

**IN THE HIGH COURT OF SINDH,
KARACHI**

J.M. No. 37/2015

Applicant : Muhammad Amin Iqbal, through
Mr. Muhammad Umar Lakhani,
Advocate.

Respondent No.1 : Noor Muhammad Lakhani, through
Mr. Khalid Javed, Advocate

Date of hearing : 29.11.2017

Date of Judgment :

J U D G M E N T

YOUSUF ALI SAYEED, J:- The instant Application under S.12(2) CPC calls into question the propriety of the Order made on 16.07.2015 (the “**Impugned Order**”) in Suit No.1235/2011 (the “**Underlying Suit**”), whereby a learned single Judge of this Court was pleased to decree the said Suit on the basis of a compromise in terms of an Application under Order 23, Rule 3 CPC (the “**Compromise Application**”), and seeks that Impugned Order and consequent consent decree be recalled/set-aside on the alleged basis that the same were obtained by fraud and misrepresentation.

2. The Underlying Suit, titled a “Suit for Declaration, Specific Performance, Perpetual Injunction and Special Damage”, was instituted by the Respondent No.1 against the Respondent No.2 on 16.07.2011 in relation to an immovable property bearing Plot No. C-26, Block No. 13, Federal ‘B’ Area, KDA Scheme No. 16, Karachi, admeasuring 600 square yards (the “**Subject Property**”). The case of the Respondent No.1, as set up in the plaint, was predicated on his claim as to there being an oral agreement of sale having been entered into between him and the Respondent No.2 in respect of the Subject

Property as on 20.01.2011, coupled with part payment of the sale consideration. Whilst the claim of the Respondent No.1 was originally resisted by the Respondent No.2, an understanding was apparently arrived at in terms of the Compromise Application, culminating in the Impugned Order and the Underlying Suit being decreed inter alia to the effect that the Subject Property be conveyed to the Respondent No.1 on payment of the sale consideration in full.

3. Learned counsel representing the Applicant based his challenge on the premise of having transacted in respect of the Subject Property in terms of an Agreement to sell dated 06.02.2015 executed between him and the Respondent No.2 and her children (i.e. the Respondents Nos. 3 to 6, who were co-owners), and his having made certain payments in that regard aggregating to Rs.4,500,000/-, which fact was not mentioned in the Compromise Application or otherwise disclosed to the learned single Judge at the time that the Impugned Order was obtained. Per learned counsel, an expansive interpretation ought to be accorded to the terms 'fraud' and 'misrepresentation' for the purpose of S.12(2) CPC, and it was contended that the failure to disclose the aforementioned transaction to the Court amounts to concealment, hence constitutes fraud, vitiating the Impugned Order and the consequent compromise decree.
4. In support of this broad proposition, learned counsel for the Applicant invited attention to the Counter-Affidavit filed by the Respondent No.2 in these proceedings, wherein the transaction with the Applicant to the extent of the Agreement to sell dated 06.02.2015 and payment received thereunder had been admitted.

5. It was pointed out that various public notices had also been published in Nawa-e-Waqt” on 27.03.2015 as well as “Jasarat” on 16.04.2015 and 16.07.2015, due to which the Respondent No.1 also ought to have been on notice, and was thus complicit in the act of concealment. It was submitted that as certain compliances that were to be made by the Respondents Nos. 2 to 6 remained, the time period for the transaction envisaged in terms of the Agreement to sell dated 06.02.2015 was extended by means of a subsequent Agreement dated 06.04.2015, whereby the vendors undertook to comply with their obligations and then give intimation in writing for 15 days to the Applicant for registration of the Sale Deed. It was submitted that pending such compliances, the Applicant proceeded to Khartoum, Sudan, where he was in employment, and it was there that he allegedly came to have knowledge of the Impugned Order and thus returned to Karachi on 26.07.2015, where after he instituted proceedings before this Court in the shape of Suit No.1443/2015 for Specific Performance and Suit No.1460/2016 for Cancellation respectively. He placed reliance on Judgments reported at PLD 1997 Karachi 267, PLD 1982 Peshawar 172, 1984 SCMR 586, 2008 CLC 75 and PLD 2010 Karachi 366.

6. Conversely, learned counsel for the Respondent No.1 contended that no case within the contemplation of S.12(2) CPC stood made out under the given circumstances, in as much as the agreement in favour of the Respondent No.1 and the institution of the Underlying Suit on the basis thereof predated the Agreement to sell dated 06.02.2015 on which the Applicant based his claim, that the Underlying Suit was

thus already in the field on the basis of such prior transaction in favour of the Respondent No.1 and could not be regarded as a device created or set up to defeat the claim of the Applicant, and that the Applicant had not even instituted any proceedings for enforcement of such claim at the time that the Impugned Order was made. He submitted that, as such, the Respondent No.1 was evidently a bona fide purchaser for value without notice. He further pointed out that the Respondent No.2 had even otherwise also stated in her counter-affidavit that her subsequent transaction with the Applicant stood cancelled due to the absence of contact with the Applicant, and that the Applicants absence from Pakistan was borne out by his own contention of having proceeded abroad. He argued that under the given circumstances, the Applicant had no valid claim in relation to the Subject Property, and that, if at all, the only remedy available to the Applicant was by way of damages, and that too, only as against the Respondent No.2.

7. Having considered the arguments advanced at the bar and examined the record, it is apparent that in the Underlying Suit the relief sought by the Respondent No.1 was of specific performance as against Defendant No.2 on the basis of agreement to sell alleged to have been entered into in favour of the plaintiff well prior to the transaction subsequently relied upon by the Applicant, and the mere fact that another agreement has also been subsequently made by the same prospective seller in favour of another person is of no significance in the context of the pre-existing claim for the purpose of the Impugned Order. Admittedly, the Applicant had not even instituted any proceedings on the basis of the subsequent agreement at that point in time. The citations on which reliance has been placed by the Applicant are thus clearly

distinguishable from the matter at hand. In this context, it also has to be borne in mind that the Applicant, who merely claims to have a contract of sale in respect of the same property executed in his favour subsequent to the earlier contract in favour of the Respondent No.1, has no interest in or charge on that property by virtue thereof. As a matter of fact, such an agreement of itself even otherwise creates no such charge.

8. As such, no case of fraud for the purposes of S.12(2) CPC and hence no case for interference stands made out. The main Application under S.12(2) is accordingly dismissed along with all other pending miscellaneous applications.

JUDGE

Karachi
Dated _____