

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD**

C.P No.D-2785 of 2015

Before:

Mr. Justice Abdul Maalik Gaddi

Mr. Justice Zulfiqar Ahmed Khan

Mst. Mariam and another ..... PETITIONERS.

Versus

Sarang Gahoti and others ..... RESPONDENTS

1. For orders on office objection
2. For Katcha Peshi.
3. For hearing of MA 13110/15

Mr. Altaf Sachal Awan, advocate for petitioners.

Mr. Muhammad Arshad S. Pathan, Advocate for respondent  
No.1.

Mr. Ashfaque Nabi Kazi, Assistant A.G.

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**O R D E R**

**ABDUL MAALIK GADDI, J** – Through this Constitutional Petition the petitioners have assailed the legality and propriety of the order dated 10.10.2015 passed by the learned Additional District and Sessions Judge, Matiari in Civil Revision Application No.01 of 2015 filed by the petitioners against the respondents, whereby the order dated 09.03.2015 passed by the learned Senior Civil Judge Matiari on an application under Section 12(2) read with Section 151 CPC filed by the petitioners in F.C.Suit No.47 / 2007 (old No.75 / 2005), was maintained.

2. Briefly, the facts of the case arising to file instant petition are that respondent No.1 filed F.C.Suit No.47 / 2007 (old No.75 / 2005) against petitioners and respondent No.2 and others for specific performance of contract, mandatory and permanent injunction in which as per record petitioners have filed their written statement on 12.11.2008, thereafter issues were framed on 26.05.2009 and the evidence of respondent No.1 and his witnesses was recorded, whereas, as per record the petitioners have not adduced any evidence before the Trial Court. Consequently, after hearing the parties Advocates the suit filed by the respondent No.1 was decreed by the Trial Court vide judgment and decree dated 21.09.2011 and 28.09.2011, respectively. It also appears from the record that the petitioners have also filed an application under Section 12(2) read with Section 151 CPC on 03.05.2012 before the Trial Court on the ground that the respondent No.1 has obtained the judgment and decree by means of fraud and misrepresentation of facts. This application was contested by the respondent No.1 and ultimately after hearing the learned counsel for the parties, learned Trial Court dismissed the said application vide order dated 09.03.2015, which was though assailed before the revisional court but petitioners remained unsuccessful. Hence this petition.

3. It is argued by the learned Counsel for the petitioners that the order on application under Section 12(2) CPC of the two courts below is against the law and facts. According to him, the petitioners were never served with summons but the suit has been decreed against the petitioners on 21.09.2011, thereafter execution application was filed and the same was allowed and in the meantime, the petitioners came to know about the fraud as the respondent No.1 in the said suit got

the decree in collusion with official respondents. He further argued that written statement on behalf of the petitioners was filed on the basis of fake power of attorney showing to have been executed by the petitioners and in connivance with the official respondents; that the learned Senior Civil Judge dismissed the application of the petitioners under Section 12(2) CPC without framing issues pertaining to fraud, as such, failed to apply his judicial mind; that the learned Trial Court failed to appreciate that the allegation of fraud was factual issue and it could only be decided after recording of evidence but the learned Trial Court decided the application summarily; that respondents No.1 and 2 fraudulently mentioned in the sale deed dated 07.01.2008 allegedly executed by the petitioner No.2 in favour of respondent No.1 that no case was pending in the Court and is free from all encumbrances and in case it is proved false then the executant would be responsible for all consequences; that said facts were based on misrepresentation amounting to fraud practiced for obtaining the decree; that the possession was not handed over at the time of execution of sale deed dated 07.01.2008 and by misrepresentation it was written that the possession was handed over at the time of sale agreement dated 24.12.2003 hence registered sale deed dated 07.01.2008 was obtained fraudulently which is invalid and void document. Learned Counsel for the petitioners during course of arguments has also reiterated the same facts and grounds which he has urged/agitated in the memo of petition. However in support of his arguments he has relied upon 2016 CLC Note 56 and has prayed that this petition may be allowed by setting aside the impugned orders and case be remanded back to the Trial Court for decision on merits.

4. As against this, learned Counsel for the respondent No.1 has supported the orders passed by two courts below and argued that order passed by the two courts below have been passed in accordance with law after appreciation of law and facts involved in the case; that judgment passed in F.C.Suit No. 75/2005 was passed by the learned Trial Court after recording the evidence and affording full opportunity to the petitioners who contested the suit by filing written statement; that during pendency of the suit one of the petitioners had executed sale deed before the Sub-Registrar in favour of respondent No.1, subsequently the petitioners have filed application under Section 12(2) CPC only to mislead the Court for getting the order but it was dismissed; that the petitioners have denied the power of attorney on the basis of which written statement has been filed without any reason only to blackmail the respondent No.1; that the documents were registered before the Sub-Registrar duly executed by petitioner No.2 (Mst. Panah Bibi) in favour of respondent No.1; that the judgment and decree passed by Trial Court have never been challenged by the petitioners; that the possession of the subject property is with respondent No.1 which was handed over to him at the time of execution of sale agreement; that Mst. Panah Bibi has never challenged the said registered sale deed before any Court and the said document was also produced in evidence in the suit hence question of concealment of facts does not arise; that the petitioners had received sale consideration while remaining sale consideration has been deposited with the Executing Court. In the last learned Counsel for respondent No.1 has prayed for dismissal of this petition having been filed malafidely only to harass the respondent No.1. In support of his arguments he has relied upon the cases of Mrs. AMINA BIB through

General Attorney v. NASRULLAH and others (2000 SCMR 296), and 2.GHULAM MUHAMMAD V. M. AHMAD KHAN AND 6 OTHERS (1993 SCMR 662).

5. Learned A.A.G submits that there is dispute in between the private parties and the official respondents have no interest in the matter, as such, the same may be decided on the material available on record.

6. We have given our anxious thoughts to the contentions raised at the bar and have perused the record with their able assistance.

7. Perusal of the R & Ps shows that respondent No.1 filed suit for specific performance of contract, mandatory and permanent injunction against the petitioners and other respondents in which petitioners and respondent No.2 have filed their joint written statement through their attorney on 12.11.2008. But, this fact has been denied by the petitioners on the ground that the written statement was filed on the basis of attorney, the person to whom they had not given any power. It also reveals from the record that after filing the written statement the issues were framed on 26.05.2009 and thereafter respondent No.1 had produced his evidence which is also available on record. It also appears from the record that the petitioners have not led any evidence in the matter and their side for evidence was closed on 24.05.2011. It reveals from the record that Mr. Qamar Mehmood Baig, Advocate, was representing the petitioners and respondent No.2 and Trial Court after hearing the parties and perusing the record decreed the suit of the respondent No.1 vide judgment and decree dated 21.09.2011 and 28.09.2011, respectively, which have not been challenged by the petitioners. However, an

application under Section 12(2) C.P.C has been filed on the ground of misrepresentation of facts and fraud, which was dismissed by the learned Senior Civil Judge Matiari vide order dated 09.03.2015 and the said order was maintained by the revisional Court vide its order dated 10.10.2015, which has been assailed through this petition.

8. From the perusal of record it reveals that the petitioners and respondent No.2 have contested the suit by filing their joint written statement, which is on record. It is the case of the petitioners that joint written statement has been filed on their behalf through fake attorney by committing fraud and misrepresentation of facts, therefore, it is liable to be ignored and their application under Section 12(2) CPC be allowed as the same has been dismissed by the two Courts below without framing any issue. This fact has been denied by respondent No.1 by taking the plea that the petitioners and respondent No.2 have contested the case before Trial Court and when the judgment and decree have been passed against them they have filed application under Section 12(2) CPC before the Trial Court just to blackmail the respondent No.1 and frustrate the judgment and decree in his favour, which has not been assailed by the petitioners before any forum, therefore, the same has attained finality.

9. Through this petition the petitioners have alleged fraud committed by respondent No.1 in respect of the subject matter, which has been denied by respondent No.1. It appears that there are words against words and in case when there are words against words burden heavily lay on the person who asserted affirmatively. But, here in this case the petitioners have failed to discharge the burden lies upon them by not producing cogent and convincing evidence. Even otherwise the question of fraud has already been adequately

addressed and decided by the two courts below in faovur of respondent No.1.

10. We have minutely gone through the orders of the two courts below and carefully examined the same on the issue of fraud and misrepresentation of facts as alleged by the petitioners, but did not find any illegality in it.

11. As far as the non framing of issues by the Trial Court with regard to fraud and misrepresentation of facts is concerned in this regard it suffice to say that determination of such allegations ordinarily involve investigation into a question of fact and in such cases an inquiry is ordinarily to be held to decide the matter. In our view, Court is not under obligation in every case to frame issue, record evidence of the parties and follow the procedure prescribed for decision in a suit. Matter is totally within the satisfaction of the Court which has to regulate its proceedings and keeping in view the nature of allegations in the application the Court may in its discretion adopt any mode for its disposal. In this respect we are fortified with the case of Mst. NASIRA KHATOON and another v. Mst. AISHA BAI and 12 others (2003 SCMR 1050). On this point we are again supported with the case of Mrs. AMINA BIB through General Attorney v. NASRULLAH and others (2000 SCMR 296), wherein The Honourable Supreme Court has observed as under;-

*“ While dealing with allegations under S.12(2), C.P.C., it was not incumbent upon Court that it must, in all circumstances, frame issues, record evidence and follow procedure prescribed for decision of the suit.”*

12. It is settled principle of law that this Court while exercising constitutional jurisdiction has to see as to whether courts below have

committed jurisdictional error not condonable in nature or have committed legal error causing miscarriage of justice. This Court while exercising the constitutional jurisdiction could not decide the matter as Court of appeal by making reappraisal of evidence and could not form a different opinion from the one concurrently held by the courts below.

13. In this matter as we have observed above that the courts below have concurrently with solid reasons dismissed the claim of the petitioners as raised in application under Section 12(2) CPC, therefore, we do not find any reason for interference in it.

14. For the foregoing reasons, we are of the considered opinion that it is not a fit case for interference by this Court while exercising the constitutional jurisdiction, with the result that this petition was dismissed alongwith listed application by our short order dated 17.05.2017 in open Court after hearing the learned Counsel for the parties and these are the reasons thereof.

JUDGE

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