

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

C.P No.D-145 of 2004

Before:

Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Irshad Ali Shah.

Petitioner[s]: Muhammad Hashim son of Wali Muhammad (deceased) through L.Rs: 1) Dr. Aftab Ahmed, 2) Mst. Jehan Ara, 3) Mst. Razia, 4) Mst. Zubaida, 5) Mst. Shaista and 6) Mst. Shahnaaz, all son and daughters of Muhammad Hashim.
Through Mr. Saad Fayaz Memon, Advocate.

Respondents No.1(i, ii, v & vi): Through M/s Muhammad Sulleman Unar and Mr. Asad Ali Jatoi, Advocates.

Official Respondents: Mr. Allah Bachayo Soomro, Additional A.G

Date of hearing: 08-12-2020.

Date of decision: 29-12-2020.

JUDGMENT

Irshad Ali Shah J:- By way of instant petition, the petitioner (now through legal heirs) has impugned order dated 18.02.2004 passed by learned IVth Additional District Judge, Hyderabad whereby he has maintained the order dated 29.07.2002 passed by learned 1st Senior Civil Judge, Hyderabad whereby an application under section 12 (2) C.P.C filed by the petitioner for setting aside of compromise decree dated 13.05.1996 in F.C Suit No.301 of 1984 titled 'Haji Abdul Ghafoor and others Vs. Abdul Wahid Khan and others' was dismissed.

2. The facts in brief necessary for disposal of instant petition are that a suit for specific performance of contract and permanent injunction was filed by Haji Abdul Ghafoor and others, it was dismissed

for non-prosecution on 04.02.1992, it was restored on 24.01.1996 on making of an application under Order 9 Rule 9 C.P.C by Abdul Ghafoor and others. Subsequently a compromise application was filed, it was allowed vide Order dated 07.04.1996. Compromise decree was drawn accordingly on 13.05.1996 by learned Trial Court. The petitioner on coming to know of such compromise decree on 18.07.1996 by making an application under section 12 (2) C.P.C sought for setting aside of the same. Issues therein were framed. It was dismissed by learned by learned Trial Court vide its order dated 29.07.2002, against such dismissal of his application the petitioner filed a Revision Application, it was dismissed by learned IVth Additional District Judge Hyderabad vide her Order dated 18.02.2004, which is impugned by the petitioner before this Court by way of instant petition.

3. It is contended by learned counsel for the petitioner that the petitioner is the lawful owner of the subject land, he is being deprived of his legal right of ownership over the subject land by Abdul Ghafoor and others by obtaining a collusive decree, by practicing fraud upon the Court, same as such is liable to be set-aside together with the impugned orders. In support of his contention, he has relied upon the cases of *Mst. Shahana Ali Vs. Syed Muhammad Haris Jaffari (PLD 2010 Karachi 366)* and *Haji Farmanullah Vs. Latif-Ur-Rehman (2015 SCMR 1708)*.

4. It is contended by learned counsel for legal heirs of Haji Abdul Ghafoor and others that the decree is not collusive one, it has not been obtained by practicing fraud; the application moved by the petitioner for setting-aside of such decree has been dismissed by learned Trial

Court after proper probe, and such dismissal has been maintained by learned Revisional Court in accordance with Law. By contending so, he sought for dismissal of the instant petition.

5. Learned Additional Advocate General, Sindh was fair enough to say that no public interest at the moment is involved in the instant petition. None came forward to advance arguments on behalf of rest of the respondents, despite publication of notices in prominent newspapers.

6. We have considered the above arguments and perused the record.

7. Admittedly, the suit filed by Haji Abdul Ghafoor and others was dismissed for non-prosecution on 04.02.1992. An application under Order 9 Rule 9 C.P.C for its restoration was filed on 09.01.1996 with unpalatable delay of about four years. It was restored on 24.01.1996 by learned Trial Judge, without accounting for such delay, that too without providing chance of hearing to the defendants, which was mandatory as per requirement of sub Rule (2) to Rule 9 of Order 9 C.P.C which prescribes that no order shall be made under this Rule unless notice of the application has been served on the opposite party. The very restoration of the suit, on account of failure to make compliance of the above said provision of law obviously was illegal. On restoration of the suit, the notices were ordered to be issued against the defendants and then the case was adjourned to 23.04.1996. Even before service of such notices, both the parties plaintiff/defendant allegedly on 07.04.1996 put appearance before learned Trial Court and filed compromise application. It was accepted by learned Trial Court

without ascertaining the fact as to whether the defendants who were allegedly consenting for such compromise decree till that time were actually having ownership right over the subject land. Such omission on the part of learned Trial Court could not be overlooked. It was a compromise decree, therefore, Haji Abdul Ghafoor and others were hardly having a need to have filed an execution application. It was filed obviously to cover-up fraud as detailed above. It was allowed and then *Nazir* of the Court executed a Sale Deed in favour of Haji Abdul Ghafoor and others on behalf of the Court. The revenue entries could not be maintained on the basis of above sale deed, as the subject land was found to be owned by the petitioner as was reported by Mukhtiarkar concerned. There is nothing on record which may suggest that any sale certificate was obtained by the *Nazir* of the Court prior to executing the Sale Deed in favour of Haji Abdul Ghafoor and others. On filing of an application under section 12 (2) C.P.C the issues were framed by learned Trial Court. Haji Abdul Ghafoor during course of his examination was fair enough to admit that survey numbers 19, 86, 105 to 108, 263 to 265, 632 to 636, 672 and 45 of Deh Shah Bukhari, (which forms part of the subject land) are still in the name of Muhammad Hashim (the petitioner). In that situation, to deprive the petitioner of its legitimate right of ownership over the subject land without contest would be unjustified and contrary to the mandate contained by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 which prescribes fair trial for determination of criminal/civil rights and obligations to every citizen. Surprisingly the subject application was dismissed by learned Trial Court without providing chance of hearing to the original defendants of the suit.

8. The conclusion which could be drawn of the above decision would be that it was prima facie a collusive decree and it was obtained by Haji Abdul Ghafoor and others by practicing fraud and making misrepresentation of the facts.
9. However, with reopening of the trial, a question which could then be of utmost importance for the disposal of the suit is, whether applicant/ petitioner (now newly added defendant) had the knowledge of the original agreement between plaintiff₁ and defendant₂ of the suit and that he purchased it with this knowledge of previous transaction. These facts would then be subjected and tested under Section 27 of the Specific Relief Act and Section 41 of the Transfer of Property Act, which the applicant/petitioner shall face during the trial. The petitioner/ applicant had to come out of this trial in terms of requirement of the aforesaid provisions of law that he had purchased it without knowledge of previous agreement and that transaction to be bonafide transaction, to escape the clutches of above sections, successfully.
10. In view of above, the orders passed by learned Courts below together with the subject decree are set-aside with directions to learned Trial Court to implead the petitioner (now through legal heirs) as party in the above suit and then to proceed with it in accordance with Law.
11. The instant petition is allowed accordingly in the above terms with no order as to costs.