

adjusted from defendant No.3 share of 50% in property bearing Plot No.42-Q, Block 6, PECHS, Karachi;

- c. To order cancellation of Sale Deed registration No.1045 dated 20.2.2008 registered with Sub-registrar-I, Clifton Town, Karachi executed by defendant No.1 on behalf of defendant No.3 and in favor of defendant No.2;
- d. To order defendants to deliver original documents of suit property to plaintiff;
- e. Damages of Rupees eighteen million from defendants jointly and severally as the honourable may deem proper for its recovery'
- f. Permanent injunction restraining defendant including their agents, partners, successors, attorneys, representatives, assigns, heirs, and/or any person working or claiming under/through them from interfering with possession of plaintiff and/or claiming any right, title or interest in respect of the suit property having $\frac{1}{2}$ undivided share in Plot No.70/I/II, 20th Street, Phase VI, Khayaban-e-Hilal, DHA, Karachi in whatsoever manner; ..."

2. Though, normally contents of the plaint are to be taken as *correct* while entertaining or exercising jurisdiction Under Order VII rule 11 CPC but undisputed facts and documents *can* well be taken into consideration. Such extension or relaxation developed to avoid an attempt to use the court as a tool to continue with an infringement to *legal right*.

3. The perusal of the record, reflects that in Suit NO.103/2009, JM No.1/2010 was preferred by Mst. Shahana Ali (defendant No.2) challenging therein compromise judgment and decree on the plea that she purchased suit property from her mother through registered sale deed. Mother of defendants No.2 and 3, executed two deeds, one gift deed in favour of Ms. Zafreen Iqbal and another sale deed in favour of Ms. Shahana Ali. Ms. Zafreen Iqbal and one Syed Muhammad Farooq Jafri, entered into sale agreement; is also claimed that Muhammad Hassan Keryo purchased suit property by way of sale deed, said Muhammad Farooq Jaffri

purchased the same from Ms. Zafreen Iqbal whereas Muhammad Hassan Keryo purchased from Ms. Zafreen Iqbal.

4. The plaintiff is claiming under *Mst. Zafreen iqbal* that he purchased the subject matter through an agreement dated 07.12.2007 and is challenging the *registered sale deed dated 20.2.2008* which was also subject matter of the suit no.103/2009 the *compromise decree* wherein was set-aside on application of Ms Shahana Ali vide order dated 27.05.2010, which, for the sake of brevity is reproduced herewith:-

Faisal Arab, J. Through this Judicial Misc. Application bearing No.1 of 2010, the applicant seeks setting aside of judgment and decree passed in Suit No.103/2009 on 09.03.2009. The controversy relates to a property which was originally owned by Mst. Afsar Iqbal, who was mother of both the applicant and respondent No.2. On 20.09.2006 Mst. Afsar Iqbal gifted the suit property to respondent No.2. ***Then on 20.02.2008 under a registered sale deed Mst. Afsar Iqbal acting as attorney of respondent No.2 executed a sale deed in favour of the applicant and title in the property stood transferred in the name of the applicant.*** In disregard of the sale deed executed in favour of the applicant on 20.02.2008, respondent No.2 entered into an agreement to sell with respondent No.1 on 01.09.2008 on the basis of gift deed dated 20.09.2006, that was executed earlier by Mst. Afsar Iqbal in her favour. Respondent No.1 then filed suit for specific performance of contract bearing No.103 of 2009 on the basis of the agreement to sell that was executed by respondent Nos.1 and 2 on 01.09.2008. During pendency of the suit, respondents Nos.1 and 2 entered into a compromise on **09.03.2009 and obtained consent decree. Pursuant to such consent decree, respondent No.1 obtained possession of the suit property through Nazir of this Court.** The applicant, who during all this time is said to be abroad, when came to know that respondent No.2 has sold the disputed property to respondent No.1 and possession has also been delivered to respondent No.1 on the basis of consent decree, filed present application under section 12(2) of the Civil Procedure Code.

2. Learned counsel for respondent No.1 at the very out set questioned the maintainability of this application....

3. In support of the contention

4. The claim of the applicant is based on a registered sale deed that was executed on behalf of **respondent No.2 in her favour on 20.2.2008 i.e. subsequent to the sale deed in favour of the applicant.** The applicant was admittedly not a party in suit NO.103

of 2009 in which consent decree was obtained. It was only when the applicant came to know that possession of the suit property has been taken over by respondent No.1 that she filed present application under section 12(2) of the Civil Procedure Code.

5. As regards filing of earlier application under section 12(2) of the Civil Procedure Code on the same grounds, I have carefully examined the signatures of the applicant who had filed JM No.49/2009. Indeed this JM has..... It was clearly established from record that JM No.49/2009 was not filed by the applicant either directly or through attorney but was filed by a person, not authorized by the applicant.

6. While deciding application under section 12(2) of the Civil Procedure Code, the court has to see whether the impugned order,

7. With regard to second argument of learned counsel for respondent No.2 that present application

8. With regard to the other contention of the counsel for respondent No.2 that scope of section 12(2) of the Civil Procedure Code is limited i.e. at best its provisions could be attracted to set aside an order, judgment and decree but it can not be invoked to nullify a registered sale deed, **suffice to state that when an application under section 12(2) of the Civil Procedure Code is granted and decree is set aside then every change that had taken place pursuant to such decree also stand nullified. On the basis of such decree if title in favour of any person was created, then it also falls to the ground, the moment the decree is set aside.** Therefore, while allowing the application filed under section 12(2) of the Civil Procedure Code Court could not only be setting aside an order, judgment or decree but at the same time would also be nullifying every change that has taken place on account of such order, judgment or decree. A party may have got the order, judgment or decree executed in his favour from the court which order, judgment or decree is subsequently set aside under the provisions of section 12(2) of the Civil Procedure Code. In such eventuality, the parties have to be relegated to the position where they were before such order, judgment or decree was passed. This is logical consequence of grant of application under section 12(2) of the Civil Procedure Code. In other words it is nothing but the fallout effect of nullifying the order, judgment or decree under the provisions of section 12(2) of the Civil Procedure Code. The annulment of the sale deed in the present case is the fallout of setting aside of the decree under the provisions of section 12(2) of the Civil Procedure Code. **Hence, the sale deed that was executed in favour of respondent No.1 pursuant to the consent decree has to be declared as nullity, once the consent decree is set aside.** In the present case, **the applicant already held title to the disputed property in her favour on the basis of a registered sale deed. The sale agreement that was executed by**

respondent No.2 in favour of respondent No.1 is subsequent to the sale deed. This sale agreement executed by respondent No.2 without having any right, title and interest *in the disputed property, was made basis to deprive the applicant's right in the disputed property and that too at her back on the basis of a consent decree that was surreptitiously procured in suit NO.103 of 2009.* This by itself creates sufficient ground for setting aside the decree under section 12(2) of the Civil Procedure Code. **The applicant should be given every opportunity to establish that subsequent to the transfer of title in her favour in relation to the suit property on 20.2.2008 on the basis of a registered sale deed no transfer in favour of respondent No.1 could have been made by respondent NO.2.** Case law relied upon by learned counsel for respondent No.2 is not attracted to the facts and circumstances of the present case. In this view of the matter, this application is allowed and the consent decree dated 09.03.2009 alongwith all its modifications, if at all there were any, is set aside and all changers in the title and possession that have taken place pursuant to the consent decree dated 09.03.2009 i.e. execution of sale deed and transfer of possession in favour of respondent No.1 also stand nullified. Nazir shall take all necessary steps to restore possession of the suit property back to the applicant. The applicant shall be arrayed as defendant No.2 in suit No.103/2009 and after filing of amended plaint shall be entitled to file written statement."

From the above order, it stands clear that :-

- i) *possession was given to respondent no.1(Farooque Jafri) by Nazir of the court on basis of compromise decree on 09.3.2009;*
- ii) *execution of sale deed and transfer of possession in favour of respondent No.1 also stand nullified;*
- iii) *Nazir was directed to hand over possession to Ms. Shahana Ali;*

The suit was *however* withdrawn later. The withdrawal of the suit resulted in affirming above legal and factual position.

5. The instant suit is *prima facie* subsequent to withdrawal of the above suit. In this suit present plaintiff is claiming to be in possession of subject matter under agreement dated 07.12.2007 under a sale agreement, *alleged* to be

executed by defendant Mst. Zafreen Iqbal and even possession under same sale agreement. This cannot *legally* sustain because it is also an undeniable matter of record that Farooque Jafri was put into possession of subject matter by Nazir on 09.3.2009 in consequence to compromise decree in Suit No.103/2009 hence plaintiff cannot be believed to be in possession of subject matter on alleged date of agreement else this fact would have become clear at time of delivery of possession by Nazir to Farooque Jafri, thus such stand *prima facie* is an engineered claim. Even otherwise, since execution of sale deed and transfer of possession in favour of Jafri by Zafreen Iqbal already held to be *nullified* and even title in name of Ms. Shahana Ali was restored vide order dated 27.05.2010, passed in suit no.103/2009 hence any act or omission by both of them i.e Farooque Jafri or Zafreen Iqbal are not sufficient to keep Shahna Ali out of possession of subject matter for which directions are being issued repeatedly due to ad-interim injunction passed in Suit No.413/2011 such orders were not complied with.

6. Be as it may, since purported sale agreement is between Ms. Zafreen Iqbal and Muhammad Hassan Keryo (plaintiff) but pay order shows that said amount is in name of Syed Muhammad Farooq Jafri which is indicative that plaintiff and defendants Syed Muhammad Farooque Jafri and Zafreen Iqbal are *prima facie* in league with each other. Perusal of plaint and other material record reflects that defendant No.4 in order to resist implementation of the orders passed by this Court, transferred the possession to plaintiff Muhammad Hassan Keryo and such sale agreement as reflected from attached pay order shows collusion with Syed Muhammad Farooq Jafri and Muhammad Hassan Keryo. Since learned counsel also pointed out that his client has rented out the property to a tenant, this fact also reflects that apparently whole situation is made in order to create smoke on the screen and to avoid implementation of the orders passed by this Court. Further, on

query learned counsel for plaintiff in Suit No.413/2011 referred page 37 which is a draft dated 16.09.2010 in favour of Syed Muhammad Farooq Jafri. Since, it is a matter of record that present plaintiff has not entered into agreement with Ms. Shahana Ali who *otherwise* is owner of the subject matter on nullification of sale deed sale deed and transfer of possession in favour of defendant Jafri by Zafreen Iqbal vide order passed in suit no.103/2009 hence instant suit is barred under Section 23(a) and (b) of Specific Relief Act which defines that *specific performance of a contract* may be obtained only by **party thereto** and **representative interest or principal of any party thereto**. Not only this, but since the defendant Shahana Ali is not party to such an agreement hence plaintiff *legally* cannot recover compensation from her hence the suit of the plaintiff for *specific performance* is also barred under Section 24(a) of Specific Relief Act which reads as:

'24. Personal bars to the relief.—Specific performance of a contract cannot be enforced in favour of a person;

a) who could not recover compensation for its breach;

7. In view of above, plaint in suit NO.413/2011 is liable to be rejected; accordingly same is hereby rejected under order VII Rule 11 CPC, whereas application filed by applicant in JM No.1/2010 is allowed with direction to the Nazir that he shall ensure that possession is handed over to the applicant Ms. Shahana Ali within three days. He would be competent to seek assistance from the law enforcing agency if anyone is not cooperating in implementation of this order.

J U D G E