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Judgment Sheet

IN THE LAHORE HIGH COURT,
BAHAWALPUR BENCH, BAHAWALPUR
JUDICIAL DEPARTMENT

....

Civil Miscellaneous No.07-C of 2023/BWP.

Muhammad Siddique.

Versus

Rabia Rafique, etc.

J U D G M E N T.

Date of hearing:	**22.03.2024.**
Applicant No.1 by:	Mr. Amir Aqeel Ansari, Advocate.
Applicant No.2 by:	M/s Nadeem Iqbal Chaudhry and Rana Rizwan, Advocates.
Respondents No.1& 2 by:	M/s Hafeez-ur-Rehman Hafeez and Rana Ahtisham Shoukat, Advocates.

AHMAD NADEEM ARSHAD, J. Through this judgment I would like to decide the instant application under Section 12(2) of the Code of Civil Procedure, 1908 (C.P.C.) as well as application titled "*Irfan Azam, etc. V. Rabia Rafique, etc*." (C.M. No.8-C of 2023) filed under Section 12(2) C.P.C. whereby the applicants have called into question the judgment & decree dated 19.10.2020 passed by this Court in Civil Revision No.823 of 2018/BWP titled "*Irfan Azam, etc. V. Rabia Rafiq, etc*." on the grounds of fraud and misrepresentation. However, for further discussion Muhammad Siddique applicant of C.M. No.7-C of 2023 be referred to as the applicant No.1, the applicants of C.M. No.8-C of 2023 be referred to as the applicant No.2. Whereas, Rabia Rafique (Rabia Imran) be

referred to as the respondent No.1 and Ali Imran be referred to as the respondent No.2.

2. Facts in brevity are that the applicant No.2 instituted a suit for declaration whereby they sought declaration to the effect that they are the only legal heirs of deceased Imran Azam whereas respondents No.1 & 2 are neither his legal heirs nor entitled to get inheritance from his moveable and immoveable properties and only they are entitled to get inheritance as per their *Sharia* shares from the agricultural land as well as the amount available in the bank accounts of deceased. They also sought a declaration that if respondents No.1 & 2 have prepared any documents fraudulently to show themselves as the widow and son of the deceased, the same are against the facts & law, forged and fictitious, a result of collusiveness and having no effect upon their rights, void-ab-initio and liable to be cancelled. As a consequential relief, they prayed for the issuance of permanent injunction that respondent No.1 namely Mst. Rabia Imran alias Rabia Rafiq may be restrained permanently from posing herself as the widow of Imran Azam deceased and posing respondent No.2 as his son; that they also be restrained from claiming any right over the moveable and immoveable properties of the deceased, from withdrawing amounts from the bank accounts and from getting incorporate inheritance mutation in their favour. Respondents No.1 & 2 resisted the suit by filing a contesting written statement. Besides this, they also instituted their independent suit for declaration and permanent injunction against the applicant No.2 and sought a declaration that the respondent No.1 and Naz Bibi (*applicant No.2 of C.M No.8-C*) being widows and respondent No.2 being son of Imran Azam are owners in possession of the property (fully described in the plaint) being legal heirs according to their legal and *Shari* shares and challenged the validity and legality of oral sale mutation No.652 dated 30.06.2011 whereby land measuring 699 *Kanals* 06 *Marlas* was allegedly alienated to Irfan Azam (*applicant No.1 of C.M. No.8-C*)

from Imran Azam deceased. Said suit was contested by the applicant No.2.

3. The learned Trial Court consolidated both the suits, framed consolidated issues out of the divergent pleadings of the parties and invited them to lead evidence in support of their rival contentions. After recording evidence of the parties, pro & contra, oral as well as documentary, partially decreed the suit of the applicant No.2 by declaring Naz Bibi (applicant No.2 of C.M No.8-C) and Rabia Rafiq (respondent No.1) as widows and Ali Imran (respondent No.2) as son of deceased Imran Azam being his legal heirs, whereas, suit of respondents No.1 & 2 was decreed in toto through consolidated judgment & decrees dated 15.02.2016. The applicant No.2 challenged said judgment and decrees by preferring an appeal which was dismissed by the learned Appellate Court vide judgment & decree dated 19.09.2018. Feeling aggrieved, they filed a revision petition (*C.R. No.823 of 2018/BWP*) before this Court which was also dismissed via judgment & decree dated 19.10.2020. Being dissatisfied, the applicant No.2 filed C.P.L.A No.1719-L of 2020 before the august Supreme Court of Pakistan and vide order dated 04.02.2021 leave was refused and their petition was dismissed. The applicant No.2 filed review petition No.Nil of 2021 in C.P.L.A No.1719-L of 2020 which was dismissed by the august Supreme Court of Pakistan vide order dated 27.01.2023. During the pendency of the Review Petition, applicant No.1 namely Muhammad Siddique filed the application under Section 12(2) C.P.C. (C.M. No.7-C of 2023/BWP) against respondents No.1 & 2 by impleading the applicant No.2 as rest of the respondents and after dismissal of the Review Petition, the applicant No.2 filed an application under Section 12(2) C.P.C. (C.M. No.8-C of 2023/BWP) against the respondents No.1 & 2 by impleading the applicant No.1 as respondent No.3. The applicant No.1 and the applicant No.2 in their applications under Section 12(2) C.P.C. challenged the judgment and

decree dated 19.10.2020 passed in Civil Revision No.823 of 2018/BWP on the grounds of fraud and misrepresentation.

4. The applicant No.1 in his application maintained that he got married to respondent No.1 on 15.06.2006 and as a result of said wedlock respondent No.2 was born on 14.12.2006 and this fact is evident from the birth certificate of respondent No.2, whereas, respondent No.1 got prepared forged documents wherein the date of birth of respondent No.2 was shown as 14.12.2010 instead of 14.12.2006; that respondent No.1 concealed ex-parte judgment and decree whereby she got divorce from him on the basis of *Khula* and also concealed said fact at the time of her marriage with Imran Azam, therefore, the judgment and decree of this Court is not sustainable as having been obtained by practicing fraud and mis-representation with the Court.

5. The applicant No.2 in his application maintained that Aneela Bibi (applicant No.4 of C.M. No.8-C of 2023) lodged a complaint in the year 2020 against respondent No.1 wherein after inquiry it was declared that respondent No.1 after the death of Imran Azam with the collusion of Molvi Muhammad Gull Gohar (*Nikah Khawan*), Abdul Rauf (Nikah Registrar) prepared ante-dated and forged Nikahnama with Imran Azam while making his forged signatures; that as a result of inquiry report, F.I.R No.140/2021 dated 29.06.2021 was registered against respondent No.1 and her co-accused wherein she was arrested and challan was sent to the Court; that respondent No.1 admitted her Nikah dated 15.02.2006 with the applicant No.1, therefore, from this wedlock respondent No.2 was born and his date of birth was recorded as 14.12.2006 in the Union Council Ahmadpur Lamma, Rahim Yar Khan which falsifies her claim that respondent No.2 is son of Imran Azam; that respondent No.1 failed to prove her divorce from respondent No.3 as she could not bring on record any certificate of divorce issued by concerned Union Council at Faisalabad; that respondent No.1 prepared a forged birth certificate of respondent No.2 from Filed Office No.12, Behboob Qureshian,

Rahim Yar Khan wherein date of birth of respondent No.2 was shown as 14.12.2010 in order to connect his relation with Imran Azam; that respondent No.1 filed an application on 21.05.2013 for correction of date of birth of respondent No.2 in the record of U.C. Ahmedpur Lamma, Rahim Yar Khan which is not decided so far; that respondent No.1 refused to get DNA test of respondent No.2 during the inquiry before the Deputy Commissioner; that respondent No.2 was not son of Imran Azam rather he was born from the marital tie of respondent No.1 and the applicant No.1; that respondent No.1 prepared her fake Nikahnama with Imran Azam as well as birth certificate of respondent No.2; that respondent No.1 contracted *Shari* Nikah with applicant No.1 on 15.02.2006 and got it registered on 13.09.2006; that respondent No.1 also contracted marriage with one Makhdoom Ahmad Mahmood on 23.07.2002 and got divorce on 18.09.2004 and out of said wedlock a baby girl Bisma was born which fact was not disclosed by her; that respondent No.1 in her *Nikahnamas* showed her as virgin lady and concealed her previous Nikah; that she narrated different ages in her respective *Nikahnamas*; that respondent No.1 secured succession certificate of respondent No.2 against which appeal of the applicant No.2 is pending; that respondent No.1 applied for guardianship of respondent No.2 and the applicant No.1 moved an application for impleading him as a party wherein he claimed the respondent No.1 as his wife because she failed to get divorce certificate from the concerned Union Council; that the above referred facts verified the misrepresentation and fraud played by respondent No.1 who deceitfully concealed her previous marriages with different persons in her suit at all forums during the litigation with them and prayed for setting aside the decree dated 19.10.2020 passed by this Court in C.R. No.823 of 2018 and dismissal of suit of the respondents No.1 & 2 with special costs.

6. This Court vide order dated 02.06.2023 issued notice to the respondents. Notices were also issued to the respondents in C.M No.8-C of 2023/BWP vide order dated 06.07.2023.

7. It is pertinent to mention here that applicant No.1 moved an application (C.M. No.1607 of 2024/BWP) and sought framing of issues and recording of evidence. The applicant No.2 also moved application (C.M. no.1606 of 2024/BWP) whereby they prayed for issuance of a direction to the respondents to file written reply of their application under Section 12(2) C.P.C.. Both the applications have been decided through separate orders.

8. I have heard learned counsel for the parties on the C.Ms and perused the record of C.Ms as well as the record of Civil Revision No.823 of 2018/BWP with their able assistance.

9. From the scanning of the applications and arguments advanced by the learned counsel for the applicant No.1 and the applicant No.2, their main allegations are that respondent No.1 contracted marriage with the applicant No.1 and during the subsistence of said marriage she gave birth to a son (respondent No.2) on 14.12.2006 which is evident from birth certificate brought on record as Annex-A, therefore, respondent No.2 is son of the applicant No.1 rather deceased Imran Azam; that the decree of dissolution of marriage on the basis of *Khula* was not effective because certificate of divorce was not obtained from the concerned Union Council, therefore, respondent No.1 is still legally wedded wife of the applicant No.1 and said facts were concealed by the respondents No.1 & 2 while obtaining the judgment and decree, hence, committed fraud and misrepresentation with the Court.

10. It is evident from the record that the applicant No.2 instituted a suit for declaration along with permanent injunction against respondents No.1 & 2 on 19.07.2012 by maintaining that they are legal heirs of deceased Imran Azam who died issueless on 27.01.2012 without any male or female issue; that a week ago it came to their knowledge that respondents No.1 & 2 made a conspiracy to pose respondent No.1 as widow and respondent No.2 as son of deceased Imran Azam and prepared forged documents in

this regard; that neither Imran Azam contracted marriage during his lifetime with the respondent No.1 nor respondent No.2 was born from said wed-lock and sought declaration to the effect that they are the only legal heirs of deceased Imran Azam, whereas, respondents No.1 & 2 are neither his legal heirs nor entitled to get inheritance from his moveable and immoveable properties and only they are entitled to get inheritance as per their *Sharia* shares from the agricultural land as well as the amount available in the bank accounts of deceased. They also sought a declaration that if respondents No.1 & 2 have prepared any documents fraudulently to show themselves as widow and son of the deceased, the same are against the facts & law, forged and fictitious, result of collusiveness and having no effect upon their rights, void-ab-initio and liable to be cancelled. As a consequential relief, they prayed for the issuance of permanent injunction that respondent No.1 namely Mst. Rabia Imran alias Rabia Rafiq may be restrained permanently from posing herself as a widow of Imran Azam deceased and posing respondent No.2 as his son; that they also be restrained from claiming any right over the moveable and immoveable properties of the deceased, to withdraw amounts from the bank accounts and to get incorporate inheritance mutation in their favour.

11. The respondents No.1 & 2 resisted the suit by filing contesting written statement wherein they took a stance that Imran Azam contracted his first marriage with Naz Bibi (applicant No.2 of C.M. No.8-C of 2023) but remained issueless despite the lapse of a considerable time; that he had an ardent desire to have children, legal heir of his property, hence, he contracted second marriage with respondent No.1; that in this regard *Shari* Nikah was performed by Qari Nazim in December, 2008; that thereafter deceased Imran Azam got registered the Nikah; that in the light of said marital tie a baby boy namely Ali Imran (respondent No.2) was born on 14.12.2010. Respondents No.1 & 2 also instituted a suit for declaration with permanent injunction wherein they challenged the oral sale mutation

No.652 dated 30.06.2011 whereby land measuring 699 *Kanals* & 06 *Marlas* was allegedly shown to be sold by Imran Azam to his brother Irfan Azam. The learned trial Court consolidated both the suits and framed consolidated issues. The basic controversy between the parties was as to who are legal heirs of Imran Azam deceased and to resolve said controversy issues No.1 & 3 were framed in the following terms:

1. *Whether plaintiffs Irfan Azam etc. are only legal heirs of deceased Imran Azam and as such they are entitled to the decree for declaration for the suit property? OPP Irfan Azam etc.*

2. *Whether defendants Rabia Imran etc. are also legal heirs alongwith plaintiffs as widow and son of Imran Azam and being so they are entitled to the decree for declaration regarding suit property? OPD Rabia Imran etc.*

12. In order to substantiate their version, the applicant No.2 got examined nine witnesses as P.W.1 to P.W.9 and tendered 21 documents as Exh.P.1 to Exh.P.21, whereas, respondents No.1 & 2 produced 13 witnesses as D.W.1 to D.W.13 and placed on record 34 documents as Exh.D.1 to Exh.D.33 and Mark-A.

13. Perusal of the statements of PWs reflects that they merely denied the factum of Nikah of Imran Azam with Rabia Imran and birth of their son through their oral evidence. The applicant No.2 did not produce any documentary evidence in support of their version.

14. However, to substantiate their stance, respondents No.1 & 2 produced original Nikahnama as Exh.D.1 and to prove said Nikahnama they produced Abdul Rauf Nikah Registrar as D.W.1, Molvi Muhammad Gull Gohar *Nikah Khawan* as D.W.3, Muhammad Sajid and Zafar Iqbal witnesses of the Nikah as D.W.4 and D.W.5. Both D.W.4 and D.W.5 also deposed that they are witnesses of *Shari* Nikah performed between Imran Azam and Rabia Imran. To prove

the factum of birth of Ali Imran during the marital ties between Imran Azam and Rabia Imran, they got examined Dr. Shazia Majid Khan Gynecologist as D.W.7. She deposed categorically that she conducted a cesarean operation upon respondent No.1 as a result of which respondent No.2 was born on 14.12.2010. She produced the birth certificate of minor as Exh.D.7. Respondents No.1 & 2 also produced Muhammad Arshad Khan Sales Consultant EFU Company as D.W.10 who produced a copy of the Insurance Policy as Mark-A. In the said policy Imran Azam nominated his son namely Ali Imran as his nominee. Muhammad Azam Azad P.W.4 during cross-examination admitted that Imran Azam had obtained an insurance policy from EFU Insurance Company. Tariq Hussain, Project Manager, Ramay Developers appeared as D.W.11 and produced the original record of allotment of the plot in the name of Irfan Azam (applicant No.1 of C.M. No.8-C of 2023). Copy of said record was brought on the record as Exh.D.8 wherein said Irfan Azam himself nominated Ali Imran son of Imran Azam as his nominee. It is also evident that Muhammad Azam Azad P.W.4 was surety in the said allotment letter. Said document was prepared on 24.05.2012 and bears the thumb impression of Irfan Azam. A copy of CNIC of Irfan Azam as well as a copy of CNIC of his wife Ruqiya Bibi was also attached with the said application of allotment. NADRA certificate was produced as Exh.D.9 wherein Ali Imran is shown as son of Imran Azam and Rabia Imran. An application addressed to Administrator Union Council G-7 Ahmadpur Lamma from Irfan Azam dated 15.06.2012 was available as Exh.D.32. In the said application, Irfan Azam maintained that the name of his nephew namely Ali Imran s/o Imran Azam is duly entered in the record of Union Council and prayed for issuance of its copy.

15. The applicant No.2 failed to rebut the oral as well as documentary evidence of respondents No.1 & 2, therefore, the learned Trial Court keeping in view evidence available on the record declared that respondent No.1 namely Rabia Imran was legally

wedded wife of Imran Azam and from their wedlock a son namely Ali Imran was born on 14.12.2010. Said findings remained intact upto august Supreme Court of Pakistan.

16. The applicant No.1 in his application admits that respondent No.1 got divorce on the basis of *Khula* through a decree of the Court dated 31.03.2008, however, he claims that she is still his wife as she failed to obtain the certificate of effectiveness of divorce from the Union Council. The decree of *Khula* obtained through Court would not fall under Section 07 of the Muslim Family Laws Ordinance, 1961 which deals with an ordinary divorce given by a husband. The matter would, however, fall under Section 08 of the Ordinance ibid which deals with other types of divorce or dissolution of marriage. For ease, said section is reproduced as under:

> ***Dissolution of marriage otherwise than by talaq.***
>
> *Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by talaq, the provisions of section 7 shall, mutatis mutandis and so far as applicable, apply.*

Section 08 of the Ordinance is a parallel provision to Section 07. The latter provides for the mechanism as to how the divorce by ‘any man’ who wishes to dissolve the marriage would become effective; while the former provision is not confined to Talaq by ‘any man’. Essentially it relates to other forms of dissolution of marriage. Said Section postulates two situations; one, divorce by a woman who has right of *Tafweez* and the other, when the wife sues for dissolution of marriage on other grounds including that of *Khula*. In cases of dissolution otherwise than when it is pronounced by a man Section 07 with necessary changes would apply.

With regard to the dissolution of marriage as mentioned in Section 8 “the provision of Section 7 shall *mutatis mutendis* and so far as applicable, apply”. Section 08, clearly places a condition on the

application of Section 07 mainly that it would apply "so far as applicable" and that also with necessary changes (*mutatis mutendis*). Islamic Law does not permit revocation of dissolution of marriage effected through *Khula*. Section 07 has not changed the Islamic Law. Dissolution of marriage under the Family Courts Act, 1964 once having attained finality does not make it ineffective merely on the ground that notice of decree for dissolution of marriage was not given and certificate of effectiveness of said divorce was not issued by the concerned Union Council. For the sake of arguments, if it is presumed that respondent No.1 failed to give notice of the decree of dissolution of marriage, then it related to the question of contravention of the provision of Sub-section 01 of Section 07. Sub-section 02 of Section 07 provides that whosoever contravenes the provisions shall be sentenced to imprisonment for a term which may extend to one year or with a fine which may extend to 5000 rupees or with both. From the above discussion, it is crystal clear that non sending of a copy of decree after obtaining *Khula* from the Court under Sub-Section 01 of Section 07 or failure to obtain the certificate can at the maximum entail penal consequences but cannot invalidate the decree of dissolution of marriage on the basis of *Khula*.

17. During the course of arguments, learned counsel for the applicant No.1 argued that the consideration of *Khula* was not paid, therefore, the marriage of respondent No.1 with the applicant No.1 has not dissolved. Suffice is to say that where marriage was dissolved by way of *Khula* imposing a condition on wife first to return the benefits of husband to him, non-fulfillment of that condition by wife, would not render decree for dissolution of marriage on the basis of *Khula* as ineffective because imposition of such condition merely would create civil liability and decree for dissolution of marriage passed by way of *Khula*, could not be considered as dependent on requiring wife to fulfill condition first. The decree of dissolution of marriage, on the basis of *Khula*, even though made conditional upon the return of the benefits, would

operate to dissolve the marriage, when it is passed and the effect thereof would not be postponed till the benefits were returned. Reliance in this regard is placed on the case of "*DR. AKHLAQ AHMED V. MST. KISHWAR SULTANA & OTHERS"* ***(PLD 1983 SUPREME COURT 169)***, where it was observed as under:

> "*It was held in the case of Moonshee Buzul-ul-Raheem v. Luteefutoon Nisa (8 Moore's Ind. App. 379) that non-payment of stipulated consideration for Khula` does not invalidate the dissolution of marriage by Khula`. Once the Family Court came to the conclusion that the parties cannot remain within the limits of God and the dissolution of marriage by Khula` must take place, the inquiry into the terms on which such dissolution shall take place does not affect the conclusion but only creates civil liabilities with regard to the benefits to be returned by the wife to the husband and does not affect the dissolution itself."*

18. The applicant No.1 also claims that respondent No.2 is his son. In support of his version, he relied upon birth certificate issued by Union Council Ahmadpur Lamma wherein the date of birth of respondent No.2 is written as 14.12.2006. Although, in the said certificate, the name of the child was written as Ali Imran but the name of his father was written as Imran Azam and mother's name was written as Rabia Imran. Said entry was made on 10.09.2011. Despite the fact date of birth was written in the certificate as 14.12.2006 but it seems to be a clerical mistake as no corroborative material is available in this regard. Said date of birth does not co-relate and support the version of the applicant No.1 as the date of marriage mentioned in the *Nikahanama* of the applicant No.1 with respondent No.1 was 13.09.2006. Although, he took a stance that his *Shari* Nikah was solemnized with respondent No.1 in the month of February, 2006 but said fact was not supported through any other piece of evidence. Contrary to that, respondents No.1 & 2 proved their stance through overwhelming evidence and the competent Court of law after discussing the whole evidence declared that respondent No.2 is son of Imran Azam who was born on 14.12.2010.

This Court while deciding the Civil Revision in para No.8 of the judgment also observed as under:

> *"It evince from the record that birth of child took place in Hamdani Hospital Sheikh Zaid Road, Rahim Yar Khan, Pakistan on 14th December, 2010. To this effect, Dr. Shazia Majid Khan, Gynecologist, Hamdani Hospital, Sheikh Zaid Road Rahim Yar Khan (DW-7) was examined who stated that she is scribe of birth certificate (EX.D-7). It is apparent therefrom that in the birth certificate parentage of the minor child is clearly mentioned."*

The august Supreme Court of Pakistan while dismissing the C.P.L.A also observed as under:

> *"We have heard the learned counsel for the parties. We have noticed that the learned Courts below have rightly appreciated the evidence produced by the parties available on the file. We are of the view that there is no need of reappraisal, even the argument of reappraisal of evidence by the learned counsel is not sustainable. There are findings of facts by the three Courts of competent jurisdiction against the petitioners. Learned counsel for the petitioners failed to make out a case for grant of leave, consequently, same is refused and this petition stands dismissed."*

19. It is also argued that respondent No.1 refused to get the DNA test of respondent No.2 during the inquiry before the Deputy Commissioner, which was necessary to reach a just conclusion. It is a trite proposition of law that no one can be compelled to give a sample for DNA testing as it would violate his liberty, dignity and privacy of a free person guaranteed under Article 14 of the Constitution of Islamic Republic of Pakistan, 1973. The august Supreme Court of Pakistan while elaborating this proposition in its judgment titled *"MST. LAILA QAYYUM V. FAWAD QAYUM AND OTHERS"* **(PLD 2019 Supreme Court 449)**, observed as under:

> ***"****Learned Mr. Awan is also right in referring to the case of Salman Akram Raja wherein it was held that a free lady cannot be compelled to give a sample for DNA testing as it would violate her liberty. If a sample is forcibly taken from Laila to determine her paternity it would violate her liberty,*

> *dignity and privacy which Article 14 of the Constitution of the Islamic Republic of Pakistan ("the Constitution") guarantees to a free person.”*

It was further held that:-

> *“There is yet another reason why a DNA should not be allowed. If proposed DNA testing is done it would neither confirm nor negate Laila’s paternity.”*

20. The provisions of Section 12(2) C.P.C. can only be pressed into service when fraud has been practiced upon the Court during the proceedings of case and judgment & decree was obtained on the basis of such fraud and misrepresentation. The scope of said provision is restricted and the applicant is obliged to prove that fraud or misrepresentation was committed by the adversary in connection with the proceedings of the Court and to prove the following aspects:

i. *The fraud and mis presentation was procured during the proceedings in the Court;*

ii. *Alleged fraud included untrue statements by respondents who did not believe to be true and has committed active concealment of facts;*

iii. *Judgment was obtained on the basis of forged documents;*

iv. *The decree was collusively obtained.*

21. A Division Bench of this Court while dealing with said proposition in a case titled *“MS. SHAZIA ASHRAF V. MUNICIPAL COMMITTEE, SAHIWAL THROUGH ADMINISTRATOR AND ANOTHER” (2006 CLC 1018)* observed as under:

> *“The provision of section 12(2), C.P.C. would be attracted only when fraud or misrepresentation is alleged in connection with the proceeding of the Court and not prior to its initiation or after decision of the Court. Reliance is placed on Lal Din and another v. Muhammad Ibrahim 1993 SCMR 710; Rehmat Ullah v. Ali Muhammad and another 1983 SCMR 1064; Hyesons Sugar Mills (Pvt.) Ltd. v. Consolidated Sugar Mills Ltd. and others 2003 CLD 996 and WAPDA through Chairman and 5 others v. Messrs Sea Gold Traders 2002 MLD 19, representation made to the Court which is deliberately false, amounts to fraud and would vitiate the*

> *order/decree subject to the exception that mere, falsity of claim to the knowledge of the person putting forward the claim would not be granted for setting aside the order or decree on the ground of fraud.**"***

22. The applicant No.2 in their suit for declaration sought a declaration that they are the only legal heirs of deceased Imran Azam and respondents No.1 & 2 are not his legal heirs. Whereas, respondents No.1 & 2 had to establish that Imran Azam contracted marriage with respondent No.1 and as a result of said wedlock respondent No.2 was born. The version of the applicants qua non-disclosure of earlier marriages, wrong mentioning of marital status and mentioning different ages by the respondent No.1 in the *Nikahnama* has no bearing on the merits of the case and does not amount to having practiced fraud with the Court. If there is any fraud, at best, it is inter-se the parties which do not attract the provisions of Section 12(2) of C.P.C. Reference is sought from the case titled *"SHEIKH MUHAMMAD IFTIKHAR AHMAD AND OTHERS V. FAIZ AHMAD AND OTHERS"* ***(2023 SCMR 2158)***, wherein it was held as under:

> ***"****Essentially, no case under section 12(2) of the C.P.C. is made out by the Appellants because no fraud was played on the Court. If there is any fraud, at best, it is inter se the parties which does not attract the provisions of section 12(2) of the C.P.C. Section 12(2) of the C.P.C. requires that fraud or mis representation be played on the court and that consequently the order obtained is through fraud or mis-representation.**"***

23. The remedy of civil suit available for setting aside the judgment and decree obtained through fraud and misrepresentation prior to the enactment of sub-section 2 of Section 12 C.P.C was taken away by this sub-Section but this remedy would not be available like a regular suit and the Court may dispose of an application under Section 12(2) C.P.C. without framing issues, recording evidence of the parties and following the procedure for trial of the suit.

The determination of allegation of fraud and misrepresentation usually involves investigation into the question of fact but it is not in every case that the Court would be under obligation to frame issues, record evidence of the parties and follow the procedure prescribed for the decision of the suit. If it were so, the purpose of providing the new remedy would be defeated. The framing of issues depends on the circumstances of each case, the nature of alleged fraud and a decree so obtained. Framing of issues in every case to examine the merits of the application would certainly frustrate the object of Section 12(2), C.P.C which is to avoid, protracted and the time-consuming litigation and to save the genuine decree-holder from grave hardships and ordeal of further litigation, extra burden on their exchequer and simultaneously to reduce unnecessary burden on the Courts.

The august Supreme Court of Pakistan in its recent judgment while elaborating this proposition in a case titled *"HAFIZ MALIK KAMRAN AKBAR AND OTHERS V. MUHAMMAD SHAFI (DECEASED) THROUGH L.RS. AND OTHERS"* **(PLD 2024 Supreme Court 262)** held as under:

> ***"****It is a well-settled exposition of law that for determining the grounds of alleged fraud, misrepresentation or want of jurisdiction, if any, raised in the application moved under section 12(2), C.P.C., the Court is not obligated in each and every case to frame issues mandatorily in order to record the evidence of parties and exactly stick to the procedure prescribed for decision in the suit but it always rests upon the satisfaction of the Court to structure its proceedings and obviously, after analyzing the nature of allegations of fraud or misrepresentation, the Court may decide whether the case is fit for framing of issues and recording of evidence, without which the allegations levelled in the application filed under Section 12(2), C.P.C. cannot be decided.*
>
> *It is correct that the determination of allegations of fraud and misrepresentation usually involve investigation into the questions*

> *of fact but it is not in every case that the Court would be under obligation to frame issues, record evidence of the parties, and follow the procedure prescribed for decision of the suit. If it were so, the purpose of providing the new remedy would be defeated. The matter is left to the satisfaction of the Court which has to regulate its proceedings, and keeping in view the nature of the allegations in the application, may adopt such mode for its disposal, as in consonance with justice, the circumstances of the case may require. Whereas in the case of Mrs. Amina Bibi through General Attorney v. Nasrullah and others (2000 SCMR 296), it was held by this Court that while dealing with the allegations under section 12(2), C.P.C., it is not incumbent upon the Court that it must, in all circumstances, frame issues, record evidence and follow the procedure prescribed for decision of the suit. In the case of Amiran Bibi and others v. Muhammad Ramazan and others (1999 SCMR 1334), this Court held that there is no cavil that determination of allegations of fraud and misrepresentation ordinarily involve investigation into the questions of fact and in such cases an inquiry should ordinarily be held to adjudicate upon the matter in issue but it is not the requirement of law that the Court, while dealing with the allegation under section 12(2), C.P.C., must in all circumstances frame issues, record evidence and follow the procedure prescribed for decision of the suit which depends upon the facts of each case in consonance with justice."*

24. It is a matter of record that the applicant No.1 filed his application under Section 12(2) C.P.C. after the dismissal of CPLA filed by the applicant No.2 and during the pendency of review petition. Whereas, the applicant No.2 filed an application under Section 12(2) C.P.C. after the dismissal of the review petition. After the dismissal of the CPLA and review application, ordinarily an application under Section 12(2) C.P.C. would not be entertainable. The findings of learned Trial Court were maintained by the apex Court of the country. This finality cannot be taken away on the ground that the applicants were ignorant of some facts. If the applicants are permitted to plead their ignorance of lack of information to advance their case, then there will be no end to the

litigation. Hon'ble Supreme Court of Pakistan in a case titled *"MST. DILBAR HAMID V. DR. GHULAM BHEEK KHAN AND OTHERS"* **(1997 SCMR 610)**, observed as under:

> *"The application under Section 12(2) C.P.C simply does not lie after dismissal of the review petition by this Court"*

The august Supreme Court of Pakistan in a case titled *"MUHAMMAD HUSSAIN V. MUKHTAR AHMAD"* **(2006 SCMR 71)**, held as under:

> ***"****To us the proposition canvassed is too naive to merit any serious consideration. Out of the pleadings the Court framed the issues and tried them. The verdict given by the trial Court has been examined by the High Court as well as by this Court and same has been finally upheld with the dismissal of the review application by this Court. The decree has attained finality. This finality cannot be taken away by urging that these petitioners were ignorant of some facts. No litigant can be permitted to plead his ignorance or lack of information to advance his case. Mr. Dogar is not correct in submitting that the improper or incorrect assertion affects the jurisdiction of the Court. Jurisdiction on Courts is conferred by law and does not depend on the litigants /parties stating correct facts in their pleadings. At best, as laid down in Order XLVII, rule 1(c), C.P.C. discovery of new and important matter or evidence, subject to the condition laid therein, may provide a ground for review of decree. If what Mr. Dogar is suggesting is accepted, there will be no end to litigation and any party can launch a fresh round by pleading revelation of facts and his own ignorance and lack of diligence.****"***

In another case titled "*MST. SABIRAN BIBI AND OTHERS V. AHMED KHAN AND OTHERS"* **(2008 SCMR 226)**, observed as under:

> ***"****I have carefully considered the submissions made at bar and am of the considered view that after dismissal of the CPLA and review application ordinarily, an application under Section 12(2) C.P.C. would not be entertainable. Furthermore, if a point has not been raised at the hearing of the petition and review stage before this*

*Court, no new point of fact or law can be allowed to be urged in the proceedings under Section 12(2) C.P.C.***"**

25. Once the litigant opted to avail one out of the provided remedies, then it generally could not be permitted to initiate the other one. The apex Court of the country while discussing the doctrine of election in the case reported as *"TRADING CORPORATION OF PAKISTAN V. DEVAN SUGAR MILLS LIMITED AND OTHERS"* **(PLD 2018 SUPREME COURT 828)**, held as under:

"*The moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one out of host of available concurrent or co-existent proceeding/ actions or remedy from a forum of competent jurisdiction vest with the suitor. Once choice is exercised and election is made then a suitor is prohibited from launching another proceeding to seek a relief or remedy contrary to what could be claimed and or achieved by adopting other proceeding/action and or remedy, which in legal parlance is recognized as doctrine of election, which doctrine is culled by the courts of law from the well-recognized principles of waiver and or abandonment of a known right, claim, privilege or relief as contained in Order II, rule (2) C.P.C., principles of estoppel as embodied in Article 114 of the Qanun-e-Shahadat Order 1984 and principles of res-judicata as articulated in section 11, C.P.C. and its explanations. Doctrine of election apply both to the original proceedings/action as well to defences and so also to challenge the outcome on culmination of such original proceedings/ action, in the form of order or judgment/decree (for illustration it may be noted that multiple remedies are available against possible outcome in the form of an order/judgement/decree etc. emanating from proceedings of civil nature, which could be challenged/defended under Order IX, rule 13 (if proceedings are ex-parte), section 47 (objection to execution), section 114 (by way of review of an order), section 115 (revision), under Order XXI, rules 99 to 103 C.P.C. and section 96 C.P.C. (appeal against the order/judgment) etc. Though there is no bar to concurrently invoke more than one*

remedy at the same time against an ex-parte order/judgment. However, once election or choice from amongst two or more available remedy is made and exhausted, judgment debtor cannot ordinarily be permitted subsequently to venture into other concurrently or coexisting available remedies. In a situation where an application under Order IX, rule 13, C.P.C. and also an application under section 12(2), C.P.C. seeking setting aside of an ex-parte judgment before the same Court and so also an appeal is filed against an ex-parte judgment before higher forum, all aimed at seeking substantially similar if not identical relief of annulment or setting aside of ex-parte order/judgment. Court generally gives such suitor choice to elect one of the many remedies concurrently invoked against one and same ex-parte order/judgment, as multiple and simultaneous proceedings may be hit by principle of res-subjudice (section 10, C.P.C.) and or where one of the proceeding is taken to its logical conclusion then other pending proceeding for the similar relief may be hit by principles of res-judicata. Giving choice to elect remedy from amongst several coexistent and or concurrent remedies does not frustrate or deny right of a person to choose any remedy, which best suits under the given circumstances but to prevent recourse to multiple or successive redressal of a singular wrong or impugned action before the competent forum/court of original and or appellate jurisdiction, such rule of prudence has been evolved by courts of law to curb multiplicity of proceedings. As long as a party does not avail of the remedy before a Court of competent jurisdiction all such remedies remain open to be invoked. Once the election is made then the party generally, cannot be allowed to hop over and shop for one after another coexistent remedies. In an illustrative case this court in the case of Mst.Fehmida Begum v. Muhammad Khalid and others (1992 SCMR 1908) encapsulated the doctrine of election as follows:

> *"However, it is one thing to concede a power to the statutory forum to recall an order obtained from it by fraud, but another to hold that such power of adjudication or jurisdiction is exclusive so as to hold that a suit filed in a civil Court of general jurisdiction is barred. I am therefore in agreement with my brother that a stranger to the proceedings, in a case of this nature has two remedies open*

> *to him. He can either go to the special forum with an application to recall or review the order, or file a separate suit. Once he acts to invoke either of the remedies, he will, on the general principles to avoid a conflict of decisions, ultimately before the higher appellate forums, be deemed to have given up and forfeited his right to the other remedy, unless as held in Mir Salah-ud-Din v. Qazi Zaheer-ud-Din PLD 1988 SC 221, the order passed by the hierarchy of forums under the Sindh Rented Premises Ordinance, leaves scope for approaching the Civil Court."*

26. For what has been discussed above, learned counsel for the applicants have failed to substantiate any allegation of fraud, misrepresentation committed during the proceedings of suit by the respondents No.1 & 2, to upset or overturn the concurrent findings recorded up to this Court. Hence, both applications are ***dismissed*** being meritless and not maintainable.

(AHMAD NADEEM ARSHAD)
JUDGE.

APPROVED FOR REPORTING.

JUDGE.

ANNOUNCED IN OPEN COURT ON_____

JUDGE.

*M. Arsalan**

Stereo.HCJDA 38.

Judgment Sheet

IN THE LAHORE HIGH COURT,
BAHAWALPUR BENCH, BAHAWALPUR
JUDICIAL DEPARTMENT

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Civil Miscellaneous No.08-C of 2023/BWP.

Irfan Azam, etc.

Versus

Rabia Rafique, etc.

J U D G M E N T.

Date of hearing: **22.03.2024.**

Applicants by: M/s Nadeem Iqbal Chaudhry and Rana Rizwan, Advocates.

Respondents No.1& 2 by: M/s Hafeez-ur-Rehman Hafeez and Rana Ahtisham Shoukat, Advocates.

AHMAD NADEEM ARSHAD, J. For the reasons recorded in the deailed judgment of even date recorded in Civil Miscellaneous No.7-C of 2023/BWP titled "Muhammad Siddique V. Rabia Rafique, etc.", this application is also ***dismissed*** in the same terms.

(AHMAD NADEEM ARSHAD)
JUDGE.

ANNOUNCED IN OPEN COURT ON _____

JUDGE.

*M. Arsalan**