

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI  
J. M. NO. 24 / 2013

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DATE	ORDER WITH SIGNATURE OF JUDGE
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- 1) For hearing of CMA No. 8827/2013.
- 2) For hearing of main application.

17.3.2016.

Mr. Mustafa Lakhani Advocate for applicant  
Mr. Muhammad Sadiq Hidayatullah Advocate  
for applicant in J.M. No. 63/2015.  
Mr. Dur Muhammad Shah Advocate for applicant  
in J.M. No. 10/2015.  
Mr. Haroon Shah Advocate for respondent No. 1

1 & 2) Through this J.M. filed on behalf of applicant (defendant No. 2 in Suit No. 791/2005) under Section 12(2) CPC the applicant has impugned order dated 17.12.2007 and Judgment dated 19.12.2012 passed in Suit No. 791/2005, whereby, the matter has been compromised on an application under Order 23 Rule 3 read with Section 151 CPC between the plaintiff and the defendants No. 1 & 2.

Briefly the facts as available on record are that a Suit was filed by the plaintiff / respondent No.1 bearing No. 791 of 2005 against the defendants wherein defendant No. 2 / applicant was declared ex-parte vide order dated 16.10.2006, whereafter, an application bearing CMA No. 13718 of 2012 was filed under Order 23 Rule 3 read with Section 151 CPC on behalf of the plaintiff and defendant No.1 and on 19.12.2012 the said application was allowed in the following terms:-

“The plaintiff and defendant No. 1 have submitted today an application under Order XXIII Rule 2 CPC, wherein, they have submitted that they have settled all their disputes outside the Court on the terms and conditions mentioned in the said application. They have prayed that this suit may be decree against defendant No. 1 and 2 in terms of the said applicant. The application is signed by the plaintiff and defendant NO. 1 as well s by the learned Counsel for the plaintiff. The plaintiff and defendant

No.1 have confirmed that they have signed this application with their own free Will and without any coercion, pressure and / or under undue influence. They have also produced their original CNICs bearing No. 42301-9459203-7) plaintiff) and No.54303-5736543-7(defendant No. 1), which have been returned to them after examination. Photostat copies of their CNICs have been retained for record purposes. Defendant No. 2 was declared ex-parte vide order dated 17.12.2007.

Accordingly, this suit is decreed in favour of the plaintiff jointly and severally against defendants No. 1 & 2 on the terms and conditions mentioned in the compromise application filed today. The parties request that the Nazir may be directed to take over vacant, peaceful and physical possession of the shop I question and to deliver the same to the plaintiff and defendant No. 1. The Nazir shall take over the possession within one week from today and shall submit a compliance report to this Court. The office is directed to assign CMA number to this application.”

Counsel for the applicant submits that insofar as defendant No. 2 is concerned, he was not a party to such application and had neither signed the same nor was present in Court, whereas, substantial relief has been given by way of compromise against the applicant, therefore, impugned compromise judgment and decree has been obtained through fraud and misrepresentation to the extent of defendant No. 2.

On the other hand, Counsel for respondent submits that defendant No. 2 was declared ex-parte, and therefore, the matter could have been compromised as defendant No. 1 had affected appearance and had signed the application.

I have heard both the learned Counsel and perused the record. It is not in dispute in this matter that the compromise application was never signed by defendant No. 2 nor the defendant No. 2 was present in Court. It is also not in dispute that substantial relief was granted against the applicant / defendant No.2 through the compromise judgment in that “accordingly, this suit is decreed in favour of the plaintiff jointly and severally against defendants No. 1 & 2 on the terms and conditions mentioned in the compromise application filed today”. The contention of the Counsel for respondent that since defendant No. 2 was declared ex-parte, and therefore, a compromise application was competently filed

does not appear to be correct and is misconceived. If a defendant is declared Ex-parte, then the matter has to proceed against such defendant in accordance with law and procedure by filing an ex-parte proof in evidence and the matter has to be decided by the Court on its own merits and not on the basis of a compromise application. A compromise judgment and decree is always by consent of the parties who come before the Court and show their willingness for passing of judgment and decree in terms of the compromise application as provided under Order 23 Rule 3 CPC. This under no circumstances, can be construed so as to be binding on a defendant which has been declared as Ex-parte and has not entered into any such compromise. Such a compromise judgment is not executable against a person who has not signed any such compromise. **(See Abdul Hafeez & another Vs. Pakistan Defence Officers Housing Authority-PLD0 2015 Sindh 336).**

In the circumstances and on the basis of hereinabove discussion, I am of the view that insofar as the judgment and decree to the extent of defendant No. 2 is concerned, the same cannot be sustained and therefore, the application under Section 12(2) CPC is allowed by setting aside the judgment dated 19.12.2012 and decree dated 23.2.2103 to the extent of defendant No. 2.

JM stands allowed on the above terms along with pending application, if any.

J U D G E

ARSHAD/