

# IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Muhammad Ali Mazhar** and **Agha Faisal, JJ.**

Constitutional Petition No. D-7470 of 2017

Mst. Almas Ismail

Versus

Fayyaz Hussain and Others

For the Appellant : Mr. Muhammad Ali Waris  
Advocate.  
For Respondent : None  
Date of Hearing : 01.06.2018

## **JUDGMENT**

**Agha Faisal, J:** This Judgment determines the merit of the present constitutional petition, by virtue whereof the order dated 25.10.2017 (“**Impugned Order**”) passed by the learned 2<sup>nd</sup> Additional District Judge Central, Karachi, in Civil Revision No. 49 of 2012 (“**Revision**”), has been assailed.

2. The Revision had been preferred against the order dated 10.09.2012 (“**12(2) Order**”) whereby the learned 2<sup>nd</sup> Senior Civil Judge Karachi Central had collectively dismissed applications filed under Section 12(2), CPC and Section 5 of the Limitation Act, 1908 respectively.

3. It may be prudent to reproduce the operative part of the Impugned Order, passed by the learned Revisional Court, herein below in order to precipitate a discussion thereupon:

“On the perusal of record it appears that predecessor in interest of the appellants namely Mst. Almas Ismail was debarred from filing written statement by the Hon’ble High Court of Sindh at Karachi (in its original jurisdiction) and in her life time she herself moved two applications under Rule 159 of Sindh Chief Court Rules which were also dismissed. Then after she did not file any appeal but remained silent and the above orders attained finality, hence she lost her right to defend the suit in her lifetime. Mst. Almas Ismail died on 07.03.2003 but no legal representative informed her death including her advocate who used to appear therefore, the suit was decreed on 03.05.2003. When the suit was transferred from the Hon’ble High Court of Sindh on administrative ground, the learned transferee Court also issued Court motion notice in suit as well as in execution application but nobody appeared on her behalf. Moreover, the legal heirs of Mst. Almas Ismail from her first husband namely Muhammad Ayoob filed application under Section 12(2) read with Section 151 CPC on 28.08.2003 which was dismissed vide order dated 08.11.2010. Then after legal heirs of Mst. Almas Ismail from her second husband Ismail D. Hussain filed the instant application on almost same grounds which was also dismissed vide Impugned Order.

In view of the above position I am of the humble opinion that since deceased Mst. Almas Ismail was debarred from filing written statement by the Hon’ble High Court of Sindh and she contested such order by filing two applications under Rule 159 of Sindh Chief Court Rules and after dismissal of said applications, she remained silent till her death and the fact of her death was also not informed to the Court by anybody, therefore, no fraud or misrepresentation was played on Court by the respondents for getting exparte judgment and decree. Moreover, previously an application under Section 12(2) CPC filed by the legal heirs of deceased Mst. Almas Ismail had already been dismissed but instead of filing appeal, they filed another application of the same nature under Section 12(2) CPC along with application under Section 5 of the Limitation Act. Accordingly the learned trial Court rightly dismissed the said second application, the order of which is impugned herein this appeal and the instant appeal is hereby dismissed. The case law relied upon by the learned counsel for appellants is distinguishable to the facts and circumstances of the instant appeal.”

4. Learned counsel for the petitioner vociferously attacked the Impugned Order and submitted that the same was contrary to the law. In addition to seeking the setting aside of the Impugned Order, the learned counsel also sought a declaration that the Judgment dated 28.04.2003

(“**Judgment**”) and the consequent Decree dated 03.05.2003 (“**Decree**”), passed by the learned 2<sup>nd</sup> Senior Civil Judge Central, Karachi, in Suit No. 56 of 2000 [previously numbered 1174 of 1998] (“**Suit**”), were contrary to the law and hence may also be set aside in the exercise of constitutional jurisdiction by this Court.

5. The fundamental premise of the learned counsel was that Mst. Almas Ismail, being a defendant in the Suit and the predecessor in interest of the petitioners herein, died a few weeks prior to the rendering of the Judgment therefore the Judgment, Decree and the proceedings in pursuance thereof were a nullity in the eyes of law.

6. We heard the learned counsel at considerable length and also reviewed the record available before us.

7. It appears that the Suit was filed, inter alia against Mst. Almas Ismail, for the specific performance of a sale agreement dated 31.07.1996 in respect of House No.A-604, constructed on 200 Square Yards in Block-12, Gulberg, Federal “B” Area, Karachi (“**Property**”). The Suit was decided, in favour of the plaintiff therein, vide the Judgment and it may be pertinent to reproduce the relevant portion therefrom:

“8. After admission of Suit notices were issued against the Defendants and Defendants Nos.2 to 4, were declared Exparte vide Order dated 03.03.2002 by the Hon’ble High Court. Record shows that Defendant No.1, was debarred from filing of Written Statement by the order of Hon’ble High Court on 06.04.1999.

9. On 19.04.2003, Plaintiff has filed his Affidavit-in-Exparte Proof wherein he has reiterated the same facts which he has mentioned in his plaint and he has produced the certain documents in proof of his contention as Exh. “P/2” to “P/3” which are available on records.

10. After hearing the Arguments of learned counsel for the Plaintiff, I have perused the contents of Plaint and Affidavit-in-Exparte Proof of Plaintiff and also perused the documents which

are available on the record. It transpired that assertion made by the Plaintiff have gone unchallenged and un-rebutted hence, I have no alternative excess to believe the same.

11. In view of the above discussion, the Suit filed by the Plaintiff is decreed as prayed with no Order as to cost.”

8. It is abundantly apparent from the foregoing that Mst. Almas Ismail, being defendant No.1 in the Suit, was debarred from filing a written statement in the said Suit vide order of the High Court dated 06.04.1999.

9. The learned counsel for the petitioner had drawn the Court’s attention to a photocopy of a death certificate, at Page 257 of the Court file, on the basis whereof it was sought to be established that Mst. Almas Ismail died on 07.03.2003. This certificate has been issued in respect of one *Shabana Almas*. However, it was argued by the learned counsel that the two were one and the same person. Even if the contention of the learned counsel is accepted it would follow that Mst. Almas Ismail was alive at the time that she was debarred in the Suit.

10. An application under Section 12(2) CPC was filed by the legal heirs of Mst. Almas Ismail with a prayer to recall and set aside the Judgment and Decree. This application was dismissed by the learned Senior Civil Judge Karachi Central vide order dated 08.11.2010 (“**1st 12(2) Order**”) and it is pertinent to reproduce the relevant portion therefrom:

“The record further reflects that Mst. Almas Ismail was debarred from filing Written Statement on 06.04.1994 by the then Additional Registrar, High Court of Sindh namely Younus Zakaria. Thereafter on 12.09.1999, she filed an application under Rule 159 of the Sindh Chief Court Rules (Original side) read with section 12(2) CPC without affidavit, hence, in compliance of Court directions she subsequently filed her affidavit duly attested by the Commissioner for taking affidavits of the High Court and in the Para no.3, of the said affidavit she deposed as under:-

“3. That I was married to Ismail D. Hussain about 14 years ago and out of wedlock three children namely Aleena aged about 12 years, Arish aged about 11 years and Wasiaq aged about 10 years were born.”

From the above admission of deceased Mst. Almas Ismail it is crystal clear that according to her own contention, she had children namely Aleena, Arish and Wasiaq. It is interesting to note that she has nowhere mentioned the name of Mst. Shabana Ayub (present applicant) as her daughter, hence, in the absence of very establishment of relationship of Mst. Shabana Ayub with deceased defendant No.1, it can never be said that she is the legal heir of deceased defendant No.1, Mst. Almas Ismail and therefore, in my humble opinion in the absence of establishment of the relationship of the applicant Shabana Ayub D/o Muhammad Ayub, with deceased defendant No.1, which is the mandatory condition under Order XXXII C.P.C, she has no locus standi to file the application in hand. Moreover the deceased defendant No.1, during her life did not challenge the order dated: 06.04.1994 by virtue of which she was debarred from filing the written Statement, hence it also attained finality. Besides this, the fraud and misrepresentation also does not reflect from the face of record. It has been reported in 2001 MLD 366, in the case of Ghulam Mehmood V/s Hukam Khan & others, which is reproduced as under:

(a) Civil Procedure Code (V of 1908)

S.12(2) – Applicability of S.12(2) C.P.C,--- Plea of fraud and misrepresentation – provision of S.12(2) C.P.C would not be attracted on discovery of fresh evidence and that too after a long litigation – Provision of S.12(2), C.P.C, would apply only when someone had obtained a decree on the basis of fraud misrepresentation or from a forum that jacked jurisdiction {P.367}A.

(b) Civil Procedure Code (V of 1908)

S.12(2)—Plea of fraud and misrepresentation – “Misrepresentation” meaning of – if the very fact represented formed the basis of assertion or denial and thus being a fact in issue required final determination by the Court through recording of evidence that would not be “misrepresentation”—such fact in issue, neither concealed nor sprung by surprise, would not fall within the scope of misrepresentation – An openly asserted claim which opposite-party had all opportunity to rebut as a question of act, could not be claimed as “misrepresentation”.

Similarly it was held in a case law reported in 2000 SCMR 1051, by their lordships, Mr. Justice Saiduzzam Siddiqui, C.J, Mr. Justice Sh. Riaz Ahmed and Mr. Justice Ch. Muhammad Arif, of the Hon’ble Supreme Court of Pakistan in the case of Mst. Sakina Bibi V/s Muhammad Nawaz & Others, which is reproduced as under:

(a) Civil Procedure Code (V of 1908)

O.XXII, R-4--- Death of son of the defendants --- Effect of Judgment and legal heirs of the deceased defendant – Where the deceased defendant failed to file written statement or did not opt to contest the suit. Judgment pronounced against the deceased would have the same force and effect as if it had been pronounced before his death {P.1052}A.

Under the circumstances and in the light of the dictum of the Hon'ble Superior Courts, I do not find any force in the application under Section 12(2), CPC of the applicant Mst. Shahana Ayub D/o Muhammad Ayub, Therefore the application stands dismissed with no order as to costs.”

11. Notwithstanding the 1<sup>st</sup> SCJ Order, another set of applications were filed under Section 12(2) CPC along with an application under Section 5 of the Limitation Act, 1908 before the Court of the II Senior Civil Judge Karachi Central wherein legal heirs of Mst. Almas Ismail sought to have the Judgment and Decree set aside. The said applications were decided vide the 12(2) Order and it is pertinent to reproduce the relevant content herein below:

“From the aforesaid discussion, it is crystal clear that the deceased defendant No.1, during her life time did not challenge the order dated 06.04.1999, by virtue of which she was debarred from filing the Written Statement, hence it has attained finality. Moreover, neither the deceased defendant No.1 nor her representative appear before this Court despite service and after dismissal of second application under Section 12(2) CPC moved by Mst. Shahana Ayub and at belated stage without explaining sufficient and cogent reason for such a long delay in filing the present application. Besides, the applicants/intervenors failed to explain the fraud and mis-representation committed by the plaintiff/D.H. in obtaining the judgment & decree. It has been held in a case reported in 2001 MLD 366 as under:

(a) Civil Procedure Code (V of 1908)

S. 12 (2) – Applicability of S.12(2), C.P.C. --- Plea of fraud and misrepresentation --- provision of S.12(2), C.P.C. would not be attracted on discovery of fresh evidence and that too after a long litigation – Provision of S.12(2), C.P.C. would apply only when someone had obtained a decree on the basis of fraud, misrepresentation or from a forum that lacked jurisdiction {P.367}A.

(b) Civil Procedure Code (V of 1908)

S.12(2) – Plea of fraud and misrepresentation –

“Misrepresentation”, meaning if – If the very fact represented formed the basis of assertion or denial and thus being a fact in issue required final determination by the Court through record of evidence that would not be “misrepresentation” – Such fact in issue, neither concealed nor sprung by surprise, would not fall within the scope of misrepresentation – An openly asserted claim which opposite-party had all opportunity to rebut as a question of act, could not be claimed as misrepresentation.”

It has been held in a case reported in 2000 SCMR 1051 as under:

“O.XXII, R.4--- Death of son of the defendants --- Effect of judgment on legal heirs of the deceased defendant --- Where the deceased defendant failed to file written statement or did not opt to contest the suit, judgment pronounced against the deceased would have the same force and effect as if it had been pronounced before this death”.

Under the Circumstances and in the light of the dictum of the Hon’ble Superior Court, it do not find any force in the applications under Section 12(2) CPC and application under Section 5 of Limitation Act of the applicants / intervenors, therefore, the same are stand dismissed with no order as to costs.”

**12.** The Revision in question had been filed only assailing the 12(2) Order, and not the 1<sup>st</sup> 12(2) Order. The justification provided during arguments in such regard was that the respective orders were passed upon applications preferred by different sets of legal heirs of the deceased Mst. Almas Ismail. It was submitted that Mst. Almas Ismail was married twice and that the progeny from each of the matrimonial unions had preferred their own independent challenges to the Judgment and Decree.

**13.** It bears from the record that the Suit was filed inter alia against the Mst. Almas Ismail in 1998 and that she was debarred from filing of a written statement therein on 06.04.1999. There is specific reference, in the 1<sup>st</sup> 12(2) Order and the Impugned Order, to application preferred by the petitioner under Rule 159 of Sindh Chief Court Rules. However, it is

also recorded that Mst. Almas Ismail was unsuccessful therein and thereafter never assailed the orders passed before any forum of competent jurisdiction.

**14.** The law in respect of proceedings in case of death of one of several defendants is laid down in Order XXII Rule 4 of the CPC and it may be prudent to reproduce the applicable provision herein below:

“4. *Procedure in case of death of one of several defendants or of sole defendant.* (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, [or on receipt of an intimation of the death of such defendant from the person nominated by him for that purpose under the rule 13, Order VIII] or a sole defendant or sole surviving defendants dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) When within the time limited by law no application is made or intimation is given under sub-rule (1), the Court may proceed with the suit, and any order made or judgment pronounced in such suit shall, notwithstanding the death of such defendant, have the same force and effect as if it had been pronounced before the death took place.

(4) It shall not be necessary to substitute the legal representatives of any such defendant who has failed to file a written statement or has failed to appear and contest the suit at the hearing; and judgment may in such case be pronounced against the said defendant notwithstanding his death, and such judgment shall have the same force and effect as if it had been pronounced before his death took place.”

**15.** It would appear that the case in hand is covered by Order XXII Rule 4 (3) and (4) of the CPC. A plain reading of the appropriate law in this regard makes it abundantly clear that the present challenge to the Judgment and Decree on the basis of the demise of Mst. Almas Ismail is unsustainable in law.

**16.** The learned counsel failed to cite any infirmity in the 12(2) Order and was also unable to demonstrate any failure of the learned Revisional Court to correctly exercise its jurisdiction under Section 115 CPC.

**17.** In the present case we have carefully considered the Impugned Order, in the light of the record before us, and find it to be in due consonance with the law, hence, the same is hereby maintained and upheld.

**18.** The Judgment and Decree could have been assailed by any person aggrieved in the manner and within the limitation of time prescribed by law. The attempt of the petitioner to assail the same by means hereof is not permissible at this stage.

**19.** In view of the foregoing this Court arrived at the conclusion that the present petition is devoid of merit and hence was constrained to dismiss the same vide short order 01.06.2018. Above are the reasons for the aforesaid short order.

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09.06.2018