

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

J. Misc. No. 50 of 2005 in Suit No.1124 of 1997

and

J. Misc. No. 47 of 2012 in Suit No.1348 of 2005

Date	Order with signature of the Judge
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Present :

Mr. Justice Nadeem Akhtar

J. Misc. No.50 of 2005 :

1. For hearing of CMA No.4350/2005 (U/O XXXIX Rs 1&2 CPC) :
2. For hearing of CMA No.2217/2013 (U/S 151 CPC) :
3. For hearing of Main Application :

Applicants : Muhammad Younus and Mst. Majeeda, through
M/S Akhtar Hussain and Masaud Ghani, Advocates.

Plaintiff : M/S Beach Developers, through
Mr. H. A. Rahmani, Advocate.

Defendants 1 & 2 : Venu Gurdas Advani and M/S International
Construction Corporation, through
Mirza Sarfaraz Ahmed, Advocate.

Defendant No.3 : M/S Al-Kehkashan (Pvt.) Ltd., through
Mr. Faisal Siddiqui, Advocate.

Defendant No.4 : Pakistan Defence Officers' Housing Authority, through
Mr. Ijaz Khattak, Advocate.

Defendant No.5 : The Military Estates Officer through
Mr. Abdul Qadir Leghari, Standing Counsel.

Defendants 6 to 9 : Akbar Mehmood, Ajaz Mehmood, Mrs. Bushra Ajaz, and
Ayaz Mehmood, through Mr. Abid S. Zuberi, Advocate.

J. Misc. No.47 of 2012 :

1. For further orders :
2. For hearing of Main Application :

Applicants : Muhammad Younus and Mst. Majeeda, through
M/S Akhtar Hussain and Masaud Ghani, Advocates.

Plaintiff : M/S International Construction Corporation, through
Mirza Sarfaraz Ahmed, Advocate.

Defendant No.1 : Province of Sindh, through
Mr. Ziauddin Ahmed Junejo, A.A.G.

Defendant No.2 : City District Government, Karachi, through
Mr. Muhammad Idrees Alvi, Advocate.

Defendant No.3 : Pakistan Defence Officers' Housing Authority, through
Mr. Ijaz Khattak, Advocate.

Intervener : M/S Beach Developers through
Mr. H. A. Rahmani, Advocate.

Interveners : Akbar Mehmood, Ajaz Mehmood, Mrs. Bushra Ajaz, and
Ayaz Mehmood, through Mr. Abid S. Zuberi, Advocate.

Intervener : M/S Al-Kehkashan (Pvt.) Ltd., through
Mr. Faisal Siddiqui, Advocate.

Dates of hearing : 05.11.2013, 21.11.2013, 26.11.2013, 27.11.2013,
29.11.2013, 04.12.2013 and 29.05.2014.

ORDER

NADEEM AKHTAR, J. – By this common order, I propose to decide and dispose of the two applications filed by the applicants Muhammad Younus and Mst. Majeeda under Section 12(2) CPC, being J. Misc. No.50/2005 for setting aside the order passed on 06.05.2002 in Suit No.1124/1997, and J. Misc. No.47/2012 for setting aside the order passed on 27.01.2009 in Suit No.1348/2005. Vide order dated 06.05.2002 impugned in J. Misc. No.50/2005, which was passed on an application filed by the plaintiff in Suit No.1124/1997, the said Suit was dismissed as not pressed with the consent of M/S Al-Kehkashan (Pvt.) Ltd., defendant No.3 therein, and without any objection from the other defendants therein. Whereas, vide order passed on 27.01.2009 in pending Suit No.1348/2005, which is impugned in J. Misc. No.47/2012, the voluntary statement filed by the plaintiff in the said Suit was recorded.

FACTS & PLEADINGS IN J. MISC. No. 50/2005 & J. MISC. No.47/2012 :

APPLICANTS' CASE IN J. MISC. No. 50/2005:

2. In their application under Section 12(2) CPC registered as J. Misc. No.50/2005 for setting aside the order passed on 06.05.2002 in Suit No.1124/1997, the applicants have averred that they are the partners of a registered partnership firm ; namely, M/S Beach Developers (**'the firm'**), the plaintiff in Suit No.1124/1997. The other two partners are Mst. Makia W/O Younus Haji Usman and Mrs. Nilofar Sikandar W/O Sikandar Abdul Karim. The firm is the owner of Plot No.DS-124, measuring 6.1 acres, situated at Khayaban-

e-Shamsheer, Phase V (Extension), Defence Housing Authority, Karachi (**'Plot No.DS-124'**), wherein the applicants made investments of more than 50% share directly and through their family members. Applicant No.1 was managing the affairs of the firm, including its projects of construction. In the year 1996, both the applicants left for Canada, and due to this reason, the construction started by the firm was suspended. Applicant No.2 has not returned ever since she left Pakistan. In August 2002, when applicant No.1 returned to Karachi, he came to know that the construction projects of the firm had been taken over by Sikandar Abdul Karim, who is the husband of one of the partners of the firm, Mrs. Nilofar Sikandar. Upon inquiries, applicant No.1 came to know that the said Sikandar Abdul Karim, in collusion with the other two partners of the firm (his wife Nilofar Sikandar and his sister-in-law Mst. Makia), had fraudulently misrepresented before the Registrar of Firms, and by producing forged documents, managed to get both the applicants retired from the firm and inducted himself as a partner thereof. Applicant No.1 filed an application under Section 31 read with Section 70 of the Partnership Act, 1932, on 12.08.2002 before the Registrar of Firms, but no action was taken on the said application. Thereafter, applicant No.1 again left for Canada. The applicants have stated that in view of the above illegal and malafide acts of Sikandar Abdul Karim and the partners of the firm, they have filed Suit No.579/2005 before this Court, which is *subjudice*.

3. The applicants have alleged that they came to know that Sikandar Abdul Karim and his brothers had filed Suit No.901/1996 before this Court against several parties, including M/S Al-Kehkashan (Pvt.) Ltd., without impleading the applicants as partners of the firm, although huge payments had been made by them and their family members in respect of the properties involved in Suit No.901/1996. It has been averred that the firm had some disputes with the defendants in Suit No.1124/1997 in relation to properties, due to which the said Suit was filed by the firm through Mrs. Nilofar Sikandar for specific performance of agreement, declaration and permanent injunction. The applicants have alleged that they came to know in the year 2005 that Mrs. Nilofar Sikandar and Mst. Makia, in collusion with Sikandar Abdul Karim, by entering into certain agreements with M/S Al-Kehkashan (Pvt.) Ltd. and by playing fraud upon this Court, filed an application for withdrawal of Suit No.1124/1997 filed by the firm, and withdrew the said Suit unconditionally. They have further alleged that as a consequence of the said fraud, High Court Appeal No.132/1999 filed by the firm against the dismissal of its stay application in Suit No.1124/1997, and Suit No.901/1996 filed by Sikandar Abdul Karim and his brothers in respect of the properties of the firm, were also withdrawn unconditionally. According to the applicants, the application for withdrawal of Suit No.1124/1997 was signed and

filed by the attorney of Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia, by suppressing the real facts of the case.

4. It has been further alleged by the applicants that Sikandar Abdul Karim, Mrs. Nilofar Sikandar, Mst. Makia and M/S Al-Kehkashan (Pvt.) Ltd. collusively and fraudulently executed a deed of assignment and got the same registered on 30.04.2002, whereby Plot No.G-5, measuring 3,703.27 sq. yds., Block 7, KDA Scheme No.5, Kehkashan, Clifton, Karachi, (**‘the Clifton plot’**), was assigned and transferred in the personal names of Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia, instead of assignment and transfer thereof in the name of the firm. They have also alleged that these collusive and fraudulent acts were committed before the withdrawal of Suit No.1124/1997, High Court Appeal No.132/1999 and Suit No.901/1996, not only to cause loss to the firm and to them, but also in order to play fraud upon this Court. They have further alleged that in lieu of the assignment and transfer of the Clifton plot in the personal names of Sikandar Abdul Karim, Mrs. Nilofar Sikandar, Mst. Makia, they collusively and fraudulently transferred Plot No.DS-124 belonging to the firm in the name of M/S Al-Kehkashan (Pvt.) Ltd., and also received “hundreds of crores” of Rupees from M/S Al-Kehkashan (Pvt.) Ltd. The applicants have prayed that, in view of the above stated collusive and fraudulent acts committed by the above named parties and the fraud played by them upon this Court, the impugned order passed on 06.05.2002 for the unconditional withdrawal of the firm’s Suit No.1124/1997 be recalled / set aside, and the said Suit be proceeded with on merits.

REPLY BY THE FIRM :

5. In J. Misc. No.50/2005, objections have been filed by the firm, wherein the averments and allegations made by the applicants in their application under Section 12(2) CPC have been denied. The firm has averred in its objections that both the applicants ceased to be the partners of the firm with effect from 26.08.1998, when they voluntarily retired from the partnership ; the applicants have no existing right, interest, share or claim in the assets, business or properties of the firm ; after their voluntary retirement, they have no right or authority to question or object to any of the acts and decisions of the firm or its partners ; they have no *locus standi* to file the present application ; and, no fraud or misrepresentation was practiced or committed by any of the parties when the impugned order was passed on 06.05.2002 in Suit No.1124/1997. By denying that major share or portion of the consideration of the plot or investment was made by the applicants, it is claimed by the firm that the financial assistance and funds were provided to the firm from time to time by Sikandar Abdul Karim. The

firm has also denied that applicant No.1 was not in Pakistan during the period alleged by him. It is claimed that he had gone abroad for a short visit, and after returning to Karachi, he fully participated in the business of the firm until he retired on 26.08.1998; and, applicant No.1 left Pakistan in August 1998 after his retirement, and thereafter he as well as applicant No.2 visited Karachi frequently.

6. Regarding the allegations made by the applicants about their alleged illegal retirement and the alleged induction of Sikandar Abdul Karim as a partner of the firm, the firm has asserted that applicant No.1 was fully aware of the induction of Sikandar Abdul Karim as a partner of the firm, as two agreements were executed on 26.08.1998 by applicant No.1 for self and as the attorney of applicant No.2 ; one agreement was for the sale and transfer of the applicants' 50% share in the firm to Sikandar Abdul Karim ; and, the other agreement was for the re-constitution of the firm, whereby both the applicants confirmed their retirement from the firm and Sikandar Abdul Karim was inducted in their place as a partner of the firm having 50% share therein. The firm has further asserted that all the requisite documents in this behalf were signed by applicant No.1 as per legal requirements, and the same were filed by him personally with the Registrar of Firms Karachi along with his covering letter dated 20.10.1998 ; after thorough scrutiny, the Registrar of Firms entered the above changes relating to the firm in his official record ; and, the malafide application filed by applicant No.1 on 12.08.2002 containing false allegations was dismissed, and he was fully aware of its dismissal as he was in Karachi at the relevant time. It is averred that applicant No.1 not only executed the above agreements and documents, but vide his letter dated 20.10.1998 addressed to the Defence Housing Authority, he also confirmed his retirement from the firm.

7. In its objections, the firm has denied that the assignment and transfer of the Clifton plot in the personal names of Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia, or the transfer of Plot No.DS-124 in favour of M/S Al-Kehkashan (Pvt.) Ltd., were collusive or fraudulent ; or any fraud or misrepresentation was committed by the parties or was played upon the Court when the order for withdrawal of Suit No.1124/1997 was passed. The firm has reiterated that the applicants, after having voluntarily retired from the firm, have no *locus standi* to challenge or question the actions or decisions of the firm or its partners.

REPLY BY M/S AL-KEHKASHAN (PVT.) LTD. :

8. J. Misc. No.50/2005 has also been opposed by M/S Al-Kehkashan (Pvt.) Ltd. by filing counter affidavit in reply thereto, wherein it has been averred that Plot No.DS-124 was owned by Venu Gurdas Adwani and M/S International

Construction Corporation (the vendors) ; by an agreement dated 03.11.1994, Venu Gurdas Adwani agreed to sell his 50% share in Plot No.DS-124 to Al-Kehkashan (Pvt.) Ltd. in consideration of Rs.42,500,000.00 ; upon execution of the said agreement, the possession of Plot No.DS-124 was handed over to Al-Kehkashan (Pvt.) Ltd. when it made a part payment of Rs.10,000,000.00 to Venu Gurdas Adwani ; under the said agreement, the balance amount of Rs.32,500,000.00 was payable by Al-Kehkashan (Pvt.) Ltd. on behalf of the vendors to the Defence Housing Authority towards the original occupancy value of Plot No.DS-124 ; instead of the said balance amount, Al-Kehkashan (Pvt.) Ltd. had to pay a sum of Rs.43,600,000.00 as the Defence Housing Authority had demanded additional amount towards delayed payment and surcharge ; all necessary documents were executed by Venu Gurdas Adwani for the transfer of Plot No.DS-124 in favour of Al-Kehkashan (Pvt.) Ltd. ; and, upon completion of all the above formalities, when the letter for transfer / mutation of Plot No.DS-124 in favour of Al-Kehkashan (Pvt.) Ltd. was about to be submitted, the firm filed Suit No.1124/1997 and obtained an ad-interim injunction order therein, due to which the process of transfer / mutation in favour of Al-Kehkashan (Pvt.) Ltd. could not take place from 1997 till about the middle of the year 2002. It has been averred that due to the blockade of its huge funds, Al-Kehkashan (Pvt.) Ltd. had to sacrifice the Clifton plot owned by it, by transferring the same in favour of the partners of the firm in consideration of the withdrawal of the firm's Suit No.1124/1997 and HCA No.132/1997, and the connected Suit No.901/1996. In view of the above, the allegations of fraud and misrepresentation leveled by the applicants have been denied by Al-Kehkashan (Pvt.) Ltd.

OBJECTIONS BY M/S AKBAR MEHMOOD AND OTHERS :

9. M/S Akbar Mehmood and others filed CMA No.2394/2009 in J. Misc. No.50/2005, praying that they may be impleaded therein as parties. Their application was allowed on 05.11.2013 with the consent of all the parties. It is their case that their predecessor-in-interest M/S Al-Kehkashan (Pvt.) Ltd. was the lawful and absolute owner of the entire Plot No.DS-124, which was sub-divided into two plots ; namely, DS-124/I measuring 15,000 sq. yds., and DS-124/II measuring 14,524 sq. yds. ; M/S Al-Kehkashan (Pvt.) Ltd. sold the sub-divided Plot No.DS-124/I to one Sheikh Abid Hussain, and retained the ownership of the other sub-divided Plot No.DS-124/II ; and, after purchasing Plot No.DS-124/I from M/S Al-Kehkashan (Pvt.) Ltd., the said Sheikh Abid Hussain gifted the same to M/S Akbar Mehmood and others, and the said gift was accepted by them. They have pointed out that in their Suit No.579/2005, the applicants did not claim any interest in Plot No.DS-124 on the basis of their alleged share in the firm. They have also pointed out that in C.P.L.A. No.78-K/2007 filed by the firm,

arising out of the applicants' Suit No. 579/2005, it was observed by the Hon'ble Supreme Court that in case their said Suit is decreed they would be entitled to their respective shares. It has been asserted that in view of the order of the Hon'ble Supreme Court, the present application filed by the applicants on the basis of their alleged share in the firm is devoid of any legal or factual basis ; and, the issue of their alleged share in the firm is yet to be determined in their Suit No.579/2005. It has also been asserted that the applicants had lawfully relinquished their rights and interests in the firm ; and, neither the applicants nor the firm have any right, title or interest in Plot No.DS-124. The allegations of fraud and misrepresentation have been denied by M/S Akbar Mehmood and others.

DEFENCE HOUSING AUTHORITY :

10. In its reply / objections to J. Misc. No.50/2005, the Defence Housing Authority ('DHA') confirmed that Plot No.DS-124 was allotted to M/S International Construction Corporation, and the same was transferred in the name of M/S Al-Kehkashan (Pvt.) Ltd. in September 1997 as per the prescribed procedure ; Plot No.DS-124 was bifurcated into two plots, one of which was sold by Al-Kehkashan (Pvt.) Ltd. on 26.08.2002 ; and, the plots were transferred in a transparent manner after personal appearance of the co-owner.

APPLICANTS' CASE IN J. MISC. No. 47/2012:

11. In the application filed by the applicants under Section 12(2) CPC, registered as J. Misc. No.47/2012, for setting aside the order passed on 27.01.2009 in Suit No.1348/2005, the background regarding the firm, their claims that they are the partners thereof and Plot No.DS-124 is owned by the firm, and the allegations about their illegal retirement and induction of Sikandar Abdul Karim as a partner of the firm, are the same as averred and alleged by them in J. Misc. No.50/2005. In J. Misc. No.47/2012, the applicants have stated that they came to know on 09.02.2012 in J. Misc. No.50/2005 that an order was passed in Suit No.1348/2005 on 27.01.2009 on the basis of a statement filed by the plaintiff therein. They have alleged that the impugned order dated 27.01.2009 was obtained by the plaintiff in Suit No.1348/2005, M/S Akbar Mehmood and others, Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia, in collusion with one another, by misrepresentation and by playing fraud upon this Court. They have also alleged that the impugned order is adversely affecting their rights and interests not only in J. Misc. No.50/2005, but also in respect of Plot No.DS-124 owned by the firm.

REPLY BY THE FIRM & M/S AL-KEHKASHAN (PVT.) LTD. :

12. Separate counter affidavits have been filed by the firm and M/S Al-Kehkashan (Pvt.) Ltd. in reply to J. Misc. No.47/2012, wherein the averments and allegations made by the applicants have been denied, and the same defense / stand has been taken as has been taken by them in their counter affidavits to J. Misc. No.50/2005. They have strongly denied that the impugned order passed on 27.01.2009 was obtained by collusion, misrepresentation, or by playing fraud upon this Court.

OBJECTIONS OF M/S AKBAR MEHMOOD AND OTHERS :

13. In their counter affidavit, M/S Akbar Mehmood and others have opposed J. Misc. No.47/2012 on almost the same grounds that have been urged by them in their counter affidavit to J. Misc. No.50/2005. They have raised some additional objections, such as, the application is barred by limitation ; the firm, who was the owner of Plot No.DS-124, has withdrawn Suit No.1124/1997, and is not claiming any right, title or interest in the said plot ; the applicants, having no right, title or interest in Plot No.DS-124, are not “aggrieved persons” ; and, the applicants have failed to specifically plead the fraud and / or misrepresentation allegedly committed at the time of passing of the impugned order dated 27.01.2009. The allegations of misrepresentation and fraud have been denied by M/S Akbar Mehmood and others.

DEFENCE HOUSING AUTHORITY :

14. In its counter affidavit to J. Misc. No.47/2012, DHA has stated that Plot No.DS-124 was transferred to M/S International Construction Co. ; thereafter, M/S Al-Kehkashan (Pvt.) Ltd., claiming to have purchased Plot No.DS-124 from the partners of the firm, approached DHA for its transfer in its name, to which DHA agreed subject to clearance of its dues and appearance of Venu Gurdas Advani and others before DHA for signatures ; after approval of the President Executive Board, Plot No.DS-124 was transferred in favour of M/S Al-Kehkashan (Pvt.) Ltd. on 03.07.2002 at the request of the present applicants and on the basis of transfer documents submitted by the partners of M/S International Construction Co. ; Plot No.DS-124 was legally divided by DHA vide letter dated 22.07.2002 on the basis of the documents submitted for its division ; sub-divided Plot No.DS-124/I was transferred in favour of Mr. Abid Hussain on 26.08.2002 upon submission of transfer documents ; and, at present Plot No.DS-124/I exists in the name of Mr. Abid Hussain, and Plot No.DS-124/II exists in the name of M/S Al-Kehkashan (Pvt.) Ltd.

KARACHI MUNICIPAL CORPORATION :

15. The defunct City District Government Karachi, now Karachi Municipal Corporation ('KMC'), has also been cited by the applicants as a respondent in J. Misc. No.47/2012. In its counter affidavit, KMC has stated that the Clifton plot was mutated in favour of M/S Al-Kehkashan (Pvt.) Ltd. on the basis of a registered sale deed dated 17.05.1986 ; vide mutation letter dated 29.06.2002, it was mutated in the names of Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia, on the basis of the registered deed of assignment dated 30.04.2002 ; and, it was mutated vide mutation letter dated 17.12.2005 on the basis of the registered sale deed dated 26.05.2005.

SUBMISSIONS OF THE APPLICANTS' COUNSEL IN J. MISC. No.50/2005:

16. Mr. Akhtar Hussain, learned counsel for the applicants, reiterated the contents of the application filed by the applicants under Section 12(2) CPC. He contended that admittedly the applicants were the partners of the firm when Suit No.1124/1997 was filed by the firm on 10.09.1997, as its composition was purportedly changed on 26.08.1998 when the applicants were illegally and collusively retired from the firm and Sikandar Abdul Karim was inducted as a partner ; the said illegal acts were committed by Sikandar Abdul Karim in collusion with the other two partners of the firm, that is, his wife Mrs. Nilofar Sikandar and his sister-in-law Mst. Makia, without the consent of the applicants and in their absence when they were not in Pakistan ;after excluding and retiring the applicants from the firm illegally, Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia then entered into an agreement with M/S Al-Kehkashan (Pvt.) Ltd., whereby the firm's Plot No.DS-124 was transferred by them in favour of M/S Al-Kehkashan (Pvt.) Ltd. in consideration of the Clifton plot plus crores of Rupees ; and, after this collusive and malafide deal, Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia, claiming to be the partners of the firm, filed an application for the withdrawal of the firm's Suit No.1124/1997, which was allowed through the impugned order dated 06.05.2002 with the consent collusively given by M/S Al-Kehkashan (Pvt.) Ltd. By referring to the resolution passed on 30.01.2002 by the Board of Directors of M/S Al-Kehkashan (Pvt.) Ltd., the learned counsel submitted that the company had resolved that the Clifton plot will be transferred in favour of the firm in consideration of withdrawal of the litigation, including Suit No.1124/1997, but instead of acting upon the said resolution, the Clifton plot was illegally transferred in the personal names of Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia. The main thrust of the arguments of the learned counsel was that on the date when the impugned order was passed, the applicants were and are still the partners of the firm ; Sikandar Abdul

Karim was/is not a partner of the firm ; and, the decisions regarding the sale and transfer of the firm's Plot No.DS-124, acquiring the Clifton plot in lieu thereof, and/or withdrawing the firm's Suit No.1124/1997, could not be made without the consent of the applicants. It was urged that by ousting the applicants from their legitimate share in the firm and its valuable properties, Sikandar Abdul Karim, Mrs. Nilofar Sikandar, Mst. Makia and M/S Al-Kehkashan (Pvt.) Ltd. turned out to be the main beneficiaries, and they collusively obtained the impugned order dated 06.05.2002 for the withdrawal of Suit No.1124/1997 by playing fraud upon this Court, due to which the applicants have been completely deprived of their valuable rights, title and interest in the firm and its assets.

SUBMISSIONS OF THE APPLICANTS' COUNSEL IN J. MISC. No.47/2012:

17. Regarding this application filed under Section 12(2) CPC, Mr. Akhtar Hussain, learned counsel for the applicants, contended that the applicants came to know on 09.02.2012 about the impugned order dated 27.01.2009 passed in Suit No.1348/2005 on the basis of a statement filed by the plaintiff therein, whereby it was held that the rights, title and interest of M/S Al-Kehkashan (Pvt.) Ltd. and M/S Akbar Mehmood and others, in Plot No.DS-124 stand protected, and all claims to the said plot stand relinquished in their favour. It was further contended that the plaintiff in Suit No.1348/2005, in collusion with M/S Al-Kehkashan (Pvt.) Ltd. and M/S Akbar Mehmood and others, filed a statement in the said Suit, whereby the claim of M/S Akbar Mehmood and others in respect of Plot No.DS-124 was admitted by the plaintiff in Suit No.1348/2005, and he also stated that the said plot had been sold by him to M/S Al-Kehkashan (Pvt.) Ltd. The learned counsel argued that the subject matter of Suit No.1348/2005 was Plot No.ST-24 and not Plot No.DS-124, therefore, no order in respect of Plot No.DS-124 could be passed in the said Suit. It was also argued that M/S Akbar Mehmood and others did not acquire any legal right, title or interest in the sub-divided Plot No.DS-124/I, as the alleged title of their predecessor-in-interest M/S Al-Kehkashan (Pvt.) Ltd. was based on fraud and collusion. He contended that the plaintiff in Suit No.1348/2005 and M/S Al-Kehkashan (Pvt.) Ltd. were parties in J. Misc. No.50/2005, and M/S Akbar Mehmood and others were interveners therein, but the proceedings of J. Misc. No.50/2005 were deliberately concealed by them in Suit No.1348/2005 when the impugned order was passed therein. It was urged that the impugned order was obtained by the above named parties, and Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia by concealment of facts and misrepresentation, and by playing fraud upon the Court, due to which the applicants have been deprived of their valuable vested rights and interest in the firm's Plot No.DS-124.

18. In support of his above submissions, learned counsel for the applicants relied upon (1) Mrs. Afroz Shah and others V/S Sabir Qureshi and others, **PLD 2010 SC 913**, (2) Abdul Razzaq V/S Muhammad Islam and 3 others, **1999 SCMR 1714**, (3) Moulana Atta-ur-Rehman V/S Al-Haji Sardar Umar Farooq and others, **PLD 2008 SC 663**, (4) Agha Ghazanfar Ali V/S Shaukat Ali and others, **1997 SCMR 1006**, (5) Haji Muhammad Boota and others V/S Member (Revenue), Board of Revenue, Punjab and others, **PLD 2003 SC 979**, (6) Abdur Rehman Khan V/S Muhammad Altaf and 3 others, **1997 CLC 1260**, (7) Messrs Dadabhoj Cement Industries Limited and others V/S Messrs National Development Finance Corporation, **2002 CLC 166**, and, (8) Mumtaz Bibi and others V/S Ghulam Akbar, **PLD 1995 Peshawar 81**,.

REPLY BY THE FIRM'S COUNSEL IN BOTH THE CASES :

19. Both the applications filed by the applicants were vehemently opposed by Mr. H. A. Rahmani, the learned counsel for the firm. His preliminary objection was that the applicants have no *locus standi* to file the present applications as they ceased to be the partners of the firm with effect from 26.08.1998 when they voluntarily retired from the firm by executing the requisite documents ; applicant No.1, through his own letter dated 20.10.1998, notified the Registrar of Firms about their voluntary retirement and induction of Sikandar Abdul Karim as a partner of the firm ; and, thereafter, the above changes in the firm's composition were duly recorded by the said Registrar in accordance with law by issuing a certificate in this behalf. He submitted that the present applications under Section 12(2) CPC could be filed only by a person who was a partner of the firm at the time of the compromise in pursuance of which Suit No.1124/1997 was withdrawn, or at the time of filing of the application for withdrawal of the said Suit, or when the impugned order dated 06.05.2002 was passed allowing the withdrawal of Suit No.1124/1997, or when the impugned order dated 27.01.2009 was passed in Suit No.1348/2005. It was urged that in view of the voluntary retirement by the applicants on 26.08.1998, they were not partners of the firm at any of the aforesaid stages, therefore, they have no *locus standi* to file the present applications. In support of this preliminary objection, the learned counsel referred to the 'Agreement to Sell Partnership Shares' dated 26.08.1998 executed by the applicants as 'sellers', whereby they sold their 50% share in the firm to Sikandar Abdul Karim; and, the agreement dated 26.08.1998 executed by the applicants for 'Re-Constitution of Partnership Firm', wherein they confirmed having retired and released from the firm with effect from the date thereof, and referred themselves therein as the 'outgoing partners'. He argued that since none of the above mentioned documents filed and relied upon by the firm along with its objections has been denied or rebutted by the applicants through document or otherwise, the

implications thereof that the applicants ceased to be the partners of the firm with effect from 26.08.1998, as asserted by the firm, stand proved.

20. Mr. H. A. Rahmani Advocate further argued that the execution, contents and veracity of the aforesaid documents have not been denied or disputed by the applicants, as they did not file any affidavit-in-rejoinder in reply thereto ; the above agreements executed by the applicants and the certificate issued by the Registrar of Firm in pursuance thereof shall remain operative and binding on the applicants, unless they are annulled by the competent Court ; admittedly, the applicants have not filed any Suit under Section 39 of the Partnership Act, 1932, for annulment of the said certificate, nor have they sought any such relief in their Suit No.579/2005 ; there were only two courses available to the applicants under the law, that is, either to rebut the above documents through documents, or to seek annulment / cancellation thereof from the Court ; and, in the absence of the above, the contention of the firm about their retirement, duly supported by un-rebutted documents, stands proved, and no evidence in this behalf is required. In support of these submissions, the learned counsel relied upon Abdul Ghani and others V/S Mst. Yasmeen Khan and others, **2011 SCMR 837**, wherein the Hon'ble Supreme Court was pleased to hold that documentary evidence can be rebutted only by documents; and, Jehan Khan V/S Province of Sindh and others, **PLD 2003 Karachi 691**, wherein it was held by a learned Division Bench of this Court that the legal effect of the failure to file affidavit-in-rejoinder is that the fact narrated in the counter affidavit have to be accepted as true. The learned counsel further argued that the certificate issued by the Registrar of Firms recording and confirming retirement of the applicants and induction of Sikandar Abdul Karim as a partner of the firm, is an official document that carries presumption of truth unless it is disproved by cogent and admissible evidence ; and, at present the said certificate conclusively proves that the applicants retired from the firm on 26.08.1998. In support of this submission, he relied upon Mazloom Hussain V/S Abid Hussain and 4 others, **PLD 2008 SC 571**.

21. Mr. H. A. Rahmani Advocate submitted that without prejudice to his preliminary objection regarding the *locus standi* of the applicants to file the present applications under Section 12(2) CPC, his additional and alternate submission is that they cannot file the present applications even if it is assumed that the applicants were the partners of the firm. He argued that Section 10 of the Partnership Act, 1932, provides an indemnity whereby a partner, committing fraud in the affairs of the firm, becomes liable to compensate for the losses caused to the firm by his fraudulent acts ; the applicants have already availed their remedy under Section 10 *ibid* by filing Suit No.579/2005, claiming *inter alia* compensation for the alleged fraudulent acts of the existing partners of the firm,

on the ground that the withdrawal of Suit No.1124/1997 by them was fraudulent ; and, when the law provides a remedy and such remedy has already been availed by the applicants, they are debarred from seeking restoration of Suit No.1124/1997 through the present application under Section 12(2) CPC. The allegations of concealment, misrepresentation and fraud made by the applicants were emphatically denied by the learned counsel in view of the preliminary objections and further submissions made him.

22. Regarding J. Misc. No.47/2012 filed by the applicants under Section 12(2) CPC for setting aside the order dated 27.01.2009 passed in Suit No.1348/2005, Mr. H. A. Rahmani contended that an application under Section 12(2) CPC can be filed only against the final judgment, decree or order, and not against an order passed on an interlocutory application whereby the Suit or proceeding is not decided finally. He argued that it is an admitted position that the impugned order was passed on an interlocutory application filed under Order I Rule 10 CPC by M/S Akbar Mehmood and others, whereby the Suit or proceedings were not finally decided, and admittedly Suit No.1348/2005 is still pending before this Court. He submitted that the application is liable to be dismissed on this ground alone.

REPLY IN BOTH THE CASES BY THE COUNSEL OF VENU GURDAS ADVANI & M/S INTERNATIONAL CONSTRUCTION CORPORATION :

23. Mirza Sarfaraz Ahmed, learned counsel for the above named parties, contended that through the present applications, the applicants have alleged that fraud was played upon this Court in obtaining the impugned orders passed in Suit No.1124/1997 and Suit No.1348/2005 on 06.05.2002 and 27.01.2009, respectively, on the grounds that they were the partners of the firm and the firm's Plot No.DS-124 was illegally assigned and transferred by M/S International Construction Corporation in favour of M/S Al-Kehkashan (Pvt.) Ltd., who in turn sold the sub-divided Plot No.ST-124/I to M/S Akbar Mehmood and others. He submitted that the all the events ; namely, retirement of the applicants from the firm on 26.08.1998, passing of resolution by M/S Al-Kehkashan (Pvt.) Ltd. on 30.01.2002, and execution of the deed of assignment on 30.04.2002 by M/S Al-Kehkashan (Pvt.) Ltd. in favour of the present partners of the firm, admittedly took place prior to the passing of both the impugned orders. He argued that since all the above actions were taken by the parties outside the Court, there was no question of playing fraud upon this Court, and as such the provisions of Section 12(2) CPC are not attracted in these cases. In support of this submission, he relied upon Messrs Safa Textile Ltd. V/S Messrs Habib Bank Ltd. & others, SBLR 2004 Sindh 183, decided by a learned Division Bench of this Court. He

further submitted that if the applicants had any interest in the plot owned by M/S International Construction Corporation, they ought to have joined Suit No.1348/2005 filed by M/S International Construction Corporation in respect of the said plot ; and, the fact that they have admittedly not done so not only shows their malafides, but also that their present applications are not maintainable. The learned counsel emphasized that the applicants have failed to comply with the mandatory requirement of Section 12(2) CPC, as the allegations made by them in their applications do not show that any fraud was played upon the Court when the impugned orders were passed.

REPLY IN BOTH THE CASES BY THE COUNSEL OF M/S AL-KEHKASHAN (PVT.) LTD.:

24. Mr. Faisal Siddiqui, learned counsel for M/S Al-Kehkashan (Pvt.) Ltd., raised a preliminary objection with regard to the maintainability of the applications on the ground that an application under Section 12(2) CPC is not maintainable against an order which merely allows the unconditional withdrawal of a Suit. In support of this submission, he relied upon (1) Shakil Ahmed V/S SSP and others, 2007 CLC 975, (2) Arshadullah and another V/S Muslim Commercial Bank and others, 2008 CLJ 689, and (3) Lal Khan V/S Additional District Judge, Jhelum and others, 1993 CLC 731. In addition to the above, the main thrust of his arguments was that only such orders can be challenged under Section 12(2) CPC whereby rights of parties are finally determined, and an order which does not fall in this particular category, cannot be challenged under the said Sub-Section. He contended that to attract the provisions of Section 12(2) CPC, there must be finality in the impugned final judgment, decree or order, as the said Section bars fresh Suit only because of this reason. He contended that in the instant case the plaintiff / firm had prayed that Suit No.1124/1997 be allowed to be withdrawn unconditionally, and on such application, the Suit was dismissed as not pressed through the impugned order dated 06.05.2002, subject to the rights of defendants 1, 2, 4 and 5 therein ; if it is assumed that any rights were determined, they could be of the aforesaid defendants ; and, if the applicants have any grievance, the same could be only against the said defendants. He argued that the impugned order, on the face of it, shows that there was no final determination of the rights of the parties, nor was any settlement or compromise recorded therein, but the Suit was simply dismissed as not pressed ; therefore, the application is not maintainable under Section 12(2) CPC. In support of this submission, he relied upon the cases of (1) Hassamuddin V/S Al-Zamin Leasing Modaraba and 5 others, 2007 CLD 1600, (2) Muhammad Ramzan and 3 others V/S The State and another, 2010 YLR 1227, and (3) Muhammad Iqbal Siddiqui V/S Bashir Ruiwala, 1989 CLC 1091.

25. The learned counsel contended that Suit No.1124/1997 was filed by the firm through one of its partners ; namely, Mrs. Nilofar Sikandar who had verified the plaint and signed the vakalatnama on behalf of the firm. He pointed out that the application for withdrawal of the said Suit, on which the impugned order was passed, was also filed on behalf of the same partner. He argued with vehemence that the applicants have simply claimed that they are the partners of the firm, but they have not even claimed in their applications that the present applications have been filed by them on behalf of the firm. He contended that Suit No.1124/1997 was instituted as far back as in 1997 and was pending adjudication in August 2002, when according to the applicants they found out about their alleged illegal retirement and other alleged illegal acts committed in connection with the firm, however, no action was taken by them until 2005, when the instant application was filed by them for setting aside the order dated 06.05.2002 although they admittedly came to know in August 2002 about the said alleged illegalities. The learned counsel contended that from the conduct of the appellants, it is very much apparent that their applications are malafide, and as such the same are not maintainable. He relied upon (1) Pio Khan V/S Sar Anjam Khan and another, **PLD 2004 SC 351**, (2) Mst. Hafeezen V/S Rana Zaheer-ud-din and another, **1999 YLR 2214**, and (3) Izzat Khan and others V/S Province of Sindh and others, **1999 YLR 1180**, in support of his above submissions.

26. The learned counsel further submitted that if it is assumed that the allegations made by the applicants were correct, even then the same do not fall within the purview of Section 12(2) CPC, as the applicants have failed to show as to what fraud was committed on the particular dates when the impugned orders were passed. He argued that all the actions and transactions complained of by the applicants have got nothing to do with the impugned orders ; and, they can succeed only if they are able to show that the firm's Suit No.1124/1997 was withdrawn without lawful authority and the impugned order passed in Suit No.1348/2005 was a result of some fraud. He further argued that Section 12(2) CPC envisages only such types of fraud which are played upon the Court and the Court passes a final judgment, decree or order as a result thereof, and not to fraud or misrepresentation committed outside the Court or before passing the final judgment, decree or order. In support of his above submissions, the learned counsel relied upon the cases of (1) Nathu Khan V/S Muhammad Rafiq and another, **1987 CLC 1501**, (2) Hyesons Sugar Mills (Pvt.) Ltd. V/S Consolidated Sugar Mills Limited and others, **2003 CLD 996**, (3) Mst. Hamida Begum V/S Muhammad Saleem, **1988 CLC 2456**, (4) Syed Ameer Hussain Shah V/S Syed Diber Hussain Shah and 3 others, **2011 MLD 1986**, and (5) Miss Shazia Ashraf

V/S Municipal Committee, Sahiwal, through Administrator and another, 2006 CLC 1018.

27. Mr. Faisal Siddiqui Advocate also attacked the *locus standi* of the applicants. He pointed out that both the applicants have admittedly filed Suit No.579/2005 seeking a declaration that they were illegally retired from the firm and that they are still the partners of the firm, which is admittedly *subjudice* before this Court. He submitted that the present applications under Section 12(2) CPC could not be filed by the applicants unless they are declared in Suit No.579/2005 as partners of the firm ; and, in case they succeed in their said Suit, only then they would become entitled to agitate their alleged claim. He contended that by filing Suit No.579/2005 for the above declaration, the applicants are now bound by their pleadings in first obtaining such declaration before asserting their alleged right as partners of the firm. He relied upon Messrs State Engineering Corporation Ltd. V/S National Development Finance Corporation, 2006 CLD 687 (Supreme Court), and Shaikh Ahmad and two others V/S Muhammad Sadiq and another, 2003 YLR 1689, in support of this submission. The learned counsel further pointed out that the certificate issued by the Registrar of Firms recording retirement of the applicants and induction of Sikandar Abdul Karim, has admittedly not been suspended or cancelled. He argued that in terms of Section 68 of the Partnership Act, 1932, the said certificate is a conclusive proof against the applicants, as held by a learned Division Bench of this Court in M. Yousuf Adil Saleem & Co. and 7 others V/S Hamid Masood, 2007 CLC 994. He submitted that in view of the above legal position, the Court could not have refused the withdrawal of Suit No.1124/1997 even if the applicants had appeared before the Court to oppose the said withdrawal at the time of passing of the impugned order.

28. The learned counsel further contended that the applicants have made allegations in their applications under Section 12(2) CPC regarding a collusive agreement, a compromise and deed of assignment dated 30.04.2002. He submitted that none of the above documents has any relevance with the impugned orders or the instant applications under Section 12(2) CPC, as the alleged collusive agreement is not a part of the applicants' applications, but has been challenged by them in their Suit No.579/2005 ; the compromise is also not a part of their applications ; the impugned order dated 06.05.2002 was not passed on the basis of the said compromise, but was passed on the application for withdrawal of Suit No.1124/1997 ; and, the deed of assignment dated 30.04.2002 was not before the Court when the said Suit was dismissed as not pressed. In addition to his above submissions, the learned counsel adopted the arguments advanced on behalf of the firm by Mr. H. A. Rahmani Advocate. In the

end, he submitted that in view of the order passed on 08.02.2008 by the Hon'ble Supreme Court in C.P.L.A. No.78-K/2007 (*M/S Beach Developers and others V/S Muhammad Yunus and others*), till date the conclusiveness and presumption is against the applicants.

**REPLY IN BOTH THE CASES BY THE COUNSEL OF
M/S AKBAR MEHMOOD AND OTHERS:**

29. Mr. Abid S. Zuberi, learned counsel for the above named parties, raised a preliminary objection that the application (J. Misc. No.47/2012) filed by the applicants under Section 12(2) CPC for setting aside the order passed on 27.01.2009 in Suit No.1348/2005, is barred by limitation. He contended that the sub-divided Plot No.DS-124/I was purchased by Mr. Abid Hussain, the predecessor-in-interest of M/S Akbar Mehmood and others, for valuable consideration from M/S Al-Kehkashan (Pvt.) Ltd., which was transferred in his name on 26.08.2002 ; the said Mr. Abid Hussain gifted the said plot to M/S Akbar Mehmood and others, who accepted the said gift ; and consequently, the said plot was transferred in their names in the year 2005. He further contended that the applicants were fully aware of the aforesaid transfer since 14.03.2009, as M/S Akbar Mehmood and others filed an application bearing CMA No.2394/2009 under Order I Rule 10 CPC in the applicants' J. Misc. No.50/2005, on which notice was issued on 17.03.2009. The learned counsel submitted that J. Misc. No.47/2012 is clearly barred by time as it was filed on 16.10.2012, and that too without any application for condoning the delay. It was urged that the application is liable to be dismissed on this ground alone. In support of this preliminary objection, he relied upon *Faizum alias Toor V/S Nader Khan and others, 2006 SCMR 1931.*

30. In addition to his preliminary objection, Mr. Abid S. Zuberi submitted that the applicants have no *locus standi* to file the present applications against M/S Akbar Mehmood and others, or against their Plot No.DS-124/I, as they are the bonafide owners of the said plot being the successors-in-interest of the bonafide purchaser who had purchased the same for valuable consideration. He further submitted that till date the applicants have admittedly not challenged the transaction and transfer of the said plot in favour of M/S Akbar Mehmood and others, or that of their predecessor-in-interest. He specifically pointed out that the firm has admittedly not challenged the ownership of M/S Akbar Mehmood and others in relation to their Plot No.DS-124/I ; the said plot was never owned by the firm ; and therefore, the said plot or the ownership thereof cannot be the subject matter of the present applications under Section 12(2) CPC. He argued that the

applicants have no *locus standi* also on the ground that their alleged rights as the partners of the firm are subject to Suit No.579/2005 filed by them, which is admittedly pending adjudication before this Court. In support of this contention, the learned counsel drew my attention to the order passed on 08.02.2008 by the Hon'ble Supreme Court in C.P.L.A. No.78-K/2007 (*M/S Beach Developers and others V/S Muhammad Yunus and others*) filed by the firm against the present applicants, whereby the order of the learned Division Bench was set aside by observing that the rights of the present applicants in the firm were still not established. It was urged that the applications are liable to be dismissed on this ground also.

31. Mr. Abid S. Zuberi further contended that the instant applications are malafide as the applicants have deliberately concealed material facts from the Court in their applications. He pointed out that the applicants have stated about the application filed by applicant No.1 to the Registrar of Firms, but the fact of its dismissal by the Registrar has been concealed by them. Similarly, they have stated about Suit No.579/2005, but have concealed the above mentioned order dated 08.02.2008 passed by the Hon'ble Supreme Court in proceedings emanating therefrom. He argued that since the applicants have come to this Court with unclean hands, they are not entitled to any relief. The learned counsel emphasized that it is an admitted position, which has also been pleaded by the applicants in their applications under Section 12(2) CPC, that Suit No.1124/1997 was filed by the firm for specific performance of an agreement in respect of Plot No.DS-124 owned by M/S International Construction Corporation. He submitted that this admitted fact shows that the firm never had any title in Plot No.DS-124, therefore, if it is assumed that the applicants are the partners of the firm, even then they never had any right, title or interest in the said plot. The learned counsel also submitted that the applicants are not aggrieved parties as contemplated in Section 12(2) CPC ; not a single document has been filed by them to substantiate the date of their knowledge, or to show that they were not in Pakistan from 1996 till August 2002 ; the allegations of fraud are vague and without any substance ; under Order VI Rule 4 CPC, the applicants were obliged to specifically plead all relevant and material particulars, including dates, in order to establish the fraud alleged by them beyond all reasonable doubt ; and, it is well-settled that in the absence of specific allegations with dates and other relevant particulars, an application under Section 12(2) CPC is not maintainable. In support of his last submission regarding pleading of specific allegations of fraud, the learned counsel relied upon (1) Messrs Dadabhoj Cement Industries

Limited and others V/S Messrs National Development Finance Corporation, 2002 CLC 166, (2) Messrs Dadabhoy Cement Industries Limited and 6 others V/S Messrs National Development Finance Corporation, Karachi, PLD 2002 SC 500, (3) Muhammad Iqbal Kamdar V/S Muhammad Tahir Ahmadani and 12 others, 2011 MLD 835, (4) Mst. Shabana Irfan V/S Muhammad Shafi Khan and others, 2009 SCMR 40.

REBUTTAL BY THE APPLICANTS' COUNSEL :

32. In his rebuttal to the submissions made by Mr. H. A Rahmani Advocate, Mr. Akhtar Hussain, learned counsel for the applicants, contended that all the documents relied upon by Mr. H. A Rahmani have been disputed by the applicants in their Suit No.579/2005 ; the said documents are the subject matter of the said Suit ; the said dispute cannot be decided in the present applications under Section 12(2) CPC which have been filed on the ground of fraud, therefore, the same are maintainable ; it is not correct that the applicants have not challenged the entries of changes recorded by the Registrar of Firms, because such relief has been sought by them in their Suit No.579/2005 in prayers 'B' and 'C' ; Plot No.DS-124 was transferred by DHA in pursuance of the impugned order passed in Suit No.1124/1997, and all subsequent changes in respect thereof were made after withdrawal of the said Suit ; Sections 10 of the Partnership Act, 1932, is not applicable in the instant cases ; and, the alternate prayer of damages made by the applicants in their Suit No.579/2005 is permissible under the law. Rebutting the submissions made by Mirza Sarfaraz Ahmed, learned counsel for Venu Gurdas Advani and M/S International Construction Corporation, Mr. Akhtar Hussain submitted that in his counter affidavit to CMA No.235/2007 filed by Al-Kehkashan (Pvt.) Ltd. in J. Misc. No.50/2005, the said Venu Gurdas Advani had stated that Suit No.1124/1997 was withdrawn as a result of compromise, and fraud was committed in obtaining the order of withdrawal of the said Suit on 06.05.2002.

33. Mr. Akhtar Hussain Advocate rebutted the arguments advanced by Mr. Faisal Siddiqui Advocate by submitting that Section 68 of the Partnership Act, 1932, is not relevant to the instant cases as the applicants have challenged the recording of entries made by the Registrar of Firms ; the case of the applicants is that the impugned orders were obtained by committing fraud, and not that any fraud was committed on the dates when the impugned orders were passed ; fraud was committed on the dates of the impugned orders in the sense that the factual position placed before the Court on the said dates was not the actual or

true factual position ; the claim of the applicants in their applications under Section 12(2) cannot be affected by the order passed by the Hon'ble Supreme Court, as the said order is tentative in nature ; and, even withdrawal simplicitor can be challenged under Section 12(2) CPC in view of PLD 2010 SC 913 and PLD 2003 SC 979 (supra). Rebutting the submissions made by Mr. Abid S. Zuberi, the learned counsel contended that the transfer in favour of M/S Akbar Mehmood and others was illegal as the transfer in favour of their predecessor-in-interest was illegal ; it is not correct that fraud with relevant particulars has not been specifically pleaded by the applicants, as they have specifically disclosed all relevant details in their applications ; and, they have also filed documents along with their applications in support of their claim of fraud, which are to be treated as part and parcel of their applications.

34. I have heard the learned counsel for the parties at great length, perused the material available on record with their able assistance, and have also examined the case-law cited by them at the bar. A number of objections with regard to the maintainability of the applications in hand have been raised by the learned counsel for the respondents. To start with, I shall first deal with the objection raised by them that the applicants have no *locus standi* to file the present applications. In this context, the main thrust of the arguments of Mr. H. A. Rahmani was that the applicants ceased to be the partners of the firm upon their voluntary retirement therefrom with effect from 26.08.1998 after executing the requisite documents. In the same context, it was argued by M/S Abid S. Zuberi and Faisal Siddiqui that the present applications could not be filed by the applicants unless they are declared as partners of the firm in their Suit No.579/2005, which is admittedly *sub judice* before this Court, wherein they have prayed for a declaration that they were illegally retired from the firm and that they are still the partners of the firm.

35. I have examined the documents filed by Mr. Rahmani on behalf of the firm in support of the above objection. A perusal of the said documents shows that an 'Agreement to Sell Partnership Shares' dated 26.08.1998 was executed by the applicants as "sellers", whereby they sold their 50% share in the firm to Sikandar Abdul Karim in consideration of Rs.103,000,000.00 due and owing from them to Sikandar Abdul Karim, and further in consideration of Sikandar Abdul Karim taking over the liability of Rs.43,621,000.00 of Habib Bank Limited and DHA, the book debts and losses of Rs.31,595,600.00, and incurring costs on further construction of the project 'Silver Sands', the aggregate amount being Rs.217,080,253.00 ; and, an agreement dated 26.08.1998 was also executed by the applicants for 'Re-

Constitution of Partnership Firm', wherein they confirmed having retired and released from the firm with effect from the date thereof, and referred themselves therein as the "*outgoing partners*". Both these agreements were signed by applicant No.1 for self and as the attorney of applicant No.2 on the basis of a General Power of Attorney executed in his favour by applicant No.2 on 26.02.1996. After executing the above mentioned agreements, applicant No.1 informed the Registrar of Firms through his letter dated 20.10.1998 that the applicants have withdrawn from the firm after executing an agreement, and the firm has been reconstituted by inducting Sikandar Abdul Karim as a partner in their place. Copies of all the requisite documents were also sent to the Registrar by applicant No.1 along with his said letter. A certificate dated 29.10.1998 issued by the Registrar of Firms has also been filed by the firm, recording and confirming the above changes in the composition of the firm as intimated to him by applicant No.1. The firm has also filed applicant No.1's letter dated 20.10.1998 to the Administrator DHA, confirming retirement of the applicants and induction of Sikandar Abdul Karim, and specifically stating that the applicants have ceased to have any subsisting interest in the firm and Sikandar Abdul Karim will be entitled to deal with the matters relating to the properties and assets of the firm.

36. All the above referred documents have not only been filed by the firm along with its written objections, but are also specifically pleaded therein. The said objections have been verified on oath by Sikandar Abdul Karim as a partner of the firm. However, no affidavit-in-rejoinder was filed by the applicants to controvert or rebut the assertions made and documents filed by the firm, although they had full opportunity to do so and they were fully aware of the implications for not doing so. I may mention here that during the course of hearing, it was stated by the learned counsel for the applicants that they have filed Suit No.579/2005 before this Court to challenge their alleged illegal retirement and the alleged illegal induction of Sikandar Abdul Karim, but it was not claimed or alleged before me that the above mentioned documents relied upon by the firm were forged or that the applicants had not signed them. In the absence of any denial or dispute with regard to the contents of the said documents and the execution thereof by the applicants in these proceedings under Section 12(2) CPC, the presumption would be that they have admitted not only the entire contents of the said documents, but also the contentions of the firm in relation thereto. In such circumstances, Mr. H. A. Rahmani is correct in saying that the entire contents of the firm's objections and the above mentioned

documents filed therewith are to be deemed to be true and admitted by the applicants. The cases of Abdul Ghani (supra) and Jehan Khan (supra) relied upon in this context by the learned counsel are fully attracted in the instant case. In the former case, the Hon'ble Supreme Court was pleased to hold that documentary evidence can be rebutted only by documents ; and in the latter case, it was held by a learned Division Bench of this Court that the legal effect of the failure to file affidavit-in-rejoinder is that the facts narrated in the counter affidavit have to be accepted as true.

37. It is an admitted position that on the dates when the impugned orders were passed, the applicants were not the partners of the firm as per the record of the Registrar of Firms, and as per the said record, the partners were Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia. This being the admitted position, I accept the contentions of Mr. H. A. Rahmani that the certificate issued by the Registrar of Firms recording and confirming retirement of the applicants and induction of Sikandar Abdul Karim as a partner of the firm, is an official document that carries presumption of truth unless it is disproved by cogent and admissible evidence, and at present the said certificate conclusively proves that the applicants retired from the firm on 26.08.1998. I also accept the contention of Mr. Faisal Siddiqui that in terms of Section 68 of the Partnership Act, 1932, the certificate issued by the Registrar of Firms recording retirement of the applicants and induction of Sikandar Abdul Karim is a conclusive proof against the applicants, as the same has admittedly not been suspended or cancelled. The case of Mazloom Hussain (supra) relied upon by Mr. Rahmani on this point supports this view, wherein the Hon'ble Supreme Court was pleased to hold that where a presumption of truth is attached to a document, it cannot be discarded unless proved otherwise by convincing and cogent evidence, and the burden of proof that the entries in the record are wrong, is on the party that alleges it. The case of M. Yousuf Adil Saleem & Co. (supra) decided by a learned Division Bench of this Court relied upon in this context by Mr. Faisal Siddiqui shall also apply to the instant case, wherein it was held by a learned Division Bench of this Court that Section 68 of the Partnership Act, 1932, lays down the principle that only statement, intimation or notice that has been entered in the register of firms constitutes conclusive proof against the person by or on whose behalf the same was filed ; and, the effect of a conclusive proof is that if a person has notified the Registrar that he has become a partner of the firm since a particular date, his statement to the Registrar creates an estoppel against him and he cannot be permitted to resile from it. As noted above, in the instant case it was applicant

No.1 who intimated the Registrar through his letter dated 20.10.1998 that the applicants had withdrawn from the firm after executing an agreement, and the firm had been reconstituted by inducting Sikandar Abdul Karim as a partner in their place. In view of M. Yousuf Adil Saleem & Co. (supra), the said letter / intimation sent by applicant No.1 for self and on behalf of applicant No.2 as her attorney, which has not been disputed by the applicants in these proceedings, is not only a conclusive proof against the applicants, but shall also operate as an estoppel against them due to which they cannot be permitted to resile from it. The submission made on behalf of the applicants that Section 68 of the Partnership Act, 1932, is inapplicable to the present cases is, therefore, not sustainable.

38. In Suit No.579/2005 filed by the applicants on 27.04.2005 against the firm, its partners Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia, the Registrar of Firms and the Province of Sindh, they have prayed *inter alia* for a declaration that they are still the partners of the firm having 25% share each therein with Mrs. Nilofar Sikandar and Mst. Makia ; for a declaration that the entry in the record of the Registrar of Firms pertaining to their retirement and induction of Sikandar Abdul Karim as a partner, was fraudulently managed by Sikandar Abdul Karim ; for a declaration that all acts, deeds and things done by Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia prejudicial and detrimental to their rights and interests from October 1996, and more particularly from October 1998 onwards, are illegal and without lawful authority, and they are liable to render accounts to them for the said period ; and, for mandatory injunction that the Registrar of Firms be directed to remove and expunge the entry dated 29.10.1998 in his records pertaining to the above changes in the firm. In their said Suit, the applicants have also prayed for accounts, damages and injunction. It would not be out of place to mention here that in his rebuttal, it was conceded by the learned counsel for the applicants that all the documents filed and relied upon by the firm have been challenged by the applicants in their Suit No.579/2005, and the said documents are the subject matter of the said Suit. It was his contention that the said dispute cannot be decided in the present applications which have been filed on the ground of fraud, therefore, the same are maintainable. With respect to the learned counsel, his contention to the extent of the maintainability of these applications cannot be accepted in view of Mst. Shabana Irfan (supra) relied upon by Mr. Abid S. Zuberi, wherein the Hon'ble Supreme Court was pleased to hold that if any fraud was allegedly committed it was a matter between the agent and the principal for which the

principal could institute a Suit in a Civil Court, proceed against the delinquent through criminal proceedings and agitate his grievance therein ; the principal, having other separate remedies against his agent, could not be allowed to affect the transaction of the third party who had paid a huge sum to the agent believing that the power of attorney was a valid and legal document, the execution whereof was not denied by the principal, and who was not privy to the alleged fraud, misstatement, misrepresentation or wrong doing of the agent, if any, committed by the agent with his principal ; and, as separate cause of action was available to the principal, separate remedies could be availed by him in accordance with law.

39. In the instant cases, the applicants have admittedly availed the remedy available to them in law by filing Suit No.579/2005, which is *sub judice*. Moreover, if at all any fraud was committed against them by the two admitted partners (Mrs. Nilofar Sikandar and Mst. Makia) and /or Sikandar Abdul Karim, or by any other respondent, which has affected or prejudiced their purported title, status, rights or interest in relation to the firm or its assets and properties as alleged by them, they may have a separate cause of action against the wrongdoer(s). It may be noted that the applicants have not prayed for cancellation of the 'Agreement to Sell Partnership Shares' dated 26.08.1998 and the agreement dated 26.08.1998 for 'Re-Constitution of Partnership Firm', executed by them, which have been filed and relied upon by the firm. It is also to be noted that so far the applicants have admittedly not initiated any proceedings for cancellation of the title documents of the Clifton plot registered in the names of Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia, or Plot No.DS-124 transferred in favour of M/S Al-Kehkashan (Pvt.) Ltd., or Plot No.DS-124/II registered in the names of M/S Akbar Mehmood and others, or Plot No.DS-124/III transferred in favour of M/S Al-Kehkashan (Pvt.) Ltd. The present applications have been filed by the applicants, presuming that they were partners of the firm when the impugned orders were passed and at the time when the present applications were filed. They have presumed so without waiting for the outcome of their Suit No.579/2005, wherein they have sought the above declarations. Filing of the said Suit by them with the above prayer clearly indicates that they themselves believe that there is a serious dispute regarding their rights and status as partners of the firm, and their said rights and status should be declared by the Court, otherwise they would not have filed the said Suit for such declarations. The said purported rights and status asserted by the applicants are subject to the final decision in their Suit No.579/2005, and in case they do not succeed in their said Suit, they shall have no basis to claim themselves as

partners of the firm. Therefore, the applicants cannot be deemed to be aggrieved by the impugned orders, and that they could not file the present applications unless they are declared as partners of the firm in their Suit No.579/2005.

40. The above view is supported by the order passed on 08.02.2008 by the Hon'ble Supreme Court in C.P.L.A. No.78-K/2007 (*M/S Beach Developers and others V/S Muhammad Yunus and others*), which was relied upon heavily by M/S Abid S. Zuberi and Faisal Siddiqui. The said C.P.L.A. was filed by the firm against the present applicants, challenging the order passed by a learned Division Bench of this Court whereby the injunction granted against the firm in the applicants' aforesaid Suit No.579/2005 was confirmed. The Hon'ble Supreme Court was pleased to set aside the orders confirming the injunction against the firm passed by the learned Division Bench and the learned single Judge. It was observed by the Hon'ble Supreme Court that "*The learned Single Judge after having made tentative assessment that respondent Nos.1 and 2 were left with no right whatsoever in the partnership and its business, and that if the Suit of respondent Nos.1 and 2 was decreed they would be entitled to their respective share of the business even if no stay is granted against the petitioners, then subsequently restraining the petitioners and passing a restraint order in favour of the respondents would not be justified from any angle or view.*" Thus it is quite clear that the Hon'ble Supreme Court was pleased to agree with the tentative assessment of the learned single Judge that the present applicants were left with no rights whatsoever in the firm or its business, and that they would be entitled to their respective share if their Suit was decreed.

41. In view of the above discussion, it is held that the applicants have no *locus standi* to question the impugned orders or to file the present applications, as they were not the partners of the firm as per the official record of the Registrar of Firms when the application for withdrawal of Suit No.1124/1997 was filed or when the impugned orders were passed in the said Suit or in Suit No.1348/2005 ; as the undisputed agreements executed by them confirming their retirement and reconstitution of the firm, as well as the certificate issued by the Registrar of Firms in relation thereto, are admittedly still in the field and have not been cancelled by any Court ; and, also as the applicants' Suit No.579/2005 for declaration of their alleged right, title and status as partners of the firm, is admittedly *sub judice* and has not yet been decided in their favour.

42. Though I have held that the applicants have no *locus standi* to file the present applications, nevertheless in order to put at rest the controversy initiated

by the applicants, it is necessary in my humble opinion to decide all the grounds of attack and defense urged on behalf of the parties.

43. The next objection that needs to be resolved with regard to the maintainability of the applications in hand was raised by Mr. Faisal Siddiqui Advocate that an application under Section 12(2) CPC is not maintainable against an order which merely allows the unconditional withdrawal of a Suit ; only such orders can be challenged under Section 12(2) CPC whereby rights of parties are finally determined ; and, to attract the provisions of Section 12(2) CPC, there must be finality in the impugned final judgment, decree or order. In order to see whether this objection has any force or not in the facts and circumstances of the applications in hand, the impugned orders need to be examined closely. The order impugned in J. Misc. No.50/2005 was passed in Suit No.1124/1997 on 06.05.2002 on CMA No.3354/2002 filed by the firm, who was the plaintiff in the said Suit. The said application was filed by the firm, which was signed by one partner and the attorney of two partners as well as the learned counsel of the firm, stating that the plaintiff-firm wishes to withdraw the said Suit unconditionally ; and, it was prayed that the Suit be dismissed as withdrawn with no order as to costs. When the application came up for orders before the Court, the learned counsel for the plaintiff-firm verified the signatures appearing on the application. It may be noted that the learned counsel for defendants 1 and 2, against whom the main relief was sought by the plaintiff-firm in respect of Plot No.DS-124, was present before the Court on 06.05.2002, but he did not oppose the application ; the learned counsel for defendant No.3 gave consent on behalf of the said defendant ; and, defendants 4 and 5 (DHA and MEO) were proforma defendants. In view of the above, the application was allowed through the impugned order dated 06.05.2002 and the Suit was dismissed as not pressed subject to the rights of the defendants.

44. In Arshadullah (supra) relied upon by Mr. Faisal Siddiqui Advocate, it was held by the Hon'ble Supreme Court that the order of High Court disposing of appeal before it as withdrawn on the statement of the counsel for the appellant would not constitute fraud or misrepresentation. In Lal Khan (supra) relied by the learned counsel, the plaintiff filed an application for unconditional withdrawal of his Suit without disclosing the terms and conditions of compromise arrived at between the parties. The application was allowed, and his Suit was dismissed as withdrawn in the absence of the defendant without any reference to the compromise. The said order of withdrawal / dismissal of the Suit was challenged by the defendant under Section 12(2) CPC. It was held by the learned Lahore

High Court that the defendant had failed to establish that any fraud had been committed by the plaintiff and as such no illegality was committed by the trial Court. In Shakil Ahmed (supra) relied upon by the learned counsel, it was held by the learned Lahore High Court that disposal of a Constitutional Petition was not a judgment, decision or order, and therefore, was not covered within ambit of Section 12(2) CPC.

45. Under Section 12(2) CPC, a person can seek his remedy by making an application to the Court which passed the final judgment, decree or order, if the validity of the same is challenged by him on the plea of misrepresentation, fraud or want of jurisdiction. The word “validity” used in this Sub-Section is meaningful and significant, which, in my humble opinion, would directly relate to the legality, legitimacy and propriety of the judgment, decree or order challenged under this Sub-Section. Therefore, it follows that the judgment, decree or order challenged under this Sub-Section must be based on formal determination or adjudication in the proceedings, in the absence of which its “validity” can neither be challenged nor can it be decided ;and a judgment, decree or order which does not fall in this particular category, cannot be challenged under this Sub-Section. While deciding an application under Section 12(2) CPC, the Court is duty-bound to first see the nature and effect of the impugned judgment, decree or order, and then to see whether the requirements of Section 12(2) CPC have been fulfilled by the applicant or not. The expression “decree” is defined in Section 2(2) CPC as the formal expression of an adjudication which, so far as the Court expressing it, conclusively determines the rights of parties with regard to all or any of the matters in controversy in the Suit, and it may be either preliminary or final ; and, “judgment” is defined in Section 2(9) CPC as the statement given by the Judge of the grounds of a decree or order. In the instant cases, admittedly no judgment or decree is under challenge, and orders passed in two separate Suits have been impugned. In my view the element of conclusive determination of the rights of parties with regard to all or any of the matters in controversy in the Suits, is fully applicable to orders challenged under Section 12(2) CPC. This view is supported by Ghulam Hussain Shah V/S Ghulam Muhammad, **PLD 1974 SC 344**, wherein the Hon’ble Supreme Court was pleased to hold that the word “judgment” covers order and the word “order” also means in general sense a judgment. From the facts noted above, it is clear that on 06.05.2002 no determination or adjudication took place nor was any judgment, decree or order passed in the firm’s Suit No.1124/1997 on merits, but in fact the Suit was simply dismissed as not pressed without the opposition of the main contesting

defendants although their learned counsel was present, and without any conclusive determination or adjudication of any rights or liabilities of the parties to the Suit.

46. Regarding the impugned order dated 27.01.2009 passed in Suit No.1348/2005, it was passed on four applications filed by M/S Al-Kehkashan (Pvt.) Ltd. and M/S Akbar Mehmood and others, the interveners in the said Suit filed by M/S International Construction Corporation against Province of Sindh, CDGK and DHA, for declaration, possession, damages and injunction. It was the case of the plaintiff in the said Suit that Plot No.ST-24 was allotted and handed over to it by KDA on 18.06.1977 and subsequently a lease deed in respect thereof was executed in its favour on 20.10.1977 ; and, the said plot was handed over by KDA to DHA in the year 1978 without the plaintiff's consent. It was prayed *inter alia* by the plaintiff in the said Suit that the lease in its favour be declared as legal, valid and binding on the defendants ; demarcation of the said plot be carried out and possession thereof be handed over to it ; the defendants be restrained permanently from selling, conveying, transferring, alienating, etc. the said plot ; damages claimed in the Suit be awarded ; and in the alternative, the other plots described in the plaint be allotted and handed over to the plaintiff. On 27.01.2009 when the interveners' applications were heard at some length, the plaintiff agreed to file a statement relinquishing all his claims in respect of Plot No.DS-124 in favour of the interveners. Accordingly, the plaintiff voluntarily filed a statement in its said Suit stating that it was the owner of Plot No.DS-124, which was sold by it to the intervener M/S Al-Kehkashan (Pvt.) Ltd., who subsequently got it bifurcated / sub-divided into two plots, that is, Plot No.DS-124/I and Plot No.DS-124/II ; Plot No.DS-124/II was retained by M/S Al-Kehkashan (Pvt.) Ltd. and Plot No.DS-124/I was sold to one Shaikh Abid Hussain, the father / predecessor-in-interest of M/S Akbar Mehmood and others ; the plaintiff had no claim, right, title or interest in any of the said plots ; both the aforesaid plots were in peaceful and vacant possession of M/S Al-Kehkashan (Pvt.) Ltd. and M/S Akbar Mehmood and others ; and, the transfer in their favour was a past and closed transaction. Vide impugned order dated 27.01.2009, the above voluntary statement given before the Court by the plaintiff, was recorded. The facts noted above show that on 27.01.2009 no determination or adjudication took place nor was any judgment, decree or order passed in Suit No.1348/2005 on merits, but in fact the voluntary statement submitted orally and in writing by the plaintiff in the said Suit was recorded without any conclusive determination or adjudication. The rights or liabilities of the parties to the Suit are yet to be

determined / adjudicated upon conclusively as the said Suit is admittedly *sub judice*. It may be noted that the firm, its partners or the applicants are not parties in Suit No.1348/2005, nor have the applicants filed any application for joining in the said Suit as parties.

47. In view of the above factual and legal position, I am of the considered opinion that the order dated 06.05.2002 passed in Suit No.1124/1997 whereby the said Suit was simply dismissed as not pressed without any opposition of the main contesting defendants, with the consent of defendant No.3, and without any conclusive determination or adjudication ; and, the order dated 27.01.2009 passed in pending Suit No.1348/2005 whereby only the voluntary statement submitted orally and in writing by the plaintiff in the said Suit was recorded without any conclusive determination or adjudication, cannot be challenged under Section 12(2) CPC.

48. The next objection of M/S Abid S. Zuberi, Faisal Siddiqui and Mirza Sarfaraz Ahmed Advocates was that Section 12(2) CPC would apply only to cases where fraud or misrepresentation is alleged or has taken place in proceedings before the Court and not to anything done outside the Court. In support of this objection, the learned counsel relied upon a number of cases. In Mst. Shabana Irfan (supra) relied upon by Mr. Abid S. Zuberi, the Hon'ble Supreme Court was pleased to hold that if any fraud was allegedly committed, separate cause of action was available to the aggrieved party for which separate remedies could be availed by him in accordance with law. In Messrs Dadabhoy Cement Industries Limited (supra) relied upon by the learned counsel, it was held by a learned Division Bench of this Court that the provisions of Section 12(2) CPC would not be attracted when the alleged fraud or misrepresentation was not in connection with the proceedings, but prior to their initiation. This decision of the learned Division Bench was upheld by the Hon'ble Supreme Court in Messrs Dadabhoy Cement Industries Limited and 6 others V/S Messrs National Development Finance Corporation, Karachi, PLD 2002 SC 500, cited by Mr. Zuberi. In Messrs Safa Textile Ltd. (supra) relied upon by Mirza Sarfaraz Ahmed, it was held by a learned Division Bench of this Court that the provisions of Section 12(2) CPC would apply if fraud or misrepresentation is alleged during the proceedings of the Suit in Court and not anything done outside the Court. In Miss Shazia Ashraf (supra) relied upon by Mr. Faisal Siddiqui, it was held by a learned Division Bench of Lahore High Court that provisions of Section 12(2) CPC would be attracted only where fraud or misrepresentation is alleged in connection with the proceedings of the Court and not prior to its initiation or after decision of the

Court. Similar view was taken in the Single Bench cases of Syed Ameer Hussain Shah, Hyesons Sugar Mills (Pvt.) Ltd., Mst. Hamida Begum, and Nathu Khan (supra) cited by Mr. Faisal Siddiqui, which are not being discussed here in view of the above authorities.

49. In the instant applications, the entire basis of the applicants' case is that they were retired illegally from the firm, Sikandar Abdul Karim was illegally inducted as a partner of the firm, and after committing the said acts, Sikandar Abdul Karim and the other two partners of the firm Mrs. Nilofar Sikandar and Mst. Makia in collusion with one another, withdrew the firm's Suit No.1124/1997 through the impugned order dated 06.05.2002, and managed to obtain the impugned order dated 27.01.2009 in Suit No.1348/2005 in collusion with the plaintiff and interveners in the said Suit. The events of retirement of the applicants and induction of Sikandar Abdul Karim as a partner of the firm, which, according to the applicants, were collusive, malafide, fraudulent and without their consent, took place in the year 1998, that is, much prior to the passing of the impugned orders. The above events / acts were admittedly not done by the parties in connection with the proceedings before the Court, nor were they recorded by the Court at the time of passing the impugned orders. Moreover, it was conceded in his rebuttal by the learned counsel for the applicants that Plot No.DS-124 was transferred by DHA in pursuance of the impugned order passed in Suit No.1124/1997, and all subsequent changes in respect thereof were made after withdrawal of the said Suit. Thus, it is an admitted position that in J. M. No.50/2005, the acts, which constituted the alleged fraud or misrepresentation according to the applicants, took place either outside the Court or subsequent to the passing of the impugned order ; and in J. M. No.47/2012, the same took place prior to the initiation of Suit No.1348/2005. In both the cases, the alleged fraud or misrepresentation certainly did not take place in connection with the proceedings before the Court. In his rebuttal, learned counsel for the applicants also conceded that it is not the case of the applicants that any fraud was committed on the dates when the impugned orders were passed. He attempted to argue that because of the collusive, malafide and fraudulent acts of the parties the process of the Court was abused and the impugned orders were obtained as a result thereof. I am afraid this argument of the learned counsel has no force as Section 12(2) CPC cannot be invoked on the plea of malafides or abuse of process of the Court. It is well-settled that Section 12(2) CPC is a special provision, its scope is very limited, and the provisions thereof must be construed strictly ; and, in order to invoke the said provision, the fraud or misrepresentation

must be specifically alleged with all relevant and material particulars, and it must have taken place in connection with the proceedings of the Court and not prior to its initiation or after decision of the Court. In view of the admitted position that it is not the case of the applicants that any fraud was committed on the dates when the impugned orders were passed, and also in view of my above observations and the above-cited authorities, it is held that the provisions of Section 12(2) CPC could not be invoked by the applicants. If at all any fraud or misrepresentation, not in connection with the proceedings before the Court, was committed against them outside the Court by the partners of the firm or by any third party, their remedy was to take action against them in accordance with law, which in fact they have availed by filing Suit No.579/2005.

50. It was also argued by the learned counsel for the respondents that in their applications under Section 12(2) CPC the applicants have not made any specific allegations of the alleged fraud or what fraud was actually played upon the Court, therefore, the applications are liable to be dismissed on this ground also. I have already held that in both cases the alleged fraud or misrepresentation certainly did not take place in connection with the proceedings before the Court. Nevertheless, both the applications were closely examined by me in order to see whether specific allegations of fraud are contained therein or not, and also whether the fraud allegedly played upon the Court has been specifically pleaded therein or not. The allegations are vague in nature and the date of knowledge of the alleged fraud has not been specifically disclosed by the applicants. All the allegations pertain to alleged illegal transactions inter se parties either before or after passing of the impugned orders. The applicants have admitted in their applications that they came to know in August 2002 that on the basis of forged and fraudulent documents managed and produced before the Registrar of Firms by Sikandar Abdul Karim, Mrs. Nilofar Sikandar and Mst. Makia, they were retired from the firm and Sikandar Abdul Karim was inducted as a partner, and also that Sikandar Abdul Karim had taken over the business of the firm. However, they have not disclosed the exact date of their knowledge nor have they explained the long delay of 33 months for filing their first application (J. Misc. No.50/2005) under Section 12(2) CPC on 04.05.2005. Similarly, they have also not disclosed the exact date of their knowledge about the alleged collusive, fraudulent and illegal agreements between Mrs. Nilofar Sikandar and Mst. Makia on the one hand and M/S Al-Kehkashan (Pvt.) Ltd. on the other ; and, also the exact date of knowledge when they came to know about the impugned order passed in Suit No.1124/1997. The applicants have also not explained as to how

the alleged illegal actions and transactions by or between the parties can be deemed to be a fraud played upon the Court as contemplated in Section 12(2) CPC. It is worth noticing that in J. Misc. No.50/2005, vague and evasive allegations of collusion, misrepresentation and fraud have been leveled by the applicants against Sikandar Abdul Karim, Mrs. Nilofar Sikandar, Mst. Makia and M/S Al-Kehkashan (Pvt.) Ltd., but there is not a single allegation of like nature against the main contesting defendants (defendants 1 and 2 in Suit No.1124/1997) against whom the main relief of declaration and specific performance was sought by the firm. The applicants have failed to explain and justify the alleged fraud in the absence of any allegation against the said main contesting defendants whose learned counsel was present when the impugned order was passed in Suit No.1124/1997 without any objection by him. It is well-established that in order to succeed in an application under Section 12(2) CPC, the scope whereof is very limited, allegations of fraud or misrepresentation with dates and all relevant and material particulars must be specifically alleged and pleaded by the applicant.

51. The above view is supported by Messrs Dadabhoj Cement Industries Limited (supra) relied upon by Mr. Abid S. Zuberi, wherein it was held by a learned Division Bench of this Court that where a party levels allegation of fraud then it must specify and mention the details of the fraud and further that the same was required to be proved beyond reasonable doubt and not on the basis of surmises, conjectures and suspicion ; and, the essential requirement for an application under Section 12(2) CPC is that full particulars of the fraud and misrepresentation must be given in the application. As already noted above, the findings in the above cited case were upheld by the Hon'ble Supreme Court. In view of my above observations and the settled law, it is held that the applications in hand are not maintainable as the same are not compliant of the mandatory requirement of disclosing full and specific particulars of misrepresentation or fraud.

52. I shall now deal with the applicability and relevance of the cases cited and relied upon by the learned counsel for the applicants to the cases in hand.

(a) In Mrs. Afroz Shah (supra) the plaintiffs initially sought withdrawal of the Suit with permission to file a fresh one, and after filing a fresh Suit, they applied for unconditional withdrawal of the original Suit. The application for withdrawal of the Suit was resisted by the defendants, however, the same was allowed and the Suit was dismissed as unconditionally withdrawn.

The said order was set aside by the Hon'ble Supreme Court on the ground that the same was passed in a mechanical manner without deciding the objections raised by the defendants. The above-cited authority is not applicable in the instant cases as the application for withdrawal of Suit No.1124/1997 filed by the firm was not contested by any of the defendants, but on the contrary, the same was not opposed by the main contesting defendants 1 and 2 and was consented to by defendant No.3. This authority in fact goes against the applicants as in paragraph 43 thereof it was held that while examining the appropriateness of the exercise of absolute right and unconditional power of the plaintiff to withdraw a Suit, Court cannot limit the exercise of such right to circumvent, abridge, scuttle or destroy the right that the law grants to the plaintiff.

- (b) The case of Haji Muhammad Boota (supra) is also inapplicable in the facts and circumstances of the present cases as the same pertains to the second round of litigation between the contesting parties when valuable rights had been created in their favour in the first round. In any event, this authority also goes against the applicants as in paragraph 4 thereof at page 998, the Hon'ble Supreme Court was pleased to hold that under Order XXIII Rule 1(1) CPC a plaintiff has an indefeasible right to withdraw his Suit or abandon a part of his claim after institution of Suit without the permission of the Court.
- (c) In Abdul Razzaq (supra), which is merely a leave granting order, leave was granted by the Hon'ble Supreme Court in view of the fact that the applicant in his application under Section 12(2) CPC had pleaded that he had not authorized his brother / counsel to enter into compromise and the same had been obtained through fraud, therefore, the controversy could not be decided without allowing opportunity to the parties to lead evidence. It was, however, held in this authority that framing of issues and recording of evidence depends upon the facts and circumstances of each case. I have already held that the applicants have no *locus standi* to file these applications as they were not the partners of the firm on the relevant dates according to the official record maintained by the Registrar of Firms, and also in view of the pendency of their Suit No.579/2005 wherein they have not yet been declared as partners of the firm ; the impugned orders could not be challenged under Section 12(2) CPC ; and, no fraud was committed in connection with the proceedings before the Court. Therefore,

there is no question of framing of issues or recording evidence, and as such the above-cited authority cannot be applied to the instant cases.

- (d) In Moulana Atta-ur-Rehman (supra), it was held by the Hon'ble Supreme Court that no order could be passed at the back of a party, particularly against a person who may be affected by such an order or which deprived him of his vested right or interest. This was an election matter wherein an order was passed by the Returning Officer at the back of a party contesting the election. This case is not relevant at all as the applicants were not the partners of the firm as per the official record of the Registrar of Firms when the impugned orders were passed, therefore, there was no question of passing the orders at their back.
- (e) In Abdur Rehman Khan (supra), it was held by a learned Division Bench of this Court that the main ingredient of fraud would be intention to deceive or to induce a person by misrepresentation to enter into a contract on a false belief ; a fraud might consist of an action in suppression of what was true or of an action in representation of what was false ; and, in order to sustain an action for deceit, it must be proved that there was a statement as to a fact which was false, and that it was false to the knowledge of the person making it, or that he made it not caring whether it was true or false. In Suit No.1124/1997, no such statement or representation was made before the Court nor was any true fact suppressed from the Court, as the said Suit was simply withdrawn by the firm, without opposition by any of the defendants, through such persons who were its partners on the relevant date according to the official record maintained by the Registrar of Firms. In Suit No.1348/2005 also, the voluntary statement of the plaintiff therein was recorded, which was based on the factual position regarding the ownership of Plot No.DS-124 prevailing on the relevant date. Therefore, this case is also of no help to the applicants.
- (f) The case of M/S Dadabhoj Cement Industries Ltd. (supra) does not support the applicants, but it in fact goes against them. As noted above, it was held in the said case by a learned Division Bench of this Court that the essential requirement for making an application under Section 12(2) CPC is that full particulars of the fraud or misrepresentation must be given in the application ; and, the provisions of the said Sub-Section would not be attracted when the alleged fraud or misrepresentation was not in connection with the proceedings, but was prior to their initiation.

- (g) The case of Mumtaz Bibi (supra) is not at all relevant as the decree in the said case was obtained by not adopting the normal course of service of summons or process.
- (h) Likewise, the case of Agha Ghazanfar Ali (supra) is also not relevant at all as it was not a case under Section 12(2) CPC.

53. It was the contention of the learned counsel for the applicants that they have every right to file these applications as the firm has vested rights, title and interest in Plot No.DS-124, which was bifurcated into two plots and was fraudulently, illegally and collusively transferred to M/S Al-Kehkashan (Pvt.) Ltd. and M/S Akbar Mehmood and others. It is an admitted position that Plot No.DS-124 was not owned by the firm, but there was merely an agreement in respect thereof between the firm and M/S International Construction Corporation, and the firm, before acquiring the title or ownership of the said plot, had filed Suit No.1124/1997 for specific performance of the said agreement in respect of the said plot. In any event, the applicants have not initiated any proceedings up till now for cancellation of the title documents in favour of any of the transferees of Plot No.DS-124, therefore, they cannot be permitted to challenge the subsisting title of the said transferees under the garb of Section 12(2) CPC. By relying on the counter affidavit filed by Venu Gurdas Advani in reply to CMA No.235/2007 in J. Misc. No.50/2005, it was contended by the learned counsel for the applicants that the above named deponent had confirmed that fraud was committed in obtaining the impugned order dated 06.05.2002 passed in Suit No.1124/1997. With respect to the learned counsel, I am unable to agree with him for the reason that the burden was exclusively on the applicants to establish beyond reasonable doubt and not on the basis of surmises, conjectures and suspicion, that the allegations of fraud leveled by them were true or at least that the same had some substance, and that the alleged fraud was played upon the Court in connection with the proceedings before it. The applicants were duty-bound to make out a case of fraud on the strength of the allegations contained in their applications, in which they have not succeeded in my humble opinion. The submission made on behalf of the applicants that Plot No.DS-124 was not the subject matter of Suit No.1348/2005, therefore, the impugned order dated 27.01.2009 in relation to the said plot could not be passed in the said Suit, appears to be misconceived. As observed above, the said plot was never owned by the firm ;and, as per the official record of the Registrar of Firms, the applicants were not the partners of the firm when the impugned order dated 27.01.2009 was passed in Suit

No.1348/2005 or when the said Suit was instituted. Therefore, the applicants cannot be deemed to be aggrieved by the said impugned order. The parties who had / have interest in Plot No.DS-124 have admittedly not challenged the said order. It would not be of place to mention here that although the applicants are claiming rights, title and interest in the firm and its properties and assets, however, till date they have not filed any application in Suit No.1348/2005 to join the said Suit as defendants in order to safeguard their purported claim, rights, title and interest in Plot No.DS-124 which is the subject matter of the said Suit.

54. In J. Misc. No.50/2005, it is not the case of the applicants that the application for withdrawal of the firm's Suit No.1124/1997 was not filed by the firm, or that the learned counsel representing the firm on the date when the said Suit was dismissed as not pressed was not engaged by the firm, or his power had ceased to have effect. Had the applicants been partners of the firm on the date when the impugned order was passed, and such fact had been misrepresented or concealed from the Court on the said date, the applicants could have claimed that the impugned order was obtained by misrepresentation and by playing fraud upon the Court. However, this is not the case set up by them in any of the applications in hand.

55. The contention of Mr. Abid S. Zuberi that J. Misc. No.47/2012 is barred by time, has force. The record indicates that an application bearing CMA No.2394/2009 under Order I Rule 10 CPC was filed on 14.03.2009 by M/S Akbar Mehmood and others in the applicants' J. Misc. No.50/2005, on which notice was ordered to be issued on 17.03.2009. As per the bailiff's report dated 06.04.2009 available in the file of J. Misc. No.50/2005, notice was duly served on the learned counsel for all the parties, including the applicants. Thus, the applicants came to know on 06.04.2009 not only about the claim of M/S Akbar Mehmood and others in respect of the sub-divided plot of Plot No.DS-124, but also about the title of M/S Al-Kehkashan (Pvt.) Ltd. from whom M/S Akbar Mehmood and others were claiming title. In view of the above, the three years' prescribed period of limitation for filing the application under Section 12(2) CPC expired on 05.04.2012. Therefore, J. Misc. No.47/2012 filed by the applicants on 16.10.2012, is clearly barred by time. Moreover, the applicants have not filed any application for condoning the long delay of more than six months, justifying therein the delay of each and every day.

56. Before parting with these cases, I may state with all humility that I would be doing injustice to the learned counsel for the parties if their strenuous efforts in presenting their respective cases in a meticulous manner are not appreciated.

57. After minutely examining the applications in hand and the material on record as well as the law cited at the bar with the able assistance of the learned counsel for the parties and giving due consideration to the arguments advanced by them, the conclusion of the above discussion is that the applicants have no *locus standi* to file the instant applications ; the impugned orders could not be challenged under Section 12(2) CPC ; the fraud alleged by the applicants was not in connection with the proceedings before the Court nor was any fraud played upon the Court when the impugned orders were passed ; the applicants have failed to fulfill the mandatory requirement of Section 12(2) CPC by not specifically disclosing and pleading the relevant and material details of the alleged fraud ; and, J. Misc. No.47/2012 is hopelessly barred by time. Consequently, J. Misc. No.50/2005 and J. Misc. No.47/2012 are dismissed along with the listed applications with no order as to costs.

J U D G E