

HIGH COURT OF SINDH, KARACHI

C.P. No. D-456/2009

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Date

Order with signature of Judge

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Khalid Majeed

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Petitioner

Versus

Sea Breeze Ltd & Ors.

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Respondents

Date of Hearing & short order 08.09.2011

Mr. Ikram Ahmed Ansari, Advocate for Petitioner.

Mr. Sher Muhammad Shaikh, Addl. A.G.

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**Present:     JUSTICE FAISAL ARAB**  
**JUSTICE IRFAN SAADAT KHAN**

**JUDGMENT**

**FAISAL ARAB, J:-** In 1987 Respondent No.1 filed Suit No.780 of 1987 on the original side of this Court against Respondent No.2 for specific performance. It was claimed that for the apartments No. 301 to 306 located in Sea Breeze Plaza, Shakra-e-Faisal, Karachi, which were sold and possession handed over by Respondent No.1 to Respondent No.2 a

sum of Rs.1,017,533/- is still due and payable and, therefore, suit be decreed and recovery of Rs.1,017,533 be affected through sale of the apartments in question. While the suit was still pending, parties compromised. On 14.11.1994 an application under Order 23 Rule 3 CPC was filed by the parties seeking compromise decree. In the compromise application, it was, *inter alia*, agreed between Respondents No. 1 & 2 that possession of Apartment No. 304 shall be handed over to the petitioner, who was not a party to the said suit. Not being a party to a suit, by itself, is of no legal consequence. Consequently on compromise application consent decree was passed on 05.12.1994.

2. When the Respondent No.3 came to know that the Petitioner is claiming ownership and possession of the said Apartment on the basis of the compromise decree, he on 15.02.1999 filed an application under Section 12(2) CPC claiming that one lady Zubaida wife of Jan Muhammad originally purchased the said apartment from Respondent No.1 on 20.05.1984 and received its possession on 20.07.1985 and then on 24.11.1998 under a sale agreement sold it to him and handed over its vacant possession and since then apartment No.304 is in his occupation and enjoyment. It was averred by Respondent No.3 that the consent decree with regard to his Apartment has been obtained by playing fraud and misrepresentation. While the application filed under Section 12(2) CPC was pending adjudication on the original side of this Court, the original jurisdiction of the district courts of Karachi in civil suits was enhanced to three million rupees on 18.09.2002 through the Sindh Civil Courts (Amendment) Ordinance, 2002. Resultantly, this Court dispatched the suit file to the District Court, Karachi (South) for disposal of

Section 12(2) CPC Application. The suit file was then assigned to Senior Civil Judge. It was then renumbered as Suit No.699 of 2003. After recording of evidence on Section 12(2) CPC application the Senior Civil Judge allowed the application, set aside the consent decree and ordered that Respondent No.3 be joined as a defendant in the suit which was to be retried. Revision against order of the Senior Civil Judge was preferred by the Petitioner, which was dismissed by IIInd Additional District Judge vide order dated 22.12.2008. The present petition has been filed against concurrent orders of both the Courts below. It is, however, clarified that once the order of the Senior Civil Judge was challenged in Revision and if the aggrieved party wants to challenge the decision of the Revisional Court before the higher forum then it is the only last order i.e. the order in revision which needs to be challenged before the High Court as the order of the Civil Court stood merged in the order passed in Revision.

3. When the matter was transferred from the original side of this Court to the District Court, the Senior Civil Judge, Karachi (South), after hearing the parties, allowed the application filed under Section 12(2) CPC and set aside the consent decree. Learned counsel for the Petitioner argued that as the compromise decree was passed on the Original Side of the High Court, the same ought not to have been set aside by the Senior Civil Judge while hearing the application under Section 12(2) CPC as the decree passed by the High Court cannot be set aside by a subordinate Court. He contended that the Senior Civil Judge had no jurisdiction to hear the application under Section 12(2) CPC and pass order, whereby decree passed by the High Court on the Original Side could be

set aside. Learned counsel argued that once decree was passed by this Court and the suit was disposed of then the application filed under Section 12(2) CPC ought not to have been dispatched to the subordinate Court for disposal and the same ought to have been decided by this Court on its original side. He also referred to the provisions of Section 12(2) CPC and argued that the validity of a decree on the pleas of fraud, misrepresentation or want of jurisdiction can be challenged only by making an application to the same Court which passed the decree and not by a separate suit. He submitted that the application filed under Section 12(2) CPC was treated by the Senior Civil Judge, Karachi (South) as a separate suit by giving it separate suit number i.e. Suit No. 699/2003 which is violative of the provisions of Section 12(2) CPC.

4. Insofar as the first argument that the decree passed by this Court cannot be set aside by the subordinate Court is concerned, reference to Sindh Civil Court (Amendment) Ordinance, 2002 is necessary. Under this amending Ordinance the pecuniary jurisdiction of the District Courts of Karachi with regard to the civil suits was enhanced from rupees five hundred thousand to three million Rupees. Section 5 of the amending Ordinance, 2002, provides that all suits, appeals and proceedings of the value not exceeding the original or appellate pecuniary jurisdiction of the District Judge pending in the High Court immediately before commencement of the Ordinance, shall stand transferred to the concerned District Judge for disposal. This means that not only suits and appeals but any proceeding in a suit, which were pending on the Original Side of this Court of pecuniary value upto three million rupees shall be transferred to the

concerned District Judge for disposal and proceedings include application filed under Section 12(2) CPC. Such application is obviously filed after decree is passed in a suit, therefore, any such application being legal proceeding in a suit, pecuniary value of which was not beyond three million rupees also stood transferred for disposal to the District Judge by virtue of Section 5 of the amending Ordinance, 2002. This Court, therefore, rightly transferred to the District Court Suit No.780/1987 in which application under Section 12(2) CPC was still pending. As regards the argument that decree passed by High Court cannot be set aside by subordinate Court, it may be clarified that this Court while deciding suits on the original civil side in reality exercises jurisdiction of the District Court on account of provisions of Sindh Civil Court Ordinance, 1962, which are amended from time to time. Civil suits beyond certain pecuniary value have to be filed and disposed of by this Court on its original side and if for any reason any proceedings in suit on account of enhancement of pecuniary value of the District Courts of Karachi are transferred to the District Court then the transferee Court is the forum to dispose of the same, including any application filed under Section 12(2) CPC. Section 12(2) CPC itself envisages that in case a decree is obtained on the pleas of fraud, misrepresentation or for want of jurisdiction, the same can be set aside. Disposal of such application, therefore, has to be by a Court which for the time being has jurisdiction to do so and no other. Therefore, it can be said that while setting aside the decree passed in a suit, no matter it was passed on the original side of this Court, the District Court, on account of change in the pecuniary jurisdiction, had the power to do so. Neither any error was committed by this Court while transferring the proceedings to the District Judge on

account of amendment brought about in the Sindh Civil Court Ordinance, 1962 through Sindh Civil Court (Amendment) Ordinance, 2002, nor Senior Civil Judge lacked jurisdiction while deciding application filed under the provisions of Section 12(2) CPC and setting aside the decree passed by this Court on the original side.

5. As regards the argument that application under Section 12(2) CPC can be moved before the same Court and not by a separate suit, it may be clarified that after transfer of the pending proceedings in the suit, new number was assigned to the suit and thereafter application under section 12(2) CPC was decided. This does not mean that the application filed under Section 12(2) CPC was treated as a separate suit. Application under section 12(2) CPC was originally filed in this Court in Suit No. 780/1987 that was earlier decreed and on account of amendment brought about through Sindh Civil Court (Amendment) Ordinance, 2002, such application was transferred to the District Judge where suit was assigned fresh number i.e. Suit No. 699/2003. Therefore, by no means it could be said that separate suit was filed to challenge the decree passed in Suit No.780/1987. The argument of learned counsel for the petitioner is, therefore, untenable.

6. Respondent No.3 who claims to have purchased the apartment in question from the original allottee Mst. Zubaida is admittedly in possession. He claims ownership on the basis of certain documents executed by Mst. Zubaida in his favour. Naturally Respondent No.3 is aggrieved by the consent decree which, as long as it stands in the field, would continue to create legal consequence against his claim. The Respondent No.3, not being a party to the suit that was decreed, is left with no other option but to file

application under Section 12(2) CPC to avoid adverse legal consequences of the consent decree on his claim, therefore, he should be accorded opportunity to establish his claim. Respondent No.3's application filed under Section 12(2) CPC has been granted and the order upheld by the ADJ in Revision. Respondent No.3 has every right to establish his case in the suit and, therefore, this Court finds no justification to interfere in the concurrent findings of both the Courts below.

7. Vide short order dated 8.9.2011 this petition was dismissed and these are the reasons for the same. While dismissing the petition it was erroneously directed that application filed under Section 12(2) CPC be decided within 3 months when actually it was meant that suit be decided within three months. The error in the short order stands corrected and be so read.

The short order was passed by a Division Bench comprising myself and Irfan Saadat Khan, J.(as he then was), but as Irfan Saadat Khan, J. ceased to be a Judge of this Court, the detailed reasons have been written by me.

Karachi.

Dated: 7.2012

JUDGE

