

THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Ahmed Ali M. Shaikh, Chief Justice &
Mr. Justice Adnan Iqbal Chaudhry.

Constitution Petition No. D - 1348 of 2015

[Wahadat Siraj Afridi versus Mst. Furqan Nasreen and Others]

Petitioner : Wahadat Siraj Afridi through Mr. Farhan Zia Abrar, Advocate.

Respondent 1 : Mst. Furqan Nasreen through Mr. Qaisar Ameen, Advocate.

Respondent 2 : Humair Associates through Syed Hassan Ali, Advocate, holds brief for Syed Wajahat Abbas, Advocate.

Respondents 3-4 : Nemo.

Date of hearing : 26-05-2022

JUDGMENT

Adnan Iqbal Chaudhry J. - The Petitioner is aggrieved of order dated 31-01-2015 passed by the 3rd Additional District Judge, Malir, dismissing his Civil Revision Application No. 02/2014 that had been preferred by him against order dated 06-01-2014 passed by the 2nd Senior Civil Judge, Malir, dismissing his application under section 12(2) CPC for setting aside judgment and decree in Suit No. 35/2008.

2. The judgment and decree in question, dated 30-07-2011, passed in Suit No. 35/2008 in favor of Furqan Nasreen (Respondent No.1-vendee) and against Humair Associates (Respondent No.2-vendor/builder), was for specific performance of an agreement to lease Plot No.117, Block-C, measuring 400 sq. yards, in the project Gulshan-e-Roomi [suit plot], and for damages. The facts that prevailed before the Senior Civil Judge were that the suit plot had been allotted to Furqan Nasreen by allotment order dated 05-12-1982; that she had paid the entire sale consideration and lease charges; that the lease thereof had been put-off by Humiar Associates on the ground that the project had come under litigation; and therefore, the notice dated 05-09-2007 issued by Humair Associates threatening to

cancel the allotment on the ground that dues were outstanding, was unlawful. Against said judgment and decree, Humair Associates filed Civil Appeal No. 72/2011. By judgment dated 28-01-2013, the learned Additional District Judge, Malir reduced the quantum of damages but maintained the decree for specific performance. Second Appeal No. 34/2013 filed by Humair Associates before the High Court was dismissed in *limine* on 30-05-2013.

3. The Petitioner emerged in April 2013 with an application under section 12(2) CPC for setting aside the judgment and decree in Suit No. 35/2008 on the ground of fraud. He contended that he was allotted the suit plot by Humair Associates by allotment order dated 11-11-2007 after making full sale consideration; that the lease thereof was not executed in his favor owing to litigation over the project; and that he came to know of the decree in favor of Furqan Nasreen when he received letter dated 11-03-2013 from Humair Associates informing him of the same. Admittedly, he had never filed any suit for specific performance against Humair Associates. As mentioned first above, the Petitioner's application under section 12(2) CPC was dismissed, so also the revision application against such dismissal. Furqan Nasreen then filed Execution No. 09/2013 to enforce the decree. That Execution was allowed; and on 17-03-2015 the Nazir of the District and Sessions Court, Malir executed an Indenture of Lease of the suit plot in favor of Furqan Nasreen which was duly registered.

4. Heard the learned counsel and perused the record.

5. The fraud that was alleged by the Petitioner in his application under section 12(2) CPC was that Furqan Nasreen had suppressed the fact that her allotment had been cancelled long ago, and that the suit plot was subsequently allotted to the Petitioner; thus the judgment and decree obtained in Suit No. 35/2008 without making the Petitioner a party thereto was fraudulent.

6. The written statement of Humair Associates in Suit No. 35/2008 shows that he too had taken the plea that Furqan Nasreen's allotment had been cancelled long ago and that the suit plot had been

allotted to "another person" (without naming the Petitioner). But that plea did not find favor with the trial court, apparently because the written statement also stated that the last notice calling upon Furqan Nasreen to clear outstanding dues or risk cancellation of allotment, was issued by Humair Associates on 17-11-2007, and the suit was filed within three months thereof. Therefore, the contention that Furqan Nasreen's allotment had been cancelled long ago, was a non-starter.

7. The Petitioner contended that he had been allotted the suit plot by Humair Associates on '11-11-2007'; whereas, as noted above, the written statement of Humair Associates was that the final notice of cancellation was sent to Furqan Nasreen on '17-11-2007'. Thus, Humair Associates had allotted the suit plot to the Petitioner before cancelling the allotment of Furqan Nasreen - in other words, making a double allotment of the suit plot. Though the Petitioner's name as the second allottee of the suit plot was disclosed by Humair Associates in the memo of Second Appeal No. 34/2013, but the High Court was still not inclined to interfere with the decree.

8. In these circumstances, if any fraud was committed with the Petitioner, that was by Humair Associates, that too before the suit was filed, and it cannot be said that any fraud was committed by Furqan Nasreen in filing the suit or in obtaining the decree. As highlighted in the cases of *Shazia Ashraf v. Municipal Committee, Sahiwal* (2006 CLC 1018) and *Water & Power Development Authority v. Sea Gold Traders* (2002 MLD 19), for the purposes of section 12(2) CPC there is a distinction between fraud in legal proceedings and fraud by a party upon another. The Petitioner's remedy was for recovery of the amount paid to Humair Associates and not under section 12(2) CPC. Should the Petitioner now opt for a civil suit for such purpose, he may explore the provision of section 14 of the Limitation Act, 1908. With that observation, the petition is dismissed alongwith pending applications.

JUDGE

CHIEF JUSTICE