Pakistan Insurance Corporation & Another* reported as *PLD 1977 Karachi 822* had given due recognition to the import of Section 19(2)(c) of the Partnership Act and I Mahmud, J (as he then was) had observed that the implied authority of a partner does not empower him to compromise or relinquish any claim or portion of the claim by the firm. This case law is squarely applicable to the present facts and circumstances and in application of the ratio enunciated we are constrained to maintain that the learned counsel for Nara and Machiyara has been unable to demonstrate that the two persons could bind their partnership firm and / or the other partners of the firm to the compromise arrangement that they concluded.

13. There is one remaining question to address in this regard, being the nature and extent of authority vested in the learned counsel for the defendants (in the Suit) in so far as the 12th April Order is concerned, however, it is considered prudent to address this issue later herein and upon the juncture when the fate of the findings contained in the

Impugned Order, in so far as the Recall Application is concerned, are to be evaluated.

14. The upshot of the above discussion is that the 12th April Order was neither a decree nor did it have the consent of the five natural and juristic persons arrayed as defendants in the Suit. While it is trite law that strangers to a compromise cannot be bound by its terms, reliance placed upon *Ahmed Khan vs. Irshad Begum & Others* reported as *2007 MLD 331* authored by Mian Saqib Nisar, J (as he then was), it would be unreasonable if the said principle could be employed by parties to a compromise to obviate their obligations. It has been maintained by this Court, in *Muhammad Akram Shaikh vs. Pak Libya Holding Company (Private) Limited & Others* reported as *PLD 2010 Karachi 400* authored by one of us (Muhammad Ali Mazhar, J) that while the terms of a compromise could not bind strangers thereto, however, the parties to such a compromise shall remain bound in respect thereof. It is thus the deliberated view of this Court that notwithstanding the foregoing, the terms recorded in the 12th April Order were binding in so far as the express parties thereto are concerned, being the respondent no. 1, Nara and Machiyara. The first point for determination framed herein is hereby answered to state that while the 12th April Order is not binding upon those not expressed as signatories thereto, however, the same remains an enforceable compromise between the respondent no. 1, 2(ii) Machiyara and 2(iii) Nara.

15. We remain vigilant that while the appellants have been absolved from the prescriptions of the 12th April Order, they could not be permitted to derive any benefit therefrom. Learned counsel for the appellants had solicited our surveillance to the Order dated 01.10.2012, rendered in the Suit, to protect the interests of the parties and security was required to be put in place in order to cater for restitution, if the same were so ordered. We have observed from the said Order that the learned Single Judge had directed that the title documents of the property sought to be exchanged, vide the 12th April Order, be deposited with the Nazir with the Court along with security to the extent of the amount that was to be paid pursuant to the 12th April Order. Therefore, it is imperative that benefit, if any, derived by parties to the present appeals and / or the Suit, other than the respondent nos.1, 2(ii) and 2(iii), may be returned /

recompensed by them and benefit, if any, derived from the said parties may be returned / recompensed thereto by the respondent nos.1, 2(ii) and 2(iii).

16. In view of our findings with respect to the 12th April Order the necessary corollary is the consequent fate of the orders in enforcement passed thereafter by the learned Single Judge culminating in the Impugned Order. It is trite law that if the basic foundation, or order in the present circumstances, fails upon the anvil of adjudication then the entire edifice built thereupon implodes. This proposition has been enunciated by the superior Courts time and time again and one pronouncement in such regard was in the case of *Maulana Attaur Rehman vs. Al Haj Sardar Umar Farooq & Others* reported as *PLD 2008 Supreme Court 663*, wherein the honorable Supreme Court maintained that when the basic order is without lawful authority and *void ab initio*, then the entire superstructure raised thereon falls to the ground automatically. Since the scope of the present appeals is circumscribed to the findings rendered in respect of the Arbitration Application, Attachment Application and the Recall Application, encapsulated in the Impugned Order, we proceed to consider each application individually.

17. The issue of consent was also sought to be agitated vide the Recall Application, filed by the present appellants. It was *inter alia* expressly stated in the said application that while they had also engaged the learned counsel representing the defendant no. 5 in the Suit but no authority had been conferred thereupon to compromise the Suit on their behalf. It was submitted that the applicants were never party to the terms of compromise recorded vide the 12th April Order and further that they had never agreed to the same. In a nutshell the applicants maintained that they had no nexus with the consent purportedly extended on their behalf translating in to the 12th April Order. The authority of the learned counsel was questioned and in addition thereto reference was also made to an application filed by other defendants wherein the terms of the purported compromise had been repudiated.

The Impugned Order maintained that since acts of a partner binds other partners in a firm, the 12th April Order had been signed by the learned counsel for all the defendants in the Suit and had also been acted upon, therefore, the Recall Application merited dismissal.

With utmost respect to the learned Single Judge, we find ourselves unable to concur with the rationale articulated. The nature and extent of the binding nature of acts of a partner upon other partners has been deliberated upon in detail supra and it is apparent that no unfettered authority is conferred upon any partner to bind the firm or the other partners. The issue of authority of the learned counsel representing the defendants in the Suit was expressly challenged in the Recall Application and it appears from the Impugned Order that the said ground and others invoked in the Recall Application were not considered in their proper perspective. In any event after having maintained that the 12th April Order is void in so far as the appellants are concerned further dilation upon the Recall Application appears unnecessary and the findings contained in the Impugned Order with regard to the Recall Application are hereby set aside and the said application is disposed of as having become infructuous.

18. The Attachment Application was preferred by the plaintiff (respondent no. 1 herein) seeking attachment of the bank accounts and other assets of the appellant no. 1 herein upon the premise that the 12th April Order was not being implemented and the said application had been allowed in the Impugned Order. Since we have held that the 12th April Order was void in respect of the present appellants, including the appellant no. 1 herein, therefore the issue of employing coercive proceedings to implement the said order does not arise. In view hereof the findings contained in the Impugned Order with regard to the Attachment Application are hereby set aside and the said application is dismissed.

19. The record shows that the Arbitration Application was preferred immediately post issuance of notice in the Suit, and appears was listed on the order sheet dated 03.04.2012, being four days after issuance of initial notice in the Suit. The application under consideration was dismissed vide the Impugned Order *inter alia* on account of the defendants in the said having stepped into the proceedings post the 12th April Order and took various steps which disentitled them to consideration of the said application. With utmost respect to the learned Single Judge, we find ourselves unable to concur with such reasoning.

Even if the Court was to consider the conduct of the applicant, in order to determine entitlement, the conduct in question would be that which took place prior to the application having been preferred. It is prima facie evident from the record of the Suit that the Arbitration Application was filed immediately after issuance of notice in the Suit and this factum is also apparent from the order sheet, on the second date of hearing in the Suit, being 03.04.2012, which shows that the said application was listed for orders. Whether or not the application could be granted on the basis of its merits was a question for the learned Single judge to decide upon consideration of the facts and in application of the law, however, predicating the dismissal of the said application upon the premise that the applicant had stepped into the proceedings cannot be sustained in the present facts and circumstances.

20. In view of the discussion and reasoning delineated supra, the appeals under scrutiny are allowed in the following terms:

i. The 12th April Order, being Order dated 12.04.2012 delivered in Suit 323 of 2012, is found to be void in respect of the appellants. However, the same shall remain binding and enforceable in so far as the respondent nos. 1, 2(ii) Ashraf Machiyara and 2(iii) Ashraf Nara are concerned.

ii. The findings contained in the Impugned Order, in so far as the Attachment Application being CMA 7278 of 2012 and the Recall Application being CMA 9078 of 2012 are concerned, are hereby set aside, as the issues raised therein stand determined as a consequence of our findings with respect to the 12th April Order, and resultantly the Attachment Application is dismissed and the Recall Application is disposed of as having become infructuous.

iii. The findings contained in the Impugned Order, in so far as the Arbitration Application being CMA 3175 of 2012 is concerned, are hereby set aside and the said application is remanded back to the learned Single Judge to be adjudicated afresh in accordance with the law.

iv. It is directed that benefit, if any, derived by parties to the present appeals and / or the Suit, other than the respondent nos.1, 2(ii) and 2(iii), may be returned / recompensed by them and benefit, if any, derived from the said parties may be returned / recompensed thereto by the respondent nos.1, 2(ii) and 2(iii) within sixty days from the date hereof.

v. The Impugned Order stands varied to the extent provided herein.

J U D G E

J U D G E

*Farooq PS/**