

## IN THE HIGH COURT OF SINDH AT KARACHI

Before : **Mr. Justice Irfan Saadat Khan**  
**Mr. Justice Fahim Ahmed Siddiqui**

HCA No. 377 of 2018

Khurram Abdul Jabbar.....Appellant

Versus

Sikandar Haji Hashim and others.....Respondents

Date of Hearing: **30.08.2019**

Date of Judgment: \_\_\_\_\_

Appellant Khurram Iqbal Jabbar through Mr.. Mujtaba Sohail Raja, advocate.

Respondent No.1 Sikandar Haji Hashim through Mr. Muhammad Yaseen Khan Azad, advocate.

Nemo for Respondents No.2 & 3.

### J U D G M E N T

**FAHIM AHMED SIDDIQUI, J:-** By means of this appeal, the appellant has assailed the order dated 4th October, 2018, whereby his application under Section 12(2) of the Code of Civil Procedure, 1908 (hereinafter referred as "CPC") was dismissed.

2. The factual matrix of the case is that the respondent No. 1 has filed a suit against the respondent No. 2 in respect of a plot bearing No. 222, 25th Street, Phase-VIII, DHA, Karachi. The suit was decreed in favour of respondent No. 1 in terms of a compromised agreement, as such decree dated 26-03-2016 was passed. The appellant challenged the said consent decree by filing an application under Section 12(2) CPC, which met the fate of dismissal through the impugned order.

3. Mr. Mujtuba Sohail, the learned counsel for the appellant prefers his submissions at length. According to him, the respondent No. 2 entered into an agreement regarding the sale of the property in question. He admits that no proper agreement was executed but the respondent No. 2 issued a receipt, which indicates that she has agreed to sell the said property in favour of the appellant. He submits that it will make no difference that there was no formal written agreement, as on the basis of the said receipt, one can comprehend that an agreement has taken place. He emphatically submits that the appellant has performed his part of the agreement by depositing the entire remaining amount before the Nazir of this Court, as such a charge is created over the said property in favour of the appellant. According to him, the respondent No. 2 or anybody else did not bring into the knowledge of the appellant about the US judgment. Per him, the respondent No. 1 is in league with respondent No. 2, who was his ex-wife and in this way, they are trying to avoid the agreement and defeating the efforts of the appellant in getting a decree in his favour. He submits that the appellant has already filed a suit against the respondent No. 2 in which the respondent No. 1 has now entered as a party and it would be appropriate that after setting aside the judgment and decree in favour of respondent No. 1 both the suits be proceeded together so that matter may be decided once and for all. In support of his contentions, the learned counsel for the appellant relies upon the case of *Muhammad Jameel through LRs v/s Syeda Sakina Riaz and others (2015 CLC 594)* and *Syed Ali Asghar and 3 others v/s Creators Builders and 3 others (2001 SCMR 279)*.

4. As against the above, Mr. Yaseen Azad, the learned counsel for the respondent No. 1, submits that the respondent No. 2 was the ex-wife of respondent No. 1. According to him, in a divorce proceedings, respondent No. 2 got entire properties of the respondent No. 1 situated in the USA and as per a settlement, she withdrew from the property in question in favour of the respondent No. 1 in lieu of all his properties situated in the USA. He draws our attention towards the settlement decree of the US Court passed in December 1998. Per him, the property in question was actually purchased by the respondent No. 1 from his own funds in the name of his ex-wife Mst Habiba i.e. respondent No. 2 as 'benamidar' and when the respondent No. 1 tried to get the same mutated in his name, the DHA officials intimated him that the said decree could not be executed on account of running out of the limitation period. In order to overcome such difficulty, the respondent No. 2 entered into an agreement with the

respondent No. 1 and subsequent to that agreement, a suit was filed which was decreed in his favour. He submits that respondent No. 2 herself appeared before the learned Single Judge and a consent decree was passed in favour of the respondent No. 1. He emphasised that the respondent No. 1 has already intimated the DHA authorities about the US judgment and he also publicised about his right over the said property in the newspapers, despite this the appellant did not associate him in his suit in which the respondent No. 1 became a party after filing the requisite application. According to him, no fraud or misrepresentation was done by the respondent No. 1 in the suit, as such the application of the appellant was rightly dismissed. He submits that if some fraud is committed by the respondent No. 2 with the appellant, a proper remedy is available to him for seeking damages against the respondent No. 2 but he has no right to make any claim regarding the property in question on the basis of merely a receipt. In support of his contentions, he relied upon the case of *Peer Dil and others v/s Dad Muhammad (2009 SCMR 1268)*.

6. None has appeared on behalf of respondents Nos. 2 & 3 despite service.

7. We have gone through the entire material placed before us under the able assistance provided by both the learned members of the bar. The appellant is seeking to reopen the suit, which has already been decreed in favour of the respondent No. 1, by filing an application under Section 12(2) CPC. For the same purpose, he relies upon a receipt purportedly issued in his favour by the respondent No. 2 regarding the same property back in the year 2012. The said receipt is supported by the copies of pay orders and details whereof is also mentioned within the said receipt. It is noteworthy that the respondent No. 1 is not in the focus in the entire transaction between the appellant and respondent No. 2. Although it is contended by the learned counsel for the appellant that the respondent No. 1 is in league with the respondent No. 2 but nothing concrete or material could be pointed out by him regarding such collusion between the two. From the judgment/decreed passed by the Superior Court of California, County of Los Angeles, it is evident that the marriage of respondent No. 1 and respondent No. 2 ended in a divorce. We are of the view that in such a strained relations, it is hardly believable that the respondents were in league to play fraud with the appellant. At the most, the case of appellant might be conceived in a way that some fraud would have been done by the respondent No. 2, as at the time of purportedly

issuance of receipt, she was well aware that she could not enter into such transaction on account of US Court's decree as well as the subsequent agreement with the respondent No.1. If it is so, the relief, if any; could only be sought by the appellant against the respondent No. 2 for which he is at liberty to take any action against her.

8. During the course of arguments, the learned counsel for the appellant relied upon the case of Muhammad Jameel (supra), but the same does not attract to the facts and circumstances of the case in hand. In the case of Muhammad Jameel (supra), this Court has observed that a separate suit challenging the decree of the previous suit on account of fraud and misrepresentation is not maintainable, in view of the provision available under Section 12 (2) of CPC. The learned counsel for appellant also cited the case of Syed Ali Asghar (supra), wherein it was held that the Courts can take notice of the changed circumstances and subsequent events for deciding a controversy between the parties. By citing the said case law, the learned counsel for the appellant emphasised upon the subsequent event i.e. purported receipt issued in his favour by the respondent No. 2. We are of the view that the case of Syed Ali Asghar (supra) is also not helpful to the appellant, as no part is played by the respondent No. 1 in the alleged subsequent event, as such there is no need to take any judicial notice of the same against him.

9. The ultimate outcome of the above discussion is that the instant appeal starkly bereft of merits, as such the same is dismissed along with all the listed/pending applications.

JUDGE

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