

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI

**JM NO.32/2020**  
**SUIT NO.1395/2018**  
**EXECUTION NO.52/2016**

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Date

Order with signature of Judge  
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**05.11.2021**

Mr. Sarfraz Ali Metlo advocate  
Mr. Juzer Q. Pishori advocate.  
Mr. Agha Zafar Ahmed advocate.

.....

**ORDER**

Heard learned counsel for respective parties.

2. Present JM seeks that decree dated 29.08.2013, obtained by respondent No.2 (plaintiff) and respondent No.1 (defendant No.1), is result of fraud and misrepresentation hence be set-aside.

3. Admittedly applicant was defendant No.2 in suit No.312/2013 and matter was listed on 26.08.2013, on that date same was discharged and on second day i.e. 27.08.2013 plaintiff and defendant No.1 filed compromise application whereby suit was decreed against defendant No.1 and as rest of defendants were not present hence suit was dismissed against rest of the defendants. Undisputedly suit preferred by the plaintiff was with regard to Memorandum of Understanding (MoU)/Agreement wherein defendant No.2 was third party, that agreement relates to the construction work by the plaintiff and defendant No.2 having different share as provided in the MoU. Being relevant paragraphs No.9, 10, 11, 12 and 13 are that :-

“9. The due amount against investment of Mr. Bhool Chand duly verified by Mr. Ashok Kumar will be paid to Mr. Bhool Chand by Mr. Muhammad Hussain Yousuf as per decided schedule on cash bill/cheque are received and from FWO/NLC only on GRP pipe work.

10. After clearance of investment of Mr. Bhool Chand the proprietor as per declared (*not readable*) ratio, 65 % of A. K. Builders and 35% of Balochistan Construction Company will be distributed.

11. In this whole work of FWO package III and NLC package IV at Port Qasim all the profit/less equity will be as follows:

12. BALOCHISTAN CONSTRUCTION COMPANY = 35% SHARE

13. A. K. BUILDERS 65% SHARE

a. SUNRISE GLOBAL PVT LTD WILL SUPPLY GRP pipe and will take (*not readable*) charged that is Rs.5000000/= (5 million) in FWO pipework, package 3<sup>rd</sup> and Rs.5000000/- (5 million) in NLC pipe work package IV.

14. All payment received from FWO/NLC will be deposited in the joint account (*not readable*) in the name of ...

15. Mr. Hussain Muhammad Yousuf

16. Mr. Vijay Kumar Badani (CNIC No.15504-7668007-3)”

Thereafter suit was decreed in terms of compromise.

4. Present applicant is claiming that though he was part of the MoU yet without notice to him suit was decreed which, *prima facie*, involves rights and entitlement of the applicant (defendant) therefore, an agreement (*compromise decree*), being without his consent, can't be acted upon. Accordingly, judgment and decree are result of misrepresentation and fraud.

5. On the other hand, counsels for plaintiff and defendant No.1 contend that after passing of decree defendant No.2 straight away filed suit No.1395/2018 claiming his due amount against plaintiff and defendant No.1 wherein applicant (defendant No.2) demanded his share i.e. 65% in view of MoU dated 21.12.2010 that

was different MoU and with different assignment. Accordingly while relying upon PLD 2019 SC 504 learned counsel for plaintiff contends that present JM is time barred and has no concern with the present decree and no relief was sought against him, therefore, that may be dismissed.

6. In contra, learned counsel for applicant/defendant No.2 while relying upon 2002 SCMR 1838 ad 2013 CLC 746 contends that limitation runs from the date of knowledge therefore his application is within time.

7. *Prima facie*, it is a matter of record that the MoU *did* contain the rights (share) of the applicant / defendant no.2, therefore, he, being necessary party, was made as '**defendant No.2**' in that suit. Needless to add that MoU, being among three persons (parties) was/is *itself* an admission that all three have rights and entitlement in the subject matter therefore, *only* two of them legally can't enter into a lawful compromise (*agreement*) particularly where such compromise (*agreement*) was / is likely to cause effect upon whole MoU which, *undeniably*, includes the rights and entitlement of third party (defendant No.2 / applicant). The plea of plaintiff and defendant No.1 that through compromise (*agreement*) they settled their own matters *only* is also not tenable because the *core* issue in the suit was MoU; dispute, if any, even between these two has arisen out of such MoU, therefore, they can't take any advantage by joining hands which, *too*, without a notice and knowledge of defendant No.1/ applicant. Here, it is conducive to refer legal position, so enunciated in the case of Muhammad Iqbal v. Khair Din (2014 SCMR 33) (Rel. Page-41), as:-

“12. .... A consent decree is a kind of agreement / contract between two parties with a superadded command of the court but it would not bind a third party who was not a party to the said suit. So far as the application of the principle of *lis pendens* is concerned, respondents / plaintiffs had failed to prove that appellants / plaintiffs had either the knowledge of the agreement to sell between the predecessor-in-interest of the respondents / defendant and Maqbool Ahmed or that he was a *bona fide* purchaser. The consent decree was, therefore, collusive and the principle of *lis pendens* would not be attracted.”

It is not a matter of dispute that defendant No.2 was categorically entitled to receive the share therefore compromise application, filed in absence of defendant No.2, apparently shows to deceive the right of defendant No.2 hence defendant No.1 and plaintiff were not legally competent to enter into such compromise (*agreement/contract*) without notice and knowledge of defendant No.2/applicant. The Court while allowing compromise (*agreement / contract*) must have to examine the totality of the effects of the compromise (*agreement/contract*) else such compromise (*agreement/ contract*) would not be lawful hence can't be allowed to have privilege of *superadded* command of the Court (s). Under the circumstances, judicial propriety demands that parties must be heard and their claims / dues should be decided as per law which, *too*, by allowing respective parties to have fair opportunity of hearing / trial which, *even*, includes a right of compromise if all parties likely to be effected agree to it. Accordingly, present JM is allowed, impugned judgment and decree are set aside.

Office to place copy of this order in connected cases.

**J U D G E**