

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Omar Sial.

Constitution Petition No.D-3730 of 2019

Muhammad Sarfaraz

Versus

Qamar Mushtari Begum and others

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Date of hearing: 05.03.2024

Mr. Arshad Jamal Siddiqui, Advocate for the petitioner.

None present for the Respondents.

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J U D G M E N T

Muhammad Shafi Siddiqui, J.- We have heard learned counsel for the appellant and perused the material available on record.

2. The petitioner has filed a suit for specific performance against the respondent No.1 in respect of a property bearing No.D-53, Block-F, measuring 1000 square yards, North Nazimabad, Karachi. The suit for performance was based on an agreement dated 17.06.1971 against a consideration of Rs.98,000/- out of which Rs.88,000/- were claimed to have been paid in cash whereas Rs.10,000/- were left to be paid. The suit for performance was filed on 19.12.1988 against an agreement of 17.06.1971. It is claimed that after service of notices and summons, a written statement was filed wherein nothing was disputed and debated. Initially an attempt was made to obtain judgment on admission under Section-12(6) CPC but failed. The following issues were then framed:-

1. *Whether the plaintiff has violated the terms and conditions of the Sale Agreement dated 17.6.71?*
2. *Whether the defendant is avoiding to execute final Register Sale Deed in favour of the plaintiff?*

3. *Whether the plaintiff is entitled to the enforcement of the specific performance of the Agreement?*
4. *Whether any cause of action accrued to the plaintiff?*
5. *What should the decree be?*

3. The judgment was then passed in consideration of the deposition of the petitioner only as no one appeared from other side. The judgment disclosed that the respondent No.1/defendant failed to adduce evidence; neither the petitioner/plaintiff was cross-examined. The suit was thus decreed and the decree was drawn accordingly. Nazir also executed the sale deed on 25.01.1994. The agreement shown to have been executed directly by parties whereas suit was filed through attorney; both having different addresses; however role of her attorney is described in the sale agreement in terms of its para-9 who's address is not disclosed; suit however disclosed his address.

4. On realization through KDA (as stated), that it was an abandoned property, an application to the Deputy Administrator, Abandoned Properties, Karachi was filed in the year 1996 under Section-14 of the Abandoned Properties Act, 1975 [hereinafter referred as the Act of 1975].

5. On learning about such "decree of performance", somewhere in April 1997, an application under Section-12(2) CPC was filed by the Deputy Administrator, Abandoned Properties Organization disclosing the facts therein that the subject plot was allotted to one Qamar Mushtari Begum by KDA and the lease in her favour was executed on 16.09.1969. The application also disclosed that the attorney was contacted somewhere in July, 1986 but couldn't keep his promises, hence suit was filed. The application further reveals that in September 1996 when he (petitioner/plaintiff) contacted the KDA

authorities for the mutation, he came to know about the plot having been declared as abandoned property.

6. The authorities under the Act of 1975 were/are in the nature of custodian and was/were meant to take over and manage the properties of the persons having domicile of East Pakistan, which is now recognized as Bangla Desh and ceased to be the citizens of Pakistan.

7. It is on these facts and circumstances that an application under Section-12(2) CPC was preferred disclosing that the jurisdiction of civil court, under the law was barred. The Act of 1975 provides a mechanism under which a person can file a claim that he had acquired the property in good faith and for adequate consideration or that his property was wrongly declared as an abandoned property. The application under Section-12(2) CPC further reveals that the KDA authorities received a letter from Pakistan Embassy at Dacca that the defendant Mst. Qamar Mushtari Begum wife of Professor Syed Ali Ahsan, Advisor to the President of Bangla Desh, seeks information whether the plot in dispute had been declared as an abandoned property or not, whereafter necessary steps were taken for declaring the property as an abandoned property under Section-11 of the Act of 1975. These facts have not been disclosed and defendant's domicile of East Pakistan, who now ceases to be citizen of Pakistan, was concealed when the suit was filed.

8. On moving such application under Section-12(2) CPC by the Deputy Administrator, Abandoned Properties Organization on 06.08.1997, the 2nd Senior Civil Judge was pleased to frame the issue on 22.04.2002 as to whether the judgment was obtained by misrepresentation of facts and fraud and as to what should the decree be. One Muhammad Ishaq as Deputy Administrator,

Abandoned Properties recorded his evidence and no cross-examination took place despite service upon the petitioner/ plaintiff on the address disclosed in the plaint itself.

9. The application was then allowed and the judgment and decree dated 27.07.1992 was set aside vide order dated 07.11.2003. The petitioner/plaintiff was directed to file amended plaint on the next date of hearing. On 24.12.2003, after providing some opportunities to the petitioner/ plaintiff, the suit was dismissed for non-prosecution with no order as to costs.

10. On realizing the dismissal of the suit for non-prosecution somewhere in July 2006, the petitioner/ plaintiff then filed an application under Section-12(2) CPC praying therein that the orders dated 22.04.2002, 07.11.2003 and 24.12.2003 be declared to have been obtained by fraud and misrepresentation. The application was contested by the Deputy Administrator, Abandoned Properties by filing counter affidavit, which was disposed off by allowing the parties to record evidence. The parties recorded their respective evidence and were also subjected to cross-examination. The application, in consideration of the pleadings and evidence recorded, was dismissed/ rejected vide order dated 27.01.2018. The petitioner then preferred civil revision No.16/2018 which too was dismissed being devoid of merit vide order dated 05.03.2019.

11. At the very outset, we have enquired as to what jurisdictional error or constitutional defect was/is pleaded by the petitioner, as the petitioner has surrendered himself to the jurisdiction, by moving an application under Section-12(2) CPC, learned counsel uttered nothing except that no other remedy is available in the shape of an appeal or revision, therefore, he has preferred this constitution petition under Article-199 of the Constitution of Islamic Republic of Pakistan.

12. We have ourselves perused the two impugned orders passed on application under Section-12(2) CPC filed by the petitioner and the order of the revisional court in civil revision No.16/2018. Four issues were framed by the senior civil judge which were thoroughly discussed by the senior civil judge. First two issues were decided in favour of the petitioner that the application was maintainable and not time barred. The issue No.3 was whether the Deputy Administrator, Abandoned Properties Organization played any fraud or misrepresentation with the court to obtain the orders dated 07.11.2003 and 24.12.2003 when their application was allowed, the petitioner's only defence was that the notice of the application under Section-12(2) CPC filed by the Deputy Administrator, Abandoned Properties Organization was not served, as the address of the plaintiff/ petitioner disclosed in the plaint was changed. This perhaps was the only solitary ground and it was thoroughly discussed by the senior civil judge while deciding the aforesaid issue. It is claimed that the notices were issued on the address disclosed in the memo of plaint and they deliberately and purposely did not appear. Notice was also published in the newspaper and all modes of service were adopted which were then available. The reasoning assigned by the senior civil judge was that perhaps it was not only the wrong address given by the plaintiff for himself but also of defendant Qamar Mushtari Begum who was shown to have contested suit via attorney, as the reports of the bailiff disclosed. It could not have been because he was not permitted to contest suit even if terms of agreement para-9 is taken to be correct. Ultimately, the resort of Order-V Rule-20 was made for service on an application filed by the Deputy Administrator, Abandoned Properties.

13. The application under Section-14 of the Act of 1975 filed by the petitioner/ plaintiff before the Deputy Administrator, Abandoned Properties in October, 1996 was also dismissed on 04.08.2008. The petitioner then preferred an appeal under Section-15 of the Act of 1975 which too was dismissed by the appellate authority. The two orders were challenged before this Court in C.P. No.D-1586/2009 and the petition was dismissed on 27.02.2013. So, the fact about the property being an abandoned property reached its conclusion and so also the fact of bona fide purchaser.

14. After detailed discussion of the facts and about the allegation of the address, the senior civil judge dismissed the application under Section-12(2) CPC of the petitioner. The revision application was then also dismissed after thoroughly examining the facts of the case, thus, we cannot sit as an appellate authority against the two orders impugned in this petition whereby the application under Section-12(2) CPC followed by revision application were dismissed. Neither jurisdictional nor constitutional violation is exposed by the petitioner in the exercise conducted by two forums below, hence this petition lacks the ingredients that could enable us to intervene.

15. What has gone unattended is perhaps an order of 24.12.2003 (dismissal of suit for non-prosecution) which was also challenged under Section-12(2) CPC. The orders allowing application under Section-12(2) CPC of the Deputy Administrator was not an outcome of fraud and misrepresentation however dismissal of plaint after few opportunities was not discussed by the Judge in the impugned order. In any case it does not demonstrate any fraud within Section-12(2) CPC as it is appealable order. The application of the Deputy Administrator under Section-12(2) CPC was allowed by order dated 07.11.2003 and on 24.12.2003 when amended title was not filed,

apparently within a period of 45 days, the suit was dismissed for non-prosecution. Additionally, we are of the view that the fact about this being an abandoned property has reached its finality when application under Section-14 of the ibid Act was taken to its logical end followed by appellate authority's decision and dismissal of C.P. No.D-1586/2009. It is these proceedings wherein he could have proved his bona fide of buying property before the cutoff date or his bona fide after the cutoff date but he failed, so the jurisdiction of civil court is otherwise not attracted.

16. In view of the above, the petition is dismissed accordingly.

Dated: 11.03.2024

JUDGE

JUDGE

Ayaz Gul