

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Present

Ahmed Ali M. Shaikh, CJ
Yousuf Ali Sayeed, J

CP No.D-5807 of 2021

1. For orders on Misc. No.24451/2021 (urgent)
2. For orders on office objection No.18 and 19
3. For orders on Misc. No.24452/2021 (exemption)
4. For orders on Misc. No.24453/2021 (stay)
5. For hearing of main case

28.09.2021

Petitioner Syed Muhammad Ali through Mr. S. M. Mansoor Akhtar
Peerzada, Advocate.

AHMED ALI M. SHAIKH, CJ.- The Petitioner has called into question the order dated 15.03.2021 penned down by the learned VIth Additional District Judge/Model Civil Appellate Court-Ext., Karachi Central, in Civil Revision No.50 of 2021 whereby the dismissal of Petitioner's Application under Section 12(2) CPC vide order dated 16.10.2020 passed by the learned Vth Senior Civil Judge, Karachi, was maintained.

2. Facts giving rise to these proceedings are that on 17.09.2014 private Respondents No.1 to 5 filed a Suit bearing No.999 of 2014 for Declaration, Cancellation, Possession, Mesne Profit and Permanent Injunction (the "Suit") against Petitioner, Respondent No.6, Syed Safdar Abbas and others in respect of a property bearing No.R-603, Block No.14, Federal B Area, Karachi. The Petitioner in the year 2015 filed written statement. It seems that initially the Suit was pending adjudication before the 1st Senior Civil Judge and subsequently it was transferred twice, firstly to the VIth Senior Civil Judge and then to the Vth Senior Civil Judge, Karachi Central. It further appears that after filing his written statement the Petitioner did not pursue the proceedings vigilantly and ultimately the Suit was decreed ex-parte vide Judgment dated 08.10.2019 followed by Decree dated 10.10.2019.

3. From the pleadings it appears that the Petitioner filed an Application under Section 12(2) CPC (the "**Subject Application**") against the Judgment and Decree on the sole ground that the same was obtained by fraud, misrepresentation and concealment of facts. The

Respondents No.1 to 4 contested the application by filing objection and counter affidavit and after hearing the learned counsel for the parties, the Subject Application was dismissed by the Vth Senior Civil Judge, Karachi Central vide Order dated 16.10.2020. The said Order was assailed through Civil Revision Application No.50 of 2020 which also met with same fate. Hence the Petitioner has filed instant Petition.

4. It is, inter alia, contended by the learned counsel for the Petitioner that the impugned orders passed by the Courts below are contrary to the law and facts as well as record. Learned counsel submits that the Suit was transferred from one Court to another but in terms of Section 24A CPC the Petitioner received no notice from the Court of Vth Senior Civil Judge, as such, he could not contest the Suit and the Respondents No.1 to 5 with the connivance of Respondent No.6 succeeded in obtaining the ex-parte Judgment and Decree. Per counsel the trial Court did not take into consideration the aforesaid aspect while dismissing the Subject Application. According to learned counsel the Revisional Court also passed Order in a mechanical manner without looking into the record, material, etc.

5. We have heard the learned counsel for the Petitioner and with his able assistance perused the record. For setting aside an ex parte Judgment and Decree the law provides a remedy in the shape of an Application under Order IX Rule 13 CPC. Furthermore, an Appeal in terms of Section 96(2) CPC is also provided. For ready reference provisions of Order IX Rule 13 and Section 96 CPC are reproduced hereunder:-

“13. Setting aside decree ex parte against defendant.—(1) In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

Provided further that no decree passed ex parte shall be set aside merely on the ground of any irregularity in the service of

summons, if the Court is satisfied, for reason to be record, that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim.

(2)....” (emphasis added)

“96.—Appeal from original decree.—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeal from the decision of such Court.

(2) An appeal may lie from an original decree passed ex parte

(3) No appeal shall lie from a decree passed by the Court with consent of parties.”

It is the case of the Petitioner that when the Suit was lastly transferred from the files of VIth Senior Civil Judge to the Vth Senior Civil Judge no notice was served upon him as envisaged in Section 24A CPC. With profound respect, for getting an ex parte Judgment and Decree set aside on the ground of improper service the remedy lies under Order IX Rule 13 CPC and not under Section 12(2) CPC. Both these provisions of law are to be read independently on account of different limitation period.

6. The Petitioner, however, consciously preferred to have the Subject Application alleging fraud, misrepresentation and concealment of facts and that he was not informed as to the transfer of the Suit from the Court of the VIth Senior Civil Judge to the Vth Senior Civil Judge, in terms of Section 24A CPC. It would be conducive to reproduced hereunder the Section 12(2) CPC:-

“12(2).—Where a person challenges the validity of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate suit.”

7. It appears that to attract the provisions of Section 12(2), there are three conditions i.e. the Judgment and Decree suffered either from want of jurisdiction or was tainted with fraud or had emerged upon misrepresentation. A bare perusal of the Subject Application and its supporting affidavit reveals that none of those ingredients are attracted. Other than the averments raised before us with reference to Section 24A CPC, the only other plea taken was that the Decree Holder in collusion

with the Defendant No.1 (respondent No.6 herein) has suppressed the fact that one Mst. Shama was the lone surviving legal heir of Mst. Mairaj-un-Nisa and she has not been made party to the Suit. Even otherwise, such allegation is sheer negation of the averments made by the Petitioner in paragraph No.7 of his written statement (copy available at page 331 of the file) filed in the Suit. He categorically stated that:-

“7. That the contents of para No.8 are denied, it is further submitted that Mst. Maraj-ul-Nisa Wd/o Muhammad Khawaja Late being one of the legal heirs of her husband is since receiving the monthly rent from the defendant No.2 there is no son and daughter of deceased Muhammad Khawaja except said widow. That after this Maraj-ul-Nisa Wd/o Muhammad Khawaja executant a sale agreement dated 11-November-2006 being a widow of the landlord....”

8. Perusal of the material available on record further shows that the Petitioner after service filed written statement in the Suit in the year 2015. It also appears that on 29.11.2017 the Suit was firstly transferred to the Court of VIth Senior Civil Judge and secondly on 04.05.2019 it was assigned to Vth Senior Civil Judge when the matter was at the stage of arguments. Even as per contents of the affidavit filed in support of the Subject Application the Petitioner admitted that when the case was transferred from the files of 1st Senior Civil Judge to the files of VIth Senior Civil Judge, court motion notice was received by him and he approached the Court and proceeded with the matter. However, instead of pursuing the proceedings diligently and regularly either himself or through counsel the Petitioner preferred to remain indolent and when the Suit was decreed he filed the Subject Application challenging the validity of the Judgment and Decree.

9. Apparently the Petitioner did not choose to avail the remedy provided under Order IX Rule 13 CPC or Section 96(2) CPC. So far as the contention as to the non-joining of one Mst. Shama in the proceedings before the trial Court is concerned these are beyond pleadings and does not carry any weight. Even Mst. Shama did not come forward and approach any forum to protect her interests.

10. In view of above and in absence of any substance with regard to the alleged fraud, misrepresentation and or concealment of facts, we are of the considered view that no relief can be granted to the Petitioner as the power of this Court under Article 199 of the Constitution is purely discretionary and meant to foster the cause of justice and fair play. For the foregoing reasons, we while allowing the application seeking urgent hearing, dismiss the Petition alongwith pending applications.

Chief Justice

Judge