

2022 M L D 1910

[Balochistan]

Before Zaheer ud Din Kakar and Muhammad Aamir Nawaz Rana, JJ

NOOR KHAN ---Petitioner

Versus

SHER KHAN and 11 others---Respondents

Constitution Petition No.1113 of 2022, decided on 2nd August, 2022.

Civil Procedure Code (V of 1908)---

---S.12(2), O.VI, R. 4 & O. I, R. 8---Bar to further suit---Particulars to be given where necessary---Plea of fraud and misrepresentation---Burden of proof---Scope---Respondents filed a suit for declaration and permanent injunction within the scope of O.I, R.8, C.P.C., on behalf of three tribes---Suit was decreed---Petitioner filed application under S.12(2), C.P.C., alleging fraud as well as misrepresentation and lack of knowledge regarding the decree---Application was concurrently dismissed---Validity---Since provision of S. 12(2), C.P.C., was invoked by the petitioner so the entire burden to prove fraud and misrepresentation was upon his shoulder---Necessary particulars constituting fraud and misrepresentation had not been mentioned in detail within the scope of O.VI, R.4, C.P.C.---Proper publication was made in the suit prior to proceeding with the case---Petitioner had tried to justify delay of 17 years in filing the application by pleading lack of knowledge but it was admitted that the petitioner's uncle was party to the judgment and decree---Petitioner had neither filed any revenue record nor had he relied upon any document which could justify his locus standi to file application under S. 12(2), C.P.C.---Constitutional petition was dismissed.

Happy Family Associate v. Pakistan Intentional Trading Company PLD 2006 SC 226 rel.

Muhammad Naeem Kakar for Petitioner.

Date of hearing: 27th July, 2022.

ORDER

MUHAMMAD AAMIR NAWAZ RANA, J.---The petitioner, while invoking constitution jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter "the Constitution"), has called in question the order dated 21.06.2021 and order dated 23.02.2022 respectively passed by learned Civil Judge-II, Zhob (hereinafter "the trial Court") and learned District Judge, Zhob (hereinafter "the appellate Court"), whereby the application under section 12(2), C.P.C. filed by the petitioner

for setting aside the judgment and decree dated 29.02.2000 was dismissed and the appeal against the same was also unsuccessful.

2. The relevant facts required to consider the claim of the petitioner are that representative civil suit for declaration and permanent injunction within the scope of Order I, Rule 8, C.P.C. was filed before learned Qazi Zhob/Sherani by certain persons belonging to Umarzai, Badinzai and Abdullahzai Kakar tribes against individuals belonging to Khalwatzai, Badinzai and Abdullahzai Kakar tribes who were impleaded in representative capacity. The suit was registered as case No.11/1999, filed on 01.06.1999 in the Court of Qazi Zhob/Sherani. The perusal of record confirms that the suit was decided on merits vide judgment and decree dated 29.02.2000 passed by learned Qazi Zhob/Sherani.

3. The counsel of petitioner has submitted that the petitioner had absolutely no knowledge of the judgment and decree dated 29.02.2000 passed by learned Qazi Zhob/Sherani and only by coincident, he came to know about the said judgment and decree in the year 2017, when in some other case, the judgment and decree dated 29.02.2000 was referred.

The petitioner has alleged "fraud" and "misrepresentation" against the respondents while obtaining judgment and decree dated 29.02.2000, further learned counsel for the petitioner contended that the Courts below have failed to exercise their jurisdiction in accordance with law and since allegation of fraud and misrepresentation duly supported by evidence had been proved, therefore there was no occasion for the trial Court to dismiss the application under section 12(2), C.P.C., so filed by the petitioner and the appellate Court has also committed the same error by dismissing the appeal of the petitioner.

Arguments heard. Relevant record perused.

4. The petitioner has challenged the judgment and decree dated 29.02.2000 after lapse of almost 17 years without any plausible and cogent explanation of the delay and just alleged fraud and misrepresentation on the part of the respondents. The main thrust of arguments of learned counsel for the petitioner was that the provision of Order I, Rule 8, C.P.C. has been misused and the suit filed in representative capacity before learned Qazi Zhob/Sherani was not legally competent.

5. Since provision of section 12(2), C.P.C. has been invoked by the petitioner so the entire burden to prove fraud and misrepresentation within the ambit of section 12(2), C.P.C. was upon the shoulder of the petitioner and simply by using the word fraud and misrepresentation, without actually pointing out the necessary particulars, the provision of section 12(2), C.P.C. is not attracted, rather in order to prove the allegations within the scope of Order VI, Rule 4, C.P.C., necessary particulars constituting fraud and misrepresentation had to be mentioned in detail and required to be proved in accordance with law which part is completely missing in the application so filed by the petitioner under section 12(2), C.P.C.

6. The suit, which was decreed on 29.02.2000; was filed in representative capacity in view of Order I, Rule 8, C.P.C. For ready reference, same is reproduced herein below:

"8. One person may sue or defend on behalf of all in same interest. - (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct".

7. The perusal of aforementioned provision clarifies that in such like suit of representative capacity, the Court, at the plaintiff's expense, issue notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct. The perusal of judgment dated 29.02.2000 reflects that proper publication was made in the newspaper prior to proceeding with the case. So much so, the petitioner has not questioned the proceedings carried out by the learned Qazi Zhob/Sherani while passing judgment and decree dated 29.02.2000 on merits, rather levelled bald allegations of fraud and misrepresentation, since scope of this petition is limited to section 12(2), C.P.C. so the merits of the judgment and decree dated 29.02.2000 cannot be evaluated in these proceedings.

8. The petitioner has tried to justify delay of 17 years in filing application under section 12(2), C.P.C. by pleading lack of knowledge but it is admitted position that uncle of the petitioner namely Kamal Khan was party to the judgment and decree dated 29.02.2000. Apart from that, considering the evidence before the trial Court, the Courts below have rightly, concurrently concluded; that plea of lack of knowledge taken by the petitioner is without any substance and deliberately lame excuses have been mentioned in order to avert the objection of limitation. Furthermore, the petitioner has failed to meet the criteria which defines aggrieved person, as in the application under section 12(2), C.P.C., so filed by the petitioner; to challenge the judgment and decree dated 29.02.2000, neither he had filed any revenue record nor had relied upon any document which could justify his locus standi to file application under section 12(2), C.P.C. so on this score alone the petitioner was not competent to initiate proceedings under section 12(2), C.P.C. In this context we are enlightened by the order passed by Hon'ble Supreme Court in the case titled as Happy Family Associate v. Pakistan International Trading Company¹. The relevant portion is reproduced:

"-----That decree attained finality and the arguments now being submitted against this decree could have been examined if the petition for leave to appeal/appeal against the decree was filed in this Court. Application under section 12(2) or under section 151, C.P.C. is no substitute to regular appeal or revision or review nor these provisions can be construed as something over and above the normal modes of questioning a decree by way of appeal, revision or review. It is unfortunate that some litigants attempt to frustrate the decree/its execution by resorting to provision of section 12(2) and section 151, C.P.C., unnecessarily".

9. Both the Courts below have minutely evaluated each and every aspect of the matter and have concurrently decided the case against the petitioner so this Court, in writ

jurisdiction, cannot evaluate factual controversies which exercise has already been done by the Courts below, exhaustively.

In view of the above, this petition is found meritless and devoid of any legal substance, as such same is dismissed in limine.

SA/124/Bal.

Petition dismissed.