ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

J. Misc. No. 10 of 2010

in Suit No. B–52 of 2006

Date	Order with signature of Judge

1. For hearing of C.M.A. No. 7759 / 2010.
2. For hearing of C.M.A. No. 1070 / 2010.
3. For hearing of Main application.

Date of hearing : 12-12-2012.

M/S Mirza Sarfraz Ahmed and Muhammad Junaid Farooqi, advocates for the applicants.

Mr. Mohammad Zubair Quraishy,
advocate for the respondent.

Nadeem Akhtar, J. **:**

1. C.M.A. No. 7759 / 2010 : This application has been filed by the applicants praying for the ejectment of their tenant from their premises. The main proceedings have been initiated by the applicants under Section 12(2) for setting aside of the ex-parte decree passed against them by this Court on 06.04.2007 in Suit No.B-52 of 2006 filed against them by the respondent. This application does not fall under the scope of Section 12(2) CPC, nor can the relief prayed therein be granted under these proceedings. The application is, therefore, dismissed. However, the applicants shall be at liberty to seek their remedy before the proper forum, if they are so advised.

2. C.M.A. No. 1070 / 2010 : In view of the Order passed on the main application under Section 12(2) CPC, this application has become infructous. Accordingly, it is disposed of.

3. Main Application under Section 12(2) CPC :

This application under Section 12(2) CPC has been filed by the applicants for setting aside of the ex-parte decree passed against them by this Court on 06.04.2007 in Suit No.B-52 of 2006 **(the Suit)** filed

against them by the respondent. The Suit was decreed jointly and severally against the applicants in the sum of Rs.334,545,061.67 with cost of funds thereon from the date of default ; and sale of the assets pledged and hypothecated by them, and the properties mortgaged by them was also ordered.

2. The Suit was filed on **29.11.2006** by the respondent against the applicants in the banking jurisdiction of this Court under the Financial Institutions (Recovery of Finances) Ordinance XLVI of 2001, for recovery of Rs.401,454,074.00. The amount claimed in the Suit included the principal amount of the finance facilities provided by the respondent to the applicants, as well as the markup and liquidated damages calculated thereon upto **30.09.2006**. The two dates mentioned in this paragraph are relevant and important for the purpose of the decision of the present application. The summons were issued in the Suit through all four modes, but the applicants / defendants did not appear nor did they file the application for leave to defend. Accordingly, the Suit proceeded ex-parte against them resulting in passing of the impugned ex-parte decree.

3. Mirza Sarfaraz Ahmed, the learned counsel for the applicants, submitted that the respondent obtained the decree against the applicants through misrepresentation, concealment of material facts / documents, and by committing fraud upon the Court. In order to elaborate these allegations against the respondent, he submitted that, before filing the Suit, the respondent had filed a Reference before the NAB against the applicants alleging that they were liable to pay to the respondent a sum of Rs.175.00 million. Before the NAB, both the parties negotiated and reached a settlement. The terms and conditions of the settlement were recorded through a 'Voluntary Return Agreement' **(the Agreement)** duly executed by both the parties on **29.11.2006**. The learned counsel submitted that under the terms and conditions of the Agreement, the parties had specifically agreed that the applicants will pay to the respondent 'the settlement amount of Rs.113.65 million' immediately after expiry of one year grace period from the date of the Agreement. He argued that despite entering into the Agreement / compromise with the applicants on 29.11.2006, the respondent filed the Suit on the same day without disclosing in the plaint the fact about the settlement or the terms and conditions of the Agreement. He contended that, if the applicants had violated any of the terms and conditions of the Agreement, the

respondent should have filed a Suit for its specific performance, rather than filing a recovery Suit by concealing the Agreement. He further argued that concealment of the Agreement / settlement by the respondent from this Court amounts to misrepresentation and fraud within the meaning of Section 12(2) CPC. He specifically pointed out that the Agreement was acted upon by the parties, therefore, there was no cause of action in favour of the respondent at the time of filing the Suit, and thus the Suit was premature. According to the learned counsel, the summons in the Suit were never served to the Applicants, and they came to know about the impugned ex-parte decree for the first time when the Official Assignee came at their factory to take over its possession in pursuance of the order passed in the Execution Application No.60/2008 filed by the respondent. The averments and allegations in relation to the misrepresentation, concealment of material facts / the Agreement, and fraud allegedly committed by the respondent, have been specifically pleaded by the applicants in the present application.

4. To oppose this application, the respondent filed its counter affidavit. Mr. Mohammad Zubair Quraishy, the learned counsel for the respondent, vehemently opposed the application and reiterated the contents of the counter affidavit filed by the respondent. He specifically denied the allegations of concealment of material facts / the Agreement, misrepresentation, and fraud leveled by the applicants against the respondent. He submitted that the Agreement had no nexus with the cause of action of the Suit ; the applicants were duly served in the Suit, but they deliberately avoided to appear therein ; the present application is barred by time ; the grounds urged by the applicants are not reasonable or sufficient for setting aside the impugned decree ; the present application does not fall under the purview of Section 12(2) CPC ; this Court has become *functus officio* after passing the decree ; and the impugned decree cannot be set aside as it has attained finality. In support of his submissions, the learned counsel relied upon the cases of (i) *Javaid Tanveer Mughal V/S Agricultural Development Bank of Pakistan and 3 others*, ***2004 CLD 748***, and (ii) an unreported Order dated 06.04.2004 passed by this Court in Suit No.B-229/2000, *National Bank of Pakistan V/S M/S Polycol Textile Industries and others*.

5. In reply to the counter affidavit filed by the respondent, the applicants filed their affidavit-in-rejoinder, wherein the legal objections to

the present application were dealt with, and the allegations against the applicants were denied. On the point of maintainability of the application under Section 12(2) CPC in banking matters, the learned counsel for the applicants cited and relied upon the cases reported as ***2001 CLC 1187***, ***2005 CLD 192*** and ***2010 CLD 1762***. Since it has now been settled that Section 12(2) is applicable in banking matters, I need not discuss the aforementioned cases. The case of *Lal Din and another V/S Muhammad Ibrahim*, ***1993 SCMR 710***, relied upon by the learned counsel is not relevant to the facts and circumstances of this case, as the decree in the said case was obtained on the basis of a forged document, which is not the case of the applicants. Similarly, the case of *Muhammad Tahir V/S Emirates Bank International PJSC and another*, ***2010 CLC 1545***, cited by the learned counsel is also not applicable to the case in hand, as the plaintiff had given the wrong address of the defendant and service was allegedly effected at the said wrong address.

6. To substantiate his submission regarding the fraud and misrepresentation pleaded by the applicants, their learned counsel cited and relied upon the cases of (i) *Government of Sindh V/S Khalil Ahmed*, ***1994 SCMR 782***, and (ii) *Muhammad Akram Shaikh V/S Messers Pak Libya Holding Company (Pvt.) Ltd. and 14 others*, ***PLD 2010 Karachi 400***. In the first case mentioned above, it was held inter alia by the Hon'ble Supreme Court that it is a general principle that fraud vitiates even the most solemn proceedings, and that the courts of general jurisdiction are competent to suo motu recall decrees obtained from it by fraud. In the second case mentioned above, it was held inter alia by this Court that concealment of facts before a judicial forum would amount to fraud and misrepresentation, and that fraud, misrepresentation and circumvention used to obtain a judgment are generally regarded as sufficient causes for the opening or vacating thereof, particularly where the judgment is obtained against a person without his knowledge.

7. The cases referred to by the learned counsel for the respondent are of hardly any help to him. In the case of *Javaid Tanveer Mughal* (supra), the question decided was in relation to an appeal arising out of the order of dismissal of the application under Section 12(2) CPC. However, it was observed by the learned Division Bench of the Lahore High Court that the provisions of Section 12(2) CPC have been made applicable before the Banking Court. The cited case, in fact, supports the

contention of the applicants. Regarding the unreported Order dated 06.04.2004 passed by this Court in Suit No.B-229/2000 (supra), the facts and circumstances were completely different. In the said case, the application was not filed under Section 12(2) CPC on the ground of misrepresentation or fraud, but was filed under Section 12 of the Ordinance of 2001, which has a completely different and distinct scope. The application was barred by time, and was filed on the ground that the attorney had no authority to create mortgage.

8. The main questions in this case, that go to its root, are whether the subject matter / finances involved in the Agreement and those in the Suit were the same or not, and whether or not obtaining the impugned ex-parte decree by not disclosing the Agreement in the Suit amounts to misrepresentation and fraud on the part of the respondent. In the above perspective, I have examined the Agreement minutely and very carefully in order to understand and appreciate the respective contentions of both the parties. Following important features of the Agreement have been noticed :

i) Vide Clause 7 of the Agreement, it was agreed that the applicants will pay to the respondent a sum of Rs.113.65 million immediately after expiry of one year grace period from the date of the Agreement.

ii) The grace period of one year for payment was agreed as some claims of the applicants were pending before the Export Promotion Bureau (EPB) at the time of execution of the Agreement. It was, therefore, specifically mentioned in the said Clause 7 that the amount will be paid by the applicants in case they do not receive their claims from the EPB.

iii) For the implementation of Clause 7 of the Agreement, Clause 8 was incorporated therein, whereby the respondent itself had authorized the NAB to pay to the respondent the entire amount of the applicants' claims received from the EPB.

iv) In Clause 9 of the Agreement, it was specifically mentioned that only in case of non-payment of the settlement amount of Rs.113.65 million within one year grace period, or non-receipt of the applicants' claims from the EPB, the respondent was

authorized by the applicants to sell the mortgaged properties either through joint efforts and/or joint advertisement in order to recover the settlement amount of Rs.113.65 million.

v) The respondent was not entitled or authorized to sell the mortgaged properties before the agreed one year grace period, and that too only in case of non-payment of the settlement amount of Rs.113.65 million by the applicants, or non-receipt of the applicants' claims from the EPB.

vi) Vide Clause 9 of the Agreement, it was further agreed by the parties that any amount over and above the settlement amount of Rs.113.65 million, received through the sale of the mortgaged properties, was to be released to the applicants.

vii) In Clause 11 of the Agreement, it was mentioned that upon signing of the Agreement, the respondent shall publish in two newspapers of Karachi ; namely, the daily 'Dawn' and daily 'Jang', the fact regarding withdrawal of its earlier advertisement of 20.11.2006 for the sale of the mortgaged properties.

viii) Vide Clause 12 of the Agreement, the parties agreed that the terms and conditions of the Agreement shall be formalized by way of a consent decree from the competent Banking Court at Karachi.

9. The contention of the learned counsel for the respondent that the present application is barred by limitation, is not correct. The impugned decree was passed on 06.04.2007, and the present application was presented on 04.02.2010. The application, having been filed within the prescribed period of three years, is therefore within time. With respect to the learned counsel for the respondent, the objections that this Court has become *functus officio* after passing the decree, and that the impugned decree cannot be set aside as it has attained finality, are not tenable. The very object of Section 12(2) CPC is to provide a specific remedy to a party who is aggrieved by an order, judgment or decree, obtained against him by misrepresentation, or by exercising fraud, or from a court / forum that had no jurisdiction to pass the same. Misrepresentation or fraud can be between the parties inter se, or upon the court itself. The inclusion of the words "judgment" and "decree" in Section 12(2) CPC clearly shows that an application under this Section for setting aside the

judgment and decree will be maintainable only after passing of the judgment and decree, and not before that. The court shall not be deemed to have become *functus officio* while hearing and deciding the application under Section 12(2), and shall have the competent jurisdiction to entertain and decide the same. Section 12(2) CPC would not have been inserted lately if it was the intention of the legislature to take away all the powers from the courts after passing of the judgment and decree.

10. It must be kept in mind that the finality of a judgment is subject to the provisions of Section 12(2) CPC. This view is fortified by the case of *Mobina Begum V/S The Joint Secretary, Ministry of Religious Affairs, Government of Pakistan*, ***1994 MLD 1441***, wherein a learned Division Bench of this Court held inter alia that finality of orders, judgments and decrees would enure only insofar as the other provisions of CPC go, but not under Section 12(2) ; no amount of finality, either under CPC or under the Qanoon-e-Shahadat Order, 1984, would be of any consequence vis-à-vis an application under Section 12(2) competently filed ; and even limited version of finality shall disappear, once the final order, judgment or decree, as the case may be, is varied, deviated from or recalled on a successful determination of proceedings following upon the making of an application under Section 12(2) CPC. The objections discussed above are, therefore, rejected.

11. The submission of the learned counsel for the respondent that the Agreement had no nexus with the cause of action of the Suit, is also not correct. A perusal of the Suit shows that the Suit was filed for the recovery of the same finance facilities and for the same period which were the subject matter of the Agreement. The only difference was that markup was calculated in the Agreement till 31.03.2006, whereas the same was based till 30.09.2006 in the Suit. Moreover, the mortgaged properties were also the same.

12. The other objections of the learned counsel for the respondent are that the grounds urged by the applicants are not reasonable or sufficient for setting aside the impugned decree, and the present application does not fall under the purview of Section 12(2) CPC. The applicants have pleaded that the parties had settled their dispute through the Agreement, whereby the applicants were not required to pay any amount to the

respondent before 29.11.2007, that is, a one year grace period commencing from 29.11.2006 ; the applicants were required to pay to the respondent only 'the settlement amount of Rs.113.65 million' after one year from 29.11.2006 ; and that the Agreement was acted upon by the parties. The applicants have alleged that in its Suit. the respondent concealed the settlement / Agreement from the Court, and such concealment of material facts and document by the respondent in the Suit amounts to misrepresentation and fraud within the meaning of Section 12(2) CPC. During the course of the hearing, I enquired from the learned counsel for the respondent to explain as to why the Suit was filed on the same day as the day the Agreement was executed. The learned counsel attempted to explain that, when the Suit was filed, the Agreement had not been received by the respondent's Head Office, therefore, the respondent was not aware of the execution of the Agreement. This was hardly any explanation, as the respondent, being a party to the Agreement, must have been aware of it especially when it was executed after negotiations in proceedings before the NAB. I then asked the learned counsel that, if his explanation regarding lack of knowledge is accepted, why the Suit was not withdrawn when the respondent came to know about the Agreement, or at least the Agreement should have been brought to the notice of the Court. The learned counsel was unable to give any satisfactory reply to the above queries.

13. It is important to note here that execution of the Agreement has not been disputed by the respondent. It is also an admitted position that, at the time of filing the Suit or even till this date, the Agreement was/is subsisting and the same had/has not been revoked or cancelled by any of the parties, particularly by the respondent. In fact, the Agreement was acted upon by the parties as rightly pointed out by the learned counsel for the applicants. All the actions taken by the parties in part performance of the Agreement were subsequent to the filing of the Suit, as the Agreement was executed by the parties on the same day (29.11.2006) as the filing of the Suit by the respondent. This is evident from the public notice published by the respondent in newspapers on 04.12.2006 in pursuance of Clause 11 of the Agreement, informing the general public that the respondent had cancelled / withdrawn its earlier notice dated 20.11.2006 for the sale of the properties mortgaged by the

applicants. The respondent's aforementioned public notice is on record as an annexure to the affidavit-in-rejoinder filed by the applicants.

14. The aforementioned facts and the admitted position discussed above clearly shows that the respondent, being a party to the Agreement and the beneficiary thereof, was fully aware of its execution and existence at the time of filing the Suit. It has also been established that the Agreement was not only concealed by the respondent from the Court, but it was also not brought to the notice of the Court before passing the impugned decree. On the contrary, the respondent kept on pressing the Suit till it was decreed as if the Agreement did not exist. The intention of the respondent was clear and obvious : that a decree should be obtained from the Court without disclosing the Agreement. It is the duty of the court to see as to whether or not the plaintiff is entitled for the relief prayed for, whether the defendant is before the Court or not. Had the Agreement been before the Court, either at the time of filing the Suit or brought to the notice subsequently, the impugned decree would certainly not have been passed. The very fact that the Suit was filed on the same day when the Agreement was executed makes all the actions of the respondent suspicious. The above acts amount to concealment of material facts / document, misrepresentation and fraud committed by the respondent both with the applicants and upon the Court. In my humble opinion, once any or all of the requirements of Section 12(2) CPC are fulfilled, any order, judgment or decree impugned under Section 12(2) CPC cannot sustain. It is, therefore, held that the grounds urged by the applicants are sufficient for setting aside the impugned decree, and accordingly, the present application is maintainable under Section 12(2) CPC. In view of the above finding, it is immaterial as to whether the applicants were duly served or not.

15. The cases of *Government of Sindh* (supra) and *Muhammad Akram Shaikh* (supra) relied upon by the learned counsel for the applicants, are fully applicable to the present case. In addition to the law discussed above, I would like to refer to some more authorities of the Hon'ble Supreme Court that fortify the above findings. In the case of *Khadim Hussain & others V/s Abid Hussain & others*, ***PLD 2009 SC 419***, it was held by the Hon'ble Supreme Court that fraud is an intrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Similarly, in the case of *Mst. Fehmida Begum V/S Muhammad*

Khalid & another, ***1992 SCMR 1908*****,** it was held by the Hon'ble Supreme Court that fraud vitiates proceedings of a court or tribunal, and such court or tribunal would have power to set aside any order which had been secured by practising fraud or misrepresentation. In the case of *Allah Wasaya and 5 others V/S Irshad Ahmad and 4 others*, ***1992 SCMR 2184***, the Hon'ble Supreme Court was pleased to define fraud as **"***Fraud means and includes, inter alia, the suggestion as a fact, of that which is not true, by one who does not believe it to be true ; and the active concealment of a fact by one having knowledge or belief of the fact.***"** (Emphasis added)

16. As a result of the above discussion, this application under Section 12(2) CPC is allowed, and the ex-parte decree passed on 06.04.2007 in Suit No. B–52 of 2006 against the applicants is hereby set aside. The applicants shall file the application for leave to defend in the Suit within thirty (30) days hereof, which shall be decided in accordance with law. It is hereby clarified that the observations made and the findings contained in this Order shall not prejudice the merits of the case of either of the parties.

J U D G E