

Order Sheet
IN THE HIGH COURT OF SINDH CIRCUIT COURT
AT HYDERABAD

C.P No.D-73 of 2021

Sher Ali Vs. Syed Hamid Ali and another.

PRESENT:

Mr. Justice Arshad Hussain Khan
Mr. Justice Irshad Ali Shah

16.02.2021

Mr. Muhammad Ishtiaque Khan, Advocate for petitioner.

ARSHAD HUSSAIN KHAN, J.- By means of this constitutional petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has called in question the order dated 16.11.2020, passed by learned IInd Additional District Judge Hyderabad in Summary Suit No.37/2013 (Execution Application No.13/2014) on an application under section 12 (2) CPC, whereby issues were framed to decide the application under section 12 (2) CPC.

2. The facts giving rise to the present constitutional petition are that the petitioner filed a Summary Suit bearing No.37 of 2014 for recovery of a balanced amount Rs.16,92,000/- with markup 10% per annum from the date of agreement taken place between the petitioner/ plaintiff and respondent No.1/ defendant in respect of a plot sold out by the petitioner to respondent No.1 for which respondent No.1 issued a cheque, which on presentation before MCB Limited Gari Khata Branch was dishonored. The said summary suit was *ex-parte* decreed as prayed with no order as to costs on 03.04.2014 and against *ex-parte* decree of the suit, no appeal was filed, hence, petitioner filed an Execution Application bearing No.13 / 2014, which was also allowed vide order dated 10.01.2018. Subsequently, respondent No.1 preferred an application under Order XXXVII rule 4 CPC r/w section 151 CPC, which was dismissed for non-prosecution, thereafter, restoration application was also declined, vide order dated 19.05.2017. Subsequently, respondent No.1 filed an application under Order IX rule 13 CPC r/w section 151 CPC for setting aside the *ex-parte* order and decree. Thereafter, respondent No.1 also filed an

application under section 151 CPC for treating the application already filed under Order IX rule 13 CPC to an application under Section 12 (2) CPC. The said application though was contested by the petitioner, however, the same was allowed, vide order dated 05.03.2020. The learned trial court after hearing the parties' counsel, passed the order dated 16.11.2020 holding that the application under section 12 (2) CPC cannot be decided without framing of issues on the point of obtaining decree by way of fraud and misrepresentation of facts and recording evidence. Hence, being aggrieved with the order dated 16.11.2020, the petitioner has approached this Court with the aforementioned prayers.

3. Learned counsel for the petitioner while reiterating the contents of the memo of petition has contended that in his suit, respondent No.1 was properly served and the *ex-parte* decree passed by learned trial Court which was not challenged, hence, it attains finality. Per learned counsel the order for conversion of application under Order IX rule 13 CPC into an application under Section 12 (2) CPC was not in accordance with law even though, leading evidence on the application under section 12 (2) CPC is against the law and norms of justice as no fraud or misrepresentation has been committed by the petitioner for the reason that the suit was decreed on the basis of documentary proof i.e. cheque (dishonored) issued by respondent No.1. Hence, he prayed for setting aside the impugned order with the directions to the learned trial court to decide the same in accordance with law.

4. From the record, it appears that the Summary Suit filed for recovery of amount by the petitioner was decreed *ex-parte*, in respect of sale transaction orally entered into between the petitioner/plaintiff and respondent No.1/defendant whereby the petitioner agreed to sell out his plot No. 5 Hali Road Gaddi Colony Hyderabad measuring 1800 Sq. ft. to respondent No.1 for a total sale consideration of Rs.40,00,000/- out of which respondent No.1 paid Rs.23,08000/- whereas for remaining amount of sale consideration, i.e. Rs.16,92,000/-, he issued cheque to the petitioner which upon deposit was dishonored. From the perusal of the impugned order dated 16.11.2020, it further reveals that the stance taken by respondent No.1 in the application under Section 12 (2) CPC is that after the above sale transaction, he came to know that the property sold by petitioner does not belong to him, therefore, he stopped the

payment of cheque issued to the petitioner and filed the suit against him for recovery of amount. The petitioner concealed the said fact from the trial court and obtained the decree. Furthermore, it is also the claim of respondent No.1 that in the suit he has not been served in accordance with law, hence, the decree was obtained by the petitioner against respondent No.1 through misrepresentation of facts and by committing fraud upon court.

5. The precise plea of the petitioner in the instant case is that since the order dated 05.03.2020 passed by learned trial court for conversion of application under Order IX rule 13 CPC filed by respondent No.1 to an application under section 12 (2) CPC, is untenable in law hence, the order dated 16.11.2020 (impugned herein) subsequently passed by the trial court on the application under Section 12 (2) CPC, whereby the issues were framed, is also not sustainable and as such the same is liable to be set aside.

6. From the perusal of the record it also transpire that the application filed by respondent No.1 for conversion of his application under Order IX Rule 13 into an application under section 12 (2) CPC though contested by the petitioner, however, order dated 05.03.2020 passed thereon was never challenged by the petitioner as such the same has attained finality. The petitioner, at this stage, cannot question the legality of the said order as it is well settled law that if the person, against whom any order is passed, does not challenge the order, it is meant to have accepted the same.

7. Insofar as the contention of learned counsel with regard to maintainability of the application under Section 12 (2) CPC in summary suit is concerned, suffice to say that still said application has not been finally decided only the trial Court has framed the issues for the parties to lead evidence. Question of maintainability of the application is also one of the issues framed by the trial court as such the plea of the petitioner is premature and misconceived in nature. For sake of convenience relevant portion of the impugned order is reproduced as under:

“The careful consideration of the above paragraph of order shows that no detail of service has been mentioned in the same that whether after issuance of summons through ordinary mode of service, the same were served through pasting etc. Moreover, the learned counsel for the plaintiff has submitted as discussed above that Section 12 (2) CPC is not applicable in

summary suits. The above position shows that the instant application cannot be decided without framing of issues on the point of obtaining the decree by way of fraud and misrepresentation of facts and so also whether Section 12 (2) CPC is applicable in the case or not. I therefore deem it appropriate that the application would be decided after framing of following issues and leading the evidence by the parties.

ISSUES

(1) *Whether the application U/S 12 (2) CPC is maintainable according to law?*

(2) *Whether the decree was obtained by the plaintiff by way of fraud and misrepresentation of facts?*

(3) *What should the decree be?*

The parties are directed to produce their list of witnesses and documents, if any, within seven (07) days."

8. Insofar the as the scope of the provision of Section 12 (2) CPC, is concerned the Hon'ble Supreme Court of Pakistan in various judgments has held that where allegation of fraud and misrepresentation is alleged which is duly supported by the material, in that eventuality, recording of evidence is incumbent upon the Court for disposal of application under Section 12(2) of the Code. In this regard, reliance can be placed upon the case of Mrs. Anis Haider and others v. S. Amir Haider and others [2008 SCMR 236] wherein it was held as follows:-

"It requires no lengthy discussion and there cannot be two opinions about the fact that the matter had already been remanded to the trial Court by this Court on 10.4.2003 for settling the above narrated points and for deciding application under section 12(2), C.P.C. Obviously, an application containing serious allegations of forgery and fraud could never have been decided without recording of evidence."

9. On the touch stone of the above pronouncement of the Honorable Supreme Court, when we examined the impugned order we did not find any illegality and infirmity in it. Even otherwise, since the order impugned in the constitutional petition is an interlocutory in nature and against such an order constitutional petition does not lie, unless there is found any blatant illegality, which has caused sheer injustice to the rights of the any of the parties. In this regard, the Hon'ble Supreme Court of Pakistan in the case of Syed Saghir Ahmed Naqvi v. Province of Sindh through Chief Secretary S&GAD, Karachi and others [1996 SCMR 1165] , inter alia, has held that:-

"The statute excluding a right of appeal from the interim order cannot be passed by bringing under attack such

interim orders in Constitutional jurisdiction. The party affected as to wait till it matures into a final order and then to attack it in the proper exclusive forum created for the purpose of examining such orders.”

10. In view of the foregoing discussion and relying upon the ratio of the authorities, stated supra, we are of the opinion that this petition being devoid of merit as well as not maintainable, hence, the same is liable to be dismissed.

These are the reasons for our short order dated 16.02.2021 whereby instant petition was **dismissed** in *limine* along with all listed applications.

JUDGE

JUDGE

Dated: 22.02.2021

Abdullah Channa/PS