

IN THE HIGH COURT OF SINDH KARACHI

**Present:**

Mr. Justice Syed Hasan Azhar Rizvi  
Mr. Justice Adnan Iqbal Chaudhry.

**High Court Appeal No. 85 of 2018**  
[M/s SAGA Shipping & Trading Corporation Ltd. and others  
versus WALIA Steel Industries PLC & others]

Appellants 1 & 3 : Saga Shipping & Trading Corporation Ltd., & Mr. Naveed Ahmed through Mr. Azhar Maqbool Shah, Advocate.

Appellant No.2 : Ajmair Steel Industries Private Limited through Chaudhry Muhammad Iqbal, Advocate.

Respondent No.1 : Walia Steel Industries PLC through Mr. Jawad A. Sarwana, Advocate.

Respondents 2, 3, 5 & 6 : Nemo.

Respondent No.4 : Collector of Customs, Customs House, Karachi through Mr. Muhammad Rashid Arfi, Advocate.

Dates of hearing : 14-11-2018, 28-11-2018, 05-12-2018, 11-12-2018 & 20-12-2018.

Date of decision : 07-05-2019

**JUDGMENT**

**Adnan Iqbal Chaudhry J.** - This is an appeal from an order dated 21-03-2018 whereby J.M. No.59/2017 filed by the Respondent No.1 (plaintiff) under section 12(2) CPC was allowed, and the order permitting the withdrawal of the Suit was set-aside to restore the said Suit. The Appellants are defendants in the Suit.

2. On 17-05-2017, the Respondent No.1 (hereinafter 'Walia Steel'), a company registered in Ethiopia, filed Suit No.1300/2017 before the original side of this Court for *inter alia* recovering

possession of cargo allegedly stolen, being 4,953.520 mts of 549 Hot Rolled Steel Coils (hereinafter 'the consignment') lying, at that point in time, at the Karachi Port.

3. It was the case of Walia Steel in the Suit that it was the owner of the consignment; that it had purchased the same from Vilmeks Ic Ve Dis Tic Ve Metal San A.S. (hereinafter 'Vilmeks'), a Turkish company; that the consignment sailed from the Port of loading at Adabiya, Egypt, around 19-04-2017 aboard 'MV Fortune Express' (hereinafter 'the vessel'), which vessel was owned by Saga Shipping (Appellant No.1); that the consignment was destined for the port at Djibouti; that the Bill of Lading described the shipper as Vilmeks and the notifying party as Walia Steel; that soon after it sailed, the vessel became untraceable; that when the vessel did not reach Djibouti, Walia Steel made inquiries and discovered that the vessel had instead reached Karachi where the consignment was claimed by Ajmair Steel (Appellant No.2), a company based in Lahore. It was alleged by Walia Steel that the consignment was stolen by Saga Shipping in collusion with Ajmair Steel and the Master and Agents of the vessel by preparing fake shipping documents to show the consignee as Ajmair Steel.

Vide an interim order dated 19-05-2017 passed in the Suit, the Appellants 1 and 2, and the Agents of the vessel were restrained from moving the consignment and from creating third party interest therein. However, when it transpired that the consignment had by that time been moved to a Customs bonded warehouse, vide order dated 22-05-2017 the Court appointed its Nazir to inspect the consignment and directed Customs Officials not to allow removal of the same from the Customs warehouse.

4. Vide counter-affidavits filed in the Suit, both Saga Shipping and Ajmair Steel denied the allegations made in the Suit. According to them, the consignment had been lawfully purchased by Saga Shipping from a Panama company namely Dynamic Steel Company,

and then sold to Ajmair Steel, who paid the customs duty thereon as consignee.

5. On behalf of Walia Steel, the plaint was verified by one Syed Ghafar Ali Shah (hereinafter 'Ghafar'), who was acting as one of five Attorneys appointed by Walia Steel by a Power of Attorney dated 16-05-2017 executed at Ethiopia, authorizing the said Attorneys severally to act for the purposes of the Suit. All of the said five Attorneys were said to be associated with and serving the law firm of Abraham & Sarwana, and Mr. Jawad Sarwana Advocate of the said firm represented Walia Steel in the Suit. Ghafar was a court clerk at Abraham & Sarwana.

6. Though the Suit was fixed for hearing date-by-court on 17-10-2017, but before that, on 06-10-2017, CMA No.13710/2017 titled under Order XXIII Rule 3 CPC, was filed in the Suit along with an application for urgent orders on the same day. The prayer in the application under Order XXIII Rule 3 CPC was as follows:

*"For the reasons disclosed in the accompanying affidavit, it is respectfully prayed on behalf of the plaintiff and defendant No.1 that this Hon'ble Court may be pleased to dispose of the present suit as both the parties have patched up their differences outside of this Hon'ble Court and the grievances of the plaintiff against the defendants have been redressed so there is no claim of the plaintiff remains against the defendants".*

The above mentioned application was signed by one Mr. Irfan Ali Advocate as counsel for Walia Steel (the plaintiff), and by Mr. Naveed Ahmed as Director of Saga Shipping (defendant No.1). Supporting affidavits were filed both by Ghafar and Mr. Naveed Ahmed. The affidavit of Ghafar stated that:

*"3. I say that the matter has been settled between the plaintiff and defendant No.1 which is main contesting party and all the grievances of the plaintiff was against the defendant No.1 so compromise has been arrived between them outside the court, there is no any further claim or grievances against the defendants of the plaintiff after settlement outside the court."*

The affidavit of Mr. Naveed Ahmed stated that:

*"2. I say that I have been read over the contents of application U/O 23 Rule 3 CPC R/W Section 151 CPC and I understand and accept the contents of the application and have no objection for disposal of the case in terms of compromise application filed by the plaintiff in this matter. I have to leave for Norway."*

The vakalatnama of Mr. Irfan Ali Advocate, which was also dated 06-10-2017, was executed by Ghafar as Attorney of Walia Steel. The application for urgent hearing was signed by Irfan Ali Advocate with a supporting affidavit of Ghafar. The ground taken in the application for urgent hearing was that Mr. Naveed Ahmed, Director of Saga Shipping had travel plans.

7. In view of the prayer for an urgent hearing, the application titled under Order XXIII Rule 3 CPC was fixed in Court on the same day and the following order was passed:

*"06.10.2017.*

*Mr. Irfan Ali, advocate for plaintiff.*

*Naveed Ahmed, Director of defendant company is present*

*1. Granted.*

*2. By means of this application, the counsel for the plaintiff seeks disposal of the suit on the ground that the parties have patched up their differences outside the Court and grievances of the plaintiff against the defendants have been redressed, hence there remains no claim of the plaintiff against the defendants. Accordingly, suit stands dismissed as not pressed, alongwith listed applications".*

Thus, though the application was titled under Order XXIII Rule 3 CPC, it was treated by the Court as an application under Order XXIII Rule 1 CPC for permission to withdraw the Suit and was allowed accordingly.

8. The very next day, on 07-10-2017, Walia Steel acting through its other Attorney, Mr. Imran Ilyas, also of the law firm of Abraham & Sarwana, moved an application in the disposed of Suit for urgent hearing along with an application under *"Order 38 & 39, Rules 1 and*

2 CPC read with sections 94 and 151 CPC and section 12(2) CPC". By such application, it was contended by Walia Steel that the withdrawal of the Suit on 06-10-2017 had been obtained by practicing fraud as Ghafar was never instructed nor authorized by Walia Steel to withdraw the Suit or to engage a fresh counsel to substitute Mr. Jawad Sarwana Advocate. By order dated 07-10-2017 passed in the Suit, the parties were directed to maintain *status quo*.

9. On 10-10-2017, Walia Steel filed J.M. No. 59/2017 under section 12(2) CPC for recalling the order dated 06-10-2017 passed in the Suit whereby the said Suit was permitted to be withdrawn. The J.M. also arrayed Ghafar (Respondent No.9 herein), Mr. Naveed Ahmed (Appellant No.3 herein) and Mr. Irfan Ali Advocate (Respondents No.6 herein) as respondents, the latter three being persons who allegedly obtained the withdrawal order dated 06-10-2017 by fraud and misrepresentation. In the J.M., Walia Steel alleged that Mr. Naveed Ahmed, the Director of Saga Shipping, was the master-mind behind the alleged fraud. It was contended that Mr. Jawad Sarwana, the counsel representing Walia Steel in the Suit had been granted general adjournment without exception from 04-10-2017 to 14-10-2017 as he had to travel abroad on a professional engagement, and that is why the Suit was next fixed date-by-court on 17-10-2017; that taking advantage of Mr. Jawad Sarwana's absence, Mr. Naveed Ahmed and Ghafar hatched a conspiracy to get rid of the Suit by moving the aforesaid application titled under Order XXIII Rule 3 CPC; that there was never any compromise between Walia Steel and Saga Shipping as alleged in the application; that Ghafar was never instructed by Walia Steel or by Mr. Jawad Sarwana to engage Mr. Irfan Ali Advocate or to compromise or withdraw the Suit; and that after committing the alleged fraud, Ghafar had vanished.

By order dated 21-03-2018 (the impugned order), the application under section 12(2) CPC (J.M. No.59/2017) was allowed by the learned Single Judge, and the withdrawal order dated 06-10-

2017 passed in the Suit was set-aside to revive the Suit; hence this appeal.

10. Heard the learned counsel and perused the record.

The Power of Attorney given by Walia Steel to Ghafar for the purposes of the Suit did not contain any express authority to withdraw the Suit. However, clause 4 of the Power of Attorney authorized the Attorneys as follows:

“4. To comprise, negotiate or to execute judgments;”

The learned Single Judge held that since the Power of Attorney was being relied upon to affect the rights/property of the principal (Walia Steel), it had to be construed strictly, and therefore even if the word ‘*comprise*’ in clause 4 of the Power of Attorney was taken to be a typographical error and was read as authority ‘to compromise’ the Suit, that could still not be construed as authority ‘to withdraw’ the Suit.

The other findings of the learned Single Judge are essentially as follows: that the application titled under Order XXIII Rule 3 CPC (CMA No.13710/2017) had misrepresented to the Court that the parties had entered into a compromise out of Court when the existence of such compromise was disputed by Walia Steel and nothing had been brought on the record by Saga Shipping or Ajmair Steel to demonstrate the alleged compromise; that where all the Attorneys appointed under the Power of Attorney were employees of the law firm of Abraham & Sarwana, it was manifest that the Attorneys were acting on the instructions of the said law firm who had not given any instructions to withdraw the Suit. The learned Single Judge further held that the circumstances where Ghafar, an employee of the law firm that was representing Walia Steel, suddenly engaged an outside counsel to withdraw the Suit, that when Saga Shipping avoided its own counsel in moving CMA No.13710/2017, that the subsequent change of counsel both by Saga Shipping and Ajmair Steel, that the absence of Ghafar after the

withdrawal of the Suit - all of the said events demonstrated that the withdrawal of the Suit had been obtained by fraud and misrepresentation. The learned Single Judge concluded that no prejudice would be caused to any party if the Suit is revived and decided on the merits.

11. While arguing the appeal, learned counsel for both sides had made extensive submissions on the title of the consignment and the merits/demerits of the Suit. Learned counsel for the Appellants also made submissions on the non-maintainability and incompetency of the Suit. However, in our view none of those submissions are germane to a decision in this appeal. Here, the sole point for our determination is whether the permission to withdraw the Suit on 06-10-2017 was obtained by fraud and/or misrepresentation. Therefore, with respect to learned counsel, we do not discuss those submissions which in our view are not relevant to the question before us.

12. Mr. Azhar Maqbool Shah, learned counsel for the Appellants 1 and 3 submitted that J.M. No.59/2017 was not maintainable to begin with, inasmuch as Walia Steel had already filed CMA No. 13786/2017 under "*Order 38 & 39 Rules 1 & 2 CPC r/w Sections 94, 151 CPC and Section 12(2) CPC*" in the disposed of Suit, which application was pending, and which application while praying for a suspension of the withdrawal order, did not pray for setting aside the same. He submitted that the word '*comprise*' in clause-4 of the Power of Attorney was apparently a typographical error and it was intended to read '*compromise*'; that when Ghafar was authorized to compromise the Suit, not only did he have the implied authority to withdraw the Suit but he was also empowered to do so as a recognized agent of Walia Steel in terms of Order III Rules 1 and 2 CPC and as laid down in the cases of *Noor Muhammad v. Muhammad Siddique* (1994 SCMR 1248); *ANSW Enterprises v. Askari Commercial Bank Ltd.* (2001 PSC 120); *Azhar Asia Shipping Agency v. Ghaffar Corporation* (PLD 1996 SC 213); and *Arokey Limited v. Munir Ahmed*

*Mughal* (PLD 1982 SC 204). Thus, Mr. Azhar Maqbool Shah submitted that when the Suit was withdrawn by a duly authorized agent in exercise of lawful authority, the question of fraud or misrepresentation did not arise. He submitted that even assuming that Ghafar had acted beyond his authority in withdrawing the Suit, that was a matter between the principal (Walia Steel) and the agent (Ghafar), for which the remedy of the principal was against the agent as so held in the case of *Shabana Irfan v. Muhammad Shafi Khan* (2009 SCMR 40).

13. Mr. Chaudhry Muhammad Iqbal, learned counsel for Ajmair Steel (Appellant No.2) while adopting the arguments of Mr. Azhar Maqbool Shah, submitted that the consignment was the property of Ajmair Steel who had filed the goods declaration and paid customs duty thereon. He too submitted that there was no fraud or misrepresentation as Ghafar had the implied authority to withdraw the Suit, and that if Walia Steel is aggrieved of such act of its agent, then its remedy is against the agent.

14. In addition to the contentions discussed in para 9 above, which we do not repeat here, Mr. Jawad Sarwana, learned counsel for Walia Steel (Respondent No.1) submitted that on 06-10-2017 when the Suit was withdrawn, he was in Australia, where he received a text message from the counsel then representing Ajmair Steel in the Suit asking Mr. Sarwana whether he had withdrawn the Suit; and that is when he asked his office at Karachi to make inquiries and discovered the fraud. Mr. Sarwana submitted that the principle that the remedy of the principal is against the agent would not be attracted in the instant case, inasmuch as here the fraud/misrepresentation is also with the Court and the same has also been committed by Mr. Naveed Ahmed who is not the agent of Walia Steel. He submitted that Ghafar had no authority to compromise or to withdraw the Suit; that the word '*comprise*' in clause 4 of the Power of Attorney is exactly what it states to be and it



was not a typographical error and not intended to state 'compromise'. He referred to various dictionaries to submit that in the context the word '*comprise*' meant 'to comprehend'. He relied on the case of *Lahore Development Authority v. Firdous Steel Mills* (2010 SCMR 1097) to submit that Walia Steel was not required to prove fraud by direct evidence which could also be inferred from circumstances of the case and conduct of the parties.

15. It is nobody's case that Ghafar while acting as Attorney of Walia Steel had entered into a compromise, but the case is that he had proceeded to withdraw the Suit. Admittedly, the Power of Attorney did not expressly authorize Ghafar to withdraw the Suit and therefore the submission of learned counsel for the Appellants was that when clause 4 of the Power of Attorney had authorized Ghafar to 'compromise' the Suit, that, by way of implication was also authority to 'withdraw' the Suit. In other words, the interpretation of clause 4 of the Power of Attorney was relevant only to determine whether that clause could be construed as implied authority to withdraw the Suit<sup>1</sup>.

16. It is settled law that a Power of Attorney is to be construed strictly. That aspect of the case has been discussed elaborately by the learned Single Judge. Clause 4 of the Power of Attorney authorized the Attorneys to "*To comprise, negotiate or to execute judgments*". Black's Law Dictionary defines 'comprise' to mean "*to comprehend; include; contain; embrace; cover*". The Oxford Encyclopedic English Dictionary also uses the word '*comprehend*' to define the word 'comprise'. Taking that definition, and the fact that the word '*comprise*' in clause 4 of the Power of Attorney is used in relation to the word '*judgment*', clause-4 of the Power of Attorney could only mean to state that once a judgment in the Suit is passed, the

---

<sup>1</sup> Section 187 of the Contract Act, 1872, which deals with the authority of an agent, states that "..... An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted for circumstances of the case"

Attorney was authorized to comprehend the judgment for purposes of its implementation either by way of negotiation or by way of its execution. In other words, there is no basis to conjecture that the Power of Attorney intended to state 'compromise' instead of 'comprise'. Therefore, when the authority to compromise was never there, it was futile to propound that the authority to withdraw should be inferred from the authority to compromise.

While discussing the extent of an agent's implied authority, it has been held by the Supreme Court of Pakistan in the case of *Islah High School, Chiniot v. Jawad Hussain* (1996 SCMR 193) that where the agent had acted on implied authority to purchase the land for the Society, and further to defend the suit for pre-emption on behalf of the Society, such implied authority did not extend to entering into a compromise to the extent of surrendering a big chunk of the land of the Society for a nominal consideration. It was further held that:

"It should be understood that merely because an agent is entrusted with a certain work, the principal is not in any way prevented from asserting that the agent had acted in excess of authority and in a manner prejudicial to the principal. A third party has a remedy against the principal for the acts of his agent provided he proved that the agent had acted wholly within the scope of his authority or ostensible authority held or exercised by the agent."

17. Learned counsel for the Appellants had submitted that Ghafar being a 'recognized agent' of Walia Steel in terms of Order III Rules 1 and 2 CPC, he was in any case authorized to withdraw the Suit. But that argument fails to appreciate that Ghafar was only a recognized agent for acts authorized by the Power of Attorney<sup>2</sup>, which had never authorized withdrawal of the Suit. The cases of *Noor Muhammad v. Muhammad Siddique* (1994 SCMR 1248); *ANSW Enterprises v. Askari Commercial Bank Ltd.* (2001 PSC 120); *Azhar Asia Shipping Agency v. Ghaffar Corporation* (PLD 1996 SC 213); and *Arokey Limited v. Munir Ahmed Mughal* (PLD 1982 SC 204) cited by Mr. Azhar Maqbool Shah are of no help to the Appellants. Firstly, in all

---

<sup>2</sup> For this proposition also, see the case of *Islah High School, Chiniot v. Jawad Hussain* (1996 SCMR 193) *supra*.

those cases, the agent was a pleader/counsel acting on the authority of a vakalatnama which had expressly authorized the counsel to compromise the matter, the act complained of. Secondly, a vakalatnama of a pleader/counsel is interpreted differently, rather conversely, from a Power of Attorney held by a recognized agent<sup>3</sup>.

Learned counsel for the Appellants had then attempted to argue that the vakalatnama given by the Attorney, Ghafar, to Irfan Ali Advocate had authorized the said Advocate to withdraw the Suit. But the fact of the matter remains that when Ghafar did not have such authority himself, he could not have delegated such authority to the Advocate<sup>4</sup>.

18. The other argument advanced by learned counsel for the Appellants was that if the agent (Ghafar) had withdrawn the Suit without authority of the principal (Walia Steel), then the remedy of the principal was against the agent and the Appellants could not be put to any inconvenience. In our view, that argument may have been worthwhile had Ghafar (the agent) acted on his own in obtaining the withdrawal order of the Suit. In the case at hand, the withdrawal order had been passed on a joint representation made by Ghafar and Mr. Naveed Ahmed of Saga Shipping. The case of *Shabana Irfan v. Muhammad Shafi Khan* (2009 SCMR 40) relied upon by Mr. Azhar Maqbool Shah is of no help to the Appellants. In that case the principal had expressly authorized his agent to sell the principal's property, which sale then became the subject matter of a suit for specific performance that was decreed in favour of the plaintiff. Thereafter, the principal sought a setting-aside of the decree under section 12(2) CPC. It was in those facts that the Honorable Supreme Court observed that the fraud, if any, was committed by the agent with the principal for which the principal's

---

<sup>3</sup> See the case of *Muhammad Shahid v. Additional District Judge Sahiwal* (2014 YLR 2309) where a learned Single Judge of the Lahore High Court has discussed the difference between construing a vakalatnama and an ordinary Power of Attorney.

<sup>4</sup> See *Muhammad Yousuf Siddiqui v. Haji Sharif Khan* (PLD 2005 SC 705).

remedy was against the agent. In the case at hand, Ghafar did not have any express or implied authority to withdraw the Suit. In any case, the question in the case at hand was not only whether the agent (Ghafar) had defrauded his principal (Walia Steel), but also whether a fraud and/or misrepresentation had been committed against the Court for obtaining the withdrawal of the Suit. In our view, where the Court comes to the conclusion that a fraud or misrepresentation had been committed against it, then any remedy that the principal may have against the agent will not by itself be a ground not to exercise jurisdiction under section 12(2) CPC.

As regards the argument that the application under section 12(2) CPC (J.M. No.59/2017) was not maintainable by reason of a similar application already pending in the Suit, that had been rejected by the learned Single Judge after an elaborate and well-reasoned discussion. Learned counsel for the Appellants have not been able to convince us to take a different view.

19. To obtain withdrawal of the Suit, it was represented to the Court both by Ghafar and by Mr. Naveed Ahmed that Walia Steel and Saga Shipping had entered into a compromise out of court. To dispute the alleged compromise, Walia Steel had filed with the J.M. affidavits of Mr. Maqbool Ahmed, Ms. Afshan Farooqui Advocate and Mr. Imran Ilyas, all three of whom were amongst the five Attorneys appointed by Walia Steel for the purposes of the Suit; all three of whom, like Ghafar, were associated with the law firm of Abraham & Sarwana; and all three stated that Walia Steel always gave its instructions directly to Mr. Jawad Sarwana Advocate and not to any of the Attorneys. Also filed was the affidavit of the Managing Director of Walia Steel stating that there was no compromise with Saga Shipping; that no instructions had ever been given to Ghafar to withdraw the Suit, nor did he have the authority to do so. It was further demonstrated by Mr. Jawad Sarwana Advocate that after coming to know of the said fraud/misrepresentation, Walia Steel revoked Ghafar's Power of

Attorney on 12-10-2017; it moved an application in the Suit to initiate proceedings for perjury against Ghafar; and the firm of Abraham & Sarwana published notices in newspapers informing the public that Ghafar was no longer employee of the firm.

20. While Ajmair Steel did file a counter-affidavit to contest a miscellaneous application filed in the J.M. by Walia Steel for conditional possession of the consignment, Ajmair Steel did not file any counter-affidavit to the application under section 12(2) CPC. Neither Ghafar nor Mr. Irfan Ali Advocate came forward to dispute the allegation against them.

21. The J.M. was contested by Naveed Ahmed for himself and on behalf of Saga Shipping by filing a counter-affidavit to the stay application. Though he denied the allegation of fraud and misrepresentation, but no mention was made of any out-of-court compromise with Walia Steel. Rather, in para-24 of his counter-affidavit, Mr. Naveed Ahmed stated that "*Syed Abdul Ghafar Ali Shah a lawful attorney exercised its power for the reason best known to him*". This appeal too is absolutely silent on what the alleged out-of-court compromise was on the basis of which both Ghafar and Mr. Naveed Ahmed had prayed to the Court for the withdrawal of the Suit. Therefore we had posed a categorical question to learned counsel for the Appellants whether there was an out-of-court compromise ? and if so, what was that compromise ? Their answer was that there was no compromise *per se*, but that when Walia Steel realized that it had mistaken the consignment to be its property and when it realized that the consignment was actually the property of Ajmair Steel, Walia Steel instructed Ghafar to withdraw the Suit. Such response was a complete contradiction of the contents of the withdrawal application and its supporting affidavits whereby both Ghafar and Mr. Naveed Ahmed of Saga Shipping had made a categorical representation to the Court that the reason for withdrawing the Suit was an out-of-court compromise between the parties. Thus, once

learned counsel for the Appellants concede that there was no out-of-court compromise, a clear-cut case of misrepresentation is established which is sufficient for us to sustain the impugned order and we need not discuss this matter further for the proof of fraud.

Therefore, for what has been discussed above, this appeal is devoid of merit and is dismissed along with pending applications.

**JUDGE**

**JUDGE**

Karachi  
Dated: 07-05-2019