

PESHAWAR HIGH COURT, PESHAWAR.

ORDER SHEET

Date of Order or Proceedin gs	Order or others Proceedings with Signature of Judge or Magistrate and that of parties or counsel where necessary
1	2
12.06.2020	<p><u>W.P No. 2658-P/2020 with I.R.</u></p> <p><u>Present:</u> Mr. Arshad Jamal Qurashi, Advocate, for the petitioner.</p> <p>*****</p> <p><u>MUHAMMAD NAEEM ANWAR, J.-</u> By filing of this writ petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner has assailed the judgment and order of learned Additional District Judge XII, Peshawar , dated 30-01-2020, whereby his revision petition was dismissed and, consequently, the judgment and order of Learned Civil Judge-I, Peshawar, dated 07-03-2019 was upheld.</p> <p>2. Facts of the aforementioned petition are that the Respondent No. 1 has filed civil suit No. 124/1 against respondents No. 2 to 10, for declaration to the effect that he is owner to the extent of 7-3/4 Marla of property bearing Khasra No. 1309/5, 1310/5, 1311/5, 1308/5, situated in Peshawar City, in the shape of plot boundaries whereof were given in head note “A” of the plaint, to which respondents No. 1 & 2 have got no concern,</p>

therefore, their claim pertaining to the said property is in-effective upon his rights. Along with declaration, a decree for perpetual injunction and in alternate decree for possession was also prayed for. The said suit was decreed on 15-12-2010 and decree holder (respondent No.1) has filed an application for execution in which the Executing Court has issued warrant of possession. The contention of petitioner was that on the strength of decree in Suit No. 124/1, the decree holder wants to take physical possession of petitioner's property. The petitioner came to know about the decree when allegedly Bailiff of the Court proceeded to the spot, hence, he filed an application under section 12 (2) C.P. C on the ground that decree was the result of fraud and misrepresentation of the facts. Learned trial court has dismissed the application against which the petitioner filed revision, but the same too met the same fate.

3. Learned counsel for petitioner contended that the petitioner is owner in possession of the property bearing khasra No. 1322/30 to the extent of one marla on the strength of registered deed No. 1819 dated 18-09-2013, which was not the subject matter of suit No. 124/2, thus, the petitioner's owned and possessed property could not be handed over to the decree holder. Next, he contended that the decree in suit No. 124/1 was the result of fraud and misrepresentation, and both these facts were requiring

framing of issues and recording of evidence, but the courts below have misread the record which resulted into miscarriage of justice, therefore, the judgments and orders being perverse, wrong, illegal and against the facts are liable to be set aside and the petitioner being necessary party in suit No. 124/1 may be impleaded and be given an opportunity to protect her rights. In support of his arguments, he relied on 2019 CLC 2016, 2019 CLC 847, 2015 CLC 931, 2019 CLC 1841, 2010 SCMR 500.

4. Arguments heard and record perused.

5. Admittedly, the property owned by the petitioner was not the subject matter of suit No. 124/1, thus, there was no decree against the petitioner's property. Record reveals that in suit No.124/1, no decree for partition was passed on the basis of which the specific portion of the property was to be handed over to the decree holder. Record also transpires that the decree for declaration was to the extent of shares in the joint property and as per the provision of Order XI Rule 35 (2) of CPC, only symbolic possession would be handed over to the decree holder. The main thrust of arguments of learned counsel for the petitioner was that under the garb of decree in suit No.124/1, the petitioner's owned and possessed property is intended to be taken from him. In such a situation, the remedy has already been provided by the legislature in the code of Civil Procedure 1908, under the provision of

Order XXI Rule 99, 100 and 101 of C.P.C, whereunder the petitioner could approach to the Executing Court by contending that no decree has been passed regarding her property but in no case the contention of the petitioner could be treated under section 12 (2) of CPC. The provisions of Order XXI Rule 99, 100 & 101 are reproduced as under: -

“99. Resistance or obstruction by bona fide claimant. Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment debtor, the Court shall make an order dismissing the application.

100. Dispossession by decree holder or purchaser.

(1) Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession. (2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

101. Bona fide claimant to be restored to possession. Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment debtor, it shall direct that the applicant be put into possession of the property.”

6. Likewise, in case of possession from joint property the mode of possession would be under Order XI Rule

35(2), which is reproduced as under: -

Rule 35(2) Where a decree is for the joint possession of immoveable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

7. Turning to the contention of learned counsel for petitioner that before passing the impugned order, neither issues were framed nor pro and contra evidence was recorded. There is no cavil with the proposition that an application under section 12 (2) of CPC should be treated as a suit but it equally settled principle of law that in every application under section 12(2) there is no need to frame issues and record evidence, rather it depends upon the facts of case to case. In the case of **Mst. Shabana Irfan versus Muhammad Sham Khan and other 2009 SCMR 40**, it was held by the Hon'ble Supreme Court that: -

“Needless to add that petition under section 12(2) of the C.P.C. can be decided summarily by the learned Court, which has passed the final judgment, decree or order in dispute, when there are admitted facts, documents between the parties. There is no need to prolong the litigation, when the case ex facie appears to have not been filed in a wrong jurisdiction, and when fraud or misrepresentation was not involved therein the case or in the transaction.”

In case of Mrs. Amina Bibi through General

Attorney versus Nasrullah and others 2000 SCMR 296, it was held by Supreme 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 as held if Amiran Bibi v. Muhammad Ramzan (1999 SCMR 1334). In the instant case, we have gone through the application under section 12(2), C.P.C., moved by the petitioner and the material available on record. In view of the facts and circumstances of the case and the judicial orders passed up to this Court during the protracted litigation, the application filed by the petitioner under section 12(2), C.P.C., was liable to be dismissed without formulating issues and recording evidence of the parties.”

8. When in suit No. 124/1, the petitioner’s property was not the subject matter then there was no case of either fraud or misrepresentation of fact.

9. For the reasons discussed above, this petition being bereft of merit is hereby dismissed in *limine*.

Announced.
12-06-2020

M Zafra PS

J U D G E

(SB. Mr. Justice Muhammad Naeem Anwar)

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