IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

C.P.No. C.P.No.S-108 of 2018

Petitioners:	1). Miss RozinaParveen, 2). Miss Uzma Sarwar, 3). Miss ErumShaheen, all daughters of Ghulam Sarwar , through Mr.Muhammad Noman Jaffar Advocate.
Respondents:	1). Ghulam Nabi s/o Abdul Karim Memon Since dead through his L.Rs: a). Mst.Islam, Khatoon (widow), b). Ghulam Qadir, c). Abdul Rehman, d) Abdul Karim (sons), e).Mst. Zamir Begum, f). Mst.Shabiran Memon, g). Mst.Naziran, h) Jamila (daughters). 2). Mst.Haseena alias Ghulam Zuhra w/o Ghulam Hyder since dead through her LRs: respondent No.4&6 & applicants 3). Mst.Safooran alias Sughran w/o Abdul Raheem Memon, d/o Ghulam Hyder Memon, 4). Asif Ali son of GhulamSarwar 5). Arif Ali son of GhulamSarwar 6). Ashique Ali son of Ghulam Sarwar through Mr.Osaf Ali Shah, Advocate.
The State:	Mr. Abid Hussain Qadri, State Counsel.
Date of hearing:	21.05.2018.
Date of order:	.2018.

O R D E R

AMJAD ALI SAHITO,J.- By way of instant petition, the above named petitioners have assailed the order dated 10.01.2018, passed by learned V-Additional District Judge, Larkana, in Civil Revision Application No.33 of 2016 “Re-Miss Rozina Parveen and others vs.

Ghulam Nabi and others", whereby he maintained the order dated 22.09.2016, passed by learned IV-Senior Civil Judge, Larkana, dismissing the application under section 12(2) C.P.C filed by petitioners, in F.C.Suit No.32 of 2007.

2. The facts leading to disposal of instant petition are that respondent Ghulam Nabi son of late Abdul Karim Memon filed a Suit for Declaration, Partition and Injunction on 15.05.2007 against Mst.Haseena alias Ghulam Zuhra, Mst.Safooran alias Sughra, both daughters of late Ghulam Hyder Memon, Asif, Arif, Ashiq, all sons of late Ghulam Sarwar Channo. In the said suit, un-city survey house area measuring about 1800 square feet, situated at Memon Muhalla, Town Dokri, was said to be owned and possessed by late Abdul Karim son of Abdul Rehman Memon, the father of the plaintiff and late Ghulam Hyder, the father of respondent No.2 and 3. The original owner of the suit house namely Abdul Karim, the father of plaintiff and late Ghulam Hyder, who was father of respondent No.2 and 3, died about 20 years back and left behind respondent No.1 and late Ghulam Hyder as his surviving legal heirs. After the death of Abdul Karim, said house was inherited to respondent No.1 and Ghulam Hyder, the father of respondent No.2 and 3, in equal share i.e 50 paisa share each (area 900 square feet each out of 1800

square feet). An area of 900 square feet was inherited by respondent No.1 while 900 square feet was inherited by Ghulam Hyder, the father of respondent No.2 and 3. The respondent No.1 and Ghulam Hyder were residing jointly in the said house. Ghulam Hyder, the brother of respondent No.1 and father of respondent No.2 and 3 passed away about 04/06 years back without having any male issue except two daughters i.e respondents No.2 and 3. Therefore, the respondent No.1, being brother of deceased Ghulam Hyder, claimed to have inherited 300 square feet out of 900 square feet share of his brother Ghulam Hyder while respondent No.2 and 3 inherited 600 square feet out of 900 square feet, hence the respondent No.1 became owner of 1200 square feet from the suit house. As such respondent No.1/plaintiff Ghulam Nabi filed F.C.Suit No.32/2007, for Declaration, Partition and Injunction against respondents/defendants Mst. Haseena alias Ghulam Zuhra Memon and others, in respect of suit property before learned IV-Senior Civil Judge, Larkana.

3. The respondent No.5 then appeared before learned trial Court and filed a joint written statement on his behalf and being attorney of respondent No.2 to 6 as well as petitioners. The learned trial Court on conclusion of trial and hearing counsel for the parties decreed the suit of the respondent No.1 in his favour

vide judgment and decree dated 22.04.2011, which was challenged in Civil Appeal No.49/2011, wherein the petitioners were mentioned as applicants No.6, 7 and 8, who were represented through their legal attorney namely Arif Ali Channo being real their brother and the said appeal was also dismissed vide judgment and decree dated 28.08.2014 passed by learned V-Additional District Judge, Larkana. Thereafter, the said judgment and decree was impugned before this Court by way of filing a Civil Revisionapplication.

4. It is pertinent to mention here that the respondents No.2, 4, 5 and 6 including petitioners are brothers and sisters inter-se, who contested the case from trial Court to appellate Court as well as before this Court by way of filing civil revision application. Suffice to say that the petitioners have not filed a complaint against their brother before any competent forum or a suit for cancellation of special power of attorney before the competent Court of law. Subsequently, the above named petitioners filed an application U/s.12(2) C.P.C before the learned trial Court praying therein for setting-aside the above judgment and decree which was dismissed by learned trial Court vide order dated 22.09.2016. The petitioners being aggrieved of such order filed a Civil Revision Application No.33 of 2016, but it was also

dismissed by learned V-Additional District Judge, Larkana, which was impugned by the petitioners by way of filing Civil Revision application before this Court but it was later-on converted into constitutional petition by an order dated 29.01.2018, wherein the notices were issued to the respondents and in pursuance whereof the reply/objections were filed by the L.Rs of the respondent No.1(deceased).

5. Learned counsel for the petitioners contended that both the impugned orders passed by the Courts below are contrary to the law and without appraisal of the facts and circumstances of the case; that the learned trial Court without framing of the issues dismissed the application under section 12(2) C.P.C, that the respondent No.1 obtained judgment and decree dated 22.04.2011 from learned trial Court with collusion of the respondents No.4 to 6 by way of fraud and misrepresentation; that the respondent No.5 got prepared a forged and managed Special of Power of Attorney dated 17.05.2007 in his favour whereas the petitioners had not executed any special of power attorney in favour of respondent No.5; that after obtaining such special power of attorney by respondent No.5 in collusion with respondent No.1 and 4 to 6, sought such judgment and decree from learned trial Court; that the respondent No.4 to 6 in order to usurp the share of petitioners with dishonest

intention collusively helped respondent No.1 to obtain the judgment and decree; that since the petitioners have not executed any power of attorney in favour of the respondentNo.5, he has engaged an Advocate for filing appeal No.49/2011 and subsequently revision application No.175 of 2015 before this Court, which are based on misrepresentation and result of fraud committed by the respondents No.5 in collusion with the respondent No.1; that both the courts below have not considered that after the death of their mother Mst. Haseena, who expired on 02.07.2015, they came to know about the fraud committed by the respondents. He further contended for setting-aside the orders passed by learned trial Court as well as appellate Court and lastly prayed for allowing of instant constitutionalpetition.

6. Learned counsel for the respondents while rebutting the above contentions argued that both the Courts below have rightly dismissed the application(s) of the petitioners as the respondent No.1 had not committed any fraud, misrepresentation or want of jurisdiction while obtaining judgment and decree in his favour, that filing of application under section 12(2) C.P.C before learned trial Court was without cogent reason, that at the time of filing of the suit on 05.05.2007, Mst. Haseena and Mst. Safooran being co- owners/co-sharers in the suit property on the

basis of inheritance, were joined as defendants and since the petitioners themselves admitted that Mst.Haseena had died on 02.07.2015, hence at the time of filing of F.C.Suit No.32/2007, the petitioners were neither co-owners/co-sharers, thus they were not joined as party, so far joining Arif, Asif and Ashfaq as respondents is concerned, to restrain them from creating third party interest; that the Appeal No.49 of 2011 filed by the petitioners through their attorney was dismissed on 28.08.2014, which was challenged by them by filing Civil Revision No.175 of 2015 before this Court, and the same is also pending for adjudication, that the petitioners had to file asuit for cancellation of alleged power of attorney or a suit for damages against the respondents No.5 but they preferred to file application 12(2) C.P.C. He lastly prayed for dismissal of the petition.

7. Learned State counsel supported the impugned orders.

8. I have considered the arguments advanced by learned counsel for the parties and have minutely gone through the record with their assistance.

9. It is discernible from the record that the judgment and decree was passed by learned trial Court in F.C.Suit No.32 of 2007 Re.Ghulam Nabi Vs. Mst.Haseena alias Ghulam Zuhra and others, which

was challenged by the petitioners through their attorney/respondent No.5 namely Arif before the appellate Court by filing an appeal, but it was also dismissed and subsequently the civil revision application was filed before this Court. Such Revision petition is admittedly pending before this Court. I would add that the object and concept of the provision of Section 12(2) C.P.C is never meant to provide another remedy to a party on his failure in appeal etc. The provision is an exception to normal procedure, available to an aggrieved person from a decree or order etc, by way of appeal, revision etc. This however would never mean an additional remedy to be exercised by a party on his failure in appeal etc. In the case of Noor Muhammad v. Muhammad Iqbal & 5 others 2014 CLC 1459, it is held by Division Bench of this Court as:-

> **"7. ... This argument has no merit as in our view application under section 12(2) C.P.C. or under section 151, C.P.C. was not substitute to regular appeal or revision or review, not such provision could be construed as something over and above the normal modes of questioning a decree by way of appeal, revision or review..."**

At this point, a referral to provision, being relevant to make object thereof clear, is made hereunder:-

> **"12. Bar to further suit.—(1)....**

> **(2) Where a person challenges the validity, of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate suit."**

10. The use of words **'a person'** in place of "**party to suit"** makes it clear that such remedy can well be availed even by a person who has never remained a **party** to proceedings. However, since such remedy has deliberately been confined only on plea of **'fraud, misrepresentation or want of jurisdiction'** therefore, in my humble view that regardless of applicant to be a stranger or a party to suit a challenge to a decree etc under this provision shall be confined to such plea alone. I would further attempt to make it clear that since in appeal the question of **fraud, misrepresentation** and even **want of jurisdiction** could competently raise with reference to available material therefore, once a **party to litigation** prefers to file an appeal despite remedy to challenge the decree on grounds, provided by Section 12(2) C.P.C, it (**party to suit)** shall stand debarred from resorting to such course else the very purpose of legal decision (right) earned through a contest shall not only fail but fail / defaulting party shall have an advantage to keep earned right under litigation,

which, I will say, would never be the intention of law-makers. Reference may safely be made to the case of Tanveer Siddiqui & another v. Muhammad Rashid 2010 YLR 1851 wherein it is observed, in categorical terms, as:-

> **"10. ..... If this is allowed then this would mean to give to a party, which has contested a legal proceedings or failed to contest the same even after due service, another opportunity to attack a decision before the same Court which has already decided against him. This remedy under section 12(2) of Civil Procedure Code is not meant for a party that could have availed the ordinary remedy provided under Parts VII and VII of the Civil Procedure Code or under a Special Statute, whatever the case may be, but failed to avail such remedy or if availed consciously gave it up. The provisions of section 12(2) of Civil Procedure Code cannot be used as a substitute or alternative for the ordinary remedy of appeal. Once a contesting or defaulting party gives up or fails to avail remedy of appeal, then the matter attains finality and remains no more open to challenge. This finality is accorded by law irrespective of the fact that an aggrieved party is otherwise able to demonstrate that it has a valid case on merits. The whole idea behind this principle of finality is that at reaching a certain stage every litigation must come to an end no matter any party may be unduly benefited on account of the bar of finality to a legal proceedings. Law envisages a stage when litigation must come to an end without any further challenge. This principle of finality is well enshrined in the doctrine of Res Judicata as well as in the statutes prescribing limitation for**

> **initiating any legal proceedings. This principle cannot be trampled by allowing a contesting or defaulting party to have recourse to provisions of section 12(2) of the Civil Procedure Code to be used as an alternative or substitute for the remedy that was though available but consciously given up. For a contesting or defaulting party, the remedy lies only before the appellate forum provided in law and not under section 12(2) of the Civil Procedure Code. The intent and object behind enacting the principle of finality as provided in the doctrine of Res Judicata or the law of limitation would be defeatedif the doors of further litigation on the contesting or defaulting party are not shut after a controversy has been decided and the remedy to challenge the same before appellate forum is no more available by efflux of time. This principle of finality, which is accorded by law to a controversy or a decision of Court of law, remains irrespective of the fact that a contesting party is otherwise able to demonstrate that it has a valid case on merits. "**

Since, it is a matter of record that Revision Petition is pending regarding the decree in question which has been filed by present petitioners themselves. Therefore, I would say that remedy under section 12(2) of the Code was / is not available for the petitioners. Thus, their application u/s 12(2) of the Code meriting dismissal on this count alone.

11. It is a matter of record that after lapse of four years, the petitioners filed an application under section 12(2) C.P.C before learned trial Court in the

year 2015. Since, the petitioners including their mother and brother have executed a power of attorney (Annexure "J") in favour of their brother/respondent No.5 who prima facie remain challenging such decree and even Revision petition is pending, therefore, the filing of application u/s.12(2) C.P.C at later stage by petitioners denying such execution of power of attorney, carries no weight.

12. So far the contention of learned counsel for the petitioners that learned trial Court was bound to frame issue and decide the application u/s.12(2) C.P.C after recording the evidence is concerned, it is not obligatory for the Court to frame issue and record evidence in each case, such application could be decided on basis of available evidence and relevant record. In this context, the reliance is placed upon case of Warriach Zarai Corporations. F.M.C United (Pvt) Ltd (2006 SCMR-531), wherein the Hon'ble Supreme Court of Pakistan has held that;

> **4. It is well entrenched legal proposition that the framing of issues depend on the circumstances of each case, nature of alleged fraud and the decree so obtained. Framing of issues in every case to examine the merit of the application would certainly frustrate object of Section 12(2) C.P.C, which is to avoid, protracted and the time consuming litigation and to save the genuine decree-holder from grave hardship, ordeal of further litigation, extra burden on their exchequer and simultaneously to**

reduce unnecessary burden on the Courts below which are already overburdened.

13. The next contention of learned counsel for the petitioners that with collusion of the respondents No.4 to 6, the respondent No.1 obtained judgment and decree fraudulently but till today, the petitioners have not filed any suit against the attorney nor filed any criminal complaint against respondents No.4 to 6 for their misdeeds. I would add that law itself permits a contest through an **authorized agent** therefore, if a denial to such **authorization** is allowed to open another round of litigation, it would frustrate the very object and purpose of lawful proceedings which a **recognized agent** can lawfully continue. Further, the plea of fraud and misrepresentation would not be available when such **agent** remained challenging the decree with which the petitioners claim to be aggrieved. Even otherwise, the litigation, so initiated by such **agent**, is alive which the petitioners can competently take-over and may raise all plea (s) and grounds.

14. Further, the contents of the applications do not contain the specific allegation of fraud to implicate the brothers of petitioners and attorney in anyfraud.

15. Consequent upon above discussion, I hold that the learned trial Court as well as appellate Court have rightly dismissed the application u/s.12(2) C.P.C

through their well reasoned orders, therefore, the petitioners have failed to point out any illegality or infirmity committed by the Courts below while passing the impugned orders, which do not call for any interference by this Court. Thus, the instant petition merits no consideration and is dismissed accordingly, with no order as to cost.

J U D G E

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