

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.231 of 2014

Muhammad Sajid Amin

VERSUS

Rizwan Ahmed Bhatti & another

Date of Hearing: 24.03.2016

Petitioner by: Mr. Muhammad Shakeel Abbasi, Advocate,

Respondents by: Mr. Abdul Rafay, Adv. for respondent No.1,
Malik Mazhar Javed, Adv. for respondent No.2

MIANGUL HASSAN AURANGZEB, J:- Through the instant Civil Revision Petition, the petitioner, Muhammad Sajid Amin, impugns the Order dated 25.07.2014, passed by the Court of learned Civil Judge 1st Class-West, Islamabad, whereby the petitioner's application under Section 12(2) of the Civil Procedure Code, 1908 ("C.P.C.") against the decree dated 14.05.2014, was dismissed.

2. The facts essential for the disposal of this petition are that on 08.09.2012, respondent No.1/plaintiff instituted a suit for declaration, cancellation and permanent injunction before the court of learned Civil Judge, Islamabad. In this suit, respondent No.1, *inter-alia*, prayed that he should be declared the owner of plot No.37 (measuring 500 square yards), Block B, Multi Gardens Project, Islamabad, and that the allotment letter dated 22.02.2006 in favour of the petitioner/defendant No.1 be cancelled. The petitioner contested this suit by filing a written statement. During the pendency of the suit, the petitioner filed an application under Order XXIII, Rule 3 of the C.P.C. praying for the said suit to be decreed. This application was duly signed by the petitioner and was also accompanied with his affidavit sworn on 23.04.2014. Paragraphs 2 to 7 of this application are reproduced herein below:-

2. That the Plaintiff and the Respondent No.1 have decided to amicably resolve and settle the dispute of the ownership of the Suit Property.

3. That on the mutual understanding reached due to intervention of friends, I, the Applicant/Defendant hereby unconditionally accept the ownership right of the Plaintiff over

the Suit Property and therefore request that the instant Suit may graciously be decreed in favor of the Plaintiff as prayed, and the Defendant No.2 (MPCHS) may kindly be directed to transfer the said Plot from the name of the Defendant No.1 to the name of the Plaintiff.

4. That the Applicant/Defendant No.1 has not created any lien or charge over the Suit Property while it was appearing under his ownership, and that it is free from any outstanding claim(s) whatsoever of any party.

5. That the Applicant/Defendant No.1 has handed over all original documents pertaining to the Suit Plot to the Plaintiff including the allotment letter and also undertake to complete all formalities and settle the outstanding for the smooth transfer of the plot, if any.

6. That the Applicant/Defendant No.1 shall have absolutely no claim whatsoever against the Plaintiff in this or any other matter at any forum whatsoever and that he shall not become party to any such claim or dispute against the Plaintiff.

7. That in view of the above, the Plaintiff shall not pursue further punitive/criminal legal action against the Applicant/Defendant No.1 in respect of the Suit Property."

3. On 23.04.2014, the learned Civil Court recorded the statement of the petitioner to the effect that the matters between the parties had been settled; that in this regard an application under Order XXIII, Rule 3 C.P.C. supported by an affidavit had been filed; that the said application be accepted; and that the petitioner had no objection if respondent No.1/plaintiff's civil suit is decreed. The learned Civil Court obtained the signatures of the petitioner in the margin of the order sheet. Consequently, the learned Civil Court decreed the suit on 14.05.2014.

4. On 03.06.2014, the petitioner filed an application under Section 12(2) C.P.C. against the decree dated 14.05.2014. Vide order dated 25.07.2014, the learned Civil Court dismissed the said application under Section 12(2) C.P.C. It is the said order dated 25.07.2014, which has been impugned by the petitioner in the instant petition.

5. Learned counsel for the petitioner submitted that the petitioner's application under Order XXIII, Rule 3 C.P.C. was not signed by his counsel, and that when the petitioner's statement was recorded on 23.04.2014, his counsel was not present. He further submitted that as the petitioner in his application under Section 12(2) C.P.C. had alleged that the decree dated 14.05.2014 had been obtained by misrepresentation, fraud and concealment of material facts, it was obligatory upon the learned Civil Court to

have framed issues and recorded evidence of the parties; that compromise between the petitioner and respondent No.1 was not just confined to the contents of the petitioner's application under Order XXIII, Rule 3 C.P.C., but there were other commitments made by respondent No.1, which had not been fulfilled; that on the non-fulfillment of the said commitments including the commitment to pay 60 per cent of the settled amount for the plot, the decree dated 14.05.2014 was liable to be set aside; and that respondent No.1 had violated the terms of the application under Order XXIII, Rule 3 C.P.C. by refusing to withdraw the criminal proceedings. In making his submissions, the learned counsel for the petitioner placed reliance on the following case law:-

- i) Pakistan Industrial Credit and Investment Corporation Vs. Khairpur Sugar Mills Ltd reported as 2012 CLD 1192. It has been held that in paragraph 18 of the said judgment as follows:-

"18. ... The compromise agreement is made by the parties, and the compromise decree by the court. If the agreement is successfully impugned, then the decree will almost always fail. But it may be possible to attack the decree without impugning the agreement. A challenge to the one is therefore not necessarily a challenge to the other. Furthermore, the grounds on which the agreement on the one hand and the decree on the other can be attacked may overlap but are nonetheless distinct. It may be that as a matter of form, the challenge is (and may have to be) directed towards the decree. However, it is the substance of the challenge that must be carefully ascertained, and hence the distinction between the decree and the agreement must be kept in mind. Thus, if a compromised matter is challenged on the ground of (say) misrepresentation, it is important to be clear whether the attack is directed against the agreement or the decree. The reason is that the compromise agreement, being simply a contract, can only be impugned on the ground of misrepresentation if the matter comes within the ambit of the Contract Act, i.e., sections 18 and 19. The compromise decree on the other hand, may be set aside under section 12(2), C.P.C. Now, one of the grounds available under the latter provision is that the decree was obtained by misrepresentation. However, it is clear that as used in section 12(2), the term "misrepresentation" has a meaning and connotation broader than the definition contained in the Contract Act. There is thus an overlap, but not complete identity, between a challenge to the compromise agreement and one directed against the compromise decree. Even if the challenge is framed in terms of section 12(2), the court

must, while considering the matter, keep the foregoing distinction in mind."

- ii) Gamma Silk Milk Pvt. Ltd Vs. Abdul Salam reported as 2006 CLC 1113. It has been held that in paragraph 16 of the said judgment as follows:-

"16. ... Indeed, the submission of Mr. Munirur Rehman that where substantial factual controversy is raised by some party through averments made in the application under section 12(2), C.P.C., going to the root of the decree passed in the suit, then the proper course available to the Court would be to frame issues in the matter and provide full opportunity to the parties to prove their respective case and then to decide that whether on the basis of material brought on record during the proceedings of application the decree challenged through application under section 12(2), C.P.C., on the basis of fraud and misrepresentation is liable to be set aside or not, is not without substance. Nevertheless, it is not a universal rule, which is to be applied mechanically in each and every case, where application under section 12(2), C.P.C. is moved by some party. Moreover, it is well-settled principle of law that a party cannot go beyond its own pleadings/averments made in the application."

- iii) Muhammad Nawaz Khan Vs. Muhammad Khan reported as 2002 SCMR 2003. In this case the petitioner had filed an application under Section 12(2) CPC on the ground that a compromise on the basis of which a decree had been passed was a fraudulent transaction having been entered into by a vendor while he was not the owner of the suit property. The Hon'ble Supreme Court of Pakistan at page 2009 of the said report held as follows:-

"The providing of the opportunity of hearing is not confined only to the extent of arguments rather the sufficiency or insufficiency of such right would depend upon facts and circumstances of each case and in its extended meanings if a case involves pure question of law, the oral address or written representation is sufficient but in case in which the matter needs some factual inquiry either through documentary evidence or oral testimony of the witnesses, the parties should be allowed proper opportunity to bring their evidence and also to examine the witnesses."

6. On the other hand, learned counsel for respondent No.1/plaintiff submitted that the decree dated 14.05.2014 was passed by the learned Civil Court on the basis of a written application supported by an affidavit of the petitioner, and therefore, the same could not be challenged; that the petitioner's

application under Order XXIII, Rule 3 C.P.C. was the entire understanding between the parties and there was nothing stopping the petitioner to include in the said application any other collateral understanding between the parties; that no other understanding other than the contents of the application under Order XXIII, Rule 3 C.P.C., existed between the parties; that in fulfillment of the terms of the compromise between the parties, the petitioner was acquitted in the criminal case; that the insistence on the recording of evidence of the persons, who had been instrumental in bringing about a compromise between the contesting parties was only an attempt to harass respondent No.1 and to get some money out of him. In making his submissions, the learned counsel for respondent No.1 placed reliance on the case of Zainab Vs. Allah Wasaya reported as 2014 CLC 1014, wherein it has been held that a trial court while adjudicating upon an application under Section 12(2) C.P.C. was not bound to frame issues in every case.

7. I have heard the arguments of learned counsel for the parties and perused the record with their able assistance.

8. Order XXIII, Rule 3 C.P.C. reads as follows:-

“3. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the 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.”

9. There is no denying the fact that the application under Order XXIII, Rule 3 C.P.C. was signed and filed by the petitioner. This application is also supported by an affidavit sworn by the petitioner. The petitioner also had his statement recorded by the learned Civil Court and had also signed the order sheet where his statement had been recorded. This was done in the presence of the learned counsel for respondent No.1. In such circumstances, the learned Civil Court had a duty not a discretion to record the lawful compromise. Since the petitioner was the author of the said application under Order XXIII, Rule 3 C.P.C. he was free to incorporate all the terms and conditions of the

compromise/understanding arrived at between the petitioner and respondent No.1. By passing the decree dated 14.05.2014, the learned Civil Court has simply allowed the petitioner's prayer in his application under Order XXIII, Rule 3 C.P.C. The petitioner consciously chose not to incorporate in the said application the alleged collateral understandings, which he has subsequently pleaded in his application under Section 12(2) C.P.C. Hence, the learned civil court in its order dated 25.07.2014 is correct in holding that the petitioner's application under Order XXIII, Rule 3 C.P.C. was completely silent on the other conditions of the compromise that the petitioner subsequently claimed the existence of.

10. It is my view that the petitioner filed the application under Section 12(2) C.P.C. as well as this petition simply to prolong the agony and woes of respondent No.1/plaintiff. The petitioner, after the decree dated 14.05.2014, wants to go back on his foot steps in order to do well what he had done ill. As per the well known maxim "*Volenti non fit injuria*" a person cannot complain of any act he passively assents to.

11. The petitioner wanted respondent No.1 to be subjected to the lengthy rigors of litigation by wanting the learned Civil Court to frame issues on the petitioner's application under Section 12(2) C.P.C. Given the grounds taken by the petitioner in his application under Section 12(2) C.P.C., as mentioned above, there was no need for the learned Civil Court to have framed the issues. The record, including the petitioner's application under Section 12(2) C.P.C. his affidavit and his statement recorded by the learned Civil Court were enough for the learned Civil Court to base its decision on. In the case of Nasira Khatoon Vs. Aisha Bai reported as 2003 SCMR 1050) the Hon'ble Supreme Court of Pakistan has held at Paragraph 7 of the judgment as follows:-

"7. The remedy of civil suit available for setting aside the judgment and decree obtained by fraud and misrepresentation prior to the enactment of subsection (2) of section 12, C.P.C. was taken away by this subsection 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 of issues, recording of evidence of the parties and following the procedure for trial of the suit. ..." (Emphasis added)

12. Law to the same effect has been laid down by the Superior Courts in the following cases:-

- i. (Warriach Zarai Corporation versus F.M.C. United (Pvt.) Ltd. – 2006 SCMR 531)
- ii. (Amiran Bibi versus Muhammad Ramzan – 1999 SCMR 1334)
- iii. (Muhammad Azeem versus national bank of Pakistan – 2001 MLD 135)
- iv. (Nazir Ahmed versus Muhammad Sharif – 2001 SCMR 46)
- v. (Barkat Ali versus Nadir Khan – 2004 YLR 81)
- vi. (Shabana Irfan versus Muhammad Shafi Khan – 2009 SCMR 40)
- vii. (Imam Din versus Siftan Bibi – 2010 YLR 2825)
- viii. (Muhammad Sharif versus Ghulam Ali – 2006 YLR 2909)
- ix. (Muhammad Yousaf versus Lal Din – 2006 YLR 677)
- x. (Saeed Iqbal versus Shabbir Ahmad – 2008 YLR 2142)

13. The decree dated 14.05.2014, was in the nature of a consent decree. In the case of Muhammad Nazir Vs. Muhammad Arif reported as 2006 MLD 187, it was held that consent decree based on a compromise between the parties was not appealable under the law, thus, its effect could not be nullified or eroded by filing a fresh suit. Although, a consent decree is not absolutely sacrosanct and the same has been held by the superior courts to be a contract between the parties with the command of a court super added to it, but at the same time the parties on whose application such a consent decree is passed should not be lightly relieved from the obligations under such a decree. Indeed a consent decree cannot have a greater validity than the compromise itself, but here it is not the petitioner's case that the terms of the compromise, which the petitioner himself reduced into writing in his application under Order XXIII, Rule 3 C.P.C., had been violated by respondent No.1. He asserts that there were some other terms, which do not find mention in his application under Order XXIII, Rule 3 C.P.C. and which had been violated by respondent No.1. This, for any reasonable person, would be too hard to digest.

14. I am of the view that the petitioner is estopped from wriggling out from his own statement. There was no reason for the learned Civil Court to doubt the legality of the compromise as set out in the petitioner's application under Order XXIII, Rule 3 C.P.C.

After all, it was the petitioner who had applied to the learned Civil Court to record the agreement and to pass a decree in accordance therewith. Therefore, it does not lie in the mouth of the petitioner to say that respondent No.1 had practiced fraud on the Court or had misrepresented material facts. In pursuance of the compromise between the parties the criminal charges against the petitioner were dropped. In the case of Qabul Khan Vs. Shah Nawaz reported as 1991 SCMR 1287, it has been held that where a compromise had already operated and taken its effect, it could not be set aside if one of the parties tried to go back on what he stated when the compromise was made.

15. In view of the above, I do not find any merit in the petition, which is accordingly dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

(JUDGE)

Qamar Khan*