

## IN THE HIGH COURT OF SINDH KARACHI

### Present:

Mr. Justice Adnan Iqbal Chaudhry  
Mr. Justice Abdul Mobeen Lakho

### High Court Appeal No. 42 of 2024

[Abdul Rashid versus Muhammad Usman (late) through legal heirs & others]

Appellant : Abdul Rashid son of Muhammad Suleman through M/s. Arshad M. Tayebaly and Sameer Tayebaly, Advocates.

Respondent No.1 : Muhammad Usman (late) through legal heirs (i) to (iii) through Mr. Shafiuddin, Advocate.

Respondents 2-10, 12 -15, 17 -19 & 22 -24 : Nemo.

Respondents 11 & 16 : Muhammad Ali Tak (Advocate) / Respondent No.11 in person.

Respondents 20, 21 & 25 : Sub-Registrar, North Nazimabad, Karachi & 02 others through Mr. Naeem Akhtar Talpur, Additional Advocate General, Sindh.

Date of hearing : 22-10-2024

Date of decision : 13-11-2024

## J U D G M E N T

**Adnan Iqbal Chaudhry J.** - This High Court Appeal is from order dated 22.11.2023 dismissing J.M. No. 42/2018, an application under section 12(2) CPC moved by the Appellant (Defendant No.2) for setting aside order dated 13.11.2014 passed in Suit No. 1010/2004, whereby an application under Order I Rule 10 CPC moved by the Respondents 11 and 12 (Defendants 12 and 13) had been allowed.

2. The facts appear to be as follows. Suit No. 1010/2004 by the Respondent No.1 (Plaintiff) was filed primarily for relief in connection with House No. D-13, Block A, North Nazimabad. By

CMA No. 652/2011 under Order I Rule 10 CPC, the Defendants 12 and 13 (Respondents 11 and 12 herein) prayed that:

*"It is therefore prayed that this Hon'ble Court may be pleased to add the SITE and Sub-Registrar as Defendant No. 25 & 25 to avoid the multiplicity of the litigation for just and proper adjudication of the suit and claim of Defendant No. 12 & 13 in Plot No. E-16 SITE Karachi and to allow the application under Order I Rule 10 CPC in the large interest of justice."*

3. Plot No. E-16 referred to in CMA No. 652/2011 was not a property involved in the suit. It was a property in which the Defendant No.2 (Appellant) held an interest. CMA No. 652/2011 was allowed by a learned single Judge as follows:

"13<sup>th</sup> November, 2014

Mr. Azhar Mehmood Advocate (Defendant No.2) in person  
Ms. Hinna Rabbani, Advocate for the State  
Mr. Muhammad Hussain, Advocate holding brief for  
Mr. Haseeb-ur-Rehman, Advocate for the Plaintiff

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CMA 652/2011 is allowed. Learned counsel for the Plaintiff is directed to file amended title and amended plaint, if required within two weeks.  
Adjourned to date in office."

4. Upon the aforesaid order dated 13.11.2014, the Plaintiff (Respondent No.1) filed an amended plaint, adding not only the SITE and Sub-Registrar SITE as defendants to the suit, but also incorporated pleas to set-up a claim to Plot No. E-16.

5. Per the Defendant No.2, he received a copy of the amended plaint much later on 06.09.2016, and that is when he came to know of the order dated 13.11.2014. Since additions in the plaint to include Plot No. E-16 were premised on the order dated 13.11.2014, the Defendant No.2 challenged that order by way of J.M. No. 42/2018 filed on 25.02.2017 under section 12(2) CPC.

It was averred by the Defendant No.2 that the order dated 13.11.2014 was passed in his absence; that Mr. Azhar Mehmood Advocate, whose name first appears in that order, was neither the Defendant No.2 nor the Advocate for the Defendant No.2, but was someone impersonating the Defendant No.2 and therefore such order was the result of fraud and misrepresentation. While the J.M.

was pending, one Mr. Azhar Mehmood Advocate appeared before the Court and also filed an affidavit denying that he ever appeared in the suit and stated that he did not know the Defendant No.2 and was never associated with his counsel.

6. The learned single Judge seized of the J.M. held that it was established that Mr. Azhar Mehmood Advocate was not present before the Court in Suit No. 1010/2004 when order dated 13.11.2014 was passed and proceeded to amend that order accordingly. However, at the same time, the learned single Judge was also of the view that such fact did not go on to establish that the order was the result of fraud or misrepresentation. The J.M. was therefore dismissed, hence this appeal.

7. Mr. Arshad Tayebaly, learned counsel for the Appellant submitted that CMA No. 652/2011 in Suit No. 1010/2004 was allowed by order dated 13.11.2014 because it was made to appear to the Court by an impersonator that the Defendant No.2 had no objection; and if the real Defendant No.2 or his counsel had been present, he would surely have opposed said CMA which had sought to add to the suit, and that too at the behest of a defendant, a time-barred plea in respect of a property vesting in the Defendant No.2. He submitted that once the learned single Judge found that Mr. Azhar Mehmood Advocate had not appeared before the Court on 13.11.2014, then the fraud and misrepresentation was established.

On the other hand, Mr. Shafiuddin, learned counsel for the Respondent No.1 and Mr. Muhammad Ali Tak, the Respondent No. 16 in person, submitted that Mr. Azhar Mehmood Advocate was an associate of the counsel for the Defendant No.2; that he had very much appeared before the Court on 13.11.2014 to represent the Defendant No.2, and again on 06.02.2015; that against the order dated 13.11.2014 the Appellant never filed an appeal; and that the J.M. was filed belatedly as an afterthought.

8. Heard learned counsel and perused the record.

9. The grievance of the Appellant (Defendant No.2) with the order dated 13.11.2014 passed in Suit No. 1010/2004 was that it had enabled the Respondent No.1 (Plaintiff) to amend the plaint to include a time-barred plea with regards to a property that vested in the Appellant. Nevertheless, the question for determination is whether said order could be challenged on the anvil of section 12(2) CPC which is confined to grounds of fraud, misrepresentation and want of jurisdiction?

10. The Appellant's pleading in J.M. No. 42/2018 (under section 12(2) CPC) was as follows:

*"6. That on the said date one Mr. Azhar Mehmood advocate (who is not known to the Defendant Nos. 2 and was never engaged by them) appeared before this Hon'ble Court, falsely representing himself to be the Defendant No.2 in person and got the order of granting application CMA No. 652/2011 through a non-speaking order.*

*This Hon'ble Court would be pleased to appreciate that application (CMA No. 652/2011) was filed by the Defendant No. 12 and when passing order dated 13.11.2014 he himself was absent on the date of hearing, this Hon'ble Court was pleased to direct the Plaintiff to file Amended Title and amended plaint, if required within two weeks without any prayer made either written or oral for permission to amend the plaint on behalf of the Plaintiff.*

.....

*9. That the Defendants Nos. 2 & 4 shocked and surprised to see that upon application filed by the Defendant No.12 the Plaintiff has included number of new allegations and number of prayers which were not in the original suit nor any permission from this Hon'ble Court was obtained to amend the plaint in the manner and these changes completely changed the nature of the suit.*

*Once again it is submitted that the application U/o I Rule 10 CPC was filed by the Defendant No. 12 and not by the Plaintiff.*

*10. That the scope of the order dated 13.11.2014 was only restricted to the effect that if the Plaintiff had anything to amend with relation of impleading of the two parties i.e. Sub-Registrar and SITE and not to include properties or made prayers not prayed for which were not the subject matter of the suit and/or beyond the scope of the suit.*

*11. That the order dated 13.11.2014 has been obtained by fraud, misrepresentation and impersonating the Defendant No.2 before this Hon'ble Court and as such, the said order is liable to be set-aside/recalled."*

Thus, the challenge to the order dated 13.11.2014 passed in Suit No. 1010/2004 was essentially on the following grounds:

- (a) that the order was not a speaking order as no amendment to the plaint could have been allowed by the Court at the instance of defendants;

- (b) that in any case, upon addition of parties under Order I Rule 10 CPC the plaint could only have been amended as per Rule 10(4) of Order I CPC *i.e.* to the extent of the parties added, and not for setting-up an additional case against the other parties;
- (c) the order had been procured by fraud and misrepresentation in portraying to the Court that the Defendant No.2 had no objection.

12. While ground 'a' may have been agitated by way of an appeal, it was clearly not a ground available under section 12(2) CPC which is confined to fraud, misrepresentation and want of jurisdiction.

13. As regards ground 'b', that was not an argument *per se* against the order dated 13.11.2014, but an argument against the amended plaint filed pursuant thereto. The fact that the Plaintiff had misconstrued or misused the order dated 13.11.2014 to amend the plaint contrary to Rule 10(4) of Order I CPC did not mean that the underlying order was obtained by fraud or representation. Against such a plaint the remedy of the Appellant was an application under Order VI Rule 16 CPC for striking of unwarranted pleadings.

14. Adverting to ground 'c', the submission of learned counsel for the Appellant was essentially that somebody impersonating the Defendant No.2 had given consent to CMA No. 652/2011, and that somebody was managed by the Plaintiff and the Defendants 12 and 13 acting in collusion. Firstly, the order dated 13.11.2014 did not record any consent. Though not a speaking order, it appears to have been passed by the Court of its own volition regardless of any contest or consent. In other words, even though it was unresolved how the name of one Azhar Mehmood Advocate had come into the order sheet, the presence of someone allegedly impersonating the Defendant No.2 had no bearing on that order. Secondly, the conspiracy theory propounded by learned counsel, and that too

merely to further an application under Order I Rule 10 CPC, was implausible.

15. For the foregoing reasons, we are inclined to agree with the order dated 22.11.2023 passed by the learned single Judge to dismiss J.M. No. 42/2018. As a result, this appeal is dismissed.

**JUDGE**

**JUDGE**

Karachi:

Dated 13-11-2024