HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

R.F.A. No.298 of 2021

Mohammad Ramzan Khokhar

Versus

Mohammad Riaz and others

Appellant by	**:**	**Malik Tanveer-ul-Hassan, Advocate.**
Respondents by	**:**	**Mr. Gul Hussain Jadoon, Advocate for Res. No.1.** **M/s Hasan Raza Khan and Yasmeen Yasin Sandhu, Advocates for Ms. Saba Mohsin, Ex-Oath Commissioner.**
Date of Hearing	**:**	**24.04.2024**

Babar Sattar, J:- The appellant has impugned the order and decree dated 28.04.2021, passed by the Civil Judge, East-Islamabad pursuant to which the suit filed by respondent No.1 was decreed on the basis of compromise effected between the parties subject to payment of remaining consideration in the amount of Rs.9.7 million.

2. Learned counsel for the appellant submitted that the appellant had not authorized his counsel to make the conceding statement before the Civil Court. He submitted that at the relevant time the appellant was behind bars and was not consulted by his counsel prior to making such statement. He further submitted that an application has been moved before

the Punjab Bar Council to initiate disciplinary proceedings against his counsel.

3. The learned counsel for respondent No.1 raised the issue of maintainability and submitted that the appeal was not maintainable against an order and decree which was in the form of consent order in terms of section 96(3) of the Code of Civil Procedure, 1908 **("CPC")**. He submitted that the power of attorney issued by the appellant to his counsel granted the counsel the power to enter into compromise in relation to the suit and it was in exercise of such power that a compromise was affected and a consent decree was passed, which could not be challenged in appeal. He relied on ***Siraj Din Vs. Mohammad Yousaf etc.*** ***(1982 SCMR 539), Mohammad Ejaz and 18 others Vs. Noor Khan and 03 others (2018 CLC 75), Aamir Abbas and 02 others Vs. Yasmeen Haider and 03 others (2018 CLC 1482), Mohammad Ali Vs. Mohammad Ishaq (1992 MLD 741), Hassan Akhtar Vs. Azhar Hameed (PLD 2010 SC 657), Mohammad Bashir Vs. Election Tribunal (PLD 1992 Lahore 432) and Mohammad Saeed Vs. Mohammad Akram Munir (2001 YLR 919)*** for the said preposition.

4. Learned counsel for the appellant submitted in rebuttal that the compromise was affected between the respondents and the family members of the appellant while he was behind bars. The appellant was not consulted before entering into the compromise that resulted into the consent decree. Once the

appellant had been released from jail, he also filed an application before the trial Court contending that the conceding statement made by his counsel had not been made on his instruction.

5. Section 96(3) of CPC states that, *"no appeal shall lie from a decree passed by Court with the consent of parties."* Further Order XXIII Rule 3 of CPC states that, *"where it is proved to the satisfaction of Court that the suit had been adjusted wholly or in part by any agreement or compromise or where the defendant satisfies the plaintiff in respect of whole or any part of the subject matter of the suit, the Court shall order such agreement compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."* The other relevant provision is Rule 1 of Order XLIII, which identifies orders from which appeals shall lie in terms of section 104 of CPC. Rule 1(m) of Order XLIII mentions, *"an order under Rule 3 of Order XXIII recoding or refusing to record an agreement, compromise or satisfaction."*

6. In view of the above, there are two legal questions that emerge in the instant case. (i) Whether an Advocate is authorized under law to enter into a compromise on behalf of the party that he represent and can a consent decree be issued on the basis of the statement of the Advocate. And (ii) whether an order recording an agreement of compromise is an appealable order in terms of section 104 read with Order XLIII Rule 1 of CPC.

7. The first question, which is the foremost issue in the instant appeal, is whether the Advocate for the appellant was competent to enter into a compromise. It has not been contested by the appellant that the appellant did appoint the counsel as his Advocate, who subsequently appeared before the trial Court and recorded a statement on behalf of the appellant that a compromise had been entered into and that the suit be decreed in terms of such compromise. It is also not contested that the appellant did not place any limitation on the power granted to the advocate appointed by him to enter into a compromise in relation to the subject matter of the suit in which such advocate was representing the appellant. The question of the authority of a counsel to enter into a compromise came before the Privy Council in ***Sourendra Nath Mitra and others Vs. Tarubala Dasi (AIR 1930 PC 158).*** The Privy Council held that, "*their Lordships regard the power to compromise a suit as inherent in the position of an Advocate … It is a power deemed to exist because its existence is necessary to effectuate the relations between Advocate and client, to make possible the duties imposed upon the Advocate by his acceptance of the cause of his client.*"

8. The law laid down in ***Sourendra Nath Mitra*** was then followed by the Supreme Court in ***Dr. Ansar Hassan Rizvi Vs. Syed Mazahir Hussain Zaidi and 03 others (1971 SCMR 634)*** wherein it was held that, "*unless there is a specific authority to the contrary, and in the absence of written authority such as a Vakalatnama, an Advocate has implied*

authority of his client to settle the suit." This principle of law was reiterated in ***M/s Arokey Limited and another Vs. Munir Ahmad Mughal and 03 others*** ***(PLD 1982 SC 204)***. While reiterating the law laid down in ***Dr. Ansaar Hassan Rizvi***, it held that, *"as the power to enter into agreements was conferred with the reference to the pending litigation, it included the power to settle that litigation by any type of agreement."* The Supreme Court revisited this issue in ***Mst. Noor Jahan Farooqi Vs. Azmat Hussain Farooqi and another*** ***(1992 SCMR 876)*** where after reiterating the law laid down in ***Sourendra Nath Mitra*** and citing dicta from the Halsburys Laws of England the Supreme Court clarified that, *"where a general power to compromise is given to the Advocate in a pending case, he has the authority to settle the dispute of that case and such settlement will be binding on the party. However, such authority will not authorize the Advocate to compromise a dispute which is not the subject matter of the case or is collaterally involved in it unless specific authority in that regard has been given."*

9. It was held in ***Hassan Akhtar Vs. Azhar Hameed*** ***(PLD 2010 SC 657)*** that in terms of Rule 3 and 4 of Order III and Rule 1(1) of Order XXIII, an Advocate had the power to compromise or abandoned a claim on behalf of his client unless his *Wakalat Nama* restricted such authority.

10. Let us address question No.ii which is fairly straightforward. In terms of section 96(3) read with Order XXIII of CPC, the Court is under an obligation to record a compromise

where a settlement has been reached between the parties. Once a settlement has been reached and a consent decree has been passed, such decree is not appealable. If, however, a decree has been passed on the basis of an order recording a compromise and the parties that have purportedly entered into a compromise contest whether a compromise was reached, such order is appealable in terms of Order XLIII Rule 1(m) read with section 104 of CPC. It was held in ***Fazal Mehdi and others Vs. Allah Ditta*** ***(PLD 2007 SC 343)*** that where the question in dispute was whether or not consent had been given to enter into a compromise the order recording such consent could be challenged in terms of Order XLIII Rule 1(m) of CPC.

11. In ***Mohammad Ali Vs. Mohammad Ishaq*** ***(1992 MLD 741)*** the Lahore High Court ruled that a consent decree passed by the trial Court in terms of a compromise could not be set aside by the appellate court where a *Vakalatnama* had been issued to a counsel authorizing him to enter into a compromise.

12. It was held by the Supreme Court in ***Siraj Din Vs. Mohammad Yousaf etc.*** ***(1982 SCMR 539)*** that where a consent decree had been passed an appeal against such decree was not competent.

13. It has most recently been held by the Supreme Court in ***Mohammad Riaz Hussain Vs. Zahoor-ul-Hassan*** ***(2021 SCMR 431)*** that a decree passed by a Court with the consent of the parties was not appealable on merits and it was only where a party disputed the fact that a compromise was affected and

whether an order had been passed by consent, could such order be challenged in terms of Rule 1(m) of Order XLIII of CPC.

14. The law on the question is therefore clear. Where there exists an order recording consent by the parties, any party can challenge such order on the basis that no consent was given for purposes of passing of an order on the basis of a compromise, which then led to the issuance of a decree. Where such ground is raised the appeal cannot be dismissed out of hand in terms of section 96(3) of CPC. The appeal would be maintainable and it would then be for the appellant to establish that the order recording consent was not sustainable as no consent had been given or no statement had been made before the court.

15. In the instant case the basis for challenge is that no consent was given by the appellant and the compromise was affected by the counsel who had received no specific instructions for such purpose from the appellant. This argument is not sustainable as it is settled law that the Advocate of a party has implicit power to affect a compromise with regard to the subject matter of the suit in which such Advocate is representing a party. Further, in the instant matter, the appellant had given explicit authority to his counsel to affect compromise in terms of Clause-I of the *Vakalatnama* issued to him and had further undertaken to ratify and confirm all acts of the counsel. Thus, there was clear authority vested in the counsel to affect a compromise, which compromise was affected by the counsel in the interest of the appellant and accordingly

the impugned order was passed recording such compromise. Given that the appellant has failed to establish that the compromise was not duly authorized or that the appellant's counsel did not have the authority to enter into a compromise, the order recording such compromise suffers from no infirmity. Consequently, the appeal is without merit and is also not maintainable in terms of section 96(3) of CPC. It is therefore ***dismissed*** subject to a cost of Rs.25,000/- payable by the appellant to respondent No.1 within a period of thirty days.

16. During the course of the hearing of the appeal, it emerged that the appellant was incarcerated in Adyala Jail and the affidavit filed on his behalf with his thumb imprint placed on such affidavit (which affidavit had also been attested by Oath Commissioner) had not been certified by the Jail Superintendent. Learned counsel for the respondent submitted that it was a mandatory requirement that every document signed or thumb printed by a jail inmate was to be verified by Jail Superintendent and that was also the entrenched practice. The original counsel for the appellant (Mr. Tahir Habib Kiani, Advocate) had submitted that he had relied on the affidavit as being authentic due to its verification by the Oath Commissioner. This Court by order dated 27.07.2021, summoned the Oath Commissioner who submitted that her tenure as Oath Commissioner expired on 18.02.2021 and her Commission was not extended thereafter. She submitted that she had not verified the affidavit that contained the thumb print of the appellant and the use of her seal and her signature was a

forgery. This Court directed the Registrar of this Court to carry out an investigation into the matter. The Registrar submitted a report stating that the Commission of Ms. Saba Mohsin, Advocate indeed expired on 18.02.2021 and the signatures on the seal were also not hers. Mr. Tahir Habib Kiani, Advocate, the original counsel for the appellant, was asked to explain as to how he had filed an affidavit with a forged certification by an Oath Commissioner whose Commission had expired and had never verified the affidavit or stamped and signed such affidavit. Mr. Tahir Habib Kiani, Advocate failed to provide a satisfactory response. His only explanation was that it was standard practice that clerks and office staff got affidavits verified by Oath Commissioners and he therefore paid no attention to the fact that the verification by the Oath Commissioner of the affidavit accompanying the appeal filed by him was not authentic.

17. The Court does not find such explanation satisfactory. An Advocate by virtue of being a professional is bound by the rules framed under the Legal Practitioners and Bar Councils Act, 1973, and also by virtue of being an officer of the Court has a duty to ensure that where an appeal is being instituted by such Advocate, the requirements of law including the filing of affidavits and their verification and/or certification has been undertaken in accordance with law. Such obligation forms part of the responsibility that an Advocate undertakes when he/she accepts a brief. To rely on some abhorrent practice, if such practice exists at all, where Advocates acquiesce in filing affidavits that are either not signed by the person issuing the

affidavit or have not been certified and/or verified in accordance with law cannot be condoned. What is worse is that Mr. Tahir Habib Kiani, Advocate, was not truthful. When the issue of forged verification by an Oath Commissioner whose Commission had long expired came to light, Mr. Tahir Habib Kiani, Advocate, insisted that it was the Oath Commissioner who had verified the affidavit. This led the Court to direct that an inquiry be carried out. The said inquiry then proved that the verification by the Oath Commissioner was indeed of forgery. If the Courts are unable to trust the representation made by counsels who as officers of the court appear before them, the ability of Courts to dispense justice in accordance with law would be seriously handicapped. As the regulator of the legal profession it thus for the Bar Council to take appropriate steps to ensure that Advocates discharge their obligation to ensure that the memos and affidavits filed in Court are duly authorized, executed and verified in accordance with law, and that any Advocate who indulges in filing forged documents faces appropriate disciplinary consequences.

18. In the aforementioned circumstances, this Court has found the conduct of Mr. Tahir Habib Kiani, Advocate, *prima-facie,* unbecoming of a lawyer and therefore refers his case to the Punjab Bar Councils in terms of Section 41 of the Legal Practitioners and Bar Councils Act, 1973, for the Bar Council to consider whether Mr. Tahir Habib Kiani, Advocate is liable for misconduct.

19. Let a copy of this order along with the report of the Registrar and the explanation filed by Mr. Tahir Habib Kiani, Advocate, be sent to the Punjab Bar Council for appropriate action in accordance with law.

(BABAR SATTAR)
JUDGE

Announced in the open Court on **14.06.2024.**

JUDGE

Approved for reporting.

M.A. Raza