

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa, CJ
Mr. Justice Muhammad Ali Mazhar
Ms. Justice Musarrat Hilali

CIVIL PETITION NO. 2341-L Of 2016

Against the order dated 19.05.2016
passed by Lahore High Court, Lahore, in
C.M.723/2016 in R.S.A.61/1998

Hafiz Malik Kamran Akbar, etc

...Petitioners

Versus

Muhammad Shafi (deceased) through LRs, etc

...Respondents

For the Petitioners:

Sardar Muhammad Ramzan, ASC

For the Respondents:

N.R.

Date of Hearing:

02.01.2024

Judgment

Muhammad Ali Mazhar, J-. This Civil Petition for leave to appeal is directed against the order dated 19.05.2016 passed by the Lahore High Court, ("**High Court**") in C.M.723/2016 in R.S.A.61/1998 whereby the Application moved by the petitioners under Section 12 (2) of the Code of Civil Procedure, 1908 ("**C.P.C.**") was dismissed.

2. The short facts of the case are that the deceased Muhammad Shafi (cited as Respondent No.1 and now being represented through his legal heirs) filed a Civil Suit in 1993 in the Court of the Senior Civil Judge, Toba Tek Singh, for specific performance of the agreement against the deceased Malik Ali Akbar (cited as Petitioner No.1 and now represented through his legal heirs/petitioners). The suit for specific performance was decreed against the predecessor of the petitioners and others. The judgment and decree was challenged by the Respondent No.4 (Muhammad Saleem) in Civil Appeal before the District Judge, Toba Tek Singh, but the appeal was dismissed *vide* judgment and decree dated 04.07.1998. Thereafter, the Respondent No. 4, approached the Lahore High Court and filed Regular Second Appeal No.61/1998 for challenging the judgment and decree passed by the District Judge in the First Appeal. The learned High Court in Regular Second Appeal affirmed the concurrent findings recorded by the two courts below and also observed that no question of law was raised before the High Court, which is a pre-requisite for filing Second Appeal under Section 100 of the C.P.C.

3. The learned counsel for the petitioner argued that the High Court dismissed the application moved under Section 12 (2) C.P.C. without advertting to the allegations of fraud and misrepresentation which could not be decided without framing the relevant issues and recording evidence of the parties. He further argued that the present petitioners were never served any court notice and there is no proof that the present petitioners had any knowledge of the pending litigation.

4. Heard the arguments. The chronology of events demonstrates that the litigation between the parties had already attained finality with regard to the suit for specific performance of the agreement. The impugned order in the present proceedings is only confined to an order passed on an application moved under section 12 (2) C.P.C. by the legal heirs of Malik Ali Akbar, who are presently the petitioners before this Court, and *vide* order dated 19.05.2016, the application was dismissed by the High Court along with another application filed under Section 5 and 14 of the Limitation Act, 1908 for the condonation of delay.

5. The record reflects that the aforesaid application was filed on 12.05.2016 for setting aside the judgment & decree dated 27.01.2004 which was passed in RSA No.61 of 1998, while the suit for specific performance was filed in the year 1991 against the predecessor of the petitioners as well as four other defendants, which was contested only by Respondent No. 4 (Muhammad Saleem), whereas the other defendants in the civil suit, including the predecessor of the petitioners, did not contest the suit which was ultimately decreed *vide* judgment and decree dated 07.02.1998; However, again, only Respondent No. 4 preferred an appeal before the learned first appellate court which was dismissed *vide* judgment & decree dated 04.07.1998 and finally, the Regular Second Appeal was dismissed on 27.01.2004. The judgment and decree passed in the Second Appeal was challenged in this Court *vide* CPLA No. 648 of 2004 but it was also dismissed on 03.06.2004. Now, the present plea of the petitioners is that their predecessor-in-interest was never served due to wrong address. When they came to know the adverse judgments, they filed an application under Section 12 (2) C.P.C. in the Trial Court on 21.11.2013 but *vide* order dated 18.04.2016, the application was rejected on the basis of being not maintainable before the Trial Court with the rider that such application should have been filed in the High Court.

6. It is discernable from the impugned order that the judgment & decree passed by the learned Trial Court have been already executed and implemented in the revenue record and the decree holder is shown as owner of the suit property. In the suit for specific performance, the Respondent No. 4 fervently contested the proceedings up to the level of this Court. The petitioners plead the knowledge of judgment and decree in the year 2013, whereas their predecessor-in-interest departed on 07.10.2011, but in his life time, he never challenged the judgments & decrees passed by the courts of competent jurisdiction against him concurrently. The plea of wrong address is totally unjustified to undo the series of judgments and decrees passed concurrently and the filing of application under Section 12 (2) C.P.C. in the present situation amounts to dragging the proceedings unnecessarily and opening a second round of litigation in the proceedings which had attained finality much earlier.

7. It is a well-settled exposition of law that for determining the grounds of alleged fraud, misrepresentation or want of jurisdiction, if any, raised in the application moved under section 12(2), C.P.C., the Court is not obligated in each and every case to frame issues mandatorily in order to record the evidence of parties and exactly stick to the procedure prescribed for decision in the suit but it always rests upon the satisfaction of the Court to structure its proceedings and obviously, after analyzing the nature of allegations of fraud or misrepresentation, the Court may decide whether the case is fit for framing of issues and recording of evidence, without which the allegations leveled in the application filed under Section 12 (2) C.P.C. cannot be decided. The main ground alleged in the application by the petitioner is that the summon on their predecessor-in-interest was not served due to wrong address. Neither the copy of plaint is attached to the paper-book to show the title of the suit or address, nor the agreement on which the suit for specific performance was filed. There is an eye-catching distinction between Order 9 Rule 13 and the niceties of Section 12 (2) C.P.C. In case of an ex-parte decree, the defendant may apply under Order 9 Rule 13 C.P.C. for setting aside the ex-parte decree and if the Court is satisfied that summons were not duly served or the defendant was prevented from any sufficient cause from appearing when the suit was called, the Court can make an order for setting aside the decree and appoint a day for proceedings with the suit. However, it is further provided in the

same Rule that no ex-parte decree shall be set aside merely on the ground of any irregularity in the service of summons, if the Court is satisfied for the reason that the defendant had knowledge of the date of hearing in sufficient time to appear on that date to answer the claim. In tandem, a person can challenge the validity of a judgment, decree, or order on plea of fraud and misrepresentation or want of jurisdiction under Sub-section (2) of Section 12 C.P.C. by making an application with full particulars of the fraud and misrepresentation to the Court which passed the final judgment, decree, or order and not by a separate suit. The term "person" provided in this Section cannot be interpreted narrowly to restrict its scope and application only to the judgment-debtor or his successors but it includes any person adversely affected by the judgment and decree or order of the Court without any distinction on whether he was party to the original proceedings or not.

8. In the case of Ghulam Muhammad v. M. Ahmad Khan and 6 others (1993 SCMR 662), this Court articulated that the availing of remedy under Section 12, C.P.C. is quite encumbersome. Sub-section (2) of Section 12, enacted by virtue of Ordinance 10 of 1980, expressly ordains that the validity of judgment and decree obtained by fraud and misrepresentation can be assailed through an application to the Court, which passed the final judgment, decree, order and not by a separate suit. It was further held that seemingly, a two-fold purpose is sought to be achieved by the amending provision; firstly from jurisprudential point of view it is the obligation of the Court on whom the fraud is practiced to undo the fraud. Such application lies before the Court passing the final judgment, decree or order. Since on appeal or revision, against the judgment, decree or order, obtained by fraud, the matter is re-opened before the Appellate or Revisional forum, as the case may be, the application has to be filed before the higher court seized of such matter. Secondly, by conferment of the remedy through a simple application, the litigating party is to a large extent, saved from the hardship and encumbersome procedure involved in prosecuting a suit, and the delay in the final decision thereof. It is correct that the determination of allegations of fraud and misrepresentation usually involve investigation into the questions of fact but it is not in every case that the Court would be under obligation to frame issues, record evidence of the parties, and follow the procedure prescribed for decision of the suit. If it were so, the purpose of providing the new remedy would be defeated. The matter is

left to the satisfaction of the Court which has to regulate its proceedings, and keeping in view the nature of the allegations in the application, may adopt such mode for its disposal, as in consonance with justice, the circumstances of the case may require. Whereas in the case of Mrs. Amina Bibi through General Attorney v. Nasrullah and others (2000 SCMR 296), it was held by this 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. In the case of Amiran Bibi and others v. Muhammad Ramazan and others (1999 SCMR 1334), this Court held that there is no cavil that determination of allegations of fraud and misrepresentation ordinarily involve investigation into the questions of fact and in such cases an inquiry should ordinarily be held to adjudicate upon the matter in issue but it is not the requirement of law that the Court, while dealing with the allegation under section 12(2), C.P.C., must in all circumstances frame issues, record evidence and follow the procedure prescribed for decision of the suit which depends upon the facts of each case in consonance with justice.

9. In the present case, the petitioners have totally failed to substantiate any allegation of fraud, misrepresentation or want of jurisdiction to upset or overturn the concurrent findings recorded up to this Court, hence we do not find any illegality or perversity in the impugned order. This Civil Petition for leave to appeal was dismissed *vide* our short order, which is reproduced as under:

"For reasons to be recorded later, leave to appeal is declined and consequently this petition is dismissed."

10. Above are the reasons assigned in support of our short order.

Chief Justice

Judge

Judge