

HIGH COURT OF SINDH, CIRCUIT COURT AT HYDERABAD

R.A No.18 of 2014

[Mst. Raftaj Bibi versus Haji Abdul Qayoom & Others]

Applicant : Through Syed Ghulam Hyder Shah advocate
Respondent No.1 : Through Mr. Abdul Ghafoor Hakro advocate
Respondent No.2 : None present
Respondents No.3&4: Through Mr. Abdul Hameed Bajwa advocate
Respondents No.5to8: Through Mr. Allah Bachayo Soomro Addl: A.G
Date of hearing: 12.02.2024
Date of decision: 11.03.2024

ORDER

KAUSAR SULTANA HUSSAIN J.- This Revision Application has been directed against the Order dated 24.12.2013, whereby application filed by present applicant Mst. Raftaj Bibi under Section 12(2) C.P.C in Civil Appeal No.47 of 2004 against the ex-parte judgment dated 03.02.2005 and decree dated 10.02.2005 passed therein, has been dismissed by the learned Ist Additional District Judge Sanghar (**Appellate Court**).

2. Record shows that respondent No.1 Haji Abdul Qayoom had filed F.C Suit No.58 of 2000 [*Re: Haji Abdul Qayoom versus Mst. Raftaj Bibi & Others*] before learned Senior Civil Judge Sanghar (**Trial Court**) against present applicant/defendant No.1 and others for Specific Performance of Contract and Permanent Injunction in respect of land situated in Block No.90 and 91 in Chak No.8, Deh Kundo, Taluka and District Sanghar admeasuring 32-00 acres (**Suit Land**). Parties were served with the summons of Suit and after completion of evidence of both sides learned trial Court dismissed the said Suit on merit vide judgment and decree dated 13.05.2004. Being aggrieved with the said judgment and decree the respondent No.1/plaintiff preferred Civil Appeal No.47 of 2004 before learned Appellate Court, which was allowed vide judgment dated 03.02.2005 and decree dated 10.02.2005.

3. It is important to mention here that no one effected appearance on behalf of the present applicant/defendant No.1 before the appellate Court, consequently the judgment dated 03.02.2005 and decree dated 10.02.2005 were passed ex-parte

to the extent of present applicant/defendant No.1. Nonetheless in the year 2007 present applicant/defendant No.1 moved an application under Section 12(2) C.P.C in Civil Appeal No.47 of 2004 before the learned appellate Court against the aforesaid ex-parte judgment and decree, wherein she taken ground that said judgment and decree were obtained by fraud as she was not served with the notice. The learned appellate Court after hearing the parties vide Order dated 23.02.2007 allowed the said application and consequently directed the parties to lead evidence on the element of fraud and misrepresentation. The respondent No.1/Haji Abdul Qayoom being aggrieved with the Order dated 23.02.2007 preferred Civil Revision Application No.40 of 2007 before this Court, which was disposed of vide Order dated 25.09.2013 with following observations:

“After hearing both Mr. Hakro and Mr. Tanoli at length, this revision by consent is disposed of in the following terms:

The preliminary legal issues be framed by the trial Court as under:-

- i. Whether in the light of Order 41 Rule 17 and Order 41 Rule 21 CPC, the provisions of Section 12(2) CPC would apply to C.A No.47 of 2004 in view of the facts and circumstances of the case.*
- ii. What would be the fate of application under Section 12(2) CPC after the sad demise of attorney of respondent No.1 who filed the said application.*

Since the above two issues are legal and can be decided without recording of evidence ; let it be decided preferably within a period of 60 days and only in case if require the proceedings in terms of the impugned order will continue

This revision application stands disposed of.”

4. After passing of above Order by this Court the learned Appellate Court again heard the parties on application under Section 12(2) CPC and vide Order dated 24.12.2013 (**impugned Order**) dismissed the said application, hence present applicant Mst. Raftaj Bibi preferred captioned Revision Application.

5. It is also important to mention here that earlier respondents No.3 and 4 herein had preferred IInd Appeal No.05 of 2005 before this Court against the impugned ex-parte judgment dated 03.02.2005 and decree dated 10.02.2005 passed by learned Appellate Court, which was converted into Civil Revision Application No.82 of 2005 and the same was dismissed in limine vide Order dated 02.05.2005.

6. Now question arises that before which Court application under Section 12(2) C.P.C was to be filed. The said question came before this Court in earlier

round of litigation through R.A No.40 of 2007 filed by respondent No.1 and the matter was remanded back to learned appellate Court by means of Order reproduced above. Even otherwise it is well settled law that application under Section 12(2) CPC is maintainable before the Court which has passed the final judgment. In present case the final judgment is to be considered of the appellate Court, as this Court in R.A No.82 of 2005 maintained the judgment of appellate Court instead of reversing the same. Reliance in this regard is placed on the cases reported in **2000 SCMR 900**. Therefore, this issue needs no further discussion.

7. Learned counsel for the applicant/defendant argued that applicant/defendant No.1 was not served with the notice of Civil Appeal No.47 of 2004 inspite of that learned Appellate Court passed the ex-parte judgment and decree against her, which is nothing but result of fraud and misrepresentation on part of respondent No.1/plaintiff.

8. Contrary learned counsel for respondent No.1 argued that application under Section 12(2) CPC is not maintainable as the applicant/defendant No.1 has failed to prove the element of fraud of misrepresentation. He while supporting the impugned order prayed for dismissal of present Revision Application. In support of his arguments has relied upon the cases reported in (i) C.L.C 1989 2117 and (ii) YLR 2001 2364.

9. Despite service no one effected appearance on behalf of respondent No.2, whereas learned counsel for the respondents No.3 and 4 in support of his case has relied upon the cases reported in (i) 2011 SCMR 1854, (ii) PLD 2010 SC 580 and (iii) 2000 SCMR 900.

10. I have heard the learned counsel for the parties and have perused the material available on record.

11. Perusal of record shows that respondent No.1/plaintiff had instituted an F.C Suit No.58 of 2000 against present applicant/defendant No.1 and others for Specific Performance of Contract and Permanent Injunction in respect of suit land before the Court of learned trial Court, wherein parties including the applicant/defendant led their evidence and finally the said suit was dismissed on merit vide judgment and decree dated 13.05.2004, against which respondent No.1/plaintiff preferred Civil Appeal No.47 of 2004 before learned Appellate Court, which was allowed vide judgment dated 03.02.2005 and decree dated 10.02.2005. On 30.05.2005 applicant/defendant No.1 moved an application under Section 12(2) CPC before the learned Appellate praying therein for setting aside the judgment dated 03.02.2005 and decree dated 10.02.2005 on the ground that same have been obtained by fraud and misrepresentation, as she was not served with the notice of appeal. The learned Appellate Court vide Order dated 23.02.2007 allowed the said application and directed the parties to lead evidence.

The respondent No.1/plaintiff however, challenged the said Order dated 23.02.2007 before this Court in Revision Application No.40 of 2007 which was disposed of vide Order dated 25.09.2013 whereby the matter was remanded back to learned appellate Court for deciding the same on two Issues, reproduced under para-3 above and the learned Appellate Court vide impugned Order dated 24.12.2013 dismissed the application under Section 12(2) CPC being not maintainable by holding that since there is ex-parte judgment and decree against the applicant/defendant No.1 as such the remedy with her (*applicant*) was to file an application under Order XLI Rule 21 CPC.

12. It is noted that in plaint of Suit two addresses of applicant/defendant No.1 were mentioned i.e one at Hyderabad and second at Azad Kashmir, however in Civil Appeal No.47 of 2004 only one address i.e of Azad Kashmir was mentioned, but learned Appellate Court had not shed light on this issue. Nonetheless since the applicant/defendant No.1 has categorically alleged that she was not served with the notice of appeal, therefore, in order to appreciate said plea I have perused the case diaries of learned Appellate Court (*available at page-151 to 161 of Court file*). The case diaries show that till 29.05.2004 the process issued against applicant/defendant No.1 was not returned either served or un-served, where-after the case diaries do not show that whether the applicant/defendant No.1 was served by all modes, while the case diary dated 25.08.2004 reflects that defendant No.5 was served through publication and on said date the correction was made in the name of applicant/defendant No.1, meaning thereby till 25.08.2004 notice was being issued on her with wrong name. Thereafter from 15.09.2004 till disposal of appeal i.e on 03.02.2005 the case diaries do not show that after correction in name, the applicant/defendant No.1 was served with the notice of appeal or not and by which mode, as there is no order of holding the service of notice against her (*applicant*) as 'good'.

13. Further in earlier Order dated 23.02.2007, passed on application under Section 12(2) by the learned Appellate Court, it is specifically mentioned that Certificate issued by Nazir of the Court of Senior Civil Judge Bhambher Azad Kashmir as well as extract from Register of said Court only shows that process was received by them and now same is dispatched to District Judge Sanghar, but it is not mentioned in both said documents that whether process was executed upon the applicant/defendant No.1 or not. Whereas in the impugned Order dated 24.12.2013 though it is simply mentioned by the learned Appellate Court that despite service applicant/defendant No.1 failed to appear, however, gave no reasons/findings that on what date and by which mode she (*applicant*) was served with the notice of appeal.

14. From the above discussion it is established that applicant/defendant No.1 was not served with the notice of Civil Appeal No.47 of 2004, as there is no

material available on record in this regard. Now question before this Court is that whether the remedy against said grievance with the applicant/defendant No.1 was to file an application under Section 12(2) CPC or an application under Order XLI Rule 21 CPC? In order to answer the said question it is appropriate to reproduce below the above provisions of law:

Section 12(2): Bar to further suit. (1) *Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.*

(2) *Where a person challenges the validity of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate suit.*

Order XLI: Appeal from original Decrees

Rule-21: *Re-hearing on application of respondent against whom 'ex parte' decree made. [1] Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.*

[2] The provisions of section 5 of the Limitation Act, 1908 (IX of 1908) shall apply to applications under sub-rule(1).

15. A bare reading of above provisions of law makes it clear that Section 12(2) will apply when validity of a judgment, decree or order is challenged on the plea of fraud, misrepresentation or want of jurisdiction whereas provisions of Order XLI Rule(21) will attract where an appeal is heard ex parte and judgment is pronounced against the respondent. In present case applicant/defendant No.1 (*who was respondent before Appellate Court*) specifically alleged that learned Appellate Court passed the judgment dated 03.02.2005 and decree dated 10.02.2005 without hearing her as she (*applicant*) was not served with the notice of appeal, as such applicant/defendant No.1 was required to move an application under Order XLI Rule (21) CPC instead of filing application under Section 12(2) CPC. However, in my view learned Appellate Court could have converted the application under Section 12(2) CPC into an application under Order XLI Rule (21) CPC for its decision on merit, when the learned Appellate Court itself held in the impugned Order that remedy with the applicant was to file an application under Order XLI Rule (21) CPC, coupled with the fact that application under

Section 12(2) CPC was within time and the applicant/defendant No.1 throughout contested the F.C Suit No.58 of 2000 by herself entering into witness box and the decision of said suit was/is in her favour.

16. It is well settled that all procedural laws are meant for advancing the cause of justice and they cannot be made a vehicle of oppression to suppress the remedies. It is also well accepted principle of law that Courts always lean in favour of adjudication on merit rather than stifling proceedings on technicalities. A cursory glance over the application filed by applicant/defendant No.1 under Section 12(2) CPC shows that it contained all the ingredients of an application under Order XLI Rule (21) C.P.C, as such mere fact that applicant/defendant No.1 has not filed proper application could not deprive the Court of its jurisdiction to decide it as an application under Order XLI Rule (21) CPC if otherwise such jurisdiction was available to the Court under the law and the said application was filed within time.

17. Applicant/defendant No.1 has only sought right of hearing, as provided to her by the law, which is supported by the fact that she was not served with the notice of appeal as there is no material available on record in this regard, and the same will not cause any prejudice to respondent No.1, as he still will be having his right to defend his case before the learned Appellate Court.

18. In view of the above, I while relying upon the cases reported in 1992 SCMR 1744 and 2024 SCMR 107 convert the application filed by applicant/defendant No.1 under Section 12(2) CPC into an application under Order XLI Rule (21) CPC and allow the same. Consequently the impugned Order dated 24.12.2013 as well as judgment dated 03.02.2005 and decree dated 10.02.2005 passed in Civil Appeal No.47 of 2004 are set aside. Civil Appeal No.47 of 2004 be deemed to be pending before the learned Appellate Court and the learned Appellate Court is directed to decide the same afresh after providing ample opportunity of hearing to parties concerned strictly in accordance with law.

19. Captioned Revision Application stands disposed of in the above terms.

JUDGE

Sajjad Ali Jessar