IN THE HIGH COURT OF SINDH AT KARACHI

J.M. No. 02 of 2015

Province of Sindh & others ---------- Applicants

Versus

Bilqees & others ---------- Respondents

Date of hearing:	**11.03.2016.**
Date of order:	**09.06.2016.**
Applicant No.1:	**Through Mr. Ziauddin Junejo AAG for Province of Sindh.**
Applicant No.2:	**Mr. G. N. Qureshi Advocate for Board of Revenue, Government of Sindh.**
Respondents:	**Through Mr. Khawaja Shamsul Islam Advocate**

O R D E R

Muhammad Junaid Ghaffar, J. Through this application under Section 12(2) CPC, the applicants have impugned order / judgment dated 1.11.2014 and decree dated 5.1.2014 passed in Suit No. 657 of 2010 by a learned Single Judge on the Original Side of this Court, whereby, CMA No. 14127 of 2014 filed on behalf of the applicant No. 2 for withdrawing the compromise application filed under Order 23 Rule 3 CPC has been dismissed and a compromise judgment and decree has been passed on CMA No. 11576 of 2014, on the ground that the same was obtained by fraud and misrepresentation. The present J.M. has been filed on behalf of Province of Sindh through Chief Secretary, Senior Member Board of Revenue, Secretary, Land Utilization Department and four other applicants, however, the application has been signed only by the Chief Secretary Sindh and Member Land Utilization Department.

2. Very briefly the facts of the matter are that respondents had filed a Suit bearing No. 657 of 2010 seeking several relief(s) against the applicants, wherein, a compromise application under Order 23 Rule 3 read with Section 151 CPC bearing CMA No. 11576 of 2014 was filed which was duly signed by the plaintiffs / respondents as well as by the Advocates for applicants / defendants No. 1 & 2 (Province of Sindh and Board of Revenue) and so also by the Secretary Land Utilization Department, Government of Sindh and Member Land Utilization, Board of Revenue Sindh. Such application was presented before the Court on 6.9.2014, whereafter another application bearing CMA No. 14127 of 2014 under Section 24A of General Clauses Act, 1897 read with Section 151 CPC was filed on 22.10.2014 by the Advocate for defendant No. 2(b), / Applicants No. 2 & 3, whereby, the incumbent Member Land Utilization, Government of Sindh prayed before this Court to allow withdrawal of the compromise application already signed and filed by his predecessor in interest. Through impugned order CMA No. 14127 of 2014 has been dismissed, whereas, compromise application bearing CMA No. 11576 of 2014 has been allowed by passing a judgment and decree.

3. Learned Counsel for Board of Revenue has contended that though the compromise application was duly signed and filed by the then Member Land Utilization on 3.9.2014, however, at the relevant time he was not authorized to sign and file any such application as he stood transferred on 21.8.2014 and in support of such contention he has referred to Notification dated 21.8.2014 issued by Chief Secretary, Government of Sindh. He has further submitted that insofar as Board of Revenue is concerned, their grievance is that through compromise application there are certain relief(s) which could not have been granted to the plaintiff / respondents, and therefore, their case is that the compromise is only valid to the extent of regularization of land for which the respondents have already made requisite payments. In substance the learned Counsel has argued that it is only to the extent of relief(s) which are outside the scope of the Suit, or are not permitted to be accepted by the Courts under Order 23 Rule 3 CPC, that the Board of Revenue is aggrieved in instant J.M.

4. The learned Additional Advocate General appearing on behalf of Applicant No.1 (Chief Secretary) has referred to Article 144 of the

Constitution as well as Order 27 CPC and has contended that insofar as Province of Sindh through Chief Secretary is concerned, the matter was not compromised on his behalf as no such application was signed and filed by him. He has further contended that Board of Revenue through the Secretary Land Utilization is neither competent to enter into any such compromise on behalf of Province of Sindh, nor, even otherwise a private Counsel could be engaged by them until and unless a proper approval has been sought through the Chief Secretary of the Province. Learned AAG has also referred to Suo Moto Case No. 16 of 2011 taken up by the Hon'ble Supreme Court and various orders passed thereon. He has further contended that the compromise application is even otherwise not competent in law, as it has restrained the applicants from taking any further action against the respondents pursuant to FIRs already pending, and has even granted relief to the extent of executing some orders passed earlier in Constitutional Petitions in favour of the respondents. Learned AAG has submitted that a Civil Court is not competent to stay any criminal proceedings which are to be decided in accordance with law, whereas, the entire prayer in the Suit has been incorporated in the compromise application and therefore, the same may be set aside as the judgment / decree has been obtained with fraud and misrepresentation.

5. On the other hand, learned Counsel for respondents has raised objections on the very maintainability of this J.M. by contending that the proper course available to the applicants was to challenge the judgment and decree by way of an appeal, as their application for withdrawal of compromise was dismissed through a reasoned order, whereas, admittedly no fraud or misrepresentation has been committed with the Court in this matter. Learned Counsel has contended that Section 12(2) CPC is not a substitute of an appeal which has otherwise become time barred in this matter. Per learned Counsel the applicants were very much aware of the proceedings including the filing of application under Order 23 Rule 3 CPC, as well as passing of the impugned judgment and decree, and therefore, present J.M. is an afterthought as the time for filing an appeal has already lapsed. He has further contended that a compromise filed before the Court is always granted subject to the condition that it is lawful, whereas, in this matter the applicants demanded payment of extra amount for regularization of

the land in question on their own and such money was deposited by the respondents immediately, and therefore, it does not lie in their mouth that on the one hand they have retained the money paid by the respondents, and on the other, are challenging the compromise application. He has further submitted that Board of Revenue under the Land Revenue Act is a statutory authority and therefore, is not required to obtain any permission from Province of Sindh, whereas, in the Suit, the Province of Sindh has even failed to file any written statement and were debarred vide order dated 13.5.2014, whereas, they have never been a contesting party in this matter. He has further contended that the impugned order has been passed jointly on two applications, whereby, the learned Single Judge through a reasoned order and after dismissal of withdrawal application has allowed the compromise, and therefore, the order on both these applications is to be read together. He has also referred to Rule 2(iii) of the Rules of Business of Government of Sindh Notified vide SRO dated 13.8.1988 in support of his argument that Board of Revenue is an independent department working under a full-fledged Secretary, of Land Utilization department and therefore, no formal approval is to be obtained from the Chief Secretary in such matters as contended on behalf of learned AAG. Learned Counsel has also referred to letter dated 18.8.2014 issued by the Land Utilization Department, whereby, the respondents were directed to make certain payments which was accordingly deposited on 17.9.2014, whereafter, the matter has been compromised. Learned Counsel has further contended that it is not merely the compromise application which was filed before the Court, whereas, the entire case has a chequered history and the matter was discussed and approved in various meetings of the Land Committee formed to see such matters and after detailed discussion in various meetings, the compromise was reached between the parties. Learned Counsel has further submitted that without prejudice if the Court comes to the conclusion that there are certain relief(s) on which compromise has been arrived at in respect of the criminal matters pending before various Courts, this Court is competent to modify the decree to that extent, whereas, insofar as regularization of land in question and issuance of lease in favour of the respondent is concerned, the same has attained finality on deposit of the requisite amount demanded by Board of Revenue. In support of his contention

Learned Counsel has referred to the case(s) reported as *Muhammad Younus Khan and 12 others V. Government of N.W.F.P. and others (1993 SCMR 618), Hameedullah Khan V. Ghulam Rasool and 41 others (2001 SCMR 1316), Monazah Parveen V. Bashir Ahmed and 6 others (2003 SCMR 1300), Sardar Ai V. Mst. Sardar Bibi @ Sadaran (2010 SCMR 1066), Mrs. Anis Haider and others V. S. Amir Haider and others (2008 SCMR 236), Mst. Farida Begum and others V. Hafiz Muhammad Shamim and others (PLJ 1996 Karachi 676), Government of Sindh and another V. Ch. Fazal Muhammad and another (PLD 1991 SC 197), Pir Muhammad Azam V. Pir Azizullah and 2 others (2011 CLC 355), Subdedar Sardar Khan and others V. Muhammad Idrees and another (PLD 2008 SC 591), Muhammad Tufail and 3 others V. Muhammad Aslam Khan and another (1999 YLR 934), Syed Ameer Hussain Shah V. Syed Dilbar Hussain Shah and 3 others (2011 MLD 1956), Nasar Khan and 6 others V. Additional District Judge-I, Lakki Marwat and 76 others (2007 CLC 326), Pir Muhammad Azam V. Pir Azizullah and 2 others (2011 CLC 355), Nazir Ahmed V. Muhammad Sharif and others (2001 SCMR 46), Afghan Carpet V. Hashwani Hotels Limited and another (PLD 2009 Karachi 61), Industrial Development Bank of Pakistan V. National Engineering Works and others (1993 MLD 1344), Lal Din and another V. Muhammad Ibrahim (1993 SCMR 710), Messrs Al-Mehran Builders V. City District Government, Karachi (2006 CLC 373), Messrs K. M. Enterprises V. City District Government, Karachi and 2 others (2008 YLR 2053), The Commanding Officer, National Logistic Cell and another (2003 CLC 719), Messrs Zia Abbas & Sons (Pvt.) Ltd. V. Karachi Development Authority (KDA) and 2 others (PLD 2004 Karachi 87), The Commanding Officer, National Logistic Cell & another V. Raza Enterprises & others (SBLR 2003 Sindh 43) and Gahi @ Gada Hussain and others V. Shaman and 7 others (PLD 2006 Karachi 588).*

6. I have heard all the learned Counsel as well as learned AAG and perused the record. The precise facts have already been stated herein above in that the respondents had filed a Suit for Declaration, Injunction and Directions in respect of some anonymous complaints against them on the basis of which various reports including report dated 11.3.2009 was impugned with a further declaration to the effect that the respondents are the lawful and genuine allottees and in possession of 9-08 Acres of Land in Na-class 166 Survey No. 328 Deh Safora situated in Gulshan-e-Iqbal Town, Karachi in consequence of their lawful claim and in terms of order dated 6.5.1979 passed in C.P. No. 524 of 1974 by this Court. Despite issuance of summons and repeated chances, it appears to be an admitted position that insofar as Province of Sindh (Applicant No. 1) is concerned, they had not filed any

written statement in the Suit and were debarred on 13.5.2014, whereas, the defendant No. 2(a) and (b) i.e. the applicants No. 2 & 3 (Board of Revenue and Member Land Utilization, Government of Sindh) had filed their written statements. During pendency of the Suit a compromise application was jointly filed on behalf of the Respondent / plaintiffs and Senior Member, Land Utilization, Board of Revenue on 6.9.2014 and before any order could be passed on such compromise application, another application was filed by the incumbent Member, Land Utilization, Board of Revenue requesting the Court to allow withdrawal of the compromise application. Through impugned order, the withdrawal application has been dismissed, whereas, judgment and decree in terms of compromise application has been passed by a learned Single Judge of this Court.

7. It may be observed that by far now it is a settled principle of law that an application under Section 12(2) CPC is not a substitute of an appeal, whereas, an application under Section 12(2) CPC is only competent in case a fraud or misrepresentation is committed with the Court. On perusal of facts of the instant matter, it does not appear to be a case of any fraud or misrepresentation with the Court. The applicants specially Applicants No.2 & 3 were well aware that their predecessor in interest had filed a compromise application before the Court, and for this very reason the incumbent Member, Land Utilization, Board of Revenue, had filed an application for withdrawal of the compromise. Therefore, in any manner it cannot be held that the applicants had no knowledge of any such proceedings pending before the Court. Perusal of the impugned order further reflects that such order was passed in presence of the applicants and their Advocates, therefore, even otherwise it cannot be said that when the order was passed, they were not present before the Court or they did not had any knowledge about such order. In fact it does not appear to be the case of the applicants that any fraud or misrepresentation was committed while obtaining the impugned judgment and decree, but according to them, the compromise was entered into, on the bases of an unlawful agreement. It is also pertinent to observe that both the applications were disposed of and decided by the learned Single Judge through a common order, and the withdrawal application filed on behalf of the applicants was dismissed on merits by the Court, and only thereafter, the compromise application

was allowed by passing the impugned judgment and decree. In the circumstances, it was always open to the applicants to prefer an appeal against the said order, whereby, their request for withdrawing the compromise application had been declined. In fact there are two aspects of the order impugned, one which relates to dismissal of their withdrawal application, and the other, whereby, the compromise application has been accepted. Both are independent in nature and have no nexus with each other insofar as merit of the case is concerned. There could be a case on behalf of the applicants, that insofar as the compromise application and its grant is concerned, the Court ought to have examined the contents of the application and to see that as to whether, it is consistent and in accordance with the provisions of Order 23 Rule 3 CPC or not. Whereas, insofar as dismissal of the withdrawal application is concerned, the same under no circumstances can be impugned through an application under Section 12(2) CPC. Therefore, insofar as the first part of the order, whereby, withdrawal application was dismissed is concerned, this J.M. under Section 12(2) CPC is misconceived as the applicants were required to file a proper appeal as provided in law by impugning the said findings on merits of the case.

8. Coming to second issue that as to what is the duty of the Court while hearing and allowing a compromise application filed under Order 23 Rule 3 CPC is concerned, in this regard it would be advantageous to refer to the provision of Order 23 Rule 3 CPC which reads as under:-

> "3. Compromise of suit. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by **any lawful agreement or compromise**, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit." (Emphasis supplied)

9. Perusal of the aforesaid provision reflects that where it is proved to the satisfaction of the Court that a Suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the Suit. The words which are to be kept in mind is that the Court should be satisfied that the Suit has been adjusted wholly or in part by any ***"lawful agreement or compromise"***

meaning thereby, that the agreement which has been placed as a compromise before the Court, ought to be lawful and not otherwise. This would impliedly mean that a Court in terms of Order 23 Rule 3 CPC is only competent to allow a lawful agreement to be entered into a compromise by passing a decree to that effect, and if any agreement which has been placed before the Court as a compromise, is not lawful, then the Court ought not to pass any judgment or decree to that effect, or even if such judgment and decree has been passed, the same to the extent of any unlawful agreement, cannot be executed. To see as to whether any agreement is lawful or not reference would be required to be made to Section 23 and 65 of the Contract Act 1872 which reads as under:-

> "23. What considerations and objects are lawful and what not. The consideration or object of an agreement is lawful, unless---it is forbidden by law; or
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> Is of such a nature that, if permitted, it would defeat the provisions of any law; or
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> Is fraudulent; or
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> Involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.
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> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.
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> 65. Obligation of person who has received advantage under void agreement or contract that becomes void. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

10. Perusal of the aforesaid provision of Section 23 reflects that if the consideration or object is unlawful, and it is of such nature that, if permitted, it would defeat the provisions of any law, or, involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy, whereas, the agreement of which the object or consideration is unlawful, to that extent such agreement is void. Similarly, Section 65 provides that when the agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract, is bound to restore it or to make compensation for it to the person from whom he has received it. Therefore, the agreement which

was placed before the Court has to be examined in the context of both these provisions of the Contract Act. It would be advantageous to refer to the contents of the compromise application filed by the parties before the Court which reads as under:-

"a) It is agreed by both the parties that the entire proceedings initiated by the Defendants No.1(b) and 2(b) on the basis of a pseudonymous complaint from Mohammad Obaid (Defendant No.4) without disclosing his proper identity and address, are nullity in the eyes of law as well as an extreme deviation and violation of the rules of business of the Government of Sindh, as well as the rules of natural justice, hence the report submitted by the Defendant No.1(b) dated 11.3.2009 as well as the approval given thereto by the Chief Minister Sindh, and the subsequent public notice published in the newspapers on 24.4.2010 and 25.4.2010 by Defendant No.2(b), are of no legal effect and not binding upon the Plaintiffs or their predecessors or successors in interest, and the same is hereby declared as void ab-initio.

b) It is agreed that the defendant No.1(a)'s report dated 11.3.2009 submitted by the Defendant No.1(b) shall be declared illegal, void ab-initio and the same is hereby cancelled for all times to come with further directions to the remaining Defendants, their subordinates, attorneys, officials, not to take any adverse action pursuant to the aforesaid report dated 11.3.2009 including but not limited to lodging of any F.I.R. or any NAB reference or cancellation of the land measuring 9 acres 08 ghuntas allotted to Plaintiffs and now being occupied by the aforesaid purchasers/builders as Plots No.328/A, 328/B, 328/C, 328/D, 328/E and 328/F of Deh Safooran, who has already sold out the same to different allottees according to their respective shares.

c) It is further agreed that the letters dated 14.10.2009 obtained by the official Defendants under coercion from the aforesaid purchasers / builders, is nullity in the eyes of law and of no legal effect and the same is hereby cancelled and it is declared that the Plaintiffs or the aforesaid purchasers/builders are not liable to pay any additional amounts towards the aforesaid suit land except an amount of Rs.1,99,66,000/-.

d) It is further agreed between both the parties that the Plaintiffs are the lawful, genuine allottees in possession of 9-08 acres of land in Naclass No.166, Survey No.328 Deh Safooran, situated in Gulshan-e-Iqbal Town, Karachi, in consequence of the lawful claim and in terms of the Order of the Hon'ble High Court dated 6.5.1979 passed in C.P. No.254/74, hence the Defendants or any other authority including but not limited to NAB has no lawful right or jurisdiction to question the legality of the title of the Plaintiffs over the aforesaid land or to take back the same from the Plaintiffs or their successors-in-interest.

e) It is declared that the so-called alleged suo moto proceedings u/s 164 of the Sindh Land Revenue Act, 1967 initiated by Defendant No.2(b) in respect of alleged "fraudulent insertion of entries" are also illegal, uncalled for and should be cancelled/withdrawn by declaring that the title of the Plaintiffs over the aforesaid land is lawful and genuine and cannot be questioned by any one including the Defendants.

f) It is further agreed that the Defendant No.5 Sub-Registrar Gulshan-e-Iqbal Town, Karachi, shall immediately execute the sub-lease deeds in favour of Abdul Majeed Suleman of the flats/shops constructed on Plots No.328/A, 328/B, 328/C, 328/D, 328/E and 328/F of Deh Safooran as and when submitted by the said Abdul Majeed Suleman for registration according to law and on the permissions already accorded by the competent authorities regarding the aforesaid two projects.

g) It is further agreed between the parties that the Defendants will allot and give possession of remaining balance land out of 29 acres and 17 ghuntas as ordered by the Hon'ble High Court vide order dated 6.5.1979 passed in C.P. No.254/74,

as well as to further allot and give possession of at least 58-1 acres of urban land in Karachi due to be allotted to the predecessor-in-interest of the Plaintiffs namely Abdul Majeed Suleman in terms of verified claim bearing Registration No.4653/V dated 5.10.1961 under Schedule IV of the Registration of Claims Act, 1956 as well as U.R.V. bearing Book No.283, Form No.8475, dated 5.10.1961.

h) It is agreed between the parties that the Defendants will not take any adverse action with regard to the lawful ownership and possession of the Plaintiffs over the aforesaid land on the basis of the report of Defendant No.1(b) dated 11.3.2009, as well as the Defendants will not take any other steps including registration of FIR, cancellation of the land and any other action detrimental to the interests of the Plaintiffs as well as the allottees of the two projects of the aforesaid purchaser/builders, pursuant to the aforesaid report of Defendant No.1(b).

i) The High Court and its earlier judgment by using the word "At least" 25 Acres out of 58.1 Acres is not restricted or put any embargo on the allotment of land against the remaining unutilized total units 2716 equivalent to 22.63 acres.

j) The allotment made Land Utilization Department up to 25 Acre in Karachi is intact and undisputed and it will remain on the Khata of claimant.

k) Remaining P.I. Units 2716 units equivalent to 22.63 Acres may be allotted by the government to the claimant.

l) Fresh Form-II and NOC of sale shall be issued by the Board of Revenue in the name of Abdul Majeed Suleman.

m) Proceedings if any, inquiry, investigation initiated by the NAB Authorities on the basis of the report dated 11.3.2009 by Defendant No.1(b) shall be declared null and void and the NAB is hereby restrained not to file any reference against the Plaintiffs as there is no loss to the public exchequer.

n) It is further agreed between the parties that in view of the payment of additional Malkano paid by the Plaintiff in favour of the Defendants there is no loss to the public exchequer, hence proceedings initiated either by the Provincial Anti-Corruption Department or by the NAB Authorities has no value in the eyes of law and shall be declared null and void."

11. Perusal of the aforesaid contents of the compromise application reflects that in nutshell there are two parts of the compromise application, one which pertains to ownership and allotment of the land in possession of the respondents, and the other, which relates to restraining the defendants from proceeding, further in respect of the criminal proceedings pending, as well as initiation of any fresh criminal proceedings including but not limited to lodging of any FIR or a NAB reference to that extent. Insofar as the first part is concerned, the same is based on certain meetings of the Land Committee as well as the concerned officers of the Land Utilization Department, whereby, the land in question and dispute was allowed to be regularized by payment of an amount of Rs. 1,99,66,000/- which appears to be lawful in manner as the same is within the competence of the concerned department. Moreover and insofar as the Board of Revenue is concerned, their learned Counsel has also not objected to this part of

the compromise and has conceded that insofar as Board of Revenue is concerned, they have already acted upon such part of the compromise and are also willing to act on any further directions of the Court. The other part is in respect of declaring the pending criminal proceedings as void with further restraint upon the applicants in respect of initiation of any further criminal proceedings. After having perused the said part of the compromise application, I am of the view that firstly no criminal proceedings can be compromised even by the Criminal Court in such manner, as the law independently caters to such situation wherein the Court having jurisdiction in the matter has to independently examine any compromise or withdrawal of the criminal proceedings after due consideration and in accordance with the relevant applicable law. In the instant matter such proceedings have been compromised by way of an application under consideration in a Civil Suit filed under Section 42 of the Specific Relief Act, seeking certain declaration(s). In my humble view as to the criminal matters, and for that matter, any further proceedings cannot be compromised by the Court in terms of Order 23 Rule 3 CPC, as it is the primary duty of the Court to see that such compromise is based on a lawful agreement. This under no circumstances can be termed as a lawful agreement. Therefore, this part of the compromise application could not have been entertained by the Court and to that extent the impugned judgment and decree can be modified by this Court under Section 12(2) CPC, as this appears to be a case of fraud and misrepresentation to the Court which has overlooked such aspect of the matter.

12. In the case reported as ***Hossain Ali Khan v. Firzoa Begum*** **(PLD 1971 Dacca 112)** a Division Bench of the erstwhile Dacca High Court has dilated upon a situation wherein, Plaintiff-Respondent had compromised a Suit of maintenance, which was subsequently challenged by the Defendant-Appellant through a separate Suit (this case pertains to pre Section 12(2) CPC era which was introduced in the year 1980), on the ground that the compromise was itself hit by section 23 of the Contract Act, and as such the decree in terms of the said contract was void. The Suit was initially dismissed by the Subordinate Judge, which was set aside in Appeal by the District Judge by holding that the compromise was hit by section 23 of the Contract Act; hence, the decree was set

aside. In further appeal the learned Division Bench has been pleased to observe as follows:-

> "If it is found that the terms of compromise are void by reason of Section 23 of the Act, a separate suit will be maintainable. This decision further lays down that the suit will still be maintainable if such a contract is invalid on any other ground. In that case it was observed:-
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> > "A judgment given or order made by consent may in a fresh action brought for the purpose be set aside on any ground which would invalidate an agreement, not contained in a judgment or order, such as that the consent is the result of a mistake or that it was *ultra vires* on the part of one of the consenting parties."
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> This observation clearly goes against the contention of the learned Advocates for the appellant.
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> Mr. Syed Mohsin Ali learned Advocate appearing as amicus curiae submits that it is the duty of the Court to see that a compromise made by the parties is lawful and he invites our attention to rule 3 of order XXII of the Code of Civil Procedure which reads as follows:-
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> > "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court hall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."
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> The word 'lawful' in the said Rule clearly indicates that the agreement which may form part of the decree must be lawful and if it is contrary to law, a Court cannot pass a decree in accordance with such an agreement."

13. Similar view has been expressed by the Patna High Court in the case reported as ***Srimati Sabitri Thakurain V. Mrs. F. A. Savi and others*** **(AIR 1933 Patna 306)** in the following terms:-

> **Pg: 339-340**
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> "It is further contended that, at any rate, the compromise is so unjust that we should in the exercise of our inherent powers refuse to record it on the basis of the principle enunciated in Nealev. Gorden Lennox (14), a principle which was applied by the Calcutta High Court in the case of Tarubala Dasi v. Sourendra Nath Mitra (13) and not dissented from by their Lordships of the Privy Council in appeal from that case. A consideration of these questions involves in a way the trial of the suit itself. Ordinarily, when investigating the fact and lawfulness of a compromise under O. 23, R. 3 it is irrelevant to examine the strength or weakness of the suit itself. We agree in the observation of my Lord the Chief Justice of this Court (Sir Courtney Terrell) in the case of Mahabir Tewary v. Chhathu Tewary (19) and are of opinion that when a compromise is in dispute, the party repudiating it, on whatever it may be, cannot reasonably ask that the entire suit be reopened. In the above case the question involved was whether a compromise partition decree should be set aside on the ground of fraud. His Lordship observed:-

> "Sometimes also the Court proceeds to examine whether the plaintiff's claim was well founded in Law—an equally irrelevant inquiry. The proper method for a Court in approaching a case of this kind is to say to the plaintiff in effect: 'I will assume for the purpose of this case that the division effected by the compromise constitutes from your point of view a thoroughly bad bargain, otherwise you would not have attempted to get it set aside, but you must proceed to establish, notwithstanding that assumption in your favour, that the compromise was induced by fraud.' The legal procedure for setting aside a compromise is not a procedure for setting aside a hard bargain."

Ordinarily, as we have said, in a proceeding under O. 23, R. 3 an inquiry into the merits of the suit itself is entirely irrelevant. T hold otherwise will create an absurd position; every party who wants to go back on a compromise lawfully entered into by him would ask, when the compromise is under inquiry, that the entire suit should be tried first before the compromise can be recorded. This will defeat the very object of O. 23 R. 3."

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Now what O. 23 R. 3 requires is that the agreement or adjustment should be lawful. Lawful, in our opinion, means lawful within the meaning of the Contract Act; that is to say, the rule requires an agreement which is legally enforceable, but not necessarily one that is specifically enforceable. We are unable to accept the contention of the appellant that in order to enable the Court to record a compromise the terms, which are to be complied with after the decree, should be specifically enforceable under the Specific Relief Act.

To hold this will mean the exclusion of a large number of cases from the purview of O. 23, R. 3. For instance, suits for realization of money will not be comprisable, and parties will be precluded form settling their disputes about monetary liabilities by fixing amounts to be payable by one to another or by fixing installments. All such suits will go outside this section, because obligations for payment of money though certainly enforceable are not specifically enforceable in the sense that a specific sum of money cannot be made payable like, say, a specific book, picture or article of furniture. If the terms settled by the parties be enforceable under the law, we do not see why the compromise should be held to be other than perfectly lawful. There is no reason, and we have no power, to import into, O. 23, R. 3 restrictions which are not to be found there. If one of the parties agreed in a pending suit to do after the decree things which are not specifically enforceable, the Court will even then, in our opinion, have to record the compromise---provided there is nothing unlawful in it—and to pass a decree. It is not the business of the Court to speculate on the difficulties that may arise at the time of execution. It will be for the executing Court to devise means and give suitable remedies in case the compromise decree is disobeyed. The Code of Civil Procedure contemplates the passing of a decree for specific performance of a contract which cannot be specifically enforced. Such a decree may not be passed on contest, but in our opinion can be passed with consent; and if the compromise be lawful, we do not see how the Court can refuse to record it and pass in accordance with it a decree which may contain terms that are not specifically enforceable.

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Leake on Contract (Edn. 6, p. 571) says that;

> "Where a contract contains several promises, or a promise to do several matters, some of which are illegal, a promise which can be separated from the

> illegality may be valid. 'the general rule is that where you cannot sever the illegal form the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the Common law, you may reject the bad part and retain the good.' So a bond may be good, though the condition is good in part and illegal in part."

14. A learned Division Bench of the West Pakistan High Court, (Karachi), in the case of ***Sheikh Muhammad Obaid Vs. Muhammad Rafi Qureshi*** **PLD 1962 (W.P) Karachi 409**, had the occasion to examine the compromise agreement between the parties, wherein, criminal proceedings registered under Section 420 PPC had also been compromised. The relevant observation of the Court is as under;

> It may be further added that the facts of this case disclose that the agreement in question is also hit by section 23 of the Contract Act. The criminal prosecution against the appellant and other persons was under section 420 P.P.C. This offence is compoundable but only with the permission of the Court. No such permission was obtained in this case from the Magistrate concerned or from the Court. In these circumstances, the agreement of the respondent that he would not prosecute the appellant for the offence under section 420 P.P.C, in law amounts to an agreement to stifle prosecution. Such agreements are considered to be against public policy. The law on the point has been laid down by the Privy Council in the case of *Bhowaniput Banking Corporation Ltd. v. Sreemati Durgesh Nandini Dassi* (2)[AIR 1941 PC95]. In that case it was considered whether an agreement was void if entered into in the face of prosecution under sections 406, 408 and 420 I.P.C. In that connection their Lordships made the following observations……."

After having examined the aforesaid judgment, the Court held that:

> "On this view of the Privy Council, it is now well settled that if the criminal offence is compoundable and can be settled in or out of the Court without the leave of the Court, a compromise entered in such cases would not be regarded as forbidden by law or against public policy, the policy of the criminal procedure being to allow compromise in such cases. But if the offence is compoundable with the leave of the Court and such leave has not been obtained, the compromise entered in such circumstances will fall within the mischief of section 23 of the Contract Act….."

15. Similarly in the case of ***Qasim Khan Vs. Jalal and others*** **(PLD 1987 Lahore 398)**, a learned Single Judge of the Lahore High Court has been pleased to observe *"that the agreement which was made the basis of the suit was void on the petitioner's own showing as the consideration for that agreement was compromise of a criminal case involving non-compoundable offence. Thus the agreement being against the public policy was clearly hit by the provision of Section 23 of the Contract Act.*

16. Insofar as instant matter is concerned, it is not clear and specific as to what criminal matters have been compromised i.e. whether they

are compoundable with or without intervention of the Court. In the circumstances, no further discussion can be made in this regard, and it would suffice to observe that as and when any such matter of compromise is placed before the Court having jurisdiction, the same shall be dealt with in accordance with law by such Court and keeping in view and having regard to the observations hereinabove as well as the decision of the Special Land Committee arrived at in its meeting dated 16.5.2014 and the proposal / offer dated 18.8.2014 in response to which the Respondents have already made payment of the differential amount of Malkano.

17. Insofar as the stance of Board of Revenue is concerned, it is not that the entire compromise is based on fraud and misrepresentation, but only to the extent of restraining and compelling them to compromise criminal proceedings pending in respective Courts. In fact, insofar as compromise in respect of land in question is concerned, Board of Revenue can even otherwise have no objection as they, after decision of the Land committee's meeting, have already demanded substantial payment for regularizing the lease of the property in question, which amount has already been paid by the respondents. The only objection which has been taken in this regard is to the effect that the then Member, Land Utilization, who had signed the compromise application on 3.9.2014, stood transferred w.e.f. 24.8.2014, hence, not competent to sign and enter into any such compromise. Even this objection appears to be misconceived and fallacious. It is not that the said Member Land Utilization had suddenly entered into any such compromise with respondents on his own, but in fact had done so on the basis of several meetings and the decision of the Land Committee dated 16.5.2014, who, after a threadbare examination of the case in hand, had directed the respondents to pay the extra charges for regularization, of the land in question. The office of Government functionaries are not person specific, and their acts cannot in its entirety be undone by their successor in interest in this manner. If the officer had done any unlawful act then recourse is to proceed against him in accordance with law, but under no circumstances, their successor in interest can be allowed to undo such acts with one stroke of pen at their own whim and desire. If permitted, then the entire system of governance would collapse, and the confidence of public in

general would be shattered, creating anarchy in the system. The Member, Land Utilization in instant matter had acted according to the directions and decision of the Special Land Committee constituted for such regularization and entering into compromise was not his personal decision.

18. In the case of ***Makhdoom Bilawal Cooperative Housing Society V. Government of Sindh and others*** (**unreported-C.P. No. 937/1991**) a compromise application was placed before a learned Division Bench of this Court, whereby respondent No.1, Government of Sindh had agreed to grant an alternate land to the petitioner in lieu of their claim made in the petition. Such compromise application was accepted by the Court vide order dated 19.12.1991 and the petition was disposed of in terms of the compromise. Thereafter an application bearing CMA No. 1187 of 1993 was filed on behalf of Karachi Development Authority under Section 12(2) CPC on the ground that alternate land allotted to the petitioner was in fact a land given to them by the Government of Pakistan vide Notification dated 3.3.1959 therefore, the land was declared as controlled area in terms of Article 12 of KDA Order 1957. The contention of the learned Counsel appearing for KDA before the Court was to the effect that the Government could not have granted lease of the plot in question without NOC from KDA. Whereas, the precise objection raised on behalf of petitioners while opposing the application under Section 12(2) CPC, was that since KDA, while filing comments in CP No D-279 of 1994 (a connected case) had conceded to the contention of the petitioners in that they had agreed that the land occupied by the Society be retained by it and the affectees would be accommodated somewhere else, cannot resile from such comments / undertaking, therefore, application was liable to be dismissed. The learned Division Bench while dismissing the application under Section 12(2) was pleased to observe as follows:-

> "It may be appreciated that KDA is a Government Agency. The decision taken by Government is reflected in the comments filed by KDA in C.P. No. D-279/1994 quoted in extension earlier. In that decision the Government again took the stand that compromise recorded by this Hon'ble Court dated 19.12.1991 was valid and binding. By virtue of this decision the applicant KDA was directed to appear in Court through their counsel and ask for disposal of this application and withdraw connected petitions and concede the prayer in petition No. 419/1993. The KDA cannot wrangle (sic) out from such comments filed in Court nor they can wrangle (sic) out from the judgments quoted supra. The CMA No. 1187/1993 is accordingly dismissed." (Emphasis supplied)

This judgment dated 17.7.2000 passed in the aforesaid petition as well as in other connected petitions bearing Nos. D-499 of 1993, 655 of 1993 and 279 of 1994 was assailed by KDA before the Hon'ble Supreme Court by preferring a Civil Petition for leave to appeal which was dismissed by the Hon'ble Supreme Court and the case is reported as ***Karachi Development Authority through Secretary V. Makhdoom Bilawal Cooperative Housing Society and others*** **(2001 SCMR 1277)**, the Hon'ble Supreme Court held as under:-

> "7. We have considered the arguments advanced by the learned counsel for the parties and minutely gone through the record. Before the learned High Court Assistant Advocate-General appeared and argued the case of Government of Sindh and also placed on record the judgments in Suit No.605 of 1992, H.C.A. No.103 of 1994 and the leave refusing order in C.P.S.L.A Nos.383 and 384-K of 1995 and also filed counter –affidavit dated 10-4-2000 and stated at the Bar that the disputed land was never allotted to K.D.A.
>
> 8. Perusal of the impugned judgment shows that the learned Judges have considered the entire case in its true perspective and after going through the judgment of the learned Division bench, leave refusing order of this Court, with convincing, plausible, logical reasons, within the well-settled principle of law, and after proper appraisal of evidence including documents, dismissed the application under section 12(2) C.P.C.
>
> 9. For the facts and reasons stated above, we are of the considered opinion that this petition is without substance and merit, which is hereby dismissed and leave is refused."

Therefore, it can be safely held that Government Functionaries cannot be allowed to wriggle out from the stance taken by the concerned department before the Court, merely because of change and or transfer of an officer.

19. It is also of paramount importance to observe that the matter of respondents land in question was referred to the Sindh Government Lands Committee, comprising of a Chairman, Secretary Law, Secretary Finance and Secretary to Government of Sindh, Land Utilization Department, and in the meeting held on 16.5.2014, the case of Respondents was placed at Agenda item No. 5, wherein, the brief facts were stated as under:

Item No. 5.

THE CASE RELATES TO THE IMPLEMENTATION OF THE RECOMMENDATION OF THE CHAIRMAN, CHIEF MINISTER'S INSPECTION TEAM (CMIT) DULY APPROVED BY THE CHIEF MINISTER SINDH REGARDING REGULARIZATION OF ALLOTMENT OF STATE LAND ALLOTTED TO M/S ABDUL MAJEED & 17 OTHERS LEGAL HEIRS OF CLAIMANT SULEMAN S/ HAJI TAR MUHAMMAD, IN EXCESS OF THEIR ENTITLEMENT. The detailed facts of the case are attached herewith at Appendix-I.

The facts of the case are that the claimant Suleman was allotted 58.1 acres of land out of S Nos. 168, 169 and 170 of Deh Gujhro Karachi vide Khatooni dated 23.5.1962. The allotment was cancelled by the Settlement & Rehabilitation Commissioner Karachi on the pretext that the scheme / policy for the allotment of the land in Karachi (former capital city) was not yet framed. The cancellation order of Settlement Commissioner Karachi was set aside by the High Court vide Judgment dated 29.1.1971 passed in C.P. No. 301 of 1965 and the case was remanded to the Additional Settlement & Rehabilitation Commissioner (Land) Karachi for consideration of claimant's claim. The Additional Settlement Commissioner Karachi (Land) Karachi **revived the allotment earlier made to the claimant** in Deh Gujhro provided the S Nos. 168, 169 & 170, which during the intervening period were declared "Building Sites" are excluded from the list of "Building Sites". No action was taken and ultimately the claimant filed C.P. No. 254 of 1974, which was disposed of vide Judgment dated 6.6.1979 wherein it was held that the case of the claimant is to be treated as a "pending case" and he is entitled to claim at least 25 acres of urban agriculture land in Karachi. Pursuant to the orders of the High Court, the legal heirs of the claimant were allotted the following in Karachi:

DEH	SURVEY NUMBERS ALLOTTED	AREA ALLOTTED IN ACRES	DATE OF ALLOTMENT
Okewari	71 to 74	19-16	19.9.1979 & 20.4.1980
Safooran	Out of N.C No. 166 After Survey, S. No. 328	09-08	
TOTAL LAND ALLOTTED		28-24 acres	

In the year 2009, on the allegation that excess land was fraudulently allotted to the claimant, the matter was inquired into by the Chief Minister's Inspection Team (CMIT).

The CMIT, after inquiry, held that as per Judgment of the High Court the claimant was entitled to get at least 25 acres of land, instead his legal heirs have been allotted 28-24 aces, hence they have been allotted 03-24 acres in excess of the their entitlement of adjust at least 25 acres. The CMIT, Recommendations are duly approved by the Chief Minister Sindh, as under:-

i) The possession of the one acre which is lying vacant & is in possession of M/S Pioneer Builders Should be taken over by the Government in Revenue Department.

ii) The **"Land in question"**, may be offered to the builders for purchase on a price to be determined by the Regularization Committee of the Board of Revenue.

CONCLUSION

The committee discussed the matter at the length and also gone through the findings & Recommendation made by the CMIT as well as the Inspector, ACE, Karachi, very minutely, and held the recommendation made by the Chairman CMIT, after having been duly approved by the Chief Minister of Sindh on Summary dated 11.3.2009 floated to him, have attained the status of the Order / directives issued by the Government of Sindh as envisaged in Rule-7 (iii) of the Sindh Government Rules of Business, 1686, and are to be complied with in letter & spirit as orders / directives issued by the Government of Sindh.

The committee observed that the Chief Minster Sindh, Government of Sindh, has approved that the "land in question" may be offers to the Builders for purchase on a price to be determined by the regularization committee of the Board of Revenue Sindh.

In view of above factual & legal position, the committee finally held that the allotment land up to adjust at least 25 acres made in compliance of Judgment of the Honorable High Court of Sindh and per allotment order made by the Additional Settlement Commissioner (Law) Karachi duly upheld by the Honorable High Court of Sindh @ Karachi was quite legal whereas the excess area is 3-24 acres which area is to be regularized. (**Emphasis supplied)**

DECISION

The committee reviewed their earlier decision dated 26.8.2009 and unanimously decided to **regularize the excess area of 03-24 acres (out of S. No. 328, previously N. C No. 166) in favour of legal heirs of claimant Suleman S/O Haji Tar Muhammad at the highest rate of Rs. 53,24,000/- per acre, as loss caused to the Government within the meaning of Section-4 (2) of Sindh Government land (Cancellation of allotment, Conversion & Exchanges) Ordinance, 2000. The allotment up to 25-00 acres is undisputed / intact, after the payment of challan, the final regularization order will be issued forthwith and thereby the area of 03-24 acres land have been allotted in excess of 25-00 acres shall also stand regularized.** The regularization is subject to condition that the land in question is available on the site and that lease money may be deposited in to Government Treasury in the relevant Head of Account by the depositor at his own risk. In case any irregularity as false information concealment of facts / pending litigation / stay of any Court is noticed hereafter on part of depositor, the malkano amount paid to this effect shall be forfeited to Government and all expenditure on future litigation shall be borne on the shoulders of depositor and remaining P.I. Units i.e. 2716 may be allotted by Government in accordance with Policy / procedure. [emphasis supplied]

Perusal of the aforesaid conclusion arrived at by the Committee and its decision thereafter, completely belies the argument of learned AAG that no approval of Chief Secretary was obtained in this matter while signing the compromise application. In fact the Member, Land Utilization department, was not in law required to obtain any further permission from the Chief Secretary, as after decision of such a high

level Committee, and duly approved by the Chief Minister, this would have hardly mattered. In that the arguments of learned AAG are not only misconceived, but contradictory in nature as well.

20. Moreover and without prejudice to the validity and or authority of the compromise in question vis-à-vis. the officer who had signed the same before the Court, there is another aspect of the matter which also requires consideration by this Court. Defendant No. 2(a) and (b) i.e. Senior Member and Secretary Land Utilization Department, Board of Revenue, had filed their written statements, wherein, it has not been seriously controverted that the disputed portion of land in question has been regularized on the basis of minutes of the meeting dated 16.5.2014 of the Land Committee and by asking the respondents to pay Rs. 53,24,000/- per acre as lease charges in lieu of alleged loss caused to the Government of Sindh vide its letter/order dated 18.8.2014. In the entire written statement, more or less, the contention of the respondents in the Suit has not been controverted seriously as the written statement has been filed on behalf of the said defendants on 22.5.2014 when the said officer was very much incharge of the office. In response to the prayer clause the said defendants have stated in their written statement as follows:-

> "It is now, therefore, respectfully submitted that in the light of unanimous decision, as purported therein the minutes dated 17.04.2014[16.5.2014], passed by the learned Land Committee, whereby it has been decided to regularize the area of 3.24 Acres (out of S.No.328, previously Naclass No.166) in favor of Legal Heirs of the Claimant Suleman son of Hai Tar Muhammad (Plaintiffs herein the Suit) at the rate of Rs.53,24,000 per acre, as loss caused to the Government of Sindh with the approval of the competent authority, the differential Challan thereto, will be issued in due course and in accordance with the law and procedure and/or any order or directions passed by this Honourable Court. The allotment upto 25 acres is undisputed/intact. After the payment of Challan, the final regularization order will be issued forthwith and thereby the area of 3-24 acres, said to have been allotted in excess of 25.00 acres shall also stand regularized. It is, therefore, prayed that this Honourable Court may be pleased to dispose of/dismiss the Suit in hand alongwith all interlocutory applications, filed therewith accordingly." (Emphasis supplied)

Perusal of the aforesaid para of the written statement as well as other contents of the same reflects that the claim of the respondents has been admitted and in the circumstances even otherwise the case falls within the provision of Order 12 Rule 6 CPC and the Court is competent to pass a judgment and decree on such admission on the part of the defendants.

21. In view of herein above facts and circumstances of the case I am of the view that insofar as the plea of fraud and misrepresentation is concerned the same is not attracted in the instant case, whereas, the compromise was arrived at after decision of the Special Land Committee dated 16.5.2014, on the basis whereof the applicants issued letter dated 18.8.2014 and demanded payment of the differential amount of Malkano which has been paid by the respondents, hence to that extent and on merits of the case, instant J.M. is misconceived. However, since it has come on record that there are certain clauses of the compromise agreement which do not seem to be lawful and void to the extent of Section 23 of the Contract Act, and are therefore, hit by the provision of Order 23 Rule 3 CPC, the same need to be modified. In the circumstances, the impugned order is modified, resultantly, the compromise judgment and decree could only be sustained in respect of clause (a), (2), (4), (5), (7)[except the words "*including registration of FIR*"], (9), (11), (13)[except *"hence proceedings initiated either by the Provincial Anti-Corruption Department or by the NAB Authorities has no value in the eyes of law and shall be declared null and void"*].

22. Accordingly application under Section 12(2) CPC stands dismissed, however, subject to above modification. Office is directed to prepare amended decree.

Dated: 9.6.2016

J U D G E

ARSHAD/