

# IN THE HIGH COURT OF SINDH, KARACHI

J.M. No. 12/2017

Applicant : P.I.B. Cooperative H. Society,  
through Mr. Shahenshah Hussain  
and Mr. Muhammad Ali Jan,  
Advocates.

Respondent No.1 : Official Assignee of Karachi,  
through Mr. Ikram Ahmed Siddiqui,  
Advocate.

Respondent No.2 : Karachi Municipal Corporation,  
Nemo.

Date of hearing : 03.04.2019

## J U D G M E N T

**YOUSUF ALI SAYEED, J:-** In terms of the listed application under Section 12 (2) CPC, the applicant has assailed the Judgment dated 26.04.2016 and Decree dated 18.05.2016 passed in Suit 438/1997 (the “**Underlying Suit**”), where the Applicant had been arrayed as the Defendant No. 2.

2. On the very first date that this matter had been taken up in Court, learned counsel for the Applicant had been called upon to satisfy the Court as to maintainability in as much as the Applicant had been afforded proper opportunity to contest the Underlying Suit but opted not to do so, thus allowing the impugned Judgment and Decree to come to pass, and thereafter had also failed to exercise the remedy available by way of appeal.

3. Learned counsel for the Applicant sought to contend that the Judgment and Decree was tainted by fraud and misrepresentation, as the plaint filed in the Underlying Suit had specific in terms of Paragraph 17 that the Defendant No. 2 was a *pro forma* defendant against whom no relief was claimed. He submitted that in the face of such statement, the Defendant No. 2 did not deem it necessary to examine the plaint further so as to ascertain whether or not the final relief elicited in terms of the prayers made therein related to or affected the Applicant, and did not deem it necessary to defend the Underlying Suit by filing a written statement or making further appearance. Placing reliance on the definition of the term 'misrepresentation', as contained in Ballentine's Law Dictionary (3<sup>rd</sup> Edition), Stroud's Judicial Dictionary (4<sup>th</sup> Edition), and Black's Law Dictionary Black's Law Dictionary (7<sup>th</sup> Edition), he argued that the statement made in terms of Paragraph 17 of the plaint constituted a misrepresentation, in view of which the remedy under Section 12 (2) CPC was open to the Applicant under the given circumstances.

4. Conversely, learned counsel for the Respondent submitted that recourse to Section 12(2) CPC was misconceived and had been resorted to on account of the lapse of the period of limitation for appeal. He submitted that the damage, if any, to the Applicant was self-inflicted in as much as it was apparent from a plain reading of Prayer-B of the plaint that relief had been sought as against the Applicant/Defendant No. 2 and the Applicant was a victim of its own mistake, as it had consciously opted not to defend the Underlying Suit and demonstrated further indolence in neglecting to prefer an appeal.

5. He submitted that the Application and supporting Affidavit were bereft of any grounds constituting either misrepresentation or fraud, which was a *sine qua non* for effectively maintaining a case under Section 12(2) CPC. He placed reliance on a judgment of a learned Division Bench of this Court in the case reported as M/s. Dadabhoy Cement Industries Limited and 6 others v. National Development Finance Corporation 2002 CLC 166 as the subsequent judgment of the Honourable Supreme Court in that very case reported at PLD 2002 Supreme Court 500. He submitted with reference to the judgment of a learned Division Bench of this Court in the case reported as Mst. Kulsoom Bano v. Adam and others 2003 CLC 1470 that recourse of Section 12(2) CPC could not be substituted for an appeal.
  
6. Having considered the submission advanced and the material on record, it is apparent that the Application is devoid of merit and no case within the scope of Section 12(2) CPC stands made out. The Applicant was evidently a party to the Underlying Suit and admittedly had timely notice thereof. The assertion made with reference to Paragraph 17 of the plaint, even if taken at face value, only reflects the myopic view taken by the Applicant and does not serve to bring the matter within the ambit and purview of misrepresentation for the purposes of Section 12(2). Furthermore, in the wake of the Judgment and Decree, the remedy that ought to have been availed by the Applicant was by way of an appeal, and if the applicable period of limitation had lapsed, an application for condonation of delay under Section 5 of the Limitation Act could have been preferred. Needless to say, the present Application is not a substitute in that regard. On query posed, no satisfactory explanation was forthcoming as to why an appeal had not been filed.

7. In view of the foregoing, the Application is dismissed.  
There is no order as to costs.

JUDGE

Karachi  
Dated \_\_\_\_\_