

IN THE HIGH COURT OF SINDH, KARACHI

HCA No.189 of 2022

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

*BEFORE: Irfan Saadat Khan,
Zulfiqar Ahmed Khan, JJ*

Muhammad Riaz
Appellant

: through Muhammad Umer
Lakhani, Advocate.

..Vs..

Mansur Mahmud Azam
Respondent

: through M/s.Mushtaq A. Memon,
Ishtiaq A. Memon, Advocates

Mr. Abdul Jabbar Lakho, Advocate
for proposed Intervenor.

Date of hearing : 27.02.2023

Date of decision : 10.03.2023

1. For orders on CMA No.3690/2022 (U/o.9 R-9)
2. For hearing of CMA No.2027/22 (U/s.12(2))

JUDGEMENT

1. This is a disposed of matter and it is a settled proposition of law that nobody could become a party in a disposed of matter *Re:Muhammad Umar and another ..Vs.. Gul Muhammad through LRs & 4 others (2010 CLC 397)*. No fruitful purpose would be served even if the application filed by the present intervener is allowed hence he is directed to pursue his application under order 1 Rule 10 CPC, already pending in the suit, which would be decided on its own merits. The present application therefore stands dismissed.

2. The above numbered High Court Appeal (HCA) was filed challenging the order passed by the learned Single Judge on 09.5.2022 on CMA No.22913/2021. The matter was taken up on

03.6.2022 and on the same date it was disposed of by extending the period from 30 days to 60 days, to enable the appellant to deposit the amount of balance sale consideration with the Nazir of this Court. In the said order, it was also observed that the disposal of the said HCA will not prejudice the stance of either party in the Suit bearing No.3095/2021. Thereafter the appellant moved two applications bearing CMA Nos.1934/2022 & 1935/2022, one for urgent hearing and the other under Section 94 CPC r/w Section 107 and 151 CPC with the prayer to allow the appellant to submit / deposit / furnish security or surety meeting the value of the balance sale consideration. It may however be noted that the appellant also moved CMA bearing No.9568/2022 in Suit No.3095/2021 on 15.6.2022 making similar prayer. The CMAs bearing Nos.1934/2022 & 1935/2022 filed in present HCA, were then taken up by the bench and after granting urgency, the appellant was allowed to submit original title documents of the property with the Nazir of this Court within 10 days, subject to verification. The present application under Section 12(2) CPC has been filed by the Respondent on the ground that the orders dated 03.6.2022 & 04.7.2022 were obtained by the appellant by way of fraud and misrepresentation, therefore, the same may be recalled.

3. Mr. Mushtaq A. Memon, Advocate has appeared on behalf of the Respondent/applicant and stated that the orders dated 03.6.2022 and 04.7.2022 were obtained by the present appellant by way of fraud and misrepresentation and therefore, the same needs to be recalled. Notice thereafter was issued to the appellant. In response thereto Mr. Umer Lakhani, Advocate has appeared and

with the consent of both the parties the following question of law was framed vide order dated 26.10.2022:

Whether it is permissible by law that a buyer in a Suit for Specific Performance mandated to deposit balance sale consideration and having undertaken to do so in the first instance however later on moving an application to substitute the balance amount with the surety/security by making a specific application in this regard before the learned Single Judge and whilst no orders having been passed on such application could approach an appellate forum to reach to the same end, and whether the said action would amount to fraud or misrepresentation with the Court under section 12(2) CPC, or not?

4. Mr. Mushtaq A. Memon, stated that on the face of it, the instant HCA filed by the present appellant was not maintainable as the same was preferred against the consent order dated 09.5.2022, passed in Suit No.3095/2021. The learned counsel then readout the said order to supplement his view point. He stated that filing of appeal against a consent order is prohibited under Section 96(3) of the CPC. He stated that from the orders dated 03.6.2022 and 04.7.2022 it could be seen both these orders were passed exparte without hearing the Respondent and the bench unilaterally extended the period without hearing him. He stated that the serious point requiring consideration is with regard to the misrepresentation made by the appellant in the instant matter as the appellant filed two applications simultaneously in respect of the same subject matter and prayer; one in the present HCA and other in the suit and without bringing into the knowledge in the present HCA with regard to filing of CMA No.9568/2022 in the suit in a deceitful manner obtained the order dated 04.7.2022.

5. The learned counsel further stated that it was duly agreed by the appellant in the suit that he will perform his part of contract and deposit balance amount of sale consideration but somehow or the other managed to seek permission from the Court for depositing surety of the said amount rather than cash amount, as agreed by him in the suit. According to the learned counsel on 04.7.2022 after moving the application bearing CMA No.9568/2022 in the suit in earlier part of the day the appellant candidly conceded before the Single Judge that he does not have funds to pay the balance sale consideration, therefore, in a way has flouted the promise made by him for specific performance and thereafter by misguiding the Court in the present HCA obtained orders on 04.7.2022 in CMA No.1935/2022, with regard to deposit of original title documents rather than the cash amount. The learned counsel stated that the said action on the part of the appellant, in not depositing the amount in cash and by misguiding the Court and obtaining the order with regard to furnishing original title documents, in his view amounts to fraud and misrepresentation made with the Court and therefore, appropriate action may be taken in this regard against the appellant.

6. Mr. Umer Lakhani, Advocate has appeared on behalf of the appellant and stated that no doubt the appellant filed two applications; one bearing CMA No.9568/2022 in the suit and CMA No.1935/2022 in the present HCA with the same prayer that since the appellant is not in a position to deposit the balance sale consideration in cash, he may be allowed to deposit the original documents which request though was not acceded to by the

learned Single Judge on 04.7.2022 but the bench took up the application bearing CMA No.1935/2022 in the present HCA and granted his prayer. Mr. Lakhani strongly opposed the assertion of Mr. Memon, and stated that no fraud or misrepresentation was played by the appellant since he was quite aggrieved he filed the two applications with the idea that if one application is allowed, he would not press the other application.

7. Mr. Lakhani, submitted that bona fides of the appellant is evident from the fact that the application bearing CMA No.9568/2022 is still pending in the suit and the Respondent who is defendant in the suit could agitate and file his objections on the said application before the learned Single Judge in accordance with law. He stated that the appellant has not committed any fraud or misrepresentation and has put up the true facts before the learned Single Judge as well as in the present HCA.

8. Mr. Lakhani, next submitted that there is no bar under the law to file two applications before two forums and in his view as the appellant has taken a legal recourse by filing two applications, which by no stretch of imagination be considered either as fraud or misrepresentation with the Court, with a prayer that since the appellant was not in a position to deposit cash hence may be allowed to furnish original title documents. In support thereof the learned counsel has placed reliance on the decision given in the case of *Jubilee General Insurance Co. Ltd., Karachi ..Vs.. Ravi Steel Company, Lahore (PLD 2020 SC 324)*. In the end, learned counsel

stated that this application is wholly misconceived and not maintainable; the same may therefore be dismissed with cost.

9. We have heard both the learned counsel at some length and have also perused the record and the decision relied upon by the counsel for the appellant.

10. Perusal of the record reveals that in the suit the plaintiff was categorically directed to deposit the sale consideration however the counsel appearing for the plaintiff in the suit stated before the learned Single Judge on 9.5.2022 that the plaintiff will be able to deposit the balance sale consideration within 60 days' time, which clearly denotes that the plaintiff in the suit was ready to deposit the balance sale consideration within a period of 60 days' time from 09.5.2022. The learned Single Judge however granted 30 days' time to deposit the balance sale consideration amounting to Rs.862.2 million with the Nazir, with further observation that this deposit of amount would be without prejudice to the merits of the case and the stance of the respective parties. The learned Judge also observed that in case of non-deposit the matter would be examined after hearing the pending application.

11. The appellant however filed the present HCA with the prayer to suspend order dated 09.5.2022 with regard to deposit of balance sale consideration within 30 days' time. The bench however vide order dated 30.6.2022 disposed of the HCA by extending the period from 30 days to 60 days without dilating upon the other legal issues agitated in the appeal. It is an admitted position that no amount, even in the extended period, was deposited by the

appellant he however filed two applications, one before the learned Single Judge and other before this Court with the same prayer to grant permission to the appellant to deposit the original title documents of a property of more value than the sale consideration subject to verification by the Nazir of this Court. So far as the application before the learned Single Judge bearing CMA No.9568/2022 is concerned the said application was fixed in the earlier part on 04.7.2022 when the learned Judge did not acceded to the request of the appellant. However the application bearing CMA No.1935/2022 was taken up by the Division Bench and thereafter the order dated 04.7.2022 was passed. It may be noted that the appellant did not brought in the knowledge of the Division Bench that similar request was not acceded to by the learned Single Judge in the earlier part of the day. The appellant was however able to persuade the bench to allow the appellant to submit the original title documents with the Nazir within 10 days, subject to verification.

12. In our view the pivotal question which has been framed and which requires consideration is whether action of the appellant would amount to fraud and misrepresentation with the Court, as envisaged under Section 12(2) CPC. We are of the view that the answer to the question leading in the present matter should be in affirmative i.e. against the appellant and in favour of the Respondent, who has filed the present application under Section 12(2) CPC, the reasons for which are as under.

13. Applications under Section 12(2) CPC are filed to allow a party to demonstrate that by way of fraud and misrepresentation

an order, judgment/decree has been obtained, which needs to be corrected. The primary parameters for filing application is fraud, misrepresentation or for want of jurisdiction and in case application under Section 12(2) CPC is allowed all the subsequent actions including decree etc. becomes nullified as a result thereto as once it is established that an order, judgment or decree has been obtained by way of fraud or misrepresentation the same cannot be sustained under the law. It is also a settled proposition of law that fraud / misrepresentation vitiates most solemn proceedings and the transactions if proved are a nullity in the eyes of the law.

14. Now if the facts of the present applications are examined, it would be noted that it was stated by the appellant before the learned Single Judge on 09.5.2022 that he will deposit the balance sale consideration within 60 days' time which permission was granted only to the extent of 30 days against which he filed a intra Court appeal and his prayer was allowed and the period was extended from 30 days to 60 days vide order dated 03.6.2022. However, for the reasons best known to the appellant he took a somersault and thereafter filed two applications one in the suit and the other in the present HCA for furnishing original title documents to the satisfaction of the Nazir, which was never his prayer either in the suit or in the HCA prior to filing of these two applications. The learned Single Judge did not accede to the request of the appellant but in the HCA a lease was granted to the appellant for deposit of the original title documents as against deposit of the cash, which as stated above, was never the prayer of

the appellant either in the suit or in the present HCA. This action of the appellant clearly demonstrates element of misrepresentation on his part, had the prayer with regard to furnishing original title documents being made either in the suit or in this HCA at the initial or primary stage then it could be said that the appellant has come to the Court with clean hands but in the present circumstances when the appellant himself promised to pay the balance sale consideration and sought time for the same, the subsequent filing of two applications simultaneously with the similar prayers appear to be tainted with malice. Though it was argued on behalf of the appellant that the prayer with regard to furnishing original title documents was made on a bona fide basis but from the facts it is apparent that the appellant took a chance in the suit as well in the HCA that in case one application is not granted the other could be granted, which action in our view appears to be falling under the parameters as mentioned under Section 12(2) CPC.

15. We therefore allow this application and answer the question, mentioned above in affirmative. Needless to state that all the proceedings initiated after the passing of the order dated 04.7.2022 would stand nullified and the order dated 04.7.2022 stands recalled.

JUDGE

JUDGE

Karachi
Dated: 10.03.2023

SM