

IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Mohammad Shafi Siddiqui

J.M. No.10 of 2009
Mrs. Sara Ahmed Soomro
Versus
Mrs. Sarwat un Nisa & others

Date of Hearing: 22.02.2016, 01.03.2016, 15.03.2016 and 18.03.2016

Petitioner: Through Mr. Abid S. Zuberi Advocate.

Respondents No.2&3: Through Mr. Zeeshan Abdullah Advocate

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J U D G M E N T

Mohammad Shafi Siddiqui, J.- The applicant in these proceedings has challenged the order dated 23.12.2004 which disposed of the suit bearing No.702 of 2000 and in terms whereof the decree dated 11.03.2008 was drawn accordingly.

2. Brief facts of the case are that the applicant and respondent No.1 filed Suit No.702 of 2000 against respondents No.2 to 4 herein in relation to properties mentioned in Para 3 of the plaint for partition, and distribution and for recovery of certain amounts as prayed. The suit was contested by respondents initially however ultimately an application under order XXIII rule 3 CPC was filed duly signed respondent No.1/ plaintiff No.1 for herself and as attorney of plaintiff No.2/applicant. The application was also signed by the advocate appearing for applicant/ plaintiff No.2 and respondent No.1/plaintiff No.1, and the defendants and their counsel. The application was assigned CMA number as 9014 of

2004. The same was allowed and the decree was drawn in the year 2008 after some modification as under.

3. Subsequent to the order on compromise application, first J.M. bearing No.39 of 2005 was filed on 11.01.2005 which was disposed of on 11.03.2008 in terms whereof J.M. was allowed to the extent that the decree passed in the above referred suit stood modified/set aside to the extent of property mentioned in J.M. No.39 of 2005 i.e. plot bearing Survey No.1, 2 and 3, Sheet RY-17, Railway Quarters Road, Karachi (Old Survey No.30, 31 and 32, Old Queens Road, Karachi), and that the controversy in relation to this property was left to be decided in Suit No.1325 of 2005. Accordingly, it is claimed that although the original decree in pursuance of impugned order, referred above, has not been drawn but the decree of modified order was drawn and prepared which is under challenged in this J.M. and this is the first ever decree drawn in Suit No.702 of 2000.

4. It is the case of the applicant that the scope of the suit is limited to the properties mentioned in Paragraph 3 of the plaint and the advocate was engaged and authorized to proceed accordingly. The compromise application, which was purportedly signed by the respondent No.1 (plaintiff No.1) on behalf of applicant (plaintiff No.2), exceeds the authority and/or scope of the suit. It is claimed to have been signed on the basis of special Power of Attorney available at page 667 of the suit file, which is a document attached with the compromise application as well. It is the case of the applicant that this authority and power granted to respondent No.1 by applicant relates to one property i.e. an area of 19 ghuntas out of Survey No.119, area 5-4 acres situated in Deh Dilawarpur, Taluka & District Jacobabad Sindh hereinafter referred as petrol pump property and hence no authority was vested on respondent No.1 to enter into such compromise in relation to the

properties mentioned in the memo of plaint, which does not include in the special Power of Attorney.

5. In relation to the Vakalatnama available on record of Suit No.702 of 2000, learned counsel for the applicant submitted that even the counsel was authorized to act with the mandate and parameter of the suit and the powers to enter into compromise was not given in relation to the properties mentioned in the compromise application.

6. It is further claimed that the applicant came to know about the decree when she arrived in Pakistan in the year 2008 and ultimately she challenged the order and the decree drawn therein, which are impugned here and hence there is no question of limitation.

7. Hence, learned counsel for applicant in the light of the above asserted that the decree has been obtained through fraud and misrepresentation and prayed that the same be set aside.

8. On the other hand M/s Iftikhar Asghar and Zeeshan Abdullah, learned counsel for respondents, have denied the contentions as raised by counsel for the applicant. They argued that on the basis of compromise decree the properties have been accordingly transferred and mutated and have exchanged hands. They submitted that even the applicant has been benefited out of the compromise since one property, which may not be part and parcel of the suit, i.e. petrol pump property was disposed of by her/applicant after the possession was handed over by the Official Assignee pursuant to decree. It is also claimed that applicant has received certain amount on the basis of the decree and hence once she acted upon, it cannot be believed that the compromise application had been signed without any authority.

9. It is the case of the respondents that if a lawyer continues to appear then the plea of ignorance and/or no knowledge is no excuse. It

is claimed by the respondents that it is a past and closed transaction and since applicant has already derived benefit out of the judgment and decree, she cannot plead that it was obtained through fraud and misrepresentation at such a belated stage.

10. Counsels for respondents have placed copy of sale deed in relation to the property, which was inserted in the compromise application i.e. Petrol Pump property the property regarding which Power of Attorney was given by applicant to respondent No.1. The sale deed was registered on 15.04.2008 and is duly signed by plaintiff No.2 (applicant). It is further pointed out that this deed was also signed as a witness by plaintiff No.1 (respondent No.1) whose authority is under challenge in these proceedings.

11. Counsel for respondents also relied upon the case of ANSW Enterprises v. Askari Commercial Bank Limited reported in 2001 PSC 120 wherein the Hon'ble Supreme Court held that express authority is not necessary to be conferred on a counsel for settling the matter through compromise and if he is debarred from doing so, it should be expressly provided in the Vakalatnama and in view of settled law, learned counsel shall be deemed to have been vested with the authority to make a statement or to settle the matter through compromise on behalf of his clients and hence it was held that there is no force in the contention of the learned counsel challenging the validity of compromise judgment and decree of the High Court based on it.

12. They further contended that when the property in question, which was inserted in the compromise application was purchased, the applicant was hardly 16 years of age and hence it is not the exclusive property of the applicant as she was only benamidar at the relevant time. Hence she achieved a monetary benefit out of such compromise.

13. Hence, both the learned counsel prayed that the main application be dismissed.

14. I have heard the learned counsel and perused and the material available on record and so also the judgments cited at bar.

15. Substantially the compromise application on behalf of the applicant appears to have been signed by advocate as well as by her attorney/mother, respondent No.1 herein. Entire bone of contention in these proceedings initiated under section 12(2) CPC is that the applicant has challenged the authority of her mother. No allegation whatsoever has been raised as against the counsel who was appearing for the applicant at the relevant time.

16. In one of the judgments i.e. ANSW Enterprises (Supra) referred above the Hon'ble Supreme Court has held that in the absence of any negative authority conferred for entering into such compromises, the authority deemed to be delegated to the counsel. In this case the authority is otherwise delegated to the advocate in terms of his Vakalatnama i.e. counsel was authorized to plead and act in the said case and to present pleadings/cross objections, to deposit or withdraw documents or money in or from the Court, to withdraw or compromise the said cause or submit to arbitration any difference or dispute that may arise, to employ/appoint or nominate any other advocate or substitute on his behalf.

17. Firstly the compromise was drafted and filed on 23.12.2004 which included a property not mentioned in plaint. Subsequently in compromise application the petrol pump property was also included and since the counsel had no authority in relation to this property, a special Power of Attorney was executed which is on record.

18. The decree was drawn on 11.03.2008. It is only when the decree was passed/drawn that the sale deed in relation to one of the property i.e. property measuring 19 Ghuntas out of Survey No.119, area 5-4 acres situated in Deh Dilawarpur, Taluka & District Jacobabad Sindh, was disposed of by the applicant herself on 15.04.2008 which was after about a month later to the date of the decree. The significant part of this sale deed is that it was witnessed by her mother/respondent No.1 whose authority has been challenged in these proceedings. Counsel for respondents has also filed at the time of hearing on 18.03.2016 a statement annexing therewith the diary sheets of the proceedings before the learned Official Assignee to show that on 15.12.2008 applicant appeared before the learned Official Assignee along with her mother Sarwat-un-Nisa.

19. No doubt the special Power of Attorney attached with compromise application relates to only one property i.e. 19 ghuntas out of Survey No.119, area 5-4 acres situated in Deh Dilawarpur, Taluka & District Jacobabad Sindh petrol pump property but the authority vested in the counsel is delegated under the law and so also through the Vakalatnama wherein advocate was authorized to compromise, which has not been objected to. The objection of the learned counsel for the applicant that in the compromise under challenge even that property has been introduced/inserted which were not part and parcel of the suit, is of no avail to the applicant as that property was disposed of by the applicant herself and none else and she was benefited out of the compromise decree in relation to such property. The special power was given to mother/plaintiff No.1 by applicant only because it was not included in the plaint and hence the advocate could not have acted upon it. Insofar as the other properties are concerned which are part and

parcel of the plaint, suffice it to say that the authority vested with the counsel under the Vakalatnama as well as under the law.

20. The case of Muhammad Yousuf Siddiqui PLD 2005 SC 705, as relied upon by learned counsel for the applicant, is distinguishable as it relates to the power delegated to the attorney through Special Power of Attorney, which is not the case here as in the instant case the compromise was made through the counsel to whom the powers were delegated. On the other hand, in the case of ANSW Enterprises (Supra) the Hon'ble Supreme Court has held as under:-

“It is manifest from a bare reading of the Vakalatnama that the learned counsel for the petitioners was given unqualified authority to make and sign any statement or compromise etc. Besides a counsel who is engaged in a case by a party has ample authority to make any statement or settle the matter through compromise on behalf of his client. This is the consistent view taken by superior Courts and is supported by the following reported judgments:-

- (1) *Mansoor Ahmad v. Sardar* (1990 MLD 1744);
- (2) *Noor Muhammad v. Muhammad Siddique* (1994 SCMR 1248);
- (3) *Muhammad Humayun v. Akbar Jan* (1972 SCMR 567);
- (4) *Ansar Hassan v. Mazahir Hussain* (1971 SCMR 634)
- (5) *Kulsoombai v. Shirinbai* (1989 CLC 234) and
- (6) *Noor Muhammad v. Muhammad Kamil* (1991 CLC 92).

It has also been held that express authority is not necessary to be conferred for settling the matter through compromise on a counsel and if he is debarred from doing so, it should be expressly provided in the Vakalatnama. No such exclusion clause has been added in Vakalatnama executed in these cases, therefore, in view of this settled law, learned counsel for the petitioners even otherwise, shall be deemed to have been vested with the authority to make a statement or settle the matter through compromise on behalf of his clients. Therefore, there is no force in the contention of the learned counsel challenging the validity of compromise and judgment of the High Court, dated 23.12.1999 based on it, through the instant petitions seeking leave to appeal.

6. *As to the application filed under section 12(2) CPC and the contention that the learned counsel did not have authority to settle the matter through compromise, it has already been held by us that he had the authority to do so in absence of any express term in the Vakalatnama authorizing him to do so, therefore, the order passed by the Banking Court on the application of the petitioner does not suffer from any legal infirmity.”*

21. In the above facts and circumstances, I do not find any reason in the presence of this specific delegation of powers to the counsel to enter into compromise. If in such a situation where the powers have been delegated to a counsel and who acted upon it, is allowed to be challenged in such a manner, as is in this case, then perhaps there will no end to the litigation and the authority of the counsel, to whom the powers have been delegated, would always remain under shadow of doubt. Insofar additional property which was not initially available in the plaint filed by applicant herself, the special Power of Attorney is available to validate the authority of respondent No.1 to compromise on behalf of applicant. Hence, the Judicial Miscellaneous is dismissed along with pending applications.

Dated:

Judge