

IN THE HIGH COURT OF SINDH AT KARACHI

H. C. A. No. 422 of 2018

[Zafar Ali Kayani and others *versus* Ahmed Saleem Khan and others]

Present:

Mr. Irfan Saadat Khan, J.

Mr. Muhammad Faisal Kamal Alam, J.

Dates of hearing : 30.09.2020.

Appellant : Zafar Ali Kayani and others, through Mr. Zayyad Khan Abbasi, Advocate.

Respondents 1 & 2 : Nemo

Respondents 3-5 : Muhammad Hussain and 2 others, through Mr. Khawaja Shams-ul-Islam, Advocate.

ORDER

Muhammad Faisal Kamal Alam, J: Through the present Appeal, Appellant has challenged the order dated 08.11.2018 (“**Impugned Order**”), whereby, Application under Order I Rule 10(2) of Civil Procedure Code, 1908 (“**CPC**”) was allowed and the present Respondents No.3 to 5 were impleaded as Respondents No.3 to 5 in J.M. No.52 of 2016.

2. Relevant facts for deciding this Appeal is that present Appellants are claiming their entitlement as owners in respect of a house built on Plot No.10-A/II, 27th Street, Phase-V Extension, Khayaban-e-Shamsheer, measuring 1000 Square Yards, DHA, Karachi – **Subject Property**. Present Appellants preferred J.M. (Judicial Miscellaneous) No.52 of 2016, under Section 12(2) of CPC, challenging the order dated 11.07.2012 and decree dated 30.07.2012, passed in Suit No.752 of 2012, on the ground that the same was obtained through fraud and misrepresentation. As per the record,

Suit No.752 of 2012 was preferred by one Ahmed Saleem Khan, who has been arrayed as Respondent No.1 in the present Appeal against present Respondents No.2 (Syed Raza) and predecessor-in-interest of the present Appellant, *namely*, (late) Zafar Ali Kayani. Last two Respondents were impleaded as Defendants No.1 and 2 respectively in the said suit, which was, *inter alia*, for Specific Performance of the Contract in respect of the above Subject Property, which was compromised between the Parties and consequently, a compromise decree dated 30.07.2012 was drawn up (available at page-275 of the present Appeal), which was challenged in the above J.M. proceeding.

3. Mr. Zayyad Khan Abbasi, Advocate for the Appellant, has argued that present Respondents No.3, 4 and 5, who filed application under Order I Rule 10 of CPC (available as Annexure 'A/3', page-223 of the present Appeal), were neither necessary nor proper parties, because they themselves are claiming to be purchasers of the Subject Property vide Conveyance Deed dated 25.02.2016, *whereas*, the Appellants have challenged the above order and decree, which is of an earlier date and at that particular point in time, the present Respondents No.3 to 5 were neither in picture nor they have any cause to file the application for becoming party in the proceeding, which is only between the present Appellants and present Respondents No.1 and 2. It is submitted that when present Appellants have not averred anything against Respondents No.3 to 5, then the latter are strangers to the J.M. proceeding and cannot be impleaded as parties. He has placed on record the Counter Affidavit of Respondent No.1, filed in above J.M., in support of his arguments, that said Respondent supported the contention of present Appellants, *particularly*, with regard to possession of the Subject Property, which at present is with the Appellants. In support of his arguments, learned counsel has cited the reported judgment of the

Honourable Supreme Court handed down in the case of ***Raja Muhammad Arshad v. Raja Rabnawaz*** [2015 S C M R page-615].

4. Mr. Khawaja Shams-ul-Islam, Advocate representing Respondents No.3 to 5, has supported the Impugned Order and referred to his application under Order I Rule 10 of CPC to supplement his arguments that the above Respondents have claimed their right and interest in respect of the Subject Property through a registered instrument viz. registered Conveyance Deed dated 25.02.2016 [at page-329 of the present Appeal]. Before purchasing the Subject Property due diligence was made. He has emphasised on the fact that Respondents purchased the Subject Property through one Muhammad Sarwar Hayat, to whom the title was conveyed by Respondent No.1 through a registered Conveyance Deed dated 09.09.2012. He has also referred to the official documents to show that mutation / transfer in favour of Respondents No.3 to 5 has been effected in the record of Cantonment Board, Pakistan Defence Officers Housing Authority and Military Estate Office in General Land Register. It is averred that Respondents No.3 to 5 being subsequent and *bona fide* owners of the Subject Property were put in physical possession of the same by the above Muhammad Sarwar Hayat, but on the night of 24th and 25 September, 2018, they were illegally dispossessed by Appellant No.(iii) (*Sajeel Zafar Kayani*) with the connivance of area SHO Javed Abro.

5. Arguments heard and record perused.

6. The significant facts of the reported judgment (*ibid*) is that appellant (of the reported case) filed application under Section 12(2) of CPC against a compromise decree, which was effected in appeal arising out from a pre-emption suit and entered through one Ghazanfar, being an attorney of the said appellant. Subsequently, an application under Section 12(2) of CPC

was preferred by the appellants questioning the status of their own attorney. The Honourable Apex Court was of the view that the said attorney should have been impleaded in subsequent proceeding under Section 12(2) of CPC, because the same is a substitute for separate / independent suit and an application under Section 12(2) CPC has all the relevant attributes of the suit and a person against whom an allegation of fraud is made, is a necessary party. The cited case law does not advance the case of present Appellants. Conversely, the above observation about nature of proceeding under Section 12(2) of CPC supports the view mentioned in the Impugned Order.

7. If for the sake of argument, the order dated 11.07.2012 and decree dated 30.07.2012, passed in the afore-referred *lis* is set aside, then it is bound to adversely affect the subsequent transactions between Respondents *inter se*. Consequently, both Appellants and Respondents are claiming to be in physical possession of the Subject Property, which issue cannot be decided without leading evidence and examining the witnesses including those who are claiming to be in possession of the Subject Property. Official record referred to by the learned counsel for Respondents No.3 to 5, including Conveyance Deed (*supra*) in favour of the said Respondents, makes out a convincing case for Respondents No.3 to 5 to be added as Respondents in the above J.M. proceeding. In the Impugned Order the scope of Order I Rule 10 of CPC has been discussed in detail in the light of reported decisions of the Honourable Apex Court. Thus, we are of the view, that in a proceeding under Section 12(2) of CPC, an application for addition or deletion of a person under Order I Rule 10(2) of CPC, can be filed and adjudicated upon on its own merits.

8. In view of the discussion, the Impugned Order does not suffer from any illegality and there is no reason for interfering with the same. However, the paragraph-10 of the Impugned Order is modified to the extent that_

- i. Present Appellants, besides filing an amended title (as directed in the Impugned Order) will also be at liberty to amend the pleadings of J.M. No.52 of 2016 in view of subsequent development, allowing present Respondents No.3 to 5 to become Respondents in J.M. proceeding;
- ii. Similarly, the Respondents will be at liberty to file an amended Counter Affidavit in the J.M. No.52 of 2016;
- iii. Issues may be framed (if required) and evidence can be recorded on Commission, in order to expedite the entire proceeding of J.M. No.52 of 2016.

9. The above direction may be completed within four weeks from the date of this order. Consequently, while maintaining the Impugned Order with the above direction, the present Appeal is dismissed.

10. Parties to bear their respective costs.

Judge

Judge

Karachi,
Dated: 09.10.2020.

Riaz / P.S.