

**IN THE SUPREME COURT OF PAKISTAN**  
**(APPELLATE JURISDICTION)**

**PRESENT:**

MR. JUSTICE MIAN SAQIB NISAR  
MR. JUSTICE MUSHIR ALAM  
MR. JUSTICE MAQBOOL BAQAR

**CIVIL APPEAL NO.49 OF 2015**

*(Against the judgment dated 4.9.2014 of the Peshawar High Court, Peshawar passed in RFA No.217/2014)*

Haji Farman Ullah

...Appellant(s)

**VERSUS**

Latif-ur-Rehman

...Respondent(s)

For the appellant(s): Ghulam Mohy-ud-Din Malik, Sr. ASC

For the respondent(s): Mr. Khalid Mahmood, ASC

Date of hearing: 06.05.2015

...  
**ORDER**

**MIAN SAQIB NISAR, J.-** This appeal with leave of the Court dated 20.1.2015 entails the facts, in that, the appellant brought a suit for specific performance against the respondent and procured a decree dated 30.6.2012 (*which was ex-parte*). The respondent moved an application not under Order 9 Rule 13 CPC, rather the provisions of Section 12(2) CPC claiming that the decree has been procured through fraud and misrepresentation. This application was contested by the appellant and on the basis of the pleadings (*application and reply*), the learned trial court was pleased to frame the following issues:-

- “1. Whether the Petitioner has got a cause of action?
2. Whether the impugned decree was obtained through fraud, deceit and misrepresentation?

3. *Whether all the necessary parties have been impleaded, its effect?*
4. *Whether the petitioner is entitled to the relief as prayed for?*
5. *Relief.”*

The parties on account of the above issues led evidence. The learned Civil Judge seized of the matter vide order dated 19.5.2014 accepted the application (*under Section 12(2) CPC*) and set aside the decree under challenge, however, held that the suit cannot be revived. In this context the court adjudged *“It is further held that in addition to the acceptance of this application there is no need of reviving of the suit No.118/1 by the titled Farmanullah....Vs....Latifur Rehman instituted on 07.06.2012 decided on 30.06.2012. In this respect reliance is placed on PLD 1995 LHR 76 Citation-D, relevant portion is hereby reproduced as under:- (d) Specific Relief Act (1 of 1877). Setting aside decree on ground of fraud----Specific concurrent findings recorded by Courts below that decree in previous suit against present plaintiff was result of fraud as he was not served and that he received no consideration for the land in question-- --controversy between parties thus, stood effectively resolved by concurrent findings of court below----Revival and re-hearing of previous suits would be futile, therefore, previous suits in which fraudulent decree had been passed against present plaintiff stood dismissed”*. This order of the Civil Judge was challenged by the appellant in RFA (*note:- as the suit was also dismissed and the decree was drawn as well*) which has been dismissed through the impugned judgment. Leave in this case primarily was granted to consider if after the acceptance of the application under Section 12(2) CPC filed by the respondent, the suit of the appellant should have been revived or it was rightly dismissed by the *fora* below.

2. Learned counsel for the appellant by relying upon the judgment of this Court reported as **Falak Khurshid Vs. Fakhar**

**Khurshid and others (2006 SCMR 595)** has submitted that the only jurisdiction vested with the trial court, as also the learned High Court was to set aside the ex-parte decree and revive the suit of the appellant enabling the respondent to contest the same on merits and get a decision accordingly (*on merits*).

3. Learned counsel for the respondent has argued to the contrary and has relied upon the judgments reported as **Sheikh Muhammad Sadiq Vs. Illahi Bakhsh and 2 others (2006 SCMR 12)**, **Nirsan Singh Vs. Kishuni Singh (AIR 1931 Patna 204)**, **Chandi Charan Pandit and others Vs. Sarat Chandra Sarma and others (AIR 1955 Assam 231)** and **Allah Ditta and another Vs. Bashir Ahmed alias Faqiria (PLD 1995 Lah 76)** to submit that in certain circumstances where sufficient material/evidence has come on record, the court while deciding an application under Section 12(2) CPC could also dismiss the main suit.

4. Heard. Prior to the Ordinance X of 1980, if a person was aggrieved of any judgment and decree etc. which according to him affected his rights and was the result of fraud and misrepresentation etc., he, in order to challenge the same, had to initiate a separate suit for the annulment thereof. However, by virtue of the above Ordinance, amendment was brought by way of Section 12(2) whereby the following was added to the Code of Civil Procedure (CPC):-

*“Where a person challenges the validity of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate suit.”*

Thus after the insertion of this new provision, the validity of a judgment and decree etc. obtained or alleged to have been obtained

on the basis of fraud and mis-representation or from a court having no jurisdiction could only be challenged by moving an application to the same court which passed the final decree etc. and not by a separate suit. Obviously if such application is straightaway conceded to by the plaintiff/deGREE holder, the judgment, decree/order assailed shall be set aside and the suit of the plaintiff shall automatically stand revived; however if the application is resisted/contested by the decree holder, the court may frame the issues (*note: if need be, because on all such applications it is not imperative to do so; or to hold the trial, as the application under section 12(2) CPC can be dismissed on the basis of pleadings of the parties simpliciter as the facts of the case may warrant*) on the basis of the pleadings before it, which issues ordinarily and particularly in this case are restricted to and are primarily meant for the purposes of adjudication and determination of the application under Section 12(2) CPC. The issues so framed do not even cover the main controversy between the parties, which controversy may ultimately arise between them once the decree is set aside, the suit is revived and the defendant of the case (*the appellant under Section 12(2) CPC*) files his written statement and joins issue on the merits of the case. It may be pertinent to mention here that the purpose of framing issues in a civil litigation is that the parties must know the crucial and critical factual and legal aspects of the case which they are required in law to prove or disprove through evidence in order to succeed in the matter on facts and also the points of law.

5. If after the contest of the application under Section 12(2) CPC, the court comes to the conclusion that the decree did suffer from vice as is stipulated by the section, it shall accept the same and as a general and ordinary rule and matter of course, the suit of the plaintiff shall stand revived and thereby give a chance to the defendant (*the applicant under Section 12(2)*) to file his written statement, for

the purposes of setting up his defence in the main suit. Thereafter, the case shall be tried and decided on its own merits per the law prescribed for a suit (*after the revival thereof*). It is in very exceptional, special and extra-ordinary circumstances where e.g. the plaint does not disclose a cause of action or is barred under the law, that while accepting the application (*under the provisions of Section 12(2) CPC*), the court may also reject the plaint or even dismiss the suit for want of jurisdiction, where the jurisdiction of the court is clearly and undoubtedly barred under the law and there is no valid reason to revive and try the suit which the court otherwise has no jurisdiction to entertain and adjudicate upon. In this context, it may be pertinent to mention that in appropriate cases of want of jurisdiction, the court while accepting the application under Section 12(2) CPC may order for the return of the plaint under Order 7 Rule 10 CPC so that the matter is tried by a court of competent jurisdiction. But where there is a controversy of facts or of law between the parties in the main *lis*, while accepting the application (*under Section 12(2) CPC*), the suit cannot and should not be dismissed. It can even not be dismissed in those cases where for the determination and resolution of the said application, either one of the parties or both have brought some evidence on record which has or may have nexus to the merits of the suit as well, if and when it goes to the trial. For example, if in a suit for specific performance, a decree has been procured by the plaintiff, which vide an application (*under Section 12(2) CPC*) is challenged by defendant or any other person and it is the case of the applicant that he did not execute an agreement to sell, or when the applicant is a third party (*not party to the suit*) has taken his own defence and asserted right to the suit property which fact(s) is/are rebutted by the decree holder/plaintiff in reply thereto, however, the court does not frame

any issue about the valid execution of the agreement to sell or other factual aspect of the matter on the main suit, rather the issues framed are restricted to the pleadings of the proceedings on the said application .e.g. where the decree has been obtained through fraud etc., if the plaintiff in order to disprove the element of fraud etc. and to establish his honesty and *bona fide* of his claim in the suit, brings some evidence on the record, which is not found by the court to be credible and good enough for the proof of the agreement to sell or his claim for specific performance, only for the reason that the evidence which has been brought on record lacks quality and standard of proof, the suit shall not be dismissed by the court while allowing the application under Section 12(2) CPC. The reason for this is that because the pleadings of the party were not yet complete in the main matter, and the issues in relation to the merits of the case were even not yet framed, the plaintiff could not be said to have the awareness and knowledge to prove his suit or to have been put to notice that his suit shall be dismissed in the eventuality he does not prove his case on merits. The suit thus in such a situation cannot be dismissed as mentioned above rather has to be revived. In support of the above, reliance can be placed on the judgment of this Court reported as **Falak Khurshid Vs. Fakhar Khurshid and others (2006 SCMR 595)** which enunciates the law to the effect “*In fact in case the trial Court found after recoding of evidence that the judgment and decree were obtained by fraud and misrepresentation he would have only allowed the said application and would have reversed/set aside the judgment and decree passed by him earlier and allowed the parties affording opportunity to the parties to adduce evidence if so desired after filing of written statement by the appellant and to dispose of the suit in accordance with provisions of the Code of Civil Procedure*”. As regards the judgment cited by the respondent's counsel reported as **Sheikh**

**Muhammad Sadiq Vs. Illahi Bakhsh and 2 others (2006 SCMR 12)**, the same is distinguishable on its own facts. The main feature of the case is that the trial as also the appellate court had rejected the application under Section 12(2) CPC. However in its constitutional jurisdiction, when invoked by the appellant under Section 12(2), the High Court had concluded on certain legal aspects of the matter, and had allowed the writ petition, set aside the order of dismissal of application under section 12(2), C.P.C. and also rejected the plaint in the suit. It is thus in the context of the above that this Court had come to the conclusion *“This is correct that in the normal circumstances if a decree is set aside under section 12(2), C.P.C., the case is remanded to the trial Court for decision of the suit on merits in accordance with law but in the facts and circumstances of the present case and the evidence brought on record by the parties in the proceedings under section 12(2), C.P.C., no useful purpose would be served in remanding the case to the trial Court”*. In any case this is a leave refusing order and as is clear from the law laid down in **Muhammad Tariq Badr and another Vs. National Bank of Pakistan and others (2013 SCMR 314)**, such an order by this Court refusing leave or granting the same is not the law enunciated by the court. Even otherwise as is clear from the reproduced paragraph, no law is being enunciated by the court and in the very special circumstances of that particular case the order of the High Court was not interfered with. Otherwise the court in very clear and unequivocal terms has avowed to the correct exposition of law i.e. when it expressed i.e. *“This is correct that in the normal circumstances if a decree is set aside under section 12(2), C.P.C., the case is remanded to the trial Court for decision of the suit on merits in accordance with law”*. This is an acknowledgment that only in very rare and special circumstances can the suit also be dismissed by the court while it

accepts an application under Section 12(2) *ibid*. This exception was resorted to in the judgment of the Lahore High Court reported as **Allah Ditta and another Vs. Bashir Ahmed alias Faqiria** (PLD 1995 Lah 76). The validity of this judgment shall be examined in some appropriate case as it is absolutely inapplicable to the facts and circumstances of this case, as especially in that case, though the matter had the genesis in the application under Section 12(2) CPC, but subsequently a suit was filed and it is in the suit that the following issues were framed:-

- “(1) *Whether the ex parte decree in Suit No.73 dated 23-4-1966 was obtained fraudulently and collusively and by giving the wrong address of the plaintiff ? OPP.*
- (2) *Whether the sale of suit land took place for consideration and with the knowledge of the plaintiff ? OPD (onus objected to).*
- (3) *Whether the transaction in dispute is against Martial Law Regulation? If so, its effect? OPD.*
- (4) *Relief.”*

It is on the basis of such issues that the parties led evidence and the court came to the conclusion that when sufficient evidence has come on the record and the parties were cognizant of the real controversy, it was not necessary to revive the suit. Here the position is altogether different. As regards the judgment reported as **Nirsan Singh Vs. Kishuni Singh** (AIR 1931 Patna 204), the court did not give a definitive opinion that in all circumstances the suit should be dismissed when a decree having been obtained on the basis of fraud and mis-representation is set aside. The only exception again created thereto is that where the parties were aware of the controversy vis-à-vis the merits of the case and had accordingly produced evidence to



that effect, in special situations, the court might dismiss the suit as well but here as is clear from the issues pointed out earlier, the parties were not cognizant of leading evidence vis-à-vis merits of the case, rather the pleadings of the parties were yet incomplete because no written statement had been filed by the respondent as yet, therefore, even if any evidence has been brought on the record by the decree holder/plaintiff to resist the application under Section 12(2) CPC to establish that an agreement to sell was executed in his favour, the defendant would not be precluded from getting the suit revived. It is postulated in the CPC that in normal course for the determination of a civil *lis*, after the plaint has been filed, the written statement must be called for, issues should be framed on the basis of the pleadings of the parties and the parties must be enabled to lead evidence according to the onus placed upon them and it is only thereafter while hearing the argument in terms of Section 20 Rule 1 that judgment should be pronounced by the courts (*note:- however this part of the judgment may not be construed to apply where plaint can be rejected under the law or summary dismissal of suit is permissible under any special law or CPC*). All these aspects are conspicuously missing in the present case. Resultantly we allow this appeal and set aside the judgments of the courts below. The suit of the appellant is revived and the matter is remanded to the trial court for decision in accordance with law after requiring the written statement from the respondent.

JUDGE

JUDGE

JUDGE

Islamabad, the6<sup>th</sup> May, 2015**Approved For Reporting**Waqas Naseer/\*