

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI
IInd Appeal No.141 of 2022
[Mst. Maimoona Noor vs. Noor Muhammad Noor]

Appellant: Through Mr. Samiullah Soomro, Advocate
Respondent Through Mr. Naseeruddin, Advocate.
Date of Hg. & Order **02.02.2026.**

ARSHAD HUSSAIN KHAN, J. The Appellant through instant IInd Appeal has assailed the judgement and decree dated **06.04.2022**, passed by the learned IV-Additional District & Sessions Judge, Karachi (Central) in Civil Appeal No.224 of 2021, which was dismissed by maintaining the order dated **07.04.2021**, passed by the IIIrd Sr. Civil Judge, Karachi (Central) on the application under Section 12(2) CPC, filed by the Appellant against the judgment dated **05.03.2020** and Decree dated **11.03.2020**, whereby Civil Suit No.44 of 2019, filed by the respondent, herein, was decreed to the extent of prayer clauses (a) and (c) of the plaint with no order as to costs whereas prayer clause (b) was declined. Above said judgments, decrees and order, hereinafter collectively referred to as the **impugned judgment**.

2. Brief facts of the case are that the respondent/plaintiff claims to be a lawful co-owner of property bearing No. R-1197, Block-19, Al-Noor Society, Federal 'B' Area, Karachi, measuring 120 square yards (suit property), by virtue of a registered sale deed dated 10.08.2005, which was subsequently mutated in the joint names of the plaintiff and the appellant/defendant (his then wife). It is averred that respondent/plaintiff married the appellant/defendant, a widow with five minor children, in the year 2004 and provided financial support, maintenance, and education to her children, including assisting in the marriages of her daughters. After purchase of the suit property, a four-storey building was constructed thereon, which remained in possession of the defendant, who allegedly enjoyed its rental income. It is further averred that in the month of March 2017, the appellant demanded divorce, allegedly under pressure and threats, whereupon talaq was pronounced. At that time, a mutual agreement was executed whereby both parties agreed to sell the joint property and share the proceeds equally. It is alleged that despite this arrangement, the respondent was

later subjected to threats and physical assault by unknown persons allegedly connected with the appellant, who also demanded the original title documents. Complaints were made to the police and proceedings under Section 22-A Cr.P.C. were initiated. It was also alleged that the appellant intends to sell the suit property unilaterally, giving rise to the respondent/plaintiff to file Civil suit No. 44 of 2019 for partition, mesne profit and permanent injunction before the court of IIIrd Senior Civil Judge, Central Karachi. The appellant/defendant, despite service of notice, failed to file a written statement and was consequently debarred from doing so, whereafter the suit proceeded ex-parte and was decreed in terms of prayer clauses (a) and (c) only. Instead of filing a civil appeal against the said judgment and decree, the appellant filed an application under Section 12(2) CPC, which was dismissed. Thereafter, Civil Appeal No.224 of 2021 was preferred, which was also dismissed, vide order dated 06.04.2022. Aggrieved by the same, the present second appeal has been filed.

3. Learned counsel for the appellant contends that judgments / order of both the courts below suffer from legal infirmity, resulting in a miscarriage of justice. He argues that the judgment and decree in the civil suit were obtained by the respondents through fraud, misrepresentation, and concealment of material facts. According to the appellant, the interest of justice requires that the matter should be decided on merits after giving fair opportunities to the parties to adduce their respective evidence and the parties should not be trapped in mere technicalities. Learned counsel further submits that both the courts failed to give due consideration to the contentions raised by the appellant regarding misrepresentation and fraud. He further argues that Section 12(2) CPC empowers a court to recall a judgment obtained by fraud, and therefore, the judgments of the lower courts be set aside and the matter be reconsidered on its merits.

4. Learned counsel for Respondent while supporting impugned judgments of the two courts below has contended that the trial court has rightly dismissed the application filed under Section 12(2) CPC. It is submitted that the appellant had failed to substantiate any allegation of fraud, misrepresentation, or concealment of facts by the respondent in obtaining the judgment and decree. Learned counsel emphasized that

the appellant has approached the court with unclean hands, deliberately concealing material facts and had not produced any evidence to support her claim of misrepresentation. Reliance has been placed on settled legal principles that mere assertion of fraud or misrepresentation, without cogent proof, is insufficient to set aside a judgment or decree. Consequently, learned counsel for respondent has prayed that the instant civil appeal be dismissed with heavy costs.

5. Heard learned counsel for the parties and perused the material available on the record.

6. From perusal of the record it transpires that the respondent/plaintiff filed suit No. 44 of 2019 for partition, mesne profit and permanent injunction against the appellant/defendant with the following prayers:

“a) To direct the defendant to partition the said property i.e. the plaintiff is a co-owner and bonafide purchaser of property No. No.R-1197, Block-19, Al-Noor Society, Federal 'B' Area, Karachi, measuring 120 Sq. Yds., Karachi, and in case of failure to do so, the Nazir of this Court may be appointed for partition the said property or sale out the said property and distribute the sale consideration amount to the plaintiff and defendant as per Muhammadan Law.

b) To direct the defendant, to pay 50% share of rent profit at the rate of Rs.40,000/- per month to the plaintiff since August 2005.

c) To grant permanent injunction against the defendants, their legal heirs, employees, agents, servants, attorneys and/or any other person or persons working under her and or on their behalf from selling, transferring, disposing, gifting, exchanging, alienating and creating third party interest in the suit property i.e. No.R-1197, Block-19, Al-Noor Society, Federal 'B' Area, Karachi, measuring 120 Sq. Yds. Karachi, till the finalization of this suit.

d) Cost of the suit with other misc.legal expenditures.

e) Any other relief or reliefs which this Court may deem fit and proper in the circumstances of the case.”

7. Record further shows that after institution of the suit, summons were issued to the appellant/defendant through all prescribed modes, including bailiff and publication in the daily *Express* dated 29.03.2019. Despite sufficient service, the defendant failed to appear and was proceeded ex-parte. On 03.07.2019, the defendant was debarred from filing written statement and counter-affidavit despite a last and final opportunity. The plaintiff thereafter led ex-parte evidence through affidavit and documents, cross-examination being recorded as nil.

Although the defendant later succeeded in getting the ex-parte order recalled under Order IX Rule 7 CPC, she again failed to file the written statement despite indulgence and was again proceeded ex-parte. Upon conclusion of evidence and hearing learned counsel for the plaintiff, the suit was decreed on 05.03.2020 in terms of prayer clauses (a) and (c) only.

8. The record further reflects that instead of challenging the judgment and decree through a civil appeal, the appellant chose to file an application under Section 12(2) CPC before the trial court alleging that the judgment and decree had been obtained through fraud and misrepresentation and seeking their recall. Upon examination of the record and after hearing the parties, the learned trial court dismissed the said application, vide order dated 07.04.2021.

9. The appellant assailed the aforesaid order through a time-barred Civil Appeal No.224 of 2021, which, after hearing learned counsel for the parties, was dismissed by the learned IV Additional District Judge, Karachi (Central), vide judgment dated 06.04.2022.

10. The record reveals that at the trial stage, the appellant was afforded more than sufficient opportunities to file a written statement, lead evidence, and address arguments; however, she chose not to contest the matter. Consequently, the suit proceeded ex-parte. Notwithstanding the absence of rebuttal, the learned trial court, after evaluating the respondent's affidavit-in-evidence and relevant documentary material, decreed the suit only to the extent of prayer clauses (a) and (c), while declining prayer clause (b) relating to mesne profits.

11. Insofar as the dismissal of application under Section 12(2) CPC is concerned, the record reflects that the appellant neither challenged nor disputed service of notice of the civil suit; rather, she admitted having knowledge of and presence in the proceedings before the trial court. This clearly shows that the appellant deliberately avoided participation and sought to enter the proceedings at a belated stage by filing an application under Section 12(2) CPC. The said application was rightly dismissed as the appellant failed to establish any misrepresentation, fraud, or concealment of facts on the part of the respondent or the court.

12. Insofar as the impugned judgment dated 06.04.2022, passed by the learned lower appellate court in Civil Appeal 224/2021 is concerned, the record shows that the application under Section 12(2) CPC was decided by the trial court in presence of the parties' counsel on 07.04.2021, whereas the appeal was instituted on 21.05.2021, i.e., after expiry of the prescribed period of thirty (30) days. No explanation for such delay was offered, nor was any application for condonation filed. In these circumstances, the appeal was rightly dismissed by the learned lower appellate court.

13. Besides above, from perusal of the record, it further appears that the present second appeal has been filed beyond the prescribed period of limitation. The limitation for filing a second appeal is governed by Article 156 of the Limitation Act, 1908, which provides a period of ninety (90) days from the date of the decree or final order passed by the lower appellate court.

In the present case, the judgment and decree were passed by the learned lower appellate court on 06.04.2022. The application for certified copies was filed on 21.04.2022, after a delay of fourteen (14) days, and the copies were received on 22.04.2022. However, the present second appeal was instituted on 10.08.2022, i.e., after **one hundred and nine (109) days** from the date of receipt of the certified copies and approximately **one hundred and fifteen (115) days** from the date of the impugned judgment and decree.

In reply to the office objection regarding limitation, it was stated that the appeal was filed on the first opening day after summer vacation. However, the record belies this assertion, as the first working day after summer vacation was 08.08.2022, whereas the appeal was filed on 10.08.2022. It is also well-settled that where an appeal is not filed within time and valuable rights accrue in favour of the opposite party, such valuable rights cannot be taken away unless very strong, convincing and solid grounds are shown for condoning the delay. In *Imtiaz Ali v. Atta Muhammad and another* [PLD 2008 S.C. 462], it was held by the Supreme Court that the appeal, having been filed after one day of the period of limitation, had created valuable right in favour of the respondents, and as such even the delay of only one day was not

condoned by the Supreme Court as no sufficient cause was found for filing the appeal beyond the period of limitation. In *Government of Pakistan through Ministry of Works and another V/S Messrs Malbrow Builders, Contractor, Sialkot* [2006 SCMR 1248], the Supreme Court was pleased to hold that the question of limitation being not a mere technicality cannot be taken lightly and the rights accrued to the other party due to limitation cannot be snatched away without sufficient cause and lawful justification.

Keeping in view the above, this Court finds that the present second appeal is hopelessly time-barred and is, therefore, liable to be dismissed on this ground alone.

14. It may be observed that this is a second appeal under Section 100, C.P.C., which is maintainable only on a substantial question of law. The appellant has failed to point out any substantial question of law arising from the impugned judgments and decrees, which do not suffer from any perversity or illegality. Accordingly, no interference is warranted under Section 100, C.P.C.

15. In view of the foregoing discussion, and after considering both the procedural and substantive aspects of the case, this Court concludes that the impugned judgments and decrees passed by the courts below are in accordance with law and facts. The appeal is, therefore, without merit and is also hopelessly time-barred. Accordingly, the present second appeal is dismissed both on merits as well as on the ground of maintainability.

JUDGE