

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI

C.P.No. D- 437 of 2012

M/S. Saro Textiles V. IIIrd Additional District  
& Sessions Judge Karachi (West) & others

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DATE

ORDER WITH SIGNATURE OF JUDGE

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BEFORE:

Mr. Justice Mushir Alam, CJ

Mr. Justice Mohammad Shafi Siddiqui

1. For orders on CMA 2528/2012
2. For Katcha Peshi.

***Dated: 06.12.2012***

Mr. Aminuddin Ansari for the petitioner.

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**Mohammad Shafi Siddiqui, J.**- This constitution petition has been filed against the order passed in Civil Revision No. 19/2010 in terms whereof the review application under section 114 CPC was dismissed.

Brief facts of the case are that the petitioner filed a suit bearing No. 393/2002 for recovery before this Court which on account of amendment in pecuniary jurisdiction was transferred by this Court to the Court of Senior Civil Judge, Karachi, (West). It is urged by the learned Counsel that on account of mistake in noting the date of hearing as 29.1.2010 instead of 27.1.2010, the suit resulted in the dismissal for non-prosecution on non-appearance of the Counsel and party on 27.1.2010. Against the said order per learned Counsel he moved application U/O IX Rule 4 read with section 151 CPC which was dismissed on 01.2.2010. Subsequently the petitioner filed an application under section 12(2) read with section 151 CPC on 10.2.2010 challenging the same order i.e. 29.01.2010, which met the same fate.

Aggrieved with this order passed by the Ist Senior Civil Judge, Karachi (West) on the application under section 12(2) CPC, the petitioner preferred a revision application which was dismissed by the IIIrd Additional District Judge, Karachi (west) vide order dated 14.3.2011. Subsequently a review application under section 114 CPC against the said order was also dismissed vide order dated 28.12.2011. Per learned Counsel the order of the dismissal of the suit under Order XVII Rule 3 CPC is an

illegal and unlawful order as the Court was not required to forthwith decide the suit. It was urged that all that has been laid down under Order XVII Rule 3 CPC that the Court may proceed with the suit notwithstanding either party fails to produce evidence etc. which means that the next steps required to be taken should be taken. Per learned Counsel the dismissal of the suit under Order 17 Rule 3 CPC is therefore an act without jurisdiction hence the application under section 12(2) CPC was preferred.

We have heard the learned Counsel and perused the record. From the record it appears that initially after the dismissal of the suit under Order 17 Rule 3 CPC an application under Order IX Rule 4 read with section 151 CPC was filed on 01.2.2010 which was decided by order dated 02.2.2010 in terms whereof the remedy available to the petitioner was by way of filing an appeal and not by moving an application for recalling the order which was passed on merits. With this application under order IX rule 4 CPC the learned Counsel for the petitioner has not filed any diary of 27.1.2010 to show that he has not noted the date as 27.1.2010. Subsequently learned Counsel for the petitioner/plaintiff moved an application under section 12(2) CPC on 10.2.2010 challenging the same order, which was also dismissed on the same date with the observation that the remedy is available to the petitioner/plaintiff by way of filing an appeal and not by moving application under section 12(2) CPC.

Aggrieved with this, Civil Revision Application No.19/2010 has been preferred which was dismissed by the IIIrd Additional District Judge, Karachi(West) and the learned Judge was pleased to pass the following order.

“As far as judgment dated 27.01.2010 is concerned it is not out of place to mention here that it is not an illegal order. The learned Sr. Civil Judge passed judgment dated 27.01.2010, the remedy available to the appellant to challenge the judgment in appeal but applicant not filed any appeal, he filed application u/o IX rule IV CPC which was dismissed, he has also not challenged said order in appellate form (forum) and again filed application u/s 12(2) CPC which has been disposed off. I do not find any illegality in an order dated 10.02.2010 and hereby maintain the same.”

Aggrieved with the aforesaid judgment dated 14.3.2011 a review application has been preferred wherein for the first time this plea was taken that the Ist Senior Civil Judge, Karachi (West) passed the judgment and decree in haste which are against the provisions of Order 17 Rule 3 CPC and hence the trial Court/Senior Civil Judge, Karachi (West) failed to follow the procedure as required under Order 17 Rule 3 CPC in terms of the judgment in the case of M. Aslam v. Nazir Ahmed reported in 2008 SCMR 942. In the review application the learned Counsel for the petitioner has prayed that the impugned order/judgment passed by the learned Additional District Judge, Karachi (West) on 14.3.2011 and that the order of a civil Judge dated 27.1.2010 is illegal and therefore nullity in law, coram-non-judice. The said review application was dismissed vide order dated 23.12.2011.

It appears that for the first time the alleged non-compliance of Order XVII rule 3 CPC was coupled with ground of fraud and misrepresentation and want of jurisdiction by the learned Counsel for the petitioner/plaintiff in review application and now in this petition. Per learned Counsel since learned Senior Civil Judge, Karachi proceeded with the suit on 27.1.2010 “forthwith” in violation of the binding judgment of the Hon’ble Supreme Court as reported in 2008 SCMR 942 (Muhammad Aslam v. Nazir Ahmed), therefore, it was illegal and unlawful for want of jurisdiction to decide in such manner.

The question that is now at this stage raised is whether the provisions of Order 17 Rule 3 CPC “permits” the learned Senior Civil Judge, Karachi to announce the judgment forthwith as prescribed therein and if it has not been provided therein then passing of the judgment “forthwith” (same day) would be deemed to be illegal or equated and kept at par with fraud, misrepresentation and want of jurisdiction. Learned Counsel for the petitioner/plaintiff relied upon the case of (Muhammad Aslam v. Nazir Ahmed) (2008 SCMR 942) wherein the learned Bench has held as under:

“It may be pointed out here that though under Order XVII Rule 3, C.P.C it has been provided that where sufficient cause is not shown for the grant of adjournment the Court may proceed to decide the suit forthwith” or “dismiss the suit forthwith”. The said rules simply lays down that the Court may proceed with the suit notwithstanding either party fails to produce evidence etc. meaning thereby that in case of default to do a specific act by any party to the suit, the next step required

to be taken in the suit should be taken. Though the word “forthwith” means without any further adjournment yet, it cannot be equated with the words “at once pronounced judgment”, as used in Order XV, Rule 4 CPC where, on issuance of summons for final disposal of the suit either party fails, without sufficient cause to produce the evidence on which he relies.”

In order to understand the mandate of Order 17 Rule 3 CPC it is necessary to go through the same to understand the intent of legislature. Order 17 Rule 3 CPC is reproduced as under:-

“O.XVII R.3. *Court may proceed notwithstanding either party fails to produce evidence etc--- Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.”*

It is provided in said Rule of Order 17 that any party to a suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witness, or to perform any act necessary for further progress of the suit, for which time is allowed, the Court may, notwithstanding proceed to decide the suit forthwith. The word forthwith, as used, has a significant meaning as it is coupled with the word “decide”. The legislature has used these words purposely as definite meanings have been assigned to each of these words.

Now the question that again arises is as to whether it was within the discretion and competence of the Presiding Officer to proceed with the case and decide forthwith if all requirements for pronouncing the judgment and decree are complied with and no other steps are needed to be taken, if at all necessary.

In this particular case the plaintiff has filed suit for recovery for which nobody but the plaintiff/petitioner has to prove the issues to discharge the burden. The respondent/ defendant certainly did not opt to lead evidence as it is the burden on the petitioner to be discharged and it would have been futile exercise had it been fixed for the evidence of the defendant/respondent if at all the next step is indeed to be taken. The Presiding Officer in his wisdom has rightly concluded that since the plaintiff/petitioner failed to produce his evidence or to cause attendance of his witness therefore, the issues which were required to be proved by the plaintiff/petitioner remain unproved and there was no reason or occasion in adjourning the matter for another futile step of recording evidence of defendant.

In view of above facts and circumstances passing of an Order under order XVII rule 3 CPC on the same day is not act without jurisdiction nor it constitute fraud or misrepresentation. The important question that is required to be decided is as to whether such alleged departure (though we may not consider it as such in the circumstances of the case), from moving to the next step i.e. (defendants evidence), if at all the learned Presiding Officer was required, would constitute fraud,

misrepresentation or render judgment as illegal for want of jurisdiction. Although we have seen the record and it is nowhere pleaded in the application under section 12(2) CPC that such alleged departure constitute fraud, misrepresentation and render order illegal for want of jurisdiction, however procedural steps though have been taken by the learned Presiding Officer but such departure if at all made does not constitute fraud, misrepresentation and does not render the judgment/order without jurisdiction nor it is the case of the petitioner in the application.

The reliance of the learned Counsel for the petitioner on the case of Muhammad Aslam v. Nazir Ahmed reported in 2008 SCMR 942 is of no help to the petitioner. In terms of the case *ibid* the plaintiff/ petitioner in that suit (in the referred judgment *ibid*) himself was in attendance when the case was dismissed under order XVII rule 3 CPC and it was open for the trial Court, despite none appearance of the witnesses of the plaintiff/petitioner to have asked the plaintiff/petitioner to come in the witness box instead of dismissing the suit forthwith. Therefore, it was in those peculiar circumstances held by the Hon'ble Supreme Court that the learned Presiding Officer first ought to have taken next steps i.e. to ask the plaintiff/petitioner to appear in witness-box (who was present in Court at the relevant time). Secondly and importantly the suit which was discussed in the reported judgment *ibid* is for recovery of possession through pre-emption which was contested and as many as 10 issues from divergent pleadings of parties were framed and the burden was not to be

discharged only by plaintiff therein. In the present case the suit was simply for recovery of money which burden was to be discharged only by petitioner.

The referred case *ibid* is also distinguishable as in the instant case neither the plaintiff/petitioner nor their witnesses were in attendance when the case was called hence there was no question of taking next step other than passing judgment since it was the plaintiff/petitioner to discharge the burden by leading evidence.

Considering academic question of learned Counsel that such departure if at all made, could be considered as “proceedings/passing of the order without jurisdiction”, we are afraid that such departure does not render the orders passed by the 1st Senior Civil Judge without jurisdiction.

In this case the plaintiff/petitioner has also moved an application U/O 9 Rule 4 CPC for recalling the order dated 27.1.2010 which was dismissed and subsequently an application under section 12(2) CPC was moved. These provision of Section 12(2) CPC are not to be utilized as a duplicate/parallel provision despite exhausting the remedy U/O 9 CPC.

Where a plaintiff/petitioner is provided with various remedies, the exhaustion of one of the remedies would curtail the plaintiff/petitioner from following/availing rest of the other remedies and he is not permitted to re-agitate by filing an application under section 12(2) CPC. Both the affidavits in support of two applications are

substantially same. Doctrine of election would play a vital role as far as the choice of petitioner in availing the remedy is concerned. We have observed that in the application under section 12(2) CPC it is nowhere the case of the plaintiff/petitioner that the passing of the judgment and decree in terms of Order 17 Rule 3 CPC is an act of fraud, misrepresentation or without jurisdiction. The application itself is silent as to the plea taken in this regard. Such view are fortified by the judgment of the Hon'ble Supreme Court in the case of Monazah Parveen v. Bashir Ahmed (2003 SCMR 1300)

“-----It may not be out of place to mention here that provisions under section 12(2), C.P.C. were never intended to be a duplication of proceedings provided for in Order IX, Rule 13 C.P.C and there was no lawful justification for filing the same. In this regard we are fortified by the dictum as laid down in case titled Ghulam Sarwar v. Muhammad Sarwar (1987 SCMR 1440).---“

In another case reported as Ghulam Sarwar vs. Mohammad Hussain & others (1987 SCMR 1440) the Hon'ble Supreme Court observed as under:

“The respondents in this petition for special leave to appeal filed a suit against the petitioner for specific performance of an agreement to sell agricultural land. The petitioner did not contest the suit; consequently on 7-12-1982 the suit was decree ex parte. On 10.5.1983 the petitioner moved an application for setting aside the ex parte decree alleging that he had not been served with any summons and that the ex parte decree had been obtained by the respondents fraudulently. This application was resisted by the respondents. The trial Court framed a number of issue; one of these was to the effect whether sufficient grounds existed for setting aside the ex parte decree. The petitioner as well as the respondent led evidence and after considering the same the trial

Court came to the conclusion that the petitioner had been properly served with summons in the suit; accordingly, it dismissed the application. The petitioner preferred a revision petition before the Additional District Judge who affirmed the findings of the trial Court and dismissed the revision petition. The petitioner then moved an application under section 12(2) of the Code of Civil Procedure re-iterating the grounds that the ex parte decree had been obtained fraudulently for there had been no proper service. He also alleged that he had not entered into any agreement with the respondent to sell his land. The application was dismissed by the trial Court and its decision was affirmed by the Additional District Judge as well as the High Court. The petition now seeks leave to appeal from this Court.

2. After hearing the learned counsel for the petitioner we are not persuaded that this is a fit case for interference by this Court. The petitioner's assertion that he was not served with any summons was inquired into in the proceedings which ensued upon his application for setting aside of the ex parte decree. The finding on his assertion in this regard went against him. The provision of section 12(2) of the Code of Civil Procedure are not intended to be a duplication of the proceedings provided for in Rule 13, Order IX, Code of Civil Procedure. As regards his other plea that he had not executed any agreement to sell his land it would have been looked into had he elected to contest the suit. This he did not care to do. In the circumstances we would dismiss this petition."

Where the jurisdiction in refusing the adjournment by the Court was exercised properly and judiciously, the order passed by the Court in rejecting the application was also justified and the order cannot be said to have been without lawful authority as the authority or without jurisdiction. The dismissal of the suit under Order 17 Rule 3 CPC was a decree which was only appealable.

The petition thus has no substance and is dismissed along with pending applications.

Judge

Chief Justice