

**HIGH COURT OF SINDH, CIRCUIT COURT AT
LARKANA**

C.P No.S-64 of 2011

[Syed Akbar Ali Shah versus Mst. Mehrunissa & others]

DATE	ORDER WITH SIGNATURE OF JUDGE
Petitioner:	Through Mr. Ghulam Dastagir Shahani, Advocate
Respondents 1 to 4:	Through Mr. Muhammad Rafiq Ahmed Abro, Advocate
The State:	Through Mr. Abid Hussain, State Counsel
Dates of hearing:	04.02.2019, 14.02.2019 & 21.02.2019

JUDGMENT

Adnan Iqbal Chaudhry J. - The Petitioner is aggrieved of orders passed by the Senior Civil Judge, maintained by the Additional District Judge, whereby the judgment and decree in his favour were set-aside under section 12(2) CPC along with subsequent orders passed in Execution proceedings. The Petitioner prays for a writ of certiorari against said orders.

2. The Petitioner, Syed Akbar Ali Shah (the second), and four other plaintiffs had filed F.C. Suit No.110/1981 (the Said Suit) against Roshan Ali Shah & others (total 31 defendants) before the Senior Civil Judge Kandhkot for mesne profits for the period 24-10-1959 to 24-10-1981 during which the defendants were in possession of agricultural land in excess of their lawful entitlement of 15% pursuant to an order dated 20-12-1959 passed by the Chief Land Commissioner, until the Supreme Court of Pakistan in Civil Appeal No.K-91/1979 finally ruled on 31-01-1981 that the plaintiffs were entitled to 85% of the said land. The said land measuring around 500 acres (after being reduced in Land Reforms from around 719 acres) situated in Deh Khariro, District Kandhkot, Kashmore, had devolved on the parties and/or their predecessors-in-title as beneficiaries of a *waqf-ul-aulad* created by their ancestor, Syed Akbar

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Ali Shah (the first), which *waqf* was cancelled in 1958 under MLR No.64.

3. In the Said Suit, though some of the defendants had entered appearance by *vakalatnamas*, subsequently they remained absent. Thus, the Said Suit proceeded *ex parte* against all defendants and was decreed on *ex-parte* proof. A Preliminary Decree was passed on 27-11-1982 appointing a Commissioner to make an inquiry as to mesne profits. On the Commissioner's report, a Final Decree was passed on 17-01-1984 awarding the plaintiffs a sum of Rs.24,69,070/-.

4. On 07-02-1984, the plaintiffs of the Said Suit filed Execution Application No.02/1984 to enforce the decree by attaching and selling that portion of the agricultural land at Deh Khariro, Kandhkot which belonged to the Judgment Debtors (JDs). The Execution Application was allowed and the said land was attached and put to auction. In the meanwhile, on 28-09-1985, 14 out of the 31 defendants of the Said Suit filed an application under section 12(2) CPC in the Said Suit (the first application) for setting aside the decrees passed therein. On the same day they also filed an application under Order XXI Rule 69 CPC in the Execution to stop the sale of their agricultural land. However, since they did not deposit the decretal amount, the Execution proceeded further and Survey No.s 221 to 225, 240 to 245, 904, 953, 956 and 555 at Deh Khariro, Kandhkot, total measuring 79-25 acres, which was said to be the land belonging to the JDs, was auctioned. The same was purchased in auction by the Petitioner, who had been permitted by the Executing Court to participate therein. The sale of the said agricultural land to the Petitioner was confirmed on 11-12-1985 and a sale certificate was issued to him on 26-01-1986.

5. Since the decree passed in the Said Suit remained unsatisfied, the Decree Holders further sought attachment and sale of two houses belonging to the JDs in Khair Shah Muhalla, Shikarpur. Consequently, the Execution was transferred to the Senior Civil Judge Shikarpur where the said two houses were attached and put

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to auction on 17-09-1987. The Petitioner, who was again permitted by the Executing Court to participate in the auction, made a bid of Rs.500,000 plus the unrecovered amount of the decree in adjustment, which was accepted by the Executing Court as the highest bid.

6. In the meanwhile, on 14-12-1986, a second application under section 12(2) CPC had been filed to set-aside the decrees passed in the Said Suit. Such application was by one Mst. Allah Bachai who was not a JD but who claimed to be a co-owner of the two houses that were attached in the Execution. Mst. Allah Bachai also moved an application under Order XXI Rule 26 CPC in the Execution to stay the auction of the two houses at Shikarpur, however, the same was dismissed vide order dated 06-12-1987. Against such dismissal, Mst. Allah Bachai appealed to the District Judge Kandhkot, which was returned vide order dated 29-08-1990 for presenting before the Court having jurisdiction. That order of return was challenged by Mst. Allah Bachai before the High Court Sindh at Sukkur in Civil Revision No.82/1990 which was dismissed vide order dated 18-12-2000.

7. Regards the first application under section 12(2) CPC filed in the Said Suit by Roshan Ali Shah and others, 7 out of the 14 applicants had withdrawn on 10-10-1987, and as regards the remaining applicants, the application was eventually dismissed by the Senior Civil Judge Kandhkot vide order dated 28-01-1989 on the failure of the applicants to lead evidence. Per the Petitioner, the second application under section 12(2) CPC filed on behalf of Mst. Allah Bachai was also dismissed on her failure to lead evidence. Though that order does not appear on the record of this petition, the said fact was not disputed by learned counsel for the Respondents.

8. On 04-05-2001, Mst. Mehrunissa and Nadir Ali Shah (Respondents 1 and 2) also filed an application under section 12(2) CPC (the third application) to set-aside the decrees passed in the Said Suit and also to set-aside subsequent orders passed in the Execution for the sale of the properties of the JDs. Such application

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was transferred from the Senior Civil Judge Kandhkot to the Senior Civil Judge Kashmore where it was numbered as Civil Misc. Application No.01/2008. Mst. Mehrunisa and Nadir Ali Shah also filed an application under Order XXI Rule 26 CPC in the Execution before the Senior Civil Judge Shikarpur to stay the confirmation of the sale of the two houses. However, since auction of the said two houses had already concluded as far back as 17-09-1987, the Senior Civil Judge Shikarpur transferred the Execution back to the Senior Civil Judge Kandhkot, who, vide order dated 31-03-2004 confirmed the sale. Per the Petitioner, he has yet to receive possession of the said two houses.

9. The order dated 31-03-2004 passed by the Senior Civil Judge Kandhkot confirming the sale of the two houses in Execution proceedings, was appealed by Mst. Mehrunissa and Nadir Ali Shah (Respondents 1 and 2) vide Civil Misc. Appeal No.01/2004. Said appeal was dismissed by the 1st Additional District Judge Jacobabad vide order dated 25-05-2004. Thereafter, Mst. Mehrunissa and Nadir Ali Shah filed Civil Revision No.35/2004 in the High Court of Sindh at Larkana, but withdrew the same on 13-10-2009 seemingly for the reason that their application under section 12(2) CPC, which was also against orders of sale passed in the Execution, was still pending.

10. On the application under section 12(2) CPC filed in the Said Suit by Mst. Mehrunissa and Nadir Ali Shah (Respondents 1 and 2), the Court proceeded to frame issues and record evidence. The said application was eventually allowed by the Senior Civil Judge Kashmore vide order dated 07-01-2010 (1st Impugned Order) whereby both the Preliminary Decree dated 27-11-1982 and the Final Decree dated 17-01-1984 passed in the Said Suit were set-aside as having been obtained by fraud and misrepresentation. It was further held that the attachment and sale of the properties in the Execution was illegal and the defendants of the Said Suit would be free to seek remedy in accordance with law for reversal of the sale, i.e., to institute proceedings for restitution under section 144 CPC. The Said Suit was revived; Mst. Mehrunissa was impleaded as a defendant;

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and both Mst. Mehrunisa and Nadir Ali Shah were permitted to file written statements to contest the Said Suit.

11. Against the 1st Impugned Order (*supra*) whereby the Said Suit was reopened, only the Petitioner out of the 5 plaintiffs of the Said Suit preferred Civil Revision No.04/2010 which was dismissed by the Additional District Judge Kashmore vide order dated 26-11-2010 (2nd Impugned Order); hence this petition. In the meanwhile, Mst. Mehrunissa had passed away on 27-07-2010 and therefore this petition was filed against her legal heirs. Roshan Ali Shah and Syed Azim Shah, who were amongst the defendants of the Said Suit, were added to this petition as Respondents 3 and 4 respectively on their application under Order I Rule 10 CPC. At the outset of the petition, learned counsel for the Respondents raised an objection to the maintainability of this petition on the ground of non-joinder of the other defendants of the Said Suit. Vide order dated 04-02-2019 counsel for both sides agreed that such objection may be decided along with the main petition.

12. Mr. Ghulam Dastagir Shahani, learned counsel for the Petitioner submitted that the defendants of the Said Suit (JDs of the Execution) have over the years been using womenfolk of their family to make repeated applications under section 12(2) CPC to frustrate the decree, i.e. firstly through Mst. Allah Bachai and then through Mst. Mehrunissa. He submitted that the defendants being inter-related, it is inconceivable that any member of their family did not have knowledge of the judgment and decree of the Said Suit at the time it was passed, and thus all applications moved under section 12(2) CPC were/are *malafide*. He submitted that the properties of the JDs were sold in Execution after due process. Mr. Shahani submitted that both the Courts below had failed to notice that the application under section 12(2) CPC moved by Nadir Ali Shah (Respondent No.2) as a co-applicant with Mst. Mehrunissa on 04-05-2001 was his second application; that his first application moved as a co-applicant along with others (Roshan Ali Shah & others) on 28-9-1985 had been dismissed by the Senior Civil Judge,

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Kandhkot vide order dated 28-01-1989; therefore, to the extent of Nadir Ali Shah, the second application under section 12(2) CPC was barred by *res-judicata*. As regards the case of Mst. Mehrunissa, Mr. Shahani submitted that she too had prior knowledge of the judgment and decree passed in the Said Suit, but he accepted that since Mst. Mehrunisa was never a defendant in the Said Suit and the decree was not against her, none of her properties could be sold in the Execution. However, he submitted that in the evidence recorded on her application under section 12 (2) CPC, Mst. Mehrunissa had not produced any document to show that she was owner or co-owner of any of the properties sold in the Execution, and thus the findings of the Courts below to set-aside the decree for Mst. Mehrunissa were perverse.

As regards the non-joinder of the other defendants of the Said Suit to this petition, Mr. Shahani submitted that only Mst. Mehrunissa and Nadir Ali Shah (Respondents 1 and 2) were made parties in the Civil Revision and consequently in this petition because the 1st Impugned Order had been passed on the application of the said two Respondents. He submitted that the objection as to non-joinder had never been taken by the Respondents in the Civil Revision, and that in any case, a petition cannot be dismissed for non-joinder of parties when this Court has the power to add parties *suo moto*.

13. Mr. Rafique Ahmed Abro, learned counsel for the Respondents 1 to 4 objected at the outset to the maintainability of the petition on the ground of non-joinder of the rest of the defendants of the Said Suit. He submitted that no effective order can be passed in their absence. Mr. Abro pointed out that Mst. Shahmul, who was plaintiff No.3 of the Said Suit, had supported the application under section 12(2) CPC moved by Mst. Mehrunissa and Nadir Ali Shah. He submitted that out of the 5 plaintiffs of the Said Suit, only the Petitioner was aggrieved of the setting aside of the judgment and decree. Per Mr. Abro, Mst. Mehrunissa was a co-owner of the properties sold in the Execution which properties she

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had inherited from her father, Taqi Shah, who inherited the same from his mother, Naz Bibi, who was one of the daughters of the original owner of the said properties, namely Syed Akbar Ali Shah-the first. Therefore, he submitted that the passing of a decree in the Said Suit and the subsequent sale of the said properties in Execution without making Mst. Mehrunissa a party thereto, were liable to be set aside. Mr. Abro submitted that at the time of the Said Suit, Mst. Mehrunissa and some of the defendants were minors whose properties were under the superintendence of the Court of Wards under the provisions of the Sindh Court of Wards Act, 1905. He submitted that Nadir Ali Shah too was a minor at the time of Said Suit and in support thereof he relied on the evidence discussed in the 1st Impugned Order. He submitted that the fact that Mst. Mehrunissa and Nadir Ali Shah were minors, was within the knowledge of the plaintiffs of the Said Suit and yet the Court of Wards was never made party to the Said Suit, nor was a guardian *ad-litem* ever appointed for Nadir Ali Shah, and thus the judgment and decree passed in the Said Suit was not only obtained by fraud, it was also without jurisdiction. He submitted that in a previous Suit No.22/1965 between the parties (and/or their predecessors-in-title) before the District Judge Jacobabad, a compromise decree dated 17-6-1966 had been passed with regards to a private partition of the agricultural land of the parties where under the Petitioner had waived his claim for mesne profits. Mr. Abro submitted that the suppression of all of the aforesaid facts in the plaint of the Said Suit and the obtaining of an *ex parte* decree was clearly fraudulent and had been rightly set aside by concurrent finding of the Courts below. Mr. Abro relied on the cases of *Bagli Gul v. Ali Waz Khan* (2003 CLC 1147) and *Yar Muhammad v. Amnat* (1988 CLC 1355) to submit that a decree obtained against a minor without appointing a guardian *ad-litem* for him, is a nullity. He cited the case of *Rooli Afza v. Sher Aman Khan* (PLD 1993 Peshawar 49) to submit that an *ex parte* decree against a minor is not warranted even if the proposed guardian does not turn up, nor can a minor be considered to be a party to a suit unless he is represented by a guardian.

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14. Heard the learned counsel and perused the record.

It is settled law that judicial review under Article 199(1)(a)(ii) of the Constitution of Pakistan of orders passed by subordinate Courts is restricted to check jurisdictional defects only, i.e., in the exercise of such jurisdiction the High Court does not ordinarily undertake a reappraisal of evidence to disturb finding of fact unless such findings are based on non-reading or misreading of evidence, erroneous assumptions of fact, misapplication of law, excess or abuse of jurisdiction and arbitrary exercise of powers.

15. A perusal of the Impugned Orders shows that to set-aside the judgment and decree in the Said Suit and orders of sale in the Execution under section 12(2) CPC, the following grounds prevailed with the Courts below to conclude that the said judgment and decree had been obtained by fraud and misrepresentation:

- (a) that it was concealed from the Court that Mst. Mehrunissa (Respondent No.1) as well as the defendants 7 to 14 of the Said Suit were minors at the time of the Said Suit and their properties were under the superintendence of the Court of Wards; that neither Mst. Mehrunissa nor the Court of Wards were made party to the Said Suit, nor was the requisite certificate obtained from the Court of Wards to enforce the decree against the property of the said minors;
- (b) that Nadir Ali Shah (Respondent No.2) too was a minor of 15 years of age at the time of the Said Suit; that since the factum of his minority was concealed, a guardian *ad-litem* for him was never appointed as mandated by Order XXXII Rule 3 CPC;
- (c) that both Mst. Mehrunisa and Nadir Ali Shah had acquired knowledge of the decrees in the year 2001 and thus their application under section 12(2) CPC filed on 04-05-2001 was within limitation;
- (d) that Mst. Shamul, who was the plaintiff No.3 of the Said Suit, had supported the case of Mst. Mehrunissa and Nadir Ali

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Shah by stating in her reply that she had never signed the plaint of the Said Suit nor the *vakalatnama* filed in the Said Suit on her behalf;

- (e) that though the Supreme Court of Pakistan had determined the ratio of the entitlement of the parties of the Said Suit to the agricultural land, the matter regarding the partition of the said agricultural land amongst the said parties was still pending before the Board of Revenue, and till such time the said undivided land could not have been attached and sold in the Execution.

Though, in passing the 1st Impugned Order the learned Senior Civil Judge also made certain observations as to the non-maintainability of the Said Suit, but since the Said Suit was eventually revived, the said observations as to non-maintainability are to be ignored.

16. The decree passed in the Said Suit was a money decree. The properties attached and sold in the Execution were so attached and sold as properties of the JDs to enforce a money decree against them. While Nadir Ali Shah (Respondent No.2) was a defendant in the Said Suit, Mst. Mehrunissa was not, and the said decree was not against her. Therefore, assuming Mst. Mehrunissa was owner of any part of the properties sold in the Execution without her knowledge, her grievance can only be towards such wrongful sale and not against the judgment and decree passed in the Said Suit. Having said that, the application under section 12(2) CPC moved on behalf of Mst. Mehrunissa also prayed for setting aside orders passed in the Execution that were adverse to her and therefore it was only to that extent that her case could have been considered. In observing so, I have not lost sight of the fact that the application under section 12(2) CPC was a joint application with Nadir Ali Shah filed in the Said Suit and not in the Execution proceedings, but then that was at best a procedural irregularity which could have been cured by separating the case of Mst. Mehrunissa from Nadir Ali Shah had an objection to

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that effect been raised at the time. Thus, to the extent of Mst. Mehrunissa, the question whether she was a minor/Government Ward at the time of the Said Suit was not relevant, and the only question that needed to be determined by the learned Senior Civil Judge, and that too for the purposes of the Execution proceedings, was whether Mst. Mehrunissa was owner of any of the properties sold in the Execution. But the evidence of the title of Mst. Mehrunissa to the properties sold in the Execution does not appear to have been discussed by the learned Senior Civil Judge in passing the 1st Impugned Order. However, since the learned Senior Civil Judge cited other reasons as well to set-aside the judgment and decree under section 12(2) CPC, if any of those reasons are sustainable, which I discuss *infra*, then any further discussion on the case of Mst. Mehrunissa becomes pointless.

17. The learned Senior Civil Judge found that apart from Mst. Mehrunissa, the defendants 7 to 14 of the Said Suit, namely Amir Ali Shah, Azim Shah, Mst. Badshah, Mst. Umrahzadi, Mst. Sahibzadi, Mst. Ghulam Surgaran and Mst. Gul Bibi (who were the siblings of Mst. Mehrunissa) were at the time Government Wards under the Sindh Court of Wards Act, 1905; and therefore suppressing such fact from the Court to obtain an *ex parte* decree against them was fraud and misrepresentation. That the defendants 7 to 14 were Government Wards at the time of the Said Suit, was a fact not disputed by the Petitioner before the Senior Civil Judge. That was so in view of the Sindh Government Gazette dated 12-12-1974 that carried the notification dated 20-11-1974 issued under the Sindh Court of Wards Act, 1905 notifying that the defendants 7 to 14 (and Mst. Mehrunissa) were Government Wards and their properties were under the superintendence of the Court of Wards. Rather, the case of the Petitioner was that he did not have knowledge that the defendants 7 to 14 were Government Wards and therefore the question of committing fraud did not arise. Assuming for the time being that to be the case, the question that then arise is whether the decree passed in the Said Suit suffered from a jurisdictional defect

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by implication of the Sindh Court of Wards Act, 1905 ? - for in the case of *Rehmat Ali v. Additional District Judge Multan* (1999 SCMR 900), while discussing the scope of section 12(2) CPC, it was held by the Honourable Supreme Court that:

"The jurisdiction of Court has reference to (i) subject matter, (ii) territorial extent, (iii) pecuniary value of the claim involved, (iv) nature of dispute, and (v) amenability of the parties to the process of the Court. The jurisdictional defect may arise with reference to absence of any of the afore-noted defects or there may be legal bar itself by a statute or something else having the force of law. On account of exercise of any jurisdictional defect, the judgment can be said to have been passed "without lawful authority" and illegally and can be set aside on the ground of want of jurisdiction."

18. The scheme of the Sindh Court of Wards Act, 1905 is as follows.

(i) When the Court of Wards assumes the superintendence of the property of a Government Ward, the fact of such assumption, and the date on which it was sanctioned by the Provincial Government, is notified in the Official Gazette. On and with effect from the date of such sanction, the whole of the property of the Government Ward, whether the existence of such property is known to the Court of Wards or not, is deemed to be under the superintendence of the Court of Wards. Any property which the Government Ward may inherit or acquire by succession subsequent to the date of the said sanction, is also deemed to be under the superintendence of the Court of Wards [see section 13 of the said Act].

(ii) On the issue of a notification under section 13(1) of the Act, the Court of Wards publishes a notice in the Official Gazette calling upon all persons having claims "against the Government Ward or his property" to submit the same in writing to the Court of Wards within six (06) months from the date of publication of the notice (see section 14(1) of the Act). However, where the Court of Wards is satisfied that any claimant was unable to comply with the notice published under sub-section (1), it may allow the claim to be submitted after the period specified in sub-section (1) [see section

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14(2) of the Act]. Every claim against the Government Ward or his property, other than a claim by the Government, not submitted to the Court of Wards under sub-section (1) or sub-section (2) of section 14 is deemed to have been duly discharged. However, there are certain exceptions to the discharge of such claim viz. where the case falls under sub-section 2(c) of section 18 of the Act; where the case falls under sections 7 and 13 of the Limitation Act, 1908; and where in any suit or proceeding instituted by the claimant it is proved to the satisfaction of the Court that the claimant was unable to comply with the notice published under sub-section 1 [see section 14(3) of the Act].

(iii) The only scenario in which a claim that is discharged under section 14(3) of the Act can be revived is provided for in section 18 of the Act where the property of the Government Ward appears to be involved beyond all hope of extrication or for any other sufficient reason by a direction of the Provincial Government.

(iv). Section 15 of the Act empowers the Court of Wards to require the claimant who submits the claim to the Court of Wards to substantiate the claim by filing documents in support thereof and binds the Court of Wards to verify the correctness of the documents submitted in support of the claim, and any document which is in the possession or under the control of the claimant which is not produced by him in accordance with the order of the Court of Wards passed under section 15(1) of the Act, such document shall not be admissible in evidence against the Government Ward in any suit brought by such claimant in respect of his claim unless it is proved to the satisfaction of the Court that the claimant was unable to produce such document before the Court of Wards.

(v). On receipt of a claim, section 16 of the Act requires the Court of Wards to investigate such claim and to decide whether the claim is to be wholly or partly admitted or wholly or partly rejected and to communicate such decision in writing to the claimant [see section

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16(1) of the Act]. However, this provision is subject to sub-section (3) which provides that:

"Subject to the provisions of sub-section (2), nothing in this section shall be construed to bar the institution of a suit in a Civil Court for the recovery of a claim against a Government Ward or his property which has been duly submitted to the Court of Wards:

Provided that, no decision of the Court of Wards under this section shall be proved in any Suit as against the defendant."

(vi). The provision of a Civil Suit under section 16(3) of the Act is subject to its sub-section (2) which in turn provides that where the Court of Wards has admitted any claim under sub-section (1), it may make to the claimant a proposal in writing for the reduction of the claim; and if such proposal is accepted by the claimant, it shall be conclusively binding upon the claimant.

(vii). Section 17(1) of the Act provides that on the publication of a notice under section 14(1), no proceeding in execution of any decree against the Government Ward or his property shall be instituted or continued until the decree holder files a certificate from the Court of Wards that the decree-claim has been duly submitted or until the expiration of one month from the date of receipt by the Court of Wards of a written application for such certificate, accompanied by a certified copy of a decree.

It is apparent that section 17 of the Act refers to those decrees that are passed after the claimant has complied with the provisions of section 14(1) of the Act and has submitted a claim against the Government Ward before the Court of Wards, and it does not relate to decree obtained without complying with the provisions of the Act.

(viii) Section 31 of the Act reads as follows:

"Section 31 - Notice of suit.

(1) No suit relating to the person or property of any Government Ward shall be brought in any Civil Court until the expiration of two months after notice in writing stating the name and place of abode of the intending plaintiff, the cause of action and the relief claimed, has been delivered to, or left at the office of

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the Court of Wards; and the plaint shall contain a statement that such notice has been so delivered or left:

Provided that, notice under this section shall not be required in the case of any suit the period of limitation for which will expire within three months from the date of a notification issued under section 13, sub-section (1).

(2) Where any such suit is instituted without delivering or leaving such notice as aforesaid or before the expiration of the said period of two months or where the plaint does not contain a statement that such notice has been so delivered or left, the plaintiff shall not be entitled to any costs if settlement as regards the subject matter of the suit is reached or the Court of Wards concedes the plaintiff's claim within the period of two months from the date of the institution of the suit:

Provided that in a suit instituted without such notice, the Civil Court shall allow not less than three months to the Court of Wards to submit its written statement".

(ix). Section 32 of the Act provides that in every suit brought by or against a Government Ward, the manager of the Government Ward's property, or where there is no manager, the Court of Wards having the superintendence of the Government Ward's property, shall be named as the next friend or a guardian for the suit, as the case may be.

(x). Sections 18 and 40 of the Act provide for events in which the Court of Wards shall withdraw its superintendence from the property of the Government Ward, and under sub-section 2(a) of section 40 one of the events is where the Government Ward attains the age of majority. It may be noted that under section 3 of the Majority Act, 1875 every minor whose property is under the superintendence of the Court of Wards, attains the age of majority at the age of 21 years.

19. What emerges from an analysis of sub-section (3) of section 15 and the provisions of section 16 of the Sindh Court of Wards Act, 1905 is that where the property of the Government Ward is under the superintendence of the Court of Wards, it is mandatory for a claimant to file his claim "against the Government Ward or his property" before the Court of Wards, and if the claimant is aggrieved of the decision of the Court of Wards to partly admit or to

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wholly or partly reject the claim, only then the claimant is not precluded from filing a Civil Suit against the Government Ward and after complying with the provision of prior notice given under section 31 of the Act. In such suit when instituted, section 32 of the Act requires the Court of Wards having the superintendence of the Government Ward's property, to be named as the next friend or a guardian for the suit.

Admittedly, the Said Suit as against the defendants 7 to 14, was instituted without going through mandatory provisions of the Sindh Court of Wards Act, 1905 and without the prerequisite decision of the Court of Wards under section 16(1) of the said Act. Thus even if the allegation of fraud and misrepresentation were to be ignored, the decree that followed suffered from a jurisdictional defect, a want of jurisdiction within the meaning of section 12(2) CPC and as laid down in the case of *Rehmat Ali (supra)*.

20. Mr. Shahani had submitted that the judgment and decree in the Said Suit could not have been set-aside for the benefit of the defendants 7 to 14 who were never applicants under section 12(2) CPC. However, I do not see any legal infirmity in that. When Order XLI Rule 4 CPC empowers the appellate court to reverse or vary the decree also in favour of the non-appealing defendant when such decree proceeds on any ground common to all defendants, which is really the embodiment of a principle of administration of justice, I do not see why such power cannot be exercised in proceedings under section 12(2) CPC in circumstances where the impugned decree for payment of mesne profits was one that proceeded on a ground common to all defendants. Indeed it has been held by the Supreme Court of Pakistan in *H.M. Saya & Co. V. Wazir Ali Industries Ltd.* (PLD 1969 SC 65) that the Court should proceed on the principle that every procedure that furthers the administration of justice is permissible even if there is no express provision permitting the same.

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21. Coming now to the case of Nadir Ali Shah (Respondent No.2). Mr. Shahani, learned counsel for the Petitioner had contended that Nadir Ali Shah had moved an earlier application under section 12(2) CPC along with other applicants (Roshan Ali Shah & others) which had been dismissed vide order dated 28-01-1989, and thus not only was his second application time-barred, it was also barred by *res judicata*. I have noticed that though the title of the order dated 28-01-1989 whereby the first application under section 12(2) was dismissed does list Nadir Ali Shah as one of the 14 applicants, the application itself is not on record of this petition to show whether Nadir Ali Shah was a signatory thereto. The objection that Nadir Ali Shah had filed a previous application under section 12(2) CPC was never raised before the Senior Civil Judge. On the other hand, the finding of the learned Senior Civil Judge that Nadir Ali Shah was a minor of 15 years of age at the time of the Said Suit and that he acquired knowledge of the decree in 2001, was a finding based on evidence, which evidence remained unshaken. Mr. Shahani made no attempt to show that such evidence was misread by the learned Senior Civil Judge.

22. Since it was established before the learned Senior Civil Judge that Nadir Ali Shah was a minor at the time of the Said Suit and that the mention of his minority was not disclosed, in my view a discussion further on Order XXXII CPC is not relevant. Where the defendant of a suit is a minor, Order VII Rule 1(d) of the CPC requires the plaint to contain a statement to that effect. Also, under Rule 115 of the Sindh Civil Court Rules, in suits where the defendant is a minor, the plaintiff is required to file with the plaint a list of persons (with correct addresses) who are suitable for appointment as guardians *ad-litem*. The plaint of the Said Suit had never disclosed that Nadir Ali Shah was a minor. Therefore, the question is not so much of the effect of the omission to appoint a guardian *ad-litem* as it is of the failure to disclose that Nadir Ali Shah was a minor. In other words, had the minority of Nadir Ali Shah been brought to the knowledge of the trial court, it would in all likelihood have

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proceeded to appoint a guardian *ad-litem* than to pass an *ex parte* decree against him. Even if the Petitioner believed that Nadir Ali Shah was a major at the time when he was not, that would still constitute 'misrepresentation'. Section 18 of the Contract Act, 1872 defines 'misrepresentation' to include "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." In my view such definition would hold good also for the purposes of section 12(2) CPC.

23. There is yet another aspect of the matter. The decree passed in the Said Suit had been disowned by one of the co-plaintiffs herself, namely Mst. Shamul, who had supported the case of Mst. Mehrunnissa and Nadir Ali Shah in proceedings under section 12(2) CPC by stating in her reply that she had never signed the plaint nor the *vakalatnama* filed in the Said Suit on her behalf. There was no explanation by the Petitioner why one of the beneficiaries of the decree would take such a stance.

24. The upshot of the above discussion is that the impugned orders passed by the Courts below to ultimately set-aside the judgment and decree in the Said Suit under section 12(2) CPC and consequently the sale in Execution proceedings, do not suffer from any jurisdictional defect so as to interfere with in writ jurisdiction. Having found so, the objection as to non-joinder of parties to this petition need not be considered. The petition is dismissed but with the observation that the trial court seized of the Said Suit shall decide the same uninfluenced by the findings arrived in the Impugned Orders.


JUDGE

Dated: 26-07-2019

Announced by me today.

M. Hakeem
Muhammad Iqbal Hakeem
25.7.19