

## IN THE HIGH COURT OF SINDH AT KARACHI

Present:  
Muhammad Shafi Siddiqui  
& Jawad Akbar Sarwana JJ

### Syed Muhammad Ghous v. Mst. Najma and Six (6) Others

#### CP No. D-4795 of 2023

Petitioner: Syed Muhammad Ghous, through Mr. Aamir Nawaz Warraich, Advocate

Respondent Nos.1 to 5: Nemo

Respondent No.6: Mr. Abdul Jalal Zaidi, AAG

Date of hearing: 17.10.2023

Date of decision: 17.10.2023

#### J U D G M E N T

**Jawad A. Sarwana, J.:** On 25.09.2006, Mst. Najma (“Respondent No.1/Plaintiff”) booked and paid for a flat, namely Flat C-4 on the Fourth Floor of Shah Jalali Apartments, located on Plot E-29/7, Ahmed Khan Chandio Village, Delhi Colony, Clifton Cantt. Karachi. On 06.07.2009, the builder of the said apartments, Babu Lal Gupta (“Respondent No.4/Defendant No.3”), Ali Muhammad Chandio (“Respondent No.2/Defendant No.1”, now through his Legal Heirs), the owner of the flat on the Fourth Floor of the building, and his son, Abdul Hafeez Chandio, one of the legal heirs (“Respondent No.3/Defendant No.2”), entered into a Sale Agreement in respect of the same flat on the Fourth Floor with one Manoj S/o Chaman Lal (“Respondent No.5/Defendant No.4”). Mst.Najma/Respondent No.1 lodged FIR No.158/2010 against the father and son and the builder for refusing to hand over to her possession of her flat(s). Ultimately, Respondent No.1/Plaintiff and Respondent Nos.2 and 3 compromised the matter and entered into an agreement for sale dated 27.05.2010 in respect of an alternate flat on the Sixth Floor in the same building. When a dispute, once again, arose between Respondent No.1/Plaintiff and Respondent Nos.2,3 and 4, which could not be reconciled, on 25.03.2012, the former filed Civil Suit No.885/2012 against the latter as well as Respondent No.5/Defendant No.4 in the Court of Xth Senior Civil Judge South, Karachi seeking declaration, specific

performance, possession, damages, mesne profit, recovery and permanent injunction against the Defendants.<sup>1</sup>

2. After Respondent No.1/Plaintiff had already filed Civil Suit 885/2012 on 25.03.2012, the Petitioner claimed that on 18.02.2015, he entered into a Sale Agreement<sup>2</sup> with Respondent No.3/Defendant No.2 in respect of the same flat, i.e. Flat No.603 on the Sixth Floor of Shah Jalali Apartments. He claims he was/is a bona fide purchaser without notice and that he allegedly owns title to the said flat on the Sixth Floor of the building.

3. On 15.11.2017, the trial court passed a Judgment and Decree granting Respondent No.1/Plaintiff decree of specific performance in respect of the Flat on the Sixth Floor of the Apartment Building and observing in the Judgment that the Flat on the Fourth Floor was purchased by the Respondent No.5/Defendant No.4. The trial court also granted Respondent No.1/Plaintiff, her claims against Respondent Nos.2 to 4 (the legal heirs of the father, his son (in person) and the builder) for recovery of Rs.75,000 being the balance amount in respect of the Sale Agreement dated 27.05.2010, mesne profit of Rs.360,000 and, awarded damages to Respondent No.1/Plaintiff in the sum of Rs.100,000.<sup>3</sup>

4. Almost three years later, in October 2020, Petitioner filed an Application under Section 12(2) CPC alleging that Respondent No.1/Plaintiff did not implead the Petitioner/Applicant as a necessary party in Suit No.885/2012 with the malafide intention and ulterior motive to misguide the Civil Court by concealing the real facts about the suit property and obtaining a decree in her favour by playing fraud and misrepresentation on the Court.<sup>4</sup> The trial court settled issues in the proceedings under 12(2) CPC on 16.02.2021,<sup>5</sup> and, after recording evidence of witnesses on behalf of Petitioner/Applicant and Respondent No.1/Plaintiff, the trial court dismissed the Petitioner/Applicant's 12(2) CPC application vide Order dated 06.10.2022.<sup>6</sup> The Petitioner, under Section 115 CPC, filed Civil Revision No.146/2022 against the said Order before the VIIIth Additional District Judge (Model Civil Appellate Court) South at Karachi. The district court dismissed the revision on 19.08.2023.<sup>7</sup> The Petitioner has impugned

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<sup>1</sup> Annexure "P/4" of the Petition, available on pages 81-101.

<sup>2</sup> Annexure "P/2" of the Petition, available on pages 67-77.

<sup>3</sup> Annexures "P/6" and "P/7", available on pages 103-129.

<sup>4</sup> Annexure "P/11", available on pages 167-171.

<sup>5</sup> Annexure "P/12", available on pages 175-177.

<sup>6</sup> Annexure "P/1" available on pages 51-65.

<sup>7</sup> Annexure "P", available on pages 27-49

the trial court's Order dated 06.10.2022 and the district court's Order 19.08.2023. Hence this Constitutional Petition.

5. Petitioner Counsel argued that the Orders passed by the learned Judge of the trial court dated 06.10.2022 and the district judge dated 19.08.2023 is improper, unjust, unfair, illegal, constitute a misreading of the evidence, a misunderstanding of the scheme of law, and adversely affect the substantial rights of the Petitioner. Further the Petitioner has no alternate and efficacious remedy except to file this Writ Petition. He seeks both the above-mentioned Orders to be set aside.

6. We have heard the Petitioner's Counsel and learned AAG, perused the record including, inter alia, the Judgment and Decree dated 15.11.2017, Petitioner's Application under Section 12(2) CPC, the Affidavit in Evidence of Petitioner's eight (8) witnesses in support of his 12(2) CPC Application and their cross-examinations as well as the evidence of Respondent No.1/Plaintiff. At the outset, the Judgment of the trial court dated 15.11.2017, by way of a background of the impugned two Orders, also appears to be well-reasoned based on the available evidence and materials and a correct appreciation of the law. We have also perused the trial court's Order dated 16.02.2021, wherein the learned Judge, after hearing the parties, keeping in view the nature of the allegations in the 12(2) CPC application, in its discretion framed issues and proceeded with an elaborate enquiry into the Petitioner/Applicant's allegations of fraud and misrepresentation and concealment of facts played upon the Court allegedly by the Respondent No.1/Plaintiff. The burden of proof was on the Petitioner/Applicant, who led evidence through eight witnesses. Most of the witnesses were relatives of the Petitioner/Applicant: Witnesses Ubaidullah was his son-in-law, Abdul Malik and Syed Abdul Nafai were his blood brothers, and Syed Muhammad Ilyas was his son. According to their testimonies, witnesses Naseeruddin was the Petitioner/Applicant's Estate Agent, and Abdul Nasir was called from Quetta just because the Petitioner/Applicant asked him to come from Quetta. Almost all the witnesses during cross-examination for the majority of the questions put to them claimed lack of knowledge ("I don't know"), conceded they did not prepare the affidavits, signed affidavits because they were told to do so, and admitted that they were illiterate/did not understand English. Finally, neither any of the Legal Heirs of Respondent No.2 nor Respondent No.3 nor Respondent No.4 stepped into the witness box. Further, the Petitioner/Applicant also did not bother to move the trial court to summon and compel the attendance of these crucial witnesses. Suffice it to say, the evidence does not inspire confidence on our part and neither did it inspire the same of the trial court. The herculean task before the

Petitioner/Applicant was to prove that fraud / misrepresentation / concealment of material facts had been played on the Court when Civil Suit No.885/2012 was filed on 25.03.2012, even though the Petitioner/Applicant executed the Sale Agreement with Respondent No.3/Defendant No.2, almost three years later, on 18.02.2015. The Petitioner/Applicant pointed out no substantial evidence to establish the factum or element of fraud and misrepresentation or concealment of facts by Respondent No.1/Plaintiff in obtaining the decree. A mere assertion of fraud in the 12(2) CPC application without proof was not sufficient to set aside the decree. We do not feel any interference is required in the trial court's Order dated 06.10.2022 dismissing the Petitioner/Applicant's Application under 12(2) CPC.

7. We have read the Revision Order dated 19.08.2023 and are of the opinion that the same also requires no disturbance. The core issue which was at the heart of the Petitioner/Applicant's application under Section 12(2) CPC, is eloquently summarised by the district court, as reproduced as follows:

“Now I am unable to understand that how a person is to be arrayed as a party when he is not even in the picture yet. How can a person be counted when he is not yet born. The Respondent No.1 filed her claim in respect of properties in the year 2012 when the applicant had not even purchased the property then the contention that the applicant was not made a party in the suit is devoid of credence. . .no eventuality in the realm of possibility exists which would have made the revelation to Respondent No.1 in the year 2012 that applicant would purchase the property in the year 2015 so she should array him as a party to her suit.”

In view of the above, we do not find any fraud / misrepresentation / concealment of facts played on the court during the proceedings of the suit.

8. Notwithstanding the above, there was no reason for Respondent No.1/Plaintiff to implead the Petitioner/Applicant for the reason that Petitioner/Applicant neither had nor could establish legal character or right on the basis of the Sale Agreement dated 18.02.2015. The Sale Agreement by itself could not confer any title on the Petitioner/Applicant also because the same is not a title deed, and such agreement does not confer any proprietary right.<sup>8</sup> Thus, impleading Petitioner/Applicant before he had established his right in the flat on the Sixth Floor would have been meaningless.

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<sup>8</sup> *Muhammad Iqbal v. Nasrullah*, 2023 SCMR 273; and, *Muhammad Yousaf v. Munawar Hussain and Others*, 2000 SCMR 204.

9. There is another aspect. The Petitioner/Applicant entered into a sale agreement with Respondent No.3, who was located on the Ground Floor of Shah Jalali Apartments. At the same time, Respondent Nos.2 and 3 resided on the Fourth Floor of the same building. Yet the Petitioner/Applicant did not bother to check in with any of them before entering into a sale agreement. The Petitioner took no steps to safeguard his interest, and he now has to live with the consequences of the risk he took. In the current circumstances, the Petitioner can neither take benefit of proviso to Section 41 of the Transfer of Property Act, 1882, nor has he been able to establish to be a bona fide purchaser for valuable consideration without notice under section 27(b) of the Specific Relief Act, 1877. Lastly, the Petitioner/Applicant did not act prudently. He had remedies available to him for the redressal of his grievance, including filing a suit for specific performance, yet he took the path less travelled by attempting to prove his title by filing a 12(2) CPC application.

9. In view of the reasoning herein, the trial court's impugned Order dated 06.10.2022 and the district court's impugned Order dated 19.08.2023 do not suffer from any illegality or material irregularity which calls for any interference. Accordingly, the Petition, along with all listed applications, is dismissed.

The parties are left to bear their own costs.

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