

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD
C.P.No.D-65 of 2012

DATE	ORDER WITH SIGNATURE OF JUDGE
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1. For orders on office objection
2. For hearing of MA-490/12
3. For hearing of main case.

23.09.2019.

Mr. Sunderdas, advocate for petitioners.
Mr. Arbab Ali Hakro, advocate for respondents.
Mr. Muhammad Ismail Bhutto, A.A.G.
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The facts in brief necessary for disposal of instant petition are that the petitioners filed a suit for declaration and permanent injunction before learned IInd Senior Civil Judge, Hyderabad, it was decreed exparte on 07.01.1999. No appeal against such decree was preferred. On 23.07.2001 by way of filing an application u/s 12(2) C.P.C such exparte decree was challenged by male legal heirs of late Mir Muhammad mainly for the reason that such decree has been obtained by practicing fraud. It was dismissed by learned IInd Senior Civil Judge, Hyderabad on 31.05.2007. Such dismissal of their application was challenged by male legal heirs of late Mir Muhammad by way of filing their Revision Application, it was dismissed on 18.08.2007 by learned District Judge, Hyderabad. Subsequent to it on 24.11.2009, another application u/s 12(2) CPC was filed by female legal heirs of late Mir Muhammad for setting aside of such exparte decree mainly for the reason that it has been obtained against dead man by practicing fraud, without joining his

legal heirs. It was dismissed by learned IInd Senior Civil Judge, Hyderabad on 16.03.2011, such dismissal of their application was impugned by female legal heirs of late Mir Muhammad by filing a Revision Application, it was accepted by learned 4th Additional District Judge, Hyderabad on 06.11.2011, whereby he directed learned 2nd Senior Civil Judge, Hyderabad to frame the issue and then to decide the application u/s 12(2) CPC afresh in accordance with law. Such order is impugned by the petitioners before this Court by way of instant constitutional petition.

2. It is contended by learned counsel for petitioners that all the legal heirs of deceased Mir Muhammad were aware of the pendency of the litigation against their late father and they could not be permitted to challenge the decree under the pretext that it has been obtained by practicing fraud one after other being male and female. By contending so, he sought for setting aside of impugned order.

3. Learned counsel for the respondents No.13 to 16 and learned A.A.G by supporting the impugned order have sought for dismissal of the instant constitutional petition by contending that the very decree was obtained against dead man, without joining his legal heirs and on remand of the matter not only issues have been framed but one of the witness too has been examined by learned trial Court.

4. We have considered the above arguments and have perused the record.

5. Admittedly, the suit was decreed *ex parte*. There is no denial to the fact that the earlier application u/s 12(2) CPC for setting aside of *ex parte* decree having been obtained by practicing fraud was moved by male legal heirs of late Mir Muhammad and second one was moved by female legal heirs of Mir Muhammad. Female legal heirs could not be denied their right under the pretext that the male legal heirs have exhausted their remedy. If such exercise is allowed to prevail then it would negate the right of fair trial, which is guaranteed by Article-10(A) of the Constitution of Islamic Republic of Pakistan. Be that as it may, the controversy with regard to the actual date of death of Mir Muhammad during pendency of suit or after disposal of the suit being factual in its nature could only be resolved after recording of evidence, such exercise as we are told has already been undertaken by learned trial Court.

6. In case of **Muhammad Hussain Vs. Mst. Razia Bibi and others (1999 MLD-3030)**, it is held by the Honourable Court;

“---S. 12 (2)---Specific Relief Act (I of 1877), S.42---Suit for declaration challenging validity of judgment and decree on plea of fraud---Suit was decreed by Trial Court---Appeal filed against judgment and decree of Trial Court was disposed of by Appellate Court in terms of compromise and decree passed by Trial Court was

modified accordingly---Respondent, after implementation of said decree, filed application under S.12(2) C.P.C, for setting aside the modified decree alleging fraud---Appellate Court accepted application of respondent without framing issues---Validity---Issues should have been framed by Court and evidence taken from both sides and application under S.12(2), C.P.C decided in accordance with law---High Court set aside order of Appellate Court and remanded matter to Trial Court to frame issues and allow parties to adduce their evidence and decide application under S.12(2) C.P.C, afresh accordingly.

7. In view of above, it would be very hard to set-aside the impugned order of learned Revisional Court by this Court in exercise of its constitutional jurisdiction by way of instant constitutional petition. It is dismissed accordingly.

JUDGE

JUDGE