

# IN THE HIGH COURT OF SINDH AT KARACHI

## Suit No. 346 of 2019 along with Execution No. 17 of 2019

Plaintiff/Judgment Debtor : Syed Khaliluddin, through Mr. Ali Tahir and Mr. Saleemuddin Patoli, Advocates.

Defendant No.1/ Decree Holder : Rafique Ahmed Qandhari, through Mr. Mohammad Vawda, Advocate.

Dates of hearing : 15.10.2019, 31.10.2019 and 21.11.2019.

### ORDER

**YOUSUF ALI SAYEED, J** – The Plaintiff has brought this Suit on the basis of a cause of action said to have accrued on 24.01.2019, upon alleged breach by the Defendant No.1 of an Order made by consent on 22.01.2019 in Suit No. 1481 of 2012, which had been instituted by the Defendant No. 1 against the Plaintiff and others in relation to land measuring 25 acres in Naiclass N.169, Deh Sharabi, Tapo Landhi, District Karachi (the “**Suit Property**”) on the basis of a Sale Agreement and General Power of Attorney dated 19.07.2011, with the present Plaintiff being arrayed therein as the Defendant No.4. A Deed of Settlement had then apparently been executed between the present Plaintiff and Defendant No.1 on 11.03.2017 (the “**Settlement Agreement**”), and in pursuance thereof an Application under Order XXIII, Rules 1 & 3, C.P.C, bearing C.M.A No. 675/2019 (the “**Compromise Application**”), was then filed under their signatures and supported by their Affidavits, which was allowed in terms of the Order of 22.01.2019, with that prior Suit accordingly being decreed as between them on the terms set out in that Application (the “**Compromise Decree**”).

2. As per the Compromise Decree, the Plaintiff had accepted the genuineness and authenticity of the Sale Agreement and General Power of Attorney dated 19.07.2011 and that possession of the Suit Property was with the Defendant No.1, who had apparently given a cheque for Rs. 10 Million to the Plaintiff and in return the Plaintiff was required to surrender the title documents of the Suit Property to the Defendant and execute a Power of Attorney in his favour and have the same registered, as well as to execute any and all documents so as to vest ownership of the Suit Property in the Defendant No.1 or his nominee
  
3. However, whilst a Power of Attorney had been executed, the Plaintiff is said to have shown reluctance in getting the same registered and handing over the title documents, hence the Defendant had requested his bank to put a stop on encashment of the cheque.
  
4. On the basis of the cause of action said to arise from such circumstances, the Plaintiff has filed this Suit essentially assailing the validity of the Compromise Decree, with it being prayed that this Court be pleased to pass judgment and decree in favour of the Plaintiff and:
  - “(i). Declare that the Plaintiff is the only rightful legal and beneficial owner of the property.
  
  - (ii). Declare the Consent Order and the Settlement Agreement to be null and void due to the same having been breached by the Defendant No. 1.
  
  - (iii). Declare the Sale Agreement dated July 19, 2011 and the General Power of Attorney dated July 19, 2011 to be void and of no legal effect.
  
  - (iv). Permanently prohibit and restrain the Defendant No. 1 from claiming any interest in the Property, taking any action against the Plaintiff in relation to the property, initiating any proceedings against the Plaintiff for the declaration and / or possession of the Property and from claiming any damages and / or

from seeking any adverse Order in relation to the foregoing against the Plaintiff.

- (v). Direct the Defendant No. 1 to pay an amount of PKR 200 Million to the Plaintiff as damages.
- (vi). Grant any other relief deemed just and appropriate in the circumstances of the case.
- (vii) Grant costs of the Suit.

5. Conversely, the Defendant No. 1 has filed an Execution Application No. 17 of 2019 (the “**Execution**”) seeking enforcement of the Compromise Decree.

6. Whilst the Suit has been met with an Application under Order 7, Rule 11 CPC, bearing CMA No. 5054/19, seeking rejection of the plaint, an Office Objection has in turn also been raised as to maintainability of the Execution; it being averred with reference to the judgment of the Honourable Supreme Court in the case reported as Peer Dil and others vs. Dad Muhammad 2009 SCMR 1268, that it has thereby been laid down that the enforcement of a compromise decree lies by way of a fresh suit rather than an execution application.

7. Proceeding on CMA No. 5054/19 and also addressing the Office Objection in relation to the Execution, learned counsel for the Defendant invited attention to the frame of the Suit and the prayers advanced, whereby it was essentially sought to set the Compromise Decree at naught, and it was submitted that, as such, the Suit was barred under the principles of *res judicata* and Section 11 of the C.P.C, 1908, and the Plaint liable to be rejected because the Compromise Decree could not be set aside through a subsequent suit.

8. Furthermore, it was submitted that the judgment in Peer Dil's case (Supra) did not lay down any principle barring the execution of a compromise decree and, instead, such judgment was authority for the proposition that where a compromise decree was not executable, the compromise could be treated as a fresh contract between the parties on the basis of which a fresh civil suit would lie for enforcement thereof. He submitted that the Office Objection in relation to the Execution was therefore, misconceived, as in terms of Section 47(1) of the C.P.C., 1908, it the executing Court which is empowered to decide whether such a decree is executable as per its terms, and if it was of the view that this was not so, it could even treat the proceedings as a suit, as envisaged in terms of Section 47 (2).
  
9. Assailing the maintainability of the Suit, it was pointed out that in terms of Prayer Clause (i), the Plaintiff had sought a declaration that he was the owner of the Suit Property even though he had surrendered his ownership rights in relation thereto under the Compromise Decree, and through Prayer Clause (ii), had sought a declaration that the Compromise Decree and Settlement Agreement are null and void, and through Prayer Clause (iii), had sought a declaration in relation to the Sale Agreement and General Power of Attorney dated 19.07.2011, even though he had categorically accepted the genuineness and authenticity thereof vide the Compromise Application. It was pointed out that Prayer Clause (iv) was for Injunction, which could not be granted under the given circumstances, and whereas in terms of Prayer Clause (v), the Plaintiff had sought damages against the Defendant No. 1, even though there was nothing otherwise stated in the in the Plaint as to what such damages were on

account of and without it even having been so much as averred that the Plaintiff had suffered such damages.

10. Learned counsel for the Defendant No.1 pointed out that in the plaint of the present Suit it had been alleged in Paragraph 13 that the Order dated 22.01.2019 had been made on the Compromise Application even though the Plaintiff had requested the Court to postpone the hearing and that the Compromise Decree had resulted under pressure, without his lawyer in attendance. It is submitted that a perusal of the Order of 22.01.2019 clearly shows that no such request was made by the Plaintiff and in fact the Plaintiff had himself affirmed the contents of the Compromise Application, as noted in the Order. It was submitted that essentially, the Plaintiff has on the one hand taken the stance that the Compromise Decree is not enforceable whilst on the other hand taken the stance that the same was allegedly not passed with his free will and consent, and contended that the filing of this present Suit and the refusal of the Plaintiff to abide by the terms of the Compromise Decree was clearly mala fide.

11. Learned counsel for the Plaintiff contended that the Settlement Agreement and Compromise Decree had been breached by the Defendant No.1, and were thus null and void. He contended that the Plaintiff could thus reassert an entitlement to the Suit Property, and the Suit had been filed accordingly seeking declarations in such terms and to also declare that the Sale agreement and General Power of Attorney dated 19.07.2011 were also void and of no legal effect, as well as to obtain recompense by way of damages from the Defendant No.1. It was pointed out that in terms of the Plaint it had been pleaded that the Settlement Agreement in pursuance of which the Compromise Application had been preferred and on the basis of which the Compromise Decree had been made

had been executed by the Plaintiff under pressure, which would be proved by him upon leading evidence.

12. It was submitted that Clause 10 of the Settlement Agreement provided that both the parties would strictly observe the terms and conditions thereof and would not violate any of its clauses and in case of any dispute arise, both parties would be at liberty to seek the resolution thereof by initiating legal proceeding before the competent forum, and as the terms of the Compromise Decree was passed had been violated by the Defendant No.1, the Plaintiff was entitled to avail his remedy through this Suit, which was therefore maintainable, it being contended further that the Plaint could not be rejected when there was such a factual controversy involved. It was submitted that as a declaration had been sought that the Settlement Agreement and Compromise Decree were null and void and damages of Rs.200 Million had also been claimed from the Defendant No.1, which could not be decided within the framework of the Execution, this Suit was the appropriate vehicle for such determination. It was submitted that even if other prayers were considered not to be maintainable, the claim for damages was an independent relief, which the Plaintiff was entitled to prove by adducing evidence, hence the Plaint could not be rejected.

13. It was submitted that the Execution was not maintainable as the Compromise Decree was merely the Courts sanction of a further agreement, which provided a fresh cause of action to the parties and the aggrieved party was required to file a fresh suit in case of its breach. It was contended that the Execution for enforcement of the Compromise Decree was neither competent nor maintainable. Reliance was placed on the judgment in the case of Peer Dil (Supra) as well as the judgments in the cases reported as Mst. Fareeda and another v. Mst.

Khalida and 2 others 2019 CLC 1243, and Tariq Gul vs. Zarar-ul-Yamin Khan 2019 CLC 566.

14. Having considered the arguments advanced, it merits consideration at the outset that the judgments cited on behalf of the Plaintiff as to the Compromise Decree being an agreement and its breach affording a cause of action are distinguishable in as much as those cases pertained to suits filed for enforcement of a compromise, whereas the present Suit assails the Compromise Decree and seeks to set the same at naught in an endeavour to again disavow the Sale Agreement and Power of Attorney dated 19.07.2011 and reopen and reassert a claim in relation to the Suit Property as well as prefer a claim for injunction and damages.
  
15. In this regard, it is apparent that the very terms of the Compromise Application estop the Plaintiff from doing so. The arguments advanced on the basis of the Settlement Agreement and relief sought in relation thereto is misconceived, as the terms thereof do not form part of the Compromise Application which proceeds on its own terms, as set out therein, with the Compromise Decree being circumscribed accordingly. Having accepted the Sale Agreement and Power of Attorney dated 19.07.2011 to be genuine, the Plaintiff cannot then resile from that stance, and is estopped from asserting a position contrary to the terms of the Compromise Decree.
  
16. On the point of estoppel, in the judgment in the case reported as Muhammad Sama Mondal v. Muhammad Ahmed Sheikh and Others PLD1963 Dacca 816 it was held as follows:

“The compromise decree stands, and while it stands, it operates as an estoppel between the parties. I am supported in my views by the case of *Cowasji Temulji v. Kisandas Tricumdas* 11 IC 984 and *Nicholas v. Aspher* and another ILR 24 Cal. 216. In the case reported in 11 IC 984, it has been laid down that a compromise decree operates as an estoppel between the parties and their representatives. In the case reported in 24 Cal. 216, it has been held that a consent decree is just as binding on the parties to the proceeding as a decree after a contentious trial.”

17. In the case of *Sailendra Narayan v. State of Orissa* AIR 1956 SC 346, it was explained that a compromise decree creates an estoppel by judgment and a judgment by consent is as effective an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case. The Supreme Court quoted with approval the observations of Lord Hershell, on appeal from the judgment of Vaughan Williams, J, in *re South American and Mexican Co. Ex parte Bank of England* (1895) 1 Ch 37, which reads as follows:

"The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a Judgment which results from the decision of the Court after the matter has been fought out to the end.

And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action."



18. In the aforementioned case reported at (1895) 1 Ch 37, it had been held that

“It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict or, upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end.”

19. That being so, the claims in respect of injunction and damages also fail.

20. As such, in view of the foregoing, it is apparent that the present Suit is barred by estoppel, hence CMA No. 5054/19 is allowed with the result that the Plaint is rejected. The other pending Applications in the Suit, as well as CMA NO. 247/19 filed on behalf of the JD in the Execution, having become infructuous, stand dismissed accordingly. As to the Objection raised by the Office in respect of the Execution, the same is overruled for the time being as the execution of a compromise decree is not barred *per se*. Hence, the Office is directed to place a copy of this Order in the file of the Execution, which would proceed further as per its own terms.

JUDGE

Karachi.  
Dated \_\_\_\_\_