

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Writ Petition No. 528/2020
Muhammad Zia ud Din
Versus
Ghaffar Khan, etc.

Petitioner by: Sardar Bilal Firdous, Advocate,
Respondent No.1: In person,
Date of Hearing: 17.09.2020.

FAIAZ AHMAD ANJUM JANDRAN, J.- Through the instant writ petition, petitioner impugns orders dated 05.10.2019 & 26.11.2019 passed by learned Civil Judge 1st Class and learned Additional District Judge-I/Judge (MCAC) Islamabad-East respectively, whereby his application under Section 12(2) of the Code of Civil Procedure ("*the Code*") for setting aside *ex-parte* judgment & decree dated 09.09.2015, was dismissed.

2. Facts, relevant for the disposal of the instant writ petition, are that on 29.06.2009, respondent No.1 (*Ghaffar Khan*) filed a suit for declaration and permanent injunction with the averments that he purchased Datsun Car bearing Registration No.RIG-1570, Model 1974 ("*the vehicle*") on 16.05.2005 against sale consideration of Rs.95,000/- through a sale agreement; that respondent No.1 gave the vehicle to the defendant/petitioner on rent at the rate of Rs.250/- per day; that the petitioner paid the rent till 20.06.2006 but subsequently discontinued and when on 17.08.2006, the respondent No.1 asked the petitioner to pay the outstanding rent, the latter refused and showed a forged agreement to sell regarding the vehicle; that the respondent No.1 asked the petitioner time and again to clear the outstanding dues and to handover the vehicle but to no avail which led to filing of the suit. The petitioner was proceeded *ex-parte* vide order dated 13.10.2010.

3. It is noteworthy that during pendency of the suit, respondent No.1 along with counsel appeared before the Court on 28.09.2013, got recorded statement to the effect that he did not want to pursue the case and had no objection if the same was dismissed as withdrawn. Consequently, the suit was dismissed as withdrawn on that very date. Subsequently, as reveals through interim order dated 18.10.2014, the suit was restored and again the petitioner was proceeded *ex-parte* vide order dated 21.03.2015. After the recording of *ex-parte* evidence, suit was decreed vide judgment and decree dated 09.09.2015.

4. Subsequently, on 20.07.2018, petitioner filed an application under Section 12(2) of the Code with the averments that neither he was properly served nor intimated about the proceedings; that respondent No.1 had concealed the material facts and obtained the *ex-parte* decree through fraud and misrepresentation, which is liable to be set aside. The learned trial Court after hearing the parties dismissed the application vide order dated 05.10.2019. The petitioner assailed the said order through revision petition but the same was also dismissed vide order dated 26.11.2019, hence, instant writ petition.

5. Learned counsel for the petitioner contends that it is the substance/material and not the form that matters, therefore, application under Section 12(2) of the Code could not have been held to be not maintainable; that the respondent No.1 by playing fraud on the basis of distorted facts, obtained *ex-parte* decree as not only incorrect address of the petitioner had been mentioned in the plaint but also the due procedure for declaring him *ex-parte* was not followed. That the facts narrated by the petitioner warrant recording of evidence, therefore, impugned orders are liable to be set-aside. Learned counsel placed reliance upon case laws reported as **PLD 2018 SC 828, 2013 MLD 1132, 2018 CLC 40 and AIR 1966 Allahabad 318.**

6. On the other hand, respondent No.1 appeared in person and contended that the petitioner by playing fraud, misappropriated the vehicle and also usurped the amount by preparing forged document, therefore, petition is liable to be dismissed.

7. Heard the learned counsel for the petitioner, respondent No.1 and examined the record.

8. The grounds for setting aside *ex-parte* decree under Order IX Rule 13 of the Code are different from those mentioned in Section 12(2) of the Code. In the former case, the applicant has to show sufficient cause for his absence from the court and if the court comes to the conclusion that the absence of the defendant/petitioner was neither willful nor deliberate or he was not duly served, the court can set aside *ex-parte* decree. In the latter case, if a decree was passed without jurisdiction or some fraud had been practiced upon the court or through misrepresentation decree was obtained, the court should set it aside under Section 12(2) of the Code.

9. The sphere of Section 12(2) of the Code is not restricted only to the extent of allegation of fraud, as observed by the two courts below, but includes misrepresentation as well. The term *misrepresentation* means and includes “*false statement of material facts.*” According to Black’s Law Dictionary 11th Edition, misrepresentation means:-

1. The act or an instance of making a false or misleading assertion about something, usu. with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.

2. The assertion so made; an incorrect, unfair or false statement, an assertion that does not accord with the facts.

10. *As manifests from definition ibid any act or an instance of making a false or misleading assertion with intention to deceive, would constitute misrepresentation which may be written, spoken or in any other form that amounts to a false notion.*

11. By keeping the principle *ibid* in juxtaposition with the facts of the present case, it emerges that the petitioner in application under Section 12(2) of the Code, not only alleged fraud by the respondent No.1 by mentioning wrong address but also misrepresentation and false statement of material facts. Para 1, 2 & 3 of the said application contain the minute details of the alleged misrepresentation.

12. For elaboration, it is necessary to mention that the plaintiff, Ghaffar Khan, claimed declaration of the facts that he purchased the vehicle through a sale agreement and then handed it over to the petitioner on rent, while the petitioner in his application, as revealed through Para 1, asserted that he purchased the vehicle from one Ghaffar Ahmad through agreement dated 10.06.2006 for consideration of Rs.100,000/-; that vehicle was handed over to him on 10.06.2006 while the outstanding amount of Rs.20,000/- was paid to the plaintiff, who also recognized the same by putting his signatures on the agreement dated 10.06.2006. The case, as set-up by the respondent, is of payment of outstanding rent while that of petitioner is of ownership. These pleadings explicitly form allegation of misrepresentation which falls within the ambit of Section 12(2) of the Code. In such eventuality, it was incumbent upon the court to give due opportunity to the petitioner to advance evidence as the submissions raised in the application could not have been decided summarily.

13. The Hon'ble Supreme Court of Pakistan has expounded in many judgments that where allegations of fraud and misrepresentation are alleged which are duly supported by the material, then recording of evidence is incumbent upon the Court for disposal of application under Section 12(2) of the Code. The depiction of the above dictum can be embellished through the precedent reported as **2008 SCMR 236 (Mrs. Anis Haider and others V. S.Amir Haider and others)**, wherein it was held that:-

“It requires no lengthy discussion and there cannot be two opinions about the fact that the matter had already been remanded to the trial Court by this Court on 10-4-2003 for settling the above narrated points and for deciding application under section 12(2), C.P.C. Obviously, an application containing serious allegations of forgery and fraud could never have been decided without recording of evidence.” [Emphasis added]

14. By adopting the above principle on the subject, as calibrated by the superior courts, this Court has held earlier in case of “***PTV and others V. Abdul Sattar***” (C.R No.503/2019) that *since the provision of Section 12(2) of the Code is substitution of the suit unlike any other provision for setting aside ex-parte judgment and decree, therefore, in a case where material alleged and produced by the applicant in support of allegation of fraud and misrepresentation is serious and specific, it would be safe to record evidence for the just adjudication of the application under section 12(2) of the Code.*

15. In view of above, the impugned orders are not sustainable in the eye of law. Consequently, the instant writ petition is allowed, impugned orders dated 05.10.2019 & 26.11.2019 are set-aside. The learned trial court is directed to decide the application of the petitioner by keeping in view the scope of Section 12(2) of the Code, after recording evidence of the parties afresh, within a period of two months from the receipt of this judgment. There will be no order as to costs.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

Imran

Announced in open Court on 30.09.2020.

JUDGE

Approved for reporting.