

Order Sheet
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD
CP No. D- 338 of 2019

Muhammad Iqbal @ Kallo
And others ----- Petitioners

Versus

Mst. Eidi Begum
and others ----- Respondents

Date of order : 26.02.2019

Mr. Aqeel Ahmed Siddiqi, Advocate for petitioners

ORDER

ADNAN-UL-KARIM MEMON, J. - The petitioners have called in question the order dated 10th October 2018 passed by learned VIIIth Additional District Judge, Hyderabad in Civil Revision Application No. 95 of 2018, which was filed against the order dated 28.7.2018 passed by the learned 1st Senior Civil Judge Hyderabad in Execution Application No.03 of 2017 whereby an application under Section 12(2) CPC filed by the petitioners was dismissed by the learned the Trial Court.

2. Precisely, the case of the petitioners is that the judgment dated 29.2.2016 and decree dated 8.3.2016 passed by the learned courts below have been obtained through fraud and misrepresentation of facts and the suit filed by respondents 1 to 7 wherein they alleged that respondents 1 to 7 and 12 to 14 are legal heirs of deceased Muhammad Asghar and after the death of Muhammad Asghar they became co-owners in the suit property to the extent of 50 paisa share; however the petitioners are legal heirs of Shabrati who actually was the real owner of the

property and expired on 4.2.1959 and after his death the father of respondents 1 to 7 and respondents 12 to 14 fraudulently transferred 50 paisa share of suit property in their favour.

3. We asked from the learned counsel to assist this court on the issue of maintainability of the captioned Constitution petition on the premise that application under Section 12(2) CPC filed by the petitioners before the learned 1st Senior Civil Judge, Hyderabad at the execution stage was dismissed on the ground that no any solid proof with regard to his entitlement on the subject property had been produced by the petitioners and the learned trial court found the aforesaid application without merit and dismissed the same.

4. Mr. Aqeel Ahmed Siddiqi, learned counsel for the applicant has argued that the petitioners are in possession of entire suit property but the respondents 1 to 7 / plaintiff and respondents 12 to 14 in collusion with each other have suppressed the facts and while passing the impugned order the learned Trial Court has not considered the aforesaid aspect of the case, thus the orders passed by both the courts below are nullity in the eyes of law and are liable to be set-aside. We posted another query from learned counsel for the petitioners as to how the instant petition is maintainable when his 50 paisa share in the subject property is still intact and he is claiming possession of the entire subject premises. He replied to the query and argued that all the orders have been obtained by the respondents in absence of the petitioners, therefore his application under Section 12(2) CPC which was wrongly dismissed by the learned the Trial Court vide impugned order dated 28.7.2018; that the petitioners ought to have been heard by the learned courts below in order to ascertain the true picture of the case in hand. He next argued that both the courts below while passing and maintaining the impugned order miserably failed to appreciate that the petitioners are 50 paisa shareholder in the suit property viz. C.S. No. 2566, therefore, they were necessary and proper

party in the suit for possession and only on the basis of documents annexed with the petition but the appearance of the petitioners and share in the suit property was concealed with mala fide intention and in order to make them shelter less from their own property. Per learned counsel the trial courts have failed to appreciate that the petitioners are co-owners in the subject property who have not been impleaded as necessary party in the aforesaid suit while getting their possession from the property in question; that both the courts below have failed to appreciate that the respondents by way of fraud and concealment of facts have obtained the judgment and decree respectively in the matter and the Revisional Court also non-suited the petitioner without assigning any cogent reason in the `impugned order` dated 10th October, 2018; that both the courts below have failed to appreciate the fact that the suit for possession was filed without documents. He lastly prayed for allowing the instant petition.

5. We have heard learned counsel for the petitioners on the issue of maintainability of the instant petition and perused the material available on record.

6. The issue is very simple in the present proceedings for the simple reason that the learned trial court vide order dated 28.7.2018 has clearly discussed the case of petitioners in the following terms:-

Heard and perused the record. The contents of application filed by interveners shows that their claim is based upon one ground i.e. that their father late Shabrati was actual owner of suit property who was expired on 4.2.1959 and after his death, the father of plaintiffs / defendant No.5 to 7 namely Muhammad Asghar had fraudulently transferred 50 paisa share of suit property in his name hence, judgment and decree passed in favour of plaintiffs / defendant No.5 to 7 against defendant No.1 to 4 is liable to be set aside but unfortunately in support of such arguments, no any solid proof has been produced by applicants in present application which showed that said Shabrati was ever owner of whole suit property even applicants did not bother to disclose the day, month or year of alleged fraud committed by father of plaintiffs / defendant No.5 to 7 with said Shabrati or his children. The record produced by plaintiffs against their 50 paisa share has established their rights against the defendant No. 1 to 4 who are in possession of their 50 paisa share while applicants remained failed in producing any recent document

showing their father to be owner of 100% share holder of suit property. There is also no justification by applicants regarding no filing of any suit against the alleged fraud committed by father of plaintiffs / defendants No. 5 to 7 when he allegedly transferred 50 paisa share in his name because in my humble view, it could be suitable for present applicants to file suit for cancellation of documents against the father of plaintiffs instead of filing present application having no ground. It is also admitted position that defendants No.1 to 4 have also preferred civil appeal No.72 of 2016 against judgment and decree passed by this court but the same was dismissed in `non-prosecution` by Honourable District & Sessions Judge, Hyderabad vide his order dated 20.08.2016 which means the judgment and decree passed by this court has also attained the finality. Consequently instant application is without merits hence, same is dismissed with no order as to cost. In consequence of dismissal of instant application (Ex.11), another application regarding stay of execution proceedings (Ex.12) is also dismissed being infructuous.

7. We have scrutinized the record in our view, the petitioners have admitted in the pleadings that they are 50 paisa shareholders in the subject property the learned trial court has not touched the 50 paisa share of the petitioners. Record clearly reflects that deceased Shabrati was not owner of whole suit property, therefore invoking Section 12(2) CPC was not called for, however we are cognizant of the fact that Section 12(2) CPC speaks of the principle that if a Decree, Order or Judgment is obtained by Fraud, misrepresentation, or where Question of jurisdiction has risen, such Order Decree or Judgment shall be challenged through an application in the same court and no other separate Suit shall lie. The terms Fraud, Misrepresentation and Want of Jurisdiction are being elaborated as follows:

Fraud is not defined in Civil Procedure code. But in most simple sense means "Deception intended to result in financial or personal Wrongful gain". Fraud is defined in Contract Act, 1872. That is much elaborative and enough for understanding the term. Definition is as follows:-

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

8. Record clearly reflects that the Trial Court has rightly passed the judgment and decree and dismissing the 12(2) application which has been rightly confirmed by the learned Revisional Court in the impugned judgment and decree. No fraud and misrepresentation of facts appears to have been committed by the respondents obtaining judgment and decree. However, if the suit property is not partitioned yet, the petitioners may avail a legal remedy for the same relief in accordance with law.

9. As a result of above discussion, this petition is devoid of any merit and is dismissed in limine along with pending application(s)

JUDGE

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